No. 22-

In the Supreme Court of the United States

OCELTIP AVIATION 1 PTY LTD.,
PETITIONER

v.

GULFSTREAM AEROSPACE CORPORATION,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in interpreting contracts that contain both an arbitration provision and a choice-of-law provision, courts may displace state principles of contract interpretation with a federal general common law rule requiring "clear intent" to opt out of the Federal Arbitration Act's default standards and apply state arbitration standards.

CORPORATE DISCLOSURE STATEMENT

Oceltip Aviation 1 Pty. Ltd. has no parent corporation or publicly held company owning 10% or more of the corporation's stock.

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INTRODUCTION

The decision below raises an important and recurring question about the dividing line between federal arbitration law and state contract law: when a commercial agreement includes both an arbitration provision and a general choice-of-law provision specifying state law, does the Federal Arbitration Act compel courts to apply a special federal rule of contract interpretation to the exclusion of state contract principles? The Circuits have split on this question, and the decision below worsens that split.

Under this Court's precedents, the construction of an arbitration agreement should turn, in the first instance, on state contract law. After all, the Federal Arbitration Act merely requires courts to place "arbitration agreements on equal footing with all other contracts," *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006); it does not otherwise alter or displace traditional "background principles of state contract law," *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 630 (2009). According to that logic, courts interpreting contracts with both a choice-of-law provision and an arbitration provision should apply ordinary state-law contract principles to determine the scope of the choice-of-law provision.

The Eleventh Circuit's decision here, by contrast, applied a special, arbitration-specific rule of contract interpretation, under which a choice-of-law provision will not reach the chosen State's arbitration law unless the contract says so "*clearly and unmistakably*." App. 2a. (emphasis added). Absent such a clear and unmistakable statement, the court declared, it would presume that the FAA's substantive provisions governed. *Ibid.*

The decision below is part of a familiar pattern: over time, "[c]ircuit after circuit (with [limited] hold-outs)" has adopted "special," "arbitration-specific" rules, in contravention of both the Federal Arbitration Act and this Court's guidance. *Morgan* v. *Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022). Here, every circuit that has considered the issue but one has adopted the special, federal common law rule that general choice-of-law provisions alone do not encompass state arbitration laws. The D.C. Circuit is the lone hold-out in favor of construing general choice-of-law provisions according to applicable principles of state law—without placing a hand on the scale to favor the alleged policy of the Federal Arbitration Act.

The confusion among the circuits stems, in large part, from perceived tension between two of this Court's previous decisions: *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989), which upheld a decision applying a California choice-of-law provision to incorporate California's arbitration laws, and *Mastrobuono* v. *Shearson Lehman Hutton*, 514 U.S. 52, 62 (1995), which ruled that a choice-of-law provision specifying that New York law would apply did not incorporate New York's rule prohibiting punitive damages awards by arbitrators. Despite the different results in each case, both decisions actually apply state contract law to construe the choice-of-law provisions. For that reason, Justice Thomas—who dissented in *Mastrobuono* over the "narrow question" at issue—still took comfort in the fact that "the majority's interpretation of the contract represents only the understanding of a single federal court regarding the requirements imposed *by state law*. As such, the major-

ity's opinion has applicability only to this specific contract and to no other." *Ibid.* at 72 (Thomas, J., dissenting) (emphasis added).

In the wake of *Mastrobuono*, however, the vast majority of circuits have simply assumed that a choice-of-law provision in an arbitration agreement should *always* be interpreted narrowly against incorporating state arbitration law, and in favor of default FAA standards. Rather than applying state contract principles to construe the contract, these circuits simply cite *Mastrobuono* as if it resolves *all* questions of contract interpretation, under all fifty States' laws, involving choice-of-law provisions. Neither *Mastrobuono* nor *Volt* supports that rule.

This Court's delay in resolving that confusion has worsened the split. For example, this Court has had prior opportunities to intervene—most notably, following the Third Circuit's decision in *Roadway Package Sys., Inc.* v. *Kayser*, 257 F.3d 287, 293 (3d Cir. 2001)—but denied certiorari. The resulting "percolation" amongst the circuit courts has merely allowed the confusion over *Volt* and *Mastrobuono* to persist and the momentum around the clear-intent rule to build. Indeed, after this Court declined to intervene in *Kayser*, the Fifth Circuit flipped to the wrong side of the split, switching from an approach construing a general choice-of-law provision to incorporate state arbitration law to the Third Circuit's "default rule" deeming such clauses inadequate to opt out from FAA standards. See *Action Indus.* v. *U.S. Fidelity & Guar. Co.*, 358 F.3d 337, 342 (5th Cir. 2004) (quoting *Kayser*, 257 F.3d at 293). This evolving consensus around a clear-statement requirement—seemingly created from federal general common law—not only rests on a

misreading of *Volt* and *Mastrobuono*, but also needlessly evicts state law from contract construction, contrary to this Court's guidance.

The Eleventh Circuit's decision gives this Court an important opportunity to both eliminate a circuit split on a recurrent issue on which uniformity is important, and to clarify a perceived tension between two of its prior decisions. This Court should grant review to make clear that when construing contracts that include arbitration provisions and general choice-of-law clauses, courts should apply ordinary state principles of contract interpretation.

OPINIONS BELOW

The Eleventh Circuit's opinion (App. 1a-17a) is reported at 31 F.4th 1323 (11th Cir. 2022). Its order denying rehearing or rehearing en banc is unreported. The district court's opinion (App. 18a-45a) is reported at 451 F.Supp.3d 1370 (S.D. Ga. 2020).

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit issued on July 5, 2022. A petition for review in that court was timely filed, and ultimately denied on July 19, 2022. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1), 2101(c).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Federal Arbitration Act provides in relevant part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or

> the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 2 of the Federal Arbitration Act, codified at 9 U.S.C. § 2.

STATEMENT

1. This case arises from the purchase of a Gulfstream G550 aircraft. Under the terms of the applicable sales agreement, Gulfstream Aerospace Corporation was obligated to manufacture and sell a new G550 to Oceltip Aviation 1 Pty. Ltd. for a purchase price of about $51 million to be paid in periodic installments over the course of the agreement, including $27.15 million by January 15, 2013.[1] App. 2a.

The sales agreement provided Gulfstream with two remedies if Oceltip did not timely make the periodic payments or Oceltip otherwise breached the agreement. The first was a liquidated damages provision, under which Gulfstream would be entitled to "retain or collect" $8 million as liquidated damages. App 3a. Alternatively, Gulfstream could resell the Aircraft to a third party in an arms-length, commercially reasonable transaction and, if the resale proceeds were more than $8 million less than Oceltip's purchase price, Gulfstream could retain from

[1] Oceltip was named Tinkler Gulfstream 650 Pty Ltd., at that time.

Oceltip's payments in hand an amount greater than the $8 million marked as liquidated damages.

2. The contract also contained an arbitration agreement, specifying that any controversy or claim arising out of or relating to the agreement would be settled by an arbitration conducted in Savannah, Georgia (Gulfstream's home state). That section of the contract—labeled "Arbitration"—included a choice-of-law provision specifying that "[t]his contract shall be governed by the laws of the State of Georgia, and the U.N. Convention on Contracts for the International Sale of Good (frequently referred to as the 'UNCISG') shall not apply, without reference to rules regarding conflicts of law." See App. 11a.

3. Over the duration of the contract's existence, Oceltip paid Gulfstream around $7,000,000. Eventually, however, it did not make the remaining payments on time. In response, Gulfstream terminated the contract and informed Oceltip that it was electing to retain as liquidated damages the $7,000,000 that Oceltip had already paid Gulfstream. App. 2a.

Oceltip filed a demand for arbitration seeking the return of its initial payments, asserting that the contract's two alternative damages provisions rendered the liquidated damages provision unenforceable under Georgia law. Gulfstream filed a counterclaim seeking an additional $1,000,000 (to reach the full $8,000,000 in liquidated damages), plus attorneys' fees and costs. The arbitration panel ultimately ruled in favor of Gulfstream. App. 4a.

4. Gulfstream applied to confirm the award in the United States District Court for the Southern District of Georgia. Oceltip, relying on the Georgia Arbitration Code, sought vacatur of the award in the Superior

Court of Chatham County, Georgia. As part of its request for vacatur, Oceltip argued that the panel had "manifestly disregarded the law"—a recognized basis for vacatur under the Georgia Arbitration Code. O.C.G.A. § 9-9-13(b)(5); App. 5a. Gulfstream removed Oceltip's application for vacatur to federal district court. Oceltip was unsuccessful in obtaining remand, and the two applications were consolidated in the district court. App. 5a-6a.

Before the district court, Oceltip argued that the agreement's choice-of-law provision, which specified that Georgia law would govern the dispute, incorporated the Georgia Arbitration Code as a component of Georgia law. In support, Oceltip cited this Court's opinion in *Volt*, 489 U.S. at 479, which upheld the application of California arbitration law where a contract's choice-of-law provision specified that California law would apply. Because Georgia arbitration law should apply, Oceltip argued, it could raise manifest disregard of law as a ground for vacatur. Oceltip also argued that Gulfstream was bound by the requirement under Georgia law that requests to confirm arbitration awards should be brought in Georgia state court. Gulfstream, in turn, argued that the contract should be read to incorporate the Federal Arbitration Act's substantive provisions, which do not include manifest disregard of law as a separately listed ground for vacatur and which gave the district court jurisdiction over the case.

The district court ultimately ruled in favor of Gulfstream, ruling that the choice-of-law provision specifying that Georgia law would apply to "any" dispute under the agreement nevertheless did not mean that Georgia arbitration law applied to this dispute. Citing *Mastrobuono*, 514 U.S. at 62, the district court

held that Oceltip carried the burden of showing that the contract clearly evinced the parties' intent to overcome the "presumption" that the FAA supplies the rules for arbitration. As a result, the district court denied each of Oceltip's arguments. See App. 27-29a.

5. On appeal, Oceltip challenged the district court's failure to apply the choice-of-law provision in favor of Georgia arbitration law. In particular, Oceltip argued that the district court should have relied on state contract law principles to interpret the plain language of the contract, rather than apply a default presumption *against* applying Georgia arbitration law. This was a matter of first impression for the Eleventh Circuit.

The Eleventh Circuit's ruled in favor of Gulfstream by doubling-down on the district court's reasoning. The opinion began by creating a new rule of contract interpretation for arbitration agreements: if parties want "certain rules to apply to the handling of [thei]r arbitration, the contract must say so clearly and unmistakably. Otherwise, the Federal Arbitration Act ("FAA") will apply." App. 2a. In adopting that new rule, the Eleventh Circuit took no account of state contract law, instead seeming to act via federal general common law.

With that default presumption framing its analysis of the contract, the court decided to construe the choice-of-law provision narrowly. Although the contract said that any controversy or claim arising out of or relating to the Agreement would be settled by arbitration, *and* that the "contract shall be governed by the laws of the State of Georgia," the Eleventh Circuit interpreted those provisions to extend only to rejecting application of the United Nations Convention on

Contracts for the International Sale of Goods (CISG). App. 11a-12a. The court thus read the specific disclaimer *against* using the CISG as defining the extent of the choice-of-law provision, even though that limitation is not present in either the arbitration agreement or the choice-of-law provision itself. App. 12a.

As part of its decision, the Eleventh Circuit noted that it believed it was following *Mastrobuono* and related out-of-circuit decisions, which—it said—required the contract to "evidence a clear intent" that "the Georgia Arbitration Code—as opposed to federal arbitral-award vacatur standards—control[led]." App. 16a. But, unlike *Mastrobuono*, the Eleventh Circuit did not consult traditional state-law contract principles (such as the rule that ambiguities are resolved against the drafter) when interpreting the contract. Instead, reasoning that *Mastrobuono* was "not materially distinguishable from Oceltip's case," it simply followed the eventual outcome in that decision. App. 16a. The court did not inquire into Georgia contract law; nor did it examine whether New York (the state law at issue in *Mastrobuono*) and Georgia (the state at issue here) espouse similar principles of contract interpretation.

Oceltip's petition for rehearing or rehearing en banc was denied.

REASONS FOR GRANTING THE PETITION

This Court should grant review to eliminate a longstanding split among the Courts of Appeals over how to interpret general choice-of-law provisions in contracts that are subject to the Federal Arbitration Act. The D.C. Circuit has applied the ordinary rule that the contract should be interpreted under state-

law principles of contract interpretation. By its decision below, the Eleventh Circuit has taken the opposite view, joining the First, Second, Third, Fourth, Sixth, Eighth, and Ninth Circuits in holding that the Federal Arbitration Act establishes a default rule construing the contracts to presumptively invoke FAA standards or mandating them outright. And while the Fifth Circuit initially took the same approach as the D.C. Circuit, applying state-law principles in construing choice-of-law clauses in contracts subject to the FAA, it later flipped positions and adopted a default rule. The default rules adopted by the Eleventh Circuit and similarly-aligned Circuits rest on a fundamental misreading of this Court's precedents in *Volt* and *Mastrobuono*—one that has snowballed, in the absence of this Court's intervention, for too long. This Court should grant review and resolve the circuit split over the proper role of state law in the recurring situation faced by the courts here. It is common for commercial contracts to include both a choice-of-law clause and an arbitration clause. The myriad businesses that use such contracts in interstate commerce need predictability that their contracts will be interpreted in accordance with state law, not uncertainty based on whether a case is filed in the D.C. Circuit or another circuit.

I. This Court Should Grant Review to Resolve a Longstanding Circuit Split and Confusion Over its Decisions in *Volt* and *Mastrobuono*.

A. There is a Well-Established Circuit Split Over Whether the Federal Arbitration Act Substantively Alters Contractual Choice-of-law Provisions.

The Eleventh Circuit's decision below placed it on one side of a long-simmering split among the circuits over whether the Federal Arbitration Act overrides background principles of state contract law in construing choice-of-law provisions in arbitration agreements. On one side stands the D.C. Circuit, which has construed a choice-of-law clause to incorporate state arbitration procedures that varied from FAA procedures. In arriving at that holding, the D.C. Circuit rejected the notion that the FAA preempts state principles of contract interpretation, and compels the application of FAA procedures. On the other side stand a growing group of Circuits, now joined by the Eleventh Circuit, holding that the Act forecloses courts from interpreting general choice-of-law provisions to incorporate state arbitration law and procedures. While their specific rationales vary, these courts all apply the FAA to displace state principles of contract interpretation, despite this Court's repeated admonition that courts may not "construe [an arbitration] agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987).

1. The FAA was enacted to "reverse the longstanding judicial hostility to arbitration agreements" and

"to place arbitration agreements upon the same footing as other contracts." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); see *Badgerow* v. *Walters*, 142 S. Ct. 1310, 1322 (2022) (same). Under the Act, "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). The Act establishes "certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion,'" *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (quoting *Volt*, 489 U.S. at 479), and that State law may not "disfavor arbitration" or discriminate against arbitration agreements as compared to other contracts, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 342 (2011); *accord Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 581 U.S. 246, 250-51(2017). Apart from that, however, "the interpretation of an arbitration agreement is generally a matter of state law." *Stolt-Nielsen*, 559 U.S. at 681.

Importantly, while the FAA is sometimes said to embody a liberal "policy favoring arbitration," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), that does not mean that courts are authorized "to invent special, arbitration-preferring" rules, *Morgan*, 142 S. Ct. at 1713. Instead, this Court's references to that "policy" are "merely an acknowledgment of the FAA's commitment to 'overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.'" *Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 561 U.S. 287, 302 (2010) (quoting *Volt*, 489 U.S. at 478). The FAA's core purpose was "to make 'arbitration agreements as enforceable as other contracts, but not more so.'" *Morgan*,

142 S. Ct. at 1713 (quoting *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12 (1967)). "Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind," but "may not devise novel rules to favor arbitration over litigation." *Ibid.*

2. The lower courts have applied these principles in different, and often confusing, ways when construing contracts that include an arbitration provision (making them subject to the FAA) and a general choice-of-law provision (which is supposed to be governed by state law).

a. In *Ekstrom* v. *Value Health, Inc.* the D.C. Circuit construed a merger agreement that included an arbitration provision and a choice-of-law provision referencing Connecticut law. 68 F.3d 1391, 1393 (D.C. Cir. 1995). When the plaintiffs sought to vacate an arbitration award, the district court deemed the petition untimely under Connecticut's arbitration statute. *Ibid.* On appeal, the plaintiff challenged the application of state arbitration procedures, arguing, among other things, that the FAA established a longer period for challenging an award and thus preempted the state rule. *Id.* at 1396.

The D.C. Circuit rejected the argument. Applying "Connecticut's substantive law on contracts and arbitrability," the court construed the arbitration clause to incorporate Connecticut's time period for challenging an arbitration award. 68 F.3d at 1394-1395. Because the contract's reference to "'Connecticut law'" embraced the state's "30-day limitation period," there was "no doubt that the parties agreed to be bound by it." *Id.* at 1396. The court explained "FAA does not prevent the enforcement of agreements to arbitrate

under different rules than those stated in the Act itself." *Id.* at 1393. Nor did the variance between the state law chosen by the parties create a "conflict with the FAA's 'primary purpose,'" since "applying Connecticut law here actually promotes the FAA's primary goal by enforcing the parties' contract to arbitrate according to its terms." *Id.* at 1396.

b. While the D.C. Circuit applied state principles of contract interpretation to resolve whether a choice-of-law provision incorporated state arbitration rules, a majority—and growing—group of circuits has veered in the opposite direction. These Circuits resolve the issue by adopting arbitration-specific contract principles, created under federal common law and ostensibly grounded in the FAA, and applying them in a manner that displaces general state law principles.

The Ninth Circuit, for example, applies a "strong default presumption [] that the FAA, not state law, supplies the rules for arbitration," which may be overcome only if the parties "evidence a 'clear intent'" for state arbitration law to apply. *Sovak* v. *Chugai Pharm. Co.*, 280 F.3d 1266, 1269 (9th Cir. 2002), *opinion amended on denial of reh'g,* 289 F.3d 615. Regardless of the circumstances of contract formation and background principles of state law, in that circuit "a general choice-of-law clause within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration." *Id.* at 1270.

Similarly, the Third Circuit "require[s] the parties to express a 'clear intent'" to apply state law vacatur standards "instead of those of the FAA," *Ario* v. *Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Acct.*, 618 F.3d 277, 293 (3d Cir. 2010),

as amended (Dec. 7, 2010), a rule it first adopted in *Kayser*, 257 F.3d at 293. That court has candidly acknowledged that its rule was simply a matter of policy not derived from state contract law or any other doctrinal principles. See *Ario*, 618 F.3d at 293. Instead, the Third Circuit "chose the 'clear intent' standard" because it "concluded that the default application of the FAA caused fewer problems than application of other standards in the absence of 'clear intent.'" *Id.* It also determined that the "clear intent" standard "furthered the FAA's goals of enforcing parties' actual bargains," reasoning that, given the FAA's history, it would be worse to "'wrongly conclude[e] that parties intended to opt out [of the FAA's rules]'" than to "wrongly conclude[e] that they did not]." *Id.* (quoting *Kayser*, 257 F.3d at 296). Under the Third Circuit's clear statement rule, "a generic choice-of-law clause, standing alone, raises no [] inference" that the parties sought to incorporate state arbitration rules, regardless of how the provision would be read under state contract principles. *Kayser*, 257 F.3d at 297 n.5; *id.* at 289.

The same is true of the other circuits that have declined to look to state contract law to interpret the scope of the choice-of-law provision. Time and again, courts have placed a hand on the interpretative scale based on the perceived "policy" of the Federal Arbitration Act, rather than simply interpreting the contracts by applying general, state-law contract principles. *E.g.*, *Action Indus.*, 358 F.3d at 343 (citing *Kayser* and *Sovak* to adopt the "clear intent" standard); *UHC Mgmt. Co.* v. *Computer Scis. Corp.*, 148 F.3d 992, 997 (8th Cir. 1998) ("the parties' intent that the agreement be so construed" must be "abundantly clear"); *Porter Hayden Co.* v. *Century Indem. Co.*, 136 F.3d

380, 383 (4th Cir. 1998) (requiring a "clearer expression of the parties' intent" to overcome a presumption that the Act's substantive provisions applied); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.* v. *Belco Petroleum Corp.*, 88 F.3d 129, 135 (2d Cir. 1996) (reading a choice-of-law provision narrowly to "adhere[] closer to the federal policy in favor of arbitration"); see also *Jacada (Eur.), Ltd.* v. *Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 712 (6th Cir. 2005) (looking to "the federal policy in favor of arbitration" to construe a choice-of-law provision), *abrogated in unrelated part by Hall St.* v. *Mattel,* 552 U.S. 576 (2008).

c. The Fifth Circuit has been on both sides of this split. After originally following an approach similar to the D.C. Circuit's framework in *Ekstrom*, the Fifth Circuit ultimately opted to follow the "clear intent" rules applied by the Third and Ninth Circuits.

In *ASW Allstate Painting & Constr. Co.* v. *Lexington Ins. Co.*, 188 F.3d 307 (5th Cir. 1999) (per curiam), the Fifth Circuit construed a choice-of law clause to incorporate a Texas law requiring expedited consideration of challenges to arbitration agreements. *Id.* at 310-311. Citing this Court's decision in *Volt*, the Fifth Circuit observed that "parties may choose state arbitration rules through a choice-of-law provision." *Id.* at 310. "Because the construction agreement contains a Texas choice-of-law provision, and Texas arbitration rules do not undermine the federal policy of the FAA," the court reasoned, "the [Texas arbitration statute]" applies to this arbitration agreement." *Ibid.* On the latter score, it was sufficient that Texas law generally reflected a "public policy favoring arbitration and upholding the parties' intentions." *Ibid.* It did not matter that Texas' provisions allowing for expedited review differed from the FAA.

In *Action Industries*, however, the Fifth Circuit abandoned *ASW*, and instead held "that a choice-of-law provision is insufficient, by itself, to demonstrate the parties' clear intent to depart from the FAA's default rules." 358 F.3d at 342. In making this shift, the Fifth Circuit purported to join [its] sister Circuits," pointing to the Third and Ninth Circuit's "clear intent" rules, *ibid.* (quoting *Ford* v. *NYLCare Health Plans of the Gulf Coast, Inc.*, 141 F.3d 243 (5th Cir. 1998); *Sovak*, 280 F.3d at 270), and citing the decisions addressed above. The *Action Industries* panel criticized the prior *ASW* decision because it "relied solely on the Supreme Court's earlier decision in *Volt*," while "fail[ing] to mention, let alone distinguish" the Supreme Court's holding in *Mastrobuono*." 358 F.3d at 342.

In justifying its pivot from *ASW*, the Fifth Circuit pointed to an earlier decision named *Ford*, which it read to hold "that a choice-of-law provision did *not* determine the scope of an arbitration clause." *Action Indus.*, 358 F.3d at 342 n.16. But *Ford* supports neither the wooden reliance on the FAA's supposed policy nor the displacement of state contract law that *Action Industries* suggests. To the contrary, the *Ford* panel gave effect to choice-of-law language within the arbitration provision, which "itself specifies that arbitration is to be governed by the [Texas General Arbitration Act]." *Ibid.* at 249. While the contract also included "a general choice-of-law clause *of sorts*," that provision merely specified "the HMO Laws and any other applicable laws or regulations," and accordingly did not point to any contradictory state law. *Id.* (emphasis added). Far from invoking any overriding FAA policies, the panel cited *Mastrobuono* for the "common law rule" that any ambiguity created by the dual

choice of law provisions must be "construed against the party who drafted it." *Ibid.* If anything, then, *Ford*'s approach to contract interpretation was more consistent with *ASW*—which is why *ASW* cited *Ford* for the proposition that Texas arbitration law "can govern the scope of an arbitration agreement without undermining the federal policy underlying the FAA." 188 F.3d at 310.

3. The decision below deepens this division in the wrong direction, joining those Circuits that have adopted a clear intent rule of contract interpretation in place of general state contract principles. See App. 17a.

The Eleventh Circuit could not have been more clear in adopting its categorical rule of construction. "Long story, short" the court explained, "if you want certain rules to apply to the handling of your arbitration, the contract must say so clearly and unmistakably. Otherwise, the Federal Arbitration act ("FAA") will apply." App. 2a. In establishing this new rule, the Eleventh Circuit did not cite or even mention state principles of contract interpretation. Instead, the court relied solely on *Mastrobuono*, reasoning that the choice-of-law clause there was "not materially distinguishable" from the provision at issue, and accordingly "does not evidence a clear intent by the parties that the Georgia Arbitration Code—as opposed to federal arbitral-award vacatur standards—control." App. 16a.

The Eleventh Circuit concluded that this result placed the court in "good company," which, by the court's count, included "[a]ll eight other Circuits that

have opined on the proper reading of *Volt* and *Mastrobuno*." App. 17a. The court nowhere mentioned the D.C. Circuit's opinion in *Ekstrom*.

This Court has given the Courts of Appeals more than two decades to resolve this split, and they have not. The D.C. Circuit (correctly) applies state law principles to choice-of-law provisions in contracts subject to the FAA. But the Eleventh Circuit and many other Circuits have adopted a clear-statement rule, apparently grounded in federal common law, in place of general state law principles. At least one of those Circuits, the Fifth, has flip-flopped on the issue. Because that approach has grown out of a misunderstanding of *Volt* and *Mastrobuono*, and fundamentally contradicts this Court's other arbitration precedents, this Court should intervene.

B. The Division Among the Circuits Results Directly From Longstanding, and Persistent, Confusion Over How to Apply and Reconcile This Court's Decisions in *Volt* and *Mastrobuono*.

Like nearly every Circuit confronting the question presented, the Eleventh Circuit below grounded its construction of the choice-of-law and arbitration provisions here in what it believed was "the proper reading of *Volt* and *Mastrobuono*." App. 17a. The same struggle to understand and harmonize these precedents was reflected in the Third Circuit's initial decision, more than 20 years ago, adopting a clear-intent rule and in the Fifth Circuit's more recent course-reversal in *Action Industries*. The confusion over *Volt* and *Mastrobuono*, and the resulting "clear intent" majority among the Circuits, calls out for this Court's clarification.

1. *Volt* concerned a contract that contained both an arbitration agreement and a choice-of-law provision specifying that the contract would "be governed by the law of the place where the Project was located." 489 U.S. at 470. A California court interpreted that provision to incorporate "the California rules of arbitration," including specific procedures not provided for in the Federal Arbitration Act. *Id.* at 472. Deferring to the California court's interpretation of California contract law, this Court held that the FAA neither compelled a construction of the arbitration agreement to incorporate FAA arbitration rules nor preempted the state court's construction. *Id.* at 474-479.

This Court reasoned that "by interpreting the choice-of-law provision to mean that the parties intended the California rules of arbitration *** to apply to their arbitration agreement," the California court had *not* violated the rule that "questions of arbitrability in contracts subject to the FAA must be resolved with a healthy regard for the federal policy favoring arbitration." *Id.* at 474-476. "There is no federal policy favoring arbitration under a certain set of procedural rules," the Court observed, for "the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Ibid.* This Court explained that "[j]ust as [the parties] may limit by contract the issues which they will arbitrate, so too may they specify by contact the rules under which that arbitration will be conducted." *Id.* at 479 (citation omitted). Because California's rules were "manifestly designed to encourage resort to the arbitral process," construing the choice-of-law clause to incorporate them "simply does not offend the rule of liberal construction *** nor does it offend any other policy embodied in the FAA." *Ibid.*

2. In *Mastrobuono*, this Court reached the opposite result, construing a contract that included both an arbitration clause and a choice-of-law clause not to incorporate New York's rule prohibiting arbitrators from awarding punitive damages. 514 U.S. at 54-55. Interpreting the contract *de novo*, this Court concluded that the choice-of-law provision did not evince an intent to incorporate New York's arbitration rules. *Id.* at 60. The provision "might include only New York's substantive rights and obligations," the Court explained, "and not the State's allocation of power between alternative tribunals." *Ibid.*

Deeming the choice-of-law clause to "introduce an ambiguity" into the agreement over the availability of punitive damages, this Court drew on both state principles of contract interpretation and the policy concerns underlying the FAA. 514 U.S. at 62. This Court initially invoked "'the federal policy favoring arbitration,'" reasoning that "'ambiguities as to the scope of the arbitration clause itself [are] resolved in favor of arbitration.'" *Ibid.* (quoting *Volt*, 489 U.S. at 476). But it went on to support its construction applying two distinct state-law principles. First, it looked to the "common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it," a principle recognized in both New York (the selected jurisdiction) and Illinois (where the suit was filed). 514 U.S. at 62. This principle operated to "protect the party who did not choose the language from an unintended or unfair result," and it was unlikely that the plaintiffs were aware that by entering into the arbitration agreement, they would "be giving up an important substantive right." *Ibid.* Second, this Court noted that reading the choice-of-law provision to incorporate New York's

punitive damages bar would contravene "another cardinal principle of contract construction" grounded in state law—"that a document should be read to give effect to all its provisions." *Id.* at 63; but see *id.* at 71 (Thomas, J., dissenting) ("The choice-of-law provision speaks directly to the issue, while the NASD Code is silent. Giving effect to every provision of the contract requires us to honor the parties' intent, as indicated in the text of the agreement, to preclude the award of punitive damages by arbitrators.").

3. The decision below reflects and perpetuates misreadings of *Volt* and *Mastrobuono* that have also marked the decisions from other Circuits adopting "clear intent" rules for choice-of-law clauses potentially incorporating state arbitration law.

a. The Eleventh Circuit concluded that "*Volt* has no application when, as here, a federal court reviews contractual language de novo." App. 17a. "*Volt*'s procedural posture was integral to the Court's decision there," the Eleventh Circuit reasoned, because this Court "deferred to the state court's construction of its own state law and did not interpret the contract there de novo." App. 13a-14a.

The court below elided the fact that state law supplied the principles for interpreting the choice-of-law clauses in both *Volt* and *Mastrobuono*. Instead, the court focused solely on *Mastrobuono*'s *de novo* construction, inferring from that "posture" that this Court had announced a rule of construction applicable, in categorical fashion, to general choice-of-law provisions. "[H]ere, as in *Mastrobuono*," the posture called for "de novo review of the choice-of-law provision." *Id.* at 14a. And because the court viewed the provision

here as being general, and hence "materially [in]distinguishable" from the one in *Mastrobuono*, the court construed it to lack the requisite "clear intent by the parties that the Georgia Arbitration Code *** control." *Id.* at 16a.

b. The Eleventh Circuit's approach of limiting *Volt* to its "procedural posture," and treating *Mastrobuono* as announcing a categorical rule of contract interpretation, carries forward the mistakes made by the "other Circuits" adopting clear intent rules. *Cf.* App. 16a-17a.

The Third Circuit's rationale in adopting its "clear intent" rule illustrate the point. More than 20 years ago, in *Kayser*, the Third Circuit relied upon *Mastrobuono* in "declin[ing] to construe the choice-of-law clause *** as evidencing a clear intent to incorporate Pennsylvania's standards for judicial review." *Id.* at 294. *Mastrobuono* supported this approach, the Court reasoned, because it "squarely held that [a general choice-of-law clause] did not *clearly* evidence an intent to opt out of the federal default rule." *Ibid.* (emphasis added). In adopting its "default rule" that "generic choice-of-law clause, standing alone," are insufficient to incorporate state arbitration law, the Court stressed that the rule was "is in synch with *Mastrobuono*'s holding." *Id.* at 294-297. In contrast, the Third Circuit treated *Volt* as offering no "guidance as to how generic choice-of-law clauses *should* be interpreted" because this Court "merely followed its obligation to defer to state court constructions of private agreements. *Id.* at 295 (emphasis added). Notably, Judge Ambro, writing separately, proposed a different way of harmonizing *Volt* and *Mastrobuono*, suggesting that ambiguous choice-of-law language should be read to incorporate state procedural rules, but not

substantive state arbitration rules in conflict with the FAA. *Id.* at 304 (Ambro, J., concurring).

The meaning of, and relationship between, *Volt* and *Mastrobuono* also lies at the center of the Fifth Circuit's conflicting decisions on these issues. *ASW* deemed it sufficient to cite *Volt*, reasoning that "[b]ecause the construction agreement contains a Texas choice-of-law provision, and Texas arbitration rules do not undermine the federal policy of the FAA," the Texas arbitration statute "applies to this arbitration agreement." 188 F.3d at 310. When it later pivoted away from *ASW*, the Fifth Circuit adopted the Third Circuit's approach of privileging the result in *Mastrobuono* over *Volt* and *Mastrobuono*'s reasoning. See *Action Indus.*, 358 F.3d at 342. Like *Kayser*, it treated *ASW* as "not persuasive" for having "relied solely" on *Volt*, while "fail[ing] to address *Mastrobuono*." *Id.* at 342, n. 16. It similarly cabined *Volt* by reading it to "presuppose that the contract had expressed the parties' clear intent to depart from the FAA's rules." *Id.* at 342, n.15.

b. The prevailing treatment of *Volt* and *Mastrobuono* in the Courts of Appeals, as reflected in the Eleventh Circuit's decision here, distorts both decisions. By treating *Volt*'s application of state arbitration rules as fact-bound and *Mastrobuono*'s application of the FAA as rule-announcing, nine circuits have adopted an all-or-nothing approach to choice-of-law provisions paired with arbitration provisions. These courts now routinely ignore state contract principles that, under this Court's precedents, ought to apply as a matter of course. As a consequence, state arbitration rules that the parties may well have chosen under state contract principles are also displaced by the FAA.

Mastrobuono does not purport to adopt a cross-cutting rule of construction or to foreclose the application of state contract principles. Rather, it independently construed the general choice-of-law provision at issue to determine the intentions of the parties. In undertaking this construction, and resolving the ambiguity it found, this Court applied state-law principles of contract interpretation as well as "'the federal policy favoring arbitration.'" 514 U.S. at 62. While these sources weighed against an intent to incorporate state law there, this Court did not suggest they would compel the same result in *all* cases. That is why Justice Thomas was able to note in dissent that "the import of the majority's decision" was at least "limited and narrow"; because the case "amount[ed] to nothing more than a federal court applying Illinois and New York contract law" to a particular agreement, the opinion "ha[d] applicability only to this specific contract." *Id.* at 71-72 (Thomas, J., dissenting).

In this respect, "*Mastrobuono* does not conflict with the Supreme Court's earlier holding in *Volt*," but not for the reasons the Eleventh Circuit and other Circuits have assumed. *Cf. Action Industries*, 358 F.3d at 342 n.15. The fact that this Court "did not interpret the contract *de novo*" in *Volt*, and "deferred to the California court's construction of its own State's law," *Mastrobuono*, 514 U.S. at 60, n.4, helps explain the different *outcomes* in the two cases. But it does not signal that *Mastrobuono* adopted a different interpretative *method* for choice-of-law clauses—much less a categorical rule. After all, *Mastrobuono* continued to ground its construction in state contract principles, citing not one, but two "cardinal principle[s] of contract construction." *Id.* at 63. And this Court has continued to rely on *Volt* to stress the importance of

"giv[ing] effect to the contractual rights and expectations of the parties," *Stolt-Nielsen*, 559 U.S. at 682 (quoting *Volt*, 489 U.S. at 479), including "'the *rules* under which that arbitration will be conducted,'" *American Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228, 233 (2013) (quoting *Volt*, *supra*, at 479).; *accord Stolt-Nielsen*, *supra*, at 683 (noting that "parties may specify *with whom* they choose to arbitrate").

By elevating *Mastrobuono*'s particular outcome to a doctrinal rule, and ignoring the interpretative method applied in both *Mastrobuono* and *Volt*, the courts of appeal have improperly evicted state law from a threshold question of contract interpretation. Many of the circuit decisions applying *Mastrobuono* suggest that it *compels* courts to conclude that general choice-of-law provisions do not incorporate state arbitration law. For example, the Fourth Circuit has held that post-*Mastrobuono*, courts are *barred* from "read[ing] a contract's general choice-of-law provision as invoking state law of arbitrability and displacing federal arbitration law." *Porter Hayden*, 136 F.3d at 382. Other courts reason that *Mastrobuono* places a dispositive hand on the scale when interpreting choice-of-law provisions, based on their own analysis as to whether adopting the broader reading of a choice-of-law provision would implicate a federal policy. *Jacada*, 401 F.3d at 711; *PaineWebber Inc.* v. *Elahi*, 87 F.3d 589, 594 (1st Cir. 1996) ("relying on *Mastrobuono*"). Stunningly, the Ninth Circuit has even read *Mastrobuono* categorically to "*dictate[]* that general choice-of-law clauses do not incorporate state rules," *Wolsey, Ltd.* v. *Foodmaker, Inc.*, 144 F.3d 1205, 1213 (9th Cir. 1998), even though the particular result in *Mastrobuono* flowed in part from New York (and

Illinois) contract principles, and *Volt* upheld the exact opposite interpretation under California law.

None of these tests is compelled by *Mastrobuono*. Nor can they be squared with the role that state contract law played in both *Volt* and *Mastrobuono*. But without further guidance from this Court, the rigid rules adopted by the Eleventh Circuit and the "other Circuits that have opined on the proper reading of *Volt* and *Mastrobuono*" (App. 17a) will almost certainly proliferate. This Court was presented with the opportunity to intervene when the Third Circuit adopted its "default rule" requiring clear intent, but ultimately denied certiorari. See 534 U.S. 1020 (2001). Had the Court granted review and held, as the petition asked, that the FAA does not categorically displace state law in construing general choice-of-law provisions, e.g., Pet. For Cert., *Kayser* v. *Roadway Package Sys., Inc.*, No. 01-422, at 20-23 (Sept. 4, 2001), the Fifth Circuit would not have flipped its position in *Action Industries*. It should seize on this opportunity to finally address the confusion surrounding *Volt* and *Mastrobuono*.

II. This Case Presents a Good Opportunity for the Court to Clarify the Role of State Law in Construing Arbitration Agreements Subject to the FAA.

A. The Predominating Clear Intent Rule Conflicts with Both the Purpose of the FAA and this Court's Directive to Treat Arbitration Contracts Like Other Contracts.

Review is also urgently needed to harmonize this Court's other areas of arbitration jurisprudence with

the predominant choice-of-law rule amongst the circuits. Despite this Court's consistent guidance that arbitration agreements should be interpreted like any other contract, the majority of circuits have adopted rules that categorically reject certain contract interpretations regardless of the intent of the parties. Those decisions are in conflict with the purpose of the FAA and this Court's precedents.

This Court has repeatedly cautioned that courts may not apply rules of contract interpretation that are "specific to arbitration" rather than general state contract law. *Marmet Health Care Ctr., Inc.* v. *Brown*, 565 U.S. 530, 534 (2012). The "interpretation of an arbitration agreement is generally a matter of state law." *Stolt-Nielsen*, 559 U.S. at 681; see also *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally *** should apply ordinary state-law principles that govern the formation of contracts."). "A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." *Perry*, 482 U.S. at 492 n.9. In other words, in "ensur[ing] the enforceability, according to their terms, of private agreements to arbitrate," courts must apply "general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act." *Volt*, 489 U.S. at 475-476.

This Court has repeatedly followed that rule when construing arbitration agreements. In *DIRECTV, Inc.* v. *Imburgia*, for example, the Court looked to "general

contract principles" under "California law" to interpret the scope of a contractual phrase that applied to "the law of your state" (there, California). 577 U.S. 47, 55 (2015). In *Lamps Plus, Inc.* v. *Varela*, this Court endorsed the Ninth Circuit's reliance on "California's rule that ambiguity in a contract should be construed against the drafter, a doctrine known as *contra proferentem*." 139 S. Ct. 1407, 1417 (2019). And of course, in *Mastrobuono* itself, the court applied principles of state law (as explained above).

The default rule applied by the Eleventh Circuit and many other Circuits cannot be squared with these principles. These courts begin their supposedly *de novo* contractual analysis by invoking a default rule against reading the choice-of-law broadly. Rather than ask whether the provision evinces a particular intent by the parties, such courts ask whether the provision is "sufficient" to displace their background presumption against applying the choice-of-law provision in the first place. See *Puerto Rico Tel. Co.* v. *U.S. Phone Mfg. Corp.*, 427 F.3d 21, 30 (1st Cir. 2005) ("the choice-of-law provision *** is insufficient to render applicable Puerto Rican law"), *abrogated by Hall St.*, 552 U.S. 576.

The upshot is that contacts that include both an arbitration provision and a choice-of-law clause are construed differently than other arbitration agreements. And in the Eleventh Circuit, as well as the Third, Fourth, Fifth, and Ninth Circuits, the rule is a categorical one; it matters not how the canons of construction available under state law would apply. Under the rules applied by these Circuits, the court must apply the FAA's standards in the absence of clear contrary intent or override the choice-of-law clause en-

tirely. That sort of broad-reaching exception is precisely kind of exception that this court rejected just last term in *Morgan*, 142. S. Ct. at 1713. Here, as there, "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring" rules. *Id.* (quoting *Moses H. Cone*, 460 U.S. at 24). Here, as there, this Court's "frequent use of that phrase connotes something different"; it is "merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Id.* (quoting *Granite Rock*, 561 U.S. at 302). Just as in *Morgan*, then, "court[s] may not devise novel rules" for arbitration agreements out of a supposed belief that the novel rule furthers the goals of the Federal Arbitration Act. *Id.*

There are yet further anomalies. In creating special interpretative rules based upon *Mastrobuono*'s outcome, the Eleventh Circuit and similarly-aligned Circuits have created, in passing, a federal common law of contracts. While *Mastrobuono* itself looked to New York and Illinois law for principles of construction, the rules adopted by these courts is unmoored from state law. As the Third Circuit frankly acknowledged, these "default" rules are ultimately based upon the raw policy consideration that favoring federal over state arbitration law would "cause[] fewer problems." *Ario*, 618 F.3d at 293. It has been well-settled since *Erie R. Co.* v. *Tompkins* that this is not how federal courts should decide cases. See generally 304 U.S. 64 (1938). In the absence of a rule in the FAA itself—and there is no dispute that such a rule is absent from the FAA—what federal courts ought to do is apply "state law," *Stolt-Nielsen*, 559 U.S. at 681, not "novel rules"

for arbitration agreements, *Morgan*, 142. S. Ct. at 1713. At the point where a federal court is articulating federal general common law as a reason for not applying the state law chosen by contracting parties, something has gone very wrong.

Nor can these courts justify evicting state law by standing on *Mastrobuono*'s statement—quoting *Volt*—that "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." 514 U.S. at 62 (quoting *Volt*, 489 U.S. at 476). As a threshold matter, this principle is specifically limited to "the scope of the arbitration clause itself," and thus cannot be read to block the application of all state arbitration laws. Even more importantly, this Court has consistently applied that principle alongside other applicable state law principles of construction—and not to displace them. That is reflected in *Mastrobouono* itself, where, as noted, the court applied two different state law canons in addition to the FAA ambiguity canon. If the FAA ambiguity canon were all that mattered, there would have been no need to consider state law in *Matrobuono*, and the outcome would have been different in *Volt*. What's more, it would contravene many decisions, both before and after *Mastrobuono*, explaining that the Act does not exalt arbitration agreements above other contracts, but merely intends for them to be treated equally. *Morgan*, 142. S. Ct. at 1713. That possibility is only another reason supporting review.

The clear-intent rule predominating among the circuits is out of step with this Court's other arbitration jurisprudence. This case is an important opportunity for this Court to harmonize the predominant rule with its other caselaw.

B. This Case is a Good Vehicle for Providing Guidance on How Federal Arbitration Policy Affects the Construction of Choice-of-law Provisions, a Recurring Problem that *Volt* and *Mastrobuono* Have Only Made Worse.

This case presents an opportunity to address the confusion over *Volt* and *Mastrobuono*, resolve the persistent split caused by that confusion, and provide badly needed guidance on the proper construction of arbitration contracts with choice-of-law provisions. While the legal issue here is narrow, its practical importance is far-reaching. Commercial agreements frequently include both an arbitration provision and a choice-of-law clause. Arbitration is often preferable to litigation due to purported advantages such as speed and efficiency. At the same time, large businesses operating across multiple states frequently rely on choice-of-law provisions to provide certainty over which state's laws will govern their disputes. Because contracts frequently include both clauses, it is vital that federal courts understand the governing background principles of interpretation.

The Court should use this case to provide guidance on the issue. The confusion over *Volt* and *Mastrobuono* has persisted for more than two decades. Absent clarification from the Court, the wave of Circuits adopting clear intent rules will only continue to build, displacing state law in an area where it traditionally controls. This case squarely raises both the split and its underlying cause; as noted, the Eleventh Circuit followed other courts in adopting a clear intent rule, and did so based upon its mistaken reading of *Mastrobuono*. Indeed, the court of appeals specifically noted

that "*Mastrobuono* is not materially distinguishable from Oceltip's case." App. 16a.

The court reasoned that "the Agreement's clause stating that it 'shall be governed by the laws of the State of Georgia' is distinguishable from the provision in *Mastrobuono* *** only in that the clause [here] further specifies that CISG shall not control the Agreement." *Ibid.* But that additional contract language does not change the fundamental question of whether *Mastrobuono* compels the wooden rule it adopted or, as *Volt* suggests, state contract principles ought to apply. And, at all events, the court is wrong in suggesting that the language specifically excluding "the U.N. Convention on Contracts for the International Sale of Goods [CISG]" "makes the case stronger for application of federal standards of arbitral-award review." *Ibid.* The court reasoned that the selection of Georgia law and exclusion of CISG law evinces an intent not to incorporate Georgia vacatur standards because "[t]he CISG does not establish standards for the review of arbitral awards." App. 11a. But even if the CISG provides only substantive rules for "contracts for the international sale of goods," the parties' intent to specifically *exclude* them does not indicate an intent to exclude Georgia arbitration rules and standards. That "comparison" could equally support the inference that the parties intended Georgia arbitration law to control, and simply wanted to be sure that Georgia substantive law would *also* apply over the CISG.

Georgia principles of contract interpretation underscore why the Court of Appeals' application of its "clear intent" standard led to a different result. As Oceltip argued below, Georgia applies the principle that ambiguities in contracts are construed against

the drafting party—here, Gulfstream. *Kennedy* v. *Brand Banking Co.*, 266 S.E.2d 154, 157 (Ga. 1980); see *Maiz* v. *Virani*, 253 F.3d 641, 660 (11th Cir. 2001) (under Georgia law, "doubts in a contract are construed strongly against the drafting party"). In *Mastrobuono*, this Court relied on that same principle to conclude that the ambiguous and general choice-of-law provision should be construed narrowly, because that benefitted the non-drafter. 514 U.S. at 62. Here, however, the exact opposite is true: interpreting the ambiguity in the choice-of-law provision against the drafter would mean reading it expansively, to incorporate Georgia arbitration law. Nevertheless, the Eleventh Circuit did not even address that fundamental rule. Instead, it rejected the role of state law principles (in a footnote), noting only that those grounds were a "separate rationale" for the Court's decision in *Mastrobuono*. App. 16a.

That difference was dispositive, for two reasons. First, applying that rule should have resulted in the Eleventh Circuit simply adopting the construction that the choice-of-law incorporated all of Georgia law. But second, if the Eleventh Circuit had any doubt whether that was the right result, then under Georgia law, a *jury* needed to resolve the intent of the parties. *Maiz*, 253 F.3d at 659-660 (citing *St. Charles Foods, Inc.* v. *America's Favorite Chicken Co.*, 198 F.3d 815, 820 (11th Cir. 1999)) (explaining that if the canons of construction do not provide a clear answer, then a jury must resolve the meaning of the provision). At each stage of the court's decision-making process, then, it disregarded applicable Georgia law in favor of its own (federal general common law) reasoning. Along the way, it treated *Mastrobuono*'s considered analysis of

state law as mere dicta that was relegable to a footnote. That reasoning cannot be squared with either *Mastrobuono* itself or this Court's general arbitration jurisprudence.

Finally, it is not enough to point to the occasional decision where a court—after arbitrarily placing a heavy burden on the party invoking the choice-of-law provision, due to a misunderstanding of the "policy" underling the Act—nevertheless conducts a limited analysis of the contract. In those instances, the court's reasoning is already skewed, because true *de novo* review does not include requiring one party to "clearly" and "unmistakably" overcome a presumption against their preferred interpretation due to supposed tension with a federal statute. App. 2a. To the extent there is any doubt on that score, that too favors review. When a decision's internal contradictions leave significant "doubt" that the correct rule was followed, the appropriate remedy is to "remand for further consideration." *Goldman Sachs Grp., Inc.* v. *Arkansas Teacher. Ret. Sys.*, 141 S. Ct. 1951, 1961 (2021).

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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