No. 20-1313

In the Supreme Court of the United States

DIMITRI SHIVKOV, INDIVIDUALLY AND AS A TRUSTEE OF THE PHOENIX 2010 REVOCABLE TRUST, ET AL.,
Petitioners,
v.
ARTEX RISK SOLUTIONS, INC. ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Are all ten circuit courts that have encountered the issue wrong to treat the availability of class arbitration as a gateway issue for a court to decide?

2. May a contract that, under this Court's precedents, cannot be read as allowing class arbitration nonetheless be read as clearly and unmistakably empowering an arbitrator to decide if class arbitration is available?

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, undersigned counsel state:

1. Respondent Artex Risk Solutions, Inc. is a subsidiary of its parent company, Arthur J. Gallagher & Co. Arthur J. Gallagher & Co. is a publicly held corporation that owns 10% or more of the stock of Artex Risk Solutions, Inc. No other publicly held corporation owns 10% or more of the stock of Artex Risk Solutions, Inc.

2. Respondent Arthur J. Gallagher & Co. is a nongovernmental corporate party with no parent company. No publicly held corporation owns 10% or more of the stock of Arthur J. Gallagher & Co.

3. Respondent TSA Holdings, LLC is a nongovernmental corporate party that is a subsidiary of its parent company, KDL Investments, LLC. No publicly held corporation owns 10% or more of the stock of TSA Holdings, LLC.

4. Respondent TBS, LLC is a nongovernmental corporate party that does not have a parent company. No publicly held corporation owns 10% or more of the stock of TBS, LLC.

5. Respondent Provincial Insurance, PCC is a nongovernmental corporate party that does not have a parent company. No publicly held corporation owns 10% or more of the stock of Provincial Insurance, PCC.

6. Respondent Tribeca Strategic Accountants, LLC is a nongovernmental corporate party that does not have a parent company. No publicly held corporation owns 10% or more of the stock of Tribeca Strategic Accountants, LLC.

7. Respondent Epsilon Actuarial Solutions, LLC is a nongovernmental corporate party that does not have a parent company. No publicly held corporation owns 10% or more of the stock of Epsilon Actuarial Solutions, LLC.

8. Respondent AmeRisk Consulting, LLC is a nongovernmental corporate party that does not have a parent company. No publicly held corporation owns 10% or more of the stock of AmeRisk Consulting, LLC.

9. Respondent Tribeca Strategic Accountants, PLC is a nongovernmental corporate party that does not have a parent company. No publicly held corporation owns 10% or more of the stock of Tribeca Strategic Accountants, PLC.

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INTRODUCTION

This Court should deny Plaintiffs' petition. Neither of the two issues on which Plaintiffs seek review is relevant to this case. Both are directed at who should decide whether the contract here authorizes class arbitration. Under this Court's precedents, however, the contract simply cannot be read as authorizing class arbitration in any event, so it does not matter who decides.

In addition, there is no circuit split or other good reason to grant review. On the issue of whether courts or arbitrators should presumptively decide if class arbitration is available, all ten circuit courts to encounter the issue agree that the answer is the courts. On the other issue—whether the contract here clearly and unmistakably empowered an arbitrator to decide—Plaintiffs have invented a split that does not exist. The arbitration provision here is unusual, and it operates unlike the provisions in the cases Plaintiffs cite. Plaintiffs' complaint is also unusual, because it makes allegations that directly undercut the arguments in their petition. For all these reasons, this case is not a good candidate for review.

STATEMENT

I. Captive insurance companies

An insurance company that is owned by its insureds is called a captive insurance company. As relevant here, a captive provides both insurance and tax benefits. The insureds may deduct from their income the premiums they pay the captive, and the captive does not pay income taxes on the premiums.

Plaintiffs are four groups of sophisticated businesspeople and companies they own. Each group wanted its own captive. To form and manage the captives, Plaintiffs hired Artex—the name this brief uses for Artex Risk Solutions, Inc. and a company it acquired, TSA Holdings, LLC. The other Defendants are (a) Artex's owner, Arthur J. Gallagher & Co., a publicly traded insurance brokerage and risk management services firm; (b) employees of Artex; and (c) other companies that Artex hired on Plaintiffs' behalf to provide underwriting and actuarial services.

II. The contracts and arbitration provision

Each group of Plaintiffs had its own Agreement with Artex. The Agreements all contain the same dispute resolution provision:

> You and we agree that in the event of any dispute that cannot be resolved between the parties, that we will agree to seek to resolve such disputes through mediation in Mesa, Arizona, and if that fails, that all disputes will be subject to binding arbitration in Mesa, Arizona, with arbitrators to be agreed upon by the parties, and if no agreement is reached, then arbitrated by the American Arbitration Association (AAA). Each party shall bear its own costs in such mediation and arbitration. To reduce time and expenses, we each waive our right to litigate against one another regarding the services provided and obligations pursuant to this Agreement, and instead you and we have chosen binding

> arbitration. All claims or disputes will be governed by Arizona law.

App. 10. Each Agreement was silent on the topic of class arbitration. As Plaintiffs conceded to the district court, "the Agreement does not mention class arbitration." Pls.' Opp. to Defs.' Renewed Mot. Compel Individual Arbitration, No. 2:18-cv-4514 (D. Ariz.), Dkt. 47, p. 16.

III. This lawsuit

A. Plaintiffs alleged that AAA *cannot* arbitrate these disputes.

Plaintiffs alleged that the IRS audited each group, issuing and litigating tax deficiencies against some of them. Each settled its case, and together they filed this putative class action lawsuit in the District of Arizona. They alleged thirteen causes of action, all based on the allegation that they were damaged by "their participation in Captive Insurance Strategies that Defendants designed * * * and managed." Compl., No. 2:18-cv-4514 (D. Ariz.), Dkt. 1, at ¶ 62. After Defendants moved to compel individual (non-class) arbitrations, Plaintiffs amended the complaint. Am. Compl., No. 2:18-cv-4514 (D. Ariz.), Dkt. 31.

The amended complaint contains a long section titled "**PLAINTIFFS' CLAIMS ARE NOT SUBJECT TO ARBITRATION**." *Id.* ¶¶ 335–43. There, Plaintiffs alleged that the arbitration provision was unconscionable and invalid because it "fail[ed] to attach the allegedly applicable rules of arbitration" and "Plaintiffs did not see the arbitration language buried on the last page." *Id.* ¶ 337(a). Plaintiffs described the arbitration provision as "neither explicit nor clearly

worded to indicate that the parties have agreed to arbitrate." *Id.* ¶ 338. "There was no meeting of the minds regarding the arbitration provisions" because "the terms of the purported arbitration provision were never explained to Plaintiffs." *Id.*

In addition, Plaintiffs alleged that "[a]lthough the Retainer Agreement refers to arbitration being conducted by the AAA," it was unenforceable because it "does not identify * * * the particular AAA rules that would apply." *Id.* ¶ 339. Plaintiffs also alleged that "the substantial costs of arbitration before the American Arbitration Association" made the arbitration provision "unenforceable." *Id.* ¶ 340.

The amended complaint tacked on an allegation that was not present in the original complaint. In response to Defendants' motion to compel arbitration, Plaintiffs alleged (in addition to all of the other allegations quoted above) that if arbitration is required, "the specification in the Retainer Agreements of the American Arbitration Association arbitration rules amounted to clear and unmistakable evidence of the parties' intent that the selected arbitrator decide whether the Retainer Agreements permit class arbitration." *Id.* ¶ 343.

B. The district court compelled individual arbitrations.

Defendants again moved to compel individual arbitrations of all claims. In response, Plaintiffs repeatedly attacked the arbitration provision.

In a 27-page opinion, the district court repelled all of Plaintiffs' attacks. The court held that the arbitration provision was not (a) substantively

unconscionable, (b) procedurally unconscionable, (c) in violation of the reasonable expectations doctrine, (d) inapplicable due to a breach of fiduciary duty, (e) expired because the Agreements were terminated, (f) inapplicable to some of Plaintiffs' claims, (g) inapplicable to some Defendants, (h) clear and unmistakable evidence of an intent to authorize an arbitrator to decide whether to allow class arbitration, and (i) capable of being read as authorizing class arbitration. App. 41–82. Thus, under this Court's decisions in *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), and *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407 (2019), the district court required each group of Plaintiffs to arbitrate its claims individually, on a non-class basis. *Id.* 80–81.

C. The Ninth Circuit affirmed.

Plaintiffs appealed to the Ninth Circuit. After briefing and oral argument, that court affirmed in a detailed, 34-page opinion. *Id.* 7–40.

On the subject of the availability of class arbitration, the Ninth Circuit held it is a gateway issue that is presumptively for a court to decide. *Id.* 33. That holding was foreshadowed by a prior unpublished Ninth Circuit opinion to the same effect, *Eshagh* v. *Terminix Int'l Co.*, 588 F. App'x 703, 704 (9th Cir. 2014), and it officially brought the Ninth Circuit into line with all nine of the other circuit courts that have encountered the issue.

Next, the court held that the Agreements did not contain clear and unmistakable evidence of intent to authorize an arbitrator to decide whether class arbitration is available. *Id.* 36–37. Plaintiffs petitioned

for rehearing *en banc*, which the full court denied. *Id.* 89. No judge requested a vote. *Id.*

REASONS TO DENY THE PETITION

This Court should deny Plaintiffs' petition for three compelling reasons.

First, the two questions the petition presents—both of which are about *who* should decide whether class arbitration is available in this case—are not even relevant to this case. All parties, the district court, and the Ninth Circuit agree that the Agreements are silent on the topic of class arbitration. Under this Court's precedents, that means the Agreements simply do not allow class arbitration. Agreements that do not allow class arbitration cannot be read as clearly and unmistakably authorizing an arbitrator to decide whether to allow class arbitration.

Second, the petition asks this Court to hold that the availability of class arbitration should presumptively be an issue for an arbitrator to decide. There is no circuit split on that issue. In fact, of the ten circuit courts to encounter it, all ten treat it as a gateway issue that is presumptively for a court to decide—and district courts in the other circuits do the same. For this Court to reach the opposite conclusion would overturn the nationwide consensus. It would also undermine or require reversing several of this Court's other decisions about gateway issues and class arbitration.

Third, this case is a poor vehicle for deciding whether agreeing to arbitrate with AAA amounts to clear and unmistakable evidence that the parties intended to have an arbitrator decide if class

arbitration is available. The arbitration provision here—which makes AAA a contingent backup to the parties' chosen arbitrator—is unlike the provision in most cases because it neither incorporates AAA rules nor states that AAA will arbitrate all disputes. Those facts, plus the critical element of *class* arbitration, distinguish this case from the Second and Tenth Circuit cases that Plaintiffs incorrectly argue form the other side of a circuit split. A ruling by this Court about the unusual arbitration provision in this case would have minimal precedential value for other cases.

In addition, Plaintiffs' own allegations make this case a poor vehicle for review. In their amended complaint, Plaintiffs alleged there was no agreement to arbitrate, the agreement was invalid because it did not specify particular AAA rules, and AAA's potential involvement made the entire provision unenforceable. Those allegations—along with Plaintiffs' failure even to attempt to reach an agreement with Defendants on an arbitrator—will prevent this Court from answering the legal questions the Petition asks.

For all of these reasons and those stated below, this Court should not grant review.

I. The answers to Plaintiffs' questions do not matter to this case.

Plaintiffs ask two questions: (1) whether gateway issues are presumptively for arbitrators or courts to decide, and (2) if the latter, whether the Agreements clearly and unmistakably show that the parties empowered an arbitrator to decide. Pet. at i.

Neither question is worthy of review, especially because the answers would have no effect on this case.

Plaintiffs long ago conceded the paramount point: the Agreements are silent on the topic of class arbitration. Plaintiffs argued to the district court that "the Agreement does not mention class arbitration." The district court therefore found that "the Agreements are silent as to class arbitration and Plaintiffs[] offer no argument for how the Agreements indicate that the parties agreed to class arbitration." App. 80. On appeal, Plaintiffs again failed to explain how the parties agreed to class arbitration, and the Ninth Circuit found "the Agreements are silent on class arbitration." App. 37.[1]

Under this Court's decisions, there can be no "arbitration on a classwide basis when an agreement is 'silent' on the availability of such arbitration." *Lamps Plus*, 139 S. Ct. at 1412 (quoting *Stolt-Nielsen*, 559 U.S. 662). Class arbitration requires "an affirmative 'contractual basis['] * * * Silence is not enough; the 'FAA requires more.'" *Id*. at 1416 (quoting *Stolt-Nielsen*, 559 U.S. at 684, 687).

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[1] Plaintiffs now argue that because AAA has rules about class arbitrations, "[a]greeing to AAA arbitration" is tantamount to agreeing to class arbitration. Pet. at 12. But that argument *violates* AAA's rules, which state that their own "existence" is not "a factor * * * in favor of * * * permitting the arbitration to proceed on a class basis." *Reed Elsevier, Inc.* v. *Crockett*, 734 F.3d 594, 599–600 (6th Cir. 2013). In addition, AAA's Supplementary Rule 1(c) states that if a court "resolve[s] any matter that would otherwise be decided by an arbitrator," the arbitrator "shall follow the order of the court." Thus, Supplementary Rule 1(c) contemplates and accommodates a court ruling on the availability of class arbitration.

Thus, even if an arbitrator should have decided whether class arbitration is available here, the outcome is certain. If the arbitrator forbade class arbitration, that decision would be unassailable under *Stolt-Nielsen* and *Lamps Plus*. But if the arbitrator allowed class arbitration, that decision would have to be overturned. 9 U.S.C. § 10(a)(4); *Stolt-Nielsen*, 559 U.S. at 671–72.[2] Because "there can be only one possible outcome," there is "no need to direct a rehearing by * * * arbitrators." *Stolt-Nielsen*, 559 U.S. at 677.

Plaintiffs' questions are academic. No matter how they are answered, there can be no class arbitration here, so this Court should deny Plaintiffs' petition.

II. *All* lower federal courts on record correctly treat the availability of class arbitration as a gateway issue for a court to decide.

Although this Court has not decided whether the availability of class arbitration is a gateway issue that is presumptively for a court to decide, *Lamps Plus*, 139 S. Ct. at 1417 n.4, this Court has "given every indication, short of an outright holding," that it is, *Reed Elsevier,* 734 F.3d at 598. That is because "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 559 U.S. at 685. Thus, as the Ninth Circuit explained

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[2] AAA's rules state that after an arbitrator decides whether to allow class arbitration, the arbitration must be stayed "to permit any party to move a court * * * to confirm or vacate" that decision. AAA Supplementary Rule 3.

here, this Court has put "a weighty thumb on the scale in favor of treating class arbitration as a gateway issue." App. 30–31.

Every circuit court to encounter the issue treats it the same way. Eight hold it is a gateway issue—the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh.[3] Two assume it is—the Second and Tenth.[4] And district courts in the First and DC Circuits have followed suit in holding it is.[5]

Plaintiffs do not cite *any* decision that sides with their view. Their petition cites just a single concurring opinion. Pet. at 17–18. Given the uniformity of decisions by the lower courts, it should be no surprise that this Court has previously denied petitions presenting this issue.[6]

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[3] *20/20 Commc'ns, Inc.* v. *Crawford*, 930 F.3d 715, 718–19 (5th Cir. 2019); *Herrington* v. *Waterstone Mortg. Corp.*, 907 F.3d 502, 507 (7th Cir. 2018); *JPay, Inc.* v. *Kobel*, 904 F.3d 923, 935–36 (11th Cir. 2018); *Catamaran Corp.* v. *Towncrest Pharmacy*, 864 F.3d 966, 972 (8th Cir. 2017); *Del Webb Communities, Inc.* v. *Carlson*, 817 F.3d 867, 869 (4th Cir. 2016); *Opalinski,* v. *Robert Half Int'l Inc.*, 761 F.3d 326, 335 (3d Cir. 2014); *Reed Elsevier*, 734 F.3d at 599.

[4] *Wells Fargo Advisors, LLC* v. *Sappington*, 884 F.3d 392, 395 (2d Cir. 2018); *Dish Network LLC* v. *Ray*, 900 F.3d 1240, 1245 (10th Cir. 2018).

[5] *Am. Inst. for Foreign Study, Inc.* v. *Fernandez-Jimenez*, 468 F. Supp. 3d 414, 421 (D. Mass. 2020); *Sakyi* v. *Estee Lauder Companies, Inc.*, 308 F. Supp. 3d 366, 380–81 (D.D.C. 2018); *Hill* v. *Wackenhut Servs. Int'l*, 865 F. Supp. 2d 84, 93 (D.D.C. 2012).

[6] *E. & J. Gallo Winery* v. *Arreguin*, 139 S. Ct. 1617 (2019) (denying Pet. for Cert., No. 18-319, at i); *Opalinski* v. *Robert Half Int'l, Inc.*, 138 S. Ct. 378 (2017) (denying Pet. for Cert., No. 16-

Not only would a contrary decision from this Court overturn the settled treatment of this issue across the entire country, it would also tear down the foundations of several of this Court's decisions, including *Lamps Plus*, 139 S. Ct. at 1412 (no class arbitration when the agreement is silent or ambiguous about its availability); *Stolt-Nielsen*, 559 U.S. at 684 (class arbitration requires an affirmative contractual basis); and *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995) (courts presumptively decide gateway questions). Plaintiffs offer no good reason for this Court to lead the quixotic revolution that they propose. This Court should deny review of Plaintiffs' Question 2.

III. This Court should not review the Ninth Circuit's decision that the Agreements did not empower an arbitrator to decide if class arbitration is available.

A. There is no circuit split.

Plaintiffs' strategy for persuading this Court to grant review is to invent a circuit split between the Ninth Circuit in this case and the Second and Tenth Circuits. Plaintiffs argue that those two courts, unlike the Ninth Circuit, hold that consenting to AAA arbitration amounts to incorporating AAA rules into the agreement. AAA has a rule that allows an arbitrator to decide if class arbitration is available,[7] so

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1456, at i); *Crockett* v. *Reed Elsevier, Inc.*, 572 U.S. 1114 (2014) (denying Pet. for Cert., No. 13-928, at i).

[7] AAA adopted that rule in "response to the ruling of the United States Supreme Court in *Green Tree Financial Corp.* v. *Bazzle*," 539 U.S. 444 (2003), which "held that, where an arbitration

Plaintiffs argue that agreeing to AAA arbitration is "clear and unmistakable evidence" the parties agreed to have an arbitrator make the decision. Pet. at 10.

There is no circuit split. For two significant reasons, the Second and Tenth Circuit decisions are very different than the present case.

1. In the other cases, the parties agreed AAA would arbitrate all disputes.

The Second and Tenth Circuit decisions both addressed unambiguous arbitration provisions in which the parties explicitly agreed to have AAA arbitrate *all* of their disputes. *Idea Nuova, Inc.* v. *GM Licensing Grp.*, 617 F.3d 177, 179 (2d Cir. 2010) ("the dispute shall be submitted to AAA arbitration for resolution"); *P&P Indus., Inc.* v. *Sutter Corp.*, 179 F.3d 861, 864 (10th Cir. 1999) ("shall be resolved by arbitration before the American Arbitration Association").

In the present case, by contrast, there was no unambiguous agreement to AAA arbitration of all disputes. Instead, the parties were to mediate any

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agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted." AAA Policy on Class Arbitrations (2005), *available at* adr.org (last visited May 18, 2021); *see also Stolt-Nielsen*, 559 U.S. at 668. But *Bazzle* was a plurality opinion that this Court later held did *not* resolve that issue. *Oxford Health Plans LLC* v. *Sutter*, 569 U.S. 564, 569 n.2 (2013). In addition, *Stolt-Nielsen* and *Lamps Plus* later held that silence about class arbitration means there can be no class arbitration. *Stolt-Nielsen*, 559 U.S. at 684; *Lamps Plus*, 139 S. Ct. at 1412. Despite those developments, the misbegotten rule remains on AAA's books.

dispute; if that failed, the parties were to arbitrate with an agreed arbitrator. Only if they were unable to agree on an arbitrator could AAA get involved.

Thus, AAA is a contingent backup in a potential second round of dispute resolution. When the parties signed the Agreements, they had no reason to believe that AAA would be involved in resolving any particular dispute. At most, it was only possible that AAA might become involved, so the Agreements cannot be read as containing "clear and unmistakable evidence" that the parties empowered an arbitrator to decide a gateway issue. *Tishman Constr. Corp. of N.Y.* v. *Muccioli*, No. 07 Civ. 888 (JGK), 2008 WL 426229, at *1, 5 (S.D.N.Y. Feb. 15, 2008) (provision stating that AAA would arbitrate if parties did not agree on an arbitrator is not "explicit language assigning the issue of arbitrability to an arbitrator").

Plaintiffs try to use a different Tenth Circuit decision, *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272 (10th Cir. 2017), to convince this Court to overlook the fact that in the present case AAA is only a contingent backup. In *Belnap*, the parties agreed, "[t]he arbitration shall be administered by JAMS and conducted in accordance with its Streamlined Arbitration Rules and Procedures" unless the parties selected "another dispute resolution service agreeable to their respective attorneys." *Id*. at 1275–76.

Plaintiffs emphasize that in *Belnap* another arbitration service could be selected. That is always true, because parties can always amend their own agreement. But, as *Belnap* emphasized, the "plain language of the Agreement establishes the JAMS rules as the default controlling rubric—a fact that

would have been quite evident to the parties entering the Agreement." *Id*. at 1282.

Belnap thus rejected the idea that "the parties did not know at the time what rules they were agreeing to govern any future arbitration." *Id*. In the present case, by contrast, the parties did not know what rules would end up governing. (In fact, as explained below, they still do not know today.) In *Belnap*, JAMS was a real default; here, AAA was a potential last resort. Thus, in *Belnap*, the parties had "clearly and unmistakably agreed to arbitrate arbitrability when they incorporated JAMS Rules into the Agreement." *Id*. at 1281. Here, the parties did nothing of the sort.

2. The other cases do not address class arbitration.

The disputes in *Idea Nuova* and *P&P* were about whether the winner of an arbitration could go to court to confirm the arbitration award. *Idea Nuova*, 617 F.3d at 180; *P&P*, 179 F.3d at 863. Both courts held that conducting an arbitration with AAA amounted to consenting to its rule allowing confirmation in court. *Idea Nuova*, 617 F.3d at 181; *P&P*, 179 F.3d at 867.

Neither *Idea Nuova* nor *P&P* had anything to do with class arbitration. Nor did *Belnap*. That is a critical difference.

In *P&P*, the Tenth Circuit explained that requiring disputes to be arbitrated by AAA "indicates an agreement that the parties be bound by the procedural rules of the AAA." *P&P*, 179 F.3d at 867. The decision says repeatedly that AAA's "procedural rules" are binding. *Id* at 867 (three times), 868.

More recently, however, this Court held that the fundamental differences between class arbitration and individual arbitration cannot be described as a mere matter of procedure. *Stolt-Nielsen*, 559 U.S. at 687. The "'crucial differences' between individual and class arbitration" prevent courts from "infer[ring] consent to participate in class arbitration," *Lamps Plus*, 139 S. Ct. at 1416 (quoting *Stolt-Nielsen*, 559 U.S. at 684–86), which is precisely the inference Plaintiffs want to draw here.

Plaintiffs cite *no* case holding that a dispute resolution provision under which the parties might or might not arbitrate with AAA is clear and unmistakable evidence that the parties agreed to empower an AAA arbitrator to decide if class arbitration is available. There is obviously no circuit split on that issue. As this Court has done with many similar questions presented in past petitions,[8] it should decline to review Plaintiffs' Question 1.

B. This case is a poor vehicle for resolving whether agreeing to AAA arbitration empowers an arbitrator to decide if class arbitration is available.

Several features of this case make it unsuitable for resolving whether agreeing to AAA arbitration is clear and unmistakable evidence that the parties

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[8] E.g., *Spirit Airlines, Inc.* v. *Maizes*, 139 S. Ct. 1322 (2019) (denying Pet. for Cert., No. 18-617, at i); *Carlson* v. *Del Webb Communities, Inc.*, 137 S. Ct. 567 (2016) (denying Pet. for Cert., No. 16-137, at i); *Scout Petroleum, LLC* v. *Chesapeake Appalachia, LLC*, 137 S. Ct. 40 (2016) (denying Pet. for Cert., No. 15-1242, at i).

intended for an arbitrator to decide whether to allow class arbitration.

First, as explained above, it makes no difference to this case whether a court or arbitrator decides. Under this Court's decisions in *Lamps Plus* and *Stolt-Nielsen*, it is simply impossible to read the Agreements as allowing class arbitration in any event. By definition, an arbitration provision that forbids class arbitration cannot authorize an arbitrator to decide whether it is available.

Second, the arbitration provision here is unusual. Unlike the arbitration provisions in all of the cases Plaintiffs cited, the provision here did not explicitly incorporate AAA's (or JAMS's) rules into the Agreement or even require the parties to arbitrate all of their disputes with AAA (or JAMS). Instead, arbitration with AAA is only a backup possibility.

Defendants' research revealed only one recent decision involving a similar provision: *Rollag* v. *Cowen*, No. 20-CV-5138 (RA), 2021 WL 807210, at *4 (S.D.N.Y. Mar. 3, 2021).[9] Given that this type of provision is uncommon, a decision from this Court about it will do little to clarify the law.

In fact, when district courts do address far more common provisions—those that incorporate AAA

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[9] The provision in *Rollag* stated that if the plaintiff was not registered with FINRA, "the AAA's employment arbitration rules * * * shall apply as an alternative." *Id.* at *4. The plaintiff was registered, so the court held that the provision's incorporation of AAA's rules as an alternative did not delegate to an arbitrator the power to decide the gateway question of arbitrability. *Id.* at *5.

rules or require AAA arbitration of all disputes—they look past the Ninth Circuit's decision in the present case. In *Quantum Fluids LLC* v. *Kleen Concepts LLC*, No. CV-20-02287-PHX-DWL, 2021 WL 242104, at *5 n.2 (D. Ariz. Jan. 25, 2021) (quoting *Shivkov*), the court held that "*Shivkov* is easily distinguishable because the clause in that case 'did not incorporate the AAA Rules.'" And in *McKenzie* v. *Brannan*, 496 F. Supp. 3d 518, 538 (D. Me. 2020), the court held, "Unlike *Shivkov*, the arbitration clause here is very clear that '[a]ny disputes will be settled by arbitration through the American Arbitration Association,' and AAA arbitration was not the last resort."

These courts recognize that the arbitration provision in the present case is unusual, so they did not follow the Ninth Circuit's decision. This confirms that a decision by this Court in the present case would have little effect on the law for most other cases.

Third, the factual setting of this case—in particular, Plaintiffs' allegations and conduct—will prevent this Court from cleanly addressing the points of law.

Plaintiffs' petition asserts that the Agreements contain clear and unmistakable evidence that the parties intended to empower an arbitrator to decide whether to allow class arbitration. But in their amended complaint, Plaintiffs alleged that the Agreements did not allow arbitration at all. Their petition urges this Court to hold that the provision here was the functional equivalent of explicitly incorporating particular AAA rules, but their amended complaint alleged that the provision was unconscionable and unenforceable specifically because it did not explicitly state what AAA rules would apply. Plaintiffs also

alleged that AAA's potential involvement made the arbitration provision unenforceable. And they alleged that "There was no meeting of the minds regarding the arbitration provisions" at all, because Plaintiffs claim never to have seen them.

Plaintiffs' own allegations against arbitration, AAA's involvement, and applying AAA rules are at least a serious impediment—and perhaps an impassable obstacle—to finding that the parties clearly and unmistakably intended and agreed to delegate specific powers to a AAA arbitrator under specific AAA rules. A better candidate for review would not involve such allegations.

Plaintiffs' own conduct also makes this case an inferior candidate for review. The petition includes the misleading statement that "It is * * * undisputed that no other agreement [to a different arbitrator] was reached." Pet. at 8. There was no agreement because there was no discussion. The parties did not mediate, as the Agreements require. The parties did not pick an arbitrator, as the Agreements require. The reason: Plaintiffs' very first move was a lawsuit that alleged the dispute resolution provision was invalid, unenforceable, and unconscionable.

Today, the parties still do not know whether they could agree on an arbitrator, so they still do not know whether AAA will end up arbitrating any of their disputes. The continuing uncertainty about whether the parties will arbitrate with AAA is another reason the petition, which revolves around what could happen at a hypothetical AAA arbitration, should be denied. This Court should decline to review Plaintiffs' Question 1.

CONCLUSION

The Court should deny the petition for a writ of *certiorari*.

Respectfully submitted.

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