No. 21-____

IN THE

Supreme Court of the United States

POWER HOME SOLAR, LLC,

Petitioner,

v.

JAMES RICKENBAUGH AND MARY RICKENBAUGH, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari from the Supreme Court of North Carolina

PETITION FOR A WRIT OF CERTIORARI

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Dated: 11/08/2021

BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

QUESTIONS PRESENTED

1. Whether, pursuant to the Federal Arbitration Act, the incorporation of AAA rules into an arbitration agreement constitutes clear and unmistakable evidence that the parties agreed to have an arbitrator determine the availability of class arbitration, where the rules identified by the parties' agreement are silent as to the availability of class arbitration?

2. Whether the question of the availability of class arbitration is an issue that requires a clear and unmistakable statement of the parties' intent to delegate the question to an arbitrator beyond what is required to delegate questions of arbitrability in the bilateral context?

LIST OF PARTIES

James Rickenbaugh and Mary Rickenbaugh, Individually and on behalf of others similarly situated

Power Home Solar, LLC

(all parties are listed in the case caption)

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CORPORATE DISCLOSURE STATEMENT

Petitioner Power Home Solar, LLC has a parent corporation, Renewable Clean Energies, LLC, a Delaware LLC. No publicly held company owns more than 10 percent of petitioner's stock.

PROCEEDINGS BELOW

James Rickenbaugh and Mary Rickenbaugh, individually and on behalf of others similarly situated v. Power Home Solar, LLC, Supreme Court of North Carolina, Twenty-Sixth District, Case No. 128A20.

James Rickenbaugh and Mary Rickenbaugh, individually and on behalf of others similarly situated v. Power Home Solar, LLC, Superior Court of North Carolina Business Court, Mecklenburg County, Case No. 2019CVS244.

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ORDERS AND OPINIONS BELOW

A. The North Carolina Business Court Defers the Issue of the Availability of Class Arbitration to the Arbitrator.

On June 9, 2021, the Supreme Court of North Carolina issued an order denying Petitioner's petition for a writ of certiorari to review the December 20, 2019 Order of the North Carolina Business Court which deferred to the arbitrator the decision as to whether class arbitration is available in this dispute. (A. 50a).

On December 20, 2019, the North Carolina Business Court issued an order that (1) denied PHS's motion to dismiss Plaintiffs' Complaint; (2) deferred to the arbitrator the decision on whether class arbitration is available to Plaintiffs; (3) compelled Plaintiffs to arbitrate their claims; and (4) stayed all litigation of Plaintiffs' claims pending the outcome of arbitration ("December 20 Order"). (A. 52a).

The December 20 Order examined the language of the parties' arbitration clause to determine whether the parties had agreed to delegate questions of arbitrability, including the availability of class arbitration, to the arbitrator. While the December 20 Order recognized that the availability of class arbitration is an issue of substantive arbitrability that is presumptively to be decided by the courts, it determined that the parties agreed to delegate this question to the arbitrator based on the language in the arbitration clause. The North Carolina Business Court relied on the arbitration clause's incorporation of the AAA Construction Industry Rules as its basis for finding that the parties had agreed to delegate the question of the availability of class arbitration to the arbitrator, despite these

rules being silent on the issue of class arbitration. In finding "clear and unmistakable" evidence of the parties' intent to delegate the question of class arbitrability to an arbitrator, the North Carolina Business Court cited to the AAA Supplementary Rules for Class Arbitration and their incorporation by reference into the AAA Construction Rules. (A. 52a).

B. The North Carolina Business Court Denies PHS's Motion to Stay Pending Appeal.

On March 5, 2020, the North Carolina Business Court issued an Order denying PHS's motion to stay the December 20 Order and arbitration of this matter pending the outcome of PHS's petition for writ of certiorari to the North Carolina Supreme Court ("March 5 Order"). (A. 187a).

C. The Supreme Court of North Carolina Denies PHS's Petition for Writ of Certiorari.

On June 9, 2021, the Supreme Court of North Carolina issued an Order denying PHS's petition for a writ of certiorari without providing a detailed written decision ("June 9 Order"). PHS's petition for a writ of certiorari was denied through a summary order without a detailed written opinion. (A. 50a).

JURISDICTION

The Order of the Supreme Court of North Carolina denying PHS's petition for writ of certiorari was issued on June 9, 2021. PHS invokes this Court's jurisdiction under 28 U.S.C. §1257, having timely filed this petition for writ of certiorari within 150 days of the Supreme Court of North Carolina's Order. This Court has jurisdiction over the final judgment pursuant to 28 U.S.C. §1257 as the decision calls into question the interpretation and application of the Federal Arbitration Act.

Jurisdiction is further appropriate here as this matter involves the decision of a state court of last resort that involves an important federal question and is in direct conflict with the holdings of several United States Courts of Appeals. *See* Supreme Court Rule 10. Specifically, the North Carolina Business Court's Order found that, based on its interpretation pursuant to the Federal Arbitration Act, the plain language of the parties' agreement delegates the threshold question of substantive arbitrability to the arbitrator. This interpretation is at odds with the Federal Arbitration Act's purpose and objective to provide the parties with certainty that the court, and not an arbitrator, will decide questions of substantive arbitrability unless the parties expressly agree otherwise through clear and unmistakable language. As further explained in Sections VII and VIII, *supra*, the North Carolina court's decision illustrates an unresolved split among the Courts of Appeals regarding the analysis a court must undertake in determining whether parties to an arbitration agreement contracted for an arbitrator to decide whether such agreement provides for class arbitration. The uncertainty in the law surrounding this issue has resulted in divergent decisions emanating from both the federal Courts of Appeal and state courts of last resort and has led to decisions that conflict with both the Federal Arbitration Act and this Court's decisions addressing class arbitrability. The lack of guidance on this issue has frustrated one of the primary purposes of the Federal Arbitration Act, to facilitate efficient resolutions of disputes through arbitration with minimal judicial interference. The Court should exercise its jurisdiction here in granting the writ to resolve the Circuit split on this issue and provide additional guidance to state courts tasked with interpreting the Federal Arbitration Act.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

9 U.S.C. §2

> 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.

9 U.S.C. §4

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the

terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

STATEMENT OF THE CASE

This case involves two interrelated and unsettled questions that this Court has yet to squarely addressed in its jurisprudence. The questions presented by this writ are (1) whether the question of the availability of class arbitration is an issue that requires additional evidence of the parties'

intent to delegate the question to an arbitrator beyond what is required to delegate questions of arbitrability generally; and (2) whether incorporating the AAA rules into an arbitration provision demonstrates "clear and unmistakable" evidence that the parties agreed to delegate to an arbitrator the determination of whether class arbitration is available. These questions concern issues of arbitrability of disputes and the delegation of decision-making between the courts and arbitrators that is required under the Federal Arbitration Act.

While the Court's recent decision in *Lamps Plus v. Varela* clarified that an "affirmative contractual basis" is necessary for a court to conclude that the parties agreed to class arbitration – courts cannot infer such an agreement from arbitration provisions that are silent or ambiguous as to class arbitration. *Lamps Plus* clarified the Court's jurisprudence and provided guidance for how courts should rule on whether an arbitration provision allows for class arbitration. What *Lamps Plus* did not squarely address is the question of whether and under what circumstances the decision on whether an agreement allows for class arbitration should be delegated to an arbitrator.

The federal circuits have yet to reach a consensus as to the necessary evidence to determine that the parties agreed to delegate the question of whether class arbitration is available to the arbitrator. Further, the federal circuits also disagree over whether the same evidentiary standard that is applied to general questions of arbitrability should also apply to delegating the question of the availability of class arbitration. Relying on this Court's guidance in *Stolt-Nielsen* and *Lamps Plus*, certain federal circuits have determined that a higher

evidentiary showing is required to demonstrate that the parties agreed to delegate the question of class arbitration to the arbitrator. Other circuits, however, have applied the same evidentiary standard to all questions of arbitrability, including the availability of class arbitration. These decisions are inapposite with the stated purposes of the FAA and the Court's guidance in *Lamps Plus* concerning the material differences between bilateral and class arbitration, and corresponding need for parties to specifically consent to class arbitration.

The federal circuits have addressed and reached different outcomes on whether (1) incorporation of AAA rules is sufficient evidence to demonstrate that the parties agreed to delegate *general questions of arbitrability* to the arbitrator; and (2) whether the same incorporation of AAA rules is sufficient evidence that the parties agreed to delegate the *specific question of class arbitrability* to the arbitrator. This Court has yet to decide these issues, and despite the Court's guidance in *Stolt-Nielsen* and *Lamps Plus*, the circuit courts have not reached consistent conclusions as to whether incorporation of AAA rules alone is sufficient to demonstrate the parties' intent to delegate arbitrability questions. Granting PHS's petition for writ of certiorari will provide an opportunity for the Court to provide guidance to lower courts on these prevalent questions and to further develop its jurisprudence on the delegation of authority between courts and arbitrators on fundamental questions of arbitrability and the availability of class arbitration under arbitration provisions that do not directly address class arbitration.

This case involves claims by two individual plaintiffs, James and Mary Rickenbaugh (the

"Rickenbaughs") who have brought claims against PHS alleging that they purchased a solar power system from PHS but have not realized the energy savings they claim they were promised. (A. 9a – 16a).[1] The Rickenbaughs seek to represent a proposed class of "more than approximately 10,000 persons" across the United States who were allegedly similarly defrauded by PHS and induced to purchase solar power systems that did not deliver PHS's promised energy savings. (A. 16a – 20a).

On January 7, 2019, the Rickenbaughs filed a class action complaint against PHS (the "Complaint") in the Superior Court for the State of North Carolina. (A. 8a – 26a). The Complaint was subsequently removed to the North Carolina Business Court. (A. 153a – 154a). The Rickenbaughs allege that in approximately February 2017, they purchased a residential solar energy system from PHS in reliance on representations made by PHS concerning the expected energy savings from PHS's products. (A. 13a – 14a). The Rickenbaughs further allege that after installing a PHS solar energy system at their residence, their actual energy savings were just a fraction of what they had been promised by PHS's sales representatives. (A. 15a – 16a). The Rickenbaughs claim they were victims of a "sophisticated and fraudulent scheme" involving false and misleading promises of guaranteed energy savings and predatory lending practices for consumer financing of PHS's solar energy systems. (A. 9a).

The Rickenbaughs brought claims against PHS, individually and on behalf of a class of other similarly situated consumers, for common law fraud,

[1] All citations to ("A. __") refer to the accompanying Appendix.

unfair and deceptive trade practices, breach of contract, punitive damages, and unjust enrichment. (A. 20a – 26a).

The Rickenbaughs' claims arise from their February 15, 2017 Agreement with PHS. (A. 27a – 47a) ("[a] contract existed between Power Home and the Rickenbaughs; specifically the Agreement"). The Agreement contains an arbitration provision, which provides in relevant part as follows:

> **13. Arbitration of Disputes.** In the event of any dispute, the parties will work together in good faith to resolve any issues. If such issues cannot be resolved, the parties agree that any dispute arising out of or relating to the negotiation, award, construction, performance or non-performance, of any aspect of this agreement, shall be settled by binding arbitration in accordance with the Construction Industry Rules of the American Arbitration Association and judgment upon the award rendered by any such arbitrator may be entered in any court having jurisdiction thereof.
>
> **NOTICE: BY INITIALING IN THE SPACE BELOW, YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY NORTH CAROLINA & SOUTH CAROLINA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE**

> **DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE BUSINESS AND PROFESSIONS CODE OR OTHER APPLICABLE LAWS. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY. WE HAVE READ AND UNDERSTOOD THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THIS MATTER INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION OF NEUTRAL ABRITRATION.**

(A. 36a (emphasis in original)).

Despite the Rickenbaughs' contractual obligation to work in good faith to resolve any issues, the first time PHS was notified of any "issues" with the Rickenbaughs' solar energy system was when they filed the Complaint on January 7, 2019. (A. 7a – 8a).

On March 26, 2019, PHS moved to compel bilateral arbitration pursuant to the arbitration provision in the agreement between PHS and the

Rickenbaughs. (A. 6a). On May 6, 2019, the North Carolina Business Court held a hearing on PHS's motion, and later received supplemental briefing following this Court's issuance of the *Lamps Plus* decision. (A. 4a). The Business Court then entered a stay of the proceedings pending a ruling on PHS's motion to compel bilateral arbitration. (A. 4a).

On December 20, 2019, the North Carolina Business Court denied PHS's motion to compel bilateral arbitration, and instead ordered arbitration of both the Complaint and the question of whether the arbitration provision permitted class arbitration. (A. 52a – 74a). The December 20 Order, while acknowledging that the availability is a fundamental issue of arbitrability to presumptively be decided by the court, also found that PHS and the Rickenbaughs "clearly and unmistakably" agreed to delegate this decision to the arbitrator through the language in the Agreement's arbitration provision. (A. 72a). In determining there was sufficient evidence to demonstrate the parties' intention to delegate this question to the arbitrator, the North Carolina Business Court relied on precedent from the North Carolina Court of Appeals holding that incorporation of AAA rules into an arbitration agreement demonstrated that the parties agreed to have an arbitrator determine whether the subject matter of their claims were governed by the applicable arbitration provision. (A. 71a – 72a).[2]

On January 17, 2020, PHS filed a Notice of Appeal from the December 20 Order. (A. 3a; 187a – 192a). On April 3, 2020, the North Carolina Supreme

[2] As explained in further detail below, the state court precedent in *Epic Games* relied on by the North Carolina Business Court did not involve class arbitration claims.

Court issued a writ of supersedeas staying the December 20 Order and the submission of the claims to arbitration pending a decision on PHS's appeal. (A. 1a – 2a; 82a – 104a). PHS's appeal before the North Carolina Supreme Court was docketed on April 1, 2020 and PHS submitted its Appellant's Brief on June 30, 2020. (A. 50a – 51a).

On June 9, 2021, the Supreme Court of North Carolina denied PHS's petition for a writ of certiorari through a summary order. (A. 50a – 51a). PHS now requests that this Court review the final judgment of the North Carolina state court through this Petition.

The North Carolina Business Court's December 20 Order erred in denying PHS's motion to compel bilateral arbitration. The December 20 Order considered the following questions in determining whether the arbitration provision between PHS and the Rickenbaugh's provides for class arbitration: (1) whether the availability of class arbitration is an issue of "substantive arbitrability" that should presumptively be decided by a court; and (2) whether incorporation of AAA Rules into an arbitration provision demonstrates "clear and unmistakable" evidence that the parties agreed for an arbitrator to decide the availability of class arbitration. (A. 72a – 73a). As further explained below, the North Carolina Business Court reached the incorrect result as to the second question.

The North Carolina Business Court recognized that this Court has left open the question of whether the availability of class arbitration is an issue of substantive arbitrability - - but also noted that several circuit courts have held that the question of class arbitration is a gateway issue to be presumptively decided by the courts. (A. 64a – 65a).

(internal citations omitted). It also referenced the significant distinctions between bilateral and class arbitration that this Court has illustrated in its holdings. (A. 65a – 66a) (citing *Lamps Plus*, 139 S. Ct. at 1416; *Stolt-Nielsen,* 559 U.S. at 685).

Prior to the December 20 Order, North Carolina courts had not addressed the question of whether a court or arbitrator should decide whether class arbitration is available under an arbitration provision. (A. 67a). The North Carolina Business Court also lacked guidance on this issue from the federal courts, noting a circuit split on this question. (A. 67a – 69a) (discussing circuit split over question of whether incorporation of AAA rules is sufficient evidence that parties agreed to have arbitrator decide whether class arbitration is available).

In holding that the parties agreed to delegate this decision to an arbitrator, the North Carolina Business Court relied primarily on the fact that the arbitration provision incorporated the AAA Construction Rules into the arbitration provision. (A. 70a – 72a) ("[t]his provision and the AAA Rule it incorporates are nearly identical to the arbitration provision and incorporated AAA Rule the Court of Appeals considered in *Epic Games*"); (A. 70a) ("[a]lthough the AAA rules do not contain class arbitration procedures, such procedures are provided for in the Supplementary Rules for Class Arbitration").[3] However, as the North Carolina

[3] Despite the North Carolina Business Court's reliance on the Supplementary Rules in its decision, these rules in fact state "In considering the applicable arbitration clause the arbitrator ***shall not consider*** the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor or against permitting the arbitration to proceed on a class basis.

Business Court acknowledges, the AAA Construction Rules themselves do not provide any reference to class arbitration. (A. 63a; 70a – 71a).[4] The North Carolina Business Court erred in holding that incorporation of the AAA Construction Rules alone, without any specific reference to class arbitration, constitutes sufficient evidence to determine that the parties agreed to delegate the question of class arbitrability to an arbitrator.

The North Carolina Business Court instead relied for guidance on state case law addressing whether incorporation of AAA Rules into an arbitration provision demonstrated an intent to delegate issues of substantive arbitrability *generally* to the arbitrator. (A. 71a – 72a) (citing *Epic Games, Inc. v. Murphy-Johnson*, 247 N.C. App. 54, 63 (2016)).[5] The December 20 Order held that *Epic Games* and its progeny "make clear that incorporation of AAA Rules into the Agreement constitutes clear and unmistakable evidence that the parties agreed to delegate issues of "substantive arbitrability," including issues of existence, scope, or validity of the Agreement, to the arbitrator. (A. 71a) (internal citations omitted). However, the court in *Epic Games* did not rely on the incorporation of AAA Rules alone as its basis for deciding that the parties had agreed to delegate questions of substantive arbitrability, as it found that the plain language of the arbitration

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[4] The Business Court relied on case law holding that agreement to AAA's Commercial Rules also constitutes an agreement to the Supplementary Rules. (A. 71a – 72a) (citing *Reed v. Fla. Metro. Univ., Inc.,* 681 F.3d 630, 635 (5th Cir. 2012)).

[5] *Epic Games* did not involve a dispute over the availability of class arbitration, rather, the parties disagreed as to whether certain of plaintiff's claims could be brought in arbitration. *See Epic Games*, 247 N.C. at 62.

provision was clear and unambiguous. *See Epic Games*, 247 N.C. at 63 ("[t]hese broad phrases indicate the drafter, *Epic Games*, intended for an extensive range of issues relating to Johnson's employment or the Employment Agreement to fall within the arbitration clause's scope"). The incorporation of AAA Rules was merely a secondary basis for *Epic Games'* outcome. *Id.* at 63-64.[6] The North Carolina Business Court erred in applying the *Epic Games* decision, and its general standard for issues of substantive arbitrability, to the issue of the availability of class arbitration in this case.

The December 20 Order contains two critical errors of law that this Court should address through this writ: (1) it incorrectly held that incorporation of AAA Rules, without any specific reference to class arbitration, constitutes "clear and unmistakable" evidence that the parties agreed to delegate ruling on whether class arbitration is available to an arbitrator; and (2) incorrectly held that the same standard for delegating general questions of arbitrability to an arbitrator should also apply to the question of class arbitrability.

[6] The arbitration provision in *Epic Games* incorporated the AAA Employment Rules rather than the Construction Rules. *See* 247 N.C. App. at 63.

REASONS FOR GRANTING THE WRIT

A. The Court Should Grant the Writ in Order to Clarify that a Clear Agreement Between the Parties is Required for the Court to Delegate Fundamental Questions of Arbitration to an Arbitrator.

1. It is Well-Established that Courts are to Decide Fundamental Questions of Arbitrability.

The Federal Arbitration Act ("FAA") requires Courts to "enforce arbitration agreements according to their terms. *See Lamps Plus*, *Inc., et. al. v. Varela* 139 S. Ct. 1407, 1415 (2019) (quoting *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (some internal citations omitted). Where interpretation of an arbitration agreement under state law "stands as an obstacle to the accomplishment of the full purposes and objectives" of the FAA, the relevant state law is preempted to accomplish the FAA's objectives. *Id.* at 1415 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011). State contract law cannot be used as a basis to circumvent the FAA's fundamental principle that arbitration is "a matter of consent, not coercion." *Id.* (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010).

2. Class Arbitration Requires the Consent of All Parties and Cannot Be Inferred Through the Existence of an Arbitration Agreement.

A party may not be compelled under the FAA to submit to class arbitration unless there is "a contractual basis for concluding that the party *agreed* to do so." *See Stolt-Nielsen*, 559 U.S. at 664

(emphasis in original).[7] In reversing an arbitration panel's decision that the arbitration clause permitted class arbitration, this Court in *Stolt-Nielsen* reasoned:

> Here, the arbitration panel imposed class arbitration despite the parties' stipulation that they had reached "no agreement" on that issue. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent. It may be appropriate to presume that parties to an arbitration agreement implicitly authorize the arbitrator to adopt those procedures necessary to give effect to the parties' agreement. But an implicit agreement to authorize class action arbitration is not a term that the arbitrator may infer solely from the fact of an agreement to arbitrate. The differences between simple bilateral and complex class arbitration are too great for such a presumption.

See 559 U.S. at 664-65 (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

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[7] In *Stolt-Nielsen*, the parties agreed to submit the question of whether their arbitration agreement allowed for class arbitration to a panel of arbitrators. *See* 559 U.S. at 662-64 ([t]he parties appear to have believed that *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration, a question addressed only by the plurality. That question need not be revisited here because the parties expressly assigned that issue to the arbitration panel, and no party argues that this assignment was impermissible.") (citing *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003)).

Decisions following *Stolt-Nielsen* continued to articulate that compelling parties to arbitrate on a class-wide basis requires some evidence to support the conclusion that the parties agreed to class arbitration. However, case law addressing the question of what constitutes sufficient evidence to conclude that the parties agreed to class arbitration remains unsettled and has resulted in a circuit split on this issue.

3. *Lamps Plus* Requires a "Clear and Unambiguous" Agreement to Compel Parties to Class Arbitration.

This Court has determined that the FAA requires a clear and unambiguous agreement between the parties for a court to compel class arbitration. *See Lamps Plus*, 139 S. Ct. at 1419 ("Courts *may not* infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis.") (emphasis added). *Lamps Plus* involved a putative class action brought by Varela on behalf of a group of employees whose tax information had been compromised resulting from a data breach with their employer. *See* 139 S. Ct. at 1413. Lamps Plus moved to compel a bilateral arbitration based on the arbitration agreement that Varela had signed in connection with his employment. *Id.* The District Court rejected Lamps Plus's request for bilateral arbitration and instead authorized class-wide arbitration:

> ("[b]ut Lamps Plus did not secure the relief it requested. It sought an Order compelling *individual* arbitration. What it got was an order rejecting that relief and instead compelling arbitration on a classwide basis. We have explained –

> and will elaborate further below – that shifting from individual from class arbitration is a "fundamental" change, that "sacrifices the principal advantage of arbitration" and "greatly increases the risks to defendants."

Id. at 1414 (quoting *Stolt-Nielsen*, 559 U.S. at 686; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) (emphasis in original).

In holding that the FAA requires more than ambiguity to ensure that the parties agreed to arbitrate on a class basis, the Court in *Lamps Plus* reasoned class arbitration lacks many of the principal benefits and advantages of bilateral arbitration, including the speed, simplicity, and inexpensiveness of utilizing bilateral arbitration to resolve a dispute. *Id.* at 1416 (citing *Epic Systems*, 138 S. Ct. at 1623). In addition to introducing additional risks and costs for both sides, class arbitration also raises due process concerns for absent class members, which are subject to limited judicial review. *Id.* (*citing Concepcion*, 563 U.S. at 349). These concerns require that courts may not infer consent to participate in class arbitration without "an affirmative contractual basis" for concluding the parties agreed to class arbitration. *Id.* at 1416 (citing *Stolt-Nielsen*, 559 U.S. at 684). Silence or ambiguity is insufficient to conclude that the parties agreed to submit to class arbitration. *Id.*

4. *Lamps Plus's* "Clear and Unambiguous" Requirement Should Also be Applied to the Question of Delegating Class Arbitrability.

Despite the Court's guidance in *Stolt-Nielsen* and *Lamps Plus*, lower courts have held that parties have consented to having an arbitrator decide

questions of class arbitrability where explicit language addressing class arbitration is absent, including the North Carolina state court that issued the decision that PHS now request this Court to review.

As further explained below, the Federal Circuits are split on this issue, with certain Circuits holding that mere incorporation of AAA rules into an arbitration agreement amounts to clear and unmistakable evidence of the parties' intent to delegate questions of class arbitrability to an arbitrator. These holdings conflict with the purposes of the Federal Arbitration Act and this Court's holdings in *Stolt-Nielsen* and *Lamps Plus*. The Court should grant the writ to directly address such Federal Circuit and state court holdings that fail to adhere to the Federal Arbitration Act and the holdings of *Stolt Nielsen* and *Lamps Plus*. In doing so, the Court should explicitly hold that incorporation of AAA rules into an agreement is insufficient to demonstrate an intent by the parties to allow an arbitrator to decide whether class arbitration is available.

B. This Court Should Adopt the Rule Promulgated by the Third, Sixth, and Eighth Circuits that Incorporation of AAA Rules Alone is Insufficient to Demonstrate the Parties' Intent to Delegate the Question of Class Arbitrability to an Arbitrator.

While *Lamps Plus* held that courts cannot infer that the parties agreed to class arbitration without supporting language in the arbitration agreement, it was silent as to under which circumstances a court may defer the decision of whether the parties agreed to class arbitration to an arbitrator. *See Lamps Plus*,

138 S. Ct. at 1416-19.[8] Where the parties stipulate to an arbitrator determining whether an agreement provides for class arbitration, courts will not revisit the arbitrator's interpretation of the agreement's language. *See Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 573 (2013) ("Oxford agreed with Sutter that an arbitrator should determine what their contract meant, including whether its terms approved class arbitration"). Here, the Parties' arbitration provision does not specifically provide that (a) class arbitration is permitted under the agreement; or (b) the arbitrator is authorized to interpret the agreement to determine fundamental questions of arbitrability. The Courts decisions in *Lamps Plus* and *Stolt-Nielson*, emphasized the principle that arbitration is a matter of consent, which includes the need for the parties to consent to class arbitration through a clear agreement if the court is to compel participation. *See Stolt-Nielsen*, 559 U.S. at 664-65; *Lamps Plus*, 139 S. Ct. at 1416. The Court emphasized in those decisions the critical differences between bilateral and class arbitrations in finding that an agreement to participate in class arbitration cannot be inferred from an agreement to arbitrate generally or from ambiguous language as to class arbitration. *Id.* The Court has not however, directly addressed these requirements in the context of whether the parties have agreed to allow an arbitrator to determine whether their agreement permits class arbitration.

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[8] In *Lamps Plus*, the parties agreed that the court was the appropriate adjudicator of whether the agreement at issue permitted class arbitration. *See generally* 139 S. Ct. 1407 (lacking any argument that arbitrator should have decided whether class arbitration was permitted).

The North Carolina Business Court recognized the Federal Circuit split on this question, and decided against adopting the holdings of the Third, Sixth, and Eighth Circuits that express contractual language, beyond broad AAA Rule incorporation, is necessary for delegation of the determination of the availability of class arbitration to an arbitrator. (A. 67a – 73a). As further explained below, the North Carolina Business Court's decision on this issue was in error given the fundamental differences between bilateral and class arbitration. This Court should adopt the rule that specific contractual language referencing class arbitration is required for a court to delegate the question of class arbitrability to an arbitrator, and explicitly hold that incorporation of AAA Rules into an arbitration provision alone is insufficient to demonstrate the parties' intent to delegate this question. The well-reasoned opinions of the Third, Sixth, and Eighth Circuits provide guidance as to the evolution of this Court's guidance as to the fundamental differences between bilateral and class arbitrations which require specific contractual language addressing class arbitration before such a significant decision can be delegated to an arbitrator.[9]

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[9] While the Fourth Circuit's decision in *Del Webb Communities, Inc. v. Carlson* did not conduct an analysis as to whether incorporation of AAA Rules is "clear and unmistakable" evidence of the parties' intent to delegate questions of class arbitrability, the arbitration provision in *Del Webb* did state that AAA Rules for construction industry proceedings shall govern the arbitration. *See* 817 F.3d 867, 868 (2016). *Del Webb* determined that the arbitration provision was ***silent*** as to class arbitration (despite reference to AAA Rules) and held that a court was to determine whether the parties had agreed to class arbitration. *Id.* at 877. PHS contends that the Fourth Circuit in *Del Webb* also reached the correct result – in that silence should be treated similarly to incorporation of AAA Rules – both as

In *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, the Court of Appeals for the Third Circuit reached the conclusion that reference to the AAA rules in an arbitration clause does not clearly and unmistakably delegate the question of class arbitrability to the arbitrator. *See* 809 F.3d at 746 (3d Cir. 2016).[10] In deciding that reference to the AAA rules failed to satisfy the "onerous burden" necessary to undo the presumption that questions of class arbitrability should be resolved by the courts, the Third Circuit reasoned that the AAA website identifies more than fifty sets of rules, and the language at issue did not reference the specific "Supplementary Rules" governing class arbitrations. *Id.* at 761-62. The "daisy-chain of cross references" from various sets of AAA rules is insufficient to meet the requirement of "express contractual language unambiguously delegating the question of [class] arbitrability to the arbitrator[s]." *Id.* at 761-63 (quoting *Opalinski v. Robert Half International, Inc.*, 761 F.3d 326, 335 (3d Cir. 2014)). This holding by the Third Circuit is consistent with the both the Federal Arbitration Act and *Lamps Plus*, in that it rejects the idea that a "daisy-chain of cross-references" between sets of AAA rules amounts to "clear and unmistakable" evidence that the parties agreed to

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insufficient to demonstrate an intent to delegate class arbitrability questions to an arbitrator.

[10] In ruling that reference to AAA rules was insufficient to demonstrate that the parties had agreed to having the arbitrator determine class arbitrability, the court in *Chesapeake Appalachia* vacated the arbitration panel's decision that it would decide the issue of class arbitrability based on a "clear and unmistakable" authorization to do so in the arbitration agreement. *Id.* at 751.

have an arbitrator decide questions of class arbitrability.

Chesapeake Appalachia's reasoning also relied on Supreme Court precedent highlighting the fundamental differences between bilateral and class arbitration, reasoning that class arbitration is "poorly suited to the higher stakes of class litigation" and that nothing in the legislative history of the FAA contemplates the existence of class arbitration. *Id.* at 764 (quoting *Concepcion*, 131 S. Ct. at 1749 n.5). The *Chesapeake Appalachia* case is factually similar to the present case, as the AAA Construction Rules do not reference the Supplementary Rules.

In *Reed Elsevier*, the Sixth Circuit held that the question of whether an agreement permits class arbitration is a gateway matter, which is reserved for judicial determination "unless the parties clearly and unmistakably provide otherwise." *See Reed Elsevier, Inc. ex. rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) ("at best, the agreement is silent or ambiguous as to whether an arbitrator should decide the question of class arbitrability; and that is not enough to wrest that decision from the courts").[11]

[11] The Sixth Circuit has also recognized that the circuit courts have reached different outcomes as to whether class arbitration should be treated differently than other issues of arbitrability when determining whether such decision has been delegated to an arbitrator. *See Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 850-51 (6th Cir. 2020) ([t]he second line of cases addresses whether incorporation of the AAA Rules provides "clear and unmistakable" evidence that the parties agreed to arbitrate whether to allow classwide arbitration … [i]t's true that a few circuits have reasoned that all questions of "arbitrability" – whether related to bilateral or

After determining that the availability of class arbitration is a question for the court, the Sixth Circuit went on to analyze whether reference to AAA's Commercial Rules, which incorporate the AAA Supplemental Rules for Class Arbitration, demonstrated that the parties agreed to allow class arbitration. *Id.* at 600. In concluding that such reference is insufficient to establish an agreement to arbitrate on a class basis, the Sixth Circuit recognized that the AAA Supplemental Rules expressly state that one should *"not consider the existence of these Supplemental Rules, or any other AAA rules, to be a factor either in favor or against permitting arbitration to proceed on a class basis." Id.* (emphasis added).

Reed Elsevier correctly held that where an arbitration provision does not mention class arbitration at all, it cannot be found to have clearly and unmistakably assigned the question of whether the agreement permits class arbitration to an arbitrator. *Id.* at 599 ("given the total absence of any reference to classwide arbitration in this clause, the agreement here can just as easily be read to speak only to issues related to bilateral arbitration"). The present case requires a similar result to *Reed Elsevier*, as the arbitration provision here contains no reference to class arbitration, and incorporation of the AAA Construction Rules is the only basis for the Business Court's holding that the parties delegated the question of class arbitrability.

In *Catamaran Corporation v. Towncrest Pharmacy*, the Eighth Circuit first addressed the issue of whether a court or arbitrator should determine whether an agreement authorizes class

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classwide arbitration – should be treated the same way") (internal citations omitted).

arbitration. *See* 864 F.3d 966 (8th Cir. 2017). *Catamaran* cited to the Supreme Court's recent decisions that "strongly hinted" to the conclusion that class arbitration is substantive in nature and requires judicial determination. *Id.* at 971 (internal citations omitted). The Eighth Circuit relied on the significant differences between bilateral and class arbitration in concluding that questions of class arbitration belong with the courts as a substantive question of arbitrability. *Id.* at 972 (internal citations omitted).

Catamaran then looked to the parties' agreement to determine whether they had "clearly and unmistakably" delegated the question of class arbitration to an arbitrator. *Id.* (citing *Howsam*, 537 U.S. at 83. While the agreement stated that any disputes or controversies were to be resolved pursuant to AAA arbitration rules, the agreement was complete silence as to class arbitration. *Id.* at 973. The Eighth Circuit considered the argument that incorporation of AAA rules constituted a clear and unmistakable question that the parties intended for an arbitrator to determine class arbitrability, which relied on prior Eighth Circuit holdings that incorporation of AAA rules served to delegate questions of arbitrability. *Id.* *Catamaran* distinguished these prior rulings, in that each dealt with questions of arbitrability in the context of bilateral arbitration alone. *Id.* Due to the inherent differences and risks between bilateral and class arbitration, the Eighth Circuit held that class arbitration demands a more particular delegation of the issue than may be sufficient in bilateral disputes. *Id.*

This Court should follow the reasoning articulated by the Third, Sixth, and Eighth Circuits and resolve a growing circuit split on this question.

While several circuits have yet to take a position on this specific question, some of these circuits have considered whether incorporation of AAA Rules is sufficient to delegate general questions of arbitrability to an arbitrator.[12] Granting this Writ will allow the Court to provide additional guidance to the federal circuits as to the limited circumstances in which incorporation of AAA Rules should be considered in determining whether parties to an arbitration agreement have delegated questions of arbitrability to an arbitrator.

C. Circuits Holding that Incorporation of AAA Rules Alone is Sufficient Evidence of the Parties' Intent to Delegate the Question of Class Arbitrability Fail to Properly Consider the Fundamental Differences Between Bilateral and Class Arbitration.

The North Carolina Business Court erred in following the reasoning of the federal circuits holding that incorporation of AAA Rules into an arbitration provision alone constitutes "clear and unmistakable"

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[12] The First Circuit has not addressed this question in the context of class arbitration but has held that an express delegation clause combined with incorporation of AAA arbitration rules constitutes "clear and unmistakable" evidence of the parties' intent to delegate arbitrability issues to the arbitrator. *See Bossé v. New York Life Insurance Company*, 992 F.3d 20, 29 (1st Cir. 2021) (citing *Awyah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11-12 (1st Cir. 2009)).[12] In holding that the language of the parties' agreement evinced an intent to delegate arbitrability issues to the arbitrator, the First Circuit focused on the agreement's delegation clause and distinguished the facts from cases where the only evidence to support an intent to delegate was incorporation of AAA arbitration rules. *Id.* at 30 (citing *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274, 277-82 (5th Cir. 2019); *NASDAQ OMX Grp., Inc. v. UBS Sec., LLC*, 770 F.3d 1010, 1016, 1031-32 (2d Cir. 2014)).

evidence of the parties' intent to delegate the question of the availability of class arbitration to the arbitrator. (A. 67a – 68a) ("[t]he Second, Fifth, Tenth, and Eleventh Circuits have concluded that an agreement's incorporation of AAA rules of the type in the Agreement here constitutes "clear and unmistakable evidence" of the parties' intent to delegate the issue of the availability of class arbitration to the arbitrator") (internal citations omitted).

This line of holdings fails to properly consider several important principles of the FAA and *Lamps Plus*, including (1) the FAA requires courts to enforce arbitration agreements according to their terms; (2) arbitration is strictly a matter of consent; (3) there are fundamental differences between bilateral and class arbitration that require parties to consent to class arbitration; and (4) such consent to class arbitration must be made through an "affirmative contractual basis." *See Lamps Plus*, 139 S. Ct. at 1415-17. The decisions relied on by the North Carolina Business Court are incongruous with these principles as they compel parties to arbitrate issues despite the lack of a clear and unmistakable agreement to do so.

As further explained below, these decisions failed to properly consider the fundamental differences between bilateral and class arbitration that this Court has emphasized through its holdings in *Lamps Plus* and *Stolte-Nielsen*. The flawed reasoning of these decisions can be identified in their holdings that (1) the decisions' confirmation that class arbitration is a fundamental or "gateway" issue that should presumptively be decided by a court; (2) which requires "clear and unmistakable" evidence to be delegated to an arbitrator; and (3) nonetheless held that incorporating certain sets of AAA Rules that do

not themselves reference class arbitration constitutes the required "clear and unmistakable" evidence that the parties agreed to delegate this question to the arbitrator. None of these decisions have sufficiently explained how incorporation of a set of AAA Rules that does not reference class arbitration, which in turn reference another set of AAA Rules that does reference class arbitration, can be "clear and unmistakable" evidence that the parties intended to delegate the question to an arbitrator. Through granting this Petition, the Court should address the flawed reasoning of these decisions.

The North Carolina Business Court relied on the Second Circuit's decision in *Wells Fargo Advisors, LLC v. Sappington* to support the proposition that incorporation of AAA Rules "without more" demonstrates a "clear and unmistakable" intent for an arbitrator to decide arbitrability of class claims. (A. 67a – 68a) (citing 884 F.3d 392, 397 (2d Cir. 2018)). The Second Circuit in *Sappington* affirmed the denial of a petition to compel bilateral arbitration, over argument that the "string of inferences" among sets of AAA Rules was insufficient to demonstrate the parties' intent to delegate questions of class arbitrability to an arbitrator. *See Sappington*, 884 F.3d at 397-98 (declining to follow holdings of *Catamaran*, *Chesapeake*, and *Reed Elsevier*).[13]

The Fifth Circuit likewise agrees that class arbitration is a "gateway" issue that must be decided by the courts, and not arbitrators, absent clear and

[13] The Second Circuit in *Sappington* also appears to treat questions of both bilateral and class arbitration as a single category. *See* 884 F.3d at 398 ("we conclude that under Missouri law the Tucker clause clearly and unmistakably demonstrates an intent to delegate to an arbitrator any questions of arbitrability, including whether class arbitration is available").

unmistakable language in the arbitration clause to the contrary. *See 20/20 Comms., Inc. v. Crawford*, 930 F.3d 715, 719-20 (5th Cir. 2019) (reasoning that agreement's incorporation of AAA rules on its own would not necessarily provide the requisite "clear and unmistakable" language providing that an arbitrator shall decide questions of class arbitrability). The court in *20/20 Comms*. relied primarily on a class arbitration bar in the arbitration provision in determining that the parties did not agree to have an arbitrator determine whether the agreement permits class arbitration. *Id*. at 721.

On remand from this Court, the Fifth Circuit in *Archer and White Sales* considered whether incorporation of AAA rules into an arbitration provision constituted "clear and unmistakable evidence" that the parties agreed to delegate threshold arbitrability questions to the arbitrator.[14] *See Archer and White Sales, Incorporated v. Henry Schein, Incorporated*, 935 F.3d 274, 278 (2019).[15] The court determined that the parties had not agreed to delegate this question of arbitrability and relied on a carve-out provision in the arbitration provision excluding actions seeking injunctive relief. *Id*. at 281-82. In reaching this result, the Fifth Circuit considered this Court's warning that "courts should not assume that the parties have agreed to arbitrate

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[14] This Court in *Archer and White Sales* rejected the "wholly groundless" exception and held that parties may delegate arbitrability questions – but should not assume that parties agreed to do so unless such a conclusion is supported by "clear and unmistakable" evidence. *See* 139 S. Ct. 524, 531 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 939, 944 (1995).

[15] *Archer and White Sales* involved a dispute over whether the arbitration provision permitted arbitration of actions seeking injunctive relief. *See* 935 F.3d at 278.

arbitrability unless there is clear and unmistakable evidence that they did so." *Id.* at 282 (quoting *First Options*, 514 U.S. at 944) ("[t]he parties could have unambiguously delegated this question, but they did not, and we are not empowered to re-write their agreement").

The Tenth Circuit has also recognized that several federal circuits have determined the availability of class arbitration is a gateway dispute for the courts to decide. *See Dish Network, L.L.C. v. Ray*, 900 F.3d 1240 (10th Cir. 2018) ("we assume without deciding that one of these gateway matters is whether an arbitration clause authorizes class arbitration") (quoting *Wells Fargo Advisors, L.L.C. v. Sappington*, 884 F.3d 392, 395 (2d Cir. 2018). The Tenth Circuit in *Dish Network* determined that the parties had clearly and unmistakably delegated the question to arbitration in their agreement. *Id.* at 1245. The court relied on Dish Network's incorporation of AAA rules and procedures into the arbitration provision along with Tenth Circuit and Colorado state law precedent in determining that the parties agreed to delegate this decision to the arbitrator. *Id.* at 1245-48 ("[b]oth the precedents from our circuit and Colorado are straight forward: incorporation of the AAA Rules provides clear and unmistakable evidence that the parties agreed to delegate matters of arbitrability to the arbitrator"). Notably, the Tenth Circuit and Colorado precedent relied on by *Dish Network* dealt with arbitrability in general – and not the specific issue of class arbitrability. *Id.* at 1245-47 (internal citations omitted).

In determining that the parties had agreed to delegate this question to the arbitrator, the Tenth Circuit adopted the position taken by the Second

Circuit in *Sappington* and rejected the reasoning of the Third, Sixth, and Eighth Circuits' holdings that more specific language beyond incorporation of the AAA rules is required to determine that the parties agreed to delegate the question of class arbitrability to the arbitrator. *Id.* at 1246-47 (analyzing Circuit split on issue).[16] The circuit split illustrated in *Dish Network* over whether incorporation of AAA rules demonstrates a clear and unmistakable agreement to delegate questions of class arbitrability to the arbitrator remains unresolved.

Eleventh Circuit courts have also declined to follow its sister circuits that require a higher showing that the parties agreed to delegate class arbitrability in holding that incorporation of AAA rules, standing alone, amounts to "clear and unmistakable" evidence of the parties' intent to have an arbitrator decide whether class arbitration is permitted. *See Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230, 1233-34 (11th Cir. 2018) ("[however, we find no basis for that higher burden in Supreme Court precedent") (analyzing circuit split on the issue).

However, the Eleventh Circuit does agree that the availability of class arbitration is a "potentially dispositive gateway question" presumptively to be decided by the courts. *See JPay, Inc. v. Kobel*, 904 F.3d 923, 931 (11th Cir. 2018) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)). Considering the significant differences between class

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[16] The Tenth Circuit's refusal to consider the fundamental differences between bilateral and class arbitration in reaching this outcome would appear to be inapposite with this Court's reasoning in *Stolt-Nielsen*. *See Dish Network*, 900 F.3d at 1247 ("[t]he fundamental differences between bilateral and class arbitration are irrelevant to us at this second stage of the analysis.").

and bilateral arbitration, the Eleventh Circuit held in *JPay* courts should assume that parties contracting to arbitrate their disputes would want a court to decide whether class arbitration is available. *Id.* at 933.

Having determined that the availability of class arbitration is a question of arbitrability for the courts to presumptively decide, the court in *JPay* then examined the language of the parties' agreement to determine whether it contained clear and unmistakable evidence that there was an agreement to delegate the question to the arbitrator. *Id.* at 936 (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010) ("parties can agree to arbitrate 'gateway' questions of arbitrability" because "arbitration is a matter of contract"). The court then conducted an analysis of JPay's Terms of Service for evidence of an intent to delegate questions of arbitrability to the arbitrator. *Id.* In determining that the parties did agree to delegate questions of arbitrability – including the availability of class arbitration -- to the arbitrator, the court relied on the Terms of Service's reference to the AAA rules and the statement the parties agreed "to arbitrate <u>any and all</u> such disputes, claims and controversies." *Id.* (emphasis in original).[17] The

[17] JPay's Terms of Service referenced two sets of AAA rules: the Arbitration Rules for the Resolution of Consumer Related Disputes and the Commercial Arbitration Rules. The court held that by expressly incorporating two sets of AAA rules, the parties clearly and unmistakably delegated questions of arbitrability to the arbitrator. *Id.* at 937-38 (citing *Terminix International Co. v. Palmer Ranch Ltd. Partnership,* 432 F.3d 1327, 1332 (11th Cir. 2005)). The court in *JPay* cited to the Eleventh Circuit precedent in refusing to follow Third, Sixth and Eighth Circuit decisions holding that incorporation of AAA rules by reference served to delegate questions of arbitrability generally, but not the specific question of class action availability. *Id.* at 940.

Eleventh Circuit in *JPay* also declined to apply a rule that demands more specific indicia that the parties agreed to delegate class arbitration than other issues of arbitrability and found that questions of arbitrability should be treated as a "unitary category." *Id.* at 942-43.

In sum, the holdings of the circuits permitting delegation of the question of class arbitration based on incorporation of AAA Rules have not properly applied this Court's "clear and unmistakable" evidence standard for delegation of arbitrability questions, and further have failed to account for the fundamental differences between bilateral and class arbitration in relying on precedent involving general questions of arbitrability in reaching their results. The Court should grant this Writ and clarify the necessary evidentiary standard for determining that parties to an arbitration agreement agreed to delegate the question of class arbitrability to an arbitrator.

D. A More Exacting Standard Should be Required to Delegate Issues of Class Arbitrability than General Questions of Arbitrability.

As discussed above, a central factor in the divergent outcomes among the circuits on the issue of delegating the question of the availability of class arbitrability involves whether courts apply the same standards they have promulgated for general questions of arbitrability to the issue of class arbitrability. *See, e.g.*, *Catamaran*, 864 F.3d at 973 (distinguishing class arbitrability question from case law addressing arbitrability questions in context of bilateral arbitration alone); *JPay*, 904 F.3d at 943 (treating questions of class arbitrability and other

question of arbitrability in the bilateral context as a "unitary category").

Notably, the North Carolina Business Court relied on precedent addressing general questions of arbitrability, and not the specific question of whether class arbitration is permitted. (A. 63a – 64a) (citing *Epic Games* and its progeny).[18] The lack of guidance on the specific question of class arbitrability led the North Carolina Business Court to look to case law addressing bilateral arbitrability questions and issue a ruling inconsistent with the purposes of the FAA. Federal circuits that have yet to weigh in on the circuit split on whether incorporation of AAA Rules amounts to "clear and unmistakable" evidence that the parties intended to delegate class arbitrability questions to an arbitrator have also recognized that there is a lack of guidance as to the appropriate standard to apply to class arbitrability questions.

For example, the Ninth Circuit has held that where the AAA rules are incorporated into an arbitration agreement, it demonstrates "clear and unmistakable" evidence that the parties agreed to have an arbitrator decide whether a dispute is arbitrable. *See Brennan v. Opus Bank*, 796 F.3d 1125, 1131 (9th Cir. 2015) (affirming granting of motion to dismiss in favor of bilateral arbitration). However, the Ninth Circuit has declined to rule on the question of whether incorporation of AAA rules into an arbitration provision is sufficient evidence that the parties clearly and unmistakably delegated the issue of class arbitration to the arbitrator. *See Shivkov v.*

[18] The North Carolina Business Court stated that it lacked state court precedent on the specific issue of delegating the question of the availability of class arbitration, and that the federal circuits were split on the issue. (A. 67a).

Artex Risk Solutions, 974 F.3d 1051, 1068 (2020) ("[plaintiff's argument touches on a circuit split on whether incorporation of AAA Rules is sufficient evidence that parties clearly and unmistakably delegated the issue of class arbitration to the arbitrator … [w]e need not take sides in this circuit split here because Plaintiffs fail to clear a threshold hurdle") (discussing divergent circuit decisions on issue).[19]

The distinctions between the Ninth Circuit's decisions in *Brennan* and *Shivkov* illustrates the need for this Court's guidance on whether a separate standard is needed to properly analyze the language of arbitration clauses in order determine the parties' intent as to whether to delegate class arbitration issues to an arbitrator. The Court should grant this Petition to articulate the appropriate standards courts should apply when determining issues of class arbitrability.

[19] While declining to take a position on the circuit split, the Ninth Circuit made it clear that it has "never held that a mere reference to the AAA shows clear and unmistakable intent to delegate a gateway issue to the arbitrator." *See* 974 F.3d at 1068.

CONCLUSION

The Petitioner prays that this Court grant its Writ of Certiorari to review the questions presented in this case and the judgment of the Supreme Court of North Carolina.

Respectfully submitted,

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APPENDIX