No. 25-____

IN THE
Supreme Court of the United States

STEWART A. FELDMAN; THE FELDMAN LAW FIRM LLP; CAPSTONE ASSOCIATED SERVICES (WYOMING), LIMITED PARTNERSHIP; CAPSTONE ASSOCIATED SERVICES, LIMITED; CAPSTONE INSURANCE MANAGEMENT, LIMITED,

Petitioners,

v.

SCOTT SULLIVAN; FRANK DELLACROCE; ST. CHARLES SURGICAL HOSPITAL, L.L.C; ST. CHARLES HOLDINGS, L.L.C; CENTER FOR RESTORATIVE BREAST SURGERY, L.L.C; SIGMA DELTA BILLING, L.L.C; CERBERUS INSURANCE CORPORATION; JANUS INSURANCE CORPORATION; ORION INSURANCE CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Federal Arbitration Act, courts presume that the parties intended to have courts, not arbitrators, decide certain "gateway questions of arbitrability" absent "clear and unmistakable evidence" to the contrary. *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 586 U.S. 63, 67-68, 69 (2019) (alterations and quotation marks omitted). One gateway question of arbitrability subject to this standard is whether an arbitration agreement allows for class arbitration.

The question presented is:

Whether the parties' generic incorporation of an arbitration association's rules in their arbitration agreement is clear and unmistakable evidence that the parties intended to delegate the issue of class arbitrability to an arbitrator, as four circuits hold, or whether the generic incorporation of such rules is not clear and unmistakable evidence to delegate that question to an arbitrator, as four other circuits hold.

PARTIES TO THE PROCEEDING

Stewart A. Feldman, the Feldman Law Firm LLP, Capstone Associated Services (Wyoming), Limited Partnership, Capstone Associated Services, Limited, and Capstone Insurance Management, Limited, petitioners on review, were plaintiffs-appellants and defendants-appellants below.

Jeff Carlson was a separately represented plaintiff-appellant and defendant-appellant below. He is not a party to this proceeding.

Scott Sullivan, Frank DellaCroce, St. Charles Surgical Hospital, LLC, St. Charles Holdings, LLC, Center For Restorative Breast Surgery, LLC, Sigma Delta Billing, LLC, Cerberus Insurance Corporation, Janus Insurance Corporation, and Orion Insurance Corporation, respondents on review, were defendants-appellees and plaintiffs-appellees below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners make the following disclosures:

The Feldman Law Firm LLP is not a publicly held corporation and has no parent company. No publicly held corporation owns 10% or more of the Feldman Law Firm.

Capstone Associated Services (Wyoming), Limited Partnership, is not a publicly held corporation and has no parent company. No publicly held corporation owns 10% or more of Capstone Associated Services (Wyoming), Limited Partnership.

Capstone Associated Services, Limited, is not a publicly held corporation and has no parent company. No publicly held corporation owns 10% or more of Capstone Associated Services, Limited.

Capstone Insurance Management, Limited, was the doing-business name of Capstone Insurance Management (Anguilla), Limited, an Anguilla corporation that has since been dissolved. It had no parent company, and no publicly held company owned 10% or more of its stock.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit:

- *Sullivan, et al.* v. *Feldman, et al.*, No. 23-20140, 132 F.4th 315 (5th Cir. Mar. 11, 2025), *reh'g denied*, Dkt. 293 (5th Cir. Apr. 30, 2025)

U.S. District Court for the Southern District of Texas:

- *Sullivan, et al.* v. *Feldman, et al.*, No. 4:20-cv-2236, Dkt. 153, 2022 WL 17822451 (S.D. Tex. Dec. 20, 2022) (consolidated with *Feldman, et al.* v. *Sullivan, et al.*, No. 4:21-cv-658, and *Feldman, et al.* v. *Sullivan, et al.*, No. 4:21-cv-682)
- *Sullivan, et al.* v. *Feldman, et al.*, No. 4:20-cv-2236, Dkt. 174 (S.D. Tex. Mar. 7, 2023), *as amended*, Dkt. 255 (S.D. Tex. June 24, 2025)

Texas District Court, Harris County:

- *Sullivan, et al.* v. *Feldman, et al.*, No. 2020-36407 (Tex. Dist. Ct., Harris Cnty., June 17, 2020)
- *PoolRe Ins. Corp., et al.* v. *Sullivan, et al.*, No. 2020-74685 (Tex. Dist. Ct., Harris Cnty., Nov. 19, 2020)
- *Feldman, et al.* v. *Sullivan, et al.*, No. 2021-11911 (Tex. Dist. Ct., Harris Cnty., Mar. 2, 2021)
- *Feldman, et al* v. *PoolRe Ins. Corp.*, No. 2023-15570 (Tex. Dist. Ct., Harris Cnty., Mar. 9, 2023)

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v.

SCOTT SULLIVAN; FRANK DELLACROCE; ST. CHARLES SURGICAL HOSPITAL, L.L.C; ST. CHARLES HOLDINGS, L.L.C; CENTER FOR RESTORATIVE BREAST SURGERY, LLC; SIGMA DELTA BILLING, L.L.C; CERBERUS INSURANCE CORPORATION; JANUS INSURANCE CORPORATION; ORION INSURANCE CORPORATION,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Stewart A. Feldman, the Feldman Law Firm LLP, Capstone Associated Services (Wyoming), Limited Partnership, Capstone Associated Services, Limited, and Capstone Insurance Management, Limited, respectfully petition for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 132 F.4th 315. Pet. App. 1a-37a. That court's order denying rehearing en banc is not reported. Pet. App. 95a-97a. The Southern District of Texas's opinion confirming the relevant arbitration awards is not reported but is available at 2022 WL 17822451. Pet. App. 38a-94a.

JURISDICTION

The Fifth Circuit entered judgment on March 11, 2025. The Fifth Circuit denied Petitioners' petition for rehearing en banc on April 30, 2025. On June 26, 2025, this Court extended Petitioners' deadline to petition for a writ of certiorari to August 28, 2025. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, provides:

> 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 * * * .

INTRODUCTION

This case crystallizes an entrenched eight-circuit split over whether an arbitration agreement's general incorporation of standardized arbitration rules constitutes clear and unmistakable evidence that the parties intended to delegate the availability of class arbitration to an arbitrator. Four circuits say yes, and four say no.

As this Court has long affirmed, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of Am.* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). To effectuate this principle, this Court has held that certain "gateway" questions of arbitrability—such as whether the agreement permits arbitration of a particular dispute—are presumptively for courts to decide. *See Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). An arbitrator can decide such gateway questions only where there is "clear and unmistakable evidence" of the parties' intent to delegate that question to the arbitrator. *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995) (quotation marks and brackets omitted).

The circuits agree that whether an arbitration agreement permits class arbitration is a gateway question of arbitrability presumptively for judicial resolution. But they have fractured over whether generally incorporating an arbitral organization's rules amounts to clear and unmistakable evidence that the parties intended to have an arbitrator, rather than a court, decide this specific and momentous question. *Compare Chesapeake Appalachia, LLC* v. *Scout Petroleum,*

LLC, 809 F.3d 746, 758, 760-762 (3d Cir. 2016) (no); *Del Webb Cmtys., Inc.* v. *Carlson*, 817 F.3d 867, 877 (4th Cir. 2016) (no); *Reed Elsevier, Inc. ex rel. LexisNexis Div.* v. *Crockett*, 734 F.3d 594, 599 (6th Cir. 2013) (no); *and Catamaran Corp.* v. *Towncrest Pharm.*, 864 F.3d 966, 973 (8th Cir. 2017) (no); *with Jock* v. *Sterling Jewelers Inc.*, 942 F.3d 617, 623 (2d Cir. 2019) (yes); Pet. App. 18a (yes); *Dish Network LLC* v. *Ray*, 900 F.3d 1240, 1245 (10th Cir. 2018) (yes); *and Spirit Airlines, Inc.* v. *Maizes*, 899 F.3d 1230, 1231 (11th Cir. 2018) (yes). This split is open and notorious; multiple courts have acknowledged it.

This Court's intervention is urgently needed. It is common practice for arbitration agreements to state that disputes will be governed by the rules of a particular alternative dispute resolution entity, such as the American Arbitration Association (AAA) or JAMS. After all, one major benefit of arbitration is simplicity, and it is much easier to incorporate preexisting rules than to generate from scratch instructions as to how the arbitration will be conducted. Holding that such a boilerplate reference clearly and unmistakably evinces an intent to delegate class arbitrability to an arbitrator—as four circuits have done—stretches the clear-and-unmistakable standard beyond its breaking point. The rule in those circuits loses sight of the lodestar that "arbitration is strictly a matter of consent." *Lamps Plus, Inc.* v. *Varela*, 587 U.S. 176, 184 (2019) (quotation marks and brackets omitted).

The question presented is all the more pressing in light of the significance of the class-arbitrability question. Class arbitration "is not arbitration as envisioned by the" FAA. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 351 (2011). Compared to

traditional bilateral arbitration, class arbitration is "slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348. It is also far riskier for defendants: Judicial review of an arbitrator's decision is limited to extremely narrow circumstances, and the scale of class arbitration exposes defendants to potentially "devastating loss[es]." *Id.* at 350. The result is an overwhelming "pressure[]" to settle even "questionable claims" that are subject to class arbitration. *Id.* Given these "crucial differences between individual and class arbitration," *Lamps Plus*, 587 U.S. at 185 (quotation marks omitted), it is vitally important that a court—not an arbitrator—determine whether an agreement authorizes class arbitration absent actual clear and unmistakable evidence the parties intended for an arbitrator to do so.

This case is an ideal vehicle to resolve the question presented. It grows out of four parallel arbitration proceedings, all concerning the same dispute and all governed by the same arbitration agreement. The agreement states that "all arbitrations * * * shall be conducted * * * pursuant to the Commercial Arbitration Rules (and not the rules for Large, Complex Commercial Cases) of the American Arbitration Association (AAA)." Pet. App. 99a. The arbitration agreement says nothing about class arbitration, nor do the AAA Commercial Arbitration Rules. But the AAA also has Supplementary Rules for Class Arbitration,[1] which state that they apply to any dispute arising out of an agreement that provides for arbitration

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[1] AAA, Supplementary Rules for Class Arbitrations (Oct. 8, 2003), *available at* https://www.adr.org/media/0aalctny/supplementary_rules_for_class_arbitrations.pdf.

pursuant to any of the rules of the AAA and that an arbitrator shall determine "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." Supplementary Class Rule 3; *see* Pet. App. 18a.

The arbitrators themselves disagreed on how to approach class arbitration. One arbitrator ruled that class arbitration was permitted and certified a class under a process that looked nothing like how federal courts approach class certification. Another arbitrator expressly disagreed that class arbitration was permitted, holding that the parties' arbitration agreement did not permit class arbitration.

In the decision below, the Fifth Circuit "reluctantly" concluded that the arbitration agreement's "mere incorporation of the AAA Commercial Arbitration Rules constitutes sufficiently clear and unmistakable evidence that the parties *intended* to delegate class-wide arbitrability to the arbitrator." Pet. App. 18a. The court reached that conclusion by following a "daisy-chain of cross-references." *Chesapeake Appalachia*, 809 F.3d at 761. An earlier Fifth Circuit decision required the court to hold in this case that by incorporating the Commercial Rules, the parties also incorporated the AAA Supplementary Class Rules into their agreement—despite neither the Commercial Rules nor the parties' agreement referencing the Supplementary Class Rules or class arbitration. It was one of these unreferenced rules that according to the court clearly delegated class arbitrability to the arbitrator. Despite the Fifth Circuit itself expressing serious concern over the procedures used by the arbitrator to certify the class, the court concluded that the FAA's extremely deferential standard of review tied the court's

hands because the parties had delegated class arbitrability to the arbitrator.

The decision below thus perfectly tees up the question presented, and it does so in a case where the stakes are concrete. Not only that, the decision below acknowledges the split and observes that the Fifth Circuit is "an outlier on the far side of" this split. Pet. App. 23a.

The time has come to resolve this split, and this is the case in which to do it. This Court should grant the petition and reverse.

STATEMENT OF THE CASE

A. Legal Background

Under the FAA, "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 586 U.S. 63, 67 (2019). Courts "generally * * * apply ordinary state-law principles that govern the formation of contracts" when interpreting arbitration agreements. *First Options*, 514 U.S. at 944. But those state-law principles are qualified by certain "rules of fundamental importance" imposed by the FAA. *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010); *see also First Options*, 514 U.S. at 944.

One of these rules is the "basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen*, 559 U.S. at 681 (quoting *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). A party "cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc.* v. *Commc'ns Workers*

of Am., 475 U.S. 643, 648 (1986) (quotation marks omitted). "[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *Id.* at 648-649.

A second rule, "which follows inexorably from the first," is that "gateway" questions of arbitrability are presumptively for courts, not arbitrators, to decide. *Id.* at 649; *Lamps Plus*, 587 U.S. at 185-186. Gateway questions of arbitrability are those the "contracting parties would likely have expected a court" to resolve, such as whether the parties have a valid arbitration agreement or whether the arbitration clause "applies to a particular type of controversy." *Howsam*, 537 U.S. at 83-84. An agreement can overcome this "strong pro-court presumption," *id.* at 85-86, only when it provides "clear and unmistakable evidence" that the parties intended to delegate the issue to an arbitrator. *First Options*, 514 U.S. at 944 (quotation marks and brackets omitted). As the panel below noted, "all circuits agree that class arbitrability presents a gateway question." Pet. App. 21a. *See also Shivkov* v. *Artex Risk Sols., Inc.*, 974 F.3d 1051, 1065-68 (9th Cir. 2020) (holding as much and collecting cases from Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits); *see also Wells Fargo Advisors, LLC* v. *Sappington*, 884 F.3d 392, 395 (2d Cir. 2018) (assuming that class arbitrability is a gateway question); *Dish*, 900 F.3d at 1245 (10th Cir.) (same).

B. Procedural History

1. In 2015, Respondents, Louisiana doctors and their multiple business entities, contracted with Petitioners to provide administrative and legal services

related to Respondents' insurance arrangements. *See* Pet. App. 3a-4a. The parties' engagement letter—which was later incorporated into a separate services agreement—contains an arbitration provision. Pet. App. 4a-6a.

As relevant here, the arbitration provision provides that "all arbitrations * * * shall be conducted * * * pursuant to the Commercial Arbitration Rules (and not the rules for Large, Complex Commercial Cases) of the American Arbitration Association (AAA)." Pet. App. 99a. The agreement mandates that any arbitration initiated by either party be concluded within four months, at which time the arbitrator's jurisdiction expires. Pet. App. 100a-101a. The arbitration agreement and the AAA Commercial Arbitration Rules are silent about class arbitration.

2. After the parties' business relationship broke down, Petitioners and Respondents each initiated multiple arbitrations to address the fallout. In total, nine arbitrations were initiated—four by Petitioners, and five by Respondents. Pet. App. 6a-8a. Each arbitration was conducted by a single arbitrator. *See id.*

Eventually, four arbitrations that all concerned effectively the same dispute were proceeding in parallel. Two of these four proceedings included the same claims for class relief against Petitioners. Pet. App. 10a-11a. The arbitrators in the putative class arbitrations reached opposite conclusions as to whether the parties' arbitration agreement authorized class arbitration.

One arbitrator, former Louisiana Court of Appeal Judge Charles Jones, concluded that the parties' agreement "permitted class arbitration." Pet. App.

10a. He then adopted the class-certification order issued by a prior arbitrator, whose four-month term expired before he had issued a final award. *See* Pet. App. 10a n.2. As the Fifth Circuit later recognized, "Judge Jones questionably used 'opt-out notices' to handle the certification of the class," *id.*, and gave potential class members only 24 hours' notice via email to opt out, *see* Glasser Award at 389-390, S.D. Tex Case No. 4:20-cv-2236, Dkt. No. 72-5 (Apr. 25, 2022).[2] Moreover, despite the complicated predominance questions involved in certifying a multi-state class, the class-certification order "was a mere eight pages, * * * and with only two conclusory paragraphs addressing predominance." Pet. App. 11a n.2. Judge Jones ultimately certified a class of 141 individuals and entities. *See* Jones Award at 3-7, Dkt. No. 102-22 (June 30, 2022).

Another arbitrator, Mark Glasser, expressly disagreed with Judge Jones's approach and "concluded that the Engagement Letter did not permit class arbitration." Pet. App. 11a.

The four arbitrators conducted a joint evidentiary hearing "where the same evidence and witnesses were presented." Pet. App. 8a. During the joint hearing, the two arbitrators being asked to rule on whether class arbitration was available—Judge Jones and Glasser—"disagreed with each other vocally from the bench" on that "hotly disputed subject." *Id.* They had disagreed on this issue before the hearing too, with one of them purporting to vacate the other's class-certification order. Glasser Award at 390, Dkt. No. 72-5 (Apr. 25, 2022).

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[2] All subsequent references to "Dkt." refer to this docket.

Judge Jones, the arbitrator who had certified a class, held an additional hearing on class damages. That late-night hearing ran from 10:20 pm to about 6:45 am the next day, over Petitioners' objections. *See* Transcript of Final Arbitration Hearing, Dkt. No. 163-10 (Jan. 30, 2023). Petitioners were not permitted to put on evidence concerning whether their conduct caused class members' individualized damages during this additional hearing.

The four arbitrators issued final awards in favor of Respondents. The three arbitrators who did not certify a class entered awards on Respondents' individual claims ranging from roughly $1.5 million to $4.5 million. Pet. App. 9a. The arbitrator who certified a class entered significantly larger awards: He awarded $31 million to the class in damages (not including fees and costs), and $89 million to Respondents in individual damages, fees, and costs. *Id.*

3. The parties filed cross-motions to vacate and confirm the awards before the District Court for the Southern District of Texas. The district court confirmed all four awards. Pet. App. 92a-93a.

As relevant here, Petitioners urged the court to vacate the Jones Award because the arbitrator "exceeded his authority by allowing class claims to proceed." Pet. App. 83a. The court rejected that argument, reasoning that by "incorporat[ing] the AAA rules for arbitration," the arbitration agreement gave the arbitrator "exclusive authority to determine which issues were properly before him, including * * * whether a class-wide arbitration would proceed." Pet. App. 86a-87a (quotation marks omitted).

4. Petitioners appealed. As relevant here, the Fifth Circuit explained that it—like every other court to reach the issue—has "concluded that class arbitrability is a gateway issue that courts leave to arbitrators only when the agreement evinces that the parties 'clearly and unmistakably' intended that result." Pet. App. 17a (citation omitted). Citing circuit precedent, the panel then "reluctantly * * * conclude[d] that the Engagement Letter's mere incorporation of the AAA Commercial Arbitration Rules" met this standard and indicated that "the parties *intended* to delegate class-wide arbitrability to the arbitrator." Pet. App. 18a.

According to the panel, the arbitration agreement's reference to the AAA Commercial Arbitration Rules also incorporated the separate AAA Supplementary Rules for Class Arbitration. *Id.* The Supplementary Class Rules purport to "supplement any other applicable AAA rules," and kick in whenever an arbitration "involves a purported class." *Reed* v. *Florida Metro. Univ., Inc.*, 681 F.3d 630, 634-635 (5th Cir. 2012), *abrogated on other grounds by Oxford Health Plans LLC* v. *Sutter*, 569 U.S. 564 (2013). One Supplementary Class Rule "provides that 'the arbitrator shall determine as a threshold matter * * * whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.'" Pet. App. 18a (quoting Supplementary Class Rule 3).

The panel held that this Supplementary Class Rule demonstrated that the parties "unambiguously delegated the question of class-wide arbitrability to the arbitrators." Pet. App. 19a-20a (footnote omitted). And because "Judge Jones allowed class arbitration to go forward based on his interpretation of the Engagement Letter, although Glasser's refusal to permit

class-wide arbitration was equally permissible," the FAA's deferential standard of review precluded the Fifth Circuit from "upset[ting] Jones's conclusion." Pet. App. 20a.

Even as the panel so held, however, it acknowledged that the circuits "disagree on whether an agreement's incorporation of generic rules permitting class arbitration can ever constitute clear and unmistakable consent to class arbitration." Pet. App. 21a. In the panel's view, the Fifth Circuit's earlier decision in *Work* v. *Intertek Research Solutions, Inc.*, 102 F.4th 769 (5th Cir. 2024)—which held that the incorporation of JAMS rules broadly referencing the arbitrator's duties was sufficient to delegate the arbitrability of a class-like claim to the arbitrator—had rendered the circuit "an outlier on the far side" of that split. Pet. App. 23a.

After resolving several other issues not relevant here, the Fifth Circuit affirmed the four arbitration awards against Petitioners. *See* Pet. App. 37a.

Petitioners sought rehearing en banc. The Fifth Circuit denied their petition. Pet. App. 97a.[3]

This petition follows.

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[3] After the Fifth Circuit's mandate issued, the district court entered an Amended Partial Final Judgment against Petitioners. *See* Dkt. No. 255 (June 24, 2025). The parties are also engaged in an ongoing arbitration proceeding to resolve the inconsistencies across the awards. *See* Pet. App. 12a-13a; Order Staying Case, Dkt. No. 256 (June 24, 2025).

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NECESSARY TO RESOLVE A DEEP EIGHT-CIRCUIT SPLIT.

The decision below sharpens a well-recognized split between eight circuits. Four circuits—the Third, Fourth, Sixth, and Eighth—hold that the incorporation of generic arbitration rules in an arbitration agreement does not provide clear and unmistakable evidence that the parties intended to delegate the question of class arbitrability to an arbitrator. *See Chesapeake Appalachia*, 809 F.3d at 758, 760-762 (3d Cir.); *Del Webb Cmtys.*, 817 F.3d at 877 (4th Cir.); *Reed Elsevier*, 734 F.3d at 599 (6th Cir.); *Catamaran*, 864 F.3d at 973 (8th Cir.).

Another four circuits—the Second, Fifth, Tenth, and Eleventh—hold the exact opposite. In these circuits, the incorporation of generic arbitration rules in an arbitration agreement evinces clear and unmistakable intent to delegate the question of class arbitrability to an arbitrator. *See Jock*, 942 F.3d at 623 (2d Cir.); Pet. App. 18a; *Dish*, 900 F.3d at 1245 (10th Cir.); *Spirit Airlines*, 899 F.3d at 1231 (11th Cir.).

This Court should grant this petition and resolve this clearcut division of authority on an important federal issue.

A. The Third, Fourth, Sixth, And Eighth Circuits Hold That The Incorporation Of Generic Arbitration Rules Is Insufficient To Delegate Class Arbitrability To An Arbitrator.

In four circuits, the parties' decision to incorporate generic rules of arbitration is not clear and

unmistakable evidence of the parties' intent to have an arbitrator decide whether an arbitration agreement permits class arbitration.

In *Chesapeake Appalachia*, the Third Circuit held that an arbitration agreement's incorporation of standardized arbitral rules did "not satisfy the onerous burden of overcoming the presumption in favoring of judicial resolution of the question of class arbitrability." 809 F.3d at 758. The agreement there directed that "disputes shall be determined by arbitration in accordance with the rules of the" AAA. *Id.* at 749. The defendant argued that this reference incorporated the AAA Commercial Arbitration Rules, which in turn incorporated the AAA Supplementary Class Rules, which in turn state that the arbitrator shall decide class arbitrability. *Id.* at 753-754, 750. The Third Circuit rejected that this "daisy-chain of cross-references" clearly and unmistakably delegated class arbitrability to the arbitrator. *Id.* at 761. As the court explained, the agreement was at most ambiguous as to class arbitrability, since it would be reasonable for parties intending to maintain the status quo of judicial determination of class arbitrability to draft an arbitration agreement devoid of any reference to class arbitration or the AAA rules governing class arbitration. *See id.* at 763. The court further dismissed as inapposite cases concerning the incorporation of arbitral rules in the bilateral context, reasoning that "class arbitration implicates a particular set of concerns that are absent in the bilateral context." *Id.* at 764.

The Fourth Circuit is in accord. In *Del Webb Communities*, the Fourth Circuit confronted an arbitration agreement providing that the "rules of the [AAA], published for construction industry arbitrations, shall

govern the arbitration proceeding." 817 F.3d at 869. The Fourth Circuit held that this agreement, which was silent as to class arbitration, "did not unmistakably provide that the arbitrator would decide whether their agreement authorizes class arbitration." *Id.* at 877.

The Sixth Circuit has similarly held that "the incorporation of the AAA's rules" is "insufficient evidence that the parties intended for the arbitrator to decide" whether the agreement authorizes class arbitration. *AlixPartners, LLP* v. *Brewington*, 836 F.3d 543, 553 (6th Cir. 2016). The Sixth Circuit first held as much in *Reed Elsevier*, which concerned an arbitration agreement providing that arbitrations will be governed by "the then-current Commercial Rules and supervision of the [AAA]." 734 F.3d at 599. As the court explained, "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." *Id.* In the Sixth Circuit, such silence or ambiguity "as to whether an arbitrator should determine the question of classwide arbitrability * * * is not enough to wrest that decision from the courts." *Id.*

The Eighth Circuit joined these courts in *Catamaran*. That case concerned two arbitration agreements requiring arbitrations to proceed "in accordance with the applicable rules of the [AAA]." 864 F.3d at 969. Citing circuit precedent "that incorporation by reference of AAA Rules constitutes a clear and unmistakable indication that the parties intended for an arbitrator to decide substantive questions of arbitrability," the defendants contended that "the agreements' incorporation of the AAA rules commits the" class-

arbitrability question "to an arbitrator." *Id.* at 973. The Eighth Circuit rejected these cases, reasoning that they "dealt with bilateral arbitration agreements" and "therefore never grappled with the fundamental changes in the underlying controversy that arise when dealing with class arbitration." *Id.* The court concluded that "[i]ncorporation of AAA Rules by reference is insufficient evidence that the parties intended for an arbitrator to decide the substantive question of class arbitration." *Id.*

B. The Second, Fifth, Tenth, And Eleventh Circuits Hold That The Incorporation Of Generic Arbitration Rules Is Sufficient To Delegate Class Arbitrability To An Arbitrator.

In sharp contrast, another four circuits hold that the incorporation of generic arbitration rules is clear and unmistakable evidence that the parties intended to delegate the question of class arbitrability to an arbitrator.

In the Second Circuit, an arbitration agreement's "incorporation of the AAA Rules evinces agreement to have the arbitrator decide the question of class arbitrability." *Jock*, 942 F.3d at 623-624. The Second Circuit first articulated this rule in *Wells Fargo Advisors*, which concerned an agreement incorporating the AAA's 1993 Securities Arbitration Rules. 884 F.3d at 394, 396-397. The court reasoned that these rules pointed to the AAA Commercial Arbitration Rules and the AAA Supplementary Class Rules, which, according to the court, "clearly leave[] the class arbitration question to an arbitrator." *Id.* at 396-397. Citing precedent discussing the incorporation of arbitral rules

"empower[ing] an arbitrator to decide issues of arbitrability," the court held that the incorporation of these rules into the agreement provided "clear and unmistakable evidence of the parties' intent to delegate" class arbitrability to the arbitrator. *Id.* (quotation marks omitted). The court rejected the plaintiff's argument that such a "string of inferences" is insufficient to delegate the particular question of class arbitrability. *See id.* at 397, 398-399.

The Tenth Circuit followed suit in *Dish*. In that case, the Tenth Circuit considered an arbitration agreement that incorporated "the AAA's National Rules for the Resolution of Employment Disputes." 900 F.3d at 1245. The Tenth Circuit held that the "incorporation of the [AAA] Rules clearly and unmistakably shows the parties intended for the arbitrator to decide all issues of arbitrability," including class arbitrability. *Id.* The court further concluded that "[t]he fundamental differences between bilateral and classwide arbitration are irrelevant" as to this question. *Id.* at 1247.

The Eleventh Circuit reached the same conclusion in *Spirit Airlines*: An arbitration "agreement's choice of American Arbitration Association rules, standing alone, is clear and unmistakable evidence that [the parties] intended that the arbitrator decide" class arbitrability. 899 F.3d at 1231. That case concerned an arbitration agreement providing that disputes would be resolved "in accordance with the rules of the American Arbitration Association then in effect." *Id.* at 1232. According to the Eleventh Circuit, "[t]hose rules include AAA's Supplementary Rules for Class Arbitrations," which the court read to provide "clear and unmistakable evidence" of the parties' intent to delegate class arbitrability. *Id.* at 1233-34. Although the

Eleventh Circuit recognized that "class arbitration dramatically changes what ordinarily goes on in arbitration," the court concluded that the incorporation of generic rules was sufficient to delegate class arbitrability to an arbitrator. *Id.* at 1234.

In the decision below, the Fifth Circuit "reluctantly" sided with these courts and concluded that an arbitration agreement's "mere incorporation of the AAA Commercial Arbitration Rules constitutes sufficiently clear and unmistakable evidence that the parties intended to delegate class-wide arbitrability to the arbitrator." Pet. App. 18a; *see supra* pp. 12-13.

The panel described the Fifth Circuit as "an outlier on the far side" of the split discussed above. Pet. App. 23a. A year earlier, in *Work*, the Fifth Circuit considered whether an arbitration agreement's reference to the JAMS Employment Arbitration Rules & Procedures clearly and unmistakably delegated class arbitrability to the arbitrator. *See* 102 F.4th at 770.[4] One of those rules directs the arbitrator to decide "arbitrability disputes, including disputes over the" agreement's scope. *Id.* at 772 (quotation marks omitted). The *Work* panel concluded that "[t]he language in this rule is 'clear and unmistakable' and unequivocally delegates the question of arbitrability to the arbitrator," including the distinct question of class arbitrability. *Id.* According to the decision below, "[n]o other circuit

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[4] *Work* technically involved arbitration of a collective action, "an employment claim similar to a class action." Pet. App. 19a. But *Work* repeatedly refers to "class arbitration" and "class arbitrability." 102 F.4th at 770-771. The decision below likewise read *Work* as speaking to the "class arbitrability" question. Pet. App. 19a-20a.

court has held that a rule generally delegating arbitrability questions carries with it a delegation of class arbitrability." Pet. App. 22a.

C. The Split Is Widely Acknowledged.

The circuits openly disagree with one another over the question presented. The Second, Tenth, and Eleventh Circuits expressly disagree with the views of the Third, Fourth, Sixth, and Eighth Circuits as to whether incorporation of generic arbitration rules suffices to make the class-arbitrability question one for an arbitrator rather than a court. *See Wells Fargo Advisors,* 884 F.3d at 398 ("declin[ing] to join" the Third, Sixth, and Eighth Circuits); *Dish,* 900 F.3d at 1247 ("disagree[ing]" with the Third, Sixth, and Eighth Circuits); *Spirit Airlines,* 899 F.3d at 1233 ("[F]our other circuits [have held] the incorporation of AAA rules, standing alone, is not enough * * * . We have concluded to the contrary.").

Multiple courts have acknowledged the resulting split. The Fifth Circuit did so in the decision below. *See* Pet. App. 21a. The Ninth Circuit has likewise recognized this split. *See Shivkov*, 974 F.3d at 1068. So have many district courts and state courts. *See Fasano* v. *Li*, No. 16 Civ. 8759 (KPF), 2023 WL 6292579, at *12 (S.D.N.Y. Sept. 27, 2023); *Harmon* v. *RDO Equip. Co.*, No. EDCV 18-02602 JVS, 2019 WL 4238877, at *5 (C.D. Cal. July 3, 2019); *Langston* v. *Premier Directional Drilling, L.P.*, 203 F. Supp. 3d 777, 785, 789 (S.D. Tex. 2016); *Hedrick* v. *BNC Nat'l Bank*, 186 F. Supp. 3d 1189, 1195 (D. Kan. 2016); *BuzzFeed Media Enters., Inc.* v. *Anderson*, No. 2023-0377-MTZ, 2024 WL 2187054, at *9 (Del. Ch. May 15, 2024); *Rickenbaugh* v. *Power Home Solar, LLC*, No. 19

CVS 244, 2019 WL 7018974, at *7 (N.C. Super. Ct. Dec. 20, 2019).

This Court should grant certiorari to resolve this entrenched and acknowledged split.

II. THE QUESTION PRESENTED IS CRITICALLY IMPORTANT AND FREQUENTLY RECURS.

This Court should also grant certiorari because the question presented is exceptionally important. Class arbitration is fundamentally different than individualized arbitration: It is slower, more expensive, and more procedurally complicated. On top of that, the high stakes of class arbitration and the extremely limited and deferential judicial review available under the FAA can exert an overwhelming pressure on defendants to settle. The ubiquity of incorporating standardized arbitral rules into arbitration agreements, and the frequency with which this issue arises in the lower courts, makes the question presented all the more pressing for this Court to resolve now.

1. The approach taken by the Second, Fifth, Tenth, and Eleventh Circuits—that the general incorporation of an arbitration association's rules is clear and unmistakable evidence of the parties' intent to permit an arbitrator to decide the availability of class arbitration—strikes at the bedrock principle that "arbitration is strictly a matter of consent." *Lamps Plus*, 587 U.S. at 184 (quotation marks and brackets omitted). Under the FAA, "arbitrators wield only the authority they are given." *Id.* The "strong pro-court presumption" applying to gateway questions of arbitrability, *Howsam*, 537 U.S. at 85-86, polices that authority, ensuring that "unwilling parties" are not "force[d]" to

arbitrate issues against their expectations, *First Options*, 514 U.S. at 945.

Allowing that presumption to be overcome on anything less than clear and unmistakable evidence in any context would fail "to give effect to the intent of the parties." *Lamps Plus*, 587 U.S. at 184 (quotation marks omitted). But it is especially alarming when the underlying question is whether the agreement permits class arbitration.

As this Court has repeatedly observed, there are "'fundamental' difference[s] between class arbitration and the individualized form of arbitration envisioned by the FAA." *Id.* (citation omitted). "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen*, 559 U.S. at 685. The "switch from bilateral to class arbitration sacrifices" these benefits; class arbitration is "slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 348.

At the same time, class arbitration "greatly increases risks to defendants." *Id.* at 350. Indeed, "the commercial stakes of class-action arbitration are comparable to those of class-action litigation." *Stolt-Nielsen,* 559 U.S. at 686. But unlike in litigation—with its layers of de novo review—all of the risk in a class arbitration is "concentrat[ed] * * * in the hands of a single arbitrator." *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444, 459 (2003) (Rehnquist, C.J., dissenting). Although the losing "party still can ask a court to review the arbitrator's decision, * * * the court will set that

decision aside only in very unusual circumstances." *First Options*, 514 U.S. at 942. Even a "grave error" on the arbitrator's part "is not enough," as long as the "the arbitrator was arguably construing the contract." *Oxford Health*, 569 U.S. at 572 (quotation marks omitted). A more demanding standard of review is not available even if the parties agreed to it. *See Concepcion*, 563 U.S. at 351.

These markedly different roles for the court ratchet up the importance of correctly answering the "who decides" question in the class-arbitration context. As this Court has recognized, "who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration." *First Options*, 514 U.S. at 942. But when class arbitrability is on the line, the stakes are even higher. Between the lack of an "effective means of review" and the specter of a "devasting loss," class arbitration can pressure defendants "into settling [even] questionable claims." *Concepcion*, 563 U.S. at 348.

Not only that, class arbitration is peculiarly "vulnerable to collateral attack." *Oxford Health*, 569 U.S. at 575 (Alito, J., concurring). As Justice Alito has observed, although a court may be unable to correct "an arbitrator's erroneous interpretation" that a particular agreement permitted class arbitration, that interpretation "cannot bind someone who has not authorized the arbitrator to make that determination." *Id.* at 574. This is so even if the arbitrator distributed opt-out notices to absent class members; "an offeree's silence does not normally modify the terms of a contract." *Id.* "Accordingly, at least where absent class members have not been required to opt *in*, it is difficult

to see how an arbitrator's decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used." *Id.* at 574-575.[5] This "fundamental flaw" could "allow absent class members to unfairly claim the 'benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.'" *Id.* (citation omitted).

Class arbitration, in short, "is not arbitration as envisioned by the FAA." *Concepcion*, 563 U.S. at 351. It is thus vitally important that the question whether an agreement permits such costly, onerous, and risky proceedings remain with the courts, absent clear and unmistakable evidence the parties intended that an arbitrator decide that threshold question. Otherwise, defendants risk being thrown onto the horns of a dilemma, forced to either litigate "tens of thousands" of joined claims without any effective judicial review or enter into an "'in terrorem' settlement." *Id.* at 350.

Arbitration defendants in New York and Texas should not be subject to different rules from arbitration defendants in New Jersey and Michigan when it comes to who decides whether they must defend against a class arbitration. That is especially so because companies often use the same arbitration agreement nationwide. Today's checkerboard of how courts answer the question presented invites gamesmanship: To maximize their chances a class arbitration is ordered, counsel can simply file on behalf of a claimant

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[5] *But see Jock*, 942 F.3d at 620 (holding that "the arbitrator's determination that the agreement permits class arbitration binds absent class members").

in New York rather than New Jersey, Texas rather than Arkansas, or Georgia rather than South Carolina. Only a grant of certiorari by this Court will put an end to this situation.

2. The question presented is also important because it is so prevalent. It is standard practice for an arbitration agreement to refer to the standardized rules set by an alternative dispute resolution entity. Indeed, since 2010, this Court has decided nearly a dozen cases involving an arbitration agreement incorporating generic arbitral rules.[6] This is unsurprising; arbitration is attractive because it is simple, and it is far easier for the parties to invoke a preset menu of rules than generate rules anew for each arbitration agreement.

The AAA's rules are particularly popular. More than 1,200 companies have registered consumer arbitration

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[6] *See Lamps Plus*, 587 U.S. at 207 (Kagan, J., dissenting); *Henry Schein*, 586 U.S. at 66; *Oxford Health*, 569 U.S. at 566; *Nitro-Lift Techs., L.L.C.* v. *Howard*, 568 U.S. 17, 18 (2012) (per curiam); *Marmet Health Care Ctr., Inc.* v. *Brown*, 565 U.S. 530, 531 (2012); *Concepcion*, 563 U.S. 333 (No. 09-893), Petition Appendix at 56a (Jan. 25, 2010); *Coinbase, Inc.* v. *Suski*, 602 U.S. 143 (2024), Joint Appendix, 2023 WL 9743766, at *138 (Dec. 18, 2023); *Bissonnette* v. *LePage Bakeries Park St., LLC*, 601 U.S. 246 (2024) (No. 23-51), Joint Appendix, 2023 WL 7924528, at *64 (Nov. 13, 2023); *Coinbase, Inc.* v. *Bielski*, 599 U.S. 736 (2023) (No. 22-105), Joint Appendix, 2023 WL 2557661, at *67-68 (Jan. 20, 2023); *New Prime Inc.* v. *Oliviera*, 586 U.S. 105 (2019) (No. 17-340), Joint Appendix, 2018 WL 2317961, at *103 (May 14, 2018); *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497 (2018) (Nos. 16-285, 16-300, 16-307), Joint Appendix, 2017 WL 4403343, at *40 (June 9, 2017).

contracts with the AAA since 2014.[7] In the last five years, the AAA closed more than 191,000 consumer and employment arbitration claims.[8] And that's just a subset of the arbitrations governed by AAA rules; the organization's "website lists more than fifty sets of" industry-specific rules. *Chesapeake Appalachia*, 809 F.3d at 749.[9]

The Fifth Circuit's rule also extends to agreements incorporating the rules set by JAMS, the second-most used alternative dispute resolution entity. *See* Pet. App. 19a. Use of JAMS rules in arbitration agreements has become increasingly popular: JAMS saw 21,390 new cases in 2024, a 10% increase from the number of cases in 2023.[10]

The upshot is that, under the rule applied below, anyone in a large swath of the country who enters into a boilerplate arbitration agreement incorporating an alternative dispute resolution entity's standardized rules—even industry-specific ones—is deemed to

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[7] AAA, *Consumer Clause Registry*, https://apps.adr.org/ClauseRegistryUI/faces/org/adr/extapps/clauseregistry/view/pages/clauseRegistry.jsf (navigate to "View Registered Consumer Arbitration Clauses").

[8] AAA, *Consumer Report Q1 2025*, https://www.adr.org/media/pwgfahhn/consumerreport_q1_2025_formatted_1.xlsx; *see also* AAA, *Consumer and Employment Arbitration Statistics*, https://www.adr.org/media/wj0cryid/consumer-and-employment-arbitration-statistics.pdf.

[9] *See also* AAA, *Rules, Forms, and Fees*, https://www.adr.org/rules-forms-and-fees/.

[10] JAMS, *Jams Resolution Report 2024*, https://www.jamsadr.com/files/uploads/documents/jams-2024-resolution-report.pdf.

allow an arbitrator to decide class arbitrability. *See* Pet. App. 18a (applying rule to agreement referencing AAA Commercial Arbitration Rules); *Wells Fargo Advisors*, 884 F.3d at 394 (same, as to agreement referencing AAA Securities Arbitration Rules); *Dish*, 900 F.3d at 1245 (same, as to agreement referencing AAA Rules for the Resolution of Employment Disputes); *see also* AAA, Commercial Arbitration Rules and Mediation Procedures 8 (Sept. 1, 2022) (proposing standard arbitration clause referring to Commercial Arbitration Rules). This outcome is especially problematic considering that national companies typically use the same arbitration agreements nationwide. Allowing geography to drive whether the same arbitration agreement permits class arbitrability defeats the purpose of standard arbitration contracts—predictability—and erodes the fundamental principle that an arbitrator's authority derives from the parties' consent.

3. Finally, the question presented frequently arises in the lower courts. Since 2015, at least forty cases have considered whether an arbitration agreement referencing standardized arbitral rules delegates class arbitrability to the arbitrator.[11] This issue has percolated long enough; it is time for this Court to weigh in.

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[11] *See* Pet. App. 16a-18a; *Work*, 102 F.4th at 772; *Jock*, 942 F.3d at 623-624; *Wells Fargo Advisors*, 884 F.3d at 399; *Dish*, 900 F.3d at 1247-48; *Spirit Airlines*, 899 F.3d at 1231; *JPay, Inc.* v. *Kobel*,

904 F.3d 923, 936-939 (11th Cir. 2018); *Catamaran*, 864 F.3d at 973; *Chesapeake Appalachia*, 809 F.3d at 758; *Dell Webb Cmtys.*, 817 F.3d at 877; *AlixPartners*, 836 F.3d at 553; *Huffman* v. *Hilltop Cos., LLC*, 747 F.3d 391, 393-394, 398 (6th Cir. 2014); *Reed Elsevier*, 734 F.3d at 599; *Smith* v. *Para Energy Grp., LLC*, No. 23-CV-01756-PAB-KAS, 2024 WL 709772, at *5 (D. Colo. Feb. 21, 2024); *Reid* v. *Tandym Grp., LLC*, 697 F. Supp. 3d 62, 77-78 (S.D.N.Y. 2023); *Fasano*, 2023 WL 6292579, at *13; *Barmby* v. *Ourisman Chevrolet Co., Inc.*, No. DLB-22-2312, 2023 WL 4549739, at *9 (D. Md. July 14, 2023); *Borozny* v. *Raytheon Techs. Corp.*, No. 3:21-CV-1657-SVN, 2023 WL 334378, at *3-4 (D. Conn. Jan. 20, 2023); *Colliau* v. *Keller Williams Realty, Inc.*, No. A-22-CV-197-RP, 2022 WL 22869803, at *3 (W.D. Tex. Oct. 17, 2022), *report and recommendation adopted*, No. 1:22-CV-197-RP, 2022 WL 22869763 (W.D. Tex. Dec. 15, 2022); *O'Connor* v. *Warner Bros. Animation, Inc.*, No. 2:20-CV-09291-MCS-JPR, 2021 WL 3598581, at *2-3 (C.D. Cal. Jan. 21, 2021); *Magee* v. *Francesca's Holding Corp.*, No. 17-565, 2020 WL 3169518, at *11 (D.N.J. June 15, 2020); *Harmon*, 2019 WL 4238877, at *5; *Sperring* v. *LLR, Inc.*, No. 5:19-cv-00433-AB-SHK, 2019 WL 13240893, at *11 (C.D. Cal. July 23, 2019); *Sayki* v. *Estée Lauder Cos., Inc.*, 308 F. Supp. 3d 366, 378-379, 381 (D.D.C. 2018); *Abrams* v. *Chesapeake Energy Corp.*, No. 4:16-CV-1343, 2017 WL 6541511, at *5 (M.D. Penn. Dec. 21, 2017); *Langston*, 203 F. Supp. 3d at 778; *Hedrick*, 186 F. Supp. 3d at 1196; *Tiffany* v. *KO Huts, Inc.*, 178 F. Supp. 3d 1140, 1148 (W.D. Okla. 2016); *Martinez* v. *Utilimap Corp.*, No. 3:14-CV-310-JPG-DGW, 2016 WL 6872649, at *3 (S.D. Ill. Nov. 22, 2016); *Torgerson* v. *LCC Int'l, Inc.*, No. 16-CV-2495-DDC-TJJ, 2016 WL 4208103, at *4-5 (D.

III. THE FIFTH CIRCUIT'S RULE IS WRONG.

1. The mere incorporation of generic arbitration rules into an arbitration agreement is not clear and unmistakable evidence that the parties intended to delegate the highly consequential question of class arbitrability to an arbitrator.

Displacing the "strong pro-court presumption" applying to gateway questions of arbitrability, *Howsam*, 537 U.S. at 85-86, requires "clear and unmistakable evidence" of intent to delegate the issue to an arbitrator, *First Options*, 514 U.S. at 944 (quotation marks and brackets omitted). Such evidence must be more than "silence or ambiguity." *Lamps Plus*, 587 U.S. at 186. Invoking that same principle, this Court "has held that courts may not infer consent to participate in class arbitration absent an affirmative 'contractual basis for concluding that the party *agreed* to do so.'"

Kan. Aug. 10, 2016); *Chesapeake Appalachia, LLC* v. *Brown*, No. 3:14-0833, 2016 WL 815571, at *2 (M.D. Penn. Mar. 2, 2016); *Castaldi* v. *Signature Retail Servs., Inc.*, No. 15-CV-00737-JSC, 2016 WL 74640, at *16 (N.D. Cal. Jan. 7, 2016); *Chesapeake Appalachia, LLC* v. *Suppa*, 91 F. Supp. 3d 853, 864 (N.D. W. Va. 2015); *Guess?, Inc.* v. *Russell*, No. 2:15-CV-05191-CAS(ASX), 2015 WL 7175788, at *3-4 (C.D. Cal. Nov. 12, 2015); *Kag West, LLC* v. *Malone*, No. 15-CV-03827-TEH, 2015 WL 6693690, at *3 (N.D. Cal. Nov. 3, 2015); *Herzfeld* v. *1416 Chancellor, Inc.*, No. 14-4966, 2015 WL 4480829, at *6 (E.D. Pa. July 22, 2015); *Williams-Bell* v. *Perry Johnson Registrars, Inc.*, No. 14-C-1002, 2015 WL 6741819, at *6 (N.D. Ill. Jan. 8, 2015); *Rickenbaugh*, 2019 WL 7018974, at *8; *Shakoor* v. *VXI Global Sols.*, 35 N.E.3d 539, 549-550 (Ohio Ct. App. 2015); *Brinkley* v. *Monterey Fin. Servs., Inc.*, 242 Cal. App. 4th 314, 353-354 (Cal. Ct. App. 2015).

Id. (quoting *Stolt-Nielsen*, 559 U.S. at 684). "Neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself." *Id.*

The incorporation of generic arbitral rules into an arbitration agreement does not clear this hurdle. Merely articulating the "daisy-chain of cross-references" connecting the arbitration agreement here and the arbitral rule delegating class arbitrability to the arbitrator illustrates as much. *Chesapeake Appalachia*, 809 F.3d at 761. The Fifth Circuit moved from an arbitration agreement referencing the AAA Commercial Arbitration Rules to the AAA Supplementary Class Rules, one of which the court concluded "specifically delegates the question of class arbitrability." Pet. App. 19a.[12] Worse yet, "[t]he Commercial Rules do not even refer to the Supplementary Rules" or class proceedings; they "are phrased in terms of basic procedural issues arising out of bilateral arbitration proceedings." *Chesapeake Appalachia*, 809 F.3d at 763. The only link is found in the Supplementary Class Rules themselves, the first rule of which states that the Supplementary Class Rules apply to "any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the [AAA], where a party submits a dispute" for class arbitration. Supplementary Class

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[12] Although the Fifth Circuit focused on Supplementary Class Rule 3, Supplementary Class Rule 1(c) contemplates that class arbitrability may be decided by a court instead. *See* Supplementary Class Rule 1(c) (stating that a court may "by order, address[] and resolve[] any matter *that would otherwise be decided by an arbitrator* under these Supplementary Rules") (emphasis added).

Rule 1(a). The rule that ultimately delegated class arbitrability to the arbitrator was thus reverse-incorporated—by way of another set of rules—into the parties' agreement.

The decision below rests on an avalanche of inferences: that the parties were aware of the Supplementary Class Rules (despite neither the agreement nor the Commercial Rules mentioning them); that the parties clearly intended to incorporate those Supplementary Class Rules into their agreement (despite the agreement's silence as to those rules); and that the parties clearly intended to have those Supplementary Class Rules strip the court of its authority to decide the class-arbitrability question. There is nothing clear and unmistakable about this series of inferences.

At most, the incorporation of generic rules renders the agreement ambiguous as to who decides class arbitrability. It is at least equally reasonable to conclude that because the arbitration agreement "contains no reference whatsoever to class arbitration, the question of class arbitrability, or the Supplementary Rules," the parties did not intend the arbitrator to resolve class arbitrability. *Chesapeake Appalachia*, 809 F.3d at 763. Such ambiguity, however, does not satisfy this Court's clear-and-unmistakable standard. *See, e.g.*, *First Options*, 514 U.S. at 944.

The consequences flowing from the decision below highlight the Fifth Circuit's error. Under the decision below—as well as under the identical rule adopted in the Second, Tenth, and Eleventh Circuits—parties who opt to incorporate standard arbitration rules into their agreements but who nonetheless intend to reserve class arbitrability for the court must affirmatively include a provision in the agreement stating as

much. That "turn[s] the presumption favoring judicial determination of classwide arbitrability on its head." *Chesapeake Appalachia*, 809 F.3d at 763 (quotation marks omitted). The whole point of that presumption is that the arbitration agreement "need not expressly exclude questions of arbitrability as outside its scope." *Id.* (quotation marks omitted).

Finally, two Members of this Court have already indicated that the mere incorporation of standardized arbitral rules does not license an arbitrator to decide class arbitrability. *Oxford Health* concerned an agreement requiring arbitration "pursuant to the rules of the American Arbitration Association." 569 U.S. at 566. In this Court, the parties "agreed that the arbitrator should determine" class arbitrability. *Id.* at 569 n.2. But in a concurrence joined by Justice Thomas, Justice Alito explained that "unlike petitioner, absent members of the plaintiff class never conceded that the contract authorizes the arbitrator to decide whether to conduct class arbitration. It doesn't." *Id.* at 574 (Alito, J., concurring). The same is true here, and it underscores that certiorari review is warranted here.

2. The decision below ultimately rests on the proposition that incorporating standardized arbitration rules is "enough to delegate *general* arbitrability clearly and unmistakably to [an] arbitrator," and is thus also enough to clearly and unmistakably delegate *class* arbitrability. Pet. App. 23a (emphasis added) (discussing *Work*'s reliance on *Cooper* v. *WestEnd Capital Management, L.L.C.*, 832 F.3d 534 (5th Cir. 2016)); *see also Wells Fargo Advisors*, 884 F.3d at 398; *Dish*, 900 F.3d at 1245; *Spirit Airlines*, 899 F.3d 1230.

That is wrong. At the outset, in cases finding that incorporation is sufficient to delegate general

arbitrability, the agreement at least directly incorporated the set of arbitral rules containing the delegation rule. *See, e.g.*, *Cooper*, 832 F.3d at 546 (explaining that the agreement "expressly adopted the JAMS Rules," one of which states that "arbitrability disputes * * * shall be submitted to and ruled on by the Arbitrator"); *Terminix Int'l Co., LP* v. *Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005) ("By incorporating the AAA Rules, including Rule 8, into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid."). Here, in stark contrast, the agreement and the relevant delegation rule are miles apart. *See supra* pp. 30-31.

Regardless, the premise that a rule applying to general arbitrability questions arising in individualized arbitration can apply to the specific question of class arbitrability constitutes a category error. "[T]he question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *First Options*, 514 U.S. at 943. And as this Court has made clear on multiple occasions, class arbitration is fundamentally different than individualized arbitration. *See supra* pp. 22-24. "[T]he whole notion of class arbitration implicates a particular set of concerns that are absent in the bilateral context." *Chesapeake Appalachia*, 809 F.3d at 764. Indeed, "the question whether the parties agreed to classwide arbitrability is vastly more consequential than even the gateway question whether they agreed to arbitrate bilaterally." *Reed Elsevier*, 734 F.3d at 599. "An incorrect answer in favor of classwide arbitration would force parties to arbitrate not merely a single matter that they may well not have agreed to arbitrate, but

thousands of them." *Id.* (quotations marks, brackets, and citation omitted).

A rule applying to *general* arbitrability questions thus does not bear on whether there is "clear and unmistakable evidence of an agreement to arbitrate the particular question of *class* arbitration." *Catamaran*, 864 F.3d at 973 (emphasis added); *see also Chesapeake Appalachia*, 809 F.3d at 754 (identifying the issue as "whether the [agreements] clearly and unmistakably delegate the specific question of class arbitrability to the arbitrators"). Whatever the incorporation of generic arbitral rules may have to say about other arbitrability questions, such incorporation is not clear and unmistakable evidence that the parties intended an arbitrator to decide the watershed question of class arbitrability.

IV. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED.

This case presents an excellent opportunity for this Court to resolve this important question. Petitioners preserved their argument that the arbitration agreement does not clearly and unmistakably delegate class arbitrability to the arbitrator. *See* Pet. App. 87a, 18a. The Fifth Circuit squarely addressed the question presented and issued a crystal-clear holding: An arbitration agreement's "incorporation of the AAA Rules, and by extension the AAA Supplementary Rules, including one that delegates class arbitrability to the arbitrator, is clear and unmistakable evidence supporting the parties' clear intent to arbitrate the issue." Pet. App. 24a. There is no alternative ground for the Fifth Circuit's conclusion that class arbitrability is a question for the arbitrator.

This case also perfectly illustrates the consequences of permitting an arbitrator to decide class arbitrability based on anything less than clear and unmistakable evidence. The arbitration agreement at issue here is silent as to class arbitration. One arbitrator concluded that the agreement nonetheless permitted class arbitration. Another arbitrator expressly disagreed with this ruling and held that the agreement did not permit class arbitration.

Not only that, the arbitrator who found that the agreement permitted class arbitration barely engaged with the class-certification requirements, devoting "only two conclusory paragraphs" to the normally complicated question of predominance. Pet. App. 11a n.2. The arbitrator's class notice process bore no resemblance to notice for a class action under Rule 23 of the Federal Rules of Civil Procedure. The final hearing on class damages itself was an eight-hour hearing that started after 10 pm and ended around sunrise the next morning, in which the arbitrator refused to permit Petitioners to present evidence rebutting a central element of the class claims. And the damages awards issued by this arbitrator surpassed by many magnitudes the awards issued by the other three arbitrators addressing the same dispute.

The Fifth Circuit expressed concern over these procedural irregularities, which the court suggested inadequately protected "the constitutional due process rights of defendants." Pet. App. 10a n.2. But because the court concluded that the parties delegated class arbitrability to the arbitrator, the court could do nothing but rubber-stamp the arbitrator's award. *See* Pet. App. 18a. After all, as this Court has explained, when a question is for the arbitrator, the "arbitrator's

construction holds, however good, bad, or ugly." *Oxford Health*, 569 U.S. at 573.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision reversed.

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