No. 25-240

In the Supreme Court of the United States

STEWART A. FELDMAN, ET AL., PETITIONERS

v.

SCOTT SULLIVAN, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Petitioners frame this case as presenting a general question under the Federal Arbitration Act (FAA), 9 U.S.C. 1-16: whether a contract's "generic incorporation" of AAA rules delegates issues of class arbitrability to the arbitrator. Yet petitioners can adopt that framing only by wishing away the contract's operative language, which is never mentioned or reproduced anywhere in the petition.

Here is a sample of what the contract actually says: "the issue of arbitrability * * * shall be decided solely by the arbitrator and not, for example, by any court"; "[t]he parties agree * * * to divest the courts of all powers in disputes involving the parties, except to compel arbitration, and to confirm, vacate or enforce [an] award"; and "[t]he courts shall have no jurisdiction over legal or equitable (including injunctive) matters." While this language was recognized below as "[o]verarching" the dispute, it was omitted entirely from the petition.

Under its proper framing, the question presented is:

Whether these case-specific terms of a bespoke contract between sophisticated parties delegates issues of class arbitrability to the arbitrator.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioners are Stewart A. Feldman; the Feldman Law Firm LLP; Capstone Associated Services (Wyoming), Limited Partnership; Capstone Associated Services, Limited; and Capstone Insurance Management, Limited.

Respondents are 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. Each entity has no parent corporation, and no publicly held company owns 10% or more of their stock.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

INTRODUCTION

According to petitioners, this case asks whether the "generic incorporation" of AAA rules is sufficient, standing alone, to delegate the issue of class arbitrability to the arbitrator. That question bears no resemblance to the parties' actual contract. It distorts the true nature of the parties' agreement, and it attempts to shoehorn this dispute into an alleged circuit conflict that is irrelevant on these facts—as confirmed even by courts on *petitioners'* side of the putative split.

Once the contract's actual terms are unearthed, this case does not implicate any circuit conflict. It does not implicate any question of great importance. It arises in a vehicle with an astounding number of serious flaws—including jurisdictional hurdles, preservation obstacles, mootness concerns, and a massive "debacle" (petitioners' own term) of a procedural backdrop. This contract was the

product of sophisticated parties explicitly channeling *all* disputes to arbitration—including (expressly) "issue[s] of arbitrability." The contract means what it says, and petitioners fail to identify a single circuit, anywhere, that would reach the opposite conclusion on these facts. If petitioners' (artificial) version of the question presented warrants further review, the Court should await a case that actually presents that question. Petitioners cannot simply rewrite the record to make this dispute look like the suitable vehicle that it so plainly is not. The petition should be denied.

ARGUMENT

A. The Question Presented Is Not *Actually* Presented—And Petitioners Bizarrely Ignore What The Parties' Contract Actually Says

Aside from its other flaws, the petition can be denied for a simple reason: the question presented is not *actually* presented. This case does not involve a generic contract "mere[ly]" incorporating the AAA rules. Contra Pet. I, 29. This contract has an *express* delegation clause; it explicitly "divest[s]" courts of "all powers" and prohibits "jurisdiction" over "legal or equitable" issues. Pet. App. 100a. It confirms, clearly and unmistakably, that "solely" the "arbitrator"—and "*not* * * * any court"— would decide "issue[s] of arbitrability." *Ibid.* (emphasis added). And while the agreement's incorporation of AAA rules might point in the same direction, the parties could not have spoken more plainly in delegating, explicitly, gateway questions to the arbitrator.

It is baffling how this critical language appears nowhere in the petition. This language was not buried in the record below. It was the core focus of the parties' briefing (*e.g.*, C.A. Pet. Reply Br. 35-39); it was respondents' prin-

cipal argument (C.A. Resp. Br. 22-32); it was the lead basis of the district court's decision (Pet. App. 86a-87a); and it was the "[o]verarching" component of the Fifth Circuit's rationale (*id.* at 5a-6a, 15a).

This was a bespoke agreement between sophisticated parties with a specific delegation clause. It "divest[s]" courts of "all powers" over substantive decisions—"legal or equitable"—including the very arbitrability question petitioners now insist courts alone can answer. Pet. App. 100a. And it did this in clear and unmistakable language—entirely aside from the AAA incorporation clause. Petitioners' refusal to disclose this language is mystifying. The AAA rules here are the tail that wags the dog. It makes no difference how to read an agreement "mere[ly]" incorporating AAA rules (contra Pet. 29) when *this* agreement explicitly delegates the gateway question.

If petitioners wish the Court to decide whether "'incorporat[ing] AAA rules, standing alone,'" is "'enough'" (Pet. 20), petitioners must identify a contract where the AAA incorporation *stands alone*. This case does not present that operative fact pattern. Petitioners improperly invite an artificial answer to a hypothetical question, and they attempt to do so by silently rewriting the record. That might be a recipe for a DIG, but it is no justification for granting review.

1. As their sole question presented, petitioners ask whether "incorporating" AAA rules delegates the issue of class arbitrability. Pet. I, 3. But this is not a case where the parties "mere[ly]" incorporate AAA rules and that incorporation, "'standing alone,'" constitutes a delegation. Contra Pet. 20, 29. Here is what the parties' contract actually says:

*"Submission of the dispute to arbitration under this agreement shall be the sole and exclusive forum for resolving *any and all disputes* between the parties, except

for attorneys' fees for services previously rendered which are before the HBA's FDC." Pet. App. 98a-99a (emphasis added).

*"The parties agree that *the issue of arbitrability* shall likewise be decided by the arbitrator, and not by any other person. That is, the question of whether a dispute itself is arbitrable shall be decided *solely by the arbitrator and not, for example, by any court*." Pet. App. 100a (emphases added).

*"The parties agree that their intent is to *divest* the courts of *all powers* in disputes involving the parties, except to compel arbitration, and to confirm, vacate or enforce [an] award." Pet. App. 100a (emphases added).

*"The courts shall have *no jurisdiction* over *legal or equitable* (including injunctive) matters. The arbitration decision shall be final and binding in all respects." Pet. App. 100a (emphasis added).

This actual contract language appears nowhere in the petition. It is not recounted or reproduced. It is tucked away in the petition appendix without any acknowledgment whatsoever. Yet that language drove the proceedings below. It was the key focus of the parties' circuit-level briefing. C.A. Resp. Br. 22-32; C.A. Pet. Reply Br. 35-39. It was the lead basis of the district court's rationale. *Id.* at 86a-87a. And it was recognized by the panel as "[o]verarching" this dispute. Pet. App. 15a (flagging "the express intent" in the contract "drafted by [petitioners]" to "'divest the courts of all powers'").

Petitioners are free to decide how to frame their question presented. But petitioners are not free to reinvent the record. Contracts are read as a whole. Petitioners cannot simply pretend the express delegation and divestment language does not exist, nor can they artificially divorce the AAA incorporation language from everything else. Petitioners ask whether merely incorporating AAA rules

is enough. Pet. I. But this contract did not merely incorporate those rules—it expressly delegated gateway questions to the arbitrator; it expressly "divest[ed]" courts of "all powers" to decide anything—save limited tasks to *facilitate* arbitration; and it expressly barred courts from exercising "jurisdiction" over "legal or equitable" issues. Pet. App. 100a. The AAA incorporation question requires a factual backdrop where the AAA incorporation alone drives the outcome. That question is not presented on these facts—and it is as artificial and academic as it gets against *express* language delegating arbitrability and foreclosing any judicial role.

2. Nor should any of this come as a surprise to petitioners. Indeed, this express language was a focus below of *petitioners' own briefing*—where they repeatedly acknowledged these clauses and understood precisely what they do.

In fact, where it suited petitioners, they were candid in recognizing the broad delegation clause: "The contract required 'the single arbitrator' alone to decide *all issues of arbitrability* in a single arbitration." C.A. Pet. Br. 60 (section heading; emphasis added). And they were equally candid about what that necessarily meant: "[b]y delegating gateway issues of arbitrability to 'the single arbitrator,' the Arbitration Agreement 'divests' the district court of 'all powers' to interpret the contract in the first instance." *Ibid.*; see also, *e.g.*, C.A. Pet. Br. 42 (conceding the contract "provides that the arbitrator shall decide arbitrability issues").

Petitioners apparently understood the clear upshot of these clauses below. None of this has anything to do with "mere[ly]" incorporating AAA rules. Contra Pet. I, 29. It has to do with the direct, obvious import of the express language of the contract itself—language that petitioners

conspicuously omit entirely from the petition. It is astonishing for petitioners to show up in this Court without even acknowledging this distinct language. And it is too late for petitioners to do an about-face from their position below: "'When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue.'" C.A. Pet. Br. 61 (quoting *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 586 U.S. 63, 68 (2019)).

These express clauses mattered before, and they obviously still matter now. Petitioners cannot simply wish away the contract's key components to tee up an abstract legal question.[1]

3. This is all bad enough for petitioners, but it goes downhill from here. The contracting parties were not legal novices. These were sophisticated entities engaged in complex transactions. Pet. App. 3a-4a. And this was a bespoke agreement tailored specifically for this context. The drafting parties (petitioners) included a *law firm* and the

[1] In making these concessions below, petitioners separately insisted the express delegation clause must explicitly mention the words "class arbitrability"—while these express clauses (merely?) delegate *all* arbitrability issues, categorically, while divesting *all* judicial power, categorically, over legal or equitable questions. See C.A. Pet. Br. 42. If petitioners still believe there was a problem with the scope or articulation of the delegation provision, they had every right to present a *separate* question raising that issue. But petitioners here elected to focus exclusively on the AAA incorporation clause (Pet. I)—while never even *mentioning* the express delegation clause (as if it did not exist). Petitioners have accordingly forfeited that distinct question. See Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition * * * will be considered by the Court."); see also, *e.g.*, *Wood* v. *Allen*, 558 U.S. 290, 304 (2010); *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31 (1993).

counterparties (respondents) were doctors and their corporate entities mitigating risks with complex "insurance arrangements." *Id.* at 4a, 15a. The parties carefully invoked certain sets of AAA rules while rejecting others (*id.* at 99a-100a), and the parties even "modifie[d]" certain AAA rules in key respects (*id.* at 99a).

It is absurd to believe that parties aware of the different AAA rules (Pet. App. 99a), aware of the "arcane" concept of delegation (*First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 945 (1995)), aware of the limited role of courts in facilitating arbitration (Pet. App. 100a), aware how to divest courts of all other powers (*ibid.*), etc., would nevertheless have failed to *exclude* class arbitrability if that is indeed what they intended.

It thus makes little sense to ask whether the "mere" incorporation of AAA rules establishes the parties' intent. Pet. I, 29. This case looks nothing like the situation implicated by the question presented. This is not parties merely referencing AAA rules indiscriminately—and courts presuming the reference indirectly establishes the parties' intent. Compare Pet. 14-17. This contract itself establishes the parties' intent—clearly and unmistakably. Within its four corners. With abundant textual clues. There is no other way to read the agreement's actual language. The delegation clause means what it says. The clause divesting courts of "all powers" means what it says. The clause prohibiting courts from exercising "jurisdiction" over "legal or equitable" matters means what it says.

Petitioners cannot simply ignore the actual contract or rewrite the record in order to latch onto a hypothetical question with a plausible split. The question of "mere" incorporation is not presented on these facts or with this contract. Petitioners will have to await a proper vehicle if they wish to adequately present *that* question. But it is

wholly counterfactual here. And that is an obvious and sufficient basis for denying this petition.

B. There Is No Genuine Conflict Between The Decision Below And The Law Of Any Other Circuit—As Petitioners' Own Authority Confirms

1. According to petitioners, there is a 4-4 circuit conflict over the import of a "generic" AAA incorporation clause on delegating class arbitrability. Pet. 14. Yet as established above (Part A), this case does not involve a "'stand[] alone'" AAA incorporation clause (contra Pet. 20). This contract involves *express* clauses delegating arbitrability, "divest[ing]" judicial power, and barring "jurisdiction" over "legal or equitable" matters. Pet. App. 100a. There is no actual conflict on *those* facts, and not a single circuit, anywhere, would have decided this case the opposite way.

a. Contrary to petitioners' contention (Pet. 14-20), this case does not implicate any genuine circuit conflict. Each circuit on petitioners' side of the split involved solely a AAA incorporation clause. See, *e.g.*, *Chesapeake Appalachia, LLC* v. *Scout Petroleum, LLC*, 809 F.3d 746, 748-749, 761 (3d Cir. 2016) (the "'reference to the AAA rules is the only link to the submission of arbitrability issues to the arbitrator'"); see also *Catamaran Corp.* v. *Towncrest Pharmacy*, 864 F.3d 966, 969 (8th Cir. 2017) (same); *AlixPartners, LLP* v. *Brewington*, 836 F.3d 543, 547 (6th Cir. 2016) (same); *Del Webb Cmtys., Inc.* v. *Carlson*, 817 F.3d 867, 869 (4th Cir. 2016) (same); *Reed Elsevier, Inc.* v. *Crockett*, 734 F.3d 594, 599 (6th Cir. 2013) (same). Those cases accordingly asked whether incorporating AAA rules, by itself, was "'enough'" to "'wrest'" the class arbitrability "'decision from the courts.'" Pet. 16 (quoting *Reed Elsevier*, 734 F.3d at 599); see also *JPay, Inc.* v. *Kobel*, 904 F.3d 923, 941 (11th Cir. 2018) ("The Third, Sixth,

and Eighth Circuits were reviewing contracts that accomplished delegation *only* by incorporation of the AAA rules.").

Yet the contract here was *not* limited to incorporating AAA rules. Indeed, it was not even *primarily* about incorporating AAA rules. Petitioners do not identify a single circuit that would have reached the opposite conclusion on this record—where the contract contains express language delegating arbitrability and divesting courts of jurisdiction. *E.g.*, *JPay*, 904 F.3d at 941 (declaring petitioners' authority "factually different in at least one critical way"; "[n]one faced the language we have here: the incorporation of AAA rules *and an express delegation clause*") (emphasis added). Which likely explains petitioners conspicuous silence on this issue: as petitioners assuredly know, they would apparently lose under the law of every circuit to have decided the *materially relevant* question. *Id.* at 939, 941 (so explaining).

Indeed, petitioners' lead authority (*Chesapeake*, *supra*) *confirms* petitioner would lose under the law of that circuit: while incorporating AAA rules is not enough, the burden is met by "'express contractual language unambiguously delegating the question of arbitrability to the arbitrator.'" *Chesapeake*, 809 F.3d at 753. The court thus specifically found that a delegation clause—using language indistinguishable from the one here—*would* suffice to delegate class arbitrability. *Id.* at 754, 758-759; accord *JPay*, 904 F.3d at 939 ("Other circuits have also specifically found that comparable language delegated the precise question of class arbitrability."). The Third Circuit reached the opposite conclusion simply because the contract there *lacked* a delegation provision—not because it would have decided this case differently. *Chesapeake*, 809 F.3d at 761.

And the logic of every other circuit points in the same direction. These circuits confirm that arbitration is a matter of contract; the parties' intent ultimately controls; and gateway issues can be delegated if that is indeed what the parties intended. See, *e.g.*, *Catamaran*, 864 F.3d at 970, 972; *AlixPartners*, 836 F.3d at 548; *Del Webb*, 817 F.3d at 874-875; *Reed Elsevier*, 734 F.3d at 597. The contract language here confirms each of those propositions. See Pet. App. 100a (unambiguously so establishing). Petitioners never once explain how a court here could decide class arbitrability without violating the contract's express delegation of arbitrability, express "divest[ment]" of judicial power, and express bar of "jurisdiction" over "legal or equitable" questions.

If petitioners wish to establish a legitimate conflict, they need to identify courts addressing the relevant question (a contract with these features *and* a AAA incorporation clause) that reach the opposite holding. But they cannot point to materially distinguishable cases that lack this contract's core commands and suggest other courts would somehow resolve this case differently.

b. Nor should any of this (again) come as a surprise to petitioners. Respondents explained exactly the same points below: whatever circuits decide about incorporating AAA rules, "the agreements in those cases did *not* also contain explicit language that delegated the issue of arbitrability to the arbitrator." C.A. Resp. Br. 29. Indeed, petitioners have simply "fail[ed] to cite a single case holding that a court, rather than an arbitrator, should determine class arbitrability when the agreement specifically delegates the issue of arbitrability to the arbitrator." *Ibid.*

Petitioners are obviously free to disagree with respondents' position (wrong as petitioners would be). But it is perplexing for petitioners to simply ignore it—while

trotting out the same (false) claims of a genuine conflict on this materially distinct factual backdrop.

In sum: Even if circuits are divided over the meaning of a generic, standalone clause incorporating AAA rules, not a *single* circuit has come out the other way in this situation: where a contract expressly delegates all arbitrability questions and divests courts of jurisdiction. *E.g.*, *JPay*, 904 F.3d at 941; *Chesapeake*, 809 F.3d at 758-759. On the sole operative question here, there is no circuit conflict.

2. a. In any event, any alleged split is irrelevant here for an additional reason: the parties acted against settled Fifth Circuit law establishing precisely how this contract would operate. Pet. App. 18a. That "clear rule" was established for over a decade before the parties entered this contract. *Robinson* v. *J&K Admin. Mgmt. Servs., Inc.*, 817 F.3d 193, 197 (5th Cir. 2016) (tracing to 2003). When the parties chose its terms, they accordingly knew precisely what the language meant and the operative effect it would have. The default in the Fifth Circuit was clear, and that default confirmed this type of agreement would delegate class arbitrability to the arbitrator. Pet. App. 18a.

Petitioners now seek to upend that default, which reflects a fundamental misunderstanding of how the FAA and contracts operate. Here, the Fifth Circuit's default rule was firmly set (confirming delegation) years before the parties entered this agreement. It makes no difference what any other circuit would have held, or whether the Fifth Circuit's baseline is even correct. All that matters is the *default was clear*. Parties are presumed to know the default in drafting the agreement (see *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 674 n.5 (2010); *First Options*, 514 U.S. at 946), and they are expected to *modify* that default if they prefer other terms.

E.g., *Terminix Int'l Co.* v. *Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1333 (11th Cir. 2005).

The FAA has no preference whether parties arbitrate or not (or delegate or not). *Morgan* v. *Sundance, Inc.*, 596 U.S. 411, 419 (2022). The FAA is designed to simply enforce contracts according to their terms. *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 506 (2018). When those terms assume preexisting meaning under settled circuit law, there is no basis for upsetting them: even if this Court were to adopt a different rule for other circuits, it would have no basis for imposing that rule on a prior contract defined by preexisting regional law. And that law here confirms the contract means what it says: the parties affirmatively intended all gateway issues, including class arbitrability, to be resolved by the arbitrator. Even if establishing a contrary baseline makes sense in other contexts, it would have no bearing here.

b. Nor is there any genuine doubt the parties were aware of settled Fifth Circuit authority. Class arbitrability is not some obscure issue buried in fine print. It has been a consistent and prominent focus of judicial attention (including in this Court) long before this contract. *Oxford Health Plans LLC* v. *Sutter*, 569 U.S. 564, 566, 569 n.2 (2013); *Stolt-Nielsen*, 559 U.S. at 666, 668-669. It was called to the public's attention in a two-Justice concurrence in the relevant period. *Oxford Health*, 569 U.S. at 574-575 (Alito, J., concurring). It was resolved in Fifth Circuit binding precedent a good decade before this contract was drafted. *Robinson*, 817 F.3d at 197. And it was a key feature of the AAA's supplemental rules years before these parties hand-picked a targeted set of AAA provisions—to which those supplemental rules indisputably apply.

It is inconceivable that the parties were unaware of this issue or the default baseline in the Fifth Circuit—

where the contract would be enforced. These parties were sophisticated. They drafted their own tailored agreement (with petitioners—who are legal experts—holding the pen). They displayed detailed knowledge of the AAA's rules. They understood (and embraced) the "arcane" concept of delegation. *First Options*, 514 U.S. at 945. They specifically limited judicial "power" to the classic acts facilitating arbitration—while explicitly barring everything else. Pet. App. 100a.

Simply put: the parties were on clear notice of the effect of incorporating AAA rules. Not only did they refuse to modify that settled baseline, but they doubled-down—reaffirming delegation in express language and divesting courts of "all powers." Pet. App. 100a. It accordingly makes no difference whether the Fifth Circuit's position is correct or not—or what any other circuit might think. These parties contracted against a clear backdrop establishing the meaning and effect of the unambiguous terms chosen for this very contract. That shared understanding necessarily controls—even if it might not control for parties in other jurisdictions.[2]

This case presents no occasion for deciding a legal rule (the effect of AAA incorporation) that has no conceivable application to these proceedings. That is reason alone for denying review.

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[2] This incidentally refutes petitioners' concerns that "[a]rbitration defendants in New York and Texas" might face "different rules" than "arbitration defendants in New York and Michigan." Pet. 24. The short answer: sophisticated defendants—especially those companies "us[ing] the same arbitration agreement nationwide"—will state their intent in express terms, just as the parties did here. And it is the rare "national compan[y]" with "nationwide" operations (Pet. 27) that is unaware of the controlling regional law, fails to usher disputes into specific venues (via forum-selection clauses), or neglects to address delegation expressly when crafting an arbitration provision for global use.

C. This Case Is An Exceptionally Poor Vehicle On Every Possible Level

Petitioners insist this is an "ideal" vehicle (Pet. 34-36), which is bewildering. This is the worst possible vehicle under any objective measure. It sets off each of this Court's major alarms: (i) it has an unacknowledged (at least in this Court) alleged jurisdictional defect; (ii) the question presented was not clearly preserved before the arbitrator(s); (iii) a now-pending arbitration may moot these proceedings entirely—at petitioners' own urging; and (iv) the absurd proceedings below left a disaster of a record and procedural backdrop, including the possibility that parts of the record are missing.

It becomes easy to lose count of the reasons for denying this petition. But each serious vehicle defect is a good place to start.

1. Petitioners advanced a predicate jurisdictional attack below (which they fail to acknowledge here), and this Court cannot reach the question presented without first confronting that latent jurisdictional question.

At each stage below, petitioners contested jurisdiction on diversity grounds. But not any usual diversity grounds. Petitioners mounted a complex, multiprong attack alleging the citizenship of a non-party destroyed diversity—and separately that the non-party's interests were in fact before the court. See C.A. Doc. 228-1.[3]

Petitioners asserted their theory (in various forms) at each stage below. *E.g.*, C.A. Doc. 159 at 4-5. Petitioners even obtained leave to file supplemental briefing devoted exclusively to this alleged jurisdictional defect. See C.A.

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[3] Short version: This entity was a party to the arbitration awards but not a party to the confirmation proceedings; since a confirmation order would theoretically affirm the entire award, the non-party's interests were potentially implicated. See, *e.g.*, C.A. Resp. Supp. Br. 1-2 (summarizing arguments).

Doc. 228-1. The parties traded extensive filings (28 pages and 21 pages, respectively), where petitioners raised five sub-arguments (see C.A. Pet. Supp. Br. vii), insisting respondents "manipulate[d] subject-matter jurisdiction" and "[t]he record on appeal disproves diversity jurisdiction." *Id.* at 18, 21. Petitioners again featured these theories at oral argument (https://tinyurl.com/feldman-ca5-argument).

The Fifth Circuit ultimately (and respondents believe correctly) rejected petitioners' jurisdictional arguments. See Pet. App. 13a-14a n.4. But it did so in a single footnote that failed to grapple with petitioners' detailed contentions. So it does little to serve as a shortcut to this Court independently working up the issue.

Petitioners may have a transparent interest now to sweep their past jurisdictional objections under the rug. But subject-matter jurisdiction is a predicate question; it cannot be assumed or waived (*United States* v. *Cotton*, 535 U.S. 625, 630 (2002); *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998)), and "courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party" (*Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514 (2009)). This issue thus stands as a direct obstacle to deciding the question presented. Nor is this obstacle worthy of the Court's time: this embedded question invites a case-specific morass promising fact-bound holdings, including a complex examination of the non-party's role and status in these "riotous[]" proceedings (Pet. App. 12a).

There is no reason for this Court to endure that pointless task when it could instead await a proper vehicle (where jurisdiction is clear) presenting the AAA incorpo-

ration question—should that question merit further review at all. This is a sufficient basis for denying this petition.

2. Even if petitioners can surmount their own jurisdiction hurdle, they still need to confirm they preserved the question presented at each stage below. And petitioners again ignore the clear factual dispute whether this issue (delegating class arbitrability) was properly raised before the arbitrators.

The parties traded dueling letters under Fed. R. App. P. 28(j) debating this point (see C.A. Docs. 263, 265, 267), which was never clearly resolved by the Fifth Circuit. And the limited record available suggests petitioners flunked the preservation standard: while they clearly objected to class arbitration (C.A. Doc. 263 at 2), they did not clearly object to the arbitrator's right to *decide* whether the parties agreed to class arbitration. See, *e.g.*, C.A. Doc. 265 at 2. Contesting class arbitration is not the same as contesting a delegation of class arbitrability; the two issues are distinct. And petitioners only identified a single sentence (in the entire sprawling proceeding) even possibly lodging the correct objection.

This Court should not waste its time wading through a massive record to determine whether the question presented was even preserved—especially when petitioners failed to address this issue upfront in their petition.

3. As yet another problem, the proceedings below are not even final and the question presented could become moot.

As petitioners admit, "[t]he parties are also engaged in an ongoing arbitration proceeding to resolve the inconsistencies across the awards." Pet. 13 n.3. What petitioners are more reluctant to admit: that pending arbitration could moot their petition. In that remaining arbitration,

petitioners have urged the arbitrator to resolve the conflict between the awards by rejecting class arbitration. If petitioners succeed in that effort, the class-arbitration award could disappear—potentially mooting whether the *arbitrator* should decide class arbitrability. This potential landmine itself dooms this case as a suitable vehicle.

4. It is finally a mystery why petitioners believe proceedings characterized as "'the *Bleak House* of arbitration'" (Pet. App. 6a) could possibly be an appropriate vehicle for review. There was nothing short of mass confusion below. The case involves multiple conflicting arbitrations. The district court confirmed *four* separate awards—all of which are inconsistent in various respects. One arbitrator authorized class arbitration while another rejected it—and yet another arbitrator is now potentially confronting which of those rulings is correct (Pet. 13 n.3).

This "riotous[]" backdrop is the polar opposite of a clean vehicle. Pet. App. 12a. The appellate record contains "over 40,000 pages and 131 volumes." C.A. Pet. Br. 8. Petitioners themselves describe the proceedings as a "debacle" and "extreme"—with "the facts border[ing] the absurd." *Id.* at 1-2. Indeed, petitioners were forced to include a "chart" in their own brief to summarize the *district court's* "chart" making sense of the conflicting awards. *Id.* at 25. And the parties could not even agree below whether the record was missing documents. See C.A. Doc. 265 at 2.

This bizarre situation is about as distorted and confusing as it gets. If the Court wishes to review the AAA incorporation issue, it should await a single case (and a single arbitration) where the parties cleanly dispute the delegation question. There is no reason for the Court to sprint headfirst into an endless morass.

D. Petitioners Overstate The Issue's Limited Importance

1. Petitioners overstate the issue's marginal significance. Parties can always contract around the default baseline—and anyone aware of the "arcane" concept of delegation will assuredly be aware of the issue of class arbitrability. See *First Options*, 514 U.S. at 945. The parties here were sophisticated actors with deep and obvious knowledge of the AAA rules and the arbitration process. There is zero realistic danger that class arbitrability (with its significant implications) was their single blind spot.

And to the extent petitioners' true concern involves less-sophisticated parties using "boilerplate" agreements (Pet. 26-27), the answer is simple: await a case involving those parties and those agreements. If petitioners are correct about the issue's recurrence (*id.* at 25-27), this Court will not have to wait long. But this case, with its bespoke agreement, is the wrong backdrop to decide the meaning of an unadorned, standalone AAA incorporation clause.

2. The bulk of petitioners' remaining concerns target the potential costs of class arbitration. See Pet. 22 ("class arbitration is 'slower, more costly, and more likely to generate procedural morass'"). Petitioners are confused: the question presented is not whether class arbitration is permitted—but who *decides* class arbitrability. And the primary disadvantages of class arbitration have nothing to do with delegating the arbitrability question.

The arbitrability question is simply another question of contract interpretation. *Coinbase, Inc.* v. *Suski*, 602 U.S. 143, 148 (2024); *Henry Schein*, 586 U.S. at 67-68; *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 68-70 (2010). It is performed by a single arbitrator swiftly and efficiently. It does not involve class discovery, increased costs, prolonged proceedings, reduced privacy, etc.—though involving the courts undoubtedly would. And an

arbitrator is just as capable of reading a contract to decide whether the parties agreed to class arbitration as the arbitrator is capable of reading that same contract to decide anything else—including contract claims, tort claims, statutory claims, constitutional claims, etc.[4]

Petitioners' only response is a direct attack on the FAA itself. Congress's core purpose was to reverse undue hostility and distrust regarding arbitration. *E.g.*, *Epic Sys.*, 584 U.S. at 505. Petitioners' entire submission is a broadside assault on the ability of an arbitrator to fairly decide class arbitrability—believing courts alone will get it right. The FAA was enacted precisely to reject that very logic. It repudiates the proposition that only courts will faithfully apply this Court's rules regarding class arbitrability. *Ibid.* And if there is no basis for class arbitration in a parties' contract, there is every reason to believe that courts and arbitrators alike will reach that conclusion.

In short, there is no clear path to adopting petitioners' theory without flouting decades of precedent disavowing petitioners' apparent distrust of arbitration. That is a strong reason for denying the petition and no reason to grant it.

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[4] Petitioners offer an extended series of complaints with how the class arbitration was allegedly conducted here. Pet. 35. None of that has anything to do with the question presented. It does not even have to do with the propriety of class arbitration—it has to do with how that case-specific class arbitration was conducted in this single instance. That is multiple steps removed from anything even remotely relevant to the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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