No. 25-240

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The Fifth Circuit's decision articulated the precise question the court was answering: Does the "mere incorporation" of standardized arbitration rules "constitute[] sufficiently clear and unmistakable evidence that the parties *intended* to delegate class-wide arbitrability to the arbitrator"? Pet. App. 18a. The court's answer was a reluctant "yes," based on

circuit precedent making the Fifth Circuit "an outlier on the far side of" a circuit split. Pet. App. 23a.

Just so. There is an entrenched eight-circuit split on the answer to this question. The question is important and recurring. And it implicates the beating heart of this Court's arbitration jurisprudence: that arbitration, especially class arbitration, is a matter of consent, not coercion.

Respondents have no serious response to any of this. They insist that—despite what the Fifth Circuit said—the "mere incorporation" question is not presented and the split is not implicated. Respondents' position largely boils down to an assertion that the Fifth Circuit *could* have answered a *different* question, based on *different* provisions in the arbitration agreement, and that *if* it had done so, there would be less need (in Respondents' telling) for this Court's review. That approach is impossible to square with the decision below, and it is also waived. Respondents invited the Fifth Circuit to rule based solely on the agreement's incorporation clause, and the Fifth Circuit did exactly that.

None of Respondents' other arguments move the needle. Their refrain—that parties can expressly contract around a default rule that incorporation delegates class arbitrability—fails several times over. Respondents' attempts to undermine this case as a vehicle similarly collapse: There is no jurisdictional issue, the question presented is preserved, Respondents' position below ensures that this case will not become moot, and the material facts are as straightforward as they can be.

The petition should be granted.

ARGUMENT

I. RESPONDENTS DO NOT DEFEND THE DECISION BELOW.

A. Respondents call it "mystifying," "baffling," "astonishing," and "perplexing" (at 2, 3, 6, 10) that Petitioners asked this Court to resolve whether the mere incorporation of arbitration rules in an arbitration agreement is clear and unmistakable evidence that the parties intended to delegate the question of class arbitrability to an arbitrator.

Respondents should put down the thesaurus and pick up the decision below. In the first sentence of the opinion's pertinent section, the Fifth Circuit held that "[t]he Engagement Letter'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 (first emphasis added). That section's final sentence is just as clear: "[T]he Engagement Letter'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. The entirety of the analysis between those two crystal-clear holdings concerns *Work* v. *Intertek Resource Solutions, Inc.*, 102 F.4th 769 (5th Cir. 2024), which had "held that an arbitration agreement's incorporation of a generic rule can be sufficiently clear and unmistakable * * * to delegate class arbitrability inquiries to the arbitrator." Pet. App. 18a.

The district court's decision similarly focused on the incorporation clause. It held that the agreement "placed the determination of issues regarding arbitrability solely within the discretion of the arbitrator" because "[t]he Agreement incorporates the AAA rules for arbitration." Pet. App. 86a-87a (citation omitted).

Respondents seek to wish away the basis for the decisions below, but as this Court recently explained, when "the decisions below applied a rule," that rule is what this Court "must address." *Barnes* v. *Felix*, 605 U.S. 73, 83 (2025). Because the decisions below expressly applied a "mere incorporation" rule, the propriety of that rule is directly presented.

B. Respondents' arguments against granting certiorari do not defend the decision below, do not mention the language in the decision quoted above, and do not cite *Work*, which the panel felt "bound" to apply as circuit precedent. Pet. App. 24a. The opposition ignores the section of the petition explaining why the decision below is wrong. *See* Pet. 29-34. Beyond a passing reference (at 11), it does not even cite the opinion's pertinent pages (Pet. App. 18a-24a). All of this is a tell that the Fifth Circuit's actual decision involves a deep split on an important issue—and is wrong on the merits.

Respondents try to reinvent the record, but here is what happened. On appeal, the parties disputed whether the incorporation clause constituted clear and unmistakable evidence of the parties' intent to delegate class arbitrability and also disputed the relevance of general delegation language in the agreement. *See* C.A. Pet. Br. 42-47; C.A. Resp. Br. 24-36. Respondents told the Fifth Circuit that these two

questions were distinct. In Respondents' words, "the arbitration agreement's incorporation of the AAA's Commercial Arbitration Rules constitutes a second, *independent* basis for finding that class arbitrability was delegated to the arbitrators." C.A. Resp. Br. 32 (emphasis added); *see id.* at 24 (same). Hewing to their framing of these questions as independent, Respondents did not mention any general delegation language in arguing for affirmance based on the agreement's incorporation of the AAA rules. Both courts below followed suit; neither the Fifth Circuit nor the district court mentioned any other provision when holding that the agreement clearly and unmistakably delegated class arbitrability to the arbitrator. *See* Pet. App. 18a-24a, 86a-87a.

Respondents' assertion (at 3-4, 6-7) that the "who decides" question should not be resolved based just on the incorporation clause is therefore waived. Having invited the Fifth Circuit to "divorce the AAA incorporation language from everything else," Opp. 4, and to apply a mere-incorporation rule, Respondents cannot now argue that the Court should not review a decision in which the Fifth Circuit accepted Respondents' invitation and agreed with them.[1]

The random snippets that Respondents cite from the record cannot obscure that the question presented is directly rooted in the Fifth Circuit's decision. They

[1] To the extent Respondents contend that other provisions are alternative grounds on which the Fifth Circuit could have ruled, that is no barrier to this Court's review. *See, e.g.*, *Barnes*, 605 U.S. at 84; *Mallory* v. *Norfolk S. Ry. Co.*, 600 U.S. 122, 127 n.3 (2023). And Respondents are wrong to suggest (at 6-7) that this Court's precedents on the delegation of arbitrability apply differently depending on the parties' sophistication.

give great weight (at 3-4) to the Fifth Circuit's statement that, "[o]verarching this discussion is the express intent * * * 'to divest the courts of all powers in disputes involving the parties, except to compel arbitration and confirm, vacate or enforce the award.'" Pet. App. 15a. But the "discussion" this intent "[o]verarch[ed]" involved three distinct issues, only one of which was the delegation question. Pet. App. 14a-15a. And when resolving *that* question, the court did not harken back, at all, to this consideration.

Respondents also invoke (at 5-6) some of Petitioners' lower-court arguments. But those arguments were in connection with a distinct issue—whether the contract required a single arbitrator to decide delegated issues of arbitrability. *See* C.A. Pet. Br. 60-62. As Respondents admit (at 6 n.1), Petitioners' position on the "who decides" question has been consistent: Language referring *generally* to delegating arbitrability does not constitute clear and unmistakable evidence of the parties' intent to delegate *class* arbitrability. *See* Pet. 32-33; C.A. Pet. Br. 42-43.

II. THE CIRCUITS ARE SPLIT.

Respondents do not dispute that the circuits are intractably split over whether the generic incorporation of arbitration rules constitutes clear and unmistakable evidence of intent to delegate class arbitrability to an arbitrator. *See* Pet. 14-20. As the decision below explains, eight circuits "disagree" on this issue: The Third, Fourth, Sixth, and Eighth are on one side, and the Second, Tenth, Eleventh, and Fifth—as a self-professed "outlier"—are on the other. Pet. App. 21a. This Court's review is warranted.

A. Respondents argue (at 8) that this case does not implicate the split because this case—unlike those from the Third, Fourth, Sixth, and Eighth Circuits—does not "involve[] solely a AAA incorporation clause." That argument fails for the reasons just discussed. *See supra* pp. 3-5. Just as those courts asked "whether incorporating AAA rules, by itself, was 'enough' to 'wrest' the class arbitrability 'decision from the courts,'" Opp. 8 (citation omitted), the Fifth Circuit here asked whether the "mere incorporation of the AAA Commercial Arbitration Rules" was enough to "delegate class-wide arbitrability to the arbitrator," Pet. App. 18a.

Respondents' argument contradicts both the Fifth Circuit's decision and their own argument below. In inviting the court to resolve this case based solely on the incorporation clause, Respondents urged the court to reject the "cases in the Third, Fourth, Sixth, and Eighth Circuits" in favor of cases from "the Second, Tenth, and Eleventh Circuits." C.A. Resp. Br. 35. Respondents thus not only recognized that this case implicates the split; they also picked a side.[2]

B. Given how the Fifth Circuit resolved this case at Respondents' urging, it makes no difference whether

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[2] Although Respondents noted below that the agreements in the Third, Fourth, Sixth, and Eighth Circuit "cases did *not* also contain explicit language that delegated the issue of arbitrability to the arbitrator," Opp. 10 (quoting C.A. Resp. Br. 29), Respondents did so in support of their independent argument that the Fifth Circuit could resolve the appeal based on the agreement's general delegation language, *see* C.A. Resp. Br. 29. Respondents separately urged the Fifth Circuit to follow the Second, Tenth, and Eleventh Circuits and rule in their favor based on a mere-incorporation rule. *See id.* at 35-36.

the Third, Fourth, Sixth, and Eighth Circuit decisions in the split involved arbitration agreements with some other potentially relevant provision. *Contra* Opp. 9-10. In any event, Respondents' bold assertion (at 9) that Petitioners would "lose under the law of every circuit"—on this separate issue not addressed by the Fifth Circuit—is baseless.

At the outset, Respondents notably cite no case arising in any of these circuits where the court *actually* reached the ruling Respondents say those courts would reach. Respondents can only speculate.

And it is poor speculation at that. The logic driving the Third, Fourth, Sixth, and Eighth Circuits' decisions is that silence or ambiguity about who decides the "specific question" of class arbitrability is not clear and unmistakable evidence of an intent to delegate that issue. *Chesapeake Appalachia, LLC* v. *Scout Petroleum, LLC*, 809 F.3d 746, 754, 759 (3d Cir. 2016); *see Catamaran Corp.* v. *Towncrest Pharm.*, 864 F.3d 966, 972-973 (8th Cir. 2017); *Reed Elsevier, Inc. ex rel. LexisNexis Div.* v. *Crockett*, 734 F.3d 594, 599 (6th Cir. 2013); *Del Webb Cmtys., Inc.* v. *Carlson*, 817 F.3d 867, 877 (4th Cir. 2016). Petitioners win under that logic. The decision below illustrates as much: The Fifth Circuit ruled against Petitioners because the panel was "bound by" (mistaken) circuit precedent concluding that a provision that was "enough to delegate *general* arbitrability" was also enough to delegate *class* arbitrability. Pet. App. 23a-24a (emphasis added); Pet. 32-33.

Respondents misread the Third Circuit's *Chesapeake Appalachia* decision in arguing otherwise. Opp. 9. The case did not turn on the absence of a general delegation provision; the Third Circuit merely

mentioned the omission as part of a laundry list of things the agreements "do not expressly mention." 809 F.3d at 758. It is therefore unsurprising that Petitioners cite no case from the Third Circuit cabining *Chesapeake Appalachia* this way. *JPay, Inc.* v. *Kobel* is no answer: The Eleventh Circuit could only speculate about what the Third Circuit "probably" would have done. 904 F.3d 923, 941 (11th Cir. 2018).

C. Respondents are doubly wrong in their effort to brush away "any alleged split [a]s irrelevant" on the theory that "the parties acted against settled Fifth Circuit law" when entering this agreement. Opp. 11.

First, the Fifth Circuit did not resolve whether the incorporation of arbitration rules clearly and unmistakably delegates class arbitrability until *after this case was argued*. *See* Pet. App. 18a-19a (citing *Work*). The parties therefore could not have been "on clear notice of the effect of incorporating AAA rules" at the time they entered into this agreement. Opp. 13. Respondents can suggest otherwise (at 11, 12) only by citations to earlier cases analyzing general arbitrability delegations, *see Robinson* v. *J&K Admin. Mgmt. Servs., Inc.*, 817 F.3d 193, 197 (5th Cir. 2016), not the effect of incorporating arbitration rules.[3]

Second, Respondents' contract-around argument does not negate the split. If the "baseline," Opp. 12, in some circuits requires parties—sophisticated or not—to expressly reserve class arbitrability for the court when incorporating generic arbitration rules, and the

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[3] On top of that, *Robinson* was issued before the Fifth Circuit recognized class arbitrability as a gateway question and before this Court "admonished in *Lamps Plus* that ambiguity as to class arbitrability is insufficient." Pet. App. 22a.

baseline in other circuits does not, then the same contract means different things in different circuits. That is a circuit split.

III. THE QUESTION PRESENTED IS IMPORTANT, PREVALENT, AND RECURRING.

The petition articulated the importance, prevalence, and recurrence of the question presented in the lower courts. Pet. 21-28. Respondents dispute only its importance. Their objection misses the mark.

The answer to "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 of Chi.* v. *Kaplan*, 514 U.S. 938, 942 (1995). This is especially true when the question is *class* arbitrability, which exposes the defendant to proceedings that are utterly unlike the bilateral arbitration "envisioned by the FAA," *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 351 (2011), and that Members of this Court have worried harbor a "fundamental flaw," *Oxford Health Plans LLC* v. *Sutter*, 569 U.S. 564, 574 (2013) (Alito, J., concurring).

Respondents incorrectly portray the question as unimportant because "[p]arties can always contract around the default baseline." Opp. 18. "[T]he fact that the parties to a contract can contract around a legal impediment does not dissolve" the underlying issue. *Chrysler Corp.* v. *Kolosso Auto Sales, Inc.*, 148 F.3d 892, 894 (7th Cir. 1998) (Posner, J.). Moreover, if parties are going to contract around the default baseline, they need to know what the default baseline *is*, particularly for national companies whose

arbitration clauses may be enforced in multiple circuits. *Cf. Norfolk S. Ry. Co.* v. *Kirby*, 543 U.S. 14, 36 (2004). Finally, requiring parties to displace a default mere-incorporation rule flips "the strong pro-court presumption" applying to arbitrability questions on its head. *Howsam* v. *Dean Witter Reynolds*, 537 U.S. 79, 85-86 (2002); *see* Pet. 31-32.

Respondents contend (at 18) that "the primary disadvantages of class arbitration have nothing to do with delegating the arbitrability question." That is wrong. As the Third and Eighth Circuits have recognized, "the fundamental differences between bilateral arbitration and class arbitration as well as the serious consequences of permitting a class arbitration proceeding to go forward" bear directly on the delegation question. *Chesapeake Appalachia*, 809 F.3d at 764; *accord Catamaran*, 864 F.3d at 973. After all, a wrong answer on delegation vitiates the parties' expectations and opens the door to an arbitrator's effectively unreviewable decision holding that class arbitration—with all its risks and burdens—is permitted. Pet. 21-24.

Petitioners' position is not that "courts alone will get it right." Opp. 19. It is that only parties who clearly and unmistakably intend to have an arbitrator answer the momentous question of whether class arbitration is permitted should have an arbitrator answer that question. That position is entrenched in this Court's precedents. *See* Pet. 21-24, 29-30.

IV. THERE IS NO VEHICLE ISSUE.

This case is an ideal vehicle. Petitioners preserved this issue below, the Fifth Circuit resolved it, and the Fifth Circuit did not ground its decision in any

alternative holding. Pet. 34. The only things that are "bewildering," Opp. 14, are Respondents' contrary arguments.

Respondents contend (at 14) that a "latent jurisdictional question" blocks review. That is incorrect. The Fifth Circuit rejected Petitioners' jurisdictional argument on the ground that "diversity of citizenship is complete because" Respondents "are all citizens of Louisiana or Delaware while none of" Petitioners are. Pet. App. 13a-14a n.4. Petitioners do not dispute that, and Respondents agree (at 15) with that holding. The mere fact that a lower court rejected a jurisdictional argument is no barrier to review.

Respondents say (at 16) that a "factual dispute whether this issue (delegating class arbitrability) was properly raised before the arbitrators" precludes this Court's review. Wrong again. An issue is preserved for this Court's review when it is "pressed or passed upon in the courts below." *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). Each alternative is met. Pet. App. 18a, 86a-87a; C.A. Pet. Br. 44-47.[4]

Respondents' suggestion (at 16) that the "pending arbitration" "could moot the[] petition"—because Petitioners might prevail there—misses the forest for the trees. Respondents have made clear that they will challenge any arbitral decision favorable to Petitioners as illegitimate on the ground that the arbitrator cannot resolve which of the four earlier

[4] Petitioners also preserved this issue at the arbitration stage. *See* C.A. Doc. 263, 267. And the Fifth Circuit implicitly resolved any preservation issue by reaching the merits. Pet. App. 18a-24a.

arbitration awards are enforceable—meaning there will be continued proceedings in the district court (and possibly beyond) and no chance of final resolution before this Court can rule. Regardless, Petitioners specifically requested that the arbitrator not issue a decision before this Court rules, and even if the arbitrator did, that would not be the end.

Respondents finally worry (at 17) about the record's size. But the only portion of the record that matters is the incorporation clause—a tidy dozen words or so. *See* Pet. App. 99a; Pet. App. 18a-24a. The "multiple conflicting arbitrations," Opp. 17, illustrate the consequences of leaving class arbitrability to arbitrators without clear and unmistakable evidence of the parties' intent to do so. Pet. 35-36.

CONCLUSION

The petition should be granted and the decision reversed.

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