No. 18-319

In The
Supreme Court of the United States

E. & J. GALLO WINERY, a California corporation; STAR H-R, INC., a California corporation,

Petitioners,

v.

REFUGIO ARREGUIN,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, First Appellate District

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court possess jurisdiction to review a state court's interlocutory appellate ruling that will not result in class arbitration unless and until further judicial proceedings occur and thus is not a "final judgment" under 28 U.S.C. § 1257(a)?

2. Does the implied preemptive effect of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, require California state courts to usurp the role of the arbitrator to decide whether the agreement's contractual language indicates the parties' intent to permit class or collective arbitration, when the arbitration agreement contains an express delegation clause that specifically authorizes the American Arbitration Association to resolve all claims and disputes relating to the interpretation of the agreement?

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INTRODUCTION

Petitioners E. & J. Gallo Winery and Star H-R, Inc. ask this Court to use this case to settle any disagreement among lower courts about whether determining if an arbitration agreement permits class arbitration is a "gateway issue" presumptively for a court to decide. But whether class arbitration is a gateway issue does not by itself determine who decides it, as all the federal appellate courts agree that an arbitration agreement can delegate the issue to the arbitrator.

Petitioners ignore that question even though there are persuasive indications that the Agreement in this case delegates the class arbitration issue to the arbitrator sufficiently clearly to require arbitration of that issue even if it is a gateway issue otherwise reserved for decision by a court. Because that issue was not fully developed in the lower courts, and because whether the specific Agreement in this case delegates the class arbitration issue to the arbitrator is a fact-bound issue that Petitioners do not assert merits review by this Court, the question whether the lower court in this case erred by referring the class arbitration issue to the arbitrator does not merit review in this case.

In the interlocutory decision below, the California Court of Appeal enforced an arbitration agreement ("Agreement") over Respondent-Plaintiff Refugio Arreguin's asserted contractual defenses. In so holding, the intermediate state court reversed the trial court's order invalidating the Agreement on state-law unconscionability grounds. The appellate court referred all

disputes between the parties, including the availability of class procedures, to arbitration.

The Agreement contains both a clause broadly delegating all contractual issues for the arbitrator's decision and a choice-of-law designating that the parties will be subject to employment rules provided by the American Arbitration Association ("AAA"). Under AAA's Supplementary Rules for Class Arbitration ("Supplementary Rules"), which are applicable to all potential class proceedings under AAA rules, the arbitrator conducts a proceeding on "clause construction" to determine whether there is a contractual basis for Mr. Arreguin to proceed with his putative class claims in arbitration. Supplementary Rule 3 provides that, following the arbitrator's interim award on clause construction, an automatic thirty-day stay will be triggered permitting any party to move the trial court to vacate or confirm the interim award.

California law allows for an immediate appeal of an order vacating an arbitration award or a judgment following the confirmation of an arbitration award. Cal. Code Civ. Proc. § 1294(c) & (d). Because additional appellate proceedings are likely whichever way these issues are resolved, the intermediate state court's interlocutory decision is not a final judgment. This Court therefore lacks jurisdiction under 28 U.S.C. § 1257(a).

Even if this Court had jurisdiction, this case would not merit review. Because this case originates from a state court, and disagreement continues on this Court

over whether the Federal Arbitration Act ("FAA") even applies in state courts, a case from a state court provides a poor vehicle for resolving issues concerning the proper interpretation of the FAA. 9 U.S.C. §§ 1 *et seq*.

In any event, resolving the FAA question Petitioners pose would not suffice to decide this case. Petitioners contend that the appellate court's decision referring all disputes to arbitration provides a convenient vehicle for this Court to review the California Supreme Court's decision in *Sandquist v. Lebo Automotive, Inc*., 1 Cal. 5th 233 (2016), which, in turn, provides this Court with the opportunity to revisit the plurality opinion in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). The asserted urgency of review is brought on by what Petitioners characterize as a circuit split on the "who decides" issue.

Even assuming that a circuit split exists, the decision below does not present facts that would resolve it. Importantly, the Agreement, translated from a Spanish-language agreement provided to Mr. Arreguin, contains a broad clause that clearly and unmistakably delegates all issues regarding the Agreement, including its enforceability, to the arbitrator. And, by specifying that AAA rules apply, the Agreement *further* delegates decisions regarding the availability of class proceedings to the arbitrator. Having both a broad delegation clause *and* incorporation of the AAA rules is what distinguishes this case from other cases that have examined the "who decides" issue and makes it inappropriate for certiorari.

While Petitioners assert that the decision below conflicts with four federal circuits—the Third, Fourth, Sixth and Eighth—that have held that the availability of class procedures is presumptively a "gateway" issue for the court, each of these courts of appeals also holds that a valid delegation clause would be sufficient to overcome that presumption, clearing the way for an arbitrator's decision on the class issue. None of those cases addressed the type of agreement at issue here, which contains a broad provision sending all matters of contract to arbitration. Moreover, the clause incorporating AAA rules, standing alone, would be sufficient to delegate the availability of class procedures to the arbitrator in three federal circuits.[1] As this Agreement contains a valid delegation clause, the decision sending the class issue to arbitration is entirely consistent with these circuits' decisions.

Moreover, Petitioners' claim that the decision below was decided incorrectly is wrong on the merits. Under this Court's jurisprudence, the overarching question is whether the parties agreed to submit the matter for arbitration. Here, the delegation clause, together with the incorporation of AAA rules, evinces the parties' clear intent to have all matters, including all

[1] The incorporation of AAA rules would be sufficient to delegate the issue to the arbitrator in the Second, Tenth and Eleventh Circuits. To the extent there may be disagreement among the federal courts over exactly what language suffices to delegate the class arbitration issue to the arbitrator, that question would be better decided in a case that squarely presents that issue as well as the threshold question of whether the class arbitration issue is a gateway issue.

contractual issues such as arbitrability, to decision by the arbitrator. The incorporation of AAA rules, standing alone, is sufficient to delegate the class issue to the arbitrator.

In short, Petitioners overreach in seeking to have this Court reach out to an unpublished state intermediate court decision, involving an express delegation clause and designation of AAA rules, as the vehicle to reconsider and abrogate the *Bazzle* plurality opinion (that did not involve consideration of either clause). The petition should be denied.

STATEMENT OF THE CASE

1. Star H-R, Inc. ("Star") is the labor contractor that handles the hiring of temporary and seasonal employees for E. & J. Gallo Winery ("Gallo") (collectively "Petitioners"). Petitioners' Appendix ("Pet. App.") 1a.

2. On August 5, 2013, Respondent Arreguin presented at a Star office and applied for a job. Pet. App. 2a, 26a-27a. Star handed him a packet, which he had to complete on-site in order to get an interview. *Id.* In the packet was an arbitration agreement ("Agreement"), written in Spanish, which provided "that all disputes that may arise out, or be related to my employment, be arbitrated under the National Rules for the Resolution of Employment Disputes of the American Arbitration Association ['AAA'] in San Francisco." Pet. App. 31a.

3. The Agreement did not expressly forbid the arbitration of class or representative actions. According to the AAA rules that were incorporated into the arbitration agreement, "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." AAA Employment Arbitration R. 6(a). The rules further provide that "[t]he Supplementary Rules for Class Arbitrations ("Supplementary Rules") shall 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 to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules."[2] *See* AAA Supp. Rule 1. The Supplementary Rules in turn provide that "the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration class permits the arbitration to proceed on behalf of or against a class (the 'Clause Construction Award')." *Id*.

4. Prior to signing the documents in the preemployment packet, Mr. Arreguin asked the Star employee about the arbitration agreement, but he was told no one could answer his questions. Pet. App. 2a, 26a-27a. Indeed, nobody during the hiring process explained anything about arbitration to Mr. Arreguin, he

[2] The Supplementary Rules for Class Arbitration can be found on the AAA website: <https://www.adr.org/sites/default/files/Employment%20Rules.pdf>.

was never shown a copy of the AAA rules incorporated into the arbitration agreement, nor was he allowed to keep a copy of the arbitration agreement so that he could have reviewed it or have someone explain the terms to him later. *Id.* Petitioners' arbitration agreement was the epitome of a take-it-or-leave-it pre-employment contract of adhesion.

5. After Mr. Arreguin signed the arbitration agreement, he was interviewed for a warehouse position at a Gallo facility in Healdsburg, Calif., and was hired on the spot. Pet. App. 2a. He worked at Gallo for a period of three months. *Id.*

6. On December 17, 2014, Mr. Arreguin filed this employee class action in the Sonoma County Superior Court, in California, on behalf of himself and other hourly, non-exempt employees. The first amended complaint alleges that Petitioners violated California wage and hour laws, including minimum wage, overtime, and other sections of the California Labor Code. Pet. App. 3a. Based on the Agreement, Petitioners moved to compel the arbitration of individual claims, dismiss class action claims, and stay the action pending the completion of arbitration. Pet. App. 24a-25a. The trial court denied the motion, finding that the arbitration agreement was unconscionable. Pet. App. 29a. Under California law, an arbitration agreement is unenforceable if it is both procedurally and substantively unconscionable. *Armendariz v. Foundation Health Psychcare Services, Inc.,* 24 Cal. 4th 83, 114 (2000). As for procedural unconscionability, the court noted that the "parties were in extremely unequal positions" and that Mr.

Arreguin "has demonstrated not only adhesion or unequal bargaining power or a failure to provide the rules, etc. but all of these combined." Pet. App. 27a-28a. As for substantive unconscionability, the trial court found the Agreement was vague, equivocal, and, in general, sloppily worded to the point where it indicated that "the entire purpose of this agreement is to bind only the employee." Pet. App. 29a.

7. Petitioners successfully appealed the trial court's finding that the arbitration agreement was unconscionable. The reviewing court found that the Agreement was procedurally unconscionable, even noting an "element of duress in Star's refusal to answer questions that Mr. Arreguin had about the paperwork while, at the same time, effectively obstructing steps that Mr. Arreguin could have taken to get answers elsewhere." Pet. App. 7a-8a. However, it also found that, "[b]ecause this agreement imposes mutual obligations on employer and employee, it is not substantively unconscionable." Pet. App. 17a. The court therefore reversed the trial court's denial of Petitioners' motion to compel arbitration.

8. The state appellate court directed the trial court on remand to send the "entire case, including the question of whether Mr. Arreguin may prosecute class claim" to arbitration. Pet. App. 2a. In resolving the question of "who decides" whether class arbitration is permissible under the Agreement, the court followed the California Supreme Court's decision in *Sandquist v. Lebo Automotive, Inc.*, 1 Cal. 5th 233 (2016). Because the Agreement neither expressly allows nor forbids

class arbitration, the court made the threshold finding that the "broad language" of the Agreement includes "all disputes that may arise out of" or be "related to" Mr. Arreguin's employment, to "be arbitrated." Pet. App. 20a. Such broad language indicates that the parties agreed to have the arbitrator decide whether class treatment was proper under the Agreement. Pet. App. 18a (citing *Sandquist*, 1 Cal. 5th at 251-60).

9. In addition to the broad language of the Agreement, the reviewing court looked at three other *Sandquist* considerations: first, "the parties' likely expectations about allocations of responsibility," while taking into consideration the "substantial additional cost and delay" associated with a rule that would require class claims to begin with a judicial determination of their arbitrability; second, the preference under state and federal law that "when the allocation of a matter to arbitration or the courts is uncertain, we resolve all doubts in favor of arbitration"; and third, the fact that when the plaintiff employee is seeking to have the availability of class claims arbitrated, arbitration of that question is consistent with the canon that "ambiguities in written agreements are to be construed against their drafters," a rule that "applies with peculiar force in the case of a contract of adhesion." Pet. App. 16a (citing *Sandquist*, 1 Cal. 5th at 246-48). By "construing the arbitration agreement in favor of sending the procedural dispute to arbitration and against the party that drafted the adhesion contract," the appellate court found that "the arbitrator will decide whether class claims can proceed, and that decision

will be subject only to limited judicial review." Pet. App. 20a (citing *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013)).

10. Petitioners unsuccessfully sought review from the California Supreme Court on the "who decides" class arbitrability issue only, arguing that "*Sandquist* conflicts with the decisions of at least five U.S. courts of appeals." Pet. App. 59a. Petitioners' bid to overrule *Sandquist* was denied on July 11, 2018.

REASONS FOR DENYING THE WRIT

I. This Court Lacks Jurisdiction Because the Judgment Below Is Not Final.

Under 28 U.S.C. § 1257(a), this Court has certiorari jurisdiction only over "[f]inal judgments or decrees" of state courts. As this Court has explained, this limitation is no mere formality to be observed in the breach:

> This provision establishes a firm final judgment rule. To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945). As we have recognized, the finality rule "is not one of those

> technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

Jefferson v. City of Tarrant, 522 U.S. 75, 81 (1997).

However, the order below is far from final. It is therefore not an "effective determination of the litigation," but is "merely interlocutory or intermediate." *Id*. The case came to the California Court of Appeal on an interlocutory appeal from a decision declining to compel arbitration of Mr. Arreguin's wage and hour claims under state law. The appellate court *reversed* the trial court's determination that the arbitration agreement was unenforceable because several terms were unconscionable under state contract law and could not be severed from the Agreement. The appellate court instead found the Agreement fully enforceable. The intermediate court then considered whether the court or the arbitrator should decide whether the parties intended to permit arbitration on a classwide basis—meaning only whether Mr. Arreguin could assert putative class claims in arbitration, not whether this case would proceed as a certified class action in arbitration. Pet. App. 18a-20a. The court considered the "broad" language of the arbitration clause delegating all "disputes that may arise out of" or be "related to" Mr. Arreguin's employment to "be arbitrated," as well as the state contract principles set forth in *Sandquist*, in sending the entire matter to arbitration. *Id.* at 20a. The case is far from over.

Moreover, the decision is not one that is "subject to no further review or correction in any state tribunal." 28 U.S.C. § 1257(a). The court ordered Mr. Arreguin's claims to be arbitrated. Pet. App. 20a-21a. The first significant event in arbitration would be a "threshold" clause construction hearing, following briefing from both parties. *See* AAA Supp. Rule 3. Upon an issuance of an interim award on clause construction, the arbitration would automatically be stayed for thirty days so that the aggrieved party could petition to vacate or correct the interim award in court. *Id*.

Thus, even if the arbitrator were to find that the agreement authorizes putative class proceedings in arbitration, Petitioners could immediately seek to vacate that award on the ground that the arbitrator exceed his or her powers. *See* Cal. Code Civ. Proc. §§ 1285, 1286.2(4); *Adv. Micro Devices, Inc. v. Intel Corp*., 9 Cal. 4th 362, 375 (1994) ("The powers of an arbitrator derive from, and are limited by, the agreement to arbitrate. [Citation omitted.] Awards in excess of those powers may, under sections 1286.2 and 1286.6, be corrected or vacated by the court."). Alternatively, if the arbitrator ruled that class claims could not be asserted, Mr. Arreguin likewise could petition to vacate the interim award. The court's order vacating the award would be subject to appeal as a matter of right. *See* Cal. Code Civ. Proc. § 1294(c). Moreover, if Mr. Arreguin were to obtain a final award in arbitration, Petitioners could again seek to vacate the arbitration award based on the arbitrator's exceeding his or her powers or other grounds, and could appeal the judgment up through

the California court system, seeking review by the California Supreme Court and ultimately by this Court if its appeal were unsuccessful. *See* Cal. Code Civ. Proc. § 1294(d) (appeal of judgment); *Gueyffier v. Ann Summers, Ltd.*, 43 Cal. 4th 1179, 1184 (2008) (judgment after confirming arbitration award appealed to through the California court system).

Thus, the decision does not terminate the litigation or is subject to no further review by the California state court system. It is not the "final word of a final court." *Market St.*, 324 U.S. at 551.

This Court has exercised its certiorari jurisdiction over state-court judgments that do not terminate a case in only a "limited set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in the lower state courts." *O'Dell v. Espinoza,* 456 U.S. 430 (1982) (*per curiam*). In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court identified "four categories" of such cases. *Florida v. Thomas*, 532 U.S. 774, 777 (2001). This case fits none of those narrow categories.

The first *Cox* category covers cases in which "there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained," and "the judgment of the state court on the federal issue is deemed final" because "the case is for all practical purposes concluded." *Cox*, 420 U.S. at 479. Here, it is by no means "preordained" that Mr. Arreguin will not only be

allowed to pursue his class claims, but also prevail on his claim on a classwide basis. *See Thomas*, 532 U.S. at 778.

Cox's second category is confined to cases where "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. That exception is also not applicable here. If Mr. Arreguin does not prevail on his class claims in arbitration, either at clause construction stage, certification, or on the merits, the question regarding whether the FAA dictates that the court, rather than the arbitrator, decide the class issue will be moot. *Jefferson*, 522 U.S. at 82.

Cox category three comprises those unusual "situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue *cannot* be had, *whatever the ultimate outcome of the case*." *Cox*, 420 U.S. at 481 (emphasis added). *Cox* explained that this category encompasses cases in which state law offers *no* subsequent opportunity to obtain a court judgment over which this Court could exercise jurisdiction. *See id.* at 481-82.

Petitioners do not face such a situation. As explained above, if the arbitrator rules against them on clause construction, they can seek further appellate review upon a denial of their petition to vacate that interim award. Because the California Supreme Court's denial of review "is to be given no weight insofar as it

might be deemed that we have acquiesced in the law as enunciated in a published opinion of a Court of Appeal," *Trope v. Katz*, 11 Cal. 4th 274, 287 n.1 (1995), the California Supreme Court could take up either the "who decides" argument or the propriety of the arbitrator's decision, including the clause construction award, in such a later appeal. But even if that court were to treat the Court of Appeal's "interlocutory ruling as 'law of the case,' that determination [would] in no way limit [this Court's] ability to review the issue on final judgment." *Jefferson*, 522 U.S. at 83. The third exception is thus inapplicable. *See id*.

Finally, "the fourth category of such cases identified in *Cox* . . . covers those cases in which 'the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review' might prevail on nonfederal grounds, 'reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action,' and 'refusal immediately to review the state-court decision might seriously erode federal policy.'" *Nike, Inc. v. Kasky*, 539 U.S. 654, 658-59 (2003) (opinion concurring in dismissal of writ) (quoting *Cox*, 420 U.S. at 482-83).

Here, the court of appeal's order did not deny arbitration of any claim, and the scope of arbitration is still to be decided on remand. This case is thus wholly unlike *Southland Corp. v. Keating*, 465 U.S. 1, 7-8 (1984), and *Perry v. Thomas*, 482 U.S. 483, 489 n.7 (1987), where this Court held that definitive state-court decisions

refusing to compel arbitration were "final" for purposes of 28 U.S.C. § 1257 as construed in *Cox*.

A party invoking *Cox* category four must demonstrate not just that a state court's decision may be wrong from the standpoint of federal policy, but that deferring review would seriously damage federal interests. Here, denial of immediate review would not "seriously erode federal policy." If the arbitrator finds that the Agreement permits assertion of class claims, federal policy would not be eroded by requiring Petitioners to first seek court vacatur, and then, if the court denied the petition, seek further appellate review. Thus, even assuming that an arbitrator's decision allowing the assertions of class claims would alter the attributes of arbitration in a way that conflicted with federal policy, such an order would, at Petitioners' election, be immediately appealable before class arbitration could occur and thus would pose no immediate threat of eroding federal policy.

Alternatively, Petitioners can await the outcome of the arbitration that would follow before seeking further review (if they lost in the arbitration) through a petition to vacate the award that would cover the decisions on clause construction, certification, and the merits. Indeed, federal policy generally *favors* deferring review until after arbitration, and thus the FAA generally does not provide for immediate appellate review of an order compelling arbitration. *See Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 85-86 (2000); 9 U.S.C. § 16.

Federal policy in favor of arbitration would be enhanced, not eroded, by empowering the arbitrator to construe the Agreement in the first instance before further review. And Petitioners may well raise other issues under the FAA in the arbitration and/or in later judicial proceedings. Thus, asserting jurisdiction over the petition at this point might create the possibility of piecemeal review of federal issues, which the Court has generally sought to avoid in applying the *Cox* factors. *See Nike*, 539 U.S. at 660.

And, as in *Nike*, multiple possibilities would ensue even if this Court were to reverse the decision below. To be sure, the issue of whether this Agreement permits class claims under state-law of contract interpretation is not properly before this Court, as the lower court has not decided this issue. On the issue on which certiorari is sought, if this Court were to conclude that the class issue is a "gateway" issue for a trial court to decide, several distinct possibilities remain. The trial court may find that the agreement does not permit Mr. Arreguin to assert class claims in arbitration, which may be subject to further review by alternative writ. And if the court goes the other direction, instructing the arbitrator to allow for putative class claims to proceed, further review by alternative writ is likely. Alternatively, Petitioners may also strategically elect to arbitrate first instead of seeking appellate review, if they believe that class certification under Mr. Arreguin's theories of liability is highly unlikely. "[B]ecause an opinion on the merits in this case could take any one of a number of different paths, it is not clear

whether reversal of the California [Court of Appeal] would 'be preclusive of any further litigation on the relevant cause of action [in] the state proceedings still to come.'" *Nike*, 539 U.S. at 660. A thorough review of the *Cox* categories thus confirms that this case does not in any way present this Court with the opportunity to review the final word of a final court.

Finally, the prospect of serious injury to federal interests is also obviated by the likelihood that other appellate rulings, from federal courts, will provide further opportunities for this Court to address the issue if necessary, and will better inform the Court's judgment about whether review is warranted. As set forth below, the delegation clause at issue neutralizes the purported conflict between the decision below and the circuit court decisions holding that the court presumptively decides the class question. Moreover, because the issue of who decides whether an agreement permits class arbitration (and what language suffices to delegate that issue to an arbitrator even if it is presumptively for a court) appears to be frequently litigated in the federal court, the Court will have no shortage of opportunities to step in if it appears that federal policy is threatened. Immediate review of a non-final state-court order is by no means essential to the defense of federal policy.

In short, the Court of Appeal's decision to reverse the trial court and order all disputes to arbitration is in no sense the state courts' *final word* in this case. The Court lacks jurisdiction under § 1257, and the petition must be denied.

II. A State-Court Decision Presents a Poor Vehicle for Review of FAA Issues.

Beyond the jurisdictional requirements of § 1257, the state-court origin of this case provides another strong reason for denying review: the lingering disagreement within this Court over whether the FAA applies in state-court actions. Petitioners' question presented, of course, presupposes that the FAA applies to state courts. Although a majority of this Court so held (over substantial dissents) in *Southland Corp.*, 465 U.S. 1, and *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), one Justice of this Court has continued to adhere to the view that the FAA does not apply to actions in state courts. *See Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429 (2017) (Thomas, J., dissenting); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (Thomas, J., dissenting). As *Kindred* and *Imburgia* illustrate, that view will likely determine the vote of at least one member of the Court in any case originating in a state court that raises an FAA issue.

The continuing disagreement on the Court over this question makes a case coming from a state court a very poor candidate for resolving any significant FAA issue. Such issues have often closely divided the Court. If this Court were to review this case on the merits, the vote of at least one Justice would be to affirm on the ground that the FAA does not apply to state courts, and there would be a significant likelihood that no holding on any other issue that might be presented by the case would command a majority of the Court. *See*, *e.g.*,

Bazzle, 539 U.S. at 460 (Thomas, J., dissenting). Review would thus threaten to waste the time and efforts of the Court.

III. The Issues Do Not Merit Review.

A "fundamental principle" of the FAA is that "arbitration is a matter of contract." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Section 2 of the FAA embodies the policy that arbitration agreements, like other contracts, are "enforced according to their terms." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 478 (1989). Any doubts about "the scope of arbitrable issues" should be resolved "in favor of arbitration." *Mitsubushi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

Although issues in a case subject to an arbitration agreement are, in cases of doubt, typically presumed to fall within the scope of the arbitration agreement and thus reserved for the arbitrator, there is a limited set of "gateway" issues that courts, not arbitrators, are expected to decide in the first instance. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). These gateway issues include whether the parties have a valid arbitration agreement, or whether a certain controversy is covered by an arbitration clause. *Id.* However, because arbitration is a matter of contract, parties can agree to arbitrate even gateway questions of "arbitrability." *Id.* at 83-85.

In *Bazzle*, a plurality of this Court, including Justice Scalia, held that the question of whether an agreement provides a contractual basis for assertion of putative class claims is not a gateway issue, but rather involves issues concerning "contract interpretation and arbitration procedures" that "[a]rbitrators are well suited to answer." *Bazzle*, 539 U.S. at 453.

Petitioners seek reconsideration of the plurality decision in *Bazzle*. According to Petitioners, *Bazzle* failed to consider that the fundamental differences between bilateral and class arbitration make the matter too important to be left to an arbitrator. Petitioners seek a ruling cementing the class question as a gateway issue. Petitioners further argue that, at a minimum, five courts from four federal circuits have concluded that *Bazzle* runs afoul of the reasoning of more recent case law from this Court, including *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686-87 (2010). *See* Pet. at 12. But whatever the merits are of Petitioners' criticisms of *Bazzle*, the decision below does not provide the proper vehicle for revisiting that decision.

Unlike the circuits eschewing *Bazzle*'s plurality holding, the court below did not directly address *Bazzle*'s reasoning. More importantly, the arbitration agreement in this case contains multiple provisions that clearly and unmistakably leave the class issue for the arbitrator to decide even assuming it is a gateway issue. None of the circuits that have held the class arbitration question to be one for decision by a court have addressed an agreement that provides *both* a general

delegation clause and a clause specifying AAA rules. By contrast, this case falls within this Court's holding that when an agreement contains a "clear and unmistakable" provision that delegates gateway issues to be resolved by arbitration, the arbitrator decides the issue. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010).

Here, as translated from the Spanish,[3] the arbitration clause provides that "all disputes that may arise or be related to [the employee's] employment" be subject to arbitration, designating the National Rules for the Resolution of Employment Disputes under AAA. Pet. App. at 3a. It further states that "[t]he claim subject to arbitration shall include, but not limited to a specific or implicit contract." *Id*. at 4a.

In other words, the language in this Agreement authorizes the arbitrator to resolve contractual disputes, including those involving "implicit" contractual terms—a phrase broadly encompassing the intended meaning of the arbitration contract itself (the only written contract between the parties). *See Oxford Health Plans*, 569 U.S. at 573 ("It is the arbitrator's construction [of the contract] which was bargained for; and so far as the arbitrator's decision concerns the construction of the contract, the courts have no business

[3] Another reason why certiorari should be denied is that the subject Agreement is translated from a Spanish-language version furnished to Mr. Arreguin. While neither party disputes the integrity of the translation, a translated arbitration agreement is not well-suited to a merits decision that would likely turn on the nuances of interpreting the language used by the parties.

overruling him because their interpretation of the contract was different from his." (citation omitted; brackets in original)). The court below only briefly examined the Agreement's language, the Agreement's designation of the arbitrator to decide contractual matters undoubtedly encompasses whether there is a contractual basis for pursuing class claims, which is a matter of contract construction. *Id*. at 570-71 (finding that the arbitrator's duty is to "construe the contract" to decide whether class procedures are available). This broad delegation of contract issues to be resolved by the arbitrator is arguably even broader than the language found to be a "clear and unmistakable" delegation in *Rent-A-Center*.[4] *See Rent-A-Center*, 561 U.S. at 71 (providing giving the arbitrator "exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement.").

This delegation clause, coupled with the Agreement's designation of AAA employment rules, vests the arbitrator with authority to determine the "scope" of the arbitration clause. *See* AAA Employment Rule 6(a). The Agreement also incorporates the Supplementary Rules that apply to all potential class proceedings under AAA rules in arbitration. AAA Supp. Rule 1(a). Under the Supplementary Rules, the arbitrator conducts

[4] This language, including the use of "including, but not limited to" indicates that the parties intended for all contractual issues to be arbitrated, not just "implicit" or "specific" issues relating to the Agreement. *See United States v. Philip Morris USA, Inc*., 396 F.3d 1190, 1200 (D.C. Cir. 2005) ("The words 'including, but not limited to' introduce a non-exhaustive list that sets out specific examples of a general principle.").

a clause construction hearing to determine whether there is a contractual basis for permitting putative class claims. The AAA Employment Rules and Supplementary Rules, in concert with the clause broadly delegating contractual disputes to arbitration, make it clear and unmistakable that the Agreement provided that the arbitrator decide all matters.[5]

Petitioners contend that decisions from the Third, Fourth, Sixth and Eighth Circuits conflict with this decision. Upon closer examination, however, none do. In each of these cases, the court reached its conclusion based on the contractual language before it, and none involved a "clear and unmistakable" delegation of the matter to arbitration.

Petitioners identify two purportedly conflicting decisions from the Third Circuit. The first, *Opalinski v. Robert Half Int'l, Inc.*, 761 F.3d 326, 335 (3d Cir. 2014), held that, contrary to the *Bazzle* plurality, "the availability of class arbitration is a 'question of arbitrability.'" The subject agreement in *Opalinski* contained a common arbitration clause, and "[n]othing else in the agreements or record suggests the parties agreed to submit questions of arbitrability to the arbitrator." *Id*. Under *Opalinski*'s analysis, the availability of class arbitration is presumptively a gateway issue for the

[5] Because delegation pertains to the parties' "manifestation of intent" at the time of contract, that the parties tested the validity of the agreement in court does not in any way undermine the force of the delegation clause. *See Rent-A-Center*, 561 U.S. at 69 n.1.

court, subject to modification by the parties via a clear delegation clause. *Id.*

In *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3d Cir. 2016), the Third Circuit considered a question left open by *Opalinski*, whether an arbitration agreement, by specifically incorporating the AAA rules, would "clearly and unmistakably" delegate the class issue to the arbitrator. The *Chesapeake Appalachia* panel held that it did not—that incorporation of "common" arbitration rules did not satisfy the burden, set by the Third Circuit, for establishing that the parties agreed to delegate the class issue to the arbitrator.

Neither Third Circuit case addresses a clause, like this one, that specifically authorizes the arbitrator to resolve disputes under the arbitration contract itself. Thus, even accepting the Third Circuit's rule elevating the burden for delegating the class issue, the Agreement here may very well meet that burden. Indeed, the Third Circuit reaffirmed the principle that courts or arbitrators cannot require the incantation of specific magic words like "class" in the Agreement in order to find that the arbitrator is authorized to resolve issues as to the availability of class proceedings, even if the absence of such words makes the burden more difficult to satisfy as a practical matter. *Chesapeake Appalachia*, 809 F.3d at 759. Because the Third Circuit's rule would not require that the parties to this Agreement submit the matter to court, there is no direct conflict with the decision below.

The Sixth Circuit's decision in *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013) similarly did not have an express delegation clause. In *Reed Elsevier*, the arbitration clause at issue incorporated the then-current Commercial Rules for AAA, but did not contain any language finding that the arbitrator decides all contractual issues, such as arbitrability. *Id.* at 599. Instead, the language of the clause specifically stated: "Issues of arbitrability will be determined in accordance and solely with the federal substantive and procedural laws relating to arbitration." *Id.*

The *Reed Elsevier* panel concluded that this "language does not clearly and unmistakably assign to an arbitrator the question whether the agreement permits classwide arbitration." *Id*. According to *Reed Elsevier*, the differences between class and bilateral arbitration are sufficiently significant that, absent a valid delegation clause, the class matter should be decided by the court. *Id*. at 598.

Again, the Agreement here contains an express delegation provision, along with the incorporation of AAA rules. There is no indication from *Reed Elsevier* that the Sixth Circuit would rule differently from the court below. To the contrary, the Sixth Circuit, when evaluating an arbitration clause with a valid delegation clause, has held that the availability of class procedures should be decided by an arbitrator. *See Lowry v. JP Morgan Chase Bank, N.A.*, 522 Fed. Appx. 281, 282 (6th Cir. 2013). Although *Lowry* is unpublished, there is nothing in the Sixth Circuit's jurisprudence that is inconsistent with *Lowry*'s conclusions.

Likewise, *Del Webb Communities v. Carlson*, 817 F.3d 867, 876 (4th Cir. 2016) embraced the rationale of *Reed Elsevier* and *Opalinski* in finding that, absent a valid delegation clause, the court must decide whether class procedures are available in arbitration. In reviewing the subject arbitration agreement, the Fourth Circuit panel found that "the parties did not unmistakably provide that the arbitrator would decide whether their agreement authorizes class arbitration. In fact, the sales agreement says nothing at all about the subject." *Id*. at 877. Thus, the *Del Webb Communities* court held that the district court must decide the class issue. The Fourth Circuit did not address a broad clause delegating all contractual enforceability questions to the arbitrator, coupled with the incorporation of AAA rules.

Lastly, the Eighth Circuit followed the reasoning of the Third and Sixth Circuits, and rejected the position that an agreement's incorporation of AAA rules, *by itself*, demonstrates a clear and unmistakable delegation of the matter to the arbitrator. *See Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972-73 (8th Cir. 2017). Like the decisions above, *Catamaran* agrees that a valid delegation clause would send the class issue to decision by the arbitrator. As the Eighth Circuit has not had the opportunity to evaluate the effect of a clause similar to the one in the Agreement at issue here, there is no reason to believe that *Catamaran* dictates a different outcome from the decision below.

When there is a valid delegation clause, federal appellate courts have not hesitated to order the class

issue to be decided by the arbitrator. *See, e.g., Robinson v. J&K Administrative Management Services*, 817 F.3d 193, 197-98 (5th Cir. 2016). *Robinson* addressed different language, but also concluded that a delegation clause similar to that in *Rent-A-Center*, addressing matters related to contract, would be sufficient to delegate the class issue. *Id.* at 198.

The divergent outcomes between *Robinson*, and the decisions of the Third, Fourth, Sixth and Eighth Circuits appear to have more to do with the specific delegation clause in *Robinson*, and the absence of similar language from the other cases, than from any differences in these courts' legal approaches. Indeed, the decisions illustrate that whether the availability of class arbitration is a gateway issue is not sufficient to determine the outcome of the who-decides issue; whether the agreement contains a delegation clause, and whether the delegation clause is sufficiently clear to send the issue to the arbitrator, must also be considered. The fact-bound question whether the specific Agreement in this case suffices does not merit review.[6]

Separately, in sending the entire matter to arbitration, the court below also followed *Sandquist*'s articulation of several unremarkable pro-arbitration precepts. Pet. App. at 19a-20a. *Sandquist* instructed courts to consider that the parties are presumed to desire speed and efficiency in bargaining for arbitration,

[6] That the question whether the language of the Agreement constitutes a delegation clause was not explicitly addressed in the lower court's opinion in this case, and is likewise not addressed in the Petition, makes this case all the more unsuitable for review.

that matters of arbitrability are generally resolved in favor of arbitration, and that ambiguities are to be construed against the drafting party, consistent with California contract law and the decision of this Court in *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 63 (1995). *See Sandquist*, 1 Cal. 5th at 245. While Petitioners expressly seek to piggyback review of *Sandquist* into this petition, the Court of Appeal's reliance on these uncontroversial precepts do not make this case a suitable vehicle for reviewing *Sandquist* even if such review were otherwise necessary.

Granting certiorari is especially unwarranted in light of the recent development in this Court's jurisprudence on the enforceability of class action waivers. Following this Court's decisions in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) and, more recently, *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the parties are empowered to use class action waivers if they intend to forbid the use of class procedures in arbitration. The issues presented by agreements "silent" on class procedure have less salience, reducing the urgency of intervention by this Court.

IV. The Decision Below Is Correct.

As set forth above, this Agreement contains a valid delegation clause. Thus, the lower court's order sending the class issue to the arbitrator is consistent with the rulings of every federal appellate court that have held that the class issue can be sent to arbitration pursuant to a valid delegation clause.

Moreover, the decision below is correct even if the clause broadly delegating all contractual issues to the arbitrator were not determined to be a valid delegation clause. This is because the designation of AAA rules, by itself, delegates the issue to the arbitrator. *See Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392 (2d Cir. 2018); *Robinson*, 817 F.3d at 197-98.

As one federal appellate court recently concluded, "Supplementary Rule 3 provides that an arbitrator shall decide whether an arbitration clause permits class arbitration[,]" which "is clear and unmistakable evidence that the parties chose to have an arbitrator decide whether their agreement provided for class arbitration." *Spirit Airlines, Inc. v. Maizes,* 899 F.3d 1230 (11th Cir. 2018).

The Second Circuit likewise found that an agreement's selection of AAA Security Arbitration Rules also incorporates the Supplementary Rules, and these two rules together "clearly and unmistakably" delegates the class issue to the arbitrator. *Wells Fargo Advisors*, 884 F.3d at 397. *Wells Fargo Advisors* emphasized that courts must construe agreements, including the validity of the delegation clause, based on state law under this Court's precedents, and the Missouri law applicable to the subject agreement does not require a heightened standard for delegating the class issue to arbitration. *Id*. at 395-96 (quoting *First Options*, 514 U.S. at 944).

The same is true here, where the parties' designation of a specific AAA rule carries with it the designation of the Supplementary Rules. *See* Supp. Rule 1. By giving effect to the Supplementary Rules, the Agreement necessarily delegates the class issue to the arbitrator. Since the delegation issue is determined by state law under *First Options* and *Wells Fargo Advisors*, the applicable California law, as embodied in *Sandquist*, does not require anything more than a broad arbitration clause to delegate the class issue to the arbitrator's decision. *See Sandquist*, 1 Cal. 5th at 246-48 (rejecting a presumption in favor of having the class issue decided by the court). Applying California law, the court below rejected imposing additional hurdles to parties struggling with the "who decides" question.

Although several courts above concluded that the differences between bilateral and class arbitration are so stark that choice cannot be left to the arbitrator, both *Wells Fargo Advisors* and *Spirit Airlines*, hold otherwise. Instead, these cases hold fast to their view that the availability of class procedures is one of arbitrability, and that *Stolt-Nielsen* did not alter this understanding. *See Wells Fargo Advisors*, 884 F.3d at 399; *Spirit Airlines*, 899 F.3d at 1234.

Because the decision below is consistent with this Court's precedents and that of well-reasoned federal appellate court decisions, review is unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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