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 COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

SUPPLEMENTAL BRIEF OF NEW AUTHORITIES (SUPREME COURT RULE 15.8)

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The conflict in the appellate cases was pronounced when this certiorari petition was filed in early September. Now the conflict is even more pronounced, as two more federal courts of appeals have spoken on the Federal Arbitration Act question presented.

I. VERY RECENT DECISIONS HAVE FURTHER WIDENED THE CONFLICT IN THE CASES ON THE QUESTION PRESENTED

Two more United States courts of appeals have opined on the question presented. The Seventh and Eleventh circuits now have joined multiple other circuits in holding — contrary to the California Supreme Court and two federal circuits — that the availability of class arbitration presumptively is a gateway question of arbitrability for the court. It is not a question for the arbitrator.

A. The Seventh Circuit Has Joined Other Circuits In Holding That The Availability Of Class Arbitration Is A Question For The Court.

In *Herrington v. Waterstone Mortgage Corp.*, 907 F.3d 502 (7th Cir. 2018), an arbitrator presided over a Fair Labor Standards Act collective action and awarded plaintiffs more than $10 million. The defendant repeatedly contended, first in the district court and then in arbitration, that the arbitration agreement did not permit class or collective actions. The arbitrator disagreed, reasoning that the agreement's invocation of the American Arbitration Association's rules had the effect of adopting the AAA's Supplementary Rules for Class Arbitration, thereby contracting to allow class- and collective-action arbitrations. The district court confirmed the arbitrator's award.

The Seventh Circuit reversed. "[S]omeone has to interpret the arbitration agreement . . . to determine whether it authorized the collective arbitration that occurred." *Id.* at 506. Whether that "someone" is the district court or the arbitrator "turns on whether the availability of class or collective arbitration is a question of arbitrability, which the court decides, or a subsidiary issue, which goes to the arbitrator." *Id.* "The Supreme Court has expressly reserved [that question]," the court noted. *Id.* at 507, *citing Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 n.2 (2013) (noting that the plurality opinion in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) — which would have assigned the question to the arbitrator — is not authoritative).

Applying this Court's arbitration precedents, the Seventh Circuit held that "[t]he availability of class or collective arbitration involves a foundational question of arbitrability" for the district court to resolve. *Id.* First, "[d]eciding whether Herrington's agreement with Waterstone permits class or collective arbitration" presents what the Supreme Court has called "the foundational question of 'with whom' Waterstone chose to arbitrate," which is a question for the court. *Id.* at 508, *quoting Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010).

Second, the availability of class arbitration presents a "related[] question of arbitrability: whether the agreement to arbitrate covers a particular controversy." *Id.*, *citing John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964). That, too, "is a gateway matter for the court to decide." *Id.*, *citing Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010).

Third, and "most important," the availability of class arbitration is a gateway matter for the court because "the structural features of class arbitration make it a 'fundamental' change from the norm of bilateral arbitration." *Id.* at 509, *quoting Stolt-Nielsen*, 559 U.S. at 686, *and citing AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347-50 (2011). "[T]he size of the suit and its potential impact on absent class members . . . cause class arbitration to diverge sharply from the bilateral model." *Id.* Inherent in arbitration is limited judicial review. *Id.* at 509-10 & n.8. "A defendant willing to accept the cost of error in a bilateral arbitration is not necessarily willing to accept it 'when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once.'" *Id.* at 510, *quoting Concepcion*, 563 U.S. at 348. "When that whopping claim is arbitrated, the defendant might find itself 'bet[ting] the company with no effective means of [judicial] review.'" *Id.*, *quoting Concepcion*, 563 U.S. at 351. A question this fundamental therefore belongs to the court, the Seventh Circuit explained.

For all those reasons, the Seventh Circuit held that "the district court should conduct the threshold inquiry regarding class or collective arbitrability to determine whether Herrington's agreement with Waterstone authorizes" something other than traditional bilateral arbitration. *Id.* at 511.

B. The Eleventh Circuit Also Has Held That The Availability Of Class Arbitration Presumptively Is A Gateway Question Of Arbitrability For The Court.

Days after the instant certiorari petition was filed, the Eleventh Circuit decided *JPay, Inc. v. Kobel*, 904 F.3d 923 (11th Cir. 2018). As shown below, that case further exacerbates the conflict in the cases.

1. The Eleventh Circuit joined most other circuits in treating the issue as a gateway question of arbitrability for the court.

JPay, like the Seventh Circuit in *Herrington*, "h[e]ld that the availability of class arbitration is a question of arbitrability, presumptively for a court to decide, because it is a gateway question that determines what type of proceeding will determine the parties' rights and obligations." *Id.* at 935.

JPay considered and rejected other courts' treatment of the Federal Arbitration Act question presented: "[T]he California Supreme Court has expressed a contrary view, *Sandquist v. Lebo Auto. Inc.*, 1 Cal. 5th 233, 205 Cal. Rptr. 3d 359, 376 P.3d 506, 522-23 (Cal. 2016), and the Fifth Circuit has stood by an earlier circuit precedent that had followed the *Bazzle* plurality. *Robinson v. J&K Admin. Mgmt. Servs., Inc.*, 817 F.3d 193, 197 (5th Cir. 2016) . . . ." *JPay*, 904 F.3d at 935. But "every federal court of appeals to have considered the question anew since *Stolt-Nielsen* has determined that class availability is a fundamental question of arbitrability [for the court]." *Id.*

"We do the same today," the Eleventh Circuit held. *Id.*

2. The Eleventh Circuit's decision, however, conflicts with other circuits' decisions on what contractual language suffices to alter the presumption and delegate the question to the arbitrator.

After adopting the analysis of most other circuits, *JPay* then strayed from them (in a 2-1 ruling on this point). According to the majority, the incorporation by reference of the American Arbitration Association's Rules in the arbitration agreement reveals "a clear and unmistakable intent to delegate [the] question[] of arbitrability to the arbitrator," overcoming the presumption that the issue is a gateway question of arbitrability for the court. *Id.* at 936. "[W]e read an arbitration agreement incorporating AAA rules . . . as clear and unmistakable evidence that the parties contracted around the default rule and intended to delegate questions of arbitrability to the arbitrator." *Id.* at 938. *JPay* relied on previous Eleventh Circuit decisions, including *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230 (11th Cir. 2018), *pet. for cert. filed* (No. 18-617), which found that the incorporation by reference of rules can delegate to the arbitrator gateway questions of arbitrability.

The *JPay* majority considered and rejected decisions from three other circuits (set forth in the petition in this case) that had held that incorporating JAMS or AAA rules did *not* effectuate a clear and unmistakable delegation of the class-action question. *Id.* at 940-41, *citing and disagreeing with Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3d Cir. 2016); and *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966 (8th Cir. 2017).

Judge Graham dissented in part. He agreed with the majority that the availability of classwide arbitration is a gateway question of arbitrability. He also agreed that incorporating rules by reference could delegate to the arbitrator *some* gateway questions of arbitrability. "But I disagree with the majority's conclusion that the language these parties used in their contract expressed a clear intent to permit the arbitrator to decide the question of the availability of class arbitration." *Id.* at 944. In Judge Graham's view, "a general delegation to arbitrate issues of arbitrability is not enough and that without a specific reference to class arbitration the court should presume that the parties did not intend to delegate to an arbitrator an issue of such great consequence." *Id.*

C. The Conflict In The Cases Is Deep And Persisting.

In sum, the Seventh and Eleventh circuits joined the Third,[1] Fourth,[2] Sixth,[3] Eighth,[4] and Ninth[5] circuits in holding that the *Bazzle* plurality opinion succumbed to this Court's later cases. By contrast, the

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1. *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326 (3d Cir. 2014); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3d Cir. 2016).

2. *Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867 (4th Cir. 2016).

3. *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013).

4. *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966 (8th Cir. 2017).

5. *Eshagh v. Terminix Int'l Co.*, 588 F. App'x 703 (9th Cir. 2014); *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670 (9th Cir. 2017), *cert. granted*, No. 17-988.

California Supreme Court[6] (and two federal circuits,[7] as noted in the petition) continue to apply the *Bazzle* plurality.

In addition, the Eleventh Circuit's 2-1 decision in *JPay* exemplifies a significant conflict in the circuits on a related issue: What contractual language suffices to delegate to the arbitrator the availability of class arbitration? In *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. ___ (2019), this Court very recently noted the existence of the delegation issue, but "express[ed] no view about" whether an arbitration contract incorporating American Arbitration Association Rules delegated to the arbitrator questions of arbitrability. Slip op. at 8. This Court repeated only that, "Under our cases, courts 'should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.'" *Id.* (citation omitted).

6. *Sandquist v. Lebo Auto., Inc.*, 1 Cal. 5th 233 (2016).

7. *Robinson v. J & K Admin. Mgmt. Servs., Inc.*, 817 F.3d 193 (5th Cir. 2016); *see Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd.*, 683 F.3d 18 (1st Cir. 2012).

II. CONCLUSION

The California Supreme Court's application of the Federal Arbitration Act, though consistent with the rule in the Fifth and (arguably) First circuits, conflicts with decisions of two more federal circuit courts of appeals, now seven in all.

Respectfully submitted.

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