No. _____

In The Supreme Court of the United States

DIMITRI SHIVKOV, INDIVIDUALLY
AND AS A TRUSTEE OF THE
PHOENIX 2010 REVOCABLE TRUST, ET AL.,

Petitioners,

v.

ARTEX RISK SOLUTIONS, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The parties' arbitration clause expressly designates the American Arbitration Association ("AAA") as their default dispute-resolution method. The clause did not also specifically mention the AAA Rules themselves, which, according to the AAA, apply whenever parties select a AAA arbitration.

> Must an agreement that specifies arbitration before the AAA as the default dispute-resolution method also specifically mention the AAA Rules to avoid being considered ambiguous about whether the parties intended to apply the AAA Rules?

2. Under the plain text of the Federal Arbitration Act, courts—not arbitrators—decide gateway issues, such as whether there is an agreement to arbitrate and what controversies does it cover. Procedural questions, however, are reserved for arbitrators.

> Is the availability of class arbitration a matter for an arbitrator to decide, or for a court to decide?

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings include:

Petitioners Dimitri Shivkov, Individually and as a Trustee of the Phoenix 2010 Revocable Trust; Vassil Zhivkov; Kristina Tsonev; Spectra Services, Inc.; DVS Holdings, LLC; Robert C. Miller; Brenda Mae Miller; Bruce G. Robinson; Sara Van Alstyne Robinson; Symphony Homes, LLC; Symphony Development Corp.; Keith C. Butler; Rebecca M. Butler; Eric K. Wilke; Julie T. Wilke; John Linder; Nina Linder; Paul M. McHale; Cynthia McHale; Keith E. Pereira, Individually and as a Trustee of the Blaser Family Revocable Trust Dated March 10, 2006; Kimberly Blaser, Individually and as a Trustee of the Blaser Family Revocable Trust Dated March 10, 2006; Brian R. Tiffany; Ryan P. Frank; Katherine S. Frank; Affilion of Cobre Valley, LLC; Affilion of Huntsville, PLLC; Affilion of Texas PLLC; Taylor-Wilke Holdings, LLC; Traditions Emergency Medicine, P.A.; Treadstone Equity Group, LLC; UTA Investments, LLC; Boomerang WB, LLC; AZ Storage 1, LLC; AZ Storage 2, LLC; Boomerang Sonoran, LLC; RV Storage, LLC; Stone Haven Lodge, LLC; UTA Holdings, LLC; Wilke Medical Direction, PLLC; 5T Capital Fund II, LLC; 5T Capital Holdings, LLC; 5T Capital LLC; Ingenuity Auto Leasing, LLC; Ingenuity Aviation, LLC; Ingenuity Equity Group II, LLC; Ingenuity Equity Group III, LLC; Ingenuity Equity Group, LLC; Ingenuity Leasing Company II, LLC; Ingenuity Leasing Company, LLC; Ingenuity Matrix, Inc.; Ingenuity

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT
—Continued

Professional Services, PLLC; Bourne Tempe Land, LLC; Brian Tiffany, MD, PC; Cation, LLC; Florida Citrus Holdings, LLC; Keith Pereira, P.C.; McHale Capital Management, LLC; PS Bailey, LLC; Blaser Management, LLC; Blue Horizon Holdings LLC; Butler Medical Group, Inc.; Devotion Homes LLC; Glass House LLC; Maui Luxury Rentals LLC; Silver Meadow Investing LLC; T&G Investments LLC; Treadstone Core3, LLC; TW Management, LLC; Kamaole Luxury Rentals LLC; Kannapali Beach Holdings LLC; Our Retirement LLC; Resiliant LLC; Nadim B. Bikhazi; Karen A. Kostluk-Bikhazi; Bradley S. Bullard; Cathleen M. Bullard; Blake G. Welling; Stephanie G. Welling; Blake Welling MD, PC; Utah Spine Care, LLC; Western States Medical, LLC; Ogden Clinic Professional Corporation; and Borsight, Inc. on Behalf of Themselves and all Others Similarly Situated.

Respondents Artex Risk Solutions, Inc; TSA Holdings, LLC f/k/a Tribeca Strategic Advisors, LLC; TBS LLC d/b/a PRS Insurance; Karl Huish; Jeremy Huish; Jim Tehero; Arthur J. Gallagher & Co.; Debbie Inman, Epsilon Actuarial Solutions, LLC; Julie A. Ekdom; Amerisk Consulting, LLC, Provincial Insurance, PCC; Tribeca Strategic Accountants, LLC; and Tribeca Strategic Accountants, PLC.

The corporate Petitioners are DVS Holdings, LLC; Symphony Homes, LLC; Affilion of Cobre Valley, LLC;

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT
—Continued

Affilion of Huntsville, PLLC; Affilion of Texas PLLC; Taylor-Wilke Holdings, LLC; Traditions Emergency Medicine, P.A.; Treadstone Equity Group, LLC; UTA Investments, LLC; Boomerang WB, LLC; AZ Storage 1, LLC; AZ Storage 2, LLC; Boomerang Sonoran, LLC; RV Storage, LLC; Stone Haven Lodge, LLC; UTA Holdings, LLC; Wilke Medical Direction, PLLC; 5T Capital Fund II, LLC; 5T Capital Holdings, LLC; 5T Capital LLC; Ingenuity Auto Leasing, LLC; Ingenuity Aviation, LLC; Ingenuity Equity Group II, LLC; Ingenuity Equity Group III, LLC; Ingenuity Equity Group, LLC; Ingenuity Leasing Company II, LLC; Ingenuity Leasing Company, LLC; Ingenuity Professional Services, PLLC; Bourne Tempe Land, LLC; Brian Tiffany, MD, PC; Cation, LLC; Florida Citrus Holdings, LLC; Keith Pereira, P.C.; McHale Capital Management, LLC; PS Bailey, LLC; Blaser Management, LLC; Blue Horizon Holdings LLC; Butler Medical Group, Inc.; Devotion Homes LLC; Glass House LLC; Maui Luxury Rentals LLC; Silver Meadow Investing LLC; T&G Investments LLC; Treadstone Core3, LLC; TW Management, LLC; Kamaole Luxury Rentals LLC; Kannapali Beach Holdings LLC; Our Retirement LLC; Resiliant LLC; Blake Welling MD, PC; Utah Spine Care, LLC; Western States Medical, LLC; Ogden Clinic Professional Corporation; Borsight, Inc.; Spectra Services, Inc.; Symphony Development Corp.; and Ingenuity Matrix, Inc. These Petitioners have no parent corporation, and no publicly held company owns 10% or more of their stock.

STATEMENT OF RELATED CASES

- *Dmitri Shivkov, et al. v. Artex Risk Solutions, Inc., et al.*, No. 2:18-cv-04514, U.S. District Court for the District of Arizona. Judgment entered August 5, 2019.
- *Dmitri Shivkov, et al. v. Artex Risk Solutions, Inc., et al.*, No. 19-16746, U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 9, 2020.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1-40) affirming the district court's order dismissing the Petitioners' First Amended Class Action Complaint and compelling individual arbitrations, is reported at 974 F.3d 1051. The order of the Court of Appeals denying Petitioners' Petition for Rehearing En Banc (App., *infra*, 83-89) is unreported. The district court's order dismissing the Petitioners' First Amended Class Action Complaint and compelling individual arbitrations (App., *infra*, 41-82) is unreported but available from Westlaw at 2019 WL 8806260.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2020. A petition for rehearing was denied on October 28, 2020 (App., *infra*, 83-89). On March 19, 2020, this Court issued an order extending the deadline for filing any petition for a writ of certiorari to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. This Petition was filed on

March 17, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provision of the Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883, is 9 U.S.C. § 4 and is reproduced in the appendix to this petition (App., *infra*, 90-91).

STATEMENT OF THE CASE

I. The Captive Insurance Strategies.

Petitioners are small business owners and entities who participated in captive insurance strategies that Defendants developed, marketed, sold, and implemented. *See* App., *infra*, 9. Captive insurance is an insurance arrangement where the insureds and the insurer are related. *See id.* at 42. If properly implemented, captive insurance has legitimate tax and insurance benefits. *See* 26 U.S.C. §§ 162(a), 831(b). For instance, the premiums paid to the captive insurance company can be tax deductible to the insured, and the premiums received by the captive-insurance company may not qualify as taxable income. To legitimately claim these benefits, however, the captive must comply with certain IRS statutes, regulations, and common-law doctrines.

As ruled by the Internal Revenue Service, the captive-insurance strategies that Defendants developed, marketed, sold, and implemented failed to comply with applicable IRS statutes, regulations, and common-law doctrines. *See* App., *infra*, 7. Petitioners filed this class-action lawsuit to recover their resulting damages. *See id.* at 45. Petitioners contend that Respondents used a prepackaged collection of misrepresentations, omissions, and form documents, common across the Class, to churn out the faulty strategies. *See id.* at 43, 45. Petitioners allege a common scheme in which Respondents knew the strategies would fail if challenged by the IRS despite Respondents' representations to the contrary. *See id.* This mass-marketed fraud caused Petitioners to be liable for back-taxes, IRS penalties, interest, and significant fees to Respondents. *See id.* at 44. Petitioners also were damaged by spending substantial time and money defending the strategies in audits and other IRS proceedings.

II. The Agreements and the Arbitration Clause.

Respondents Artex Risk Solutions, Inc. ("Artex") and TSA Holdings, LLC, formerly known as Tribeca Strategic Advisors, LLC ("Tribeca"), drafted management-services agreements ("Agreements") for Petitioners. Some of the Agreements were signed by Artex and some by Tribeca, but they are substantially identical to the extent relevant here. *See id.* at 9.

In the Agreements, Artex and Tribeca included the following arbitration clause ("Clause"):

> You and we agree that in the event of any dispute that cannot be resolved between the parties, that we will agree to seek to resolve such disputes through mediation in Mesa, Arizona, and if that fails, that all disputes will be subject to binding arbitration in Mesa, Arizona, with arbitrators to be agreed upon by the parties, and if no agreement is reached, then arbitrated by the American Arbitration Association (AAA).

See id. at 10.

The AAA Commercial Arbitration Rules provide that "[t]he parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules." AAA Commercial Arbitration R. ("Commercial Rules") R-1(a) (available at https://adr.org/sites/default/files/Commercial%20Rules.pdf). These Rules likewise confer on the arbitrator "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 or to the arbitrability of any claim or counterclaim." *Id.* R-7. Finally, the AAA Rules provide that "upon appointment, 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 clause permits the arbitration to proceed on behalf of or against a class." AAA Supplementary R. for Class

Arbitrations ("Supplementary Rules") 3 (available at https://www.adr.org/sites/default/files/Supplementary_Rules_for_Class_Arbitrations.pdf).

III. Proceedings in the District Court and the Ninth Circuit.

Petitioners sued Respondents in a class action filed in the United States District Court for the District of Arizona, alleging various claims on behalf of themselves and others similarly situated, and later amended their claims in their First Amended Complaint ("Complaint"). *See* App., *infra*, 45-46. Most Respondents then filed a Renewed Joint Motion to Compel Individual Arbitrations ("Motion"), and the remaining Respondents filed Joinders to the Motion. *See id.* Respondents sought to compel individual arbitrations of all claims against them.

The District Court did not reserve for the arbitrators the question of whether Plaintiffs may proceed as a class in arbitration. *See id.* at 75-80. Instead, the court ordered Petitioners to "individually arbitrate their claims." *Id*. at 80. The Order further dismissed without prejudice the claims against all Respondents. *See id.* at 81.

After the District Court entered its Judgment, Petitioners appealed to the Ninth Circuit, which affirmed. *See id.* at 1-40. The Ninth Circuit held, among other things, that the AAA Rules did not govern the question of "who decides"—as between the court or the arbitrators—whether Petitioners can proceed in

arbitration as a class. The appellate court reasoned that the AAA Rules were inapplicable because the Clause expressly referenced only the AAA but did not specifically mention the AAA Rules. *Shivkov v. Artex Risk Solutions, Inc.*, 974 F.3d 1051, 1068 (9th Cir. 2020). The court added that the submission to AAA is ambiguous because the Clause "provides first for mediation, second for arbitration by an arbitrator selected by the parties, and, only if the parties cannot agree on an arbitrator, arbitration before the AAA." *Id.* at 1068-69.

The Ninth Circuit also held that the question whether an arbitration may proceed as a class is a gateway question of arbitrability, which is presumptively for courts, not arbitrators, to decide—unless the parties otherwise agree. 974 F.3d at 1064-68.

Petitioners sought reconsideration en banc, but the Ninth Circuit denied reconsideration. App., *infra*, 83-90.

ARGUMENT

Arbitration is everywhere. The AAA website has a counter indicating that the AAA has already administered tens of thousands of cases this year as well as millions of cases since 1926. American Arbitration Association, https://www.adr.org/ (last visited March 12, 2021). The AAA also regularly administers class arbitrations and utilizes its Supplementary Rules for those cases. The AAA maintains an online docket of class

arbitrations, which shows that as of the date of this Petition the AAA has administered over 500 class arbitrations. AAA Class Arbitration Dockets, https://apps.adr.org/CaseDocketApp/faces/CaseSearchPage.jsf?_ga=2.75166226.1233984601.1614004671-1651791743.1613584745 (last visited Feb. 22, 2021).

This case involves two questions relating to class arbitration before the AAA. On the first question, contrary to the Ninth Circuit's holding, the Second and Tenth Circuits hold that consent to AAA arbitration is tantamount to consent to the AAA Rules. The other circuits have not ruled on this precise question.

On the second question, who decides class arbitrability, most circuits have confronted the issue and are in agreement, but this Court correctly considers the question open for resolution. A plurality of this Court once held that class arbitration was procedural and thus a question for the arbitrator to decide because "it concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003). Since then, however, the Court has reminded litigants that the question remains open in light of the plurality decision. *Oxford Health Plans, LLC v. Sutter*, 569 U.S. 564, 569 n.2 (2013); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 680 (2010).

Circuits addressing the second issue have paid insufficient attention to the plain text of the statute, because the Federal Arbitration Act ("FAA") authorizes

courts to decide whether the making of the agreement for arbitration is "in issue." 9 U.S.C. § 4. Deciding whether the parties can combine claims in a class does not put "in issue" the separate procedural question of whether the underlying controversy can proceed to arbitration. Granting courts this additional authority ignores the plain text of the statute and simply perpetuates an unmoored policy preference, lacking logic. The Court should grant the Petition and hold that the controlling statutory text reserves the class question for arbitrators—not courts.

I. In holding that the parties did not delegate the class-arbitration question to the arbitrators, the decision creates a split with the Second and Tenth Circuits.

It is undisputed that the parties agreed to arbitration with the AAA if no other agreement could be reached. It is also undisputed that no other agreement was reached. Thus, the default dispute-resolution method of arbitration with the AAA was triggered. That—by itself—invokes the AAA Rules, according to the AAA itself: "The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association ('AAA') under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules." Commercial Rule R-1(a).

A. Given that a reference to AAA incorporates the AAA Rules, the Ninth Circuit's holding is "disingenuous" under Second Circuit precedent.

The AAA says it about as plainly as it can be said. Providing for arbitration before the AAA is deemed to incorporate the AAA Rules into the parties' contract. Hence, the Second Circuit had no trouble in declaring any contrary argument "disingenuous." *Idea Nuova, Inc. v. GM Licensing Grp.*, 617 F.3d 177, 181 (2d Cir. 2010) ("AAA arbitration is arbitration conducted according the AAA rules"). But that "disingenuous" argument is precisely what the Ninth Circuit adopted and held.

The Second Circuit is not alone in disagreeing with the Ninth Circuit's rule. The Tenth Circuit has also addressed the precise issue and held: "A party who consents by contract to arbitration before the AAA also consents to be bound by the procedural rules of the AAA, unless that party indicates otherwise in the contract." *P & P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 867-68 (10th Cir. 1999); *see also Bank of Am., N.A. v. Micheletti Family P'ship*, No. 08-02902, 2008 WL 4571245, at *6 (N.D. Cal. Oct. 14, 2008) ("By explicitly stating that arbitration would be conducted by AAA, the parties thereby incorporated AAA rules"). Here, as discussed below in part I.C., the parties did not "indicate[] otherwise in the contract." Instead, they freely adopted arbitration before the AAA as their default dispute-resolution method—without any reservation.

That adoption manifests their assent to having the arbitrator decide the issue of class arbitration.

B. Adoption of the AAA Rules delegates to the arbitrator the question of class arbitration.

By agreeing to AAA arbitration, the parties to the Clause were not silent or ambiguous about who should decide the availability of class arbitration. Under AAA Rules, "[u]pon appointment, 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 clause permits the arbitration to proceed on behalf of or against a class." Supplementary Rule 3.

Moreover, the FAA grants contracting parties the freedom "to authorize arbitrators to resolve such questions." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 (2019). The Clause here provides "clear and unmistakable evidence" of the parties' intent that arbitrators decide the class-arbitration question. *Bazzle*, 539 U.S. at 452 (cleaned up).

This view is supported by analogous authority. The prevailing view among the majority of Circuits, including the Ninth Circuit, is that selecting the AAA and expressly incorporating the AAA Rules clearly delegates to the arbitrators the question of whether arbitration may proceed as a class. *See JPay, Inc. v. Kobel*, 904 F.3d 923, 936 (11th Cir. 2018); *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1245-46 (10th Cir. 2018); *Wells*

Fargo v. Sappington, 884 F.3d 392, 397-99 (2d Cir. 2018); *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015); *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 635 (5th Cir. 2012), *abrogated in part on other grounds by Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *but see Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972-73 (8th Cir. 2017); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 763-65 (3d Cir. 2016); *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599-600 (6th Cir. 2013).

So the precise question here is whether explicit incorporation of the Rules themselves is necessary. The answer is that it is not because specifying AAA itself in the contract automatically incorporates the AAA Rules: "The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by AAA without specifying particular rules." Commercial Rule R-1(a) (cleaned up).

There is no basis in law or logic to find ambiguity regarding the parties' intent to abide by AAA Rules if the parties expressly reference the AAA within the four corners of an agreement. Other than the Ninth Circuit, no Circuit has held that parties who have invoked the AAA did not clearly and unmistakably delegate arbitrability to the arbitrators merely because they did not expressly use the word "rules."

The Ninth Circuit's error in reaching the merits of the class arbitration question was not harmless. The

Ninth Circuit affirmed the District Court in ruling that "the Agreements are silent on class arbitration," 974 F.3d 1069, but this is not accurate. The Clause invokes the AAA, which clearly contemplates class arbitrations. Under the AAA's Supplementary Rules, "the arbitrator shall determine as a threshold matter whether the applicable arbitration clause permits" class arbitration. Supplementary Rule 3 (cleaned up). Agreeing to AAA arbitration, which authorizes class arbitrations, is not "mere silence on the issue." *Stolt-Nielsen*, 559 U.S. at 687. This language thus provides the arbitrator contractual leeway to decide the class-arbitration question. *See Oxford Health Plans*, 569 U.S. at 571.

By agreeing to arbitration before the AAA, the parties are deemed to have incorporated the AAA Rules into their agreement. This Court should reverse the Ninth Circuit to hold that AAA Rules unambiguously apply to AAA arbitrations, even when the Rules themselves are not expressly mentioned.

C. The Ninth Circuit's focus on the supposedly contingent nature of arbitration conflicts with the Tenth Circuit.

The Ninth Circuit distinguished the prevailing position among the circuits, and refused to apply the AAA Rules, by observing that the Clause "provides first for mediation, second for arbitration by an arbitrator selected by the parties, and, only if the parties cannot agree on an arbitrator, arbitration before the AAA."

974 F.3d at 1068-69. That observation, however, also conflicts with the Tenth Circuit's *Belnap* decision, which held that the parties clearly and unmistakably delegated the class arbitration decision to the arbitrators even though the parties had agreed to mediate before arbitrating.

The Clause here is like the one in *Belnap*; the only "difference" is that the clause in *Belnap* selected arbitration through JAMS (formerly "Judicial Arbitration and Mediation Services"), while the Clause here selected arbitration through AAA. In *Belnap*, the clause provided: "No Disputant may prosecute any suit until and unless the Disputants have submitted the issues to mediation and, if necessary, to arbitration in accordance with the rules of JAMS or another suitable dispute resolution service agreeable to their respective attorneys." *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1281-82 (10th Cir. 2017) (cleaned up). Although the clause in *Belnap* happened to expressly mention "the rules of JAMS," that was not material to its holding about the contingent nature of arbitration.

JAMS Rules, like AAA Rules, provide for arbitrators to decide questions of arbitrability. *See id.* at 1281. Despite this, the plaintiff in *Belnap* argued that the parties had not delegated issues of arbitrability to the arbitrator because they merely selected the JAMS Rules as "one option for dispute resolution." *Id*. But the Tenth Circuit rejected this argument, holding that the "plain language of the Agreement establishes the JAMS Rules as the default controlling rubric—a fact that would have been quite evident to the parties

entering the Agreement." *Id.* at 1282. The mere "ill-defined possibility" that parties might choose another forum and set of rules is "not enough to say that the JAMS Rules are not the Agreement's ordinary controlling standard." *Id.* (cleaned up). The Tenth Circuit, therefore, held that the parties clearly and unmistakably intended for an arbitrator to decide issues of arbitrability. *Id.* at 1283.

In other words, making arbitration a "contingent" default dispute-resolution method is immaterial. The parties still contemplated arbitration, expressly provided for it, and specified the exact arbitral forum. The fundamental task of courts and arbitrators is "to give effect to the intent of the parties." *Lamps Plus*, 139 S. Ct. at 1416 (quoting *Stolt-Nielsen*, 559 U.S. at 684). And here the parties' intent is made express in their agreement to arbitrate before the AAA.

If the Ninth Circuit were following *Belnap*, the fact that the Clause "provides first for mediation, second for arbitration by an arbitrator selected by the parties, and, only if the parties cannot agree on an arbitrator, arbitration before the AAA" would have played no part in the Ninth Circuit's analysis. 974 F.3d at 1068-69. Mediation and non-JAMS arbitration were contingencies in *Belnap*, just as mediation and non-AAA arbitration are contingencies here. At no point prior to the parties' dispute did the parties' minds ever meet on which non-AAA arbitrators should hear this dispute. However, the parties **did** agree on the AAA, and so, the AAA procedure is necessarily triggered. And yet, unlike the Tenth Circuit in *Belnap*, the Ninth

Circuit held that these contingencies overrode the parties' intent to default to the AAA and its rules. *See* 974 F.3d at 1068-69. This Court should grant certiorari to reverse the Ninth Circuit.

II. The question of class arbitrability should not be a gateway issue for the courts, given the plain statutory text of the FAA.

The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. It expressly delegates to courts the power to enforce arbitration agreements where "the making of the agreement for arbitration or the failure to comply therewith is not in issue." *Id.* § 4. Examining the making of the agreement for arbitration necessarily entails resolving gateway questions of arbitrability such as "whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." *Bazzle*, 539 U.S. at 452; *accord Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 69-70 (2010) (describing the FAA's procedures).

As mentioned, this is an open issue for the Court. *Oxford Health Plans*, 569 U.S. at 569 n.2; *Stolt-Nielsen*, 559 U.S. at 680. To date, the Court has expressly reserved the question of whether the availability of class relief in arbitration amounts to a gateway question of arbitrability. *See Lamps Plus*, 139 S. Ct. at 1417 n.4. The Court now should settle the issue by holding that

the availability of class arbitration is a question for the arbitrators.

A. Class arbitration should not be a gateway question for a court because it does not ask whether there was an agreement to arbitrate a particular controversy.

The Ninth Circuit decided that the availability of class arbitration is also a "gateway" question of arbitrability that courts, not arbitrators, should decide. 974 F.3d at 1064-68. In so holding the Ninth Circuit, like several other circuits, never reconciles its holding with the FAA's plain statutory text. *Id.* at 1065-67.[1] Indeed, during its discussion of this issue, the Ninth Circuit's decision does not quote any statutory text. *Id*. Instead, the Opinion hews closely to the rationale articulated in the Seventh Circuit's opinion in *Herrington v. Waterstone Mortg. Corp*., 907 F.3d 502 (7th Cir. 2018). 974 F.3d at 1066. *Herrington* opines that class arbitration involves two questions of arbitrability: (1) "whether the potential parties to the arbitration agreed to arbitrate," and (2) "whether the agreement to arbitrate covers a particular controversy." *Id.* at 507-08.

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[1] *See also 20/20 Commc'ns, Inc. v. Crawford*, 930 F.3d 715, 718 (5th Cir. 2019); *Herrington v. Waterstone Mortg. Corp.*, 907 F.3d 502, 506–07 (7th Cir. 2018); *JPay*, 904 F.3d at 936; *Catamaran*, 864 F.3d at 972; *Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 876-77 (4th Cir. 2016); *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326, 334 (3d Cir. 2014); *Reed Elsevier*, 734 F.3d at 599.

On its face, *Herrington*'s analysis falls short of establishing that the making of the agreement to arbitrate or agreeing to arbitrate a particular controversy presents the same issue as whether the parties agreed to class-arbitration procedures. The issue of class arbitration presupposes an agreement to arbitrate a particular controversy. How the controversy is to be arbitrated—by individuals, joinder, or class action—is a quintessential question of procedure and is not the same as whether the parties agreed to arbitrate. The question does not put "the making of the agreement for arbitration or the failure to comply therewith" in issue. 9 U.S.C. § 4.

Surprisingly, the Ninth Circuit's opinion essentially concedes as much by acknowledging the class question is not the same as the arbitration question but instead "interlocks" with it. 974 F.3d at 1067. But, as Chief Judge Tymkovich of the Tenth Circuit put it in his concurring opinion, "[t]he right to combine claims does not fall into this 'threshold' or 'gateway' category because it has nothing to do with whether the underlying controversy can proceed to arbitration." *Dish Network*, 900 F.3d at 1255.

Echoing *Herrington*, however, the Ninth Circuit also concluded that "most importantly the structural features of class arbitration make it a fundamental change from the norm of bilateral arbitration." 974 F.3d at 1066 (quoting *Herrington*, 907 F.3d at 509) (cleaned up). The *Herrington* decision based its reasoning in part on dicta from *Stolt-Nielsen*, 559 U.S. at 686. But in *Stolt-Nielsen*, the issue of "who decides" class

arbitration was not before the Court. *See id.* at 672, 676. Rather, the issue was whether the arbitrators could order class relief on the basis of public policy alone instead of language in the contract. *See id.* After deciding that the contract controls, the Court further held that mere silence in the contract is insufficient to order class arbitration. *See id.* at 687. It was this merits-based question that prompted the Court to describe the "fundamental" differences between class and bilateral arbitration. *Id.*

Even if the differences between class and bilateral arbitration were somehow fundamental, it would not follow that the FAA should presume parties intended for courts to resolve fundamental questions rather than arbitrators. *Dish Network*, 900 F.3d at 1255 (Tymkovich, C.J., concurring). At most, these differences may inform which way the inquiry should be resolved, not who should resolve it. *Id.* Indeed, arbitrators regularly resolve fundamental questions, including ultimate questions of liability and damages. Thus, "consequence alone" cannot reliably resolve which procedural questions amount to gateway questions because "any procedural rule has the potential to determine a case." *Id.* Wresting the class-procedure decision from arbitrators thus makes no sense on policy grounds and is unsupportable on textual grounds.

Gateway issues are not magical because the "parties are free to authorize arbitrators to resolve" gateway questions of arbitrability. *Lamps Plus*, 139 S. Ct. at 1417. The only limitation is that evidence of their intent to do so must be "clear and unmistakable."

Bazzle, 539 U.S. at 452. The parties met that standard here by selecting the AAA as the arbitral forum because the AAA Rules themselves provide that they are automatically incorporated even without express incorporation of the Rules: "The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by AAA without specifying particular rules." Commercial Rule R-1(a) (cleaned up). The AAA Rules go on to state that the arbitrator makes the decision about class arbitration: "[U]pon appointment, 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 clause permits the arbitration to proceed on behalf of or against a class." *Id.* at R-3.

B. The question of class arbitration is quintessentially one of procedure.

The Ninth Circuit's analysis also interpreted dicta from *Stolt-Nielsen* to avoid the Court's holding in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). Under *Howsam*, "procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide." *Id.* at 84 (cleaned up). The Ninth Circuit concedes that "a class action is a classically procedural mechanism in federal court under Federal Rule of Civil Procedure 23." 974 F.3d at 1067 (cleaned up).

But the Ninth Circuit refused to apply *Howsam* because "the relevant metric is not the labeling of a particular mechanism in federal court as 'procedural,' but rather the categories of gateway issues in reviewing an arbitration agreement that the Court has instructed determine whether an issue is presumptively for a court or an arbitrator to decide absent *further agreement* by the parties." *Id.* (emphasis in original). This circular framing of the issue unfortunately begs the question because it assumes exactly what the court is supposed to be deciding: whether class treatment of an arbitration is a "gateway issue."

The FAA's text does not turn on whether a question is "fundamental" and then reserve "fundamental" questions for the courts. Nor does it confer on courts a free-floating authority to conduct thought experiments on what the parties may have intended as to all disputed matters. Nor does it encourage judges to override the statutory language and the parties' agreement simply because class actions are currently out of fashion in certain jurisdictions. Rather, the statutory text reserves for courts the power to decide whether they are "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4. The Ninth Circuit, like the other circuits, erred in disregarding the plain text of the statute.

CONCLUSION

Plaintiffs respectfully request that this Court grant the Petition and reverse the Ninth Circuit's decision.

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Respectfully submitted,

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