No. 15-1242

In the Supreme Court of the United States

SCOUT PETROLEUM, LLC, *et al.*,

Petitioners,

v.

CHESAPEAKE APPALACHIA, LLC,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Third Circuit correctly held that the oil and gas leases between Respondent and certain Pennsylvania landowners do not "clearly and unmistakably" delegate decisions about the availability of class-wide arbitration to an arbitrator.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent Chesapeake Appalachia, L.L.C. states that it is a wholly-owned subsidiary of Chesapeake Energy Corporation, a publicly-held corporation.

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INTRODUCTION

The Court of Appeals below correctly held that Respondent Chesapeake Appalachia, LLC did not "clearly and unmistakably" delegate decisions about the availability of class-wide arbitration to an arbitrator by agreeing to a clause which states that disputes "between Lessor and Lessee * * * shall be determined by arbitration in accordance with the rules of the American Arbitration Association." Pet. App. 3–4. Petitioners have not identified any aspect of that decision which would warrant this Court's review.

The only question presented here is whether the Third Circuit correctly applied the "clear and unmistakable" standard to the particular leases at issue. Petitioners expressly waived below any challenge to the applicability of that standard. They nevertheless strain to manufacture a circuit split on *how* courts apply the "clear and unmistakable" standard. But those efforts are unavailing.

First, Petitioners cite a plethora of cases holding that an agreement's reference to the AAA rules constitutes "clear and unmistakable" evidence of intent to delegate questions about whether *individual* claims are subject to arbitration. But that is not the issue. The question here involves only the availability of *class-wide* arbitration. And that is a wholly separate question, as this Court's decisions make clear. *See, e.g.*, *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685–87 (2010). Questions of *individual* arbitrability simply are not presented in this case.

Second, Petitioners cite two unpublished district court decisions holding that particular contracts

which mentioned the AAA rules delegated authority over questions regarding class-wide arbitration under the "clear and unmistakable" standard. Leaving aside that unpublished district court decisions do not create a circuit split, those two decisions only highlight the fact-dependent nature of the "clear and unmistakable" standard. They do not conflict with the Third Circuit's decision below, which focused not only on the leases' reference to the AAA rules but also the fact that the language in the leases contemplates only bilateral disputes.

And third, Petitioners cite cases from the Fifth and Eleventh Circuits finding "clear and unmistakable" delegations concerning class-wide arbitration in particular contracts. But neither of those cases establishes that mere reference to the AAA rules constitutes clear and unmistakable evidence of intent to delegate questions regarding class-wide arbitration. As the Third Circuit itself recognized, its decision did not "create a circuit split." Pet. App. 44.

Petitioners are thus left to argue (at 22–27) that the Third Circuit misconstrued the particular leases at issue, relying heavily on their own view of Pennsylvania law and its incorporation-by-reference doctrine. But the decision below is plainly correct, and does not warrant further review.

Finally, even if this Court were inclined to take up issues regarding whether courts or arbitrators should decide the availability of class-wide arbitration, and what effect reference to the AAA rules has on that analysis, this would not be the right case. Petitioners have expressly waived a threshold question that this Court would want to

address before or together with the Question Presented. And this appeal is also still in an interlocutory posture.

The Petition should therefore be denied.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

Respondent Chesapeake Appalachia, L.L.C. ("Chesapeake") is an oil and gas company that provides exploration, production, processing, and transportation services within the Appalachian Basin, which spans West Virginia, Pennsylvania, and Ohio. As relevant here, Chesapeake entered into several oil and gas leases in 2008 with individual landowners in northeastern Pennsylvania. Pet. App. 3.

Under these leases, Chesapeake is the "Lessee" (obtaining rights to use the land) and the respective landowners are the "Lessor" (giving those rights to Chesapeake). Pet. App. 3–4. The leases contain a two-sentence arbitration clause:

> *ARBITRATION*. In the event of a disagreement between Lessor and Lessee concerning this Lease, performance thereunder, or damages caused by Lessee's operations, the resolution of all such disputes shall be determined by arbitration in accordance with the rules of the American Arbitration Association. All fees and costs associated with the arbitration shall be borne equally by Lessor and Lessee.

Pet. App. 4. Petitioners Scout Petroleum LLC and Scout Petroleum II LP were not original counterparties to any of these leases, but in 2013,

they purchased rights from several Lessors and began receiving royalty payments from Chesapeake. Pet. App. 4.

On March 17, 2014, Petitioners initiated AAA arbitration against Chesapeake, *see Scout Petroleum LLC* v. *Chesapeake Appalachia, L.L.C.*, AAA No. 14-20-1400-0339, purporting to arbitrate, on behalf of themselves and a putative "class," the interpretation of Petitioners' newly-acquired leases. Pet. App. 9. Petitioners claim that Chesapeake took improper deductions from their royalty payments. In its Answering Statement filed with the AAA, Chesapeake objected to the arbitration proceedings because it did not agree to resolve disputes in class-wide arbitration, and did not agree to submit class arbitrability to arbitration. Pet. App. 9.

B. Proceedings Below

Chesapeake promptly initiated a federal declaratory judgment action in the U.S. District Court for the Middle District of Pennsylvania against Petitioners on April 1, 2014, seeking two declarations: (1) that the court, not arbitrators, must decide whether class arbitration is available pursuant to the leases, and (2) that class arbitration is not available pursuant to the leases. Pet. App. 9–10. On April 4, 2014, Chesapeake moved for summary judgment limited to the first question of "who decides" the availability of class-wide arbitration. *See* CA App. 335–40 (Mot.); CA App. 428–48 (Br. in Supp.). Petitioners moved to dismiss or stay the action on April 29, 2014. *See* CA App. 509–13 (Mot.); CA App. 514–35 (Mem. in Supp.).

After these cross-motions were filed, but before the district court had an opportunity to rule on them,

Petitioners asked the arbitration panel to decide the same "who decides" question over Chesapeake's repeated objections and despite the pendency of the federal action. *See* CA App. 1941–42, 2107–08. On October 6, 2014, the panel ruled that it, not the court, would decide whether class-wide arbitration is permitted. *See* CA App. 94–109. On October 14, 2014, Chesapeake moved to vacate the panel's order. *See* CA App. 1488–91 (Mot.), CA App. 1492–515 (Mem. in Supp.).

The District Court Decision. On October 16, 2014, the district court granted Chesapeake's motion for summary judgment on Count I, and accordingly, denied Petitioners' motion to dismiss and granted Chesapeake's motion to vacate the panel's order. *See* Pet. App. 90–93. Petitioners then moved for reconsideration, *see* CA App. 807–14 (Mot.); CA App. 815–41 (Mem. in Supp.), and on the eve of the hearing on that motion, they filed a motion to recuse the district judge and vacate his summary-judgment order, *see* CA App. 2274–75. On December 19, 2014, the district court denied Petitioners' pending motions and issued a new Memorandum Opinion further explaining its decision. *See* Pet. App. 48–89.

In explaining its decision, the district court started by analyzing this Court's decision in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), which addressed whether courts or arbitrators should determine the availability of class-wide arbitration. *See* Pet. App. 54–58. The district court explained that, in *Bazzle*, "[a] plurality of the United States Supreme Court * * * held that the issue of whether or not the contracts were silent as to class arbitration was a matter for the arbitrator to decide,

not the courts." Pet. App. 90–93 (citing *Bazzle*, 539 U.S. at 447 (plurality opinion)). Under that approach, class arbitrability would generally be a question for the arbitrator except in "'certain limited circumstances.'" Pet. App. 56 (quoting *Bazzle*, 539 U.S. at 452 (plurality opinion)). But JUSTICE STEVENS, whose vote was essential to the outcome, did not join the plurality opinion, and the opinion was therefore not controlling. *See* Pet. App. 56–57. The district court below also went on to note that this Court has "issued subsequent decisions that eroded the already tenuous pronouncement in *Bazzle*" and undermined the plurality's position. Pet. App. 58 (citing *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Oxford Health Plans LLC* v. *Sutter*, 133 S. Ct. 2064 (2013)).

The district court then explained that Courts of Appeals since *Stolt-Nielsen* and *Oxford Health* have unanimously viewed the availability of class-wide arbitration as a question of arbitrability to be decided by a court absent "clear and unmistakable" evidence that the parties have delegated the question to the arbitrator—in particular, the Sixth Circuit in *Reed Elsevier, Inc. ex rel. LexisNexis* v. *Crockett*, 734 F.3d 594 (CA6 2013), *cert. denied sub nom. Crockett v. Reed Elsevier, Inc.*, 134 S. Ct. 2291 (2014), and the Third Circuit in *Opalinski* v. *Robert Half International Inc.*, 761 F.3d 326, 331 (CA3 2014), *cert. denied*, 135 S. Ct. 1530 (2015). *See* Pet. App. 58–72. The district court took the same approach.

Applying the "clear and unmistakable" standard to the leases at issue, the district court concluded that it was not met because the leases "'nowhere mentions'" class-wide arbitration, Pet. App. 77–78

(quoting *Reed Elsevier*, 734 F.3d at 599–600), much less delegates decisions about its availability to the arbitrator. But because another decision from the Middle District of Pennsylvania had reached a contrary conclusion in construing the exact same language in other Chesapeake leases, *see Chesapeake Appalachia, LLC* v. *Burkett*, No. CIV.A. 3:13-3073, 2014 WL 5312829 (M.D. Pa. Oct. 17, 2014),[1] the district court certified the order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *See* Pet. App. 79.

The Court of Appeals Decision. The Third Circuit granted Petitioners permission to appeal on January 21, 2015, *see* CA App. 207–09, and affirmed the district court's interlocutory order on January 5, 2016. *See* Pet. App. 1–45. In presenting their appeal to the Third Circuit, Petitioners expressly waived any challenge to the district court's holding that the availability of class-wide arbitration is a matter of arbitrability for a court to decide absent "clear and unmistakable" evidence that the parties have delegated the question to the arbitrator. *See, e.g.*, Pet'rs' CA Reply Br. 8 ("Chesapeake also wrongfully implies that Scout is criticizing the *Opalinski* opinion. That is not the case because Scout *embraces and meets the clear and unmistakable evidentiary standard* set forth in *Opalinski*.") (emphasis added). As a result, the only question before the Court of Appeals was whether Petitioners could satisfy the "clear and unmistakable" standard, which the Third Circuit held that it could not.

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[1] *Burkett* is currently stayed on appeal before the Third Circuit.

The Third Circuit reached its conclusion "[b]ased on the language of the Leases themselves, the nature and contents of the various AAA rules, and the existing case law." Pet. App. 3. With respect to the case law, the court noted some disagreements among district courts, *see* Pet. App. 17 & n.3, but also recognized that "only two circuit courts have had the opportunity to consider the specific issue of whether an arbitration agreement referring to the AAA rules clearly and unmistakably delegated the question of class arbitrability to the arbitrators: (1) [the Third Circuit] in *Opalinksi*; and (2) the Sixth Circuit in *Reed Elsevier* * * * ." Pet. App. 17–18. The Sixth Circuit had held in *Reed Elsevier* "that such an agreement failed to meet this 'clear and unmistakable' standard," and while the Third Circuit had left the question open in *Opalinski*, it had nevertheless emphasized "the onerous nature of overcoming the presumption in favor of judicial resolution of such questions of arbitrability—which requires express and unambiguous contractual language of delegation as opposed to mere silence or ambiguous contractual language." Pet. App. 18.

After extensively reviewing the existing case law, *see* Pet. App. 17–26, the Third Circuit turned to the question "whether the Leases at issue in this appeal really satisfy [the 'clear and unmistakable' standard]." Pet. App. 26. "[L]ook[ing] to the actual language of the Leases," the court noted that they are "silent as to the availability of classwide arbitration or whether the question should be submitted to the arbitrator." Pet. App. 26 (quotation omitted). The court then focused on Petitioners' argument that the original parties to the leases *had* clearly and unmistakably addressed the issue. The

court "agree[d] with Scout that, in order to undo the presumption in favor of judicial resolution, an arbitration agreement need not include any special 'incantation.'" Pet. App. 27. But the court nevertheless explained that the "clear and unmistakable" requirement "still impose[s] basic standards that must be satisfied," and that, "[a]s a practical matter, the absence of an 'incantation' * * * makes it more difficult to meet such burdens." Pet. App. 29. Emphasizing "'the total absence of any reference to classwide arbitration'" and the fact that "the Leases consistently use singular (and defined) terms to describe the respective parties to any arbitration proceeding," the court found that the exacting standard was not met. Pet. App. 30 (quoting *Reed Elsevier*, 734 F.3d at 599).

Addressing the reference to the AAA rules and Petitioners' arguments about Pennsylvania's doctrine of incorporation-by-reference, the court explained that "[i]t is uncontested that, under Pennsylvania law, '[i]ncorporation by reference is proper where the underlying contract makes clear reference to a separate document * * * .'" Pet. App. 32-33 (quoting *Std. Bent Glass Corp.* v. *Glassrobots Oy*, 333 F.3d 440, 447 (CA3 2003); second alteration in original). But because federal law also imposed a requirement of "clear and unmistakable" evidence, the court explained that "it is not enough for Scout to establish that the AAA rules provide for the arbitrators to decide, *inter alia*, the question of class arbitrability, and that, in turn, these rules are incorporated by reference pursuant to state law." Pet. App. 33. In contrast to the context of bilateral arbitration, where parties may incorporate the Commercial Rules of the AAA, and those rules

provide for arbitrators to decide questions of arbitrability, the Court of Appeals found that Petitioners' "daisy-chain of cross-references—going from the Leases themselves to 'the rules of the American Arbitration Association' to the Commercial Rules and, at last, to the Supplementary Rules"—fell short of the "clear and unmistakable" standard. Pet. App. 34 (initial quotation omitted). The court thus explained that, "[h]aving examined the various AAA rules, we believe that the Leases still fail to satisfy the onerous burden of undoing the presumption in favor of judicial resolution of the question of class arbitrability," Pet. App. 34—particularly, "[g]iven the actual contractual language at issue here," Pet. App. 36.

Petitioner now seeks a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Present Any Issues Warranting This Court's Review.

The decision below correctly applied the "clear and unmistakable" standard to the leases at issue, and Petitioners neither identify any split among the circuits, nor point to any other important legal issue that might warrant this Court's review. While they cite cases that allegedly conflict with the decision below, those conflicts are illusory.

1. The decision below does not conflict with the cases Petitioners cite (at 11–14) holding that contracts which incorporate the AAA rules clearly and unmistakably delegate questions about the scope of an arbitration clause. Petitioners' principal tack is to elide the distinction between two fundamentally different questions that parties might agree to

delegate to an arbitrator: (a) whether a particular dispute is subject to arbitration between those parties (the "bilateral-arbitrability" question), and (b) whether a particular dispute can be adjudicated through a class-wide arbitration (the "class-arbitrability" question).

This Court's precedents make clear that those are two very different questions. In *Stolt-Nielsen*, the Court explained that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." 559 U.S. at 685. Indeed, the Federal Arbitration Act itself illustrates this distinction because, even though Congress chose to address a whole host of issues related to arbitration, class-wide arbitration "is not arbitration as envisioned by the FAA." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 351 (2011). Thus, just as an agreement to bilateral arbitration does not also constitute an agreement to class-wide arbitration, so too an agreement to delegate the bilateral-arbitrability question to an arbitrator does not constitute a "clear and unmistakable" agreement to delegate the class-arbitrability question.[2]

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[2] *See, e.g.*, *Chesapeake Appalachia, LLC* v. *Suppa*, 91 F. Supp. 3d 853, 864 (N.D. W. Va. 2015) ("[T]he Supreme Court's recognition of the fundamental differences between bilateral and class arbitration is significant. Based on those differences, the Court prohibited decisionmakers from 'presum[ing] . . . that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.' *Stolt–Nielsen*, 559 U.S. at 687, 130 S. Ct. at 1758. It follows that the parties' silence on the question of 'who decides' class arbitrability should not be read as implicitly

The bilateral-arbitrability question has never been at issue in this case. Chesapeake has never disputed that, under the particular leases at issue, the arbitrator may decide on a purely bilateral basis whether particular claims are subject to arbitration. Rather, Chesapeake brought this action because Petitioners purported to initiate a class-wide arbitration and took the position that the arbitrator should decide the class-arbitrability question, over Chesapeake's objection, for parties not in the case.

Because bilateral arbitrability is not at issue in this case, the cases cited by Petitioner regarding bilateral arbitrability are irrelevant. That contracts incorporating the AAA rules might "clearly and unmistakably" delegate the bilateral-arbitrability question has no bearing on delegation of the question of *class* arbitrability.

In fact, the decision below expressly acknowledged that, in the context of bilateral arbitrability, "'[v]irtually every circuit to have considered the issue has determined that incorporation of the [AAA] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.'" Pet. App. 39 (quoting *Oracle Am., Inc.* v. *Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (CA9 2013); alterations in original). But the Third Circuit explained that "this bilateral arbitration dispute case law is entitled to relatively little weight in the class arbitrability context" due to

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consenting to submit the question to an arbitrator. The weighty consequences of class arbitration are no less implicated by the 'who decides' question than by the 'is it available' question.").

"the fundamental differences between bilateral arbitration and class arbitration as well as the serious consequences of permitting a class arbitration proceeding to go forward." Pet. App. 40 (quotation omitted).

Petitioners therefore miss the mark (at 11–13) in citing cases that do not address class arbitrability, but instead address issues regarding the scope or enforceability of bilateral arbitration clauses. *See Petrofac, Inc.* v. *DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (CA5 2012); *Fallo* v. *High-Tech Inst.*, 559 F.3d 874, 879 (CA8 2009); *Awuah* v. *Coverall N. Am., Inc.*, 554 F.3d 7, 8 (CA1 2009); *Terminix Int'l Co.* v. *Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1329 (CA11 2005); *Contec Corp.* v. *Remote Sol. Co.*, 398 F.3d 205, 207 (CA2 2005).[3] These cases say nothing about the question presented here: whether incorporation of the AAA rules might constitute "clear and unmistakable" evidence of an agreement to delegate the *class*-arbitrability question to an arbitrator.

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[3] The same is also true for most of the cases that Petitioners cite in their two-page footnote 3. *See Brennan* v. *Opus Bank*, 796 F.3d 1125 (CA9 2015); *Gilman* v. *Walters*, 61 F. Supp. 3d 794 (S.D. Ind. 2014); *W & T Travel Servs., LLC* v. *Priority One Servs., Inc.*, 69 F. Supp. 3d 158 (D.D.C. 2014); *Getzelman* v. *Trustwave Holdings, Inc.*, No. 13-cv-02987-CMA-KMT, 2014 WL 3809736 (D. Colo. Aug. 1, 2014); *Haire* v. *Smith, Currie & Hancock LLP*, 925 F. Supp. 2d 126 (D.D.C. 2013); *Oracle Am., Inc.* v. *Myriad Grp. A.G.*, 724 F.3d 1069 (CA9 2013); *Chen* v. *Dillard's Inc.*, Nos. 12-CV-2366-CM & 12-CV-2517-JTM, 2012 WL 4127958 (D. Kan. Sept. 19, 2012); *Yellow Cab Affiliation, Inc.* v. *N.H. Ins. Co.*, No. 10-cv-6896, 2011 WL 307617 (N.D. Ill. Jan. 28, 2011); *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366 (CAFed 2006); *P & P Indus., Inc.* v. *Sutter Corp.*, 179 F.3d 861 (CA10 1999).

2. Petitioners also cite (in a footnote, at 13 n.3) two unpublished district court decisions, both from within the Ninth Circuit, which suggest that incorporation of the AAA rules can constitute clear and unmistakable evidence of intent to delegate authority over questions regarding class-wide arbitration. *See* Pet. 13 n. 3 (citing *Accentcare, Inc.* v. *Jacobs*, No. C 15-03668 JSW, 2015 WL 6847909 (N.D. Cal. Nov. 9, 2015); *Marriott Ownership Resorts, Inc.* v. *Flynn*, Civil No. 14-00372 JMS-RLP, 2014 WL 7076827 (D. Haw. Dec. 11, 2014)).

As a threshold matter, no alleged conflict with these two unpublished district court decisions would warrant this Court's review. Neither the Ninth Circuit nor any other circuit has reached a similar conclusion in *any* factual context, much less a similar one—making review of any potential conflict premature at best. Indeed, the only other Court of Appeals to address the issue squarely is the Sixth Circuit, which held in *Reed Elsevier* that a contract did not clearly and unmistakably delegate the class-arbitrability question where it provided that claims would "'be resolved by binding arbitration under * * * the then-current Commercial Rules and supervision of the American Arbitration Association ("AAA").'" 734 F.3d at 599. But these two district court decisions do not conflict with the decision below in any event because the "clear and unmistakable" inquiry is fact-dependent and can turn not only on the incorporation *vel non* of particular arbitration rules, but can also on the rest of the contract language, as the Third Circuit below recognized.

The district court in *Accentcare* started by expressly reserving the *Bazzle* question—*i.e.*,

whether class arbitrability is "a matter of contract interpretation and arbitration procedure" that would be presumptively delegated to the arbitrator, or instead "a question of arbitrability" that is presumptively for a court decide absent "clear and unmistakable" evidence to the contrary. 2015 WL 6847909, at *3. The court then observed that, under Ninth Circuit precedent, "'incorporation of the AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability,'" *id.* (quoting *Brennan* v. *Opus Bank*, 796 F.3d 1125, 1130 (CA9 2015)), and that "[d]istrict courts have emphasized the importance of the *specific provisions of the AAA rules* that are incorporated by the arbitration agreement," *id.* (comparing *Yahoo! Inc.* v. *Iversen*, 836 F. Supp. 2d 1007, 1012 (N.D. Cal. 2011), with *Tompkins* v. *23andMe, Inc.*, No. 5:13-CV-05682-LHK, 2014 WL 2903752, at *10 (N.D. Cal. June 25, 2014); emphasis added). The Court thus emphasized that the parties had specifically incorporated "the AAA's National Rules for the Resolution of Employment Disputes," and further that it was interpreting "an employment contract between sophisticated parties." *Id.* at *3–4.

That ruling does not conflict with the decision below. The contract in *Accentcare* required arbitration for "'any controversy, claim or dispute between Employee and the Company * * * relating to or arising out of Employee's employment or the cessation of that employment,'" *id.* at *1—claims which go beyond disputes under the employment contract itself, sweeping in all manner of employment disputes that are often brought on a collective basis either as class actions or as collective actions under the FLSA. Here, by contrast, the

arbitration provision covers only "disagreement[s] between Lessor and Lessee concerning this Lease, performance thereunder, or damages caused by Lessee's operations * * * ," Pet. App. 4—claims not ordinarily litigated on class-wide basis.

The district court in *Marriott* confronted an arbitration agreement that specifically incorporated "'the commercial arbitration rules of the American Arbitration Association.'" 2014 WL 7076827 at *7. The court also reserved the *Bazzle* question, *see id.* at *12, and held that the terms of the agreement provided clear and unmistakable evidence of intent to delegate the class-arbitrability question, *see id.* at *15. The contract at issue was uniquely worded, however, providing that

> "'[a]ny disagreement or controversy between the Developer and the Association with respect to the question of the fulfillment of the Developer's obligations * * * shall, at the request of either party, be submitted to arbitration in accordance with the commercial arbitration rules of the American Arbitration Association * * * . Issues of arbitrability shall be determined in accordance with the federal substantive and procedural laws relating to arbitration; all other respects of the dispute shall be interpreted in accordance with, and the arbitrator shall apply and be bound to follow, the substantive laws of the State of Hawaii.'" *Id.* at *5.

The contract went on to specify that

> "'[e]ach owner is automatically a member of the Association,' and that 'any Member shall

> have the right to pursue or defend any' 'lawsuit, arbitration or other legal proceedings relating to the Program or Resort' 'on his own behalf, or on behalf of * * * any other Member, if the law generally grants to the Member this right or if such Member is directly affected.'" *Id*. (citations omitted).

The broad collective language of the contract, the specific reference to suits on behalf of other members, and the express reference to "[i]ssues of arbitrability" make the contract at *Marriott* materially different from the narrow clause at issue here.

Both cases thus illustrate that application of the "clear and unmistakable" standard is a context-specific task that cannot be reduced to a simple question whether reference to the AAA rules (in any manner or context whatsoever) constitutes delegation of the class-arbitrability question. Instead, a court must look at the language of the contract, apply principles of contract interpretation according to the governing state law, and determine whether the parties agreed—clearly and unmistakably—to delegate the class-arbitrability question to an arbitrator. That is precisely what the Court of Appeals did below, when it rested its decision not only on its analysis of the AAA rules, but also on "the actual contractual language at issue here." Pet. App. 36. The fact that two district courts have reached differing outcomes in applying a contextual standard to different contracts does not establish a conflict that might warrant this Court's review.

3. Finally, Petitioners cite (at 17–19 & n.4) cases from the Fifth and Eleventh Circuits finding "clear and unmistakable" evidence of an agreement to delegate the class-arbitrability question under other particular contracts. But neither of these cases establishes that mere reference to the AAA rules constitutes clear and unmistakable delegation of the class-arbitrability question.

In *Southern Communications Services, Inc.* v. *Thomas*, 720 F.3d 1352 (CA11 2013), *cert. denied*, 134 S. Ct. 1001 (2014), the Eleventh Circuit did not address the delegation issue at all. Rather, the only two issues on appeal were (a) whether the arbitrator "exceeded his authority" under the FAA in reaching the conclusion that class-wide arbitration was available and (b) whether the arbitrator exceeded his authority in certifying a class. *See id.* at 1359–60. The threshold question whether class arbitrability was a question for the court or the arbitrator was not even at issue. While the court did discuss the contract's incorporation of the AAA rules, that discussion came only in the context of reviewing the arbitrator's reasoning as to why the contract authorized class-wide arbitration. There is no conflict with the decision below, which addressed only that threshold question of "who decides"—which had been certified for interlocutory appeal—leaving the substance of the class-arbitrability question, addressed in *Southern Communications*, for further consideration on remand.

In *Reed* v. *Florida Metropolitan University, Inc.*, 681 F.3d 630 (CA5 2012), *abrogated in part on other grounds by Oxford Health Plans LLC* v. *Sutter*, 133 S. Ct. 2064 (2013), the Fifth Circuit did state that

"the parties' agreement to the AAA's Commercial Rules also constitutes consent to the Supplementary Rules." *Id.* at 635. But as the Third Circuit explained below, that ruling rested on the Fifth Circuit's analysis of consent based on the conduct of the parties; it did not rest on a holding that a contract's reference to the AAA rules constitutes "clear and unmistakable" evidence of intent to delegate the class-arbitrability question. *See* Pet. App. 42–43. Indeed, the Fifth Circuit in *Reed* expressly noted that the party challenging delegation had "represented to the district court that it had agreed to [the Supplementary] Rules," 681 F.3d at 635 n.5, so there was not even a genuine dispute on that point. Here, by contrast, Chesapeake objected all along to "class" arbitration proceedings, to the point that Chesapeake initiated this declaratory judgment action seeking a declaration that a court, not an arbitrator, must decide class arbitrability under the leases.

Thus, as the Court of Appeals recognized below, it did not "create a circuit split" in holding that the oil and gas leases at issue did not clearly and unmistakably delegate the class-arbitrability question to the arbitrator. Pet. App. 44.

II. The Decision Below Is Correct.

Unable to identify any real split of authority, Petitioners are left to argue (at 22–27) simply that the Third Circuit got it wrong. While this Court rarely entertains this sort of request for fact-bound error correction, the Third Circuit got it right in any event.

Under the "clear and unmistakable" standard as articulated in *Opalinski* v. *Robert Half International*

Inc., 761 F.3d 326 (CA3 2014), *cert. denied*, 135 S. Ct. 1530 (2015)—which Petitioners conceded was applicable, *see supra* p.7—it is firmly established that "[s]ilence or ambiguous contractual language is insufficient." 761 F.3d at 335. The only question that the Third Circuit had to answer was thus whether the leases at issue unambiguously delegate the class-arbitrability question. And they plainly do not.

It is beyond dispute that the text of the leases themselves (a) is silent on the delegation question and (b) contains language that contemplates arbitration between only the "Lessor" and the "Lessee." *See* Pet. App. 4 ("In the event of a disagreement *between Lessor and Lessee* * * * the resolution of all such disputes shall be determined by arbitration in accordance with the rules of the American Arbitration Association.") (emphasis added). The only thing Petitioners offer in support of their claim of "clear and unmistakable" delegation is the leases' statement that arbitration will follow the AAA rules. But that vague reference is anything but clear and unmistakable evidence of intent to delegate the class-arbitrability question.

Petitioners' reasoning requires a string of inferences that fall well short of that exacting standard. The leases themselves do not specify *which* of the AAA rules apply. Assuming that the Commercial Rules apply, the Commercial Rules too are silent on class-wide arbitration, as Petitioners conceded below. *See* Pet'rs' CA Opening Br. 23–25. So Petitioners look instead to the Supplementary Rules for Class Arbitrations, which purport to give arbitrators authority to decide class certification.

But this circuitous line of reasoning—what the Third Circuit correctly called a "daisy-chain" of references, Pet. App. 34 (citation omitted)—is far from "clear and unmistakable."

The Third Circuit thus rightly held that, even with these inferences added on, the leases "still fail to satisfy the onerous burden of undoing the presumption in favor of judicial resolution of the question of class arbitrability." Pet. App. 34. That conclusion is unassailably correct. Put simply, the parties did not unambiguously delegate the class-arbitrability question to the arbitrator merely by providing that disputes between the Lessor and Lessee would be adjudicated in accordance with the AAA Rules.

II. This Case Is a Poor Vehicle.

Finally, even if Petitioners had identified a circuit split over whether reference to the AAA rules constitutes "clear and unmistakable" evidence of intent to delegate the class-arbitrability question, this case would present a particularly poor vehicle to address that question.

1. Petitioners have expressly waived the threshold question whether the "clear and unmistakable" standard applies to issues of class arbitrability. *See supra* p.7. It would make little sense for the Court to grant certiorari to decide *how* the "clear and unmistakable" standard should apply to a particular contract without first deciding (or, at least, deciding simultaneously) *whether* the "clear and unmistakable" standard applies to the class-arbitrability question.

To be clear, Chesapeake agrees with the conclusion of the Third, Fourth, and Sixth Circuits that "whether an arbitration agreement permits class arbitration is a question of arbitrability for the court" "'unless the parties clearly and unmistakably provide otherwise.'" *Dell Webb Communities, Inc.* v. *Carlson*, 817 F.3d 867, 876 (CA4 2016) (quoting *Reed Elsevier*, 734 F.3d at 597–99, in turn quoting *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

But before Petitioners waived the issue, they had invoked the plurality opinion in *Bazzle* before the district court and argued that the availability of class-wide arbitration is a "procedural question * * * for the arbitrator to decide." CA App. 527 (Scout's Mem. in Supp. of Mot. to Dismiss or Stay). And in the Petition (at 13 n.3), they also cite *Price* v. *NCR Corp.*, 908 F. Supp. 2d 935 (N.D. Ill. 2012), which held that "whether an arbitration agreement allows parties to arbitrate class claims is a procedural issue to be resolved by an arbitrator." *Id.* at 944 (citing *Collier* v. *Real Time Staffing Servs., Inc.*, No. 11 C 6209, 2012 WL 1204715, at *5 (N.D. Ill. Apr. 11, 2012)).

Petitioners themselves have thus called into question the very premise of the Question Presented: that the "clear and unmistakable" standard governs questions of class arbitrability. Yet the Court would not have occasion to reach that issue in this case, since Petitioners expressly waived it below.

2. This case also represents a poor vehicle because it arises in an interlocutory posture—coming from an appeal certified under 28 U.S.C. § 1292(b). It is the province of the Court to "review[] judgments,

not opinions," *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (footnote omitted), and yet there is no final judgment for the Court to review in this instance. The Court has typically required "special circumstances [to] justify the exercise of [its] discretionary certiorari jurisdiction to review [an] interlocutory order." *Office of Senator Mark Dayton* v. *Hanson*, 550 U.S. 511, 515 (2007). But no such special circumstances are presented here.

Petitioners remain free to argue to the district court in subsequent proceedings that the leases at issue do, in fact, authorize class-wide arbitration. And if Petitioners disagree with the district court's resolution of that question—which is the ultimate issue in this litigation—they will still have the opportunity to seek review. But in the meantime, there is no pressing reason why this Court should grant discretionary review to resolve an issue that may not have any ultimate effect on the outcome.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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