No. 16-95

In The Supreme Court of the United States

J&K ADMINISTRATIVE MANAGEMENT SERVICES, INC., et al.,

Petitioners,

v.

NEFFERTITI ROBINSON, individually and on behalf of those similarly situated, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Where the arbitration provision drafted by Petitioner J&K Administrative Management stipulates that an arbitrator must decide "all claims challenging the validity or enforceability of this Agreement (in whole or in part) or challenging the applicability of the Agreement to a particular dispute or claim" (App.42a), does this delegation language clearly and unmistakably reserve to the arbitrator the question of whether Respondent Neffertiti Robinson and other former employees of Petitioners may bring a collective action in the arbitral forum for unpaid overtime under the Fair Labor Standards Act, 29 U.S.C. § 216(b)?

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INTRODUCTION

Petitioners suggest that this case presents a split in the federal courts of appeals regarding when an arbitrator may decide the availability of class arbitration. They are doubly wrong; this case does not present a circuit split, and it does not involve class arbitration.

The Fifth Circuit prefaced its analysis of the particular arbitration agreement in this case by explaining that "whether class or collective arbitration is available under an arbitration agreement" is a threshold issue for judicial determination unless the parties clearly and unmistakably delegate it to an arbitrator. App.4a. In reaching this conclusion, the Fifth Circuit followed the majority of appellate courts that have addressed the so-called "who decides" issue, including the Third and Sixth Circuits.

The court below found evidence of clear and unmistakable delegation of the collective arbitration question to an arbitrator in this case while the Third and Sixth Circuits, in other cases, did not. But this result is entirely predictable where Petitioners included a specifically enumerated delegation clause in their arbitration provision committing to the arbitrator all disputes over the provision's enforceability, and its applicability to particular claims or disputes. None of the arbitration provisions considered in the Third and Sixth Circuit opinions contained comparable delegation language.

So what Petitioners identify as a circuit split is simply the application of a uniform legal standard to

disparate sets of facts. Petitioners actually only establish that courts faced with very different contract language reached different conclusions, a point which hardly justifies the intervention of this Court.

Nor does this case implicate the "fundamental" differences between bilateral arbitration and class action arbitration that have led this Court to look on the latter with skepticism. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347-51 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686-87 (2010). Respondents here have sought to bring a collective action under the Fair Labor Standards Act ("FLSA"), a procedural mechanism that requires each similarly situated employee to affirmatively opt in to the action. And Petitioner J&K Administrative Management operated only three facilities in the Dallas/Fort Worth, Texas area, and ceased offering services nearly three years ago. Thus, to the extent that appellate opinions in the wake of *Stolt-Nielsen* and *Concepcion* have suggested that a heightened standard for delegation of the class arbitration question is warranted because class action arbitrations could affect thousands of absent class members, those concerns are not present in this opt-in collective action involving a relatively small number of former employees.

In 2003, four justices of this Court stated that the question of whether an arbitration agreement allows for class proceedings concerns "contract interpretation and arbitration procedures" and thus should be decided by arbitrators rather than courts when the parties do not specify otherwise. *Green Tree Fin. Corp. v.*

Bazzle, 539 U.S. 444, 453 (2003) (plurality opinion). Someday this Court may indeed want to revisit the question that only a plurality answered in *Bazzle*: whether the availability of class procedures in arbitration is presumptively for a court or an arbitrator to decide.

But the instant case turns on specific delegation language rather than baseline presumptions and does not even involve class arbitration as this Court has interpreted that term. All of this makes it a uniquely poor vehicle for bringing closure to the question left open in *Bazzle*, and the petition for certiorari should accordingly be denied.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

a. Neffertiti Robinson was hired by J&K Administrative Management ("J&K") on February 17, 2011. Dkt. 7 at 2, Record on Appeal ("ROA") 35. She worked as a caregiver, providing companionship and assistance with daily activities to J&K's elderly and infirm clients. Petitioner Kimberly N. Meyers is the president of J&K. Dkt. 1 at 15. Petitioners operated three business locations in the Dallas/Fort Worth, Texas area. Dkt. 1 at 19. Petitioners ceased serving elderly and infirm clients on November 15, 2013. Dkt. 7 at 2, ROA 35.

Whenever Ms. Robinson worked an overnight shift with a client, usually lasting more than twelve hours,

she was paid a flat rate that amounted to less than the federal minimum wage for each hour she worked. She also never received overtime pay when she worked more than forty hours in a week. Dkt. 1 at 17. Although at that time the FLSA included a companionship exemption from its minimum wage and overtime requirements for work performed in a private home, Ms. Robinson often performed caregiver services for J&K clients in hospitals, assisted living facilities, nursing homes and group home settings where the FLSA's companionship exemption did not apply. Dkt. 1 at 16-17. Based on her conversations with other J&K employees, Ms. Robinson learned that other employees were performing similar work outside of private homes and were subject to the same pay practices. Dkt. 1 at 18.

b. On January 23, 2014, Ms. Robinson, through counsel, sent a letter to Petitioners' counsel outlining her claims under the FLSA and asking whether Petitioners contended that her claims were subject to a pre-dispute arbitration agreement. Dkt. 16-1 at 12, ROA 153. The Election and Arbitration Agreement associated with J&K's Occupational Injury Benefit Plan, App.38a-45a, did not specify an arbitration provider or any arbitration rules, so Ms. Robinson sought to meet and confer with Petitioners regarding how any required arbitration would be conducted. Dkt. 16-1 at 13, ROA 154. However, Petitioners' counsel never responded to this letter, and as Ms. Robinson's statute of limitations was continuing to run, she filed an arbitration demand with JAMS (formerly Judicial Arbitration and Mediation Services, Inc.) on February 18, 2014.

Ms. Robinson's arbitration demand sought unpaid wages under sections 6 and 7 of the FLSA for the three-year period preceding the demand. Under section 16 of the FLSA, she also sought to represent a group of similarly situated J&K employees who had performed caregiving services outside of personal homes in any workweek during the three-year period preceding the demand. Dkt. 1 at 15. Four other former employees of Petitioners – Ann Knight, Joan Stanton, Gloria Turner, and Sandra Harris – subsequently filed Notices of Consent with JAMS seeking to join Ms. Robinson's collective action as opt-in plaintiffs. 29 U.S.C. § 216(b); Dkt. 37-3 at 20-29, ROA 570-579. Ms. Robinson, along with Knight, Stanton, Turner, and Harris, are referred to collectively as Respondents.

c. When Petitioners still had not responded to or even acknowledged the arbitration demand as of March 16, 2014, Respondents filed a Complaint in the U.S. District Court for the Northern District of Texas. The Complaint invoked sections 4 and 5 of the Federal Arbitration Act ("FAA") and sought to compel Petitioners to participate in the arbitration and to have the court appoint JAMS as the arbitration provider. Dkt. 1 at 1, 8.

Petitioners repeatedly suggest that Respondents sought to compel arbitration of "both the individual claims and the collective claims." Pet. 5, 7. This is incorrect. What Respondents actually sought was a court order requiring Petitioners to participate in the arbitration proceeding Ms. Robinson had initiated with JAMS. Respondents did not seek any declaration from

the district court regarding whether Ms. Robinson and the other Respondents could pursue an FLSA collective action in arbitration, taking the position that this question regarding the scope of the arbitration proceedings should be answered by the arbitrator in the first instance. Dkt. 14 at 2, ROA 125. Respondents do not challenge any other representations made in Petitioners' Statement of the Case.

REASONS FOR DENYING THE WRIT

I. The Decision Below Is Consistent with This Court's Precedent and Not in Conflict with the Decisions of Any Other Federal Appellate Court.

In addressing the question of "who decides" whether J&K's Election and Arbitration Agreement permits arbitration on a collective action basis, the Fifth Circuit opinion began where virtually all judicial opinions analyzing the "who decides" question begin: by describing this Court's opinion in *First Options of Chicago, Inc. v. Kaplan* and its discussion of presumptions. App.4a (quoting *First Options*, 514 U.S. 938, 943 (1995) ("Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute. . . . so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter.") (internal citation omitted)).

But while the parties' intent is paramount in both instances, courts attempting to divine that intent from sometimes opaque contractual language are instructed by *First Options* to apply opposing presumptions to the two questions. In the case of whether a particular merits-related dispute is arbitrable, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *First Options*, 514 U.S. at 944-45 (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)) (alterations omitted). Conversely, given the "rather arcane" nature of the question of "who [primarily] should decide arbitrability," "courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options*, 514 U.S. at 944-45 (alterations omitted).

Having set out these background principles, the Fifth Circuit then addressed the question of whether the availability of collective action procedures is a gateway or threshold question of arbitrability presumptively for courts to decide: that is, whether it constitutes the sort of "narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002). Just

like the Third and Sixth Circuits in the opinions emphasized by Petitioners, the Fifth Circuit answered this question in the affirmative. App.4a (describing "the threshold question of whether class or collective arbitration is available under an arbitration agreement").

But labeling the availability of collective arbitration as a threshold question of arbitrability is not the end of the inquiry, for "parties can agree to arbitrate gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010). Such a clause delegating gateway issues to the arbitrator is enforceable under the FAA just like any other agreement to arbitrate, so long as the evidence of the parties' agreement to arbitrate gateway questions of arbitrability is clear and unmistakable. *Id.* at 69-70 and n.1.

And this is what the supposedly alarming circuit split identified in the Petition amounts to: the arbitration provision in this case contained a *Rent-A-Center*-style delegation clause, while the arbitration provisions in the earlier cases decided by the Third and Sixth Circuits did not. In their eagerness to portray a legal dispute worthy of this Court's attention, Petitioners downplay the differences in the language of the arbitration agreements in the relevant cases. At the same time, they overstate the significance of one thing that all of these arbitration provisions have in common

– the fact that none of them mentioned class or collective arbitration by name – suggesting that failure to use these specific terms carries some dispositive significance that none of the opinions ascribe to it (and that some of the opinions explicitly disclaim).

A. Neither *Scout Petroleum* nor *Opalinski* in the Third Circuit, nor *Reed Elsevier* or *Huffman* in the Sixth Circuit, Involved the Sort of Specific Delegation Language Found in J&K's Arbitration Agreement.

The Petition tries to put the opinion below at odds with opinions from the Third and Sixth Circuits by pointing to what the Fifth Circuit described as the "clear rule of law" from its earlier decision in *Pedcor Management Co. Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355 (5th Cir. 2003): that "if parties agree to submit the issue of arbitrability to the arbitrator, then the availability of class or collective arbitration is a question for the arbitrator instead of the court." App.8a. But the problem with this basis of distinction is that none of the Third and Sixth Circuit opinions the Petition cites involved an arbitration provision that delegated issues of arbitrability to an arbitrator.

The first of the opinions that the Petition analyzes in detail, Pet. 12-13, is *Reed Elsevier, Inc. v. Crocket*, 734 F.3d 594 (6th Cir. 2013). The arbitration provision in

that case, which concerned the purchase of a subscription to an online legal database, stated:

> 2. Arbitration
>
> Except as provided below, any controversy, claim or counterclaim (whether characterized as permissive or compulsory) arising out of or in connection with this Order (including any amendment or addenda thereto), whether based on contract, tort, statute, or other legal theory (including but not limited to any claim of fraud or misrepresentation) will be resolved by binding arbitration under this section and the then-current Commercial Rules and supervision of the American Arbitration Association ("AAA"). . . . Issues of arbitrability will be determined in accordance and solely with the federal substantive and procedural laws relating to arbitration[.]

Reed Elsevier, 734 F.3d at 599.

The court in *Reed Elsevier* concluded that "[t]his language does not clearly and unmistakably assign to an arbitrator the question whether the agreement permits classwide arbitration." *Id.* But that language does not clearly and unmistakably assign any other issues of arbitrability to an arbitrator either, so it does not provide any support for Petitioners' theory – that the Fifth Circuit treats the availability of class arbitration like other issues of arbitrability when looking for clear and unmistakable evidence of its delegation to an arbitrator, while the Sixth Circuit applies some different, higher standard.

The other Sixth Circuit opinion cited by Petitioners provides no better evidence for this imagined circuit split. In *Huffman v. Hilltop Cos., LLC*, the Sixth Circuit analyzed an arbitration provision that read as follows: "Any Claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by binding arbitration administered by the American Arbitration Association ("AAA") in accordance with its Commercial Arbitration Rules and its Optional Procedures for Large, Complex Commercial Disputes." 747 F.3d 391, 393-94 (6th Cir. 2014). Again, no language in this arbitration clause evinces a clear and unmistakable intent to delegate any gateway issues of arbitrability to an arbitrator, whether that gateway issue is the availability of classwide arbitration or the validity of the provision in the face of an unconscionability challenge, as in *Rent-A-Center*.

But there is a Sixth Circuit opinion, albeit an unpublished one, that does suggest how a Sixth Circuit court confronted with explicit delegation language would handle the question of class arbitration. *Lowry v. JP Morgan Chase Bank, N.A.*, which predated both *Reed Elsevier* and *Huffman* but which neither opinion discussed or distinguished, affirmed a district court order compelling arbitration of a borrower's claims, including putative class claims, arising out of a car loan he obtained from Chase. 522 Fed. Appx. 281, 282 (6th Cir. 2013). Chase argued on appeal that the district court should have dismissed the class claims rather than submitting them to arbitration, because the loan agreement contained a class action waiver. But the

Sixth Circuit panel disagreed, pointing to delegation language in the arbitration provision of the Chase loan agreement:

> The Arbitration Agreement provided that "any claim or dispute" between Lowry and Chase will be arbitrated, and it defined "any claim or dispute" as "[a]ny claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this clause, and **the arbitrability of the claim or dispute**)[.]" . . . (emphasis added).
>
> In submitting Lowry's class claims to arbitration, the district court found that the Arbitration Agreement explicitly mandated that the parties submit the question of a claim's arbitrability to arbitration. Chase ignores this provision of the Agreement and argues that the class-action waiver was unambiguous. Although the Agreement contains an unambiguous class-action waiver, the provision requiring an arbitrator to resolve disputes about the arbitrability of claims does not exclude class claims. Lowry and Chase clearly and unmistakably agreed to submit any disputes concerning the arbitrability of all claims, including class claims, to arbitration. The district court must direct that arbitration proceed "in the manner provided for" by the Arbitration Agreement, 9 U.S.C. § 4, and it did not err when it submitted the dispute regarding the arbitrability of Lowry's class claims to arbitration.

Id. at 283.

The Fifth Circuit in this case was confronted with delegation language very similar to, and indeed even stronger than, the delegation language in the Chase Bank loan agreement in *Lowry*. J&K's Election and Arbitration Agreement in conjunction with its Occupational Injury Benefit Plan specified that "[t]he types of claims covered by this Agreement include . . . (g) claims challenging the validity or enforceability of this Agreement (in whole or in part) or challenging the applicability of the Agreement to a particular dispute or claim." App.42a. The court below found this language, which it analogized to the delegation clause in *Rent-A-Center*, to be "unambiguous evidence of the parties [sic] intent to submit arbitrability disputes to arbitration." App.10a.

When one looks at *Lowry*, a Sixth Circuit opinion analyzing an arbitration clause with a specific delegation provision, it becomes clear that the two Circuits are in complete accord. The divergent outcomes in this case and in *Lowry* from the opinions in *Reed Elsevier* and *Huffman* appear to have more to do with the presence of specific delegation clauses in the first two cases, and their absence from the last two, than any differences in the legal approaches of the Fifth and Sixth Circuits.

Finally, Petitioners spend a great deal of time discussing the Third Circuit's opinion in *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3d Cir. 2016), about which a petition for certiorari is already pending before this Court. No. 15-1242 (Apr. 5,

2016). But the arbitration agreement in *Scout Petroleum* also lacks the clear and unmistakable delegation language found on the face of J&K's Election and Arbitration Agreement.

The oil and gas leases at issue in *Scout Petroleum* state that "[i]n 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." 809 F.3d at 749.

Petitioners point to the language of AAA Commercial Rule 7(a) and argue that it is similar to section (g) of the J&K Arbitration Agreement in conferring upon arbitrators the power to rule on their own jurisdiction. Pet. 14. But even if the wording is similar, the context and placement are very different. For in evaluating the parties' intention to clearly and unmistakably delegate issues of arbitrability to an arbitrator, specific language of delegation within the clause itself can hardly be compared to one of 58 separate Commercial Rules, which are in turn among over 50 sets of active rules maintained by the AAA. *Scout Petroleum*, 809 F.3d at 761-62.

Adding to the ambiguity of the *Scout Petroleum* situation, the leases in that case referred only to the "rules of the American Arbitration Association" and did not specify any particular set of rules, requiring what the Third Circuit described as "a daisy-chain of cross-references" from the leases themselves to the

unspecified "rules of the American Arbitration Association" to the Commercial Rules to the AAA's Supplementary Rules regarding class arbitration. *Id.* at 761, 763. No such cross-referencing to secondary sources was necessary for the Fifth Circuit when it analyzed the delegation language within the J&K Arbitration Agreement itself.

In reaching its conclusion that the leases combined with the various AAA rules did not clearly and unmistakably delegate the power to decide class arbitrability to the arbitrator, *Scout Petroleum* relied heavily on an earlier Third Circuit opinion that Petitioners barely acknowledge: *Opalinski v. Robert Half Intern Inc.*, 761 F.3d 326 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1530 (2015). *Opalinski* also reviewed an arbitration provision that lacked any delegation language: merely stating that "'[a]ny dispute or claim arising out of or relating to Employee's employment, termination of employment or any provision of this Agreement' shall be submitted to arbitration." 761 F.3d at 329. The Third Circuit went on to hold that the availability of class arbitration is an issue of arbitrability presumptively for the court to decide and that "overcoming the presumption is onerous, as it requires express contractual language unambiguously delegating the question of arbitrability to the arbitrator." *Id.* at 335.

The courts in *Reed Elsevier*, *Huffman*, *Opalinski* and *Scout Petroleum* reached the conclusions they did – that whether each of those arbitration agreements allowed for class proceedings was for the court to decide – because they could find no "express contractual

language" in any of those agreements "unambiguously delegating the question of arbitrability to the arbitrator." But section (g) of the J&K Election and Arbitration Agreement contains just such express contractual language of delegation, and it is this contractual language that sets this case apart and led the Fifth Circuit to come to the opposite conclusion on the "who decides" question than the Third and Sixth Circuits reached in the earlier cases.

Put another way, these cases differ only on their facts, and a conflict based on application of uniform law to different facts does not warrant this Court's review.

B. No Federal Appellate Court Has Held that an Arbitration Provision Must Explicitly Mention Class Arbitration in Order to Delegate the Class Arbitration Question to the Arbitrator.

The Petition tries to distinguish the Fifth Circuit's opinion in this case from the Third and Sixth Circuit opinions in *Scout Petroleum*, *Huffman* and *Reed Elsevier* by emphasizing the fact that the J&K Arbitration Agreement did not expressly address the availability of class or collective arbitration, yet the court below still found evidence of delegation. The implication seems to be that if this identical language were presented to the Third or Sixth Circuits, they would have decided the collective arbitration issue themselves because the only evidence they would have found clear

and unmistakable enough to delegate the question to the arbitrator is an explicit reference to class or collective arbitration in the arbitration agreement. Pet. 16.

But none of the Third or Sixth Circuit opinions Petitioners cite say any such thing, and some of them say precisely the opposite. They do note the fact that the arbitration clauses in those cases did not expressly say anything about class or collective arbitration, *see, e.g.*, *Reed Elsevier*, 734 F.3d at 599, but more by way of explaining why the question was a difficult one on that set of facts than by way of offering a bright-line answer to it. For example, after pointing out the clause's silence on the topic of class arbitration, the court in *Reed Elsevier* went on to offer an explanation of how the clause could nonetheless be interpreted to delegate the class arbitration issue to an arbitrator but concluded that this was only one possible interpretation and that the language remained "ambiguous as to whether an arbitrator should determine the question of classwide arbitrability; and that is not enough to wrest that decision from the courts." *Id.*

The Third Circuit opinions are even more explicit that mentioning class or collective arbitration would not be the only way of establishing clear and unmistakable delegation of that issue. The court in *Opalinski* opined that the arbitration provision was silent on the issue of class arbitration but then added that "[n]othing else in the agreements or the record suggests that the parties agreed to submit questions of arbitrability to the arbitrator." 761 F.3d at 335.

And *Scout Petroleum* spoke at length about what the failure to explicitly address the question of class arbitration did and did not mean. It began by noting that the concept of "silence" on the availability of class arbitration was given an unusual meaning in *Stolt-Nielsen*, where the parties stipulated that their clause was "silent" on the question of class arbitrability and then went on to define what they meant by "silent." *Scout Petroleum*, 809 F.3d at 758 (citing *Stolt-Nielsen*, 559 U.S. at 668-69) ("Counsel for AnimalFeeds explained to the arbitration panel that the term 'silent' did not simply mean that the clause made no express reference to class arbitration. Rather, he said, '[a]ll the parties agree that when a contract is silent on an issue there's been no agreement that has been reached on that issue.' ").

The holding of *Stolt-Nielsen* was that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Stolt-Nielsen*, 559 U.S. at 684. But the Court had "no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration," merely concluding that given the parties' stipulation about their lack of agreement on the matter, there was no such contractual basis in that case. *Id.* at 687 n.10.

But *Stolt-Nielsen* was concerned exclusively with the question of when classwide arbitration is available, not the antecedent question of who should decide that matter, or what contractual basis, if any, would support

answering that antecedent question in any particular way. *Id.* at 680 (stating that the Court "need not revisit [the 'who decides'] question," addressed but commanding only a plurality opinion in *Bazzle*, "because the parties' supplemental agreement expressly assigned this issue to the arbitration panel, and no party argues that this assignment was impermissible.").

Thus, *Stolt-Nielsen* is largely irrelevant to the "who decides" analysis except insofar as the ultimate decisionmaker – be it court or arbitrator – would wind up applying the approach set forth in *Stolt-Nielsen* in determining whether or not a particular arbitration agreement contained a "contractual basis" for permitting classwide proceedings.

But the court in *Scout Petroleum* did address what sort of "express contractual language" is necessary to answer the "who decides" question in favor of delegation to an arbitrator. And what the Third Circuit concluded on this point was that "to undo the presumption in favor of judicial resolution, an arbitration provision need not include any special 'incantation' (like, for example, 'the arbitrators shall decide the question of class arbitrability' or 'the arbitrators shall decide all questions of arbitrability')." *Scout Petroleum*, 809 F.3d at 758. If that weren't clear enough, later in the opinion the court reiterated the point: "the parties' failure to use a specific set of words does not automatically bar the courts from finding that the agreement clearly and unmistakably delegated the question of class arbitrability." *Id.* at 759.

Thus, while the Third and Sixth Circuit opinions considered the arbitration clauses' silence about class proceedings to be a factor that contributed to their finding no clear and unmistakable delegation of that issue, it was not a dispositive factor. And it is not a factor that the Fifth Circuit can be said to have treated differently from the other courts, given that J&K's Arbitration Agreement, like all of the others, did not expressly mention the issue of class arbitration.

Certainly, these would be easier cases if the clauses' drafters had included some language about class or collective arbitration in their agreements. But none of the opinions at issue established a rule of law for how arbitration provisions that do not expressly address the availability of class or collective arbitration will always be interpreted with respect to "who decides" whether such proceedings will be allowed, let alone conflicting rules of law on that point that would establish "a split among the circuits." Pet. 16.

Petitioners obviously do not like the way the Fifth Circuit answered the "who decides" question in this case based on the clear delegation language in J&K's Arbitration Agreement. But a circuit split cannot be built on facts and frustration alone, and here Petitioners offer nothing else.

II. The Decision Below Does Not Involve a Proposed Class Action and Does Not Implicate the Concerns About Class Arbitration Enunciated in *Stolt-Nielsen* and *Concepcion*.

As explained in the previous section, the Third and Sixth Circuit opinions in *Reed Elsevier, Huffman* and *Scout Petroleum* do not set a higher standard for delegating the issue of class arbitration to an arbitrator than delegating other gateway issues of arbitrability. But in explaining why they found class arbitration to be a gateway issue of arbitrability in the first place, those courts did focus on some themes about the differences between bilateral and class arbitration articulated by this Court in *Stolt-Nielsen* and *Concepcion*. *See Reed Elsevier*, 734 F.3d at 598 (noting that "the Court has characterized the differences between bilateral and classwide arbitration as 'fundamental'" and referring specifically to the "due-process concerns" that come into play when an arbitrator's award "adjudicates the rights of absent parties" (quoting *Stolt-Nielsen*, 559 U.S. at 686)). The court in *Scout Petroleum* also observed that "the whole notion of class arbitration implicates a particular set of concerns that are absent in the bilateral context" and went on to quote from *Stolt-Nielsen* and *Concepcion*, as well as Justice Alito's statement in *Oxford Health* that "courts should be wary of concluding that the availability of classwide arbitration is for the arbitrator to decide, as that decision implicates the rights of absent class members without their consent." *Scout Petroleum*, 809 F.3d at

764 (quoting *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2071-72 (2013) (Alito, J., concurring)).

But to the extent the Court is inclined to examine what effect, if any, its comments about class arbitration in *Stolt-Nielsen* and *Concepcion* should have on the "who decides" question, this is not the proper case in which to conduct that examination. First and foremost, Respondents did not bring a proposed class action but rather a collective action under the FLSA. Anyone wishing to join that action must opt in by filing a notice of consent, as Respondents Knight, Stanton, Turner and Harris have already done. Dkt. 37-3 at 20-29, ROA 570-579. Thus the concerns expressed by the Court in *Stolt-Nielsen* and Justice Alito in *Oxford Health* about adjudicating the rights of absent class members do not arise here.

Even as FLSA collective actions go, this one will be on the small side. J&K operated only three locations in the Dallas/Fort Worth, Texas area and ceased providing services to elderly and infirm clients in November of 2013. Moreover, this protracted litigation over the "who decides" issue has delayed the arbitration on the merits of Respondents' FLSA claims, which only began in August of 2016. And because the FLSA's three-year statute of limitations for willful violations continues to run until each collective action member opts in by filing a Notice of Consent, 29 U.S.C. § 255(a), the number of former J&K employees who will be able to participate in the arbitration even if it does go forward on a collective basis may be extremely limited.

This action is thus much more akin to a consolidated arbitration proceeding than a class arbitration proceeding, and multiple appellate courts both before and after *Stolt-Nielsen* have held that the permissibility of a consolidated arbitral proceeding is a procedural question for an arbitrator rather than a threshold question of arbitrability presumptively for a court. *See, e.g.*, *Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd.*, 683 F.3d 18, 23-25 (1st Cir. 2012) (distinguishing *Stolt-Nielsen* and holding that whether association of franchisees could proceed with joint arbitration against a franchiser was for the arbitrator to decide); *Blue Cross Blue Shield of Mass., Inc. v. BCS Ins. Co.*, 671 F.3d 635, 640 (7th Cir. 2011) (whether twelve claims could be consolidated in a single arbitration was a procedural question for the arbitrator); *JetBlue Airways Corp. v. Stephenson*, 88 A.D.3d 567, 573 (N.Y. 1st Dep. 2011) (the availability of collective arbitration sought by hundreds of pilots was a procedural question for an arbitrator because, unlike in a class arbitration, all affected pilots would be parties).

Admittedly, the Fifth Circuit opinion did not turn on any differences between class and collective arbitration and that court would no doubt have found the delegation language in J&K's Arbitration Agreement sufficient to commit the question of class arbitration to an arbitrator as well. But if the Court wishes to revisit the "who decides" question left open in *Bazzle*, and if its analysis of that question is going to turn on attributes of class arbitration discussed in *Stolt-Nielsen* and

Concepcion, then it should wait for a case that actually presents those class issues. This is not such a case.

III. Even if This Court Is Inclined to Review the *Bazzle* Plurality's Approach on the "Who Decides" Question in a World Thirteen Years Later Where Most Arbitration Provisions Contain Explicit Class Action Waivers and Very Few Class Arbitrations Take Place, This Case Does Not Present a Vehicle to Review That Question.

Finally, lurking in the background of the Petition is the question of whether the Court should revisit its fractured opinion in *Bazzle*, where a four-justice plurality concluded that the availability of class proceedings in arbitration was not a threshold question of arbitrability but a matter of arbitration procedure and contract interpretation that arbitrators were "well suited" to answer in the first instance. *Bazzle*, 539 U.S. at 453. As discussed previously, the opinion below creates no new circuit split because the Fifth Circuit joined the majority of appellate courts to come down on the other side of the presumption than the *Bazzle* plurality, finding the question of class arbitration to be a threshold question of arbitrability. *See also Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 873-77 (4th Cir. 2016), *pet. for cert. filed*, July 25, 2016, No. 16-137 (also holding that whether an arbitration provision permits class arbitration is a threshold issue of arbitrability presumptively for a court to decide).

But not every federal appellate court or state court of last resort has reached this result. *See Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 56 (1st Cir. 2007) (citing *Bazzle* and stating that "when claims are submitted to arbitration, the question of whether class arbitration is forbidden is not a question of arbitrability, but initially a question of contract interpretation and should be decided in the first instance by an arbitrator"); *Sandquist v. Lebo Auto., Inc.*, 376 P.3d 506 (Cal. 2016) (concluding that arbitrators rather than courts should decide whether particular arbitration provisions allow class arbitration). The issue is also currently on appeal to the Ninth Circuit, where it has been fully briefed. *See Guess, Inc. v. Russell*, Nos. 15-56870, 16-55716 (9th Cir. May 13, 2016).

If this Court were to choose to revisit in this case the question of whether the availability of class proceedings in arbitration is presumptively for the court or an arbitrator to decide, Respondents may well take the position that the *Bazzle* plurality, rather than the majority of post-*Bazzle* appellate courts, had the better of the argument. But the Fifth Circuit opinion here barely analyzed the presumption, instead spending most of its ten pages discussing the specific delegation language in J&K's Arbitration Agreement and why it constituted clear and unmistakable evidence of delegation sufficient to rebut that presumption (as well as why this Court's decision in *Stolt-Nielsen* did not alter the analysis).

This fact-bound opinion, which focused on the specific delegation language of the arbitration clause at

issue here, would be an incredibly poor vehicle for trying to address the legal question that failed to command a majority in *Bazzle*. Perhaps someday another case will arrive that will allow the Court to reach that core question in a setting where it is clearly posed. But even in a case without all the vehicle problems that plague this one – such as the specific delegation clause and the fact that it involves an opt-in collective action – the continued salience of the "who decides" question in 2016 is in considerable doubt. The proliferation of class action waivers in mandatory arbitration provisions in the thirteen years since *Bazzle* makes this question seem far less important, and less likely to warrant the Court's attention, than was the case in 2003.[1]

[1] In a 2015 study of over 800 mandatory, pre-dispute arbitration agreements that consumers entered into with banks and other financial service companies, the Consumer Financial Protection Bureau found that between 85% and 100% of the arbitration agreements, covering 99% of the market share subject to binding pre-dispute arbitration, contained provisions explicitly banning class arbitration. Bureau of Consumer Fin. Prot., Proposed Rule, Arbitration Agreements, 81 Fed. Reg. 32830, 32842 (May 24, 2016). The study also found that of over 1800 arbitration demands filed with the American Arbitration Association between 2010 and 2012, only two were filed as class actions. *Id.* at 32846. Since *Bazzle* was decided, class action arbitration has become such a rare specimen that the question of "who decides" its availability under particular contractual language is now largely an academic exercise with few real-world implications.

But the question of whether the Court needs to revisit *Bazzle* is itself a question for another day; this case certainly does not present an appropriate opportunity to do so.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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