No. 16-1456

IN THE
Supreme Court of the United States

DAVID OPALINSKI, AND JAMES MCCABE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

ROBERT HALF INTERNATIONAL INC., AND ROBERT HALF CORPORATION,
Respondents.

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

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JAMES M. HARRIS
SEYFARTH SHAW LLP
2029 Century Park East
Suite 3500
Los Angeles, CA 90067-3021
(310) 201-5219

RICHARD L. ALFRED
Counsel of Record
PATRICK J. BANNON
JAMES M. HLAWEK
SEYFARTH SHAW LLP
World Trade Center East
Two Seaport Lane
Suite 300
Boston, MA 02210
(617) 946-4800
ralfred@seyfarth.com

Counsel for Respondents

September 27, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED BY PETITION

The Question Presented by the Petitioners is as follows: Where an arbitration agreement does not expressly refer to class arbitration, is the determination of whether class arbitration is permitted by the agreement a question of arbitrability for the court to decide or a question of interpretation and procedure to be decided by the arbitrator?

CORPORATE DISCLOSURE STATEMENT

1. Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, undersigned counsel state that Respondent Robert Half International Inc. has no parent corporation; that The Vanguard Group owns 10 percent or more of its stock; that no other publicly held company owns 10 percent or more of its stock; that the parent corporation of Respondent Robert Half Corporation is RH Holding Company, Inc., which is a wholly owned subsidiary of Robert Half International Inc.; and that no publicly held company other than its parent owns 10 percent or more of its stock.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The unpublished opinion of the court of appeals, 677 Fed. Appx. 738 (3d Cir. 2017), is set out at pp. 3a-15a of the Appendix to the Petition (the "Appendix" or "Pet. App."). The unreported order of the court of appeals denying rehearing *en banc* is set out at pp. 1a-2a of the Appendix. The unreported order and opinion of the District Court granting Respondents' motion to dismiss is set out at pp. 16a-32a of the Appendix.

JURISDICTION

The court of appeals entered its amended opinion on March 23, 2017 and its order denying rehearing *en banc* on March 6, 2017. Pet. App. 1a, 3a. The jurisdiction of the Court rests on 28 U.S.C. § 1254(1).

INTRODUCTION

This is the second petition for certiorari that Petitioners David Opalinski and James McCabe have filed in this case, both raising the same issue. According to their current petition, there is a deep and widening circuit split on the issue of whether a court or an arbitrator should determine whether an arbitration agreement authorizes class arbitration. Pet. at 18-21. But there was no split when Opalinski and McCabe filed their first petition, and there is none now. As the Third Circuit explained in its initial opinion in this case, Opalinski and McCabe's assertion that several circuits "have concluded that the availability of classwide arbitration is not a question of arbitrability for the court" was "untrue," because "none of those Circuits [had] ruled, or even expressed a view,

on the issue before us." Pet. App. 49a-50a. Rather, all five circuit courts that have resolved the issue – the Third, Fourth, Sixth, Eighth, and Ninth as discussed below – have held that determining the availability of class arbitration presents a question of arbitrability that is presumptively for a court to decide. For this reason alone, the Petition should be denied.

Similarly, the "who decides" issue lacked practical, real-world significance when Opalinski and McCabe filed their first petition, and it continues to lack significance now. The reported cases addressing this issue typically have, like the present case, involved older arbitration agreements that pre-date this Court's now-extensive class arbitration jurisprudence. Such agreements, like the present ones, typically made no mention of class arbitration, or who should determine its availability. In light of this Court's now-evolved jurisprudence, parties have strong incentive to deal with such issues explicitly, and are in fact doing so, replacing older agreements that were silent on such issues. Consequently, the present issue is headed towards total extinction.

STATEMENT OF THE CASE

1. Robert Half International Inc.[1] is an international staffing firm with numerous domestic offices. Opalinski and McCabe are former RHI employees who worked as staffing managers for the company in New Jersey between 2001 and 2009. Civil Docket for Case 2:10-cv-02069 (D.N.J.) ("Dkt.") 1 (Complaint and Jury Demand) at ¶¶ 8, 9.

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[1] Respondents Robert Half International Inc. and Robert Half Corporation are collectively referred to as "RHI" within this opposition.

2. Opalinski and McCabe both signed employment agreements requiring them to arbitrate: "Any dispute or claim arising out of or relating to Employee's employment, termination of employment or any provision of this Agreement . . . ." Pet. App. 5a. They signed their respective agreements in 2002 and 2001, before this Court had first considered the possibility of class arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 9-10. *See* Pet. App. 5a-6a; *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion). Neither agreement mentions class arbitration. Pet. App. 5a.

3. Opalinski and McCabe filed their federal complaint in April 2010, alleging that RHI had misclassified them as overtime-exempt employees in violation of the Fair Labor Standards Act. Pet. App. 21a-22a. They sought to recover overtime pay allegedly due to them as individuals, and to pursue their claims as a collective action on behalf of thousands of current and former RHI staffing managers nationwide pursuant to 29 U.S.C. § 216(b). Pet. App. 22a.

4. On July 1, 2011, RHI moved to "compel the individual arbitration of Plaintiffs' claims." Dkt. 54-1 at 21; Pet. App. 6a, 22a. RHI's primary argument was that Supreme Court precedents "require Plaintiffs to arbitrate their claims, and to do so individually, not in a collective action." Dkt. 62 at 1 (RHI's Reply in Support of Motion To Compel).

5. Opalinski and McCabe opposed the motion to compel on several grounds, but they did not argue that determining the availability of class arbitration was an issue for the arbitrator. Dkt. 60. Rather, they argued that "arbitration clauses that prohibit class claims should not be enforced" where, as they claimed was the case here, statutory rights cannot be "vindicate[d] . . . in the absence of a class action." Pet.

App. 85a. They urged the District Court to deny arbitration entirely given RHI's position that "class arbitration should not be permitted here." *Id.*

6. On October 6, 2011, the District Court granted RHI's motion to compel arbitration. Pet. App. 79a. Although Opalinski and McCabe had not urged this point, it further ruled that "the issue of whether class arbitration is permitted . . . is an issue for the arbitrator," rather than the court. Pet. App. 86a.

7. RHI objected throughout the arbitration proceedings that the arbitrator lacked authority to determine the availability of class arbitration. *See* Third Circuit Court of Appeals Case No. 12-4444 ("Case No. 12-4444"), Defendants-Appellants' Opposition to Plaintiffs-Appellees' Motion for Summary Action (July 26, 2013) at 5, Ex. A, Ex. B at 1 n.1. Nonetheless, on May 31, 2012, the arbitrator issued a "partial final award," ruling that the "any dispute or claim" language in Opalinski and McCabe's arbitration agreements effectively authorized her to conduct class arbitration. Pet. App. 61a, 69a-70a.

8. On June 29, 2012, RHI filed a motion in the District Court to vacate the arbitrator's award, arguing that the arbitrator had exceeded her powers in concluding class arbitration was permissible. Dkt. 68-3 at 8-21.

9. On December 3, 2012, the District Court denied RHI's motion to vacate, deferring to the arbitrator's determination that RHI had agreed to class arbitration. Pet. App. 53a-60a. RHI timely appealed to the Third Circuit ("*Opalinski I*"). Dkt. 74.

10. In June 2013, before briefing in *Opalinski I*, this Court issued its decision in *Oxford Health Plans LLC v. Sutter,* 133 S. Ct. 2064 (2013), in which it noted that

it "ha[d] not yet decided whether the availability of class arbitration is a question of arbitrability" that is "presumptively for courts to decide." *Id*. at 2068 n.2. It went on to hold that an arbitrator's determination that an arbitration agreement authorizes class arbitration is entitled to deference where the parties had agreed to submit that issue to the arbitrator. *Id.* at 2071.

11. Thereafter, RHI filed its opening brief on appeal in *Opalinski I*. It argued that determining the availability of class arbitration is a gateway "question of arbitrability" because it determines "whose claims" and "what types of controversies" the arbitrator may adjudicate – both of which are well-established questions of arbitrability. Case No. 12-4444, Appellants' Opening Brief (Sept. 23, 2013) at 17-25 (citing *e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 946-47 (1995); *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79, 83 (2002); *Puleo v. Chase Bank USA*, 605 F.3d 172, 178 (3d Cir. 2012) (*en banc*)).

12. In their opposition brief, Opalinski and McCabe argued that prior Third Circuit decisions had authoritatively concluded that determining the availability of class arbitration was *not* a question of arbitrability. Case No. 12-4444, Plaintiff-Appellees' Brief (Oct. 23, 2013) at 22-32.

13. Following oral argument, the Third Circuit panel requested supplemental briefing addressing Opalinski and McCabe's contention that several other circuits had already held that determining the availability of class arbitration was *not* a "question of arbitrability." Case No. 12-4444, Court Response Request (Apr. 7, 2014). In their supplemental brief, Opalinski and McCabe argued that the First, Second and Eleventh Circuits had all ruled that determining

the availability of class arbitration was not a "question of arbitrability" for the courts. Case No. 12-4444, Plaintiff-Appellees' Supplemental Brief (Apr. 22, 2014).[2] RHI, however, explained that the circuit court decisions referenced by Opalinski and McCabe did not address that issue. Case No. 12-4444, Appellants' Supplemental Brief (Apr. 22, 2014) at 2-5.

14. On July 30, 2014, the Third Circuit in *Opalinski I* unanimously reversed the denial of RHI's motion to vacate, "h[olding] that the availability of class arbitration is a substantive 'question of arbitrability' to be decided by a court absent clear agreement otherwise." *Opalinski v. Robert Half Int'l Inc.* 761 F.3d 326, 329 (3d Cir. 2014), *cert. denied*, 135 S.Ct. 1530 (2015); Pet. App. 36a-37a. The Third Circuit remanded the case to the District Court to "determine whether [Opalinski and McCabe's] arbitration agreements call for classwide arbitration." *Opalinski I*, 761 F.3d at 335; Pet. App. 52a.

15. The panel rejected as "untrue" Opalinski and McCabe's assertion that the First, Second and Eleventh Circuits had previously "concluded that the availability of classwide arbitration is not a question

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[2] Opalinski and McCabe cited to the following cases: *S. Commc'ns Servs. v. Thomas*, 720 F.3d 1352 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 1001 (2014); *DIRECTV, LLC v. Arndt*, 546 Fed. Appx. 836 (11th Cir. 2013); *Fantastic Sams Franchise Corp. v. FSRO Ass'n*, 683 F.3d 18 (1st Cir. 2012); and *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 113 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012). *See* Case No. 12-4444, Plaintiff-Appellees' Supplemental Brief (Apr. 22, 2014) at 3. In their current Petition, Opalinski and McCabe cite to the same cases contending that there is a circuit split on the "who decides" question, along with two other cases discussed below – *Robinson v. J&K Administrative Mgmt. Servs., Inc.*, 817 F.3d 193 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 373 (2016); and *Blue Cross Blue Shield of Massachusetts, Inc. v. BCS Ins. Co.*, 671 F.3d 635 (7th Cir. 2011). Pet. at 2-3.

of arbitrability," explaining that "none of those Circuits ruled, or even expressed a view, on the issue before us." *Opalinski I*, 761 F.3d at 334; Pet. App. 49a-50a.

16. The panel further noted that this Court "has long recognized that a district court must determine whose claims an arbitrator is authorized to decide." *Opalinski I*, 761 F.3d at 332; Pet. App. 44a (citing, *e.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010) ("parties may specify *with whom* they choose to arbitrate") (emphasis in original). It concluded that the availability of class arbitration presented a question of arbitrability because it resolved "whether RHI must include absent individuals in its arbitrations with Opalinski and McCabe," and also because it concerns whether a binding arbitration clause applies to a certain type of controversy. *Opalinski I*, 761 F.3d at 332-333; Pet. App. 45a-46a.

17. Opalinski and McCabe sought rehearing *en banc* in *Opalinski I*, arguing that the panel had impermissibly disregarded prior Third Circuit decisions that had supposedly held that the availability of class arbitration was not a question of arbitrability for the courts. Case No. 12-4444, Plaintiff-Appellees' Petition for Re-Hearing *En Banc* (Aug. 13, 2014) at 4-8. Without dissent, the full Third Circuit denied rehearing *en banc*. Pet. App. 34a-35a.

18. After the Third Circuit denied rehearing *en banc* in *Opalinski I*, Opalinski and McCabe filed their first petition for a writ of certiorari. *See* Supreme Court Case No. 14-625, Petition for a Writ of Certiorari (Nov. 25, 2014). The lone issue presented was: "Where an arbitration agreement does not expressly refer to class arbitration, is the determination of whether class or group arbitration is permitted by the agreement a question of arbitrability, presumptively for the District

Court to decide . . . ."[3] *Id*. at i. That issue merited review, the petition argued, because the Third Circuit's ruling in *Opalinski I* conflicted with prior decisions of the First, Second, Seventh, and Eleventh Circuits. *Id*. at 14-19.

19. In its Opposition, RHI demonstrated that no such circuit split existed. *See* Supreme Court Case No. 14-625, Opposition to Petition for a Writ of Certiorari (Jan. 30, 2015). To the contrary, it demonstrated that every circuit court decision addressing the issue had concluded that the availability of class arbitration was a question of arbitrability for the courts. *Id*. at 9-11. And it demonstrated that none of the supposedly contrary rulings cited by Opalinski and McCabe had even addressed that issue as the Third Circuit had previously found. *Id*. at 11-17. This Court denied certiorari. 135 S.Ct. 1530 (2015).

20. On remand, RHI moved for the District Court to issue an order finding that Opalinski and McCabe's arbitration agreements do not call for class arbitration. Pet. App. 23a. RHI established that nothing in those agreements expressly or implicitly showed that it had agreed to class arbitration. Pet. App. 24a.

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[3] Opalinski and McCabe repeatedly, and falsely, assert in their current Petition that RHI engaged in "gamesmanship" that unduly delayed this case, alleging that RHI initially agreed to allow the arbitrator to determine the availability of class arbitration and insisted on judicial resolution only *after* the arbitrator had ruled against it. *See* Pet. at 4-5, 15. But Opalinski and McCabe litigated and lost these contentions in *Opalinski I,* the Third Circuit squarely rejecting their argument that RHI waived its contention that the District Court should have determined the permissibility of class arbitration. Pet. App. 39a-40a. That determination, which Opalinski and McCabe did not challenge in their *Opalinski I* certiorari petition, is now binding law of the case that they may not now re-litigate, even indirectly.

Opalinski and McCabe's supplemental brief argued otherwise. Pet. App. 32a.

21. On November 19, 2015, the District Court entered an order ruling that Opalinski and McCabe's agreements do not authorize class arbitration and dismissing their claims. Pet. App. 18a.

22. Opalinski and McCabe appealed the dismissal of their claims to the Third Circuit ("*Opalinski II*"), arguing that the District Court had erroneously concluded that their agreements did not authorize class arbitration and that the ruling on the "who decides" question in *Opalinski I* was incorrect and should be re-visited. Pet. App. 8a. RHI refuted both points. Third Circuit Court of Appeals Case No. 15-4001 ("Case No. 15-4001"), Brief of the Appellees (May 9, 2016).

23. On March 23, 2017, the Third Circuit issued an unpublished opinion affirming the dismissal of Opalinski and McCabe's claims. Pet. App. 3a. The panel declined Opalinski and McCabe's request to reconsider the "who decides" ruling in *Opalinski I*, which, it noted, was binding law of the circuit. Pet. App. 8a.

24. As to the merits, the panel "agree[d] with the reasoned decision of the District Court" that the arbitration agreements contain "nothing suggestive of any implicit intent to permit class arbitration." App 11a.

25. Opalinski and McCabe's subsequent petition for rehearing was denied. Pet. App. 1a. This Petition followed, raising the single question previously raised and rejected in the first petition – whether the avail-

ability of class arbitration is a question of arbitrability presumptively for a court to decide.[4]

REASONS FOR DENYING THE PETITION

I. THERE IS NO CIRCUIT SPLIT REGARDING WHETHER DETERMINING THE AVAILABILITY OF CLASS ARBITRATION CONSTITUTES A "QUESTION OF ARBITRABILITY" PRESUMPTIVELY FOR THE COURT.

According to the Petition, there is a conflict among the circuits on the "who decides" question, some circuits finding that an arbitrator should determine the availability of class arbitration, and some circuits finding that the availability of class arbitration is a question of arbitrability presumptively for a court to decide. Pet. at 18-21. As the Third Circuit found, Opalinski and McCabe's contention is "untrue." *Opalinski I*, 761 F.3d at 334; Pet. App. 49a-50a. There is no conflict.

A. Every Circuit Court Decision Resolving The "Who Decides" Issue Has Concluded That Determining The Availability Of Class Arbitration Presents A Question Of Arbitrability Presumptively For The Court.

Because arbitration is a creature of consent, certain types of "gateway disputes" relating to the existence or

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[4] Opalinski and McCabe's Petition does not include the issue of whether class arbitration waivers are invalid under the National Labor Relations Act ("NLRA"). The Third Circuit found that "Plaintiffs did not raise [the NLRA issue] before the District Court, so they have waived the opportunity to raise [that issue] on appeal." Pet. App. 15a.

not of such consent are presumptively reserved "for judicial determination unless the parties clearly and unmistakably agree otherwise." *Howsam,* 537 U.S. at 83 (internal quotations and citations omitted). Such threshold questions of arbitrability include "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.

In *Reed Elsevier, Inc. v. Crockett,* 734 F.3d 594 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 2291 (2014), the Sixth Circuit squarely held that determining the availability of class arbitration constitutes a question of arbitrability because it determines "whether the parties arbitrate one claim or 1,000 in a single proceeding." *Id.* at 598. Given the "fundamental" differences between class and bilateral arbitration discussed in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and *Stolt-Nielsen*, the Sixth Circuit explained that resolution of that issue is "fundamental to the manner in which the parties will resolve their dispute," and "vastly more consequential" than whether the parties had agreed to any arbitration at all. 734 F.3d at 598-99. Indeed, it read *Concepcion* and *Stolt-Nielsen* as having "given every indication, short of an outright holding" that the availability of class arbitration presents a question of arbitrability presumptively for the court to decide. *Id*.

Since *Reed Elsevier,* four other circuits (including the Third Circuit) have resolved the "who decides" issue, and all four have followed *Reed Elsevier* in ruling that the class arbitration issue constitutes a question of arbitrability.

First, shortly after the *Opalinski I* decision, the Ninth Circuit followed suit in *Eshagh v. Terminix Int'l*

Co., No. 12-16718, 2014 U.S. App. LEXIS 24194, at *3 (9th Cir. Dec. 22, 2014) (finding that the availability of class arbitration is a gateway question of arbitrability that contracting parties would likely have expected a court to decide).

The Fourth Circuit then reached the same conclusion. In *Dell Webb Communities*, *Inc. v. Carlson*, 817 F.3d 867 (4th Cir. 2016), *cert. denied,* 137 S.Ct. 567 (2016), the Fourth Circuit discussed the "significant distinctions between class and bilateral arbitration" that this Court noted in *Concepcion* and *Stolt-Nielsen*. *Id*. at 875-76. Based on these differences, the Fourth Circuit found that "[i]t is not surprising then that those circuit courts to have considered the question have concluded that . . . whether an arbitration agreement permits class arbitration is a question of arbitrability for the court" unless the parties clearly provide otherwise. *Id*. at 876. The Fourth Circuit joined the other circuits in finding that the availability of class arbitration is a question of arbitrability. *Id*. at 877.

More recently, the Eighth Circuit reached the same conclusion in *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972 (8th Cir. 2017). As in *Reed Elsevier*, *Del Webb*, and *Opalinski I* (Pet. App. 47a-48a), the Eighth Circuit in *Catamaran Corp*. discussed the fundamental differences between bilateral and class arbitration that this Court identified in *Concepcion* and *Stolt-Nielsen*. *Catamaran Corp*., 864 F.3d at 971-72. The Eighth Circuit then stated that "[a]fter considering all of these fundamental differences, we conclude that the question of class arbitration belongs with the courts as a substantive question of arbitrability." *Id*. at 972. The Court further explained that "[e]ven though we presume the question of class arbitration lies with the

courts, parties to an agreement may nonetheless commit the question to an arbitrator." *Id*.

Thus, five circuits–the Third, Fourth, Sixth, Eighth and Ninth–have all held that the availability of class arbitration presents a question of arbitrability presumptively for the court.[5] As shown next, none of the circuit court decisions cited in the Petition conflict with this uniform line of decisions.

B. No Circuit Court Has Held That Determining The Availability Of Class Arbitration Is A Procedural Question For An Arbitrator To Decide.

In their first petition to this Court, Opalinski and McCabe asserted that the First, Second, Seventh, and Eleventh Circuits had found that determining the availability of class arbitration is a procedural question for an arbitrator to decide. Supreme Court Case No. 14-625, Petition for a Writ of Certiorari (Nov. 25, 2014), at 14-17. In the current Petition, Opalinski and McCabe cite to the First, Second, Seventh, and Eleventh Circuit decisions raised in their first petition, as well as a more recent Fifth Circuit decision, in support of their repeated contention that there is a circuit split on the "who decides" question. Pet. at 10-11. Opalinski and McCabe's contention remains untrue. As was the case when Opalinski and McCabe

[5] Opalinski and McCabe assert in their "Question Presented" that the Third, Fourth, and Sixth Circuits found that "*only* a court can decide" the availability of class arbitration. Pet. at i (emphasis added). That is untrue. As shown above, all three circuits found that the class arbitration question is *presumptively* for a court to decide (i.e., the parties can by their agreement submit the issue to an arbitrator), not that the court decides the question under all circumstances.

filed their first petition, there is no circuit split. None of the decisions that Opalinski and McCabe have cited, including the Fifth Circuit decision that was issued after *Opalinski I*, have resolved the "who decides" issue.

1. The First, Second, Seventh, And Eleventh Circuit Decisions That Opalinski And McCabe Cited In Both Of Their Petitions Do Not Address Whether The Availability Of Class Arbitration Is A Question Of Arbitrability.

Opalinski and McCabe contend that the First, Second, Seventh, and Eleventh Circuits "[have] indicat[ed]" that the availability of class arbitration is a procedural question "that an arbitrator should decide." Pet. at 10. That is not the case. Opalinski and McCabe cite to the following cases, all of which are off point.

- In *S. Commc'ns Servs. v. Thomas,* 720 F.3d 1352 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 1001 (2014)), the Eleventh Circuit expressly stated that it had not decided the "who decides" question. In *Thomas*, the Plaintiff-Appellant argued on appeal only that an arbitrator had exceeded his authority by construing a "silent" arbitration agreement as authorizing class arbitration. *Id.* at 1359. Following the issuance of *Sutter*, the Eleventh Circuit rejected the provider's "excess of powers" argument because, as in *Sutter*, "the arbitrator in this case [had] arguably 'interpreted the parties' contract.'" *Id.* (quoting *Sutter*, 133 S.Ct. at 2068). Significantly, the Eleventh Circuit noted that, "[l]ike the Supreme Court, we also have not decided

whether the availability of class arbitration is a question of arbitrability." *Id.* at 1358 n.6. It then explained that, "as in *Sutter*, this case does not give us the opportunity to consider the question, because here [the Plaintiff-Appellant] gave the question of whether the contract allowed for class arbitration to the arbitrator . . . ." *Id*.

- In *DIRECTV, LLC v. Arndt*, 546 Fed. Appx. 836 (11th Cir. 2013), the district court vacated an arbitrator's order finding that an employer's arbitration agreements with its employees provided for class arbitration. *Id*. at 838. The Eleventh Circuit reversed the district court, concluding that, as in *Thomas*, "the arbitrator's award reveals that she arguably interpreted the agreements." *Id.* at 840. The "who decides" issue was not raised in *DIRECTV*, and the Eleventh Circuit, therefore, never discussed it. *See id.*

- In *Jock v. Sterling Jewelers, Inc.,* 646 F.3d 113 (2d. Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012), the arbitrator issued a preliminary award concluding that the arbitration agreement authorized class arbitration. *Id.* at 116. The district court vacated the award, finding that the arbitrator had exceeded her powers. *Id.* at 118. The Second Circuit reversed the district court, concluding that customary deference to an arbitral award required affirmance of the arbitrator's clause construction award. *Id.* at 122-27. Neither the majority nor the dissent addressed the "who decides" issue; the majority repeatedly emphasized that the parties had voluntarily submitted the class arbitration issue to the arbitrator. *E.g., id*. at 124 ("[T]here

is no escaping the fact that the parties submitted that question [whether the arbitration agreement permits class arbitration] to the arbitrator for a decision."). The Second Circuit, therefore, was not asked to give, and did not express, any opinion on whether the class arbitration issue is for the arbitrator or the court.

- The decision in *Blue Cross Blue Shield of Massachusetts, Inc. v. BCS Ins. Co.*, 671 F.3d 635 (7th Cir. 2011), involved consolidation, not class arbitration. In *Blue Cross,* the district court denied an insurer's petition seeking a ruling that an arbitrator did not have authority to consolidate existing arbitration proceedings. *Id.* at 636-37. On appeal, the insurer argued that the arbitrator should not have the authority to consolidate by pointing to language in *Stolt-Nielsen* about fundamental differences between individual and class litigation. *See id.* at 636-37, 639-40. The Seventh Circuit rejected that argument, explaining, in language the Petition ignores, that consolidation and class certification implicate vastly different concerns: in consolidation, unlike class certification, all the parties are already before the arbitrator with individually asserted claims. *See id*. at 639-40. Further, class certification raises unique issues, including the need for individual notice to class members, the need for the adjudicator to protect class members, and the potential for a small claim to become a "whopping" one. *Id*. at 640. As the Seventh Circuit found, consolidation "poses none of these potential problems"

and, unlike class arbitration, "would not change the fundamental nature of arbitration." *Id.* [6]

- The decision in *Fantastic Sams Franchise Corp. v. FSRO Ass'n,* 683 F.3d 18 (1st Cir. 2012), involved an "associational action" rather than a class arbitration. In *Fantastic Sams*, a non-profit franchisee association filed an arbitration demand against a franchisor on behalf of its members. *Id*. at 19-20. The district court left it to the arbitrator to decide whether the association could arbitrate on behalf of the ten members whose arbitration agreements were silent on that issue. *Id.* at 21. On appeal, the franchisor argued that under *Stolt-Nielsen*, the association could not bring arbitration on behalf of the ten members because their agreements were silent about class arbitration. *Id*. at 22. The First Circuit concluded that the association had sought to bring an "associational action" that is fundamentally different on several bases from the class action arbitration at issue in *Stolt-Nielsen*. *See id*. at 22-23. In particular, the association did not seek to represent absent parties or parties that were not signatories to the arbitration agreements. *Id*. at 23. Accordingly, the First Circuit found that the association's action did not raise any of the concerns that animated this Court's decision of class arbitrations in *Stolt-Nielsen*. *Id*. The First Circuit then concluded that whether the

[6] The Seventh Circuit dismissed the insurer's appeal because it was from a non-appealable interlocutory order. *See id*. at 638. The Court addressed the insurer's *Stolt-Nielsen* argument in the interest of "completeness." *Id*. at 638-39.

association could arbitrate on behalf of ten of its members did not raise issues consistent with "questions of arbitrability" because all the parties and all the claims were concededly before the arbitrator. *Id.* at 24-25.

2. In *Robinson*, The Fifth Circuit Found Only That The Parties To An Arbitration Agreement Could Agree To Submit The Class Arbitration Issue To An Arbitrator.

The Fifth Circuit's decision in *Robinson v. J&K Administrative Mgmt. Servs., Inc*., 817 F.3d 193 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 373 (2016), is the only decision relied on by Opalinski and McCabe that was decided after they filed their prior petition in *Opalinski I*. Like the pre-*Opalinski I* decisions, *Robinson* also did not hold, as Opalinski and McCabe contend, that the availability of class arbitration is a "question of arbitrability" for the arbitrator. Pet. at 10. Rather, it held only that the parties to an arbitration agreement can agree to submit the class arbitration issue to an arbitrator, rejecting the employers' argument that arbitrators are absolutely precluded from deciding the availability of class arbitration. 817 F.3d at 197 ("[I]f 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."). As in *Sutter*, the parties in *Robinson* agreed that the question of whether the contract allowed for class arbitration was for the arbitrator to decide. *Id*. at 198 (finding "unambiguous evidence" of the parties' intent to submit the class arbitration question to an arbitrator).

* * *

In sum, the fundamental premise of the Petition is incorrect. There is no circuit conflict regarding the "who decides" question. To the contrary, all five circuits that have decided the issue – the Third, Fourth, Sixth, Eighth and Ninth – have squarely ruled that determining the availability of class arbitration presents a question of arbitrability presumptively for the court. None of the decisions on which Opalinski and McCabe rely have decided that issue. For this reason alone, the Petition should be denied.[7]

II. THE DECISION OF THE THIRD CIRCUIT WAS CORRECT ON THE MERITS.

The Petition asserts that the Third Circuit erred as a matter of law in concluding that the availability of class arbitration is presumptively for a court to decide. Pet. at 21-27. That is not so. The Third Circuit's decision represents a correct application of this Court's arbitration jurisprudence.

In *Howsam*, this Court distinguished between two types of gateway questions. First are "procedural

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[7] Although not relevant to whether there is a circuit split, Opalinski and McCabe also incorrectly assert that *Opalinski I* conflicts with prior Third Circuit decisions. *See* Pet. at 11 (*citing Quilloin v. Tenet HealthSystem Phila., Inc*., 673 F.3d 221 (3d Cir. 2012); *Vilches v. Travelers Cos*., 413 Fed. Appx. 487 (3d Cir. 2011) (non-precedential opinion)). The one-sentence in *Quilloin* regarding the "who decides" issue was, as the *Opalinski I* panel noted, dicta because the parties had agreed in the trial court that the arbitrator, not the court, should resolve the availability of class arbitration. *Opalinski I*, 761 F.3d at 331; Pet. App. 43a. Moreover, as the Third Circuit in *Opalinski I* noted, the prior Third Circuit decisions had relied on a mistaken reading of *Stolt-Nielsen* that was later exposed in *Sutter*, where this Court stated that it had not resolved the "who decides" issue. *See Opalinski I*, 761 F.3d at 331-32; Pet. App. 42a-43a (citing *Sutter*, 133 S. Ct. at 2068 n.2).

questions" that "'grow out of the dispute and bear on its final disposition.'" *Howsam*, 537 U.S. at 84 (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)). As this Court found, "parties would likely expect that an arbitrator would decide" these questions of procedure. *Howsam*, 537 U.S. at 84. Accordingly, such questions are presumptively for an arbitrator to decide. *See id*. Examples include whether an arbitration claim is time-barred (*Id*. at 85-86); whether the parties to an arbitration agreement followed a grievance process that was a prerequisite to arbitration (*John Wiley & Sons*, 376 U.S. at 556-59); and whether an arbitrator was authorized to award treble damages (*Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 n.2 (2003)).[8]

The other type of gateway question is one of arbitrability. *Howsam*, 547 U.S. at 83-84. Questions of arbitrability include those gateway disputes that must be resolved to "avoid[] the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id*. These are the kind of important questions "where contracting parties would likely have expected a court to have decided the gateway matter." *Id*. at 83. Thus, a question of arbitrability is "'an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.'" *Id*. at 83 (quoting *AT&T Techs., Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986)).

There are three independent reasons that determining the availability of class arbitration constitutes a

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[8] *Stolt-Nielsen* makes clear that determining the permissibility of class arbitration does not raise a "procedural" question, but a substantive question regarding the scope of the parties' intentions to arbitrate. 559 U.S. at 684-85.

question of arbitrability presumptively for the court. First, this Court has long recognized that determining whose claims an arbitrator is authorized to decide is a question of arbitrability for the court. *See John Wiley & Sons,* 376 U.S. at 546-47 (The Court has "no doubt" that the question of whether the defending company was bound by an arbitration agreement that had been signed by a company with which it had merged "is a matter to be determined by the court"); *First Options*, 514 U.S. at 947 (the issue of whether individual business owners were personally bound by an arbitration agreement they had signed for their closely held company presented a question of arbitrability for the Court to decide); *AT&T Techs.*, 475 U.S. at 651 (finding that "whether or not [a] company is bound to arbitrate. . . is a matter to be determined by the Court" and that a party cannot be forced to "arbitrate the arbitrability question'").

Determining the availability of class arbitration presents a question of arbitrability under this line of authority, as the Third Circuit correctly held in *Opalinski I*. Pet. App. 44a-46a. RHI sought to compel bilateral arbitrations against Opalinski and McCabe under individual arbitration agreements it had entered into with each of them. In opposition, Opalinski and McCabe asserted that their individual arbitration agreements empowered the arbitrator to adjudicate not only their personal claims, but also additional "individuals not currently parties to this action." Pet. App. 45a. The disputed issue raises a quintessential question of arbitrability involving whose claims the arbitrator has jurisdiction to arbitrate under the terms of Opalinski and McCabe's agreements – the claims of Opalinski and McCabe only, or the claims of Opalinski and McCabe as well as thousands of absent individuals. Pet. App. 22a, 45a.

Second, this Court has also recognized that determining whether a concededly binding arbitration clause applies to a certain type of controversy is a question of arbitrability. *See Howsam*, 537 U.S. at 84. Following that principle, this Court in *AT&T Techs*. found that the threshold issue of whether a collective bargaining agreement required the employer to arbitrate grievances about layoffs is a question of arbitrability for the court because it required determining whether the parties had agreed to arbitrate a particular type of controversy. 475 U.S. at 651 ("[T]he Seventh Circuit erred in ordering the parties to arbitrate the arbitrability question. It is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs . . . . If the court determines that the agreement so provides, then it is for the arbitrator to determine the relative merits [of the underlying dispute].").

Applying this framework, the Third Circuit correctly held in *Opalinski I* that the availability of class arbitration concerns whether a binding arbitration clause applies to a certain type of controversy, thus raising a question of arbitrability. Pet. App. 46a. As the Third Circuit explained, "[t]raditional individual arbitration and class arbitration are so distinct that a choice between the two goes . . . to the very type of controversy to be resolved." Pet. App. 48a; *see also Stolt-Nielsen*, 559 U.S. at 685 ("[C]lass-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."). Indeed, a claim involving two parties is a different type of controversy in almost every way from claims involving huge sums that are brought on behalf of hundreds or thousands of absent claimants. In *Concepcion*, the Court described class arbitration as

"not arbitration as envisioned by the FAA" and found it "hard to believe" that defendants would agree to it at all. 131 S. Ct. at 1752-53. To ask whether parties agreed to class arbitration, therefore, is necessarily to ask what type of controversy the parties agreed to arbitrate – a quintessential question of arbitrability.

Finally, an important factor in determining whether an issue is a question of arbitrability is whether a court or an arbitrator is better suited to resolve it. *See Howsam*, 537 U.S. at 85. If arbitrators may decide for themselves whether they are authorized to conduct lengthy class arbitrations or only short and simple individual arbitrations, some might intentionally or unintentionally favor class arbitration. *See AT&T Techs.,* 475 U.S. at 651 (parties would be less willing to enter into arbitration agreements if an arbitrator could determine his or her own jurisdiction); Clancy & Stein, *An Uninvited Guest*, 63 Bus. Lawyer 55, 73 (2007) (noting that arbitrators' rulings in class arbitration are "fraught with financial conflicts of interest for the arbitrator" because "a decision to certify a class almost certainly would . . . increase the arbitrator's compensation for the case"). Presuming that a court should decide whether an arbitrator is authorized to preside over class arbitration – as the Third, Fourth, Sixth, Eighth, and Ninth Circuits have done – is the sounder course.[9]

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[9] Opalinski and McCabe also make a passing contention that RHI "asked to have the case decided by an arbitrator with the American Arbitration Association ("AAA"), whose rules provide for the arbitrator to decide" the availability of class arbitration. Pet. at 22. Opalinski and McCabe did not, however, argue the relevance of RHI's incorporation of the AAA rules by reference into their agreements as part of their briefing of the "who decides" issue in *Opalinski I*. Thus, Opalinski and McCabe have waived

III. A RULING FROM THIS COURT WILL HAVE LITTLE OR NO PRACTICAL SIGNIFICANCE.

Petitioners' arguments about the practical importance of the "who decides" issue (Pet. at 28-31) depend largely on the mistaken premise that there is a circuit split. As shown above, there is not, and the circuit courts are well on their way to resolving the issue without this Court's intervention.

Moreover, the "who decides" issue is on the road to practical extinction. The parties entered into the agreements at issue in 2001 and 2002. Since that time, this Court has increased awareness of the class arbitration issue by considering the availability of class arbitration at least four times, in *Bazzle*, *Stolt-Nielsen*, *Concepcion* and *Sutter*.

As contracting parties recognize the availability of class arbitration as a potentially important question, they have every incentive to resolve it explicitly in their arbitration agreements. *See Institutional ADR Today: The Comprehensive, Cost-Effective Alternative*, Vol. 19, No. 8 Metro. Corporate Counsel (Northeast Edition) 24 (2011) (interview with William K. Slate, II, President of the American Arbitration Association) ("As a result of [*Concepcion*], a greater number of organizations are considering whether to include arbitration agreements in their contracts and also whether those arbitration agreements should include express

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the AAA incorporation issue. Also, as the Third Circuit found in *Opalinski II*, the parties' incorporation of the AAA rules has no bearing on who determines the availability of class arbitration because the AAA rules did not contemplate class arbitration at all when the parties entered into the agreements in 2001 and 2002. Pet. App. 14a.

class action waivers."); Meredith R. Miller, *Contracting Out of Process, Contracting Out of Corporate Accountability*, 75 Tenn. L. Rev. 365, 375 (2008) ("In the wake of *Bazzle*, businesses have not left these questions to implication by simply using broad agreements to arbitrate. Rather, with increasing frequency, corporations have expressly limited the right to proceed on a classwide basis.") (footnotes omitted); Gilles & Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. Chi. L.R. 623, 629 (2012) ("But most class cases will not survive the impending tsunami of class action waivers."). When arbitration agreements state expressly whether class arbitration is authorized, as they are increasingly doing, the "who decides" issue is not "critically important"– it is moot.

Additionally, Petitioners' contention that "[p]ersistent uncertainty over who should decide the availability of class-wide arbitration" needlessly delays arbitration by allowing parties like RHI a "second bite at the apple" (Pet. at 28-29) misses the mark because it is based on false premises. First, as described above, there is no "persistent uncertainty"– all five circuits that have faced the issue have found that courts should decide the availability of class arbitration. Second, as explained above (*see supra* p. 5), RHI did not take two bites at the apple: RHI moved the District Court to compel individual arbitration before the arbitration proceedings began. Third, the rule adopted by each of the five circuits will not delay arbitrations – a court's decision on the availability of class arbitration is not subject to second-guessing by an arbitrator. Finally, whether an arbitration agreement permits class arbitration is no more difficult or time-consuming to resolve than any of the other gateway questions of arbitrability that are routinely

the province of the courts. Allowing an arbitrator to proceed with class arbitration based on a largely unreviewable interpretation of an arbitration agreement, on the other hand, may lead to a procedural dead-end. *See Sutter*, 133 S. Ct. at 2071 (Alito, J., concurring) ("With no reason to think that the absent class members ever agreed to class arbitration, it is far from clear that they will be bound by the arbitrator's ultimate resolution of th[e] dispute."). Opalinski and McCabe's contention about "persistent uncertainty" and "needless[] delays" is, therefore, without merit.

CONCLUSION

For the foregoing reasons, the Court should deny Opalinski and McCabe's Petition for a Writ of Certiorari.

Respectfully submitted,

JAMES M. HARRIS
SEYFARTH SHAW LLP
2029 Century Park East
Suite 3500
Los Angeles, CA 90067-3021
(310) 201-5219

RICHARD L. ALFRED
Counsel of Record
PATRICK J. BANNON
JAMES M. HLAWEK
SEYFARTH SHAW LLP
World Trade Center East
Two Seaport Lane
Suite 300
Boston, MA 02210
(617) 946-4800
ralfred@seyfarth.com

Counsel for Respondents

September 27, 2017