No. 15-10627

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARRIOTT OWNERSHIP RESORTS, INC.; MARRIOTT VACATIONS WORLDWIDE CORPORATION; MARRIOTT RESORTS, TRAVEL COMPANY, INC.; MARRIOTT RESORTS HOSPITALITY CORPORATION,

Plaintiffs-Appellants,

– v. –

WILLIAM B. STERMAN,

Defendant-Appellee.

On Appeal from a Judgment and Order of the
United States District Court for the Middle District of Florida
Case No. 6:14-cv-01400 (Mendoza, J.)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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No. 15-10627

MARRIOTT OWNERSHIP RESORTS, INC., et al. v. STERMAN

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

CERTIFICATE OF INTERESTED PERSONS

In addition to the persons previously identified as having an interest in the outcome of this appeal, the Chamber of Commerce of the United States of America identifies the following individuals:

Kate Comerford Todd

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RULES

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.[1]

The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including cases addressing the enforceability and interpretation of arbitration agreements.

Many of the Chamber's members and affiliates employ arbitration agreements in their contracts. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. The type of arbitration contemplated by the

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

Federal Arbitration Act ("FAA") is speedy, fair, inexpensive, and less adversarial than litigation in court—in part because "arbitration as envisioned by the FAA" takes place on an individual rather than class-wide basis. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011). The Chamber's members have therefore structured millions of contractual relationships around arbitration agreements.

Class arbitration is a worst-of-all-worlds Frankenstein's monster: It combines the enormous stakes, formality and expense of litigation that are inimical to bilateral arbitration with exceedingly limited judicial review of the arbitrators' decisions. It is for that reason that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748.

Accordingly, whether parties to an arbitration agreement intended to depart from traditional arbitration procedures and instead authorize class arbitration is a fundamental, threshold question of monumental importance that, like other gateway questions of arbitrability, is one that parties expect will be decided by a court rather than an arbitrator. Yet the decision below turns this expectation on its head, concluding that any time parties agree to use the standard

commercial arbitration rules of the nation's most popular arbitration administrator, they are clearly and unmistakably delegating the exceptionally important question of the availability of class arbitration to arbitrators rather than courts. The Chamber has a strong interest in explicating the errors in that approach.

STATEMENT OF THE ISSUES

1. Whether, in light of the Supreme Court's repeated recognition of the "fundamental" differences between bilateral and class arbitration, the availability of class arbitration is a "gateway" question that is presumptively for courts, not arbitrators, to decide.

2. Whether an agreement that nowhere mentions class arbitration and merely designates the commercial arbitration rules of the American Arbitration Association amounts to a clear and unmistakable delegation to the arbitrators to decide the availability of class arbitration.

INTRODUCTION AND SUMMARY OF ARGUMENT

Who decides—a court or an arbitrator—whether an arbitration provision authorizes class-wide arbitration?

This question is of considerable practical significance to businesses across the country. As the Supreme Court has observed,

class arbitration is "not arbitration as envisioned by the FAA" and "lacks its benefits." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011). Rather, class arbitration is an unwieldy hybrid proceeding that sacrifices the informality and expediency of traditional arbitration in favor of the procedural complexity and bet-the-company stakes of class litigation.

I. The Supreme Court has explained that certain fundamental issues concerning an arbitration agreement are "gateway question[s]" that are reserved for courts to decide absent a "clear[] and unmistakabl[e]" agreement to the contrary. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–84 (2002) (quotation marks omitted). Whether an arbitration agreement authorizes class-wide arbitration is a quintessential "gateway question" that goes to the heart of what and with whom the parties have agreed to arbitrate and that contracting parties would expect to be answered by a court.

While neither the Supreme Court nor this Court has squarely decided whether the availability of class-wide arbitration is a gateway issue of arbitrability, the Supreme Court has "given every indication, short of an outright holding, that classwide arbitrability is a gateway question rather than a subsidiary one." *Reed Elsevier, Inc. ex rel.*

LexisNexis Div. v. Crockett, 734 F.3d 594, 598 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 2291 (2014). In particular, in *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), the Court strongly suggested that the issue is a gateway question of arbitrability, but was not required to reach the issue because the parties in that case had stipulated that the question was for the arbitrator to decide. *See id.* at 680, 685–87. Similarly, in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), the Court again declined to reach the issue, but made clear that "*Stolt-Nielsen* flagged that it might be a question of arbitrability." *Id.* at 2068 n.2.

It is thus unsurprising that the only two circuits to have addressed the issue in the wake of *Stolt-Nielsen* and *Oxford Health Plans* have held that the availability of class-wide arbitration is presumptively for courts to decide. *See Opalinski v. Robert Half Int'l, Inc.*, 761 F.3d 326 (3d Cir. 2014), *cert. denied*, 2015 WL 998611 (U.S. Mar. 9, 2015); *Reed Elsevier*, 734 F.3d 594. As the Sixth Circuit observed, because "[a]n incorrect answer in favor of classwide arbitration would force parties to arbitrate not merely a single matter that they may well not have agreed to arbitrate, but thousands of them," the decision "whether the parties agreed to classwide arbitration

is vastly more consequential than even the gateway question whether they agreed to arbitrate" at all. *Reed Elsevier*, 734 F.3d at 599 (citation, alterations, and quotation marks omitted).

II. The court below held that the parties had clearly and unmistakably delegated the question of class arbitration to the arbitrator by referring to the Commercial Arbitration Rules of the American Arbitration Association ("AAA") in their arbitration agreement. But a mere reference to an arbitration provider's rules—ones that do not mention class arbitration procedures at all—falls far short of satisfying the Supreme Court's "clear and unmistakable" standard, which is meant to prevent courts from "forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Howsam*, 537 U.S. at 84.

Indeed, that standard is an especially demanding one in the context of class arbitration. The Supreme Court has held that an arbitration provision must reflect the parties' actual agreement to authorize class procedures before such procedures may be imposed upon an unwilling party. The same principle holds for the threshold question of "who decides" whether class procedures are available. And for that reason, one court after another has properly concluded that adopting

the AAA's Commercial Arbitration Rules falls far short of the "clear and unmistakable" agreement needed to remove this crucial determination from the hands of courts and delegate it to an arbitrator.

ARGUMENT

I. THE AVAILABILITY OF CLASSWIDE ARBITRATION IS A QUESTION FOR COURTS, NOT ARBITRATORS, TO DECIDE

A. Gateway Questions Of Arbitrability Are Presumptively For The Courts To Decide.

The ability of parties to structure their arbitration agreements is a core aspect of the FAA's pro-arbitration policies. The FAA "imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion." *Stolt-Nielsen*, 559 U.S. at 680 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). As the Supreme Court has repeatedly explained, a "party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Howsam*, 537 U.S. at 83 (quotation marks omitted). For that reason, "parties may agree to limit the issues subject to arbitration" as well as "to limit *with whom* a party will arbitrate its disputes." *Concepcion*, 131 S. Ct. at 1748–49.

Accordingly, an arbitrator has authority to decide a particular question only if the parties have authorized him or her to do so. *See, e.g.*, *Stolt-Nielsen*, 559 U.S. at 682 ("[A]n arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution."); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648–49 (1986) ("[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.").

In keeping with these principles, the Supreme Court has recognized that "gateway question[s]" of "arbitrability"—*i.e.*, "whether the parties have submitted a particular dispute to arbitration"—are presumptively for the courts, not arbitrators, to decide. *Howsam*, 537 U.S. at 83–84 (quotation marks omitted). Such gateway questions include, but are not limited to, "whether parties have a valid arbitration agreement at all" (*Oxford Health Plans*, 133 S. Ct at 2068 n.2) and "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy" (*Howsam*, 537 U.S. at 84).[2]

[2] *See also, e.g.*, *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299–300 (2010) (disputes over "formation of the parties' arbitration

What these issues have in common is that "contracting parties would likely have expected a court" to decide them. *Howsam*, 537 U.S. at 83. That is because their resolution goes to the heart of the arbitral bargain, shaping the very nature of the dispute or disputes that the parties have agreed to submit to the arbitrators for decision. Farming out these gateway questions to the arbitrators would therefore "risk * * * forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.* at 83–84. Moreover, because the FAA imposes a default rule that such issues are "for judicial determination," parties must "clearly and unmistakably provide otherwise" in order to contract around that rule. *Id.* at 83 (quoting *AT&T Techs.*, 475 U.S. at 649). As the Supreme Court explained in *First Options*:

> [G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should

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agreement" and "its enforceability or applicability to the dispute" are ordinarily for the courts); *First Options of Chi. v. Kaplan*, 514 U.S. 938, 943–47 (1995) (same for dispute over whether arbitration clause applied to a party who "had not personally signed" the contract in which it was contained); *AT&T Techs.*, 475 U.S. at 651 (same for dispute over whether particular labor-management layoff dispute fell within the arbitration clause in a collective bargaining agreement); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546–48 (1964) (same for dispute over whether arbitration provision survived a corporate merger).

> decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

514 U.S. at 945.

By contrast, when a court concludes that parties have agreed to arbitrate a given dispute, but recognizes that there are potential procedural obstacles to arbitration, such questions of "procedural arbitrability" are presumptively for the arbitrator to decide. *Howsam*, 537 U.S. at 84. As the Supreme Court has recently summarized, "[t]hese procedural matters include claims of waiver, delay, or a like defense to arbitrability," as well as "the satisfaction of prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate." *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1207 (2014) (quotation marks omitted).

B. The Availability Of Class Arbitration Is A Gateway Question Of Arbitrability.

The question whether class arbitration is available—namely, whether parties have agreed to traditional, bilateral arbitration or have instead agreed to arbitrate the claims of hundreds or thousands of absent parties—is a decision of profound importance that parties would expect a court to resolve, not a mere procedural detail. Indeed, the

Supreme Court has made it clear 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." *Stolt-Nielsen*, 559 U.S. at 685. Whether class arbitration is available is about far more than "merely what 'procedural mode' [is] available to present [a plaintiff's] claims." *Id*. at 687.

Specifically, the shift from bilateral to class-wide arbitration results in several "fundamental changes" (*id.* at 686) that wreak havoc on the type of arbitration that is contemplated by the FAA. To begin with, "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 131 S. Ct. at 1751. Bilateral arbitration is an attractive alternative to litigation precisely because, in the ordinary course, it permits parties to trade the "procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution," including "lower costs" and "greater efficiency and speed." *Stolt-Nielsen*, 559 U.S. at 685; *see also Concepcion*, 131 S. Ct. at 1751.

Class arbitration, by contrast, "*requires* procedural formality." *Concepcion*, 131 S. Ct. at 1751. Before reaching the merits, the arbitrator "must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted." *Id.* Moreover, the delays inherent in class arbitration are undeniable: In *Concepcion*, the Court cited statistics showing that class arbitrations take years to resolve instead of months—and ***none*** of the hundreds of class arbitrations discussed by the court ended with "a final award on the merits." *Id.*

In addition, class arbitration ratchets up the stakes of arbitration and the risk to defendants of an adverse decision. The "commercial stakes of class-action arbitration are comparable to those of class-action litigation" because the arbitrator's award "adjudicates the rights of absent parties." *Stolt-Nielsen*, 559 U.S. at 686. In a class arbitration proceeding, all of the risk is packed into a single arbitrator's (or panel's) decision and therefore "will often become unacceptable," pressuring defendants "into settling questionable claims." *Concepcion*, 131 S. Ct. at 1752; *see also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 459 (2003) (Rehnquist, C.J., dissenting) (observing that a class arbitration

proceeding "concentrate[s] all of the risk of substantial damages awards in the hands of a single arbitrator").

What is more, it remains unsettled whether a class arbitration is even capable of yielding a judgment binding on all parties. Even if the arbitrator were to observe all of the procedural formalities required to "bind absentees in litigation," such as notice, an opportunity to be heard, and the right to opt out (*id.* at 1751), absent class members might argue that they are not bound by the arbitrator's decision, because, for example, their arbitration agreements do not authorize class arbitration or they were not afforded their contractual right to participate in the selection of the arbitrator. Justice Alito suggested as much in his concurring opinion in *Oxford Health Plans*, arguing that, "at least where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used." 133 S. Ct. at 2071–72 (Alito, J., concurring)). Consequently, absent class members might claim the "'benefit from a favorable judgment without subjecting themselves to

the binding effect of an unfavorable one.'" *Id.* at 2072 (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 546–47 (1974)).

For these reasons, class arbitration is not "arbitration as envisioned by the FAA" and "lacks its benefits." *Concepcion*, 131 S. Ct. 1753. And because "[a]rbitration is poorly suited to the higher stakes of class litigation" (*id.* at 1752) and arbitrators' decisions on matters within their authority are subject to limited review, parties should not be compelled to submit the determination of such a fundamental issue—whether class arbitration is available—to an arbitrator in the absence of a clear and unmistakable agreement to do so.

In light of *Stolt-Nielsen*, *Concepcion*, and *Oxford Health Plans*, the Third and Sixth Circuits—the only two federal appellate courts to have squarely decided the issue—have held that the question whether an arbitration provision authorizes class proceedings is a "gateway" issue of arbitrability that ordinarily must be decided by a court. As the Third Circuit put it, "[t]raditional individual arbitration and class arbitration are so distinct that a choice between the two goes, we believe, to the ***very type of controversy*** to be resolved." *Opalinski*, 761 F.3d at 334 (emphasis added). The Sixth Circuit similarly has said that "whether the parties arbitrate one claim or 1,000 in a single proceeding is no

mere detail. * * * [T]he question whether the parties agreed to classwide arbitration is vastly more consequential than even the gateway question whether they agreed to arbitrate bilaterally." *Reed Elsevier*, 734 F.3d at 598–99; *see also Huffman v. Hilltop Cos.*, 747 F.3d 391, 398–99 (6th Cir. 2014) (following *Reed Elsevier*).[3] Numerous district courts have reached the same conclusion.[4]

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[3] In a recent unpublished decision, the Ninth Circuit similarly concluded that a district court did not err in striking a plaintiff's class claims because "[i]ssues that contracting parties would likely have expected a court to have decided are considered gateway questions of arbitrability for courts, and not arbitrators, to decide." *Eshagh v. Terminix Int'l Co.*, 588 F. App'x 703, 704 (9th Cir. Dec. 22, 2014) (quotation marks omitted).

[4] *See, e.g.*, *Chesapeake Appalachia, LLC v. Suppa*, --- F. Supp. 3d ---, 2015 WL 966326, at *8 (N.D. W. Va. Mar. 4, 2015) (noting that "class arbitration raises numerous and significant issues that are of lesser concern in bilateral arbitration" and concluding, therefore, that "the law protects parties by presuming that a decision implicating such consequential matters should be litigated through the judicial process instead of through arbitration"); *Chassen v. Fid. Nat'l Fin., Inc.*, 2014 WL 202763, at *5–6 (D.N.J. Jan. 17, 2014) (concluding "that the issue of class-wide arbitration is a gateway issue" because of the differences between bilateral and class-wide arbitration); *Safra Nat'l Bank of N.Y. v. Penfold Inv. Trading, Ltd.*, 2011 WL 1672467, at *3 (S.D.N.Y. Apr. 20, 2011) ("[A]bsent an agreement to arbitrate on a class basis, the availability of class arbitration is a gateway issue to be decided by the courts."); *Corrigan v. Domestic Linen Supply Co.*, 2012 WL 2977262, at *4 (N.D. Ill. July 20, 2012) ("It is for courts, not arbitrators, to decide whether class claims are able to proceed."); *Eshagh v. Terminix Int'l Co.*, 2012 WL 1669416, at *10 (N.D. Cal. May 11, 2012), *findings and recommendations adopted in full*, Dkt. No. 63, No. 1:11-cv-00222 (E.D.

The few courts that have taken a contrary view have principally relied upon the non-binding plurality opinion in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), in which four Justices opined that the availability of class arbitration is merely a question of "arbitration procedures" and not a gateway question of arbitrability. *Id.* at 452–53. But the Supreme Court has subsequently cautioned that "*Bazzle* did not yield a majority decision" on this question and expressed surprise that the parties "appear[ed] to have believed that the judgment in *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration." *Stolt-Nielsen*, 559 U.S. at 679–80. Dispelling any doubts that may have lingered on that score, the Court recently reiterated that "*Stolt-Nielsen* made clear that this Court has not yet decided whether the availability of class arbitration is a question of arbitrability." *Oxford Health Plans*, 133 S. Ct. at 2068 n.2. Accordingly, "who decides"—a court or an arbitrator—whether an

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Cal. July 6, 2012), *aff'd*, 588 F. App'x 703 (rejecting plaintiff's argument that "the question of whether he has a right to bring a class in arbitration is a question of procedural arbitrability for the arbitrator, not the Court").

arbitration agreement authorizes classwide arbitration is an open question in the Supreme Court.[5]

That said, the Court has strongly signaled that the reasoning of the *Bazzle* plurality is unlikely to survive, noting that the discussion in "*Stolt-Nielsen* flagged that [the availability of class arbitration] might be a question of arbitrability." *Oxford Health Plans*, 133 S. Ct. at 2068 n.2. It appears that the only reason why the Supreme Court has not yet issued such a holding is that—unlike here—the parties in *Oxford Health Plans* and *Stolt-Nielsen* had consented to having the arbitrator decide whether the arbitration agreement authorized class procedures. *See id.*; *Stolt-Nielsen*, 559 U.S. at 680. Indeed, Justice Alito's concurrence in *Oxford Health Plans* warned that "in the absence of concessions like Oxford's," the difficulty of binding absent class members to an arbitrator's decision "should give courts pause before concluding that the availability of class arbitration is a question the arbitrator should decide." 133 S. Ct. at 2072 (Alito, J., concurring). As

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[5] It is an open question in this Court as well. *See S. Commc'ns Servs., Inc. v. Thomas*, 720 F.3d 1352, 1358 n.6 (11th Cir. 2013) ("Like the Supreme Court, we also have not decided whether the availability of class arbitration is a question of arbitrability."). This Court did not need to reach the issue in *Thomas* because—as in *Oxford Health Plans*, but unlike here—the parties did not dispute the arbitrator's authority to decide the class arbitration issue. *Id.*

the Sixth Circuit summarized, "the [Supreme] Court has given ***every indication***, short of an outright holding, that classwide arbitrability is a gateway question"—*i.e.*, a question ordinarily reserved for courts—"rather than a subsidiary one." *Reed Elsevier*, 734 F.3d at 598 (emphasis added); *see also Opalinski*, 761 F.3d at 331 ("Subsequent Supreme Court decisions * * * cast doubt on the *Bazzle* plurality's decision."); *Suppa*, 2015 WL 966326, at *7 ("As both the Sixth and Third Circuits have acknowledged, the Supreme Court's post-*Bazzle* decisions have gone beyond merely asserting that the 'who decides' question remains unresolved.").

Accordingly, there is good reason to think that the Supreme Court would hold that the availability of class arbitration is a gateway question of arbitrability. This Court should follow the clear indications of the Supreme Court—and the decisions of the Third and Sixth Circuits and numerous district courts—and hold that the availability of classwide arbitration is a fundamental "gateway" issue for courts to decide.

II. A STANDARD PROVISION INCORPORATING THE AAA'S COMMERCIAL ARBITRATION RULES IS NOT A "CLEAR AND UNMISTAKABLE" DELEGATION TO THE ARBITRATOR OF THE QUESTION WHETHER CLASS ARBITRATION IS AVAILABLE

The court below declined to reach the issue of whether the availability of class-wide arbitration is a gateway issue of arbitrability. Instead, the court concluded that the arbitration provision's statement that disputes would be resolved "pursuant to . . . the *then-current commercial arbitration rules* and supervision of the AAA" amounted to a "clear and unmistakable delegation of authority to the arbitrator" to decide the class arbitration issue. Order 8–9 (emphasis and ellipses in original; alterations omitted). Although neither the arbitration provision nor the AAA's Commercial Rules mention class arbitration, the district court concluded that the parties' incorporation of those rules ***further*** incorporated the separate AAA Supplementary Rules for Class Arbitrations ("Supplementary Class Rules"), which (when applicable) set forth procedures by which an arbitrator may determine "'whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.'" *Id.* at 8 (quoting Supplementary Class Rule 3).

This daisy chain of incorporation falls far short of satisfying the Supreme Court's clear-and-unmistakable standard. As the Supreme Court has explained, that standard is a "heightened" one (*Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010)) that creates a "strong pro-court presumption as to the parties' likely intent" (*Howsam*, 537 U.S. at 86). Applying these principles, the Third Circuit has said that "[t]he burden of overcoming the presumption is onerous, as it requires express contractual language unambiguously delegating the question of arbitrability to the arbitrator." *Opalinski*, 761 F.3d at 335. Unlike the ordinary presumption that any ambiguities in the agreement should be construed in favor of arbitration, in this context the presence of any "silence or ambiguity" defeats a claim that the issue has been delegated to the arbitrator. *First Options*, 514 U.S. at 945. This safeguard ensures that parties will not be forced "to arbitrate a matter that they may well not have agreed to arbitrate." *Howsam*, 537 U.S. at 84.

In concluding that the clear-and-unmistakable standard was met here, the court below relied on *Terminix International Co. v. Palmer Ranch Limited Partnership*, 432 F.3d 1327 (11th Cir. 2005), which held that the parties' incorporation of the AAA Commercial Arbitration

Rules into their arbitration agreement amounted to an express agreement to arbitrate arbitrability. *Id.* at 1332–33. The Court reasoned that because what was then AAA Commercial Rule 8(a)—now 7(a)—grants an arbitrator the authority to rule on his own jurisdiction, including the arbitrability of a given claim, the parties had agreed to let the arbitrator decide any challenges to the validity of the arbitration clause. *Id.*

But the Court in *Terminix* assessed whether the parties had agreed to arbitrate arbitrability in the context of a bilateral arbitration agreement and the AAA Commercial Rules, and thus had no occasion to address the AAA Supplementary Class Rules or the possible delegation of the class arbitration issue.[6] This distinction is critical, given that the Supreme Court and numerous appellate courts have recognized the fundamental differences between bilateral and class arbitration. *E.g.*,

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[6] The same was true in the decisions of other circuits on which the Court in *Terminix* relied. *See Contec Corp. v. Remote Solution, Co.*, 398 F.3d 205, 208 (2d Cir. 2005); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473–74 (1st Cir. 1989); *see also, e.g.*, *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372–73 (Fed. Cir. 2006). *But see Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 777 & n.1, 780 (10th Cir. 1998) (concluding that the parties did not specifically intend to submit the question of arbitrability to the arbitrator, even though the arbitration clause incorporated the AAA Commercial Arbitration Rules).

Concepcion, 131 S. Ct. at 1750–51; *Stolt-Nielsen*, 559 U.S. at 684–87; *Opalinski*, 761 F.3d at 333–35; *Reed Elsevier*, 734 F.3d at 598–99. Indeed, the Sixth Circuit has emphasized that, because of these differences, "the question whether the parties agreed to classwide arbitration is ***vastly more consequential*** than even the gateway question whether they agreed to arbitrate bilaterally." *Reed Elsevier*, 734 F.3d at 599 (emphasis added). After all, "[a]n incorrect answer in favor of classwide arbitration would 'forc[e] parties to arbitrate' not merely a single 'matter that they may well not have agreed to arbitrate[,]' but thousands of them." *Id.* (quoting *Howsam*, 537 U.S. at 84) (citation omitted; alterations in original).

In light of the substantial importance of the decision whether class-wide arbitration is available, the district court's extension of *Terminix* to the circumstances presented here is unwarranted. Indeed, there are at least four reasons why the district court erred in reading *Terminix* as broadly it did.

First, the district court's extension of *Terminix* is in considerable tension with the Supreme Court's recent arbitration decisions—particularly *Stolt-Nielsen*. In *Stolt-Nielsen*, the Court held that neither courts nor arbitrators may "presume that the parties' mere silence on

the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." 559 U.S. at 687. Rather, there must be "a contractual basis for concluding that the party *agreed* to do so." *Id.* at 684. It follows, therefore, that parties' silence on the antecedent "who decides" question cannot be construed as implicit—much less "clear" and "unmistakable"—consent to submit the availability of class arbitration to the arbitrator either. Yet deeming an unremarkable reference to the AAA Commercial Rules—the most commonplace arbitration rules in the United States—to be a clear and unmistakable delegation of the class arbitrability issue would effectively do just that.

The recent decision in *Chesapeake Appalachia, LLC v. Suppa*, --- F.3d ----, 2015 WL 966326 (N.D. W. Va. Mar. 4, 2015), captures the problem with the district court's reasoning in this case. The upshot of such reasoning, that court explained, is that "parties could not agree that the AAA rules would govern only bilateral arbitration unless they specifically excluded the Supplementary Rules for Class Arbitrations." *Id.* at *10. Yet this would "turn[] the presumption favoring judicial determination of classwide arbitrability on its head," because the "entire point of the presumption is that an arbitration clause need not expressly exclude questions of arbitrability as outside its scope." *Id.*

Second, embracing the district court's interpretation of *Terminix* would put this Court in square conflict with the decisions of the Third and Sixth Circuits, as well as several district courts. The arbitration provision in this case is materially indistinguishable from the arbitration provisions in *Huffman*, *Reed Elsevier,* and *Opalinski*, all of which also called for arbitration under the AAA Commercial Arbitration Rules. *See Huffman*, 747 F.3d at 394; *Reed Elsevier*, 734 F.3d at 599; *Opalinski v. Robert Half Int'l, Inc.*, 2012 WL 6026674, at *1 n.1 (D.N.J. Dec. 3, 2012), *rev'd*, 761 F.3d 326. Yet the courts in those cases each concluded that such language is insufficient to delegate the availability of class arbitration to the arbitrator. As the Sixth Circuit reasoned, such language "does not clearly and unmistakably assign to an arbitrator the question whether the agreement permits classwide arbitration"; "given the total absence of any reference to classwide arbitration" in the arbitration agreement itself, the agreement "can just as easily be read to speak only to issues related to bilateral arbitration." *Reed Elsevier*, 734 F.3d at 599. "Thus, at best, the agreement is silent or 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.* (citing *Stolt-Nielsen*, 559 U.S. at 684–85).

Similarly, the Third Circuit concluded that "the strong presumption favoring judicial resolution of questions of arbitrability is not undone" absent "express contractual language unambiguously delegating the question of arbitrability to the arbitrator." *Opalinski*, 761 F.3d at 335.[7]

Indeed, some courts have recognized a clear distinction between agreeing to allow arbitrators to decide questions of arbitrability under Commercial Rule 7 in general and agreeing to allow arbitrators to decide the class arbitration issue under the Supplementary Class Rules in particular. For instance, Judge Gettleman of the Northern District of Illinois has concluded that the question whether a plaintiff's individual claims fell within the scope of the arbitration clause was a question for the arbitrator in light of the parties' incorporation of the Commercial Rules. *Corrigan v. Domestic Linen Supply Co.*, 2012 WL 2977262, at *2–3 (N.D. Ill. July 20, 2012). But he further held that the availability

[7] *See also, e.g.*, *Suppa*, 2015 WL 966326, at *1, *10 (agreement calling for arbitration "in accordance with the rules of the [AAA]" is insufficient to delegate issue of class-wide arbitrability to the arbitrator); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, --- F. Supp. 3d ----, 2014 WL 7335045, at *3, *12–13 (M.D. Pa. Dec. 19, 2014), *appeal filed*, No. 15-1275 (3d Cir. docketed Feb. 3, 2015) (same); *Eshagh*, 2012 WL 1669416, at *3, *10 (same for agreement calling for arbitration "in accordance with the Commercial Arbitration Rules then in force of the [AAA]," "[g]iven the Supreme Court's * * * determination in *Stolt-Nielsen* that a party may not be compelled to submit a dispute to class arbitration where there is no agreement to do so").

of class arbitration remained for the court to decide, because the agreement was "silent as to class arbitration." *Id.* at *4–5 (citing *Stolt-Nielsen*, 559 U.S. at 682–83). Similarly, Judge Brann of the Middle District of Pennsylvania rejected as "unpersuasive" the proposal that a court should "take a contract that clearly and unmistakably provides for bilateral arbitration and the rules that will govern bilateral arbitration, and extrapolate that evidence to 'clearly and unmistakably provide' for class arbitration." *Chesapeake Appalachia*, 2014 WL 7335045, at *13; *accord Suppa*, 2015 WL 966326, at *9–10. As Judge Brann observed, "[u]sing bilateral arbitration dispute case law to make a decision in a classwide arbitration dispute case completely ignores the * * * fundamental differences between classwide and individual arbitration." *Chesapeake Appalachia*, 2014 WL 7335045, at *12 (quotation marks omitted).

Third, because the Commercial Rules nowhere mention class arbitration or the Supplementary Class Rules, the district court was forced to stretch mightily (and too far) in concluding that consent to use the Commercial Rules amounts to an express incorporation of the Supplementary Class Rules as well. The Commercial Rules do not themselves refer to or incorporate the Supplementary Class Rules;

indeed, they do not mention the notion of class arbitration at all. In other words, to reach the conclusion that it did, the district court had to infer that (1) the parties were aware of the existence of the Supplementary Class Rules, even though they were not referenced in either the agreement itself or the text of the Commercial Rules; (2) the parties clearly intended the Supplementary Class Rules to apply to their dispute, notwithstanding the agreement's silence as to those rules; and (3) in particular, the parties clearly intended to have Supplementary Class Rule 3 divest courts of their jurisdiction to rule on the availability of class-wide arbitration. This piling of inference upon inference stretches the Supreme Court's "clear and unmistakable" requirement beyond recognition. *See Lopez v. Ace Cash Express, Inc.*, 2012 WL 1655720, at *8 (C.D. Cal. May 4, 2012) (deciding the availability of class-wide arbitration because the parties' express incorporation of one set of AAA rules did not amount to an "express[] incorporat[ion] [of] the Supplementary Rules").[8]

[8] To be sure, some courts have agreed with the district court that an incorporation of the Commercial Rules amounts to an express incorporation of the Supplementary Rules as well. *See, e.g.*, *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 635 (5th Cir. 2012), *abrogated on other grounds by Oxford Health Plans*, 133 S. Ct. 2064; *Chesapeake Appalachia, LLC v. Burkett*, 2014 WL 5312829, at *7 (M.D. Pa. Oct. 17,

Fourth, even if incorporation of the Commercial Rules were deemed to further incorporate the Supplementary Class Rules as well, the Supplementary Class Rules do not require that the issue of class arbitrability be decided by the arbitrator. On the contrary, they explicitly recognize that the decision may be made by a court instead. Specifically, Supplementary Class Rule 1(c) contemplates that "a court" may, "by order, address[] and resolve[] any matter that would otherwise be decided by an arbitrator under these Supplementary Rules" and requires the arbitrator in such circumstances to "follow the order of the court." AAA Supp. R–1(c). This language's lack of certainty over who decides the availability of class arbitration procedures stands in contrast to Commercial Rule 7, which assigns to the arbitrator the power "to rule on his or her own jurisdiction, including * * * the arbitrability of any claim or counterclaim." AAA Comm. R–7(a).

CONCLUSION

The district court's judgment should be reversed.

2014); *Price v. NCR Corp.*, 908 F. Supp. 2d 935, 945 (N.D. Ill. 2012). But none of those decisions is binding on this Court, and we respectfully submit that decisions such as *Lopez* better comport with the "heightened standard" (*Rent-A-Center*, 561 U.S. at 69 n.1) that the clear-and-unmistakable requirement is meant to impose.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(c)(7), the undersigned counsel for the *amicus curiae* certifies that this brief:

(i) complies with the type-volume limitation of Appellate Rule 29(d) because it contains 6,019 words, including footnotes and excluding the parts of the brief exempted by Appellate Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Appellate Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

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CERTIFICATE OF SERVICE

I certify that that on April 1, 2015, the foregoing brief was served electronically via the Court's CM/ECF system upon all counsel of record.

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