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Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DISH NETWORK L.L.C. and ECHOSPHERE, L.L.C.

Plaintiffs - Appellants,

v.

MATTHEW RAY, on behalf of himself and all similarly situated persons,

Defendant - Appellee.

No. 17-1013

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:16-CV-00314-LTB)

Meghan W. Martinez, Martinez Law Group, P.C., Denver, Colorado, (Dayna L. Dowdy, Martinez Law Group, P.C., Denver, Colorado, with her on the briefs) for Plaintiffs-Appellants.

Brian D. Gonzales, The Law Offices of Brian D. Gonzales, PLLC, Fort Collins, Colorado, (Ryan F. Stephan, Stephan Zouras, LLP, Chicago, Illinois, with him on the brief) for Defendant-Appellee.

Before **TYMKOVICH**, Chief Judge, **SEYMOUR**, and **McHUGH**, Circuit Judges.

SEYMOUR, Circuit Judge.

This case involves an arbitration proceeding between DISH Network L.L.C. ("DISH") and Matthew Ray, a former employee who signed an arbitration agreement

when he was employed. The arbitrator determined that the Arbitration Agreement between the two parties permitted classwide arbitration, and then stayed the arbitration to permit DISH to contest the issue in court. DISH filed a Petition to Vacate Clause Construction Arbitration Award, which the district court denied. We affirm.

I.

Matthew Ray worked as a sales associate for DISH until his termination in 2015. When he was employed, Mr. Ray signed an Arbitration Agreement drafted by DISH, which provided the following:

> *[T]he Employee and DISH agree that any claim, controversy and/or dispute between them, arising out of and/or in any way related to Employee's application for employment, employment and/or termination of employment, whenever and wherever brought, shall be resolved by arbitration. The Employee agrees that this Agreement is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., and is fully enforceable.*
>
> . . . The arbitration shall be governed by and construed in accordance with the substantive law of the State in which the Employee performs services for DISH as of the date of the demand for arbitration, or in the event the Employee is no longer employed by DISH, the substantive law of the State in which the Employee last performed services for DISH. A single arbitrator engaged in the practice of law from the American Arbitration Association ("AAA") shall conduct the arbitration under the then current procedures of the AAA's National Rules for the Resolution of Employment Disputes "Rules").

Aplt. App. at 51 (emphasis added).

After his termination, Mr. Ray initially filed an action in the federal district court alleging violations of the Fair Labor Standards Act ("FLSA"), Colorado's Wage Claim Act, Colorado's Minimum Wage Act, and a common law claim for breach of contract.

Dish moved to dismiss, demanding that Mr. Ray arbitrate his claims pursuant to the Agreement. Mr. Ray dismissed the lawsuit and filed with the American Arbitration Association ("AAA"), asserting the same four claims. In addition, and the focus of this case, Mr. Ray attempted to pursue his claims as a class action under Fed. R. Civ. P. 23 and a collective action under 29 U.S.C. § 216(b).

One of the issues presented to the arbitrator was whether the Agreement permitted class arbitration. In his Clause Construction Award, the arbitrator first determined that he had jurisdiction to decide the issue. He reasoned that the determination of whether an arbitration agreement permits classwide arbitration was not a "gateway issue," an issue that is normally decided by courts rather than arbitrators. Gateway disputes 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." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (plurality opinion) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964) (a court should decide whether arbitration agreement survived corporate merger and bound resulting corporation); *AT&T Techs., Inc. v. Communication Workers of America*, 475 U.S. 643, 651-52 (a court should decide whether labor-management layoff controversy falls within arbitration clause of collective-bargaining agreement). The arbitrator reasoned that even if the issue presented was a "gateway issue," the parties had clearly and unmistakably expressed their intention in the Agreement that questions of arbitrability be resolved by the arbitrator rather than the courts.

After concluding that he had jurisdiction to decide the issue, the arbitrator analyzed the language of the Agreement to determine the parties' intent as to classwide arbitration. Examining six features relevant to that end, the arbitrator ultimately concluded that the Agreement permitted collective action covering Mr. Ray's FLSA and state law claims.

DISH filed with the district court a Petition to Vacate Clause Construction Award, which the court denied. The court agreed with the arbitrator that he had jurisdiction to decide the issue. Although, unlike the arbitrator, the court concluded that the determination of classwide arbitrability was a "gateway issue" normally decided by the court, it nevertheless held that the Agreement clearly and unmistakably expressed the parties' intention to have the arbitrator resolve such questions. The court also held that the arbitrator did not manifestly disregard the law in interpreting the Agreement. DISH appeals.

II.

DISH first contends that the arbitrator exceeded his powers in determining the gateway issue of jurisdiction over the arbitrability of class and collective claims. It therefore asserts that the normal standard of review usually applicable to an arbitrator's decision, which is extremely deferential, does not apply to the arbitrator's ultimate conclusion here that the Agreement permits classwide arbitrations. DISH also argues that even if the arbitrator did not exceed his powers, his decision manifestly disregarded the applicable law and must therefore be vacated. We address each argument in turn.

A. Class Arbitration as a Gateway Issue

We review a district court's order to vacate or enforce an arbitration award de novo. *U.S. Energy Corp. v. Nukem, Inc.*, 400 F.3d 822, 830 (10th Cir. 2005). "In doing so, however, we give 'great deference' to an arbitrator's decision." *Chevron Mining Inc. v. United Mine Workers of America, Local 1307*, 648 F.3d 1151, 1154 (10th Cir. 2011) (quoting *U.S. Energy*, 400 F.3d at 830). Under the Federal Arbitration Act ("FAA"), vacation of an award is only proper in a few instances that include fraud, corruption, arbitrator misconduct, and arbitrator overreach. 9 U.S.C. § 10(a). Various courts have determined that vacation is also appropriate when the arbitration award violates public policy, when the arbitrator did not conduct a fundamentally fair hearing, or when an arbitrator's decision is "based on a 'manifest disregard' of the law, defined as 'willful inattentiveness to the governing law.'" *Chevron Mining*, 648 F.3d at 1154 (quoting *U.S. Energy*, 400 F.3d at 830); s*ee also Denver & Rio Grande W. R.R. v. Union Pac. R.R.*, 119 F.3d 847, 849 (10th Cir. 1997) (citing cases). Our powers of review have been described as "among the narrowest known to the law." *Litvak Packing Co. v. United Food and Commercial Workers, Local Union No. 7*, 886 F.2d 275, 276 (10th Cir. 1989). In fact, "[e]rrors in either the arbitrator's factual findings or his interpretation of the law (unless that interpretation shows a manifest disregard of controlling law) do not justify review or reversal on the merits of the controversy." *Chevron Mining*, 648 F.3d at 1154 (quoting *Denver & Rio Grande*, 119 F.3d at 849).

But this level of deference only applies to disputes that the parties agreed to submit to arbitration. The Supreme Court has recognized that "arbitration is a matter of

contract and 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 (2002) (quoting *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)). "Accordingly, the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). In making this determination, the Court has "long recognized and enforced a 'liberal federal policy favoring arbitration agreements.'" *Howsam*, 537 U.S. at 83 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). But the Court "has made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, *i.e.,* the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Id.* (quoting *AT&T*, 475 U.S. at 649).

The Court has distinguished "questions of arbitrability" from what it refers to as mere "procedural questions," "which grow out of the dispute and bear on its final disposition." *Id*. at 84 (quoting *John Wiley*, 376 U.S. at 557). "They include, for example, issues related to 'waiver, delay,' or 'whether a condition precedent to arbitrability has been fulfilled.'" *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 597 (6th Cir. 2013) (quoting *Howsam*, 537 U.S. at 84-85). This distinction is not always easy to discern, however, and the question of whether an arbitration clause permits classwide arbitration is a gateway dispute for the courts to decide or a procedural question for an arbitrator is an especially baffling one.

In *Bazzle*, a plurality of the Court stated that whether an agreement permits class arbitration was a procedural question for an arbitrator because "it concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties." 539 U.S. at 452. But the Court subsequently noted the non-binding nature of *Bazzle* in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 680 (2010) ("In fact, however, only the plurality decided [the classwide arbitrability] question."). As the Court described in *Stolt-Nielsen*, bilateral arbitration allows "parties [to] forgo the procedural rigor and appellate review of the courts in order to realize" benefits like "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Id.* at 685. But these benefits are not realized in classwide arbitration, which gives "reason to doubt the parties' mutual consent to resolve disputes through [it]." *Id.*; *see also AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333, 348 (2011) ("[T]he 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.").

Moreover, "[u]nder the Class Rules, 'the presumption of privacy and confidentiality' that applies in many bilateral arbitrations 'shall not apply in class arbitrations,' thus potentially frustrating the parties' assumptions when they agreed to arbitrate." *Stolt-Nielsen*, 559 U.S. at 686 (citations omitted). The Court also pointed out that the "commercial stakes of class-action arbitration are comparable to those of class-action litigation," but "the scope of judicial review is much more limited." *Id.* at 686-87

(citing *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008)). As the Court emphasized in *Concepcion*, 563 U.S. at 350:

> The absence of multilayered review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.

In light of these Supreme Court cases, many circuits have concluded that whether an arbitration clause permits classwide arbitration is a gateway dispute for the courts to decide. *See, e.g.*, *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972 (8th Cir. 2017) (holding classwide arbitration determination to be a gateway dispute); *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 873 (4th Cir. 2016) (same); *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326, 334-35 (3d Cir. 2014) (same); *Reed Elsevier*, 734 F.3d at 598 (stating "the Court has given every indication, short of an outright holding, that classwide arbitrability is a gateway question rather than a subsidiary one.")

While this issue certainly appears to be advancing in the opposite direction of the concurrence's well-reasoned opinion, we need not resolve it today. Because we conclude below that the parties showed clear and unmistakable evidence of their intention to delegate questions of arbitrability to the arbitrator, "we assume without deciding that one of these gateway matters is whether an arbitration clause authorizes class arbitration." *Wells Fargo Advisors, L.L.C. v. Sappington*, 884 F.3d 392, 395 (2d Cir. 2018).

B. Clear and Unmistakable Evidence of Delegation

We therefore turn to whether Mr. Ray has shown by clear and unmistakable evidence that the parties intended to delegate this question to an arbitrator. *See Howsam*, 537 U.S. at 83 ("The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is 'an issue for judicial determination *[u]nless the parties clearly and unmistakably provide otherwise*.'" (alteration in original) (emphasis added) (quoting *AT&T*, 475 U.S. at 649). "Because 'arbitration is simply a matter of contract,' '[j]ust 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.'" *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1280 (10th Cir. 2017) (alteration in original) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (citations omitted)). For the reasons set out below, we conclude that there was clear and unmistakable evidence of delegation here.

Under the parties' broad Agreement, which DISH drafted and required its employees to sign,

> *any* claim, *controversy* and/or dispute between them, *arising out of and/or in any way related to Employee's* application for employment, employment and/or *termination of employment*, whenever and wherever brought, *shall be resolved by arbitration*. . . . *A single arbitrator* engaged in the practice of law from the American Arbitration Association ("AAA") *shall conduct the arbitration under the then current procedures of the AAA's National Rules for the Resolution of Employment Disputes ("Rules").*

Aplt. App. at 51 (emphasis added). In turn, Rule 6(a) of the Rules provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any

objections with respect to the existence, scope or validity of the arbitration agreement." AAA, Employment Arbitration Rules and Mediation Procedures (effective Nov. 1, 2009), Rule 6(a). Based on precedent from both this circuit and the state of Colorado, we are persuaded that the broad language of the Agreement and incorporation of the Rules clearly and unmistakably shows the parties intended for the arbitrator to decide all issues of arbitrability.

Our holding in *Belnap* is instructive. The arbitration agreement in *Belnap* did not include an incorporation of the AAA Rules like the agreement in this case, but it did include broad language and incorporation of the JAMS Streamlined Arbitration Rules and Procedure.[1] 844 F.3d at 1281. JAMS Rule 8(c) provides:

> Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, *shall be submitted and ruled on by the Arbitrator*. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

Belnap, 844 F.3d at 1281 (quoting JAMS Rule 8(c)). We held that the parties "clearly and unmistakably agreed to arbitrate arbitrability when they incorporated the JAMS Rules into the Agreement." *Id.* In reaching this conclusion, we relied on cases from other circuits reaching the same result. *See, e.g.*, *Cooper v. WestEnd Capital Mgmt. L.L.C.*, 832 F.3d 534, 546 (5th Cir. 2016) (express adoption of JAMS rules presented clear and unmistakable evidence of agreement to arbitrate arbitrability); *Emilio v. Sprint*

[1] JAMS stands for Judicial Arbitration and Mediation Services, Inc. It is a company, as the name suggests, that specializes in Arbitration and Mediation services. It has its own set of arbitration rules that can be incorporated into its arbitration agreements, which was the case in *Belnap*.

Spectrum L.P., 508 F. App'x 3, 5 (2d Cir. 2013) (same); *Wynn Resorts, Ltd. v. Atl.-Pac. Capital, Inc.*, 497 F. App'x 740, 742 (9th Cir. 2012) (same). Notably, we also found persuasive multiple cases holding that incorporation of the AAA Rules constituted clear and unmistakable evidence of an agreement to arbitrate arbitrability. *Belnap*, 844 F.3d at 1283-84 (citing *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (incorporation of AAA rules constitutes clear and unmistakable evidence that contracting parties agree to arbitrate arbitrability); *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009) (same); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 208 (2d Cir. 2005) (same). *Belnap* thus convinces us that when contracting parties incorporate the AAA rules into a broad arbitration agreement, as was the case here, such an incorporation clearly and unmistakably evinces their intent to arbitrate arbitrability.

Moreover, "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944. Accordingly, Colorado state law necessitates our holding today. Colorado is clear on the effects of incorporating the AAA rules: "[B]y incorporating the AAA Commercial Arbitration Rules into their agreement, the parties authorized the arbitrator to decide arbitrability issues." *Ahluwalia v. QFA Royalties, L.L.C.*, 226 P.3d 1093, 1099 (Colo. App. 2009).[2] Colorado requires no language more specific than that in the Agreement here to delegate questions of arbitrability to the arbitrator.

[2] DISH tries to distinguish *Ahluwalia* by arguing that it involved the AAA Commercial Arbitration Rules rather than the Employment Rules, which govern the contract in this

DISH contends the district court failed to apply the applicable law by not following the guidance of multiple circuits that require more specific language delegating the question of classwide arbitrability. *See e.g.*, *Catamaran*, 864 F.3d at 973 (requiring "a more particular delegation of the [class arbitration availability] issue than we may otherwise deem sufficient in bilateral disputes"); *Chesapeake Appalachia, L.L.C. v. Scout Petroleum, L.L.C.*, 809 F.3d 746, 763 (3d Cir. 2016) (requiring "express contractual language unambiguously delegating the question of class arbitrability to the arbitrators" (quotation marks omitted)); *Reed Elsevier*, 734 F.3d at 599 (stating that "given the total absence of any reference to classwide arbitration in this clause, the agreement here can just as easily be read to speak only to issues related to bilateral arbitration. 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."). But we disagree with the reasoning of these circuits.

We instead adopt the approach of the Second Circuit in *Sappington*, 884 F.3d 392. In rejecting the analyses of the Third, Sixth, and Eighth Circuits, the court in *Sappington* astutely reasoned as follows:

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case. But both sets of Rules contain almost identical provisions delegating arbitrability disputes to the arbitrator. *Compare* AAA Commercial Arbitration Rule 7(a) ("The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.") *with* AAA Employment Arbitration Rule 6(a) ("The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.").

> Some of these sister circuits have justified requiring more explicit language to delegate the question of class arbitrability to an arbitrator by explaining that "class arbitration implicates a particular set of concerns that are absent in the bilateral context." Chesapeake, 809 F.3d at 764; accord Catamaran, 864 F.3d at 973 (identifying these concerns as "bet-the-company stakes without effective judicial review," "loss of confidentiality," "due process rights of absent class members," "loss of speed and efficiency," and "increase in costs"). *These are legitimate concerns. But recall that our inquiry involves two distinct steps:* (1) determining whether the question is one of arbitrability presumptively for a court to decide and, if so, (2) determining, on a case-by-case basis, whether there is clear and unmistakable evidence of the parties' intent to let an arbitrator resolve that question. *The concerns that some of our sister circuits have identified as unique to class arbitration indisputably relate, in our view, to the first of these steps, that is, determining whether the particular class arbitration availability question is "the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter."* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002); see Catamaran, 864 F.3d at 971 (describing questions of arbitrability as "substantive in nature"); Chesapeake, 809 F.3d at 753 (same); Reed Elsevier, 734 F.3d at 597 (describing questions of arbitrability as "important" and contrasting them with "subsidiary" questions). *When, as here, we assume that the class arbitration question is a question of arbitrability* and, accordingly, that a court should presumptively answer that question, *we still must consider whether there is clear and unmistakable evidence that the parties intended otherwise based on the language of the clause at issue. State law defines how explicit the clause's language must be to satisfy that standard*—and Missouri law requires nothing more explicit than the language found in the [parties' arbitration clause].

884 F.3d at 398-99 (emphasis added). That is exactly the situation we have here: whether there is clear evidence of the parties' intent to let the arbitrator decide the issue. The fundamental differences between bilateral and classwide arbitration are irrelevant to us at this second stage of the analysis. Both the precedents from our circuit and Colorado are straight forward: incorporation of the AAA Rules provides clear and unmistakable evidence that the parties intended to delegate matters of arbitrability to the arbitrator.

Accordingly, we conclude the Agreement between DISH and Mr. Ray provides clear and unambiguous evidence that the parties intended to delegate *all* issues of arbitrability to the arbitrator.[3]

C. Manifest Disregard of the Law

DISH next contends that even if the arbitrator had the authority to determine whether the Agreement permitted classwide arbitration, the Clause Construction Award should be vacated because the arbitrator manifestly disregarded the law or alternatively impermissibly based his decision on public policy. We disagree.

Having held that the arbitrator had the authority to determine the arbitrability of the classwide arbitration issue, our further review becomes extremely limited and is "among the narrowest known to the law." *Litvak Packing*, 886 F.2d at 276.

> Because the parties "bargained for the arbitrator's construction of their agreement," an arbitral decision "even arguably construing or applying the contract" must stand, regardless of a court's view of its (de)merits. Only if "the arbitrator act[s] outside the scope of his contractually delegated authority"—issuing an award that "simply reflect[s] [his] own notions of [economic] justice" rather than "draw[ing] its essence from the contract"—may a court overturn his determination.

[3] We note DISH's objection to what it describes as the district court declining to follow the binding precedent of *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780 (10th Cir. 1998). There, applying Kansas law, we held that the arbitration agreement at issue did not manifest clear and unmistakable evidence the parties intended the arbitrator to decide issues of arbitrability. However, we never addressed whether incorporation of the Commercial Arbitration Rules of the AAA added clear and unmistakable evidence of delegation, and there is no indication that either party raised this as an issue. *Riley* is therefore not contrary to our holding here.

Oxford Health Plans L.L.C. v. Sutter, 569 U.S. 564, 569 (2013) (citations omitted). "So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Id.*

As the Supreme Court has explained, this question can almost always be answered by simply "summarizing the arbitrator's decisions." *Id.* at 570. Here, the arbitrator spent ten pages laboring over this issue and analyzing it in depth. The arbitrator first examined the Agreement's command that the parties arbitrate "any claim, controversy, and/or dispute between them, arising out of and/or in any way related to Employee's application for employment, employment and/or termination of employment." Aplt. App. at 51. After noting Supreme Court precedent holding that the word "any" "has an expansive meaning," *United States. v. Gonzalez*, 520 U.S. 1, 5 (1997), the arbitrator reasoned that "[t]he language used here reasonably can be construed as broad enough to suggest that the parties intended to require arbitration of all types of controversies and disputes, including class or collective arbitrations of covered types of claims, related to the signatory employee's employment relationship with DISH." Aplt App. at 40 (citing *Sutter v. Oxford Health Plans L.L.C.*, 675 F.3d 215, 218, 223 (3d Cir. 2012) (*aff'd* 133 S. Ct. 2064 (2013)); *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 116-17, 126-27 (2d Cir. 2011); *Rame, L.L.C. v. Popovich*, 878 F. Supp. 2d 439, 449, 453 (S.D.N.Y. 2012).

The arbitrator then pointed out that the Agreement listed six specific exceptions to the broad description of arbitral matters: "in brief, the agreement excludes from arbitrability Employee claims for unemployment compensation, workmen's compensation and ERISA plan benefits, and DISH claims for injunctive relief related to

non-competition agreements, intellectual property and confidential company information." Aplt. App. at 41. Noting that there was no such exclusion made for class or collective arbitration proceedings, the arbitrator concluded that this factor also weighed in favor of interpreting the Agreement so as to permit classwide arbitration.

In addition, the arbitrator evaluated the following portion of the Agreement:

> The right to a trial, to a trial by jury, and to common law claims for punitive and/or exemplary damages are of value and are waived pursuant to this agreement. Other than potential rights to a trial, a jury trial, and common law claims for punitive and/or exemplary damages, nothing in this Agreement limits any statutory remedy to which the Employee may be entitled under law.

Id. at 51. He reasoned that any interpretation construing the Agreement to exempt classwide arbitration "would limit the exercise of a statutory remedy to which the Employee is entitled under [the] FLSA." *Id*. at 42. Under the Fair Labor Standards Act ("FLSA"), an employee who is "affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation," can bring an action against the employer "for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). The arbitrator concluded that this feature of the Agreement also weighed in favor of construing it to permit classwide arbitration.

The arbitrator next considered three factors weighing in favor of DISH's argument that the Agreement prohibited classwide arbitration. He first recognized that "[i]f what we want to know is whether the parties mutually intended to authorize arbitration of class or collective proceedings, the fact that their agreement does not expressly or specifically so state must be counted as a factor supporting [DISH's] arguments." Aplt. App. at 44.

The arbitrator then highlighted the numerous references that seemed to contemplate bilateral rather than class proceedings. But he also cited several cases holding that "phrases such as 'you' and 'your employment' do not expressly disclaim collective arbitration proceedings and do not necessarily signal an intent to preclude collective or class arbitration." *Id*. at 46. The arbitrator concluded that this factor certainly weighed in favor of DISH's interpretation but that it was not dispositive.

Finally, the arbitrator noted the Agreement's requirement that the proceedings be kept confidential:

> A single arbitrator engaged in the practice of law from the American Arbitration Association ("AAA") shall conduct the arbitration under the then current procedures of the AAA's National Rules for the Resolution of Employment Disputes ("Rules"). Regardless of what the above-mentioned Rules state, all arbitration proceedings, including but not limited to hearings, discovery, settlements, and awards shall be *confidential* . . . .

Id. at 51 (emphasis added). He stated that he "agree[d] with [DISH] that this language indicates an intention of the parties to depart from the AAA's otherwise-applicable rules to the extent necessary to ensure the confidentiality of the proceedings." *Id*. at 47. However, he ultimately concluded that the confidentiality provision of the Agreement "d[id] not require an implied limitation on the scope of the parties' Arbitration Agreement to prohibit class arbitrations." *Id*. at 48.

After analyzing these six features of the Agreement, the arbitrator split his conclusion into two parts. First, he concluded that the Agreement permitted collective arbitration of Mr. Ray's FLSA claims because the first three considerations outweighed

the last three discussed above. His conclusion on the state law claims, however, was not so simple:

> The record submitted presented a closer case as to whether the Arbitration Agreement, properly construed, was intended to authorize "opt-out" class action arbitration of [Mr. Ray's] Colorado statutory claims or of his breach of contract claim. It is appropriate for the clause construction inquiry to insist on a more explicit expression of mutual intent to permit class arbitration of claims arising under such statutes than with the FLSA claims, where the entitlement to proceed collectively is defined by the underlying statute itself as an integral incident of the "claim" the parties agreed to arbitrate. Applying that standard, I conclude that the language employed by the parties in the Arbitration Agreement creates substantial and legitimate doubt as to whether that agreement was intended to permit or to preclude "opt-out" class arbitration of the state law statutory claims and breach of contract claim. The first three factors discussed above weigh in favor of a conclusion that the parties did intend to permit such class arbitration of those claims, but do so with less force than in the case of the FLSA claims, while the fourth, fifth and sixth factors discussed above weigh against such a conclusion.

Id. The arbitrator ultimately resolved this close call by using the *contra proferentem*[4] rule of construction:

> Application of the other rules of construction counseled by Colorado law have not allowed me to resolve [the ambiguities in the agreement] without significant remaining doubts as to what the parties mutually intended. Accordingly, and as a last resort, I resolve those doubts against the drafter of the Arbitration Agreement – DISH. Accordingly, I conclude that the Arbitration Agreement does permit class arbitration of the [Mr. Ray's] state law statutory and breach of contract claims.

Id. at 49.

We did not summarize the arbitrator's interpretation of the Agreement and his ultimate conclusion because we necessarily agree with him, but rather to show that he

[4] "*Contra proferentem* construes all ambiguities against the drafter." *Miller v. Monumental Life Ins. Co.*, 502 F.3d 1245, 1253 (10th Cir. 2007).

interpreted the parties' contract, which is all we are allowed to consider. *See Sutter*, 569 U.S. at 569 ("So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong."). Here, the arbitrator clearly "considered their contract and decided whether it reflected an agreement to permit class proceedings. That suffices to show that the arbitrator did not 'exceed[ ] [his] powers.'" *Id.* at 570 (alteration in original) (quoting 9 U.S.C. § 10(a)(4)).

DISH's main argument to the contrary is that the arbitrator completely disregarded the Supreme Court's holding in *Stolt-Nielsen*, 559 U.S. 662. In that case, the Court held that an arbitration panel exceeded its powers under § 10(a)(4) when it ordered a party to submit to class arbitration. But that case presented a unique factual situation where an arbitration panel determined that an arbitration agreement permitted classwide arbitration *even though both parties stipulated that they had not reached an agreement on the issue.* *Id*. at 684. The Court held that the arbitration panel did not attempt to interpret the contract, but rather, imposed its own policy preference. *Id.* at 676-77 ("In sum, instead of identifying and applying a rule of decision derived from the FAA or either maritime or New York law, the arbitration panel imposed its own policy choice and thus exceeded its powers.").

This case is clearly distinguishable from *Stolt-Nielsen* because Mr. Ray never stipulated that the Agreement is silent as to classwide arbitration. Rather, this case is more like *Sutter*, where the Court held *Stolt-Nielsen* inapplicable. 569 U.S. at 571-72. There, Mr. Sutter entered into a contract with Oxford Health Plans to provide medical care to its patient network. *Id*. at 566. The contract included an arbitration clause, but

there was no explicit mention of classwide arbitration anywhere in the agreement. *Id.* The arbitrator held the arbitration clause expressed the parties' intent that class arbitration could be maintained. *Id.* at 567. Oxford Health's main contention on appeal was that the arbitrator made the same mistake as the arbitration panel in *Stolt-Nielsen* and merely imposed its own policy preference. *Id.* at 571.

The Court rejected Oxford Health's argument and clarified the holding of *Stolt-Nielsen*:

> *In Stolt–Nielsen*, *the arbitrators did not construe the parties' contract*, and did not identify any agreement authorizing class proceedings. So in setting aside the arbitrators' decision, we found not that they had misinterpreted the contract, but that they had abandoned their interpretive role. *Here, the arbitrator did construe the contract* (focusing, per usual, on its language), *and did find an agreement to permit class arbitration. So to overturn his decision, we would have to rely on a finding that he misapprehended the parties' intent. But § 10(a)(4) bars that course*: It permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly. *Stolt–Nielsen* and this case thus fall on opposite sides of the line that § 10(a)(4) draws to delimit judicial review of arbitral decisions.

Id. at 571-72 (emphasis added). Like the arbitrator in *Sutter*, the arbitrator here interpreted the contract between the two parties. Regardless of DISH's opinion of the arbitrator's decision or our opinion of the arbitrator's reasoning, the arbitrator did not stray from his delegated task of interpreting the contract. Therefore, his decision must stand.

Finally, DISH argues that the arbitrator completely disregarded Colorado law by ignoring the holding of *Medina v. Sonic-Denver T, Inc.*, 252 P.3d 1216 (Colo. Ct. App. 2011). DISH contends *Medina* stands for the proposition that "when an arbitration

agreement includes nothing to show that class or collective arbitration is intended to be part of it, it is silent and therefore lacking in the requisite consent for class or collective arbitration." Aplt. Br. at 33. We disagree. In *Medina*, several employees of Mountain States Toyota attempted to bring a class arbitration claim against Mountain States for unpaid commissions. 252 P.3d at 1218. The arbitration agreement between the employees and Mountain States included a specific waiver of class arbitrations, *id.* at 1217, but the employees argued that the provision was unconscionable and should therefore be disregarded, *id*. at 1218. The court held that it was not necessary to determine the unconscionability issue because if the waiver was unenforceable, the arbitration agreement would be silent as to class arbitration and the parties would therefore have no agreement on the issue. *Id*. at 1220.

The holding of *Medina* is a far cry from what DISH proffers. The court in *Medina* certainly did not hold that an arbitration clause must expressly include an allowance of classwide arbitration or risk running afoul of *Stolt-Nielsen*. The waivers in *Medina* allowed the court to skip an analysis of the parties' intent on the issue, a key feature not present here.

In sum, the arbitrator in this case did not manifestly disregard Colorado law when he concluded that he was authorized to conduct class arbitration by the broad language of the Agreement in combination with the requirement that arbitration be conducted pursuant to the AAA's Employment Dispute Rules. Accordingly, the district court correctly denied DISH's petition to vacate the arbitration award.

We AFFIRM.

No. 17-1013, *DISH Network, LLC v. Ray*

TYMKOVICH, Chief Judge, concurring.

I join in affirming the district court. As the panel decision recognizes, we need not decide whether the availability of classwide process is an arbitrability question. I write separately, however, to make clear precisely how our ruling differs from related opinions in other circuits. In addition, because I anticipate more circuit courts—including our own—will eventually face this difficult question, I respectfully offer my reasons for doubting that the popular answer is the correct one.

I.

To begin, our recent opinion in *Belnap v. Iasis Healthcare*, 844 F.3d 1272 (10th Cir. 2017), neatly disposes of this appeal. Under *Belnap*, Dish and Ray's incorporation of the AAA Employment Rules into their arbitration agreement constitutes clear and unmistakable evidence of an agreement to arbitrate matters of arbitrability.[1] *Belnap* thus demands we apply the FAA's deferential standard of judicial scrutiny to the arbitrator's decision in this case regardless of whether or not that decision determines matters of arbitrability. And because—as the

[1] Though not at issue here, I doubt state contract law bears on the "clear and unmistakable" standard required for agreements to arbitrate arbitrability. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944–45 (1995) (describing the elevated standard as a creature of Supreme Court precedent and thus, presumably, federal law).

panel opinion points out—the arbitrator here has rendered a decision within the bounds of permissible choice, we must affirm the district court.

A.

Belnap tells us how we must interpret the arbitration agreement before us here. Like the contract between Dish and Ray, the *Belnap* court confronted a contract that failed to specify on its face who—the arbitrator or a court—would decide matters of arbitrability. The contract did, however, provide that the arbitration "shall be administered by JAMS and conducted in accordance with its Streamlined Arbitration Rules and Procedures." *Belnap*, 844 F.3d at 1276 (emphasis omitted). And like the AAA Employment Rules here, the JAMS Rules at issue in *Belnap* stated that "[j]urisdictional and arbitrability disputes . . . *shall be submitted and ruled on by the Arbitrator*." *Id.* at 1281.

We deemed this clear and unmistakable evidence of an agreement to arbitrate arbitrability. *See id.* As our opinion explained, it "would have been quite evident to the parties" that their invocation of the JAMS rules incorporated those rules into the agreement. *Id.* at 1282. Because those rules plainly delegated arbitrability determinations to the arbitrator, their incorporation rendered that delegation clear and unmistakable. *Id.* at 1283–84; *accord Wells Fargo Advisors, LLC v. Tucker*, 884 F.3d 392, 396 (2d Cir. 2018).

We cannot honor Dish's request to ignore *Belnap* merely because it dealt with the JAMS rules rather than the AAA Employment Rules. *See* Aplt. Br. at 24.

This is a distinction without a difference. *Belnap*'s reasoning applies to the incorporation of *any* arbitration rules that explicitly delegate arbitrability determinations to the arbitrator. Indeed, the *Belnap* court drew support from a body of precedent that touched multiple sets of arbitration rules—*including* AAA rules. *See id.* at 1283–84. In sum, *Belnap* controls this issue.

B.

This conclusion also moots classification of the right to class or collective action procedures as a question of arbitrability. Our opinion about whether a given question goes to arbitrability has no legal import where—as here—we have "clear[] and unmistakabl[e]" evidence of a decision to arbitrate arbitrability. *AT&T Tech., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986). In such circumstances, we approach *all* of the arbitrator's decisions with the heavy deference the FAA mandates.

I recognize that other circuits have not been so particular about this order of analytical battle. *See Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 971 (8th Cir. 2017); *Dell Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 874, 877 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 567 (2016); *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326, 331, 335 (3d Cir. 2014); *Reed Elsevier, Inc. ex rel. LexisNexis v. Crockett*, 734 F.3d 594, 597–99 (6th Cir. 2013). But for them it did not matter; each ultimately held the contract before them *lacked* sufficient proof of an agreement to arbitrate arbitrability. *See Catamaran*, 864 F.3d at 972–73; *Dell*

Webb, 817 F.3d at 877; *Opalinski*, 761 F.3d at 335; *Reed Elsevier*, 734 F.3d at 599. Our precedent commands a different course in this case, as I have just explained. As a result, the sequence of our analysis is critical.

C.

Belnap thus plots a clear course for resolving Dish's appeal. It tells us to consider first whether Dish and Ray have agreed to arbitrate arbitrability. It then tells us that, by incorporating the AAA Employment Rules, Dish and Ray *did* in fact agree to arbitrate arbitrability—clearly and unmistakably. And since the arbitrator rendered a decision within the broad discretion the FAA affords, that determination must stand.

II.

This case therefore gives us no occasion to decide whether the availability of class or collective action procedures is an arbitrability question. But the time for that decision will inevitably come, in our circuit and elsewhere. If and when it does, I see reason to question the analysis of the circuits which have already decided the issue. *See Catamaran*, 864 F.3d at 971–72; *Dell Webb*, 817 F.3d at 873–77; *Opalinski*, 761 F.3d at 331–35; *Reed Elsevier*, 734 F.3d at 597–99. Those courts have aptly identified the fundamental differences between classwide and bilateral arbitration. But the law does not ask *how much* these two means of arbitration differ. The law asks whether arbitrating the same subject-matter on a classwide basis as opposed to bilaterally renders the underlying claims

functionally distinct. I see several reasons to doubt a procedural mechanism for combining claims would have that effect.

I begin with the observation that the FAA maintains a dichotomy whereby, pursuant to private contract, some legal claims get arbitrated while others go to court. We use the term "arbitrability"—meaning the *ability* to *arbitrate*—to denote a claim's belonging to one forum or the other. A "question of arbitrability" is therefore a question about whether the parties have agreed to settle a particular *claim* through arbitration or instead litigate it in court. *See, e.g.*, *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 69 (2010) (describing arbitrability questions as concerning issues "such as whether the parties have *agreed to arbitrate* or whether their agreement *covers a particular controversy*." (emphasis added)); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–84 (2002); *see also, e.g.*, *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1207 (2014) ("The provision before us . . . determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all."); *cf. United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("[T]he judicial inquiry . . . must be strictly confined to the question whether the reluctant party did agree to arbitrate *the grievance* . . . ." (emphasis added)). Put more simply, questions of arbitrability generally go to the "subject matter" of the dispute. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964).

By contrast, whether a claimant can proceed on behalf of a class is classically a matter of procedural rule, not substantive right. *See Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624–25 (2018). For example, under the Rules of Civil Procedure applicable in federal courts, class actions come about through judicial administration of Rule 23. *See, e.g.*, *Shady Grove Othopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399–400 (2010). Likewise, the joinder provisions contained in Rules 18, 19, and 20 combine claims in a manner comparable to the Fair Labor Standards Act's collective action provision. *See* Fed. R. Civ. P. 18–20; *Genesis Healthcare Corp. v. Symczyk*,133 S. Ct. 1523, 1527 n.1 (2013). Federal courts can use these Rules to combine claims in civil lawsuits only because the Rules "really regulate[] procedure," *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941), and do not "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b). In other words, they bear on *how* a claim gets litigated, but not the underlying subject matter of the claim or the contours of substantive law.

In apparent recognition of the difference between questions of arbitrability and questions of procedure, our FAA case law tells us to presume that courts decide the former whereas arbitrators—within their assigned subject-matter purview—decide the latter. *See Howsam*, 537 U.S. at 83–84. To be sure, the Supreme Court has identified certain *procedural* questions of arbitrability in the "narrow circumstance[s] where contracting parties would likely have *expected* a

court to have decided" a given threshold issue. *Id.* at 83 (emphasis added). But that expectations-based inquiry applies only to "potentially dispositive *gateway* question[s]" the answers to which "will determine whether the underlying controversy *will proceed to arbitration* on the merits" at all. *Id.* (emphasis added); *see BG Group*, 134 S. Ct. at 1207 ("The text and structure of the provision make clear that it operates as a *procedural condition precedent* to arbitration." (emphasis added)). The right to combine claims does not fall into this "threshold" or "gateway" category because it has nothing to do with whether the underlying controversy can proceed to arbitration. Indeed, the opportunity to allow or deny claim combination necessarily follows a determination that the parties *have agreed* to arbitrate the underlying claims on the merits.

Several circuits have nonetheless classified the right to combine claims as implicating the arbitrability of those claims. They have portrayed this result as compelled by Supreme Court dicta and good policy. They cite loss of efficiency, loss of confidentiality, and raised stakes as reasons to presume that parties would not want an arbitrator deciding the availability of class or collective action procedures. *See Catamaran*, 864 F.3d at 971–72; *Dell Webb*, 817 F.3d at 875–76; *Opalinski*, 761 F.3d at 331–34; *Reed Elsevier*, 734 F.3d at 598. I too doubt the utility of classwide arbitration, but in my mind the suggested conclusion does not follow from the premises. Only if a court *denies* the claimant classwide procedures can it preserve the recognized benefits of bilateral arbitration. And an

arbitrator can *deny* the same classwide procedures just as well. Most importantly, however, the decision maker—whether court or arbitrator—must conclude the *parties themselves* did not agree to classwide arbitration.

The valid criticisms of arbitrating an entire class of claims together thus move past the real issue of *who decides* and instead focuses—unnecessarily—on the *decision itself*. *But cf. Epic Systems*, 138 S. Ct. at 1632 ("The respective merits of class actions and private arbitration as means of enforcing the law are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested."). This is especially troublesome in the FAA context, where Congress has endeavored to minimize judicial oversight. *See, e.g.*, *id.*; *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013) ("[L]imited judicial review . . . 'maintain[s] arbitration's essential virtue of resolving disputes straightaway.' If parties could take 'full-bore legal and evidentiary appeals,' arbitration would become 'merely a prelude to a more cumbersome and time-consuming judicial review process.'" (citation omitted) (quoting *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008)).

I am likewise convinced the mere magnitude of an issue cannot transform it from a procedural concern to a matter of substantive law. *See Sibbach*, 312 U.S. at 14 ("If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse

confounded."). The Supreme Court long ago acknowledged that *any* procedural rule has the potential to determine a case. *See Hanna v. Plumer*, 380 U.S. 460, 468 (1965). Indeed, as one legislator famously and aptly put it, "procedure is of exquisite importance. . . . I'll let you write the substance . . . you let me write the procedure, and I'll [get] you every time." *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Regulations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell, Chairman, H. Comm. on Energy & Commerce). But aside from the few "gateway" issues already acknowledged, the FAA does not empower courts to wrest procedural matters from arbitrators on the basis of consequence alone. *See Howsam*, 537 U.S. at 85; *John Wiley*, 376 U.S. at 557 ("Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.").

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010), does not say otherwise. In *Stolt-Nielsen*, the Supreme Court held that an arbitrator acted in manifest disregard of the law by imposing class procedures solely on the basis of his own policy preference. *See id.* at 671–72. The manifold differences between classwide and bilateral arbitration were crucial to that holding because the arbitrator had no contractual basis for implying an agreement to arbitrate on a classwide basis from an agreement to arbitrate bilaterally. *See id.* at 684–85. To

be sure, dicta in *Stolt-Nielsen* indicates that this was not "*merely*" a question of "procedural mode." *Id.* at 687 (emphasis added). But the Court used this point only to emphasize the *seriousness* of the question, which the Court itself described as "whether *the parties agreed* to authorize class arbitration." *Id.* (emphasis added). I do not take this to mean that the differences between two sets of procedures renders them any *less procedural*. *Cf., e.g.*, *Epic Systems*, 138 S. Ct. at 1623–29 (repeatedly referring to claim combination as a matter of procedure). Indeed, consider the manifold differences between the class action procedures of Rule 23 and the collective action procedures provided for in the FLSA. *See, e.g.*, *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975) (per curiam). Few, if any, would think those differences undermined the decidedly procedural character of these distinct means for combining claims. Thus, if *Stolt-Nielsen* does support the decisions of other circuits, it does not do so on the basis of authoritative descriptions explaining what it means for a question to bear on arbitrability. And it is *those* descriptions that bind this court.

AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), has even less bearing on this case. In *Concepcion*, the Supreme Court held preempted California's judicial determination that classwide arbitration waivers in consumer contracts of adhesion were unconscionable. *See Concepcion*, 131 S. Ct. at 1753. The Court based its reasoning largely on the idea that, by mandating the availability of classwide arbitration, California reduced parties' ability to realize

arbitration's benefits as the FAA guarantees them. *See id.* at 1748–53. But the classification question we are trying to answer does not concern freedom of choice. Indeed, it does not even concern what the parties have actually chosen. Rather, it concerns *who presumptively determines* what the parties have chosen. And both the holding in *Concepcion* as well as its underlying rationale direct us away from enhanced judicial scrutiny.

Other circuits have also raised due process concerns surrounding class and collective action arbitrations. But I do not see one person's entitlement to claim-combination procedures as bearing in any way on the due process rights of others. For Ray to arbitrate his claims alongside those of similarly situated Dish employees, those employees' claims must be deemed arbitrable just as Ray's have been. And other employees *may or may not* have arbitration agreements with Dish that *may or may not* cover the same substantive claims and *may or may not* contain agreements to arbitrate arbitrability. Accordingly, before any classwide arbitration can resolve these other employees' claims, those claims would each be subject to the same arbitrability determinations that they would have been in the bilateral context. Thus, so long as courts continue to enforce the FAA, I see no reason why classwide arbitration threatens due process any more than bilateral arbitration does.

Finally, I think it important to note that a party hoping to avoid classwide arbitration has an easy way to do so: put it in the contract. The FAA not only

protects freedom of choice with respect to arbitration agreements, *Epic Systems*, 138 S. Ct. at 1632, it also *preempts* the states from limiting those choices, *see Concepcion*, 131 S. Ct. at 1753. We therefore need not do violence to our FAA jurisprudence to save parties from opting for classwide arbitration contrary to our perception of their best interests.