No. 12-135

IN THE

Supreme Court of the United States

OXFORD HEALTH PLANS LLC,
Petitioner,

v.

JOHN IVAN SUTTER, M.D.,
Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONER

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August 21, 2012

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* SUPPORTING PETITIONER

Pursuant to Rule 37.2(b) of the Rules of this Court, the Chamber of Commerce of the United States of America hereby requests leave to file the accompanying *amicus curiae* brief in support of petitioner. The Chamber has obtained petitioner's consent, but respondent's counsel has not responded to the Chamber's requests for consent.

The question presented in this case significantly affects the interests of the Chamber and its members. The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every

size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Many of the Chamber's members and affiliates routinely include arbitration agreements in their business contracts. Consequently, the Chamber frequently submits *amicus* briefs in cases presenting issues under the Federal Arbitration Act (FAA), including in recent cases before this Court. See, *e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444 (2003). For a collection of the Chamber's recent *amicus* briefs in arbitration cases, see http://chamberlitigation.com./cases/issue/arbitration-alternative-dispute-resolution.

Unlike litigation, private arbitration is purely a matter of consent, not coercion. By agreeing to arbitrate, parties are able to avoid costly and time-consuming litigation by submitting to a streamlined yet fair process based upon the mutual consent of the parties. Compelling parties to resolve disputes through costly, time-consuming, and high-stakes class arbitration, when the parties have not agreed to do so, frustrates the parties' intent, undermines their agreements, and erodes the benefits offered by arbitration as an alternative to litigation. Imposing class arbitration on parties who have not agreed to that procedure conflicts with the central goal of the FAA: to ensure that arbitration agreements are enforced strictly according to the terms adopted by the parties.

Parties agree to arbitrate because it offers an alternative to the dispute-resolution processes already available in courts. The FAA ensures not only that arbitration agreements are enforceable, but also that hostility to arbitration is not permitted to remake arbitration to replicate the most expensive and formal aspects of court litigation when the parties have not agreed to such procedures. The Chamber and its members thus have a vital interest in having this Court grant review and reverse the decision below, which upheld an arbitrator's decision to order class arbitration based solely on a clause—essential to any mandatory arbitration agreement—that required the parties to arbitrate rather than litigate all disputes arising from their agreement.

For these reasons, the Chamber respectfully requests that the Court grant its motion for leave to file an *amicus curiae* brief in support of petitioner.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is set forth in the accompanying motion for leave to file this brief.

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received timely notice of *amicus curiae*'s intent to file this brief. Petitioner has consented to *amicus curiae*'s filing of this brief, but respondent's counsel did not respond to *amicus curiae*'s requests for consent.

INTRODUCTION

In *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), this Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775. Given the "foundational FAA principle that arbitration is a matter of consent," and the degree to which "class-action arbitration changes the nature of arbitration," the Court held that an arbitrator may not "presum[e] the parties consented to [class arbitration] simply by agreeing to submit their disputes to an arbitrator." *Id.* Under *Stolt-Nielsen*, an arbitrator who orders class arbitration based solely on the parties' agreement to resolve their disputes through mandatory arbitration exceeds his powers under the FAA. *Id.* at 1770.

Contrary to these principles, the decision below held that an arbitrator did *not* exceed his powers under the FAA by ordering class arbitration based solely on a standard arbitration clause—essential to a mandatory arbitration agreement—requiring the parties to arbitrate rather than litigate all disputes arising from their agreement. That decision, if upheld, would permit arbitrators to impose class arbitration on virtually any mandatory arbitration agreement, regardless of whether the parties actually consented to resolve their disputes in that manner. As this Court has recognized, class arbitration so fundamentally changes the nature and stakes of arbitration that it is "hard to believe" that any defendant would consent to such a procedure. *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011). Under the decision below, however, an arbitrator can manufacture such "consent" from a standard "any dispute" clause and effectively insulate his decision

from judicial review simply by purporting to have "interpreted" the agreement.

This would eviscerate *Stolt-Nielsen*, frustrate the legitimate contractual expectations of thousands of businesses and other parties to arbitration agreements, and subject parties to a costly and burdensome procedure that they never would have envisioned, let alone consented to, when they agreed to submit their disputes to arbitration. For these reasons, as discussed more fully below, the Court should grant the petition for certiorari and reverse the decision below.

REASONS FOR GRANTING THE PETITION

As petitioner has shown, the circuits are split as to what constitutes a sufficient contractual basis for ruling that the parties to a contract that contains an arbitration provision agreed to authorize class arbitration. Pet. 13–20. Aligning itself with the Second Circuit's decision in *Jock* v. *Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012), the Third Circuit in the decision below upheld an arbitrator's decision to order class certification based solely on a standard clause requiring the parties to arbitrate rather than litigate all disputes arising from their agreement. Pet. App. 14a–17a, 46a–48a. Because the arbitrator had purported to "articulate a contractual basis for his decision," which the panel found not "totally irrational," the court refused to determine independently whether ordering class arbitration exceeded the arbitrator's power under the agreement. *Id.* at 14a, 17a; *accord Jock*, 646 F.3d at 127 (upholding arbitrator's conclusion that "any dispute" clause authorized class arbitration because his conclusion was not "manifestly wrong").

In stark conflict with these decisions, the Fifth Circuit has correctly held that, under the FAA, a standard "any dispute" clause is "not a valid contractual basis upon which to conclude that the parties agreed to submit to class arbitration," regardless of an arbitrator's purported discovery of such an agreement in the clause's general terms. *Reed* v. *Fla. Metro. Univ., Inc.*, 681 F.3d 630, 641–46 (5th Cir. 2012). Given the "fundamental differences between bilateral arbitration and class arbitration" that this Court identified in *Stolt-Nielsen* and *Concepcion*, the Fifth Circuit properly held that an agreement to submit to class arbitration "should not be lightly inferred," *id.* at 639–40, and that courts must "ensure that an arbitrator has a legal basis for his class arbitration determination," an inquiry which "necessarily requires some consideration of the arbitrator's award and rationale," *id.* at 645. In so holding, the Fifth Circuit expressly "part[ed] ways" with the Second Circuit's decision in *Jock*, *id.* at 646, and "disagree[d]" with the Third Circuit's decision here for "essentially the [same] reasons," *id.* at 644 n.13.

This square and acknowledged circuit split is alone sufficient reason to grant certiorari. Most arbitration contracts include some form of "any dispute" clause, and many companies use a single, uniform arbitration agreement throughout their operations nationwide. Whether a company is subject to the significant burdens attending class arbitration under an agreement governed by the FAA should not depend on whether suit is brought in New York, New Jersey, or Texas. Moreover, the number of corporations that are either headquartered or incorporated in the Second and Third Circuits is vast, which means that plaintiffs will readily forum-shop to get the benefit of the law in those circuits. The Court should grant review

to restore uniformity and predictability to this critically important area of the law.

The Chamber submits this brief to amplify two additional reasons this case warrants the Court's review. *First*, the decision below is fundamentally incompatible with this Court's holding in *Stolt-Nielsen* that, under the FAA, arbitrators may not infer an agreement to authorize class arbitration solely from the fact that the parties agreed to submit their disputes to mandatory arbitration. By rubber-stamping the arbitrator's decision to order class arbitration based solely on the arbitration agreement's general "any dispute" clause—standard language that appears in many arbitration provisions—the decision below for all practical purposes nullifies this Court's holding in *Stolt-Nielsen*. If allowed to stand, the rule adopted by the Third Circuit below and the Second Circuit in *Jock* would permit arbitrators to impose class arbitration on virtually any arbitration agreement, contrary to *Stolt-Nielsen*'s core teaching that, under the FAA, class arbitration is a matter of consent, not coercion, and may not be compelled absent a contractual basis for finding that the parties agreed to resolve their disputes in that manner.

Second, the question presented is important because, as this Court stressed in *Stolt-Nielsen* and *Concepcion*, class arbitration fundamentally alters the nature and stakes of arbitration. Class arbitration dramatically increases the risk defendants face from an adverse decision by a single arbitrator whose decision is effectively unreviewable, allowing plaintiffs' lawyers to pressure defendants into settling nonmeritorious claims. And it transforms arbitration from a speedy, informal, and inexpensive means of resolving disputes into a virtual carbon copy of trial litigation, but without the benefit of rigorous appel-

late review and the certainty and repose of a judgment that binds absent class members. As this Court observed, it is "hard to believe" that any defendant would agree to class arbitration, *Concepcion*, 131 S. Ct. at 1752—let alone that it would do so simply by agreeing to submit all disputes arising from the parties' contract to mandatory arbitration.

I. THE DECISION BELOW DEPRIVES THIS COURT'S DECISION IN *STOLT-NIELSEN* OF PRACTICAL SIGNIFICANCE.

In *Stolt-Nielsen*, this Court granted certiorari "to decide whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the [FAA]." 130 S. Ct. at 1764. The arbitration clause in that case provided that "'[a]ny dispute arising from the making, performance or termination'" of the parties' contract would be settled in arbitration. *Id.* at 1765. The parties had stipulated that "the arbitration clause was 'silent' with respect to class arbitration," *i.e.*, that "'no agreement'" had been reached on that issue. *Id.* at 1766. The arbitrators nonetheless ordered the parties into class arbitration, concluding that "the arbitration clause allowed for class arbitration" because the defendants had failed to "show an intent to preclude class arbitration," and because otherwise there would be "no basis for a class action absent express agreement among all parties and the putative class members." *Id.* (internal quotation marks and alteration omitted).

This Court held that the arbitrators had exceeded their powers under the FAA by ordering class arbitration without a contractual basis. *Id.* at 1767–76. While recognizing that "the interpretation of an arbitration agreement is generally a matter of state law," the Court concluded that the "FAA imposes certain rules of fundamental importance, including the basic

precept that arbitration is a matter of consent, not coercion." *Id.* at 1773 (internal quotation marks omitted). Because "the central or 'primary' purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms," in enforcing and construing arbitration provisions, both "courts and arbitrators must give effect to the contractual rights and expectations of the parties." *Id.* at 1773–74 (internal quotation marks omitted). "This is because an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution." *Id.* at 1774 (citing *AT&T Techs., Inc.* v. *Commc'ns Workers*, 475 U.S. 643, 648–49 (1986)).

Given the "foundational FAA principle that arbitration is a matter of consent," the Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775. Further, because class arbitration "fundamental[ly] changes" the nature of arbitration, the Court held that, under the FAA, an arbitrator may not infer an "implicit agreement to authorize class-action arbitration . . . solely from the fact of the parties' agreement to arbitrate." *Id.* at 1775–76. In other words, in construing an arbitration clause, an arbitrator may not "presum[e] the parties consented to [class arbitration] by simply agreeing to submit their disputes to an arbitrator." *Id.* at 1775; *see also id.* at 1776 ("the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings").

The decision below cannot be reconciled with *Stolt-Nielsen*. By upholding the arbitrator's decision to order class arbitration based on nothing more than a standard "any dispute" clause, the decision below contravenes *Stolt-Nielsen*'s holding that a bare agreement to arbitrate all disputes arising from the parties' agreement is not a sufficient contractual basis for ordering class arbitration. And by refusing to subject the arbitrator's "interpretation" of the agreement to meaningful judicial scrutiny, the decision below gives arbitrators virtually unfettered discretion to impose class arbitration on almost any arbitration agreement, contrary to *Stolt-Nielsen*'s holding that, under the FAA, class arbitration is a matter of consent, not coercion.

A. The Decision Below Conflicts With *Stolt-Nielsen*'s Holding That An Agreement To Authorize Class Arbitration Cannot Be Inferred Solely From The Parties' Agreement To Arbitrate Their Disputes.

The decision below is squarely at odds with *Stolt-Nielsen*'s holding that arbitrators may not infer an agreement to authorize class arbitration under the FAA solely from the parties' agreement to arbitrate their disputes. The arbitrator in this case inferred an agreement to authorize class arbitration from standard arbitration language providing that "[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration." Pet. App. 93a. The decision below is no less "at war with the foundational FAA principle that arbitration is a matter of consent" than the arbitrators' decision in *Stolt-Nielsen*. 130 S. Ct. at 1775.

Most arbitration provisions contain a general clause requiring the parties to arbitrate "any" or "all"

disputes relating a specified subject matter. See *Reed*, 681 F.3d at 642 ("The 'any dispute' clause is a standard provision that may be found, in one form or another, in many arbitration agreements."); *Complaint of Hornbeck Offshore (1984) Corp.*, 981 F.2d 752, 755 (5th Cir. 1993) (collecting cases involving such clauses). Indeed, the American Arbitration Association's guidance on drafting arbitration agreements suggests the following standard language: "Any controversy or claim arising out of or relating to this contract . . . shall be settled by arbitration." American Arbitration Association, *Drafting Dispute Resolution Clauses: A Practical Guide* 7 (Sept. 1, 2007); *see also* JAMS ADR Clauses (Jan. 1, 2011), http://www.jamsadr.com/clauses ("Any dispute, claim or controversy arising out of or relating to this Agreement . . . shall be determined by arbitration"). Ironically, the arbitration agreement this Court held insufficient to authorize class arbitration in *Stolt-Nielsen* included such a clause. 130 S. Ct. at 1765 (clause requiring "'[a]ny dispute'" arising from the parties' contract to be settled by arbitration).

Such a clause reflects nothing more than "the fact of the parties' agreement to arbitrate." *Id.* at 1775. By its terms, a general clause requiring all disputes arising from the parties' contract to be submitted to arbitration establishes only that the parties agreed to arbitrate rather than litigate their disputes, and says nothing whatsoever about whether they agreed to authorize class arbitration. As *Stolt-Nielsen* made clear, the ability to represent a class is not somehow inherent in the concept of arbitration such that a court or arbitrator would be justified in supplying such a term as "necessary to give effect to the parties' agreement." *Id.* To the contrary, the Court held, "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." *Id.* Under *Stolt-Nielsen*, therefore, a clause that simply requires parties to arbitrate rather than litigate their disputes is "not a valid contractual basis upon which to conclude that the parties agreed to submit to class arbitration." *Reed*, 681 F.3d at 643; see also Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 Marq. L. Rev. 1103, 1155 (2011) ("A general arbitration clause, according to the *Stolt-Nielsen* Court, does not authorize class arbitration because class arbitration differs too much from individual arbitration.").

Thus, if the arbitration agreement at issue here had included only the second clause ("all such disputes shall be submitted to final and binding arbitration"), it would scarcely be debatable that the arbitrator exceeded his powers under the FAA by ordering class arbitration. The arbitrator, however, purported to discern an intent to authorize class arbitration in the initial clause providing that "'[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court.'" See Pet. App. 47a. But that clause cannot be enough to take this case outside *Stolt-Nielsen*, for it simply confirms that the agreement to arbitrate disputes covered by the agreement is mandatory rather than permissive, *i.e.,* that the parties have agreed to resolve their dispute through arbitration and thus have waived their right to litigate those disputes in a civil action in court. The "no civil action" clause merely precludes resort to litigation and adds nothing to the arbitrator's authority to resolve "all such disputes" arising under the parties' agreement. Accordingly, both clauses reflect only "the parties' agreement to arbitrate." *Stolt-Nielsen*, 130 S. Ct. at 1775. Under *Stolt-Nielsen*, that is not a

sufficient "contractual basis for concluding that the party *agreed*" to class arbitration. *Id*. "[T]he FAA requires more." *Id*. at 1776.

B. The Decision Below Undermines The FAA's Consent Requirement By Refusing To Scrutinize The Contractual Basis For Ordering Class Arbitration.

The decision below further undermines *Stolt-Nielsen* by refusing to subject the arbitrator's decision to order class arbitration to meaningful judicial scrutiny. See Pet. App. 17a (refusing to disturb the arbitrator's decision because the court found it not "totally irrational"). By treating the question whether the parties agreed to authorize class arbitration as just another question of state-law contract interpretation committed to the arbitrator, the court of appeals essentially gave arbitrators *carte blanche* to impose class arbitration on any arbitration agreement, so long as they purport to base their decision on "interpretation" of the agreement. *Id*. That result is not faithful to the teachings of *Stolt-Nielsen*.

The core flaw in the court of appeals' analysis is its failure to recognize that under *Stolt-Nielsen*, whether the parties agreed to authorize class arbitration is not simply a question of state-law contract interpretation. Rather, *Stolt-Nielsen* holds that the FAA places independent limitations on an arbitrator's power to order class arbitration. See 130 S. Ct. at 1773 ("While the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance") (citation omitted). Although the Court in *Stolt-Nielsen* did not have occasion to define exhaustively those limitations, the Court's holding entails at least the following two propositions: (1) when the parties have not reached an agreement as to class arbitration, federal substan-

tive law supplies the default rule—the parties may not be compelled to submit to class arbitration; and (2) as a matter of federal law under the FAA, a contract term that merely evidences the parties' agreement to arbitrate rather than litigate their disputes is an insufficient basis upon which to impose class arbitration. See *id*. at 1775–76.

Meaningful judicial review is necessary to ensure that arbitrators respect "their limited powers under the FAA" to order class arbitration. *Id*. at 1776. Where, as here, an arbitrator has purported to discover an intent to authorize class arbitration in a standard clause requiring the parties to submit all their disputes to arbitration, a reviewing court must do more than merely ensure that the arbitrator's interpretation of the contract is not "totally irrational"; it must ensure that the arbitrator's decision is consistent with the FAA's substantive requirements. As the Fifth Circuit properly held in *Reed*, given the fundamental FAA principle that arbitration is a matter of consent, and given the extent to which class arbitration differs from traditional bilateral arbitration, courts must "ensure that an arbitrator has a legal basis for his class arbitration determination, even when applying the appropriately deferential standard of review," and "[s]uch an analysis necessarily requires some consideration of the arbitrator's award and rationale." 681 F.3d at 645.

A contrary rule would allow arbitrators to subvert the FAA's consent requirement under the guise of "interpretation." Under the approach adopted by the Third Circuit below and the Second Circuit in *Jock*, as long the arbitrator incants the magic words that he is "interpreting" the agreement and attempting to divine the parties' "intent," a decision to order class arbitration is immune from meaningful judicial scru-

tiny. This is no idle concern. Prior to this Court's decision in *Stolt-Nielsen*, an arbitrator in one case concluded that the agreement permitted class arbitration even though it provided that the customer "'will not participate in any class action lawsuit in connection with any [arbitrable] dispute.'"[2] In another case, the arbitrator ordered class arbitration even though the agreement stated that no arbitration "'shall include, by consolidation, joinder, or in any other manner, any person other than [claimant] and [respondent].'"[3]

The arbitrator's "interpretation" of the parties' agreement here is likewise indefensible. As discussed, the clause on which the arbitrator relied says nothing about class arbitration, but merely reflects the parties' agreement to arbitrate, rather than litigate, any disputes arising from their contract. There is simply no basis for the arbitrator's conclusion that this clause "vest[s] in the arbitration process everything that is prohibited from the court process." Pet. App. 47a. If that were true, then presumably the parties would be entitled to a jury trial and all the other procedural rights attending civil litigation as well. But the entire reason parties agree to arbitration is to *forgo* the procedural rigor and associated burdens of litigation. *Cf. Concepcion*, 131 S. Ct. at 1747 (rejecting notion that an arbitration agreement can be deemed unconscionable if it fails to afford all procedures inherent in litigation). As the Fifth Circuit correctly held, "the mere fact that the parties would oth-

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[2] Partial Final Clause Construction Award, *Jones* v. *Genus Credit Mgmt. Corp.*, AAA Case No. 11 181 00295 05, slip op. at 2 (Oct. 13, 2005) (emphasis omitted).

[3] Preliminary Award on Hobby's Request to Allow Class Action (Clause Construction Award), *Hobby* v. *Snap-on Tools Co., LLC*, AAA Case NO. 11 114 01884 04, slip op. at 4 (June 8, 2005) (emphasis omitted).

erwise be subject to class action in the absence of an arbitration agreement is not a sufficient basis to conclude that they agreed to class arbitration when they entered into an arbitration agreement." *Reed*, 681 F.3d at 643. The arbitrator's contrary conclusion here has no basis in the parties' actual consent to class arbitration, and the arbitrator therefore exceeded his powers under the FAA by ordering class arbitration.

C. The Decision Below Would Allow Arbitrators To Impose Class Arbitration On Virtually Any Arbitration Agreement.

For these reasons, the rule adopted by the Third Circuit below and the Second Circuit in *Jock* is incompatible with *Stolt-Nielsen*. At a minimum, it renders *Stolt-Nielsen* "an insignificant precedent." *Jock*, 646 F.3d at 129 n.2 (Winter, J., dissenting). For all intents and purposes, these circuits have confined *Stolt-Nielsen* to cases in which the parties have stipulated that they reached no agreement as to class arbitration. But "[i]f *Stolt-Nielsen* resolves only the effect of a *sui generis* and idiosyncratic stipulation of the parties," *id.*, the Court's decision in that case will have no prospective application. Such stipulations are undoubtedly rare under ordinary circumstances, and will surely be nonexistent after *Stolt-Nielsen*.

The result would be that arbitrators would have essentially unfettered discretion to expand the scope of their authority beyond the parties' agreement by ordering class arbitration, regardless of whether the parties actually agreed to that procedure in any meaningful sense, contrary to "the foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen*, 130 S. Ct. at 1775. With this unfettered discretion, nothing would prevent arbitrators from concluding (based on their "interpretation" of the parties' agreement) that any arbitration agreement con-

taining a standard "any dispute" clause authorizes class arbitration because, in the arbitrator's view, the broad language manifests an intent to authorize in arbitration all actions, including class actions, that could have otherwise been brought in court.

This would frustrate the legitimate expectations of thousands of companies that have entered into arbitration agreements containing "any dispute" clauses. Countless such arbitration provisions exist and will generate future disputes. Thus, even if companies could draft around the decision below in future agreements, this Court's review is necessary to prevent the lower courts from undermining their existing agreements. These companies would never have imagined that by agreeing to submit their disputes to arbitration and precluding resort to litigation they were subjecting themselves to the significant burdens and risks of class arbitration. Indeed, the very concept of class arbitration is a relatively recent development.[4] Given the limited commercial history of class arbitration, including, until very recently, the lack of any guidance regarding how such an arbitration should actually proceed, it would be fanciful to believe that the parties consented to class arbitration merely by agreeing to submit all their disputes to mandatory arbitration.

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[4] Although the FAA was enacted in 1925, the first serious analysis of class arbitration occurred more than 50 years later. *See* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 38 (2000) (citing *Keating* v. *Superior Court*, 167 Cal. Rptr. 481 (Cal. Ct. App. 1980)). And the American Arbitration Association did not publish rules addressing class arbitrations until 2003, after this Court's decision in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003).

In short, to protect parties' legitimate contractual expectations under the FAA, and to prevent the lower courts from rendering *Stolt-Nielsen* a dead letter, the Court should grant the petition for certiorari and reverse the decision below.

II. CLASS ARBITRATION FUNDAMENTALLY CHANGES THE NATURE AND STAKES OF ARBITRATION.

Three times in the last decade this Court has granted certiorari to address questions concerning class arbitration. See *Concepcion*, 131 S. Ct. 1740; *Stolt-Nielsen*, 130 S. Ct. 1758; *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444 (2003). The volume of litigation and the persistence of the issues surrounding class arbitration reflect both the continuing legal uncertainty regarding the proper standards governing class arbitration and the enormous stakes for the parties to arbitration agreements. Indeed, at stake may well be the ongoing viability of private dispute resolution as an alternative to civil litigation. These issues are no less pressing today than they were when this Court granted certiorari in *Concepcion*, *Stolt-Nielsen*, and *Bazzle*.

The business community is particularly concerned about the rule adopted by the Second and Third Circuits because, as this Court has now recognized on two separate occasions, class arbitration "fundamental[ly] changes" the nature and stakes of arbitration. *Stolt-Nielsen*, 130 S. Ct. at 1776; *accord Concepcion*, 131 S. Ct. at 1748 ("classwide arbitration interferes with fundamental attributes of arbitration"). Given the significant burdens and risks associated with class arbitration, a rule that allows arbitrators to infer an agreement to authorize class arbitration from a standard "any dispute" clause renders the FAA's bedrock requirement of consent a fiction and is simply

inconsistent with economic reality. See *Concepcion*, 131 S. Ct. at 1752 (finding it "hard to believe" that companies would ever agree to class arbitration). The Chamber here highlights three ways in which improperly compelling class arbitration fundamentally transforms the bargain the parties struck when they agreed to bilateral arbitration.

A. Class Arbitration Greatly Raises The Stakes Of Arbitration, Pressuring Defendants To Settle Questionable Claims.

First, class arbitration dramatically increases the stakes of arbitration and the risk to defendants of an adverse decision. In a class arbitration, the arbitrator's decision "no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties." *Stolt-Nielsen*, 130 S. Ct. at 1776. As a result, the defendant's financial exposure is magnified exponentially. Even if the defendant would face the same number of individual claims, resolving those claims through multiple bilateral arbitrations allows the defendant to spread the risk of an erroneous decision across multiple decisionmakers. Class arbitration, by contrast, concentrates that risk in a single proceeding, forcing the defendant to stake potentially devastating liability on a single roll of the arbitration dice. See *Concepcion*, 131 S. Ct. at 1752; *Bazzle*, 539 U.S. at 459 (Rehnquist, C.J., dissenting) (class arbitration "concentrat[es] all of the risk of substantial damages awards in the hands of a single arbitrator").

These concerns are compounded by the lack of meaningful judicial review of the arbitrator's award. As this Court has recognized, the narrow scope of judicial review makes arbitration "poorly suited to the higher stakes of class litigation." *Concepcion*, 131

S. Ct. at 1752; see also *Stolt-Nielsen*, 130 S. Ct. at 1776 ("the commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited") (citation omitted). Class arbitration forces defendants to "bet the company with no effective means of review." *Concepcion*, 131 S. Ct. at 1752.

Given these dynamics, class counsel can use the threat of class arbitration to extort settlements from defendants regardless of the ultimate merits of the underlying claims. Even when a company has a meritorious defense, "the risk of an error will often become unacceptable." *Id*. "Defendants are willing to accept the costs of these errors in [bilateral] arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts." *Id*. But when a single erroneous decision could cripple the company, few defendants will have the fortitude to press on, even if they are likely to prevail. "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Id*. This "'in terrorem'" effect of class-action litigation is well documented, "and class arbitration would be no different." *Id*.

B. Class Arbitration Defeats The Primary Advantages Of Arbitration By Increasing Its Cost, Length, And Complexity.

Second, class arbitration greatly increases the cost, duration, and procedural complexity of arbitration. Arbitration is viewed as an attractive alternative to litigation, particularly for resolving small claims, precisely because it offers "'streamlined proceedings and expeditious results.'" *Preston* v. *Ferrer*, 552 U.S. 346, 357 (2008); see also *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 588 (2008) (emphasizing "arbi-

tration's essential virtue of resolving disputes straightaway"); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) ("it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts [parties] to forgo access to judicial remedies" in favor of arbitration).

Class arbitration, by contrast, "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. Before even reaching the merits of the parties' claims, 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*. The AAA's rules, moreover, contemplate significant judicial involvement in this process, providing for stays of the proceedings to allow parties to seek judicial review of both the arbitrator's conclusion that the arbitration agreement authorizes class arbitration and the arbitrator's decision to certify a class. Pet. App. 96a–97a (Rules 3, 5(b)). The predictable result is that class arbitrations take much longer and cost much more to resolve than bilateral arbitrations—if they are ever litigated to a final decision at all. See *Concepcion*, 131 S. Ct. at 1751 (citing statistics showing that class arbitrations take on average 3.5 times longer than bilateral arbitrations and rarely result in an award on the merits).

C. Class Arbitration May Not Bind Absent Class Members To A Defense Judgment.

Finally, it remains unclear whether class arbitration is even capable of yielding a binding judgment in the defendant's favor. Whether and under what con-

ditions a defense award from an FAA arbitration may be enforced against absent class members is a critical but unsettled question. Even if the arbitrator observes all the procedural formalities required to bind absent class members to a court judgment, see *id.* (discussing requirements of notice, opportunity to be heard, and right to opt out), absent class members may argue that they are not bound by the arbitrator's decision, for example, because their arbitration agreements do not authorize class arbitration, because they were not afforded their contractual right to participate in the selection of the arbitrator, or for some other reason. As a result, class arbitration may not even yield one of the most basic benefits of bilateral arbitration—a "mutual, final, and definite award." 9 U.S.C. § 10(a)(4).

Given these significant disadvantages of class arbitration, many companies, given the option, would simply abandon arbitration altogether in favor of litigation, where at least the delays and expense would buy them meaningful appellate review and a final and binding judgment. Indeed, it is precisely for these reasons that the Court in *Concepcion* found it "hard to believe" that defendants would *ever* consent to class arbitration. 131 S. Ct. at 1752. And it is precisely for these reasons that the Court in *Stolt-Nielsen* held that class arbitration so fundamentally changes the nature of arbitration that arbitrators may not "presume, consistent with their limited powers under the FAA," that the parties agreed to authorize class arbitration merely by agreeing to submit their disputes to arbitration. 130 S. Ct. at 1776. The decision below disregards this Court's teachings on class arbitration and should be reversed.

CONCLUSION

For these reasons, and those stated by petitioner, the Chamber urges the Court to grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

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