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**

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

Did the arbitrator exceed his powers under the Federal Arbitration Act when he interpreted the atypical terms of the agreement in this case to authorize the arbitration of class claims?

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## STATEMENT OF THE CASE

This case presents a fact-bound dispute about whether a particular, unusually worded arbitration agreement should be interpreted to authorize class arbitration. After carefully considering the language of the agreement, the arbitrator concluded that "on its face, the arbitration clause in the Agreement expresses the parties' intent that class arbitration can be maintained." (App. 48a). The arbitrator dutifully reconsidered his interpretation of the agreement in light of this Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), and came to the same conclusion. The courts below properly rejected Oxford's contention that the arbitrator's decision violated *Stolt-Nielsen*.

(1) The events giving rise to this litigation concern the method used by defendant Oxford Health Plans, a major provider of health insurance, in processing claims for reimbursement from some 16,500 physicians in New Jersey from 1996 to 2004. The plaintiff alleges that Oxford's practices deprived physicians of proper reimbursement by improperly delaying payment, by changing or "downcoding" claims to reflect procedures less expensive than those that had actually been performed, and by refusing compensation for procedures by improperly "bundling them" with other procedures. (App. 56a).

In 2002 respondent Sutter, a New Jersey physician who was injured by Oxford's reimbursement practices, filed a class action in the New Jersey state courts. Oxford moved to dismiss that action, relying on an arbitration provision contained in the pre-printed agreement that

physicians were required to sign in order to obtain compensation for treating patients insured by Oxford. That agreement provided in pertinent part:

> No 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 in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

(App. 46a-47a). Oxford moved for an order dismissing the action and compelling arbitration of the claims in the complaint. Oxford argued that under the arbitration provision "all actions concerning any disputes arising under the agreement should be sent to arbitration."[1] The New Jersey court granted the motion, dismissing the complaint and ordering that "the claims in Plaintiff's . . . Complaint are hereby referred to arbitration . . . ."[2]

In December 2002 Sutter and Oxford commenced arbitration. Sutter proposed that the arbitration proceed on behalf of the thousands of New Jersey physicians affected by Oxford's misconduct; Oxford opposed such a class proceeding. The arbitrator deferred resolving that dispute until this Court had decided *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444 (2003). Following the June 2003 decision in *Bazzle*, the parties submitted

1. Transcript of Motion, Oct. 25, 2002, Superior Court of N.J., Essex County, No. ESX-L-6644-02, at 6.

2. Order Dismissing Case and Referring Claims to Arbitration, Nov. 21, 2002.

arguments on the question of whether the arbitration could be maintained as a class action.

The arbitrator held that the arbitration agreement authorized class proceedings. The arbitrator recognized that he could not order class arbitration without "the parties' agreement." (App. 45a). He emphasized that the terms of the arbitration clause were "unique in my experience" and "much broader even than the usual broad arbitration clause." (App. 47a). The interpretation of the arbitration clause, the arbitrator reasoned, turned on the relationship between the first part of the clause (which prohibits certain civil actions in court) and the second part of the clause (which provides that certain claims shall be submitted to arbitration). The arbitrator concluded that the scope of the two parts of the clause was coextensive; the claims that under the second part are to be arbitrated are the same as the claims that, under the first part, may not be the subject of a civil action instituted in court.

> Having prohibited [in the first phrase] all conceivably possible civil actions, the clause takes this universal and unlimited class of prohibited civil actions and says, "and all such disputes shall be submitted to final and binding arbitration . . . ."
>
> This means that the clause sends to arbitration "all such disputes," which, apart from the prohibition, could have been brought in the form of any conceivable civil action. . . . [T]he disputes that the clause sends to arbitration are the same universal class of disputes the clause prohibits as civil actions

> before any court. It follows that the intent of the clause, read as a whole, is to vest in the arbitration process everything that is prohibited from the court process.

(App. 47a).

Because class actions were within the scope of the prohibition against civil actions, the arbitrator concluded that class actions must be among the matters that were to be resolved by arbitration.

> A class action is plainly one of the possible forms of civil action that could be brought in a court concerning a dispute arising under this Agreement. . . . [B]ecause all that is prohibited by the first part of the clause is vested in arbitration by its second part, I find that the arbitration clause must have been intended to authorize class actions in arbitration.

(App. 48a; see *id.* ("on its face, the arbitration clause in the Agreement expresses the parties' intent that class action arbitration can be maintained")).

In March 2005, following a period of discovery, the arbitrator determined that the arbitration should in fact proceed as a class action. The arbitrator issued a Partial Final Class Determination delineating the scope of the class of claimants. The arbitrator stayed his award to permit the parties to seek judicial review of his decision. (App. 79a-84a). Oxford then brought an action in federal district court seeking to overturn the arbitrator's decision.

The district court concluded that the arbitrator "did exactly what the Supreme Court said in *Green Tree* an arbitrator must do: interpret the agreement to determine whether the contract permits class certification. [The arbitrator] knew about and followed the law." (App. 71a). "[The arbitrator] proceeded to perform a detailed analysis and interpretation of the agreement, concluding that 'the arbitration clause in the Agreement expresses the parties' intent that class action arbitration can be maintained.'" (*Id.*) The district judge upheld the arbitrator's interpretation of the agreement. "Under the deferential standard of review that this Court must follow, [the arbitrator's] interpretation is reasoned and rational." (*Id.)* Oxford appealed to the Third Circuit the arbitrator's decision that a class proceeding was warranted under the circumstances of this case, but did not in that appeal challenge the arbitrator's conclusion that the agreement itself permitted class arbitration. (App. 55a-59a; see Pet. 6). In 2007 the Third Circuit upheld the challenged portion of the arbitrator's decision. (App. 55a-59a).

(2) Oxford subsequently asked the arbitrator to reconsider his 2003 decision in light of this Court's 2010 decision in *Stolt-Nielsen*. The arbitrator again concluded that "the text of the clause itself authorizes, indeed requires, class-action arbitration." (App. 39a).

> [T]he [arbitration] clause is not at all silent: It plainly says "No civil action . . . and <u>all</u> (emphasis supplied) such disputes" are to go to arbitration. It was my task to construe that clause. "All," I found, and would find again, means all, without exception, the entire universe of actions that could possibly have been brought in any court, necessarily including class actions.

(App. 41a). The arbitrator explained that his 2003 decision, unlike the arbitrators' decision in *Stolt-Nielsen,* was not based on public policy.

> [T]he [2003] determination in this arbitration involved no such adventures into public policy, but was rather concerned solely with the parties' intent as evidenced by the words of the arbitration clause itself. . . . I found that the arbitration clause unambiguously evinced an intention to allow class arbitration, indeed to require it.

(App. 35a-36a). The arbitrator also rejected Oxford's contention that his 2003 decision had inferred the existence of an agreement on class arbitration merely from the absence of express language excluding class proceedings.

> [T]he [2003 decision] was not based on such reasoning. The absence of such an exclusion was not something that had to be relied on to divine the meaning of the clause. It merely corroborated what was already obvious from the language of the clause itself. "All" means all. As noted in the [2003 decision], if it had been the parties' intention to exclude class actions from the clause, *in the face of such sweeping language*, normal drafting would have suggested a specific exclusion.

(App. 39a)(emphasis added)

Oxford returned to district court, asking that the court vacate the arbitrator's 2010 decision in light of

*Stolt-Nielsen*. The district court, however, concluded that the arbitrator had "performed the appropriate function of an arbitrator under the FAA after *Stolt-Nielsen*; [the arbitrator] examined the parties' intent, and gave effect to the arbitration agreement." (App. 28a-29a).

> [A]fter giving full consideration to *Stolt-Nielsen*, [the arbitrator] concluded that the contractual basis between these parties, i.e. their arbitration agreement, clearly and unambiguously expressed their intent to authorize class action arbitration despite omission of the words "class action."

(App. 28a). The district judge declined Oxford's request that he interpret the arbitration agreement de novo (App. 27a-28a), and denied the motion to vacate the arbitrator's decision. (App. 30a).

On appeal the Third Circuit rejected four arguments advanced by Oxford. First, the court of appeals held that an agreement may be interpreted to permit class arbitration even if "the words 'class arbitration' are not written into the text of the arbitration clause." (App. 13a n. 5). Second, the court of appeals rejected Oxford's contention that the arbitrator's interpretation of the agreement in the instant case was merely a "pretext" designed to hide the fact that the arbitrator was actually imposing on the parties "his policy preferences." (App. 14a-15a). Third, the appellate court held that *Stolt-Nielsen* did not preclude an arbitrator, in construing an agreement, from considering the agreement's "unique . . . breadth," noting that *Stolt-Nielsen* indicated that an arbitrator ordinarily could indeed consider "the particular wording" of an agreement. (App. 17a)(*quoting Stolt-Nielsen*, 130

S. Ct. at 1770). Finally, the Third Circuit concluded that "the arbitrator did not impermissibly infer the parties' intent to authorize class arbitration from their failure to preclude it." (App. 17a).

## REASONS FOR DENYING THE PETITION

This appeal presents a dispute about the construction of a form arbitration agreement used by Oxford in 1998. The interpretation of that agreement rests on its distinctive two part structure, one part delineating the claims that may not be brought in court and the other part specifying the claims that are to be resolved in arbitration. The arbitrator concluded that the two parts are coextensive, and that the parties thus intended that the agreement send to arbitration all of the claims, including class actions, that the first part bars from court. Oxford's disagreement with that text-based interpretation does not warrant review by this Court.

Oxford contends that the arbitrator actually based his "purported" interpretation of the agreement and of the intent of the parties on policy considerations, and on the mere fact that the agreement did not explicitly bar class arbitration, grounds that would be inconsistent with this Court's decision in *Stolt-Nielsen.* The arbitrator, however, expressly insisted that these were not the bases of his interpretation, and the courts below rejected this fact-bound objection. That dispute also does not warrant review.

Petitioner suggests that there is a conflict between the Second and Fifth Circuits regarding the application of *Stolt-Nielsen.* The particular issue regarding which

the Fifth Circuit recently stated that it disagreed with the Second Circuit, however, is not presented by this case. The Third Circuit below applied to the particular circumstances of this case settled legal standards that do not differ significantly from the standards applied by the Fifth Circuit.

## I. THIS COURT SHOULD NOT GRANT REVIEW IN THE INSTANT CASE TO RESOLVE ANY CONFLICT BETWEEN THE SECOND AND FIFTH CIRCUITS

Petitioner's claim of a circuit conflict rests largely on two decisions, *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012), and *Reed v. Florida Metropolitan University, Inc.,* 681 F.3d 630 (5th Cir. 2012). In both *Jock* and *Reed* an arbitrator had approved a claimant's request for class arbitration. There were some similarities in the language of the arbitration provisions in *Jock* and *Reed*, but there were differences in the cases as well. In *Jock*, but not *Reed*, there was a dispute about whether the arbitrator had actually determined that the agreement at issue authorized class arbitration. 646 F.3d at 125 (majority opinion), 129 (Winter, J., dissenting). In *Reed*, but not *Jock*, the arbitrator had reasoned that the defendant was legally obligated to make clear in the agreement that the plaintiff was waiving her right to pursue a class action. 681 F.3d at 643-44. The arbitration agreement in *Jock* was construed in light of Ohio law, 646 F. 3d at 126; the agreement in *Reed* was interpreted in light of Texas statutes. 681 F.3d at 641 n. 10, 641-42, 643. The two circuits reached different conclusions regarding the particular provisions before them. The Second Circuit in *Jock* upheld the decision of the arbitrator in that case

to direct class arbitration; the Fifth Circuit in *Reed* overturned the decision of the arbitrator in that case to authorize such class arbitration.

The Fifth Circuit in *Reed* expressly disagreed with what it perceived to be a specific legal error in the Second Circuit decision in *Jock*. Assuming arguendo that the Fifth Circuit correctly characterized the basis of the Second Circuit decision with which it disagreed, that conflict between the Fifth and Second Circuits concerns an issue that is not presented by, and that this Court cannot resolve in, the instant case.

(1) The Fifth Circuit decision in *Reed* does not contain a sweeping rejection of all parts of the Second Circuit decision in *Jock*, or insist that the arbitration agreement in *Jock* was incorrectly interpreted. Rather, in *Reed* the Fifth Circuit disagreed only with one specifically identified aspect of the Second Circuit's *Jock* decision. According to *Reed,* the Second Circuit in *Jock* held that where an arbitrator has ordered class arbitration, the courts cannot review the basis or legality of that decision, but may consider only claims that the arbitrator had no authority to decide the question at all. Under *Jock*, the Fifth Circuit asserted, courts must

> restrict[] [their] analysis to whether the parties had submitted the class arbitration issue to the arbitrator and "whether the agreement or the law categorically prohibited the arbitrator from reaching that issue." [646 F.3d at 123]. . . . . The majority [in *Jock*] reasoned that, because the class arbitration issue was submitted to the arbitrator, and neither the law nor the

> agreement barred the arbitrator from deciding the issue, the arbitrator did not exceed her powers in resolving the issue.

681 F.3d at 644-45.[3] It was the Second Circuit's asserted complete refusal to examine the basis of an arbitrator's decision to authorize class proceedings that prompted the Fifth Circuit to

> respectfully disagree with the Second Circuit decision in *Jock*. We read *Stolt-Nielsen* as requiring courts to ensure that an arbitrator has a legal basis for his class arbitration determination . . . . Such an analysis necessarily requires some consideration of the arbitrator's award and rationale. . . . *To the extent that* the Second Circuit decided not to undertake an inquiry into the arbitrator's reasoning, we must part ways.

681 F.3d at 645-46 (emphasis added).[4]

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3. Similarly, petitioner describes the decision in *Jock* as having been based on the premise "that judicial review [is] limited to verifying 'that the issue of whether the agreement permitted class arbitration was squarely presented to the arbitrator.'" Pet. 14, *quoting Jock,* 646 F.3d at 124.

4. *Reed* contains a footnote commenting that "[w]e disagree with *Sutter* for essentially the reasons stated herein with respect to the Second Circuit's *Jock* decision." 681 F.3d at 644 n. 13. The adjective "essentially" calls the meaning of this passage into doubt, and "the reasons stated here with respect to . . . *Jock*" have no application to the issues in *Sutter*, as demonstrated below.

If, as the Fifth Circuit contended in *Reed*, the Second Circuit decision in *Jock* precludes judicial scrutiny of the basis of an arbitrator's decision to authorize class arbitration—so long as that issue was properly submitted to the arbitrator—there would indeed be a conflict between *Reed* and *Jock*.[5] Such a conflict might at some point warrant review by this Court. But that issue is not presented by this case.

In the instant case the Third Circuit clearly *did* "undertake an inquiry into the arbitrator's reasoning," just as the Fifth Circuit correctly held is required by *Stolt-Nielsen*. First, the Third Circuit assessed the arbitrator's textual basis for holding that the agreement authorized class arbitration, and concluded that it was sufficiently plausible to pass muster under the governing deferential standard of judicial review. (App. 14a, 16a, 17a). Second, the Third Circuit carefully considered Oxford's contention that "the arbitrator's purported examination of the parties' intent was pretext for the imposition of his policy preferences." (App. 14a). The court of appeals rejected that accusation of impropriety on the part of the arbitrator, concluding to the contrary that the arbitrator "performed his duty appropriately and endeavored to give effect to the parties' intent." (App. 15a). Third, the

5. It is far from clear that *Reed's* characterization of *Jock* is correct. The Second Circuit in that case also reviewed the basis of the arbitrator's decision, and concluded that "[i]t was not unreasonable, and clearly not manifestly wrong." 646 F.3d at 127. *Jock* was issued before *Reed* was decided, and the Second Circuit has not yet had an opportunity to clarify whether *Jock* means, as the Fifth Circuit concluded, that a court reviewing an arbitrator's decision that an agreement permits class actions can look only to whether that issue was properly before the arbitrator.

Third Circuit considered and rejected Oxford's contention that the arbitrator had inferred the parties' agreement to class arbitration merely from their failure to preclude that procedure, a type of inference that the court below agreed was proscribed by *Stolt-Nielsen*. (App. 17).[6] Consistent with the Fifth Circuit's insistence that a court must assure that an arbitrator's decision is grounded on "a legal basis," 681 F.3d at 645, the Third Circuit concluded that in this case the arbitrator had indeed acted "within the bounds of the law." (App. 17a).

In fact, Oxford does not appear to seriously contend that the Third Circuit refused to review at all the basis of the arbitrator's decision or to consider Oxford's arguments that the arbitrator had acted on an impermissible basis. To the contrary, Oxford notes that the Third Circuit "summarized the arbitrator's textual analysis" and "accepted that reasoning as sufficient to establish contractual 'intent.'" (Pet. 11-12). Petitioner also acknowledges that the court of appeals actually considered and "rejected Oxford's argument that the parties had never reached any actual agreement" and "that the arbitrator impermissibly inferred the parties' intent." (Pet. 12).

This case thus does not provide an appropriate vehicle for resolving a dispute as to whether, as the Fifth Circuit held in *Reed*, a court in reviewing a class arbitration decision must determine whether the grounds relied on by the arbitrator were permissible under *Stolt-Nielsen*.

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6. "[T]he arbitrator did not impermissibly infer the parties' intent to authorize class arbitration from their failure to preclude it." (App. 17a).

Whichever way this Court were to decide that issue, the result in the instant case would be the same. Under either that holding in *Reed* or the assertedly contrary rule in *Jock*, the decision of the Third Circuit would be affirmed.

Petitioner points out that the agreements in both *Reed* and *Jock* contained language providing that the arbitrator could award the same remedies that would be available in court. (Pet. 14, 16, 18). As petitioner observes, the Fifth Circuit in *Reed* concluded that such language did not indicate an agreement to authorize class proceedings. (Pet. 18; see 681 F.3d at 643). In *Jock*, on the other hand, the Second Circuit stated that an arbitrator could reasonably conclude that this type of provision meant that the parties intended to approve such class proceedings. 646 F.3d at 126-27. That difference between the Second and Fifth Circuits also cannot be resolved in the instant case, however, because the Oxford arbitration agreement does not contain, and thus the arbitrator did not rely on, any such "equal remedy" language.

(2) Oxford argues on a number of other grounds that the decision of the Third Circuit conflicts with the Fifth Circuit's decision in *Reed.* But these asserted differences between the Third and Fifth Circuits are entirely distinct from the basis on which the Fifth Circuit in *Reed* disagreed with the Second Circuit in *Jock*: the supposed refusal of the Second Circuit in *Jock* even to review the basis of the arbitrator's decision. These claimed differences between the Third and Fifth Circuits fall far short of the type of genuine circuit conflict that warrant review by this Court.

Oxford suggests that the Third Circuit has held that under the Federal Arbitration Act there are no legal

constraints on the grounds on which an arbitrator can order class arbitration. The Third Circuit decision, petitioner insists, holds that arbitrators have "effectively unfettered discretion" to order class arbitration. (Pet 13; see *id.* at 15 ("essentially uncontrolled discretion")). A holding that arbitrators are at liberty to order class arbitration on whatever basis they please would undoubtedly conflict with the Fifth Circuit's decision in *Reed,* as well as with this Court's decision in *Stolt-Nielsen.* But as the qualifying adverbs "effectively" and "essentially" suggest, the Third Circuit opinion in this case contains no such legal rule.

The Third and Fifth Circuits recognize similar legal limitations on the authority of an arbitrator to order class arbitration. The Fifth Circuit holds that an arbitrator can only direct class arbitration where there is "a contractual basis for doing so." *Reed*, 681 F.3d at 640, 644. As the decision below makes clear, the Third Circuit applies the same requirement: "an arbitrator lacks the power to order class arbitration unless there is a contractual basis for concluding that the parties agreed to that procedure." (App. 8a; see *id.* at 12a, 14a). In the Fifth Circuit an arbitrator may not simply disregard the terms of an agreement and "dispense his own brand of industrial justice." *Reed*, 681 F.3d at 637 (*quoting United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)), 638 (*quoting Stolt-Nielsen*). The Third Circuit applies the same limitation. (App. 81)(*quoting Steelworkers* and *Stolt-Nielsen*). The Fifth and Third Circuits agree that an arbitrator cannot base a decision to order class arbitration on policy considerations. *Compare Reed*, 681 F.3d at 641, *with* App. 14a-15a, 16a. Both circuits hold as well that the existence of an agreement to authorize class arbitration cannot be inferred merely from

the fact that the arbitration agreement does not expressly preclude class proceedings. *Compare Reed*, 681 F.3d at 645, *with* App. 71a. And in both circuits the existence of such an agreement to class arbitration cannot be inferred simply from the fact that the parties agreed to arbitration at all. *Compare Reed*, 681 F.3d at 639, *with* App. 8a, 11a.

(3) Oxford contends that the Third and Fifth Circuits disagree about whether an arbitrator's decision to order class proceedings should be subject to "meaningful review" by the courts. (Pet. 13, 16, 20, 26). The phrase "meaningful review," however, does not appear in either *Reed* or the decision below. Oxford's objection that the judicial review accorded by the court below was not sufficiently "meaningful" reflects only a disagreement with the outcome of the appeal in this case, not the existence of any circuit conflict regarding the controlling legal standards.

The Third Circuit's review of the arbitrator's decision in this case involved a careful evaluation whether that decision was consistent with the substantive standards described above, standards that are the same as those applied in the Fifth Circuit. Moreover, the Third and Fifth Circuits utilize very similar standards of judicial review when resolving a challenge to an arbitral decision. In the instant case the Third Circuit applied a "deferential standard of review" (App 5a); the Fifth Circuit in *Reed* applied an "exceptionally deferential standard of review." 681 F.3d at 637. The Third Circuit does not "entertain claims that an arbitrator has made factual or legal errors." (App. 5a). Similarly, the Fifth Circuit "will . . . not set aside an [arbitration] award for 'a mere mistake of fact or law.'" *Reed*, 681 F.3d at 638 (*quoting Rain CII Carbon, LLC v. ConocoPhillips Co.,* 674 F.3d 469, 471 (5th Cir. 2012));

see *Stolt-Nielsen*, 130 S. Ct. at 1767 ("It is not enough for petitioners to show that the [arbitration] panel committed an error—or even a serious error").

> [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

*Reed*, 681 F.3d at 637 (*quoting United Paperworkers Int'l Union v. Misco, Inc.,* 484 U.S. 29, 38 (1987)).

The Third Circuit will uphold an arbitrator's interpretation of an arbitration agreement if it can "be rationally derived from the parties' agreement." (App. 7a; see *id.* at 17a). The Fifth Circuit applies the same rule, requiring only that an award have "a basis that is at least rationally inferable . . . from the letter or purpose of the agreement." *Reed*, 681 F.3d at 637 n. 8 (*quoting Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.,* 918 F.2d 1215, 1218 (5th Cir. 1990)). Despite these uniformly recognized limitations on the extent to which a court may substitute its judgment for the decision of the arbitrator selected by the parties, the Third Circuit will overturn such a decision where there is "clear evidence of arbitral overreaching" (App. 15a), where there is "reason to doubt the authority or integrity of the arbitral forum" (App. 6a), and where an arbitral decision is not "within the bounds of law" governing when an arbitrator can conclude that the parties agreed to class arbitration. (App. 17a).

Oxford repeatedly insists that the Third Circuit has held that an arbitrator's decision ordering class proceedings will automatically be upheld whenever that decision merely "purports" to find that the parties agreed

to class arbitration. (Pet. 3, 12, 13, 14, 20, 22, 26). The meaning of this assertion is not entirely clear. Petitioner may be contending that so long as an arbitrator's decision recites a finding that the parties agreed to class arbitration, the Third Circuit bars a court from even considering a contention that the arbitrator's decision was grounded on an impermissible basis or type of inference. Any such contention, however, is decisively refuted by what actually occurred in this case, in which the court of appeals indeed assessed and resolved just such contentions even though the arbitrator had held that the terms of the arbitration agreement encompassed an agreement to allow class arbitration.

Oxford's concern about arbitral decisions that "purport" to determine the intent of the parties may be a reference to cases in which a party asserts that an ostensible arbitral finding that there was an agreement between the parties was actually a ruse, intended to cover up an improper standard or motive on the part of the arbitrator. Oxford has at times suggested that the arbitrator in this case was indeed dissembling. It describes the arbitrator as having "purported to discern . . . an intent [to authorize class arbitration] in the language of the agreement." (Pet. 11). Oxford asserts that "[t]he arbitrator's . . . ruling is best explained as a *post hoc* rationalization for a result clearly based in fact on the policy preference revealed by the arbitrator's original decision." (Pet. 24). And in the court below Oxford expressly contended that "the arbitrator's reference to ascertaining the parties' intent was pretense."[7] The Third Circuit did not, however, refuse

7. Brief of Defendant-Appellant Oxford Health Plans LLC, p. 37 (capitalization omitted).

to consider these arguments. To the contrary, the court of appeals discussed in detail and directly addressed Oxford's contention "that the arbitrator's purported examination of the parties' intent was *pretext* for the imposition of his policy preferences." (App. 14a)(emphasis added). The court of appeals rejected Oxford's argument on the merits: "Oxford's allegations of pretext are simply dressed-up arguments that the arbitrator interpreted its agreement erroneously." (App. 15a).

(4) Oxford contends that the Fifth and Third Circuits disagree about whether class proceedings are authorized by what petitioner labels a "standard" arbitration clause. The Fifth Circuit in *Reed* characterized the language of the particular agreement in that case as involving "standard" wording that is found "in many arbitration agreements." 681 F. 3d at 642; see Pet. 4 (characterizing the agreement in *Reed* as a "standard provision"), 18 (same). Petitioner insists that the wording of the agreement in this case also used the "standard language" (Pet. 3) and was a "routine" arbitration clause. (Pet. 15). Petitioner contends that because the wording of the arbitration clause in this case was simply the same type of "routine," "standard" provision at issue in *Reed*, the differing outcomes in the Third and Fifth Circuits must present a circuit conflict. (Pet. 13, 16).

But the arbitrator's decision in this case rested on his conclusion that the wording of the arbitration agreement in question here was in fact quite unlike more common arbitration clauses.

> This clause is much broader even than the usual broad arbitration clause. The introductory

> phrase, "No civil action concerning any dispute arising under this agreement shall be instituted before any court," is unique in my experience and seems to be drafted to be as broad as can be. . . . It would not be possible to draft a broader or more encompassing clause.

(App. 47a). The arbitrator's holding that the agreement authorized class proceedings rested on his view that the wording of the agreement in question was quite different from "the usual" arbitration clause.[8] The arbitrator's construction of the agreement in this case turned on his interpretation of the inter-relationship between the first and second parts of the arbitration clause. (See pp. 3-4, supra). Oxford does not identify any other instance in which parties have used, or arbitrators have construed, this particularly idiosyncratic language.

In upholding the arbitrator's decision, the Third Circuit likewise emphasized that the arbitrator had concluded "that the parties' arbitration clause was unique in its breadth" (App. 16a; see *id.* at 3a), and rejected Oxford's attack on the arbitrator's construction of that

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8. Defendants in other cases have relied on just that distinction. In *Reed Elsevier Inc. v. Crockett*, 2012 WL 604305 (S.D. Ohio Feb. 24, 2012), the agreement provided that "any controversy, claim or counterclaim arising out of or in connection with [a settlement] . . . will be resolved by [binding arbitration]." The company, in opposing class arbitration, insisted that the Third Circuit's decision in the instant case was distinguishable because "the arbitration clause was different and much broader in scope than the clause in the [applicable] agreements." Brief of Appellee Reed Elsevier Inc., No. 12-3574 (6th Cir.), at 26, available at 2012 WL 3638416.

unusual language. The Third Circuit only upheld the arbitrator's interpretation of the specific wording of the particular agreement in this case; it manifestly did not, as Oxford contends, hold that an intent to authorize class proceedings could be read into "any broad arbitration agreement." (Pet. 20). The Third Circuit's assessment of the arbitrator's interpretation of the particular provision in the instant case cannot be characterized as in conflict with the Fifth Circuit's assessment of the very different language at issue in *Reed* merely by using a single adjective—"broad"—to characterize the two dissimilar arbitration provisions.

The wording and circumstances of arbitration agreements are simply too varied to permit the fashioning of some simple judicial standard dictating whether an agreement to authorize class proceedings can be inferred even from agreements with less idiosyncratic language. Even the wording of more common arbitration provisions differs in a number of respects, rendering impracticable the task of devising a uniformly applicable rule of textual interpretation. Several of the decisions referred to by petitioner as involving "broad" language involved wording that raised issues of textual interpretation quite different from both the agreement in *Reed* and the agreement in this case. For example, in *Smith & Wollensky Restaurant Group, Inc. v. Passow,* 831 F. Supp. 2d 390 (D.Mass. 2011), the agreement provided for arbitration of "any claim that, in the absence of this Agreement, would be resolved in a court of law," and defined "claim" as "any claims for wages, compensation and benefits." 831 F. Supp. 2d at 392. The arbitrator concluded that this particular wording encompassed class claims, and the district court held that "the language . . . supports such a ruling." *Id.* In *Amerix*

*Corp. v. Jones*, 2012 WL 141150 (D.Md. Jan. 17, 2012), the arbitrator's decision relied in part on the fact that the agreement did contain one express reference to class actions (prohibiting them in court), but had no similar express bar to class proceedings in arbitration. 2012 WL 141150 at *7. Some agreements (unlike the agreement in this case) provide that the arbitrator may award the same remedies that would be available in a judicial proceeding. (See p. 14, supra). A number of other types of substantive provisions have been important to the interpretation of particular arbitration agreements.[9]

Even where the text of agreements is the same, non-textual factors may warrant divergent interpretations of that language. "[T]he interpretation of an arbitration agreement is generally a matter of state law." *Stolt-Nielsen*, 130 S. Ct. at 1773; see *id.* at 1768 (relying on New York and maritime law).[10] Oxford contends that in this case the agreement should be interpreted in light of New Jersey law (Pet. 24 n. 10), a position it advanced in the courts below. (App. 72a). The same agreement might be subject to a different interpretation if it were governed by the law of another state. Several decisions cited by petitioner relied in part on state law principles

9. See Answer Brief of Appellee American Arbitration Association, Inc., *Long John Silver's, Inc. v. Stewart,* No. 10-6249 (10th Cir.), at 10-11, 29-31 (arbitration agreement incorporated by reference the American Arbitration Association rules, which in turn provide for class arbitration); *Fantastic Sams Franchise Corporation v. FSRO Ass'n, Ltd.,* 683 F.3d 18, 23 (1st Cir. 2012)(possible significance of change in language of arbitration agreement).

10. The Fifth Circuit in *Reed* relied on state law in construing the agreement in that case. 681 F.3d at 641 n. 10, 642, 643-44.

that contracts of adhesion are to be interpreted against the drafter[11] and that contractual waivers of rights must be spelled out unambiguously.[12] State statutes regarding joinder of arbitration claims may be relevant, where they exist.[13] Moreover, Oxford argued in the courts below that the agreement in this case should also be construed in light of the positions taken by the parties in briefs filed in an earlier court proceeding, a factor that would not be present in all cases. (App. 15a). Oxford also suggests that the interpretation of this agreement should turn at least in part on how widespread class arbitrations were when the agreement was signed in 1998, a consideration whose impact would depend on the year in which an agreement was made. (Pet. 22). *Stolt-Nielsen* holds that "evidence of 'custom and usage,'" which could vary by industry, "is relevant to determining the parties' intent when an express agreement is ambiguous." 130 S. Ct. at 1769 n. 6. The interpretation of particular language in some cases might be influenced by how similar provisions had been construed at the time the language in question was adopted. In short, no decision by this Court could establish—even for so-called "standard" agreements, however defined—a single rule of construction that would encompass all these and other possible textual and non-textual factors.

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11. *Southern Communications Services, Inc. v. Thomas*, 829 F. Supp. 2d 1324, 1328 (N.D.Ga. 2011).

12. *Louisiana Health Service Indemnity Co. v. Gambro A B,* 756 F. Supp. 2d 760, 768 (W.D.La. 2010).

13. See *Lyndoe v. D.R. Horton, Inc.,* 2012 WL 3101704 at *3-*5 (10th Cir., July 24, 2012).

## II. CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE ARBITRATOR'S FACT-BOUND INTERPRETATION OF THE PARTICULAR ARBITRATION PROVISION IN THIS CASE

Oxford emphatically disagrees with the arbitrator's interpretation of the arbitration agreement in this case. But petitioner's objections raise only fact-bound disputes regarding this particular agreement.

As explained above, the arbitrator grounded his interpretation on the inter-relationship between the two parts of the arbitration provision.

> No 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 in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

(App. 93a). The arbitrator concluded that the second part referred to arbitration all matters that the first part excluded from court. (App. 48a, 57a).

Oxford in this Court contends that the phrase "all such disputes" in the second part of the arbitration clause includes only disputes "under this Agreement" arising between Oxford and Sutter individually, and does not include all claims (including class claims) that are encompassed within the "civil action[s]" barred by the first part of the agreement. The arbitrator's interpretation of the inter-relationship between the two parts of the arbitration clause is the more plausible. But

even if the arbitrator's reading of the arbitration clause was incorrect, a court may not overturn the arbitrator's interpretation of the agreement merely because it was "an error—or even a serious error." *Stolt-Nielsen*, 130 S. Ct. at 1767.

When this litigation first began in New Jersey courts, Oxford did not draw the distinction it now asserts between disputes and civil actions. To the contrary, Oxford's counsel argued that "Sutter's contract here says that all *actions* concerning any disputes arising under the agreement should be sent to arbitration."[14] In the Third Circuit, moreover, Oxford did not advance this textual argument until its petition for rehearing.[15] This Court does not ordinarily consider arguments that were not

14. Transcript of Motion, *Sutter v. Oxford Health Plans Inc.*, N.J.Superior Ct., No. ESX-L-6644-02, Oct. 25, 2002, p. 6 (emphasis added); see *id.* at 30 ("plaintiff quoted the contract here as saying that any dispute arising under the contract needs to be arbitrated. That's wrong. The contract says, actions concerning any disputes arising under"). In its state court briefs Oxford also described the agreement as referring all "actions" (not all disputes under the agreement) to arbitration. Oxford's Memorandum of Law in Support of Its Motion to Stay and/or Dismiss in Part the Amended Complaint, 7 ("Sutter's . . . Agreement with Oxford requires arbitration of all 'civil action[s] concerning any dispute under' the . . . Agreement."), 12 ("Sutter's agreement to arbitrate any 'civil action concerning any dispute' arising under the . . . Agreement is even broader than the 'any dispute' language in *Martindale [v. Sandvik, Inc.*, 173 N.J. 76, 800 A. 2d 872 (2002)]"); Oxford's Reply Memorandum of Law in Further Support of its Motion to Stay and/or Dismiss in Part the Amended Complaint, 2 ("Sutter does not dispute that his contract requires arbitration of all 'civil action[s] concerning any dispute arising under' his . . . Agreement.").

15. Petition of Defendant-Appellant Oxford Health Plans LLC for Rehearing or Rehearing *En Banc*, 9-10.

timely presented in the courts below, and should not do so in this case.

Petitioner notes that under *Stolt-Nielsen* an arbitrator may not order class proceedings based merely on the arbitrator's own view of public policy, and maintains that the arbitrator did just that. (Pet. 24). The arbitrator, however, was well aware of that holding in *Stolt-Nielsen*. (App. 35a). In his 2010 opinion the arbitrator explained that his earlier 2003 opinion had no such basis. (*Id.*). Oxford appears to contend, as it did in the court below, that the arbitrator's 2010 opinion was a ruse intended to cover up the arbitrator's secret policy-based motives. (Pet. 24). The Third Circuit considered and rejected this attack on the good faith of the arbitrator. (App. 14a-15a). That dispute about the motives of the arbitrator in this particular case presents no question of law warranting review by this Court.

Finally, Oxford suggests that the arbitrator's original 2003 decision held (or, at least, might be interpreted to have held) that an agreement to class arbitration could be inferred merely from the fact that such class proceedings were not expressly prohibited. (Pet. 15). In his 2010 decision, however, the arbitrator made clear that his 2003 interpretation of the arbitration agreement was not based on that impermissible type of reasoning.

> Oxford argues that the [2003 decision] relied on absence of specific exclusion of class-action arbitration from this [arbitration] clause to indicate that it was the intention of the parties to include class arbitration [.] If true, this reasoning would run afoul of *Stolt-Nielsen*.

> However, the [2003 decision] was not based on such reasoning. The absence of such exclusion was not something that had to be relied on to divine the meaning of the clause. It merely corroborated what was already obvious. . . .

(App. 39a). Petitioner acknowledges that the language to which it objected in the 2003 opinion was not used in the 2010 opinion. (Pet. 5 n. 4 ("[t]he arbitrator [in 2010] retreated from his previous [2003] reliance on the lack of any specific exclusion of class arbitration")). The Third Circuit concluded that *neither* of the arbitrator's decisions had, in violation of *Stolt-Nielsen*, "impermissibly infer[red] the parties' intent to authorize class arbitration from their failure to preclude it." (App 17a). Oxford may contend that the Third Circuit misinterpreted, or the arbitrator misrepresented, the bases of the 2010 and 2003 arbitral decisions, but those fact-bound disputes do not warrant review by this Court.

## III. THE QUESTION PRESENTED IS OF LIMITED AND DECLINING IMPORTANCE

Oxford asks this Court to begin the complex task of developing detailed legal standards governing how arbitrators are to construe, and how courts are to review arbitral decisions regarding, arbitration agreements that do not contain express language concerning whether or not class arbitrations are permitted. But at least since this Court's 2003 decision in *Bazzle*, companies (and corporate attorneys) framing arbitration agreements have been well aware that an agreement that lacked explicit language to the contrary might be construed to authorize class proceedings. The problem of interpreting arbitration

agreements that do not deal expressly with the issue of class arbitration will fade away as parties preempt such disputes by using more specific language.

In an amicus brief filed in this Court even before the decision in *Stolt-Neilsen* called attention to the desirability of express language, the Chamber of Commerce of the United States advised the Court that already "[a] class action waiver is a key component of many Chamber members' arbitration agreements."[16] In *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), for example, the agreement provided that a plaintiff could obtain arbitration only in an "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." 131 S. Ct. at 1744. In *Concepcion* the American Bankers Association informed the Court that "[m]any of [its] members, constituent organizations and affiliates . . . have independently adopted as standard features of their consumer contracts provisions that call for individual arbitration . . . and disallow class proceedings."[17] Another amicus brief in *Concepcion* advised the Court that the issue in *Concepcion* would affect "tens of millions of arbitration agreements."[18] In *American Express Co. v.*

16. Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner, *AT&T Mobility v. Concepcion.* 1, available at 2010 WL 673841.

17. Brief of Amici Curiae American Bankers Association, et al, 3, available at 2010 WL 3183853; see Brief of CTIA-The Wireless Association ® as Amicus Curiae in Support of Petitioner, 4 ("hundreds of wireless carriers" have arbitration agreements that ban class arbitration), available at 2010 WL 3183858.

18. Brief of DRI—The Voice of the Defense Bar in Support of Petitioner, 1, available at 2010 WL 3183854.

*Italian Colors Restaurant,* No. 12-133, *certiorari granted* November 13, 2012, the Chamber of Commerce informed the Court that today "[m]ost arbitration agreements require that disputes be resolved on an individual, rather than classwide basis."[19] It is clear that express provisions regarding the permissibility of class arbitration are now widely utilized.[20]

In the instant case the Chamber of Commerce argues that "[w]hether 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."[21] But as the Chamber pointed out only two years ago in its briefs in *Concepcion*, and only three months ago in its brief in *Italian Colors*, its members and countless other businesses are already assuring that the interpretation of arbitration agreements does not vary by circuit or by state simply by including express language in their arbitration provisions, rather than continuing to use non-

19. Brief of the Chamber of Commerce of the United States of America, et al., as *Amici Curiae* in Support of Petitioners, p. 2. The arbitration agreement in that case provides in part: "There shall be no right or authority for any Claims to be arbitrated on a class action basis . . . ." *In re American Exp. Merchants' Litigation*, 667 F.3d 204, 209 (2d Cir. 2012).

20. This is not, of course, a recent development. Some firms recognized decades ago the desirability of addressing this issue with express language. See *Fantastic Sams Franchise Corp. v. FSRO Ass'n., Ltd.,* 683 F.3d 18, 20 (1st Cir. 2012)(arbitration agreement reworded in 1988 to expressly bar class arbitration).

21. Brief of the Chamber of Commerce of the United States of America as Amicus *Curiae* Supporting Petitioner, at 4.

explicit arbitration clauses. Petitioner warns that parties will not view arbitration "as a desirable alternative to litigation" if they cannot be confident that arbitrators will not misconstrue non-explicit "broad" arbitration provisions to permit class arbitration (Pet. 27); but parties can avoid that problem simply by using explicit language more to their liking.

Petitioner and amici argue that class arbitration would be both harmful and unfair to the defendants. But companies which share that concern ordinarily have the ability to avoid such proceedings. Businesses such as Oxford, like virtually all retailers and employers, have as a practical matter total control over the wording of the arbitration agreements that they use. No ordinary customer or employee is in a position to object to or negotiate the terms of pre-printed form arbitration agreements to which they must agree as a condition of purchasing goods or services or obtaining or continuing employment. Oxford itself rewrote its own arbitration agreement in 2003, more than nine years ago, to expressly bar class arbitration with regard to claims arising after that date.[22] Over time there will be a further decline in the number of arbitration disputes that involve older, less precisely phrased arbitration agreements, as parties increasingly use agreements with explicit language regarding class arbitration.

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22. Partial Final Class Determination Award of Arbitrator, 10 ("since May 2003, Oxford has added a provision to the standard arbitration clause specifically excluding the signing physician from class arbitration. . . . I am excluding from the class for this arbitration all those persons whose contracts contain a prohibition on class arbitrations"). This portion of the arbitrator's decision is not included in the Petition Appendix; it falls in the ellipsis at p. 81a. The arbitration agreement in this case dates from 1998.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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