No. 14-625

IN THE

Supreme Court of the United States

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

v.

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

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Petitioners are David Opalinski and James McCabe on behalf of themselves and all others similarly situated.

Respondents are Robert Half International, Inc., and Robert Half Corporation (collectively referred to herein as "Robert Half").

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INTRODUCTION

In its Opposition to Plaintiffs' petition for a writ of certiorari, Defendant Robert Half argues both that (1) there is no Circuit split for this Court to resolve on the question of who should decide the availability of class-wide arbitration and (2) that the question is of little practical significance because of the increasing use of class action waivers in arbitration agreements. Robert Half's arguments are misplaced because there is a clear, ongoing difference of opinion among the federal courts as to who should decide this question. Moreover, the very existence of numerous cases on this subject (as well as recent legal scholarship) reflect that many businesses do not include express class action waivers in their arbitration agreements. Thus, the issue of who should decide the availability of class-wide arbitration will not disappear any time soon and this Court's guidance is urgently needed.

This Court should put the continuing uncertainty to rest by answering the question left open in Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2068 (2013), as to "whether the availability of class arbitration is a question of arbitrability" for the courts, or a procedural question for the arbitrator to decide. Allowing courts to decide this question undermines the "national policy favoring arbitration," AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1749 (2011), by taking the decision out of the comparatively expert hands of the arbitrator, and subjecting the decision to time-consuming appeals. In light of the continuing and costly uncertainty brought about by the doctrine as it currently stands, Petitioners urge this Court to grant certiorari.

I. Contrary to Robert Half's Contentions, There Is A Clear Circuit Split Regarding Whether The Availability Of Classwide Arbitration Procedures Is A 'Question of Arbitrability' For the Courts.

Robert Half claims that "there is no circuit conflict regarding whether determining the availability of class arbitration presents a 'question of arbitrability' that is presumptively for a court, [or] an arbitrator to decide." Opp. at 1, 11-17.[1] However, this contention is belied by the numerous recent decisions

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[1] In its Opposition, Robert Half contends that in addition to the Third and Sixth Circuits, the Ninth Circuit has also held that the availability of classwide arbitration is a gateway issue for courts to decide. The decision Robert Half cites for this proposition is an unpublished and non-precedential opinion in which the Ninth Circuit summarily affirmed a lower court decision, affirming the district court's decision to compel individual arbitration, with virtually no analysis or explanation. See Eshagh v. Terminix Int'l Co., L.P., 588 F. App'x 703, 703 (9th Cir. 2014). Given Robert Half's eagerness to disclaim the precedential value of the Third Circuit's decision in Vilches v. Travelers Cos., 413 F. App'x. 487 (3d. Cir. 2011) (which is in direct conflict with the Third Circuit's decision in the instant case), Robert Half should not be permitted to rely upon an equally non-binding and cursory opinion for the proposition that this issue has been decided in its favor in the Ninth Circuit. It has not.

that have split on this issue, including decisions issued since this Court's decision in Oxford Health expressly left the question open. See Oxford Health, 133 S. Ct. at 2068 ("Stolt–Nielsen made clear that this Court has not yet decided whether the availability of class arbitration is a question of arbitrability"). First, although the Circuit Court decisions cited by Petitioners may not address the issue as directly as the Third Circuit did here, they clearly approve of arbitrators deciding the availability of class-wide arbitration. Second, contrary to Robert Half's bold assertion that "[t]here is no conflict," at least a dozen district courts in the last few years have directly confronted this question and have concluded that the availability of class-wide arbitration is a procedural question, presumptively for the arbitrator to decide. See infra, pp. 6-7, n. 3-7. For these reasons, this question clearly merits the Court's attention as this ongoing difference of opinion among the federal courts will continue without intervention from this Court.

Robert Half argues that the Circuit Court opinions cited by Petitioners are irrelevant and not on point. Opp. at 11-17. Again, while these decisions may not confront the question as directly as the Third Circuit did in this case, the import of the decisions is clearly that the courts had no concern with an arbitrator deciding the availability of class-wide arbitration.

For example, in DIRECTV, LLC v. Arndt, 546 F. App'x 836, 837 (11th Cir. 2013), the Eleventh Circuit reversed a district court's decision vacating an arbitrator's award determining the availability of class-wide arbitration. The district court had found the arbitrator exceeded her powers under the Federal

Arbitration Act, 9 U.S.C.A. § 10 (a)(4) but the Eleventh Circuit held that the award did not exceed the arbitrator's powers. Id. at 839. Robert Half argues that the Court did not address the "who decides" question, but the Court clearly addressed it implicitly because, if the availability of class-wide arbitration was a gateway issue for courts to decide, then presumably the Eleventh Circuit would have found that the arbitrator *had* exceeded her powers in deciding the question. It did not.[2]

Similarly, while Robert Half points out that Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd., 683 F.3d 18, 24-25 (1st Cir. 2012), addressed associational rather than class arbitration, there is no reason the court's reasoning would be limited to associational arbitration and not apply to class arbitration.

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[2] Likewise, in other Circuit Court cases cited by Plaintiffs, the courts implicitly approved of the arbitrator answering the question of whether class-wide arbitration was available under the parties' agreement. For example, in S. Commc'ns Servs., Inc. v. Thomas, 720 F.3d 1352 (11th Cir. 2013), cert. denied, 134 S. Ct. 1001 (2014), the Court affirmed a district court decision approving an arbitrator's decision that class-wide arbitration was available under the parties' agreement, and in Jock v. Sterling Jewelers Inc., 646 F.3d 113 (2d Cir. 2011), the Court reversed a district court decision, which had vacated an arbitrator's award that had construed an agreement to allow for class-wide arbitration. In approving the arbitrators' awards, these courts necessarily determined that the arbitrators had not exceeded their powers in deciding the availability of class-wide arbitration.

The First Circuit noted that "[u]nlike a 'question of arbitrability,' the parties' dispute in this case does not implicate the validity of the arbitration agreement or present any question of whether FSRO's particular claims come under the arbitration agreement." Id. at 25. The same holds true here, where the parties do not dispute the validity of the arbitration agreement or that it applies to the particular wage claims at issue here.

Likewise, Robert Half argues that Blue Cross Blue Shield of Massachusetts, Inc. v. BCS Ins. Co., 671 F.3d 635, 640 (7th Cir. 2011), did not determine that the availability of class-wide arbitration was a procedural question rather than a gateway question because that case addressed the availability of consolidated arbitration. But other courts have applied the reasoning of Blue Cross Blue Shield of Massachusetts, Inc. to the question of who should decide the availability of class-wide arbitration and have cited it for the proposition that this is presumptively a question for the arbitrator, *not* the courts. See Cramer v. Bank of Am., N.A., 2013 WL 2384313, *4 (N.D. Ill. May 30, 2013) (citing Blue Cross Blue Shield for the proposition that whether "the Agreement does not permit class arbitration raises a question of procedural arbitrability" rather than a gateway issue). While the Blue Cross Blue Shield court distinguished class arbitrations from consolidated arbitrations in its decision, as shown by the Cramer case, its reasoning is easily extended to the question of who should decide the availability of class-wide arbitration, and courts in the Seventh Circuit have consistently held that it should be the arbitrator, not the courts. See infra, n. 4.

That these Circuit Court decisions stand for the conclusion that arbitrators should decide the availability of class-wide arbitration is further underscored by the numerous lower court decisions which cite them for that very proposition. Indeed, numerous lower court decisions post-Oxford Health from within the 2nd,[3] 7th,[4] 8th,[5] 9th[6], and 10th[7] Cir-

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[3] See, e.g., In re A2P SMS Antitrust Litig., 2014 WL 2445756 (S.D.N.Y. May 29, 2014); Guida v. Home Sav. of Am., Inc., 793 F. Supp. 2d 611, 619 (E.D.N.Y. 2011).

[4] See, e.g., Kovachev v. Pizza Hut, Inc., 2013 WL 4401373 (N.D. Ill. Aug. 15, 2013); Cramer v. Bank of America, N.A., 2013 WL 2384313, *3–4 (N.D.Ill. May 30, 2013); Price v. NCR Corp., 908 F. Supp. 2d 935, 945 (N.D. Ill. 2012) ("[b]ecause the question of whether the Agreement at issue here implicitly permits class arbitration is not a question of whether the Agreement is valid or whether it covers the parties' underlying dispute, it is a question of procedural arbitrability for the arbitrator to decide"); Collier v. Real Time Staffing Servs., Inc., 2012 WL 1204715, *5 (N.D. Ill. Apr. 11, 2012) ("[h]aving concluded that the parties in this case [have agreed to arbitrate], the court holds that it is up to the arbitrators themselves to resolve procedural questions in the first instance") (internal quotation omitted).

[5] See, e.g., Harrison v. Legal Helpers Debt Resolution, LLC, 2014 WL 4185814, *5 (D. Minn. Aug. 22, 2014) ("class arbitration is reserved as a matter for the Arbitrator to decide").

(*Footnote continued*)

cuits have dealt with the "who decides" issue head on and have decided that the question is for an arbitrator, *not* a court. These decisions are in *direct conflict* with the Third Circuit's decision in this case and the Sixth Circuit's opinion in Reed Elsevier, Inc. v. Crockett, 734 F.3d 594 (6th Cir. 2013). Thus, there is still a clear split of opinion among the Circuits which is ongoing and unlikely to abate any time soon.

For example, in a lengthy decision in In re A2P SMS Antitrust Litig., 2014 WL 2445756, *5, *9 (S.D.N.Y. May 29, 2014), the district court discussed Supreme Court precedent on the question of "whether the availability of class arbitration procedures is presumptively a question for the Court or the arbitrator" as well as conflicting lower court and circuit court authority. As Petitioners have argued here, the district court ultimately concluded that "it is apparent that the appellate courts addressing this issue after Stolt–Nielsen have arrived at divergent results." Id. at *9. The Court went on to consider the merits of the issue and to conclude that the availabil-

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[6] See, e.g., Lee v. JPMorgan Chase & Co., 982 F. Supp. 2d 1109 (C.D. Cal. 2013); Okechukwu v. DEM Enterprises, Inc., 2012 WL 4470537, *2–3 (N.D. Cal. Sept.27, 2012); Hesse v. Sprint Spectrum L.P., 2012 WL 529419, *3-4 (W.D. Wash. Feb. 17, 2012).

[7] See, e.g., Fisher v. General Steel Domestic Sales, LLC, 2010 WL 3791181, *2–3 (D. Colo. Sept.22, 2010).

ity of class-wide arbitration is an issue for the arbitrator:

> Put succinctly, the question of the availability of class arbitration does not go to the power of the arbitrators to hear the dispute, but rather to an issue that simply pertains to the conduct of proceedings that are properly before the arbitrator. For example, in the circumstances at hand, the Court has already ruled that the parties' agreement to arbitrate is clear, that this agreement is enforceable, and that the arbitration clauses cover the parties' substantive claims. The Court having already made these initial determinations, interpreting the provisions of the RSA to determine whether they allow for class arbitration is a matter within the arbitrator's competence. This view is also wholly consistent with Supreme Court precedent explaining that, in the face of a valid agreement to arbitrate, it will be the rare question that must be decided by the Court . . . Removing an issue from consideration by the arbitrator and assigning it the courts to address through relatively formal procedures and multi-layered review tends to run counter to [the FAA's policy in favor of arbitration.]

In re A2P SMS Antitrust Litig., 2014 WL 2445756, *10 (internal citations omitted).

Similarly, in Lee v. JPMorgan Chase & Co., 982 F. Supp. 2d 1109, 1114 (C.D. Cal. 2013), the court noted that "neither Plaintiffs nor Defendants contest that Plaintiffs' claims are subject to arbitra-

tion" and that "[t]he only question, as in Bazzle, is the interpretive one of whether or not the agreements authorize Plaintiffs to pursue their claims on a class, collective, or representative basis." The court concluded that this "question concerns the procedural arbitration mechanisms available to Plaintiffs, and does not fall into the limited scope of this Court's responsibilities in deciding a motion to compel arbitration." Id.

These recent decisions expressly considered and rejected the reasoning of the Sixth Circuit in Reed Elsevier, and are emblematic of numerous federal court decisions which contradict the Third Circuit's conclusion in this case. In light of these many cases, finding that an arbitrator should determine the availability of class-wide arbitration, it is simply false to suggest that there is no Circuit split in need of this Court's attention.

II. The Practical Significance Of The "Who Decides" Question is Ongoing And Continues To Threaten The Efficiency Of The Arbitral Process.

In its Opposition, Robert Half contends that the "[p]ractical significance of the "who decides" issue has substantially diminished and will continue to do so." Opp. at 2. However, the situation on the ground plainly contradicts Robert Half's contention that parties will simply insert class action waivers into their agreements and avoid the "who decides" question altogether. Instead, scholarship has revealed that "the predicted tsunami of arbitral class waivers has not occurred." Peter B. Rutledge & Christopher R.

Drahozal, "Sticky" Arbitration Clauses? The Use of Arbitration Clauses After Concepcion and Amex, 67 Vand. L. Rev. 955, 961 (2014) (noting that the use of arbitration clauses and class action waivers since Concepcion has not increased dramatically, in part because "even standard form contracts might be 'sticky'--that is, resistant to change even if change might be in the business's best interest"); Christopher R. Drahozal & Samantha Zyontz, Private Regulation of Consumer Arbitration, 79 Tenn. L. Rev. 289, 349 (2012) (noting that "while some types of consumer contracts in the [] sample commonly included class arbitration waivers, other types did not"). Thus, recent legal scholarship recognizes that many employers and businesses continue to omit class-action waivers from their arbitration provisions. Moreover, the many cases that have contended with the "who decides" question in the past several years further highlight that this is a continuing, unresolved issue. Thus, contrary to Robert Half's contentions, this is not a dead issue of "no practical significance." Opp. at 20.

As Petitioners set forth in their petition for certiorari, in the absence of clear, uniform rules regarding whether courts or arbitrators should decide the availability of class arbitration, parties will be able to engage in forum shopping by choosing to bring suit in one jurisdiction or another based on who they wish to determine the availability of class-wide relief. See David Reif, Who Resolves Class Arbitrability?, 81 Def. Couns. J. 387, 393-94 (2014) (noting "the diversity of results" among different courts on the "who decides" question and advising that "the forum in which the issue is resolved can be outcome deter-

minative" such that "[t]he first party to the courthouse has a clear advantage").

Furthermore, allowing courts to determine whether class-wide procedures are available imposes significant burdens on parties and courts and undermines the efficiency or arbitration by permitting multiple appeals of the preliminary clause construction decision. This result will allow large companies and employers to use their superior resources to fight class proceedings at every stage of appeal (and insert additional layers of procedure into the entire dispute resolution process) and will provide companies with another weapon to stymie class proceedings by endlessly appealing and litigating the availability of class-wide relief in court (despite having compelled plaintiffs to arbitrate in the first place). Thus, contrary to Robert Half's contentions, this is an issue of great importance for the future practice of class-action litigation and arbitration. This Court should therefore grant certiorari and provide the Circuit Courts guidance on this important and increasingly prevalent issue.

CONCLUSION

For all the reasons set forth in Petitioner's petition for a writ of certiorari and this Reply, the petition should be granted.

Respectfully submitted,

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