No. 12-135

IN THE

Supreme Court of the United States

OXFORD HEALTH PLANS LLC,
Petitioner,

v.

JOHN IVAN SUTTER, M.D.,
Respondent.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONER

ROBIN S. CONRAD
SHELDON GILBERT
KATHRYN COMERFORD TODD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
ERIC D. MCARTHUR
AMY L. HANKE
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Amicus Curiae
* Counsel of Record

January 29, 2013

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. IMPOSITION OF CLASS ARBITRATION ABSENT AFFIRMATIVE CONTRACTUAL AUTHORIZATION VIOLATES THE FAA	5
A. Arbitration Is A Matter Of Consent, Not Coercion	5
B. Class-Wide Arbitration Is Fundamentally Different From Traditional Arbitration	7
C. Under *Stolt-Nielsen*, A Standard Agreement To Arbitrate "Any Dispute" Arising From A Contract Is An Insufficient Basis To Impose Class Arbitration	11
D. The Decision Below Is Contrary To The Standards Set Forth In *Stolt-Nielsen*	13
II. THE FAA PROHIBITS CLASS ARBITRATION ABSENT CLEAR AND UNMISTAKABLE AUTHORIZATION BY THE PARTIES	16
A. The Enforceability Of Arbitration Agreements Under The FAA Is A Matter Of Federal Law	17
B. Under The FAA, Clear And Unmistakable Evidence Of Intent Is Required To Authorize Class Arbitration	19

TABLE OF CONTENTS—continued

Page

CONCLUSION 23

TABLE OF AUTHORITIES

CASES Page

Am. Express Co. v. *Italian Colors Rest.*, No. 12-133 (U.S. granted Nov. 9, 2012) 1
AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740 (2011) ..... *passim*
AT&T Techs., Inc. v. *Commc'ns Workers of Am.*, 475 U.S. 643 (1986) ..... *passim*
Dean Witter Reynolds, Inc. v. *Byrd*, 470 U.S. 213 (1985) 5, 17
EEOC v. *Waffle House, Inc.*, 534 U.S. 279 (2002) 7
First Options of Chi., Inc. v. *Kaplan*, 514 U.S. 938 (1995) 4, 17, 18, 21
Green Tree Fin. Corp. v. *Bazzle*, 539 U.S. 444 (2003) 1, 8
Hall Street Assocs., L.L.C. v. *Mattel, Inc.*, 552 U.S. 576 (2008) 9
Hornbeck Offshore (1984) Corp. v. *Coastal Carrier Corp. (In re Complaint of Hornbeck Offshore (1984) Corp.)*, 981 F.2d 752 (5th 1993) 13
Mastrobuono v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) 5
Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) 5, 7, 9
Moses H. Cone Mem'l Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983) 17
Preston v. *Ferrer*, 552 U.S. 346 (2008) 9
Reed v. *Fla. Metro. Univ., Inc.*, 681 F.3d 630 (5th Cir. 2012) 13, 14, 16
Stolt-Nielsen S.A. v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) ..... *passim*
United Steelworkers of Am. v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) 6

TABLE OF AUTHORITIES—continued

Page

Volt Info. Scis., Inc. v. *Bd. of Trs.*, 489 U.S. 468 (1989) ..... *passim*

STATUTES

9 U.S.C. § 2 5
§ 10(a)(4) 7, 10, 17

SCHOLARLY AUTHORITIES

Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 Marq. L. Rev. 1103 (2011) 14

Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 38 (2000)..... 20

OTHER AUTHORITIES

Am. Arbitration Ass'n, *Drafting Dispute Resolution Clauses: A Practical Guide* (Sept. 1, 2007)..... 14

JAMS, *JAMS Clause Workbook* (Jan. 1, 2011), http://www.jamsadr.com/clauses.... 14

Nat'l Chamber Litig. Ctr., *Arbitration and Alternative Dispute Resolution Cases*, http://chamberlitigation.com/cases/issue/arbitration-alternative-dispute-resolution (last visited Jan. 24, 2013) 1

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America 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 regularly submits *amicus* briefs in cases presenting issues under the Federal Arbitration Act (FAA), including in recent cases before this Court. See, *e.g.*, *Am. Express Co.* v. *Italian Colors Restaurant*, No. 12-133 (U.S. granted Nov. 9, 2012); *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 under the FAA, see http://

---

[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 or submission of this brief. Pursuant to Rule 37.3, *amicus curiae* states that all parties have consented to the filing of this brief by filing letters with the Clerk of the Court granting blanket consent to the filing of *amicus* briefs.

chamberlitigation.com/cases/issue/arbitration-alternative-dispute-resolution.

The question presented in this case significantly affects the interests of the Chamber and its members. First, the decision below undermines the ability of parties to structure their arbitration agreements so as to secure a meaningful alternative to litigation. Likewise, if permitted to stand, the decision below would discourage arbitration by creating a substantial risk that agreements to arbitrate may be transformed unilaterally to encompass class arbitration even where the contracting parties have not manifested their intent to do so.

As a result, for the reasons set forth in petitioner's brief and for the reasons set forth below, the Chamber respectfully submits that the decision of the Third Circuit should be reversed.

SUMMARY OF ARGUMENT

I. Unlike litigation, private arbitration under the FAA is a matter of consent, not coercion. Through arbitration, parties are able to avoid costly and time-consuming litigation by submitting to a streamlined process based upon the mutual consent of all parties to the arbitration agreement. Compelling parties to resolve disputes through costly, time-consuming, and high-stakes class-action 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 do so thus conflicts with the FAA's goal of ensuring that arbitration agreements are enforced according to the terms agreed to by the parties.

Moreover, the ability of parties to structure and limit their agreements to arbitrate is a core component of the FAA's policy to promote arbitration. Under the FAA, parties to an arbitration agreement can (1) limit the issues they choose to arbitrate, (2) agree to the rules that will govern arbitration, and, above all, (3) decide specifically "*with whom*" they choose to arbitrate. *Stolt-Nielsen*, 130 S. Ct. at 1774. Given that "class-action arbitration changes the nature of arbitration" in each of these fundamental respects, this Court has expressed "reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration." *Id.* at 1775–76. If, however, the adoption of a standard arbitration clause could justify imposing class arbitration, then "[t]he willingness of parties to enter into agreements that provide for arbitration . . . would be 'drastically reduced.'" *AT&T Techs., Inc.* v. *Commc'ns Workers of Am.*, 475 U.S. 643, 651 (1986). That result would conflict with the FAA's core goal of *promoting* private arbitration by making sure that arbitration contracts are enforced in accordance with the parties' actual agreement.

Applying these principles, this Court already has ruled that "[a]n implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Stolt-Nielsen*, 130 S. Ct. at 1775. That ruling forecloses the arbitrator's decision here, which purported to infer an intent to authorize class arbitration from the parties' adoption of a standard agreement to forgo litigation in favor of mandatory arbitration. Under this Court's decision in *Stolt-Nielsen*, that is an insufficient contractual basis to authorize class arbitration.

II. Alternatively, the Chamber submits that, under the FAA, before class arbitration may be imposed,

there must be "clear and unmistakable" evidence that the agreement extends the arbitrator's jurisdiction to encompass the resolution of disputes involving third parties through class-action arbitration. Cf. *First Options of Chi., Inc.* v. *Kaplan,* 514 U.S. 938, 944–45 (1995) (requiring "clear and unmistakable" showing that parties agreed to have arbitrators "decide the scope of their own powers").

Requiring clear and unmistakable evidence of the parties' mutual consent to adopt class-wide arbitration promotes the underlying goals of the FAA. It reinforces the consensual nature of arbitration by precluding inadvertent imposition of class arbitration where, as here, there are compelling reasons to doubt that the parties would have agreed to authorize class-action arbitration without ever saying so. Further, the requirement of clear and unmistakable evidence reduces the risk that the parties' agreement will be transformed from a standard bilateral arbitration contract to encompass class-wide arbitration in the absence of mutual assent by the parties. Eliminating that risk is essential to promoting resort to private arbitration as an alternative to litigation.

For the reasons set forth in petitioner's brief, as well as those stated below, the agreement to arbitrate in this case does not authorize an arbitrator to exercise jurisdiction over class-wide arbitration, complete with the complexity and procedural trappings inherent in such an undertaking. The decision below upheld an arbitrator's decision to order class arbitration based on nothing more than a standard clause—essential to any mandatory arbitration agreement—requiring the parties to arbitrate rather than litigate all disputes arising from their agreement. That result cannot be reconciled with *Stolt-Nielsen*. *A fortiori*, the

agreement does not reflect evidence of a clear and unmistakable intent to authorize class arbitration.

As a result, the judgment below should be reversed.

ARGUMENT

I. IMPOSITION OF CLASS ARBITRATION ABSENT AFFIRMATIVE CONTRACTUAL AUTHORIZATION VIOLATES THE FAA.

A. Arbitration Is A Matter Of Consent, Not Coercion.

The FAA's "central purpose" is "to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53–54 (1995). Enacted to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate," *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219–20 (1985), the FAA's central provision mandates that arbitration agreements covered by the Act "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2. The FAA thus ensures that both "courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.'" *Stolt-Nielsen*, 130 S. Ct. at 1773–74; *accord Concepcion*, 131 S. Ct. at 1752 ("Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations."); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (the FAA "is at bottom a policy guaranteeing the enforcement of private contractual arrangements").

Unlike litigation, therefore, arbitration is purely "a matter of consent, not coercion." *Volt Info. Scis., Inc.* v. *Bd. of Trs.*, 489 U.S. 468, 479 (1989). In litigation, the plaintiff can unilaterally require the defendant to

submit to the authority of the court, whose power to resolve the dispute derives, not from the parties' agreement, but from a legislative grant of authority. The parties cannot choose which judge will decide the case; nor can they choose the rules of procedure the court will follow. These and other aspects of the proceeding are prescribed by law.

Arbitration is different. Unlike a court, an arbitrator "'is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept.'" *United Steelworkers of Am.* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). Rather, "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Techs.,* 475 U.S. at 648–49; *accord Stolt-Nielsen*, 130 S. Ct. at 1774 ("an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution"). And unlike in litigation, where a party can be haled into court without its consent, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf*, 363 U.S. at 582; *accord Volt*, 489 U.S. at 478 ("the FAA does not require parties to arbitrate when they have not agreed to do so").

Moreover, because arbitration is a creature of contract, "parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. "[T]he FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement*.'" *Id.* at 474–75 (emphasis and alteration in *Volt*) (quoting 9 U.S.C. § 4). As a result, the parties may "specify by contract the rules under which th[e]

arbitration will be conducted." *Id.* at 479. They may also exclude certain claims or parties from the arbitration, for "nothing in the statute authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002); see also *Stolt-Nielsen*, 130 S. Ct. at 1774 ("parties may specify *with whom* they choose to arbitrate their disputes"); *Volt*, 489 U.S. at 478 (parties may "exclud[e] certain claims from the scope of their arbitration agreement").

In short, under the FAA, the parties are free to choose the terms of the arbitration, and neither courts nor arbitrators may "'force the parties to arbitrate in a manner contrary to their agreement.'" *Volt*, 489 U.S. at 472. An arbitrator who does so exceeds his powers under the FAA. See 9 U.S.C. § 10(a)(4) (authorizing judicial vacatur of an arbitral award "where the arbitrators exceeded their powers"); *Stolt-Nielsen*, 130 S. Ct. at 1767 (an arbitrator exceeds his powers when he "strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice") (internal quotation marks and alteration omitted).

B. Class-Wide Arbitration Is Fundamentally Different From Traditional Arbitration.

Class arbitration reflects a stark break from traditional arbitration, whereby a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors*, 473 U.S. at 628. Far from effectuating the parties' agreement, compelling class arbitration absent affirmative authorization fundamentally transforms the bargain the parties struck when they agreed to bilateral arbitration. See *Con-*

cepcion, 131 S. Ct. at 1753 (class arbitration "is not arbitration as envisioned by the FAA"); *Stolt-Nielsen*, 130 S. Ct. at 1776 (class arbitration "fundamental[ly] changes" arbitration). That is so in at least three critical respects.

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 decision makers. Class arbitration, by contrast, concentrates that risk in a single proceeding, forcing the defendant to stake potentially devastating liability on a single arbitrator's decision. 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 limited judicial review of the arbitrator's final 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 de-

fendants to "bet the company with no effective means of review." *Concepcion*, 131 S. Ct. at 1752.[2]

Second, class arbitration greatly increases the cost, duration, and procedural complexity of arbitration. Arbitration is viewed as an attractive alternative to litigation 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 "arbitration's essential virtue of resolving disputes straightaway"); *Mitsubishi Motors*, 473 U.S. at 633 ("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

---

[2] Given these dynamics, class counsel can use 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." *Concepcion*, 131 S. Ct. at 1752. "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.*

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).

Third, it remains unclear whether class arbitration is even capable of yielding a judgment binding on all parties. For example, whether and under what conditions a defense award from an FAA arbitration may be enforced against absent class members is a critical but unsettled question. Even if the arbitrator were to observe 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 (1) their arbitration agreements do not authorize class arbitration or (2) they were not afforded their contractual right to participate in the selection of the arbitrator. 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, the Court in *Concepcion* concluded it was "hard to believe" that defendants would *ever* consent to class arbitration. 131 S. Ct. at 1752. And, it is precisely for these reasons, as discussed next, that the Court in *Stolt-Nielsen* held that class arbitration so fundamentally changes the nature of arbitration that arbitrators may not conclude, "consistent with their limited powers under the FAA," that the parties authorized class arbitration merely by agreeing to submit their disputes to arbitration. 130 S. Ct. at 1776.

C. Under *Stolt-Nielsen*, A Standard Agreement To Arbitrate "Any Dispute" Arising From A Contract Is An Insufficient Basis To Impose Class Arbitration.

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 arbi-

tration without a contractual basis. *Id.* at 1767–76. 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, "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.

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.

Although the Court in *Stolt-Nielsen* did not have occasion to define what contractual bases would be sufficient to authorize class arbitration under the FAA, *id.* at 1776 n.10, the Court's holding necessarily entails at least the following two propositions: (1) when the parties have not reached an agreement as to class arbitration, federal substantive law supplies the default rule—"the parties cannot be compelled to submit their dispute to class arbitration," *id.* at 1776; and (2) 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, *id.* at 1775 (class arbitration "is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate").

D. The Decision Below Is Contrary To The Standards Set Forth In *Stolt-Nielsen*.

The decision below is squarely at odds with *Stolt-Nielsen*'s holding that, under the FAA, arbitrators may not infer an agreement to authorize class arbitration solely from the parties' agreement to arbitrate. The arbitrator in this case inferred an agreement to authorize class arbitration based solely on 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. By ordering arbitration based on this standard arbitration clause, which reflects nothing more than the parties' agreement to arbitrate, the decision below is no less "at war with the foundational FAA principle that arbitration is a matter of consent" than was 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* v. *Fla. Metro. Univ., Inc.*, 681 F.3d 630, 642 (5th Cir. 2012) ("The 'any dispute' clause is a standard provision that may be found, in one form or another, in many arbitration agreements."); *Hornbeck Offshore (1984) Corp.* v. *Coastal Carriers Corp. (In re Complaint of Hornbeck Offshore (1984) Corp.)*, 981 F.2d 752, 755 (5th Cir. 1993) (collecting cases involving such clauses). For example, the American Arbitration Association's guidance on drafting arbitration agree-

ments suggests the following standard language: "Any controversy or claim arising out of or relating to this contract . . . shall be settled by arbitration . . . ." Am. Arbitration Ass'n, *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 . . . ."). Indeed, the arbitration agreement this Court held insufficient to authorize class arbitration in *Stolt-Nielsen* included such a clause. 130 S. Ct. at 1765 (quoting clause requiring "'[a]ny dispute'" arising from 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 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 Christo-

pher 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.'" Pet. App. 46a. But that clause cannot authorize class arbitration, as it simply confirms that the agreement to arbitrate disputes covered by the agreement is mandatory rather than permissive, *i.e.,* that the parties have authorized arbitration as a mechanism to resolve their disputes, *and* have waived their right to litigate those disputes in a civil action in court. Accordingly, together, 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.*

Moreover, here, the arbitrator's conclusion that the arbitration clause "vest[s] in the arbitration process everything that is prohibited from the court process" is contrary to the FAA. Pet. App. 47a. If that were true, then the parties would be entitled to a jury trial and all the other procedural rights attending civil litigation. 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 otherwise 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.

Because the arbitrator's contrary conclusion here has no basis in the parties' actual consent to class arbitration, and rests on nothing more than the parties' agreement to arbitrate, under *Stolt-Nielsen*, the arbitrator exceeded his powers under the FAA when he ordered the parties into class arbitration.

II. THE FAA PROHIBITS CLASS ARBITRATION ABSENT CLEAR AND UNMISTAKABLE AUTHORIZATION BY THE PARTIES.

Separately, the decision below should be set aside because, under the FAA, class arbitration may not be imposed absent clear and unmistakable authorization by the parties. Requiring clear and unmistakable evidence of a contractual intent to authorize class arbitration would effectuate the federal policy favoring arbitration by (1) ensuring that parties' agreements to arbitrate are enforced according to their terms, *Volt*, 489 U.S. at 479, and (2) addressing concerns that an arbitrator "would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration," *AT&T Techs.*, 475 U.S. at 651. Under that standard, the decision below must be set aside because there can be no showing that the parties clearly and unmistakably expressed an intent to authorize class arbitration.

A. The Enforceability Of Arbitration Agreements Under The FAA Is A Matter Of Federal Law.

Section 2 of the FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). "While the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen*, 130 S. Ct. at 1773 (internal citations omitted) (quoting *Volt*, 489 U.S. at 479). The FAA imposes these federal standards to promote private arbitration by "ensuring that private agreements to arbitrate are enforced according to their terms." *Volt*, 489 U.S. at 479.

For example, the FAA establishes that, where specific contracting parties have agreed to arbitrate their disputes, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24–25. This federal rule of law effectuates the FAA's underlying purpose: "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter*, 470 U.S. at 219–20.

Conversely, the FAA promotes arbitration by imposing constraints on arbitrators to prevent them from exceeding the scope of their authority over the parties. *E.g.*, 9 U.S.C. § 10(a)(4). For example, in *First Options* v. *Kaplan*, 514 U.S. 938 (1995), the Court addressed the showing required under the FAA to establish that the parties agreed to assign to the arbi-

trator the threshold issue of arbitrability. *Id.* at 944. The Court explained that although courts "generally" "should apply ordinary state-law principles that govern the formation of contracts," the FAA imposed a different requirement when the issue was whether the parties "agreed that the arbitrators should decide arbitrability." *Id.* Specifically, the Court held that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* (second and third alterations in original) (quoting *AT&T Techs.*, 475 U.S. at 649). Thus, mere contractual "silence or ambiguity" on this threshold issue was insufficient under the FAA to express the parties' intent to authorize the arbitrator to resolve the question of arbitrability. *Id.* at 945.

First Options, in turn, relied heavily on the analysis in *AT&T Technologies*, 475 U.S. at 651. There, the Court explained, in the context of labor arbitration, that the "clear and unmistakable" evidence requirement was necessary because "[t]he willingness of parties to enter into agreements that provide for arbitration of specified disputes would be 'drastically reduced' . . . if . . . [an] arbitrator had the 'power to determine his own jurisdiction.'" *Id.* (quoting Cox, *Reflections on Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509 (1959)). The Court continued that, "[w]ere this the applicable rule, an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration." *Id.*

As shown below, these principles likewise compel the conclusion that class arbitration may not be imposed under the FAA absent clear and unmistakable evidence that the parties agreed to authorize it.

B. Under The FAA, Clear And Unmistakable Evidence Of Intent Is Required To Authorize Class Arbitration.

As noted above, in *Stolt-Nielsen*, the Court had no occasion "to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." 130 S. Ct. at 1776 n.10. Although the Court can resolve this case based on the holding in *Stolt-Nielsen*, the Chamber submits that the Court should establish that clear and unmistakable evidence of intent is necessary to authorize class arbitration. That standard would ensure the FAA's important goals and policies are carried out by courts and arbitrators.

First, as the Court recognized in *Concepcion* and *Stolt-Nielsen*, there are fundamental differences between bilateral arbitration and class arbitration. See *Concepcion*, 131 S. Ct. at 1750–53 (class arbitration sacrifices the informality of bilateral arbitration, requires additional procedural formality, "greatly increases the risk to defendants," and is "poorly suited to the higher stakes of class litigation"); *Stolt-Nielsen*, 130 S. Ct. at 1776 ("changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental"). Such a dramatic shift in the nature of the proceedings makes it unlikely the parties would have authorized class arbitration absent an express statement in the agreement to that effect.

In light of the vastly different nature of class proceedings, the Court has questioned whether a defendant *ever* would agree to class arbitration. *Concepcion*, 131 S. Ct. at 1753 ("We find it hard to believe that defendants would bet the company with no effective means of review . . . ."); *Stolt-Nielsen*, 130 S. Ct. at 1776 ("the differences between bilateral and class-action arbitration are too great for arbitrators to pre-

sume, 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").[3] At the very minimum, there is "reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration." *Stolt-Nielsen*, 130 S. Ct. at 1775–76 (citing *First Options*, 514 U.S. at 945).

Requiring "clear and unmistakable" evidence that the parties agreed to authorize class arbitration would better effectuate the parties' intent because bilateral arbitration is the default expectation given that "[a]rbitration is poorly suited to the higher stakes of class litigation." *Concepcion*, 131 S. Ct. at 1752. Because it is unlikely the parties would have implicitly contemplated a seismic shift to class arbitration, a requirement of clear and unmistakable evidence ensures that the parties' agreement to arbitrate will not inadvertently be transformed in a manner to which they have not assented. See *Stolt-Nielsen*, 130 S. Ct. at 1775–76 (ruling that arbitrator may not infer an "implicit agreement to authorize class-action arbitration").

Second, requiring a showing of "clea[r] and unmistakabl[e]" evidence of intent to authorize class arbitration would address concerns that arbitrators will

---

[3] Indeed, until recently, the issue whether parties authorized class-wide arbitration was purely an academic exercise. 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 *Bazzle*.

not "be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration." *AT&T Techs.*, 475 U.S. at 649, 651; see also *First Options*, 514 U.S. at 945. Such concerns are substantial given data regarding the strong tendency of arbitrators to conclude that they, in fact, have been authorized to conduct lengthy and costly class arbitration proceedings. For example, the American Arbitration Association has reported that arbitrators issued Clause Construction Awards that concluded that arbitration clauses *authorized* class arbitration in 70 percent (95 of 135) of the class arbitrations administered by the AAA between 2003 and 2009. See Br. of American Arbitration Association as *Amicus Curiae* in Support of Neither Party at 22, *Stolt-Nielsen*, 130 S. Ct. 1758 (filed Sept. 4, 2009). Indeed, in only 5 percent of those cases (7 of 135) did an arbitrator conclude that the parties had not authorized class arbitration. *Id.*[4]

Allowing arbitrators to expand "their jurisdiction" to encompass class-wide arbitration on the basis of contractual "silence" or perceived contractual "ambiguity" would " 'drastically reduc[e]' " the "willingness of parties to enter into agreements that provide for arbitration of specified disputes." *AT&T Techs.*, 475 U.S. at 651; cf. *Concepcion*, 131 S. Ct. at 1752 n.8 ("It is not reasonably deniable that requiring consumer disputes to be arbitrated on a classwide basis will have a substantial deterrent effect on incentives to arbitrate."). Allowing arbitrators essentially unfettered discretion to expand the scope of their authority by ordering class arbitration based upon flimsy or

---

[4] The remaining 24 percent (33 of 135) of the AAA Clause Construction Awards were resolved through stipulations by the parties that class arbitration had been authorized. Br. of American Arbitration Association 22.

ambiguous contractual bases thus would contravene "the foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen*, 130 S. Ct. at 1775; see also Pet. Br. 37-38 ("[C]lass arbitration determinations are ones that even the best-intentioned arbitrator may find it difficult to approach with complete impartiality.").

Doing so 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, nothing would prevent arbitrators from undermining companies' existing agreements. These companies would never have imagined that merely 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. Given the limited commercial history of class arbitration, including, until very recently, the lack of any guidance regarding how such an arbitration should proceed, it would be fanciful to believe that the parties consented to class arbitration simply by agreeing to submit all their disputes to mandatory arbitration. See *Concepcion*, 131 S. Ct. at 1748 ("The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'") (alteration in original) (quoting *Volt*, 489 U.S. at 478).

Finally, applying that standard here, the decision below should be set aside because there is no clear and unmistakable evidence of intent by the parties to authorize class-wide arbitration. As explained above, under *Stolt-Nielsen*, "[a]n implicit agreement to authorize class-action arbitration . . . is not a term that

the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." 130 S. Ct. at 1775. It follows, *a fortiori*, that the parties' adoption of a standard arbitration clause does not qualify as "clear and unmistakable" evidence of the parties' intent to authorize class-wide arbitration.

CONCLUSION

For these reasons, and those set forth in petitioner's brief, the decision below should be reversed.

Respectfully submitted,

ROBIN S. CONRAD
SHELDON GILBERT
KATHRYN COMERFORD TODD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
ERIC D. MCARTHUR
AMY L. HANKE
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Amicus Curiae

* Counsel of Record

January 29, 2013