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 FOR PETITIONER

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QUESTION PRESENTED

In *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758, 1775 (2010), this Court made clear that "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 arbitration." In this case, an arbitrator concluded that the parties affirmatively consented to class arbitration on the basis of a contract provision stating: "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." The question presented is:

Whether an arbitrator exceeds his powers under the Federal Arbitration Act by determining that parties affirmatively "*agreed to authorize* class arbitration," *Stolt-Nielsen*, 130 S. Ct. at 1776, based solely on their use of broad contractual language precluding litigation and requiring arbitration of any dispute arising under their contract.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 675 F.3d 215. The opinion of the district court (Pet. App. 19a-30a) is unpublished, but is available at 2011 WL 734933. The opinion of the arbitrator (Pet. App. 31a-53a) is unreported. A prior opinion of the court of appeals (Pet. App. 55a-59a) is unpublished, but is available at 227 F. App'x 135. Prior opinions of the district court (Pet. App. 61a-77a) and the arbitrator (Pet. App. 79a-85a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2012. A petition for rehearing en banc was denied on April 30, 2012. Pet. App. 87a-88a. The petition for a writ of certiorari was filed on July 27, 2012, and granted on December 7, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The provisions of Chapter 1 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16, are set forth as an appendix to this brief.

STATEMENT

1. In 1998, petitioner Oxford Health Plans (through a subsidiary) entered into a professional services contract with respondent John Sutter, a physician. In exchange for preferred access to Oxford's network of members, Dr. Sutter agreed to provide health care services to those members at prescribed reimbursement rates. Pet. App. 92a; JA 11.

Oxford and Sutter also agreed, as part of their business relationship, to arbitrate any dispute that might arise under the parties' contract. Their arbitration clause provides, in its entirety:

> 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. All costs and expenses of the arbitration, including actual attorney's fees, shall be allocated among the parties to this Agreement according

> to the arbitrator's discretion. The arbitrator's award may be confirmed and entered as a final judgment in any court of competent jurisdiction and enforced accordingly. Proceeding to arbitration and obtaining an award thereunder shall be a condition precedent to the bringing or maintaining of any action in any court with respect to any dispute arising under this Agreement, except for the institution of a civil action to maintain the status quo during the pendency of any arbitration proceeding.

Pet. App. 93a-94a. Nothing in the agreement refers to arbitration by or on behalf of a class, and there is no other evidence that the parties ever discussed or contemplated the possibility of class proceedings.

In 2002, a dispute arose between the parties over reimbursement for Dr. Sutter's professional services. Despite the arbitration agreement, Sutter filed a complaint in New Jersey Superior Court, seeking to represent both himself and a putative class of "healthcare providers throughout the State of New Jersey … who render or have rendered medical services to patients who are members of healthcare plans sponsored by defendants[.]" C.A. App. 155-156. The suit alleged breach of contract and other common law and statutory claims under New Jersey law, all relating to whether Oxford had improperly denied, reduced, or delayed reimbursements to Dr. Sutter and other New Jersey physicians who had contracts with Oxford. Pet. App. 2a; *see also* C.A. App. 155-156. Oxford moved to compel arbitration under the terms of its agreement with Sutter, while Sutter moved to certify a plaintiff class. The state court granted Oxford's motion, leaving all other issues to the arbitrator. Pet. App. 2a-3a; JA 25-26.

2. a. Before the arbitrator, the parties disputed whether their contract authorized class arbitration. The arbitrator deferred determination of that issue pending this Court's decision in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), which presented the question whether the FAA permitted enforcement of a state-law rule that allowed class arbitration if the parties' contract was silent on that issue, *id.* at 447. The arbitrator observed that, at the time, "[i]t was widely supposed that the Supreme Court would rule, as some lower Federal Courts had, that the Federal Arbitration Act does not allow class actions in arbitration unless the parties have specifically agreed to class action arbitration." Pet. App. 45a.

In the end, *Bazzle* did not address that question. Instead, a plurality concluded that the arbitrator in the case should have decided, in the first instance, whether the agreement was truly "silent" on the question of class arbitration. *See* 539 U.S. at 447. After that decision, the parties in this matter agreed that the proper next step would likewise be for the arbitrator to consider, in the first instance, whether their agreement authorized class arbitration. Pet. App. 45a.

In an order dated September 23, 2003, the arbitrator decided that the agreement authorized class proceedings. Pet. App. 43a-53a. He acknowledged that the text did not expressly address the issue, *id.* at 45a-46a, and he did not point to any other evidence that the parties ever discussed or came to any meeting of the minds about it, *see id.* at 45a-52a. Nonetheless, he concluded that "on its face, the arbitration clause … expresses the parties' intent that class action arbitration can be maintained." *Id.* at 48a.

The arbitrator reasoned that this Court's decision in *Bazzle* had "firmly rejected" the view that there was any "blanket prohibition on arbitration class actions without specific authorization in the arbitration clause." Pet. App. 45a. Starting from that premise, he expressed the view that the clause here was "much broader even than the usual broad arbitration clause," prohibiting "any conceivable court action" and instead sending "all such disputes" to arbitration. *Id.* at 47a. He concluded that the "intent of the clause, read as a whole" was "to vest in the arbitration process everything that is prohibited from the court process." *Id.* Because "[a] class action is plainly one of the possible forms of civil action that could be brought in a court," the clause "must have been intended to authorize class actions in arbitration." *Id.* at 48a. "Accordingly, … on its face, the arbitration clause in the Agreement expresses the parties' intent that class action arbitration can be maintained." *Id.*

Looking beyond the arbitration clause itself, the arbitrator also reasoned that if Dr. Sutter had agreed to arbitrate any dispute under his contract with Oxford, but the arbitration clause did not authorize class proceedings, then Dr. Sutter would not be able to pursue a class action in any forum. Pet. App. 48a. In the arbitrator's view, "that reading [could not] be inferred in the absence of a clear expression that such a bizarre result was intended." *Id.* In other words, "to avoid a finding" that the parties intended to authorize class actions in arbitration, "it would be necessary for there to be an express exception for class actions in the prohibition" on court actions—*i.e.*, the clause would have to permit class actions in court. *Id.* Similarly, the arbitrator "note[d]" that because "Oxford successfully invoked the arbitration clause to prohibit a class action in court,

it ought to be [precluded] by judicial estoppel from arguing in th[e] arbitration" that the clause did not allow for class proceedings. *Id.*

b. The arbitrator's ruling on clause construction left questions of class certification for a later date. Pet. App. 52a. After further proceedings, the arbitrator certified a plaintiff class in March, 2005. *Id.* at 79a-84a; JA 38-55. Sutter asserts that the class includes as many as 20,000 New Jersey physicians who, over an eight-year period, signed provider agreements with Oxford containing arbitration clauses with language the same as "or similar to" that in Dr. Sutter's contract. Pet. App. 82a.

In accordance with the AAA's Supplementary Rules for Class Arbitrations—issued shortly after the arbitrator's 2003 clause construction ruling—the arbitrator's class certification ruling was set out in a partial final "class determination" award, which attached and incorporated the arbitrator's original "clause construction" award. *See* Pet. App. 79a, 85a. Oxford asked the United States District Court for the District of New Jersey to vacate both rulings, as contemplated by Rule 5 of the AAA Supplementary Rules. *See id.* at 97a-98a. The court denied the motion to vacate. *Id.* at 61a. Oxford appealed the class certification ruling (but not the underlying clause construction ruling), and the court of appeals affirmed. *Id.* at 55a-59a. The arbitration has since proceeded on a class basis. Oxford denies both Sutter's allegations that Oxford breached its contract with him and his suggestion that purportedly common

practices improperly reduced payments to thousands of members of the physician class.[1]

3. In April 2010, this Court decided *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). There, the parties to a commercial contract contested whether their broad arbitration clause should be construed to permit class arbitration, while "stipulat[ing]" that the clause was "silent" on the issue—meaning not just that there was no express reference to class arbitration, but that the parties had never reached any agreement on the question, one way or the other. *See id.* at 1766, 1768-1770 & nn.6-7. An arbitration panel concluded that class proceedings were permissible under such a silent agreement, because the record "did not 'establish that the parties … intended to *preclude* class arbitration.'" *Id.* at 1775 (quoting arbitration award). This Court rejected that reasoning as "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Id.* Instead, the Court held, the FAA rule is exactly the reverse: "[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.* Furthermore, such an agreement "is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Id.* Because the parties had conceded the absence of any actual agreement, neither party could be "compelled to submit the[] dispute to class arbitration." *Id.* at 1776.

Oxford asked the arbitrator here to reconsider his clause construction award in light of *Stolt-Nielsen*. Pet.

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[1] Before certiorari was granted, a final award was not expected until sometime in 2014. *See* Pet. 6. & n.3. Following the grant of review, proceedings in the arbitration were stayed.

App. 4a. It contended that here, as in *Stolt-Nielsen*, the parties had agreed to arbitrate all disputes but had not expressly or implicitly agreed to permit class arbitration. In an order dated July 6, 2010, again attaching and incorporating the initial clause construction award, the arbitrator considered *Stolt-Nielsen* but adhered to his original decision. *Id.* at 31a-32a. In his view, "the crucial fact in *Stolt-Nielsen* was the parties' stipulation that the arbitration clause was silent with respect to class arbitration." *Id.* at 37a. Because there had been "no meeting of the minds on that point and hence no agreement," there was "nothing of the parties' intent for the arbitrators to discover and enforce." *Id.* This case, the arbitrator maintained, "could not be more different," because he had engaged in "a vital exercise to determine what the parties intended by the[ir arbitration] clause regarding class arbitration." *Id.* at 38a.

Quoting the language of the clause—"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"—the arbitrator concluded that a class action could proceed in arbitration because "a class action is a form of civil action." Pet. App. 38a-39a. Because the clause prohibits bringing a class action in court, while directing all "disputes" under the agreement to arbitration, he reasoned that those "disputes" must include "the entire universe of actions that could possibly have been brought in any court, necessarily including class actions." *Id.* at 41a. He concluded that "the parties' intent to have class arbitration [was] clear," *id.* at 42a, because "the text of the clause itself authorizes, indeed requires, class-action arbitration," *id.* at 39a.

The arbitrator further sought to distinguish *Stolt-Nielsen* on the ground that the arbitrators there ex-

ceeded their powers by construing an arbitration clause to permit class proceedings "essentially for reasons of public policy." Pet. App. 35a; *see Stolt-Nielsen*, 130 S. Ct. at 1768-1770. He maintained that in this case he was always "concerned solely with the parties' intent as evidenced by the words of the arbitration clause itself." Pet. App. 35a.

The arbitrator retreated from his previous reliance (Pet. App. 48a) on the lack of any specific *exclusion* of class arbitration, conceding that such reasoning "would run afoul of Stolt-Nielsen" (*id.* at 39a). He now suggested that "[t]he absence of such an exclusion … merely corroborated what was already obvious from the language of the clause itself." *Id.* He continued, however, to emphasize that if class arbitration were not available, Dr. Sutter would not be able to maintain a class action at all. *See id.* at 41a-42a. He remained unwilling to accept that result, which he had previously called "bizarre" (*id.* at 48a). *See, e.g.*, *id.* at 41a ("[I]f the clause cannot permit Dr. Sutter's court class action to go to arbitration, then Dr. Sutter's original class action must be outside of the arbitration agreement altogether[,] … and the court class action should be reinstated."). Similarly, the arbitrator repeated his conclusion that because Oxford had "moved in court successfully to invoke the arbitration clause" in its agreement with Dr. Sutter, it was now "judicially estopped from claiming that this case cannot proceed in arbitration as a class action." *Id.* at 40a.

4. Oxford asked the district court to vacate the arbitrator's reconsidered clause construction award under Section 10 of the FAA, 9 U.S.C. § 10. In February 2011, the court denied Oxford's motion and granted Sutter's cross-motion to confirm the award. Pet. App. 19a-20a. In reaching that conclusion, the court stressed

the "highly deferential standard of review under the FAA." *Id.* at 27a. Noting that this Court in *Stolt-Nielsen* "expressly declined 'to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration,'" the court reasoned that the arbitrator had "concluded that the contractual basis between these parties, i.e. their arbitration agreement, clearly and unambiguously expressed their intent to authorize class action arbitration[.]" *Id.* at 28a. Thus, the award would be confirmed because the arbitrator's decision "suggests that [he] performed the appropriate function of an arbitrator under the FAA after *Stolt-Nielsen*; [he] examined the parties' intent, and gave effect to the arbitration agreement." *Id.* at 28a-29a.

5. The court of appeals affirmed. Pet. App. 1a-18a. It acknowledged that, under *Stolt-Nielsen*, "[a]n arbitrator may exceed his powers by ordering class arbitration … unless there is a contractual basis for concluding that the parties agreed to that procedure." *Id.* at 8a; *see also id.* at 8a-12a. But it rejected Oxford's contention that the arbitration clause at issue in this case is just as "silent" as the clause at issue in *Stolt-Nielsen*. *Id.* at 13a. The court reasoned that in this case, unlike in *Stolt-Nielsen*, "[n]o stipulation between Oxford and Sutter is conclusive of the parties' intent." *Id.* The court then deferred to the arbitrator's decision to permit class proceedings, on the ground that the arbitrator "articulate[d] a contractual basis for his decision," and Oxford could not point to a "conclusive statement of the parties' intent" to the contrary. *Id.* at 14a-15a.

In reaching that conclusion, the court summarized the arbitrator's textual analysis:

> He reasoned that the clause's first phrase, "No civil action concerning any dispute arising under this Agreement shall be instituted before any court," is broad enough to include class actions. Thus, its second phrase, "and all such disputes shall be submitted to final and binding arbitration …," sends all conceivable civil actions—including class actions—to arbitration. In other words, the phrase "no civil action … shall be instituted in any court" meant that a class action may not be instituted in a court of law. "All such disputes" must go to arbitration.

Pet. App. 14a.

Without endorsing, or even discussing, the soundness of this reasoning, the court accepted it as sufficient to establish contractual "intent" for purposes of *Stolt-Nielsen*. Pet. App. 14a-17a. The court rejected Oxford's arguments that the parties here had never reached any actual agreement as to class arbitration and "that the arbitrator improperly inferred the parties' intent to authorize class arbitration from the breadth of the parties' arbitration agreement and from its failure to preclude class arbitration." *Id.* at 16a. These, the court reasoned, were "simply dressed-up arguments that the arbitrator interpreted [the] agreement erroneously." *Id.* at 15a.

In sum, the court of appeals refused to provide any meaningful independent review of the "contractual basis" asserted by the arbitrator for finding that the parties "*agreed to authorize* class arbitration." 130 S. Ct. at 1776 & n.10. It was satisfied by the fact that the arbitrator had at least "articulate[d] a contractual basis

for his decision" that the court considered not "totally irrational." Pet. App. 14a, 17a. In the court's view, "[n]othing more [was] required under § 10(a)(4) of the Federal Arbitration Act." *Id.* at 17a.

SUMMARY OF ARGUMENT

In *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), and *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011), this Court has made clear 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." *Stolt-Nielsen*, 130 S. Ct. at 1775. The Court has further held that consent to class arbitration may not be inferred from the parties' basic agreement to arbitrate or from the fact that an agreement does not *preclude* class proceedings. *Id.*

Here, the core of the parties' arbitration agreement provides only 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. This language does not address the possibility of class proceedings in any way, and there is no other evidence to suggest that the parties ever discussed or contemplated, let alone agreed to authorize, class arbitration. Under *Stolt-Nielsen*, those simple observations should be enough to resolve most cases, including this one.

The arbitrator here purported to rest his imposition of class proceedings on a textual analysis of the parties' agreement, but his reasoning is unsustainable under any standard of review. The wording of the arbitration clause is wholly unremarkable, banning litigation of disputes in court and instead referring them to

arbitration. What it sends to arbitration is "disputes," not "civil actions." In any event, a class action is not a special form of "civil action" but a procedural device, and *Stolt-Nielsen* specifically holds that parties do not authorize the use of class procedures simply by agreeing to arbitrate their disputes. 130 S. Ct. at 1775-1776. If anything, the text of the parties' agreement is inconsistent with any intent to authorize class procedures; but the Court need not address that question, because there is no plausible argument that the text provides any affirmative "contractual basis for concluding that the part[ies] *agreed*" to class arbitration. *Id.* at 1775.

Stolt-Nielsen arguably leaves open the possibility that affirmative agreement to class arbitration might sometimes be shown by evidence beyond the text of an arbitration clause. Here, however, there is no extrinsic evidence of any intent to authorize class arbitration—no parol evidence concerning the parties' negotiations, no course of conduct or evidence of industry practice, no clear state default rule against which the parties might be shown to have contracted. And after *Stolt-Nielsen*, there is no room in this context for extra-textual analysis that, while framed in contractual terms, in fact is based on an adjudicator's (or even local law's) view of a desirable policy result. On the record here, such a policy preference provides the most apparent explanation for the arbitrator's decision. *Stolt-Nielsen* makes quite clear, however, that an arbitrator "exceed[s his] powers," 9 U.S.C. § 10(a)(4), if he seeks to impose class arbitration on any such basis.

In refusing to vacate the arbitrator's decision, the court of appeals did not consider whether his contractual reasoning was correct, or even plausible. It concluded that, on FAA review, it was enough that the arbitrator had "articulated" a "contractual basis" for his

imposition of class arbitration. As this Court observed in *Stolt-Nielsen*, however, "merely saying something is so does not make it so." 130 S. Ct. at 1769 n.7. Accepting any "contractual basis" that an arbitrator can "articulate" would leave parties and courts powerless to enforce *Stolt-Nielsen*'s holding that an arbitrator lacks the power to conduct a class arbitration absent the parties' affirmative consent.

While arbitrators are accorded wide authority to adjudicate questions that are properly submitted to them, courts play a vital role in ensuring that arbitrators stay within the scope of their mandates. The promise of this independent judicial check on *ultra vires* action by arbitrators is essential to provide contracting parties with the confidence to entrust their disputes to arbitration in the first place—a fundamental goal of the FAA. *Stolt-Nielsen* makes clear that the judicial role in policing the limits on arbitral power extends not only to what issues parties have agreed to arbitrate, but to *with whom*—including in particular whether they have authorized class arbitration. Indeed, judicial oversight is especially critical in this context, both because of the fundamental differences this Court has recognized between ordinary bilateral arbitration and class proceedings and because policy views or financial interests may make it difficult for arbitrators to remain wholly impartial in deciding the class issue.

In short, courts must stand ready to vacate arbitral awards that would impose class arbitration without a proper contractual basis—even given the normally "high hurdle" of FAA review. *See Stolt-Nielsen*, 130 S. Ct. at 1767. Here, the arbitrator's contractual analysis is so plainly inadequate that it cannot be sustained under any meaningful standard of review.

ARGUMENT

I. THE FEDERAL ARBITRATION ACT PERMITS CLASS ARBITRATION ONLY IF THE PARTIES HAVE AFFIRMATIVELY AGREED TO AUTHORIZE IT

The arbitrator here required Oxford to submit to class arbitration proceedings based on nothing more than a broadly worded arbitration clause requiring arbitration (and precluding litigation) of any dispute arising under the parties' contract. But this Court has twice held that a party may not be forced into class arbitration without its affirmative consent—and that class proceedings are so inconsistent with the ordinary understanding of arbitration that consent to use them may not be inferred from the agreement to arbitrate itself.

In *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758, 1775 (2010), 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." And in *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752-1753 (2011), the Court reaffirmed that, in light of the fundamental differences between class arbitration and "arbitration as envisioned by the FAA," a party to an arbitration agreement "may not be required" to submit to class proceedings against its will. These basic principles control the outcome of any case, like this one, in which neither the text of the parties' agreement nor any extrinsic evidence provides a basis for concluding that the parties ever agreed to class arbitration.

a. *Stolt-Nielsen* considered "whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the [FAA],"

130 S. Ct. at 1764—a question left open by this Court's plurality decision in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003). *Stolt-Nielsen* involved an arbitration clause requiring "[a]ny dispute arising from the making, performance or termination" of a commercial contract to be resolved by arbitration. 130 S. Ct. at 1765. When a dispute arose, the claimant filed a putative class action in federal court. *Id.* After a series of court rulings, the dispute entered arbitration. *Id.* In a supplemental agreement, the parties agreed that the arbitration panel would decide whether their original agreement authorized class arbitration. *Id.*

Before the panel, the parties actively contested whether their broad arbitration clause should be construed to permit class arbitration. In doing so, however, they "stipulated" that the clause itself was "silent" on the issue. *See* 130 S. Ct. at 1766. According to plaintiff's counsel, "silence" meant more than that the clause made no "express reference" to the availability of class procedures. *Id.* Rather, the "stipulation" meant that "neither the language of the contract nor any other evidence established that the parties had reached any agreement on the issue of class arbitration[.]" *Id.* at 1770; *see also id.* at 1766, 1768-1770 & nn.6-7. The question for the arbitration panel was therefore whether class proceedings were available in the absence of any such agreement.

The panel concluded that the clause should be interpreted to permit class proceedings. It reasoned, for example, that the evidence did not prove an intent to *preclude* class arbitration, and that the defendants' position "would leave 'no basis for a class action'" at all. 130 S. Ct. at 1766, 1769 n.7; *compare* Pet. App. 48a. In addition, the panel pointed to a number of post-*Bazzle*

arbitration decisions that had allowed class treatment under a "wide variety of clauses." 130 S. Ct. at 1766.

This Court held that the arbitrators' ruling "exceeded their powers" within the meaning of the judicial review provision of the FAA, 9 U.S.C. § 10(a)(4). The Court fully recognized the "high hurdle" faced by a party seeking vacatur of an arbitrator's decision, 130 S. Ct. at 1767, and that "the interpretation of an arbitration agreement is generally a matter of state law," *id.* at 1773. The Court also made clear, however, that "the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" *Id.* As a consequence, "parties are 'generally free to structure their arbitration agreements as they see fit,'" including "to limit the issues arbitrated," to choose the "rules under which an arbitration will proceed," and in particular to "specify *with whom* they choose to arbitrate their disputes." *Id.* at 1774. The duty of courts and arbitrators in such cases is simple: "to give effect to the intent of the parties." *Id.* at 1775.

From these principles, the Court explained, "it follows 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." 130 S. Ct. at 1775; *see also id.* at 1776 ("[C]onsistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties *agreed to authorize* class arbitration."). In particular, the Court rejected the arbitrators' reliance on an absence of evidence to "'establish that the parties … intended to *preclude* class arbitration.'" *Id.* at 1775 (quoting arbitration award). To the contrary, the Court cautioned, the FAA required an affirmative showing of

consent to class proceedings, based on more than just the existence of the agreement to arbitrate itself:

> An 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. This is so because 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. at 1775.

The Court explained that imposing class proceedings on non-consenting parties violates the FAA by disrupting the parties' basic agreement. Traditional arbitration embodies a trade-off in which "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." 130 S. Ct. at 1775. In contrast, "the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration." *Id.* at 1775-1776. For example, an arbitrator may be called upon to resolve not just a single dispute between contracting parties, but "many disputes between hundreds or perhaps even thousands of parties." *Id.* at 1776. His award must purport to "adjudicate[] the rights of absent parties." *Id.* At the same time, defendants lose the protection of full appellate review, on the premise that they agreed to accept the generally "much more limited" scope of judicial review of arbitration awards on the merits. *Id.* As the Court concluded:

"We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.*

In *Stolt-Nielsen*, the parties had stipulated that they never reached any actual agreement with respect to class arbitration. *E.g.*, 130 S. Ct. at 1766, 1770, 1776. The arbitration panel's decision was therefore "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Id.* at 1775. Indeed, there could be only "one possible outcome." *Id.* at 1770. "[W]here the parties stipulated that there was 'no agreement' on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration." *Id.* at 1776. And because both parties had acknowledged that their contract was silent on the issue, the Court had "no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." *Id.* at 1776 n.10.

b. The Court reinforced these points in *Concepcion*, which held that "the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." 131 S. Ct. at 1744. Specifically, the FAA preempted a state-law rule classifying certain express waivers of any right to class arbitration as unconscionable and, therefore, unenforceable. *See id.* at 1746. As the Court explained, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748.

The state rule at issue made class arbitration "manufactured … rather than consensual." 131 S. Ct. at 1751. Invoking *Stolt-Nielsen*, the Court held that the change from individual to class proceedings was too "fundamental" to permit that result. *Id.* at 1750.

> Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.

Id. In fact, class arbitration requires parties to forgo the "principal advantage" of arbitration, its informality. *Id.* at 1751. Entertaining class claims "makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.*

In addition, the Court observed that it remains uncertain whether class arbitration can either protect the rights of absent class members or bind them in matters resolved in favor of the defendant. 131 S. Ct. at 1751. At the same time, class arbitration "greatly increases risks to defendants," while essentially eliminating appellate review of errors of fact or law. *Id.* at 1752. In light of these limitations, the Court expressed frank skepticism that any defendant would ever agree to "bet the company with no effective means of review." *Id.* And in the absence of such agreement, class arbitration "may not be *required* by state law." *Id.* at 1753. As the Court concluded, class arbitration simply "is not arbi-

tration as envisioned by the FAA[.]" *Id.* (emphasis added).

In sum, this Court has twice made clear that class arbitration may not be imposed absent the affirmative agreement of all parties—and that such agreement may not be inferred from the agreement to arbitrate itself, or imposed on the parties by rules of law that conflict with the commands of the FAA. Any class arbitration must rest, instead, on a distinct and sound "contractual basis." *Stolt-Nielsen*, 130 S. Ct. at 1775. If it does not, it violates the fundamental FAA precept that "arbitration 'is a matter of consent, not coercion.'" *Id.* at 1773.

II. THERE IS NO CONTRACTUAL BASIS FOR CLASS ARBITRATION IN THIS CASE

In this case, there is no plausible argument that the parties ever affirmatively agreed to permit class arbitration. Nothing in the text of the parties' arbitration clause refers in any way to class proceedings, and no extrinsic evidence suggests any non-textual basis for finding an agreement to authorize class arbitration. The arbitrator's contrary ruling relies on nothing more than the existence of a broad agreement to arbitrate that bars litigation and includes no express *prohibition* on class arbitration. Under *Stolt-Nielsen*, that is plainly not enough.

A. There Is No Textual Basis For Class Arbitration

The arbitration clause here states 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[.]

Pet. App. 93a. On its face, this language does nothing more or less than one would expect of a typical broad arbitration agreement. It (1) prohibits Oxford and Sutter from litigating any dispute arising under their agreement in the courts, instead (2) sending all such disputes to arbitration. In light of *Stolt-Nielsen*'s clear holding that "[a]n implicit agreement to authorize class 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, there should be no question that the text here provides no basis for imposing class arbitration.[2]

The arbitrator in this case nonetheless asserted that "the text of the [arbitration] clause itself authorizes, indeed requires, class-action arbitration." Pet. App. 39a. That assertion cannot withstand even minimal scrutiny.

1. The arbitrator first suggested that there is something "unique" about the breadth of the clause here that justifies interpreting it to allow class arbitration. Pet. App. 47a. But clauses requiring arbitration of "all disputes" or "any dispute" are commonplace. When parties to a contract seek to reduce the risk of future litigation burdens by agreeing to arbitrate disputes, they often seek to extend the benefits of that agreement broadly to "any" or "all" potential disputes. An "any dispute" clause thus reflects "standard" wording that is found, "in one form or another, in many arbi-

[2] As the dissent in *Stolt-Nielsen* observed, "[t]he breadth of [an] arbitration clause, and the absence of any provision waiving or banning class proceedings," is not enough to permit arbitrators to order class arbitration. 130 S. Ct. at 1782 (Ginsburg, J., dissenting). Rather, *Stolt-Nielsen* "demands contractual language one can read as affirmatively authorizing class arbitration." *Id.*

tration agreements," and "[o]n its face … merely reflects an agreement between the parties to arbitrate their disputes." *Reed* v. *Florida Metro. Univ., Inc.*, 681 F.3d 630, 642 (5th Cir. 2012) (citing sources). Form arbitration clauses drafted by leading arbitration organizations are of similar breadth. *See id.* (citing forms suggested by the AAA and JAMS). Indeed, the arbitration clause at issue in *Stolt-Nielsen* itself was an "any dispute" clause. *See* 130 S. Ct. at 1765.

2. The arbitrator also remarked on the two-part structure of the clause at issue here—barring civil actions in court with the first breath, and sending any dispute to arbitration with the second. *E.g.*, Pet. App. 47a-48a. But that structure is not remarkable, let alone "unique" (*id.* at 47a). To date, three federal appellate courts have considered the question presented in this case, and the clauses at issue in all three cases share the same basic two-part structure. In addition to the decision below, the Second Circuit in *Jock* v. *Sterling Jewelers Inc.* considered a clause in which the parties agreed to arbitrate "'any dispute, claim, or controversy … which could have otherwise been brought before an appropriate government or administrative agency or in a[n] appropriate court,'" with the employee expressly "'waiving [her] right to commence any court action.'" 646 F.3d 114, 116-117 (2d Cir. 2011), *cert denied*, 132 S. Ct. 1742 (2012) (quoting contract). Likewise, in *Reed* the clause provided that "'[n]either [party] shall file or maintain any lawsuit in any court against the other,'" while also specifying that "'any dispute … no matter how described, pleaded or styled, shall be resolved by binding arbitration.'" 681 F.3d at 632-633 (quoting contract).

By including an express prohibition on litigation, in addition to an "any disputes" arbitration provision, par-

ties avoid any possible lack of clarity and ensure that the clause will be enforceable. For example, under New Jersey law at the time that Oxford and Sutter signed their agreement, an arbitration clause stating only that any dispute between the parties was to be arbitrated could have been held to provide insufficient notice that the agreement to arbitrate would override a general right to invoke judicial proceedings, especially as to statutory claims.[3] The two-part structure simply makes especially clear what the parties are waiving (court actions) and what they are permitting (arbitration). Nothing more.

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[3] *See, e.g.*, *Alamo Rent A Car, Inc.* v. *Galarza*, 703 A.2d 961, 966 (N.J. Super. Ct. App. Div. 1997) ("The 'any dispute' language is the very least an employer needs to utilize in order to guarantee arbitration of all disputes. The better course would be the use of language reflecting that the employee, in fact, knows that other options such as … judicial remedies exist; [and] that the employee also knows that by signing the contract, those remedies are forever precluded[.]"); *Garfinkel* v. *Morristown Obstetrics & Gynecology Assocs., P.A.*, 773 A.2d 665, 672 (N.J. 2001); *Marchak* v. *Claridge Commons, Inc.*, 633 A.2d 531, 535 (N.J. 1993) ("A clause depriving a citizen of access to the courts should clearly state its purpose."); *see also Trumbull* v. *Century Mktg. Corp.*, 12 F. Supp. 2d 683, 687 (N.D. Ohio 1998) ("The language of the arbitration clause says nothing about arbitration of statutory claims …, or about the significance of the right to a judicial forum … . [I]t cannot be concluded that there was a knowing waiver of the right to a judicial forum[.]"); Cal. Civ. Proc. Code § 1295(a) (certain medical service contracts must contain provision stating, "[i]t is understood that any dispute as to medical malpractice[] … will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process"); Volin, *Recent Legal Developments in the Arbitration of Employment Claims*, 52 Disp. Resol. J. 16, 21 (1997) (counseling employers to avoid "arguments" over enforceability of arbitration clauses by "expressly stating … that the parties are waiving their right to a judge or jury trial").

3. The arbitrator also focused on language barring any "civil action concerning any dispute … before any court" and referring "all such disputes" to arbitration. *E.g.*, Pet. App. 48a. According to the arbitrator, that language "must have been intended to authorize class actions in arbitration," because "[a] class action is plainly one of the possible forms of civil action." *Id.*; *see also id.* ("[A]ll that is prohibited by the first part of the clause is vested in arbitration by its second part[.]"); *id.* at 39a ("'No civil action' simply cannot, as a matter of English, be read to exclude any particular civil proceeding, including a class action, from its coverage.").

But the arbitration clause does not send all "civil actions" to arbitration. It prohibits all civil actions "concerning *any dispute*" arising under the parties' contract, and sends "all such *disputes*" to arbitration. Pet. App. 93a (emphasis added). This makes sense. A "civil action" is, by definition, a "judicial proceeding." *Black's Law Dictionary* 31 (8th ed. 2004); *cf. BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 91 (2006) ("action" is "ordinarily used in connection with judicial, not administrative, proceedings"); Fed. R. Civ. P. 2. Arbitration is an alternative, streamlined, non-judicial method of resolving disputes. The parties' agreement has one natural reading: Any dispute arising under the agreement shall be submitted to arbitration, rather than being made the basis of a civil action in court.

Moreover, a class action is not a special "form[] of civil action" (Pet. App. 48a) or a "particular civil proceeding" (*id.* at 39a). It is a procedural device that is sometimes available to resolve multiple individual disputes at the same time. *See generally* Fed. R. Civ. P. 23; *Shady Grove Orthopedic Assocs. P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1439 (2010) (plurality opinion). It would be implausible to contend that the parties in-

tended to preserve in arbitration all procedures potentially associated with civil actions in court. *Cf. Concepcion*, 131 S. Ct. at 1752-1753 ("Parties *could* agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation. … But what the parties in the aforementioned examples would have agreed to is not arbitration as envisioned by the FAA[.]"). And while arbitrators have discretion to determine many of the procedures to be used in the conduct of an arbitration, *Stolt-Nielsen* squarely holds that class proceedings are not the type of procedure an arbitrator is authorized to impose without the specific authorization of the parties. 130 S. Ct. at 1775.

4. Finally, the arbitrator divined that the parties must have intended to authorize class arbitration because their agreement so completely prohibits suits in court. Pet. App. 47a ("[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."). But it is irrational to conclude that parties who comprehensively barred court litigation in favor of arbitration "must have … intended" to commit themselves to the possibility of protracted, uncertain, costly, and high-stakes class proceedings. *Id.* at 48a; *see Reed*, 681 F.3d at 643 ("[T]he central purpose of the arbitration agreement is to *avoid* … provisions [such as a state statute permitting certain class actions], not to incorporate them into the arbitration agreement."); *cf. Concepcion*, 131 S. Ct. at 1748 ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbi-

tration and thus creates a scheme inconsistent with the FAA.").

5. If anything, the text of the parties' agreement is inconsistent with any intent to authorize class arbitration. For example, the arbitration clause refers to disputes arising under "this agreement"—*i.e.*, the agreement between Sutter and Oxford. Pet. App. 93a. It sends *those* disputes to arbitration, before a single arbitrator selected by the parties (in accordance with the AAA rules) to hear their particular dispute. *Id.* Here, Sutter wants the single arbitrator appointed to hear his dispute with Oxford to hear and resolve, at the same time, allegedly similar disputes involving as many as 20,000 other parties, each arising under its own separate professional services agreement. That is a fundamentally different proposition. *Cf. Bazzle*, 539 U.S. at 458-459 (Rehnquist, C.J., O'Connor, and Kennedy, JJ., dissenting) (provisions calling for parties to appoint one arbitrator to resolve "'disputes … arising from … *this* contract'" made "quite clear that petitioner must select, and each buyer must agree to, a particular arbitrator for disputes between petitioner and that specific buyer").[4]

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[4] Similarly, the agreement gives the arbitrator full discretion to allocate all costs of an arbitration, including attorneys' fees, among the parties. Pet. App. 93a. That provision makes sense in the context of an ordinary, bilateral arbitration of inherently limited scope, but would be quite surprising if its effect were to impose on either party potential liability for the arbitrator's fees, other costs, and attorneys' fees in a multi-year, multi-issue class arbitration involving thousands of parties. *Cf. Bazzle*, 539 U.S. at 459 (dissenting opinion) (arbitration defendant might choose different arbitrators for proceedings with different members of proposed class, "to avoid concentrating all of the risk of substantial damages awards in the hands of a single arbitrator"). The agreement also includes specific pre-arbitration grievance procedures

This Court need not address, however, whether the text of the parties' agreement should have been construed to exclude any possibility of class proceedings. After *Stolt-Nielsen*, the controlling point is that there is no plausible converse argument that the text reveals an *affirmative agreement* to *authorize* class arbitration. At most, the parties' arbitration clause is "silent" on the question in the *Stolt-Nielsen* sense. The clause does no more than require arbitration, rather than litigation, of "all … disputes," Pet. App. 93a; and *Stolt-Nielsen* could not have been clearer that "it cannot be presumed the parties consented to [class arbitration] by simply agreeing to submit their disputes to an arbitrator." 130 S. Ct. at 1775. The text here cannot provide what *Stolt-Nielsen* demands: a specific "contractual basis for concluding that [a] party *agreed*" to class arbitration. *Id.*

B. There Is No Non-Textual Basis For Finding Consent To Class Proceedings

For most cases (including this one), the fact that the text of an arbitration clause does not address class arbitration will provide a straightforward answer to the question whether there is any "contractual basis" for ordering class proceedings. Arguably, *Stolt-Nielsen* leaves open the possibility that, in the absence of a stipulation that the parties never reached any meeting of the minds on the question, there may be circumstances in which a court or arbitrator may properly look beyond the text.[5] But even in those circumstances,

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that clearly contemplate only bilateral disputes. *See* JA 20; Pet. App. 50a-52a.

[5] *See* 130 S. Ct. at 1770 (stipulation left case in posture in which "neither the language of the contract *nor any other evidence* established that the parties had reached any agreement" (empha-

the question would still be whether "the *parties* … *reached any agreement* on the question of class arbitration." 130 S. Ct. at 1770 (emphasis added). The record in this case reveals no extra-textual basis for finding any such agreement.

1. One can imagine, for example, circumstances in which extrinsic evidence might show that the parties actually "reached an[] agreement on the question of class arbitration," 130 S. Ct. at 1770, although they failed to express it clearly in their written contract. There might be evidence of discussions that took place at the time of contracting, or of an accepted practice of using class arbitration in a particular field. But the arbitrator here never pointed to any such extrinsic evidence, and there is none that would support his decision. [6]

It is also possible that the law governing a particular contract might seek to impose a default rule that class arbitration would be deemed available unless excluded. Such a rule, if clearly established at the time of contracting and known to both parties (and if not preempted by the FAA under *Stolt-Nielsen* and *Concepcion*), might support an inference of actual agreement to class proceedings if the parties chose not to

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sis added)); *Concepcion*, 131 S. Ct. at 1750 (suggesting possibility of "some background principle of contract law that would affect [an agreement's] interpretation").

[6] On the contrary, Oxford and Sutter made their arbitration agreement in 1998, before most parties would reasonably have entertained any notion of class arbitration. As this Court noted in *Stolt-Nielsen*, 130 S. Ct. at 1768 n.4, testimony in that case revealed that class arbitrations were uncommon before this Court's 2003 decision in *Bazzle* and the ensuing adoption of the AAA supplementary rules.

contract around it. Again, however, the arbitrator here did not point to any such rule, nor could he have. The parties did not contract against the background of any special rule of New Jersey law addressing class arbitration.[7] And as to federal law, the prevailing rule in 1998 was that the FAA "forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter," because "to read such a term into the parties' agreement would 'disrupt the negotiated risk/benefit allocation and direct the parties to proceed with a different sort of arbitration.'" *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (brackets omitted).[8] Indeed, when the arbitrator first considered clause construction after this Court's 2003 decision in *Bazzle*, he remarked that it had been "widely supposed" that in that case this Court "would rule, as some lower Federal Courts had, that the Federal Arbitration Act does not allow class actions in arbitration unless the parties have specifically agreed to class action arbitration." Pet. App. 45a. If anything, then, the background rules in place at the time of contracting here cut strongly against any notion that the parties ever contemplated, let alone reached any meet-

[7] The general New Jersey rule is that "[t]he law will not … supply a term or condition with respect to which [a contract] is silent." *See, e.g., Crewe Corp.* v. *Feiler*, 140 A.2d 411, 418 (N.J. Super. Ct. App. Div. 1958), *rev'd on other grounds*, 146 A.2d 458 (N.J. 1958).

[8] *See also Johnson* v. *West Suburban Bank*, 225 F.3d 366, 377 n.4 (3d Cir. 2000) ("This court has never addressed the question whether class actions can be pursued in arbitral forums, though it appears impossible to do so unless the arbitration agreement contemplates such a procedure." (citing *Champ*, 55 F.3d at 274-275)); *Stolt-Nielsen*, 130 S. Ct. at 1771 (describing conflict between *Champ* rule and state-law decisions in California and South Carolina that this Court did not resolve in *Bazzle*).

ing of the minds, that their arbitration agreement would authorize class proceedings.

2. It bears emphasis that, after *Stolt-Nielsen*, there is no room in this context for the sort of legal analysis that may be framed in terms of contractual interpretation or the parties' intent, but in fact involves a court or arbitrator's interpolation of an additional contract term based on, for example, the adjudicator's sense of "community standards of fairness and policy." *Restatement (Second) of Contracts* § 204, cmt. d (1979); *see Stolt-Nielsen*, 130 S. Ct. at 1775 (quoting *Restatement* § 204). As *Stolt-Nielsen* makes clear, that sort of policy-based "interpretation" of an arbitration agreement is not permissible under the FAA. *See* 130 S. Ct. at 1767-1770, 1775-1776. Indeed, even state law may not impose a policy preference for the availability of class procedures as a necessary term, or condition on the enforceability, of a private arbitration agreement. *Concepcion*, 131 S. Ct. at 1750-1751 (class arbitration is "inconsistent with the FAA" to the extent it is "manufactured by [state law] rather than consensual").

The record in this case suggests that the best explanation for the arbitrator's contorted attempts at textual analysis may be just such a policy preference. In his first opinion on clause construction, the arbitrator observed that if the parties' agreement prohibited court actions but did not authorize class arbitration, Dr. Sutter would not be able to pursue class claims at all. Pet. App. 48a. The arbitrator thought that possibility so "bizarre" that it could not be accepted unless the agreement expressly *precluded* class arbitration. *Id.* Similarly, he reasoned that Oxford, having chosen to enforce its arbitration agreement when Sutter tried to bring a putative class action in court, should be "judicially estopped"—*i.e.*, barred by the adjudicator's sense

of fairness or equity—from arguing that the agreement did not permit class arbitration. *Id.* at 40a.

In his second opinion, after *Stolt-Nielsen*, the arbitrator returned to the theme that respondent surely *must* be able to bring a class action *somewhere*. He repeated the "estoppel" point and then suggested, in addition, that if class arbitration were not permissible, the arbitration agreement should not be enforced at all. Pet. App. 41a ("[I]f the clause cannot permit Dr. Sutter's court class action to go to arbitration, then Dr. Sutter's original class action must be outside of the arbitration agreement altogether … and the court class action should be reinstated."); *see id.* at 40a-42a (relying heavily on the fact that Oxford enforced the parties' agreement by having Sutter's judicial class action dismissed in favor of arbitration). Clearly, then, when this arbitrator concluded that the parties' arbitration clause "must have been intended to authorize class actions" (*id.* at 48a), that conclusion was driven largely if not entirely by his policy view concerning what procedural options Sutter ought to have. *Stolt-Nielsen* makes quite clear that an arbitrator "exceed[s his] powers," 9 U.S.C. § 10(a)(4), when he seeks to conduct class proceedings on the basis of such a policy predilection, rather than faithfully enforcing the arbitration agreement that the parties before him actually made. 130 S. Ct. at 1767-1770; *see also Concepcion*, 131 S. Ct. at 1748-1749, 1750-1751.

III. THE ARBITRATOR EXCEEDED HIS POWERS BY IMPOSING CLASS ARBITRATION IN THE ABSENCE OF ACTUAL AUTHORIZATION BY THE PARTIES

A. The Court Below Refused To Review Whether There Was A Legitimate Contractual Basis For Imposing Class Arbitration

In refusing to vacate the arbitrator's decision under the FAA, the court of appeals did not consider whether his construction of the parties' arbitration clause was correct, or even plausible. Citing the deferential standard of review generally applicable to an arbitrator's contractual interpretations or other rulings (Pet App. 7a), the court reasoned that its only role was to confirm that the arbitrator had "articulated" a "contractual basis" for his determination that was not "totally irrational." *Id.* at 14a, 17a; *see id.* at 15a (dismissing objections to arbitrator's decision as "simply dressed-up arguments that the arbitrator interpreted [the parties'] agreement erroneously").

In *Stolt-Nielsen* this Court, applying the same narrow standard of review, held that arbitrators had "exceeded their powers" within the meaning of 9 U.S.C. § 10(a)(4) by construing an arbitration agreement that was silent on the issue to permit class arbitration. *See* 130 S. Ct. at 1767-1768. The court of appeals here sought to distinguish *Stolt-Nielsen* on the ground that Oxford and Sutter did not "stipulate" that they never reached any actual agreement, one way or the other, about class arbitration. *See* Pet. App. 13a. In the court's view, absent such a candid concession from Dr. Sutter, "the arbitrator in this case was not constrained to conclude that the parties did not intend to authorize class arbitration." *Id.*

In theory, the court acknowledged that the arbitrator *was* constrained by the requirement that there be a "contractual basis" for imposing class arbitration. Pet. App. 14a. In practice, however, the court gave that constraint no effect. As discussed in Part II, there is no plausible contractual basis for concluding that the parties ever contemplated the possibility of class proceedings, let alone agreed to authorize them. If the court had given the question any meaningful review, it would have had to conclude that, as in *Stolt-Nielsen*, the arbitrator here exceeded his powers.

Instead, the court effectively abdicated any responsibility for judicial review. Although it nominally reserved the right of courts to intervene in the face of a "totally irrational" decision (Pet. App. 17a) or "clear evidence of arbitral overreaching" (*id.* at 15a), its ruling on the facts of this case made clear that there was no substance to that promise. If the arbitrator's reasoning here was sufficient to "articulate" an adequate "contractual basis" under *Stolt-Nielsen*, *id.* at 14a, then nothing short of a "conclusive statement of the parties' intent" (*id.* at 15a), either precluding class arbitration or conceding that the agreement does not address the issue, would permit a court to vacate an order imposing class proceedings. All an arbitrator need do is *say* that he or she has "construe[d] the arbitration clause in the ordinary way to glean the parties' intent," *id.* at 38a, and courts are rendered powerless to intervene.

B. Under The FAA And *Stolt-Nielsen*, The Arbitrator's Determination Should Have Been Subject To Meaningful Review

As this Court observed in *Stolt-Nielsen*, however, "merely saying something is so does not make it so." 130 S. Ct. at 1769 n.7. Accepting any "contractual ba-

sis" that an arbitrator can "articulate" would betray the promise of *Stolt-Nielsen* that courts will intervene when arbitrators exceed their powers by ordering class arbitrations without all parties' actual consent. It would make *Stolt-Nielsen* "an insignificant precedent." *Jock*, 646 F.3d at 129 n.2 (Winter, J., dissenting). That is manifestly not the right result.

It is a "basic precept" of the FAA "that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen*, 130 S. Ct. at 1773 (quoting *Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)). "[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration," *AT&T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648-649 (1986), and the terms of an arbitration agreement delineate the scope of that authority. Because consent as manifested in the arbitration agreement is the wellspring from which the arbitrator's authority flows, an arbitrator's legitimate power is limited to what the parties have agreed to confer. *See Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) ("'[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" (quoting *United Steelworkers of Am.* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960))).

While arbitrators have wide authority to adjudicate those questions that are properly submitted to them, courts play a critical role in ensuring that arbitrators do not stray outside the scope of their mandates. At the outset of a controversy, there is a strong presumption that a court rather than an arbitrator will decide whether the parties have agreed to resolve a particular dispute through arbitration. *See AT&T Techs.*, 475

U.S. at 649 ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."). After an arbitrator has ruled, one of the limited grounds on which a court may vacate that decision is that the arbitrator imposed arbitration to an extent greater than that consented to by the parties. *See* 9 U.S.C. § 10(a)(4); *Stolt-Nielsen*, 130 S. Ct. at 1774-1775; *Eastern Associated Coal Corp.* v. *Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000) (courts defer to arbitrators when the "'arbitrator is even arguably construing or applying the contract *and acting within the scope of his authority*" (emphasis added)).

This independent judicial check on the exercise of arbitral authority is vital to ensuring that arbitrators do not arrogate to themselves powers that the parties have not delegated to them. If arbitrators could define the scope of their own jurisdiction, they "would be empowered 'to impose obligations outside the contract limited only by [their] understanding and conscience.'" *See AT&T Techs.*, 475 U.S. at 651; *see also First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 945 (1995) (noting the "significance of having arbitrators decide the scope of their own powers"); *Stolt-Nielsen*, 130 S. Ct. at 1767 (arbitration award must be vacated "when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice'"). Effective judicial checks are thus essential to provide contracting parties with the confidence to entrust their disputes to arbitration. If they do not believe that such checks will be applied effectively if and when needed, parties will have a "'drastically reduced'" willingness to enter into arbitration agreements in the first place. *AT&T Techs.*, 475 U.S. at 651; *see also Concepcion*, 131 S. Ct. at 1752 n.8

(requiring class arbitration would have a "substantial deterrent effect on incentives to arbitrate"). That would be contrary to the purpose of the FAA, which "was designed to promote arbitration." *Concepcion*, 131 S. Ct. at 1749.

Stolt-Nielsen makes clear that the basic limitations on an arbitrator's legitimate power include not only what issues the parties have agreed to submit to arbitration but also "*with whom* they [have chosen] to arbitrate their disputes"—including whether they have authorized class arbitration. 130 S. Ct. at 1774. Indeed, meaningful judicial oversight is particularly important in the context of class arbitration. As the Court has recognized, a shift from bilateral to class arbitration has the effect of transforming a process that is meant to be a fast, informal, and inexpensive means of dealing with relatively low-stakes disputes into one that can (as this case demonstrates) take decades to complete; that rivals court litigation in cost and complexity; and that exposes defendants to potentially crippling liability without the protection of full judicial review, increasing the risk of *in terrorem* settlements of dubious claims. *See, e.g.*, *Concepcion*, 131 S. Ct. at 1750-1753.

Moreover, class arbitration determinations are ones that even the best-intentioned arbitrator may find it difficult to approach with complete impartiality. For one thing, as both this case and *Stolt-Nielsen* attest, whether class proceedings should be available to claimants is the sort of issue on which arbitrators may have strong policy views that they may find difficult to put aside. *See* Part II.B.2, *supra*. In addition, arbitrators—unlike judges—are compensated by the parties before them, typically based on the time devoted to resolving a particular matter. They thus have a direct, inevitable, and significant financial interest in decisions

concerning the availability of class arbitration because any determination to proceed on a class basis will substantially increase the length and scope of the proceedings. *See* DRI Amicus Br. in Support of Pet. 12 & n.4; *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 416 (1967) (Black, J., dissenting) (noting "serious questions of due process" raised by submitting threshold issue to arbitrators where "[t]heir compensation corresponds to the volume of arbitration they perform"). If only for the purpose of preserving public confidence in the process, such decisions must be subject to some meaningful degree of independent review.

For these reasons, courts must stand ready to vacate awards that would impose class arbitration without a proper contractual basis, even given the normally "high hurdle" of FAA review. *See Stolt-Nielsen*, 130 S. Ct. at 1767.[9] In *Reed*, for example, the Fifth Circuit

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[9] Indeed, under *Stolt-Nielsen*'s reasoning, whether parties have agreed to authorize class arbitration is likely a threshold or "gateway" issue of arbitrability that courts should presumptively address or review *de novo*. *See* 130 S. Ct. at 1771-1772 (noting open question); *cf. Bazzle*, 539 U.S. at 456-457 (dissenting opinion); *see also Howsam*, 537 U.S. at 83-86 (discussing distinction between issues of arbitrability and routine procedural issues); *Central W. Va. Energy, Inc.* v. *Bayer Cropscience LP*, 645 F.3d 267, 275 (4th Cir. 2011) (reasoning that "*Stolt-Nielsen* found that the particular question of whether parties had '*agreed to authorize* class arbitration' was not one of procedure" committed to arbitrators under *Howsam*, but concluding that issue was not presented on facts of case); *Reed Elsevier, Inc.* v. *Crockett*, 2012 WL 604305, at *6 (S.D. Ohio Feb. 24, 2012) (holding that the availability of class arbitration is a gateway issue of arbitrability), *appeal docketed*, No. 12-3574 (6th Cir. May 17, 2012). The issue is not squarely presented in this case because in 2003 the parties here, like those in *Stolt-Nielsen* (*see* 130 S. Ct. at 1772), understood this Court's decision in *Bazzle* to direct the question whether the arbitration clause permitted class proceedings to the arbitrator at least in the first in-

properly "read *Stolt-Nielsen* as requiring courts to ensure that an arbitrator has a legal basis for his class arbitration determination, even while applying the appropriately deferential standard of review." 681 F.3d at 645. Under this approach, a court may not merely observe that an arbitrator endeavored or purported to construe the parties' agreement. Although the Fifth Circuit recognized the need to apply an "appropriately deferential standard of review," it properly insisted on some real "consideration of the arbitrator's award and rationale" and some independent assessment of the award's substantive merit. *Id.* Applying that limited but meaningful degree of scrutiny, the *Reed* court held that an arbitrator exceeded his authority by imposing class arbitration solely on the basis of a broadly-worded "any dispute" arbitration clause materially indistinguishable from the one at issue here.

At least the same degree of judicial review is required in this case. Indeed, as discussed above, the arbitrator's stated reasoning here is so deficient that it cannot be sustained under *any* meaningful standard of review. Whatever "contractual basis" may be minimally adequate to permit a court or arbitrator to conclude that parties "*agreed to authorize* class arbitration, *Stolt-Nielsen*, 130 S. Ct. 1776 & n.10, the agreement here is surely not enough.

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stance (*see* Pet. App. 45a), and Oxford did not argue for *de novo* review on this basis in the lower courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS

9 U.S.C. § 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, 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. § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to

proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse

in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

9 U.S.C. § 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the

district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

9 U.S.C. § 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and

for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. § 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

9 U.S.C. § 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

9 U.S.C. § 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award,

and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

9 U.S.C. § 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

9 U.S.C. § 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

9 U.S.C. § 16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.