No. 12-135

IN THE

# Supreme Court of the United States

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OXFORD HEALTH PLANS LLC,
*Petitioner*,

v.

JOHN IVAN SUTTER, M.D.,
*Respondent*.

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

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## BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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## BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*. The brief supports the position of Petitioner before this Court in favor of reversal.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

## INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes nearly 300 major U.S. corporations that collectively employ more than 19 million workers domestically. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices.

EEAC member companies, many of which conduct business in numerous states, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment non-discrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using arbitration and other forms of alternative dispute resolution. A number of EEAC member companies thus have adopted company-wide policies requiring the use of binding arbitration to resolve all employment-related disputes. Those policies primarily are designed to promote relatively prompt, informal resolution of individual disputes, thus avoiding costly, complex, and protracted litigation in state or federal court.

A three-judge panel of the Third Circuit below improperly deferred to an arbitrator's erroneous conclusion that a broadly-worded binding arbitration clause was sufficient on its face to find that the parties affirmatively intended to permit class arbitration, despite the agreement's silence regarding the

availability of such procedures. In doing so, it failed to adhere to the basic principle that arbitration agreements are to be enforced in accordance with their terms.

Because of its interest and practical experience in this area, EEAC has filed *amicus curiae* briefs supporting the enforceability of arbitration agreements in numerous cases before this Court, including *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998), *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000), *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, __ U.S. __, 130 S. Ct. 1758 (2010); *Rent-A-Center, W., Inc. v. Jackson*, __ U.S. __, 130 S. Ct. 2772 (2010); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); and, most recently, *American Express Co. v. Italian Colors Rest.*, No. 12-133 (filed July 30, 2012). Accordingly, EEAC has a level of knowledge and expertise that makes it uniquely well-positioned to brief the Court on the importance of the issues beyond the immediate concerns of the parties to the case.

## STATEMENT OF THE CASE

In 1998, Oxford Health Plans entered into a professional services contract with one of its healthcare providers, Dr. John Ivan Sutter. Pet. App. 1a-2a. The contract contained a standard arbitration clause, which provides:

> 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.

Pet. App. 2a.

In 2002, Sutter filed a breach of contract action in New Jersey state court in which he sought to proceed on behalf of a class of contracted physicians. *Id.* The state court granted Oxford's motion to refer the case to arbitration, leaving it to the arbitrator to resolve whether class proceedings would be available in that forum. Pet. App. 3a. The arbitrator deferred consideration of the question pending this Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). J.A. 28-29.

Thereafter, the arbitrator found that the broad language of the arbitration clause "must have been intended to authorize class actions in arbitration," J.A. 32, pointing out that the clause broadly prohibited "civil actions" in court, and that class actions in court were a type of prohibited "civil action." *Id.* He surmised that "to avoid a finding that such was the parties' intention, it would be necessary for there to be an express exception for class actions in the prohibition," which "cannot be inferred absent some clear manifestation of such intent." *Id.* The arbitrator observed further that if class arbitration were not permitted, the broad prohibition on court actions "would mean that class actions are not possible in any forum. In my view, that reading cannot be inferred in the absence of a clear expression that such a bizarre result was intended." *Id.*

This Court subsequently held in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* that where an arbitration agreement is silent as to the availability of such procedures, class arbitration may not be imposed "unless there is a contractual basis for concluding" that the parties, in fact, intended to allow for it. __ U.S. __, 130 S. Ct. 1758, 1775 (2010). Imposing class arbitration in the absence of such proof, the Court observed, "is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Id.*

Oxford asked the arbitrator to reconsider his original class arbitration determination in light of *Stolt-Nielsen*. Pet. App. 4a. The arbitrator agreed that *Stolt-Nielsen* was controlling authority, but distinguished it on the ground that his ruling had been based on "the parties' intent as evidenced by the words of the arbitration clause," which he had concluded "unambiguously evinced an intention to allow class arbitration, indeed to require it." J.A. 70. After unsuccessfully moving to vacate the arbitrator's clause construction award in federal district court, Oxford appealed to the Third Circuit, which affirmed. Pet. App. 5a, 17a-18a.

The Third Circuit acknowledged that "an arbitrator oversteps [the limits placed on his authority], and subjects his award to judicial vacatur under Section 10(a)(4) [of the Federal Arbitration Act], when he decides an issue not submitted to him, grants relief in a form that cannot be rationally derived from the parties' agreement and submissions, or issues an award that is so completely irrational that it lacks support altogether." Pet. App. 7a. It also observed that "when the arbitrator strays from interpretation and appreciation of the agreement and effectively

dispenses his own brand of industrial justice, he exceeds his powers and his award will be unenforceable," Pet. App. 8a (internal quotations omitted), noting in particular that "an arbitrator may exceed his powers by ordering class arbitration without authorization." *Id.*

Nevertheless, according broad deference to the arbitrator's findings, and distinguishing *Stolt-Nielsen* primarily on the ground that plaintiffs' counsel there had conceded the lack of any actual agreement on the question of class arbitration, the court below declined to review the award, finding that the arbitrator "did articulate a contractual basis for his decision to order class arbitration." Pet. App. 14a. After its Petition for Rehearing/Rehearing En Banc was denied, J.A. 9, Oxford Health filed a petition for a writ of certiorari, which this Court granted on December 7, 2012. *Id.*

## SUMMARY OF ARGUMENT

This Court repeatedly has emphasized that a principal aim of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et seq.*, is to construe private arbitration agreements in accordance with the parties' desire and expectations. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, __ U.S. __, 130 S. Ct. 1758, 1775-76 (2010). The "FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). To the contrary, courts are to "rigorously enforce agreements to arbitrate ... in order to give effect to the contractual rights and expectations of the parties." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458 (2003) (citations and internal quotations omitted). *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,*

*Inc.*, 473 U.S. 614, 626 (1985) ("as with any other contract, the parties' intentions control"). The Third Circuit's decision below disregards that basic principle.

In *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, __ U.S. __, 130 S. Ct. 1758 (2010), this Court held that under the FAA, a party to an arbitration agreement cannot be forced to submit to class arbitration procedures "unless there is a contractual basis for concluding that the party agreed to do so," *id.* at 1775, making clear that "[a]n implicit agreement to authorize class-action arbitration" is insufficient. *Id.* Despite the Court's unequivocal ruling that class procedures cannot be compelled unless plainly authorized by the parties, the court below has concluded that a broadly-worded arbitration clause is enough to evince such an affirmative intent. Its holding not only is inconsistent with the FAA's longstanding aims and objectives, but also fails to keep faith with this Court's well-established guidance reaffirming the strong public policy favoring bilateral arbitration of private disputes.

While *Stolt-Nielsen* does not address directly what constitutes a sufficient "contractual basis" on which to find that the parties to an arbitration agreement effectively – if not explicitly – agreed to the availability of class arbitration procedures, it plainly cautions arbitrators not to "presume, consistent with their limited powers under the FAA, that the parties' mere silence …" is enough to make such a finding. 130 S. Ct. at 1776. To the contrary, arbitrators must establish that the parties affirmatively "agree[] to authorize class arbitration, not merely that they fail to bar such a proceeding." *Reed v. Fla. Metro. Univ.*, 681 F.3d 630, 644 (5th Cir. 2012) (citation omitted).

Inasmuch as the court below failed to adhere to these legal standards, but rather allowed the arbitrator to rely on ubiquitous arbitration clause language arbitrarily to permit one party to benefit from terms on which there was no meeting of the minds, it erred.

Because the chasm between bilateral arbitration and class arbitration is wide and deep, arbitrators must exercise great caution before imposing the latter in the absence of express contractual language authorizing such procedures. Perhaps even more so than other types of claims, class-wide arbitration of employment disputes "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." *Stolt-Nielsen*, 130 S. Ct. at 1775.

Put simply, if employers wished to be subject to class-wide arbitration, they would express as much in the terms of their arbitration agreements. The fact that few, if any, do so should further highlight the folly in construing an agreement that is silent on the question as affirmatively allowing class arbitration. Such an approach, far from enforcing the contract as agreed to by *both* parties, perpetuates the very "judicial suspicion of the desirability of arbitration," *Mitsubishi*, 473 U.S. at 626-27, the FAA was designed to reverse.

## ARGUMENT

### I. BECAUSE ARBITRATION IS A MATTER OF MUTUAL CONSENT, CLASS PROCEDURES MAY NOT BE IMPOSED UNLESS IRREFUTABLE EVIDENCE EXISTS THAT THE UNDERLYING AGREEMENT ALLOWS FOR SUCH PROCEDURES

The Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, which provides that arbitration agreements "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, embodies the "congressional declaration of a liberal federal policy favoring arbitration agreements …." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also Nitro-Lift Techs., LLC v. Howard*, __ U.S. __, 133 S. Ct. 500, 503 (2012). It "establishes that, as a matter of federal law, 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." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 n.8 (1995) (citation and footnote omitted).

Inexplicably, the court below held that the parties affirmatively "agreed to authorize class arbitration" based solely on their use of broad contractual language precluding litigation and requiring arbitration of any dispute arising under their contract. To the extent that the decision below impermissibly conflicts with the plain text of the FAA and is inconsistent with well-established legal principles reiterated time and again by this Court, it must be reversed.

### A. This Court Repeatedly Has Reaffirmed The Fundamental Principle That Arbitration Is A Matter Of Mutual Consent, Not Coercion

"[T]he FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter or consent, not coercion.'" *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, __ U.S. __, 130 S. Ct. 1758, 1773 (2010) (citation omitted); *see also Rent-A-Center, W., Inc. v. Jackson*, __ U.S. __, 130 S. Ct. 2772, 2776 (2010) (the FAA "reflects the fundamental principle that arbitration is a matter of contract"). As this Court observed nearly three decades ago, "'[the] preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, a concern which 'requires that [courts] rigorously enforce agreements to arbitrate.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) (citation omitted). Thus, "[w]hether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.'" *Stolt-Nielsen*, 130 S. Ct. at 1773-74 (quoting *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989)); *see also AT&T Mobility LLC v. Concepcion*, __ U.S. __, 131 S. Ct. 1740, 1745 (2011) ("In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms") (citations omitted).

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991), this Court held that an arbitration agreement that an employee signed as a condition of employment, in which he pledged to submit to indi-

vidual arbitration any employment-related dispute, was enforceable under the FAA, so as to require him to arbitrate his claim that his employer engaged in unlawful discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq*. In so doing, the Court made clear that as a general rule, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." 500 U.S. at 26 (citation omitted). *Gilmer* thus epitomizes the principle that "the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Boyd*, 470 U.S. 213, 218 (1985) (citations omitted).

### B. Where An Arbitration Agreement Is Silent As To The Availability Of Class Arbitration, *Stolt-Nielsen* Proscribes The Forced Imposition Of Such Procedures In The Absence Of A "Contractual Basis" For Doing So

In *Stolt-Nielsen*, this Court held that as a general rule, "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. It made clear that "[a]n implicit agreement to authorize class-action arbitration" is insufficient, especially since permitting class procedures "changes the nature of arbitration" significantly. *Id*. Despite the Court's admonition in *Stolt-Nielsen* that class procedures cannot be compelled unless plainly and unambiguously authorized

by the parties, the court below nevertheless erroneously concluded that a broadly worded arbitration clause is enough to evince such an affirmative intent.

The Court in *Stolt-Nielsen* declined to elaborate on the meaning of "contractual basis" in that context, though lower courts interpreting the term have applied far more robust a standard than did the court below. In *Reed v. Florida Metropolitan University*, for instance, the Eleventh Circuit rejected an arbitrator's conclusion that that a broadly worded arbitration clause similar to the one at issue here implicitly authorized class arbitration procedures. 681 F.3d 630 (11th Cir. 2012). It determined that under *Stolt-Nielsen*, more than the mere "*fact of the parties' agreement to arbitrate*" is required to establish a contractual basis for ordering class arbitration. *Id.* at 642. Rather:

> For a court to read additional provisions into [a] contract, the implication must clearly arise from the language used, or be indispensible to effectuate the intent of the parties. It must appear that the implication was so clearly contemplated by the parties that they deem it unnecessary to express it.

*Id.* at 643 n.10 (citations omitted).

In construing a standard arbitration clause[2] (which on its face makes no mention of class arbitration procedures, much less confirms they are "indispensible

[2] The type of "any dispute" clause in question here is common, particularly in arbitration agreements that have been in place for many years. *See Reed v. Fla. Metro. Univ.*, 681 F.3d 630, 642 (11th Cir. 2012) ("any dispute" clause "is a standard provision that may be found, in one form or another, in many arbitration agreements") (citations omitted).

to effectuate" the parties' intent) as establishing a "contractual basis" for ordering class arbitration, the court below failed to adhere to the FAA's requirement that agreements to arbitrate be enforced as they are written.

Even prior to *Stolt-Nielsen*, most courts of appeals held that the FAA precludes the imposition of class-based arbitration or consolidation of individual arbitrations where the arbitration agreement itself is silent as to the availability of such procedures. *See, e.g., Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219 (2d Cir. 2001); *see also Gov't of the United Kingdom v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987); *American Centennial Ins. Co. v. National Cas. Co.*, 951 F.2d 107 (6th Cir. 1991); *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814 (11th Cir. 2001). Some went a step further, expressing the logical view that class arbitration categorically is unavailable in the absence of contract language *expressly* authorizing the procedure. In *Champ v. Siegel Trading Co.*, for example, the Seventh Circuit ruled that the FAA prohibits a court from ordering class-wide arbitration "absent a provision in the parties' arbitration agreement providing for class treatment of disputes ... ." 55 F.3d 269, 271 (7th Cir. 1995). It determined that since the arbitration agreement at issue was silent as to class arbitration, "[f]or a federal court to read such a term into the parties' agreement would 'disrupt[] the nego-

tiated risk/benefit allocation and direct[] [the parties] to proceed with a different sort of arbitration.'" *Id.* at 275 (citation omitted).

Here, not only did the court below disregard the fact that the arbitration agreement in question did not contain an express class arbitration authorization clause, but it allowed the arbitrator to rely on standard, boilerplate language commonly found in such agreements to infer the availability of class procedures. It appears that in doing so, the arbitrator acted upon a lack of understanding as to the purpose and role of the class action device, misconstruing it as a substantive, rather than procedural, right. He found, for instance, that because a class action "is plainly one of the possible forms of *civil action* that could be brought in court, the agreement's requirement that all "civil actions" be subject to arbitration must envision class-based arbitration.

In general, however, there is no categorical "right" to bring a class action lawsuit. Rather, the class action device is a procedural mechanism, "arising under Fed. R. Civ. P. 23, that may be waived by agreeing to an arbitration clause." *Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000).

### C. Parties May Waive The Availability Of Judicial Class Action Procedures In Exchange For The Many Advantages Of Individual Arbitration

Indeed, parties to arbitration agreements often agree to streamlined procedural mechanisms that do not allow for claims to be brought on a class-wide basis. In doing so, they do not trade away any substantive rights, but rather exchange "'the procedures and opportunity for review of the courtroom for

the simplicity, informality, and expedition of arbitration.'" *Gilmer*, 500 U.S. at 31 (citation omitted); *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009) ("the relative informality of arbitration is one of the chief reasons that parties select arbitration").

The parties may decide, for instance, to "limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate its disputes." *Concepcion*, 131 S. Ct. at 1748-49 (citations omitted); *see also 14 Penn Plaza*, 556 U.S. at 265-66 ("[t]he decision to resolve ... claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace ... discrimination; it waives only the right to seek relief from a court in the first instance"). The ability to bring a class action is just one of many procedural tools that can be waived in a valid arbitration agreement.

In other words, when parties agree to submit their disputes to binding arbitration, "they relinquish the right to certain procedural niceties which are normally associated with a formal trial. One of those 'procedural niceties' is the possibility of pursuing a class action under Rule 23." *Champ*, 55 F.3d at 276 (citations omitted); *see also Vaden v. Discover Bank*, 556 U.S. 49, 76 (2009) ("A big part of arbitration is avoiding the procedural niceties of formal litigation"). Thus, parties to valid arbitration agreements are free to – and routinely do – contractually waive their right to access the Rule 23 class action procedure.

As one commentator has observed:

> Class action suits are a procedural mechanism for seeking redress of a grievance, and therefore do not define the substantive rights or remedies

> available to either party. In fact, if the availability of class actions abridges, enlarges, or modifies the substantive rights of parties, then Rule 23 would violate the Rules Enabling Act and would be unconstitutional.

Joshua S. Lipshutz, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 Stan. L. Rev. 1677, 1714-15 (2005) (footnotes omitted). Furthermore:

> While the principles underlying courtroom procedures are highly valued by our judicial system – the right to a jury, appealability, openness – they are waived by a contractual decision to submit disputes to arbitration. *If arbitration consisted of all of the same procedures as litigation, there would be no benefit to arbitration at all.*

*Id.* (footnote omitted) (emphasis added). This is especially true in the employment context, in which many employers have adopted alternative dispute resolution programs with a mandatory arbitration component primarily in an effort to reduce litigation costs and to minimize ill will between the parties to a dispute.

Allowing an arbitration to proceed as a class action even where the contract does not expressly allow for it would profoundly undermine the efficiencies of arbitrating workplace disputes. "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation … ." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001). In particular:

> The time and cost of pursuing a claim through traditional methods of litigation present the most glaring and formidable obstacles to relief for employment discrimination victims. While it might not make a difference to the upper level managerial worker who can afford the services of an expensive lawyer, and who can withstand the grueling process of litigation, those employees who are less financially sound are chronically unable to attract the services of a quality lawyer. For example, experienced litigators maintain that good plaintiff's attorneys will accept only one in a hundred discrimination claimants who seek their help. For those claimants who are denied the services because of their financial situation, the simpler, cheaper process of arbitration is the most feasible recourse.

Craig Hanlon, *Reason Over Rhetoric: The Case for Enforcing Pre-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 5 Cardozo J. Conflict Resol. 2 (2003).

The financial and other benefits that the parties derive from employment arbitration are likely to disappear altogether if they are forced to submit to complex, class-based arbitration even where the underlying agreement does not provide for class arbitration procedures. In addition to increasing the costs, adjudicating claims on a class-wide basis brings a level of complexity that undermines many of the core advantages of arbitration. As this Court pointed out in *Stolt-Nielsen*:

> Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure 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 … thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. And the commercial stakes of class-action arbitration are comparable to those of class-action litigation ….

130 S. Ct. at 1776 (citations omitted).

In class-based employment litigation brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*., for instance, each class member may recover up to $300,000 in compensatory and punitive damages, plus back pay and attorneys' fees, but only after overcoming any individual defenses offered by the defendant and proving individual damages. Attempting to resolve these complex issues in a class arbitration would remove all of the efficiencies of the arbital forum, while at the same time disallowing the built-in protections that inure to both plaintiffs and defendants through full judicial review. *See Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541 (2011).

Indeed, the significantly higher costs and exposure posed by class actions in general, and employment class actions in particular, places great pressure, especially on multinational employers, to settle rather than run even a small risk of catastrophic loss. *See, e.g. Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (characterizing it as "judicial blackmail"); *Rutstein v. Avis Rent-A-Car Sys., Inc.*,

211 F.3d 1228, 1241 n.21 (11th Cir. 2000) (same). This is equally true in the case of class arbitration:

> [W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of "in terrorem" settlements that class actions entail, and class arbitration would be no different.

*Concepcion*, 131 S. Ct. at 1752 (citation omitted).

## II. CLASS ARBITRATION IS FUNDAMENTALLY AT ODDS WITH THE FAA'S POLICY AIMS AND OBJECTIVES

If courts or arbitrators were free to order classwide arbitration even in the absence of any language expressly authorizing such procedures, employers would be faced with the very litigation burdens and acrimony they sought to avoid by introducing arbitration in the first place, thus undermining the FAA's longstanding policy objective to facilitate and promote bilateral arbitration. *See* Imre S. Szalai, *Aggregate Dispute Resolution: Class and Labor Arbitration*, 13 Harv. Negotiation L. Rev. 399, 428 (2008) (noting that "a lengthy, technical class procedure in arbitration would appear contrary to the understanding of arbitration as expressed in the FAA's legislative history"). As this Court observed in *Concepcion*:

> 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. *The conclusion follows that class arbitration, to the extent it is manufactured … rather than consensual, is inconsistent with the FAA.*

131 S. Ct. at 1750-51 (emphasis added).

Arbitration by its very nature is designed to promote, rather than discourage, cost-effective resolution of individual claims in as non-adversarial a manner as possible. Allowing an arbitration to proceed on a class-wide basis where the parties have not agreed to do so defeats most, if not all, of those aims. Thus, "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." *Stolt-Nielsen*, 130 S. Ct. at 1776 (footnote omitted).

Contrary to the universal guiding principles of common contract and federal statutory law, the court below improperly permitted Respondent to proceed in arbitration on a class wide basis, even though the underlying agreement does not authorize resort to such procedures. This inexcusable failure to give effect to the terms of the arbitration agreement as written is inconsistent with the FAA and fails to adhere to the Court's admonitions in *Stolt-Nielsen* that class arbitration may not be imposed in the absence of unequivocal evidence that the parties intended to be so bound. Accordingly, the decision below must be reversed.

## CONCLUSION

For the foregoing reasons, the *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision of the court of appeals should be reversed.

Respectfully submitted,

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