No. 12-135

IN THE
Supreme Court of the United States

OXFORD HEALTH PLANS LLC,
Petitioner,
v.

JOHN IVAN SUTTER, M.D.,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on the issue presented in this case, namely whether the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), as interpreted by this Court in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), requires a court to vacate an arbitral award authorizing class arbitration where there is no contractual basis to justify such an award.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

NELF has frequently filed amicus briefs in this Court on issues arising under the FAA that

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.2(a), NELF also states that, on January 8, 2013, and on January 9, 2013, counsel for Respondent and counsel for Petitioner respectively filed with this Court a general written consent to the filing of amicus briefs, in support of either or neither party.

affect the rights of businesses in their contractual relationships with other businesses and with individuals. See *Am. Express. Co. v. Italian Colors Restaurant, cert. granted* 2012 WL 3096737 (U.S. Nov. 9, 2012) (No. 12–133); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Hall St. Assocs., L.L.C., v. Mattel, Inc.*, 552 U.S. 576 (2008); *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002).

As NELF's participation in these cases illustrates, NELF is committed to the use of arbitration as a viable alternative forum for resolving disputes. NELF is also committed to the related principle that arbitration "is a matter of consent, not coercion . . . ." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010) (citation and internal quotation marks omitted). In this connection, NELF strongly opposes the imposition of class actions in arbitration where, as here, the parties have agreed merely to arbitrate their disputes and, therefore, as a matter of law, have not consented to classwide arbitration.

The Third Circuit's decision in this case is of direct importance to NELF's business constituents, many of whom make use of standard predispute arbitration clauses in their commercial agreements. If allowed to stand, the Third Circuit's decision could permit arbitrators or courts to "interpret" boilerplate arbitration clauses as warranting the imposition of class arbitration, contrary to both *Stolt-Nielsen* and the businesses' intent. The Third Circuit's decision must be reversed to honor this Court's precedent that a business's mere consent to arbitration cannot mean that the business has "bet the company" on the enormous risks and uncertainties of class

arbitration, and "with no effective means of review" under the FAA. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). For these and other reasons discussed below, NELF believes that its brief would provide an additional perspective to aid this Court in deciding the issues presented in this case.

SUMMARY OF ARGUMENT

The Third Circuit has erroneously deferred to an arbitrator's "interpretation" of a boilerplate predispute arbitration clause as authorizing the imposition of class arbitration. The arbitration clause at issue merely provides that the parties have agreed to arbitrate "any dispute arising under this Agreement." Under *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010), the parties have "simply agree[d] to submit their disputes to an arbitrator." Therefore, the parties have not consented to class arbitration as a matter of law. Their standard "any dispute" arbitration clause cannot provide the contractual basis required under *Stolt-Nielsen* to authorize class arbitration. Accordingly, *Stolt-Nielsen* requires vacatur of an arbitral award of class arbitration where, as here, the facts of a case cannot provide a contractual basis to justify such an award.

Stolt-Nielsen recognizes that the changes brought about by class arbitration are substantially disadvantageous to businesses. Therefore, businesses are presumed *not* to have consented to class arbitration where, as here, they have simply agreed to arbitrate disputes. Parties must *agree* to override this potent default term of bilateral arbitration under the FAA. The parties in this case

have simply agreed to submit "any dispute under this Agreement" to binding arbitration. Each word in this standard arbitration clause is enlisted solely to serve the parties' intent to arbitrate and not litigate their disputes. Therefore, the parties have not agreed to authorize class arbitration.

If allowed to stand, the Third Circuit's decision could render *Stolt-Nielsen* a nullity by requiring courts to defer to arbitral awards of class arbitration where, as here, there is clearly no contractual basis for doing so. The lower court's decision could effectively result in the imposition of class arbitration as a mandatory implied term in any bare agreement to arbitrate disputes, despite *Stolt-Nielsen*'s clear holding to the contrary. Moreover, the Third Circuit's decision could effectively permit the imposition of class arbitration as a mandatory implied term in virtually *every* commercial arbitration agreement, because the boilerplate "any dispute" arbitration clause at issue is ubiquitous in the case law and is endorsed by the prominent national arbitration associations.

Finally, the Third Circuit's deference to an arbitral award that plainly violates *Stolt-Nielsen*'s contractual basis requirement under the FAA is entirely misplaced. To be sure, the FAA may require judicial deference to an arbitrator's erroneous interpretation of a statute *other than* the FAA. However, the FAA "cannot be held to destroy itself." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). That is, the FAA cannot be interpreted to require judicial deference to an arbitral award that violates the FAA's core purposes by imposing class arbitration without the parties' mutual consent.

ARGUMENT

I. *STOLT-NIELSEN* REQUIRES VACATUR OF AN ARBITRAL AWARD OF CLASS ARBITRATION WHERE, AS HERE, THE PARTIES HAVE SIMPLY AGREED TO ARBITRATE THEIR DISPUTES AND THEREFORE HAVE NOT CONSENTED TO CLASS ARBITRATION.

In this case, the Third Circuit has deferred to an arbitrator's "interpretation" of a boilerplate predispute arbitration clause as authorizing the imposition of class arbitration. *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215 (3d Cir. 2012). The arbitration clause at issue merely provides that the parties have agreed to arbitrate, and not litigate, "any dispute arising under this Agreement."[2] Under this Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), the parties have "simply agree[d] to submit their disputes to an arbitrator[,]" and nothing more. *Id.*, 130 S. Ct. at 1775. Therefore, "it cannot be presumed [that] the parties consented to [class arbitration]" based on this mere agreement to arbitrate disputes. *Id.* *Stolt-Nielsen* instructs that such a bare arbitration clause cannot, as a matter of law, provide the contractual basis necessary to authorize class arbitration under the FAA. *See id.*,

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[2] In particular, the parties' arbitration clause provides 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 in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator." *Sutter. v. Oxford Health Plans*, 675 F.3d at 217.

130 S. Ct. at 1775. Accordingly, the arbitrator's award in this case must be vacated as *ultra vires* under § 10(a)(4) of the FAA. The Third Circuit's decision cannot stand. [3]

In *Stolt-Nielsen*, this Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id*., 130 S. Ct. at 1775. In that case, the Court vacated an arbitral award of class arbitration under § 10(a)(4) of the FAA because the record established that there was no contractual basis supporting such an award. *See id*. at 1776 n.10. Under *Stolt-Nielsen*, then, the FAA requires vacatur of an arbitral award of class arbitration whenever the facts of a case preclude a contractual basis to justify such an award.

This is such a case. The parties here have merely agreed to arbitrate "any dispute arising under this Agreement." In *Stolt-Nielsen*, the Court concluded that such a generic arbitration clause, in which the parties have merely agreed to arbitrate their disputes, cannot provide a contractual basis authorizing class arbitration. "[C]lass-action arbitration changes the nature of [bilateral] 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 (emphasis added).

The Court in *Stolt-Nielsen* therefore announced a rule of contract interpretation under

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[3] Section 10(a)(4) of the FAA authorizes a federal court to vacate an arbitral award "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4).

the FAA, applicable here, that a mere agreement to arbitrate disputes cannot provide a contractual basis authorizing class arbitration. Such an agreement only authorizes bilateral arbitration. "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*." *Id*. at 1775 (emphasis added).

The Court based this important principle on the FAA's "basic precept that arbitration is a matter of consent, not coercion . . . ." *Id*. at 1773 (citation and internal quotation marks omitted). As the Court explained in exhaustive detail, in both *Stolt-Nielsen* and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), "'the changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental.'" *Concepcion*, 131 S. Ct. at 1750 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1776). In brief, class arbitration transforms the simplicity and efficiency of bilateral arbitration into a costly, complex and high-risk proceeding that virtually evades judicial review under the FAA. *Stolt-Nielsen*, 130 S. Ct. at 1775-76; *Concepcion*, 131 S. Ct. at 1750-52.

In light of these substantial disadvantages wrought by class arbitration, a business is presumed *not* to have consented to class arbitration where, as here, it has "simply agree[d] to submit [the parties'] disputes to an arbitrator . . . ." *Stolt-Nielsen*, 130 S. Ct. at 1775. After all, arbitration is presumptively a simple bilateral affair under the FAA. *See Concepcion*, 131 S. Ct. at 1751, 1753. Parties must *agree* to override this potent default term of bilateral arbitration. "[W]e see the question as being whether the parties *agreed to authorize* class arbitration."

Stolt-Nielsen, 130 S. Ct. at 1776. The FAA therefore requires a separate, identifiable contractual basis, quite apart from the parties' basic agreement to arbitrate disputes, to warrant an order of class arbitration. *See id*., at 1775-76. A mere agreement to arbitrate disputes, as in this case, lacks any such contractual basis as a matter of law. *See id*. at 1775. This rule of contract construction under the FAA jibes with the Court's recent observation that "[w]e find it hard to believe that defendants would bet the company [on class arbitration] with no effective means of review . . . ." *Concepcion*, at 1752.

Applying *Stolt-Nielsen* to the arbitration clause at issue here compels the conclusion that the parties did not agree to authorize class arbitration and, therefore, that the arbitral award must be vacated. The parties have simply agreed to submit "any dispute under this Agreement" to binding arbitration. Each word in this standard arbitration clause is enlisted solely to serve the parties' intent to arbitrate and not litigate their disputes.

Under *Stolt-Nielsen*, such spare contractual language can function only as a "simpl[e] agree[ment] to submit [the parties'] disputes to an arbitrator . . . ." *Id*. at 1775. The parties' "any dispute" clause therefore forecloses any possible contractual basis authorizing class arbitration. *See id*. As one lower court recently concluded, when considering a virtually identical arbitration clause, "[o]n its face, the 'any dispute' clause 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) (vacating arbitral award of class arbitration under *Stolt-Nielsen*).

As with the parties' stipulation in *Stolt-Nielsen* that they had not reached any agreement on class arbitration, *id*. at 1768, the parties' arbitration clause in this case "le[aves] no room for an inquiry regarding the parties' intent" on the issue of class arbitration. *Id*. at 1770. Where, as here, the parties "simply agree[] to submit their disputes to an arbitrator," *id*. at 1775, the contract affords no ambiguity or room for "interpreting" any consent to classwide arbitration. In this situation, *Stolt-Nielsen* instructs that no deference is due an arbitral award to the contrary. "[W]hen an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice[,] . . . his decision may be unenforceable." *Id*. at 1767 (citation and internal quotation marks and brackets omitted).

If allowed to stand, the Third Circuit's decision could render *Stolt-Nielsen* a nullity by requiring courts to defer to arbitral awards of class arbitration where, as here, there is clearly no contractual basis for doing so. The lower court's approach could effectively result in the imposition of class arbitration as a mandatory implied term in any bare agreement to arbitrate disputes, despite *Stolt-Nielsen*'s clear holding to the contrary. Businesses could be threatened with the risk of class arbitration as soon as they set pen down to paper to draft a boilerplate arbitration agreement, when in fact they never consented to or anticipated any such intractable and costly proceedings. "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and . . . creates a scheme inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1748.

Moreover, the Third Circuit's decision could, as a practical matter, effectively permit the injection of class arbitration as an implied term in virtually *every* commercial arbitration agreement. This is so because the boilerplate "any dispute" arbitration clause at issue here is ubiquitous. "The 'any dispute' clause is a standard provision that may be found, in one form or another, in many arbitration agreements." *Reed* v. *Florida Metro. Univ.,* 681 F.3d at 642 (noting recurrence of "any dispute" clause in *Stolt–Nielsen,* 130 S. Ct. at 1765; and in *Jock v. Sterling Jewelers Inc.,* 646 F.3d 113, 116 (2d Cir. 2011)). In fact, the American Arbitration Association and another prominent national arbitration association have endorsed this very "any dispute" language, or some close variant, as the industry standard for an effective general arbitration clause. *See Reed*, 681 F.3d at 642 (discussing American Arbitration Association, *Drafting Dispute Resolution Clauses: A Practical Guide*, p. 7 (Sept. 1, 2007), *available at* www.adr.org[4] (as visited January 28, 2013) (recommending "[a]ny controversy or claim arising out of or relating to this contract . . . shall be settled by arbitration . . . ."); JAMS *ADR Clauses*, *available at* http://www.jamsadr.com/clauses/#Standard (*JAMS Standard Arbitration Clause for Domestic Commercial Contracts*) (as visited January 28, 2013) (recommending "[a]ny dispute, claim or controversy arising out of or related to this Agreement . . . shall be determined by arbitration . . . .")). In short, class

[4] Search www.adr.org for "Drafting Dispute Resolution Clauses: A Practical Guide"; then follow hyperlink to first search result.

arbitration could become a common default term in arbitration agreements, notwithstanding *Stolt-Nielsen*'s clear holding to the contrary.

Finally, the Third Circuit's deference to an arbitral award that plainly violates the FAA's contractual basis requirement is entirely misplaced.[5] To be sure, the FAA may require judicial deference to an arbitrator's erroneous interpretation of a statute *other than* the FAA. "[A] court . . . will not set [the arbitral award] aside for error, either in law or fact." *Stolt-Nielsen*, 130 S. Ct. at 1780 (citation and internal quotation marks omitted). *See also Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (discussing same).

However, as this Court recently concluded, the FAA "cannot be held to destroy itself." *Concepcion*, 131 S. Ct. at 1748 (citation and internal quotation marks omitted). Here, the FAA cannot be interpreted to require judicial deference to an arbitral award that violates the FAA's core purposes by imposing class arbitration without the parties' mutual consent. The FAA is based on "the basic precept that arbitration is a matter of consent, not coercion . . . ." *Stolt-Nielsen*, 130 S. Ct. at 1773 (citation and internal quotation marks omitted). Moreover, the FAA envisions arbitration on an individual basis only, *Concepcion*, 131 S. Ct. at 1751-52, and requires a contractual basis to override this potent default term. *See Stolt-Nielsen*, 130 S. Ct. at 1775-76. The bare arbitration clause at issue here lacks any such contractual basis as a matter of law.

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[5] *See Sutter v. Oxford Health Plans*, 675 F. 3d at 224 (affirming, as not "totally irrational," arbitral award authorizing class arbitration based on generic "any dispute" arbitration clause).

See id. at 1775. Therefore, any arbitral or judicial decision to the contrary must be vacated under the FAA, to protect "[t]he overarching purpose of the FAA . . . to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 131 S. Ct. at 1748.

In sum, the FAA does not, and cannot, require deference to an arbitral award that contravenes the FAA's core purposes by ordering class arbitration without the parties' mutual consent. And *Stolt-Nielsen* instructs that the naked arbitration clause at issue means that the parties did not consent to class arbitration.

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court reverse the judgment of the Third Circuit.

Respectfully submitted,

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