No. 12-135

IN THE

Supreme Court of the United States

OXFORD HEALTH PLANS LLC,

Petitioner,

v.

JOHN IVAN SUTTER, M.D.,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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Oxford's petition presents a question this Court left open in *Stolt-Nielsen* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010): Whether a contract provision requiring arbitration rather than litigation of any dispute, without more, can be a sufficient "contractual basis [to] support a finding that the parties agreed to authorize class-action arbitration." *Id*. at 1776 n.10; *see* Pet. i. In the two-plus years since *Stolt-Nielsen*, that question has already generated three federal appellate decisions and an express conflict among the circuits.

In opposing review, respondent argues that there is no conflict; that the case involves only a fact-bound dispute over the construction of an unusual arbitration clause; and that the question presented is unimportant. None of that is correct.

I. The Circuits Are Squarely Divided As To Whether An Arbitrator May Permissibly Construe A Broad Arbitration Clause, Without More, As An Agreement To Authorize Class Arbitration

As the petition demonstrates (Pet. 13-20), the Second, Third, and Fifth Circuits have all considered whether an arbitrator has the power to impose class arbitration on a theory that parties implicitly "agreed" to class proceedings, where there is no evidence of any such agreement other than the parties' adoption of a broad arbitration clause that prohibits court actions and directs all disputes to arbitration. *See* Pet. App. 1a-18a; *Jock* v. *Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011); *Reed* v. *Florida Metro. Univ., Inc.*, 681 F.3d 630 (5th Cir. 2012). The Third Circuit in this case and the Second Circuit in *Jock* have said yes. The Fifth Circuit in *Reed* has said no. The question is ripe for review.

1. Sutter asserts that the Third Circuit's decision here does not conflict with *Reed* because the contractual language at issue is "very different," with the language here being "particularly idiosyncratic." Opp. 20; *see* Opp. 19-23. That is demonstrably incorrect.

The language here provides that "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. The language in *Reed* had precisely the same "two part structure" (Opp. 8): One part provided that "Neither [party] shall file or maintain any lawsuit in any court against the other," while another specified that "any dispute … no matter how described, pleaded or styled, shall be resolved by binding arbitration." Pet. 17 n.8 (quoting clause). Likewise, the

parties in *Jock* 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 at 116-117 (quoting contract); *see* Pet. 13 n.7. No amount of squinting can identify any difference in these formulations that is material to the question presented here.

The appearance of indistinguishable language in three otherwise unconnected appellate decisions from the last three years also demonstrates the lack of any basis for the arbitrator's central assertion that the language here is "unique" (Pet. App. 47a), or for any decision or argument based on that assertion (*see, e.g.*, Opp. 19-21). As Sutter acknowledges (Opp. 19), the Fifth Circuit in *Reed* recognized the language before it as "standard" wording found "in many arbitration agreements." 681 F.3d at 642. Neither Sutter nor any of the opinions below actually identifies any material difference between that language and the language at issue here. And the ability of an arbitrator simply to *assert* that a clause is "unique" (Pet. App. 47a), and to purport to conclude on that basis that the parties must have "intended" to authorize class arbitration (*id.* at 48a), exposes the core of the problem here. *See* Opp. 19-20. Allowing courts to defer to such a "remark[]" (Pet. App. 16a; *compare* Opp. 20-21), without subjecting it to any meaningful degree of independent review, leaves defendants without any effective means of enforcing *Stolt-Nielsen*'s clear requirement of true contractual consent. *See also Jock*, 646 F.3d at 128 (Winter, J., dissenting) (Second Circuit's adoption of same approach has "rendered [*Stolt-Nielsen*] an insignificant precedent in this circuit"); Pet. 25-26.

Nor, clearly, is it tenable to suggest (Opp. 21-23) that arbitration provisions are so variable that this Court should simply despair of providing any further guidance on the critical question left open in *Stolt-Nielsen*. Opp. 21-23. Broad "any dispute" arbitration provisions may be phrased in different ways, but they have a common gist: All disputes go to arbitration, not to court. *See Reed*, 681 F.3d at 642 (collecting sources).[1] An arbitration clause saying essentially just that, without more, either may or may not support a fair inference that the parties, by adopting it, "*agreed to authorize* class arbitration." *Stolt-Nielsen*, 130 S. Ct. at 1776.[2]

In this case and in *Jock*, the Third and Second Circuits held that such broad arbitration clauses provided, by themselves, a sufficient "contractual basis" to permit an arbitrator to order class arbitration under *Stolt-Nielsen*, 130 S. Ct. at 1775. In *Reed*, the Fifth Circuit held that a functionally indistinguishable clause did not. That is a square conflict warranting this Court's review.

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[1] One reason for parties to use language making both points is to avoid any question that the parties are forgoing recourse to the courts. *See, e.g.*, *Garfinkel* v. *Morristown Obstetrics & Gynecology Assocs., P.A.*, 773 A.2d 665, 672 (N.J. 2001) ("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 by signing the contract, those remedies are forever precluded[.]" (quoting *Alamo Rent A Car, Inc.* v. *Galarza*, 703 A.2d 961, 966 (N.J. Super. Ct., App. Div. 1997))).

[2] Sutter points out (Opp. 22-23) that there are circumstances in which other factors may affect the proper interpretation of an arbitration clause. He does not, however, suggest that any such factor figured in any of the decisions below in this case. Indeed, the *absence* of any potentially confounding factor makes this case an excellent vehicle for review. *See* pp. 7-8, *infra*.

2. In an attempt to deny or minimize the conflict, Sutter suggests that there is no conflict because the Third Circuit theoretically left the door ajar for review of some future arbitral opinion the court might be willing to characterize as "totally irrational" (Pet. App. 17a). *See* Opp. 17; *see generally* Opp. 10-19.[3] Indeed, he argues that here the court undertook a "careful evaluation" of the arbitrator's decision, applying the same "substantive standards" as the Fifth Circuit. Opp. 16. None of this is remotely persuasive, in light of the diametrically opposite results reached in this case and in *Reed*.

Of course, all courts endeavor to apply the same standards, if that means only identifying and stating basic principles at a high level of generality. *See, e.g.*, Opp. 15-17. The conflict here has emerged because the lower courts have understood these standards differently, and applied them in different ways to indistinguishable facts.

In this case, for example, the Third Circuit drew from *Stolt-Nielsen* a "lesson … that where, as here, the parties' intent with respect to class arbitration is in question, the breadth of their arbitration agreement is relevant to the resolution of that question." Pet. App. 17a. In contrast, *Reed* concludes that a broad "'any dispute' clause is a standard provision that may be found, in one form or another, in many arbitration agreements," "merely reflects an agreement between the parties to arbitrate their dispute," and "is therefore not a valid contractual basis upon which to conclude that

[3] Sutter recites a few differences of detail among the cases. Opp. 9-10. He does not try to explain why the Court should view those differences as consequential, which they are not.

the parties agreed to submit to class arbitration." 681 F.3d at 642-643; *see* Pet. 18-19.

More broadly, *Reed* acknowledges the normally narrow scope of judicial review of arbitral decisions, but on this critical threshold issue it "read[s] *Stolt-Nielsen* as requiring courts to ensure that an arbitrator has a legal basis for his class arbitration determination." 681 F.3d at 645. That is, before an objecting party may be compelled to submit to class arbitration, a reviewing court must satisfy itself that the arbitrator indeed had a sufficient "contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen*, 130 S. Ct. at 1775. The Fifth Circuit concluded that a broad arbitration clause, by itself, is not such a basis as a matter of law. In this case, in contrast, the Third Circuit dismissed the same objections to an arbitrator's assertion of a "contractual basis" for class arbitration, under a materially indistinguishable contractual provision, as "uncognizable claims of factual and legal error." Pet. App. 16a; *see id.* at 14a-17a. The limitation on judicial review imposed by the Second Circuit in *Jock* is, if anything, even narrower, as Sutter himself points out. *See* Opp. 10-12; *Jock*, 646 F.3d at 123; Pet. 14-15.

As a practical matter, then, the Second and Third Circuits have made quite clear that they will not—and their district courts may not—conduct any meaningful review of an arbitrator's assertion that he or she has divined bilateral "agreement" to class arbitration from nothing more than the common language of a broad arbitration clause. It is thus unsurprising that the Fifth Circuit expressly saw its adoption of a more searching approach as a "disagree[ment]" both with *Jock* and with the Third Circuit's decision in this case. 681 F.3d at 645-646; *id.* at 644 n.13 ("We disagree with *Sutter* for essentially the reasons stated herein with respect to

the Second Circuit's *Jock* decision.").[4] That recognition of a conflict is correct, and Sutter cannot ignore it or wish it away. *See, e.g.*, Opp. 11 n.4.

II. THIS CASE IS AN IDEAL VEHICLE FOR REVIEW

On the premise that there is no conflict, Sutter argues that this case involves only "fact-bound disputes regarding this particular agreement." Opp. 24; *see* Opp. 24-27. His premise is wrong for the reasons just discussed. The case squarely presents a basic question left open in *Stolt-Nielsen*: Whether a contract provision requiring arbitration rather than litigation of any dispute, without more, can be a sufficient "contractual basis [to] support a finding that the parties agreed to authorize class-action arbitration." 130 S. Ct. at 1776 n.10; *see* Pet. i; *see also* Pet. 20-26.

As to the specific agreement here, Sutter notes the arbitrator's stated reasoning that "no civil action concerning any dispute" may be brought in court; "all such disputes" are to be arbitrated; and all previously possible "civil actions," which the arbitrator would construe to include class actions, must therefore be subject to arbitration. *See* Opp. 24; *see also* Opp. 3-6; Pet. 5-10.

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[4] Sutter notes that *Reed* addresses *Jock* in its text, while expressing disagreement with the Third Circuit's decision in this case in a footnote. Opp. 11 n.4. That is unsurprising. *Jock* was decided before *Reed* was briefed, and the Fifth Circuit knew its decision would create a conflict. The Third Circuit issued its opinion in this case nearly a month after *Reed* was argued. When it did, the plaintiff-appellee in *Reed* submitted the decision to the Fifth Circuit as additional authority with the observation that "[t]he facts in *Sutter* are identical to those in the present case." *Reed*, No. 11-50509, Doc. 00511817909, at 1 (5th Cir. filed Apr. 11, 2012). From the Fifth Circuit's point of view, the new decision merely deepened the conflict.

Sutter offers no defense of this construction on the merits, beyond a passing *ipse dixit* that it is "more plausible" than Oxford's. Opp. 24. As the petition points out, however, the arbitrator's position is untenable on its face—in part because it is "disputes," not "actions," that the text requires to be arbitrated. Pet. 5 n.1, 22-23. Sutter offers no substantive response to this simple textual point.[5]

In any event, as discussed above, the language here is materially indistinguishable from that at issue in *Reed* and *Jock*. The Third and Fifth Circuits have reached conflicting results as to whether that language, without more, can or cannot be construed as an affirmative agreement to authorize class arbitration, sufficient under the FAA and *Stolt-Nielsen*. And here, as in *Reed*, there is no more. *See* Pet. 22-24. This case is thus a perfect vehicle to address whether allowing an arbitrator to impose class arbitration based on nothing more than his purported interpretation of an ordinary, broad arbitration agreement violates "the basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen*, 130 S. Ct. at 1773 (citations omitted); *see also id.* at 1775 ("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," because "class-action arbitration changes the nature of arbitration to such a degree

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[5] Instead, he suggests that Oxford has waived the right to *make* the point. Opp. 25-26. That is not correct. Oxford has been arguing for years that the arbitration clause here cannot be read to reflect any agreement to authorize class arbitration. *E.g.*, Pet. C.A. Br. 41-44. This refutation of the arbitrator's textual analysis is just another reason why that is so. *See Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 378-379 (1995) (parties may use any argument to support a preserved claim).

that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."); *AT&T Mobility* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) (expressing skepticism that any defendant would ever agree to class arbitration); *id*. at 1753 (class arbitration "is not arbitration as envisioned by the FAA").

III. THE QUESTION PRESENTED IS IMPORTANT

Finally, Sutter argues (Opp. 27-30) that the question presented is of "limited and declining importance," because contracting parties should now be aware of the issue and insert express class-action bans into their arbitration agreements if they wish.[6] That is not a sound basis for denying review.

As the petition points out, there are at least two pending federal appeals raising the same issue (one of them being held in abeyance), and at least two more cases that were pending on appeal have recently settled. *See* Pet. 27-28 & n.14, 29-30 & n.16.[7] Thus, including the decision below, *Jock*, and *Reed*, at least seven cases on this issue have reached the courts of appeals in just the last two years. Several district courts have also faced the question. *See* Pet. 27 & n.13. The frequency with which the issue continues to be litigated belies any suggestion that it is unimportant. And Sutter offers no answer to the petition's point (Pet. 29-30) that these reported cases, especially at the appellate level, merely scratch the surface, because of the tremendous

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[6] Sutter does not contest that the question presented is both recurrent and ripe for review. *See* Pet. 26-30.

[7] The Vermont Supreme Court recently remanded a case without reaching the issue. *See* Pet. 28 & n.14; *Bandler* v. *Charter One Bank*, 2012 WL 4748096, ¶ 23 n.5 (Oct. 5, 2012).

pressure on defendants to settle cases in which class proceedings are imposed—particularly in arbitration, where there will be very limited opportunity for eventual review on the merits.

Nor is there any reason to believe that the importance of the question here will decline. As this case amply demonstrates, cases in which one party seeks class arbitration often generate years—even decades—of litigation. That is one reason why, nearly ten years after Sutter says this Court's decision in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), should have prompted parties to begin inserting express class arbitration bans into their contracts (Opp. 27), many such cases still remain. Another reason is that not every party seeking to "reduc[e] the cost and increas[e] the speed of dispute resolution" by invoking the "efficient, streamlined procedures" and "informality" that are the classic hallmarks of arbitration will think (or be able) to begin that process by hiring particularly sophisticated counsel of the sort who drafted the agreements at issue in cases such as *Concepcion* and *American Express Co.* v. *Italian Colors Restaurant*, No. 12-133 (cert. granted Nov. 13, 2012).[8] And, as DRI explains in its amicus brief, as a practical matter, even parties who can invest in such counsel "cannot revisit and revise all their contracts containing arbitration agreements whenever another … decision comes along." DRI Br. 20. Thus, "[i]n the real world … arbitrators often see—and will continue to see—contracts drafted long before anyone

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[8] Moreover, as the continuing litigation in the *American Express* case makes clear, even including an express prohibition on class actions is no guarantee that an arbitration agreement will be enforced according to its terms.

could reasonably have considered class arbitration a subject for negotiation." *Id.*

The briefs supporting certiorari filed by DRI and the U.S. Chamber of Commerce likewise confirm that the question presented is of significant importance to the business community. No less than when *Stolt-Nielsen* and *Concepcion* were decided, unjustified imposition of class arbitration continues to inflate defendants' potential liability beyond expected or manageable bounds, depriving businesses of the bargained-for advantages of arbitration and creating undue pressure to settle even non-meritorious claims. Chamber Br. 16-19; DRI Br. 9-15.

Finally, it is ironic for Sutter to argue that this Court should deny review here because parties can always expressly *ban* class arbitration in their contracts. The very question addressed in *Stolt-Nielsen* was what default rule should apply in determining an arbitrator's authority to impose class arbitration when the parties' agreement did not address the issue. *See* 130 S. Ct. at 1764, 1766. The Court answered, unequivocally, that class arbitration may *not* be imposed unless the parties affirmatively "*agreed to authorize*" it. *Id.* at 1776. There is no force to Sutter's argument that it is now unimportant whether that rule, required by the FAA and forcefully explicated by this Court, will or will not be meaningfully enforced.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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