No. 12-135

IN THE

# Supreme Court of the United States

OXFORD HEALTH PLANS LLC,

*Petitioner,*

*v.*

JOHN IVAN SUTTER,

*Respondent.*

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

## BRIEF FOR RESPONDENT


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## QUESTION PRESENTED

Did the arbitrator "exceed[] [his] powers," within the meaning of section 10(a)(4) of the Federal Arbitration Act, when he concluded that the arbitration paragraph agreed to by the parties authorized class arbitration?

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## STATEMENT

(1) This litigation arose out of a controversy regarding the manner in which health insurance companies reimburse physicians. The vast majority of patients with private insurance are covered by plans under which health insurers enter into agreements with physicians and other health care providers, so-called network providers, to compensate them at specified rates for particular medical procedures. Plans are typically structured to impose substantial additional costs on patients who obtain treatment by doctors outside the network. Thus most doctors have no choice but to accept these network agreements on the terms dictated by the insurance companies.

These companies' provider agreements often delineate each of the medical procedures using the Current Procedural Terminology (CPT) codes established by the American Medical Association, setting a specific rate of compensation for each. Health insurers have repeatedly violated these agreements in the three specific ways involved in this case. First is the practice known as "bundling." Where a doctor has provided several distinct medical services, health insurers often refuse to pay for all of the services that occurred, instead treating the medical care as a single bundle paying for only some of the procedures involved. Second is the practice known as "downcoding." Insurers unilaterally alter the CPT codes for which reimbursement is sought, so that the physician is paid for a less expensive medical procedure than was actually provided. Third is delaying payment to physicians, in violation of statutory prompt-payment requirements that are incorporated into agreements

between the insurers and the physicians. These delays enable the insurers to earn interest on the large sums they have received as premiums. *See In re Managed Care Litig.*, 135 F. Supp. 2d 1253, 1256-57 (S.D. Fla. 2001).

These practices typically are embodied in the computer programs that process claims, so that the violations are systemic and the total amount of compensation withheld by the companies is substantial, and the alteration of CPT codes is often concealed from the providers. For most physicians, however, the amount of compensation lost to any single insurance company is relatively modest; in the instant case the plaintiff's losses were about $1,000 a year. Thus the amount of an individual physician's losses would ordinarily be small enough that it would make no economic sense to hire a lawyer to sue the insurance company for these contract violations. In some instances physicians have obtained redress for these practices in small claims court, where (unlike in regular courts or arbitration) the filing fees are nominal and no attorney is required. As a practical matter, however, a health insurance company can engage in bundling, downcoding and delayed payment with relative impunity unless the physicians affected can challenge those practices in a class action.

(2) Respondent John Ivan Sutter is a pediatrician in Clifton, New Jersey, a suburb of New York City. Oxford Health Plans LLC is one of the major health insurance companies in the state. Like other health insurance plans, Oxford contracts with physicians who become part of its provider network. At the time when this dispute arose Oxford insured more than 300,000 people who lived or worked in New Jersey, and its network included more than 13,000 physicians and other health care providers. In

1998 Sutter signed an agreement with Oxford, becoming one of the company's network physicians. Oxford agreed to reimburse Sutter at particular rates spelled out in the agreement, using the CPT codes to delineate the procedures at issue. J.A. 11-12, 21-24.

This litigation began in 2002, when Sutter filed an action in New Jersey Superior Court on behalf of himself and a class consisting of all physicians who render medical services to patients who are members of health insurance plans sponsored by Oxford. Sutter's complaint asserted that Oxford had engaged in improper bundling and downcoding, in violation of the providers' agreements with Oxford, and also asserted a number of state statutory claims, including an assertion that Oxford had violated New Jersey's prompt-payment laws. The complaint specifically delineated both individual claims on behalf of Dr. Sutter and class claims on behalf of the other New Jersey physicians in Oxford's network.

Oxford moved to stay the lawsuit under the Federal Arbitration Act (FAA) and the similarly worded New Jersey Arbitration Act. N.J.S.A. 2A:24-1, et seq. Oxford relied on paragraph 11 of its agreement with Sutter, the first sentence of 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.

J.A. 15-16. This sentence contains two distinct provisions. The first, which prohibits instituting certain civil actions, applies to a "civil action concerning any dispute arising under this Agreement." By itself, this provision simply bans resort to courts, and does not require (or even authorize) arbitration. The second provision directs that certain disputes "be submitted to final and binding arbitration." The decisions below are at times confusing because they often use the phrase "the arbitration clause" or "the clause," without explaining whether they are referring to paragraph 11, to its entire first sentence, or only to the mandatory arbitration provision. For clarity, we refer to the first part of the sentence as the "no-civil-action provision," to the second part of that sentence as the "mandatory arbitration provision," and to paragraph 11 as "the arbitration paragraph."

The arbitration paragraph also provides that the arbitrator's decision would be "final and binding," and "may be confirmed and entered as a final judgment in any court of competent jurisdiction and enforced accordingly." Pet. App. 93a.

In state court Oxford argued that under the FAA, and the state's arbitration law, it was entitled to a stay of Sutter's entire action, including the class claims. Neither the FAA nor that state's law creates a right to enforce a simple waiver of the right to file suit; rather, both establish an entitlement only to the specific performance of an agreement to *arbitrate* a particular matter. Thus whether Oxford was entitled under the FAA and state law to end Sutter's entire civil action, or only a portion of that action, depended on whether all or only part of Sutter's lawsuit was subject to the mandatory arbitration provision.

Sutter argued that although the mandatory arbitration provision would apply to his contract claims, it did not apply to his state statutory claims.[1] Those statutory causes of action, Sutter contended, did not "arise under" his agreement with Oxford. Oxford responded that there was no difference between the coverage of the mandatory arbitration provision and the no-civil-action provision; both applied to the same disputes. "Sutter's . . . Agreement with Oxford requires arbitration of all 'civil action[s] concerning any dispute under' the . . . Agreement."[2] Oxford's attorney reiterated at the oral argument on its motion this insistence that the mandatory arbitration provision applied to everything subject to the no-civil-action provision.

> Sutter's contract here says that all *actions* concerning any disputes arising under the agreement should be sent to arbitration.[3]

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1. Plaintiff's Brief in Opposition to Defendant's Motion to Compel Arbitration and to Dismiss, 23-27.

2. Oxford's Memorandum of Law in Support of Its Motion to Stay and/or Dismiss in Part the Amended Complaint, 7; *see id.* 12 (referring to "Sutter's agreement to arbitrate any 'civil action concerning any dispute' arising under the . . . Agreement'"); Oxford's Reply Memorandum of Law in Further Support of Its Motion to Stay and/or Dismiss in Part The Amended Complaint, 2 ("Sutter['s] . . . contract requires arbitration of all 'civil action[s] concerning any dispute arising under' his . . . Agreement"), 11 ("Sutter's [s]tatutory [c]laims [m]ust [b]e [a]rbitrated [because] [t]hey 'concern[] [a] dispute' between Oxford and Plaintiffs regarding matters that 'aris[e] under' the . . . Agreement") (emphasis omitted).

3. Transcript of Motion, Oct. 25, 2002, 6 (emphasis added).

> [P]laintiff quoted the contract here as saying that any dispute arising under the contract needs to be arbitrated. That's wrong. The contract says, *actions* concerning any dispute arising under. That already broadens up the claim.[4]

The transcript of that proceeding was part of the record before the arbitrator.

The state court agreed that the mandatory arbitration provision applied to the statutory as well as the contract claims, and dismissed the action in its entirety. The court's orders described in broad terms the claims it was referring to arbitration. In its October 25, 2002 order, the court stated that it was dismissing the complaint "as the matters raised should properly be referred to arbitration." The court's November 21, 2002 order recited that "the claims in Plaintiff's Amended Complaint are hereby referred to arbitration." J.A. 25-26. Prior to the state court's ruling on Oxford's motion, Sutter had asked that court to direct that any arbitration proceed as a certified class action.[5] The state judge declined to act on that motion, instead ordering that "all procedural issues including, but not limited to, the determination of class certification, shall be resolved by the arbitrator." J.A. 26.

Sutter filed a demand for arbitration with the American Arbitration Association and an arbitrator was appointed in the spring of 2003. Following this Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003),

4. Id. at 30 (emphasis added).

5. Letter of Eric D. Katz to Hon. Stephen J. Bernstein, Oct. 21, 2002.

the parties filed briefs regarding whether the arbitration paragraph authorized class action proceedings. Oxford insisted that it was the intention of the parties that there be no class actions, and advanced a variety of arguments for that construction of the agreement. Oxford did not, however, disavow the position it had taken in the state court less than a year earlier that the agreement required arbitration of any "*action* concerning any dispute arising under th[e] agreement." Nor did Oxford dispute that the arbitrator had the authority to decide the issue of whether the agreement authorized arbitration of class claims.

The arbitrator concluded that the first sentence of the arbitration paragraph (which he referred to as "the arbitration clause" or "the clause") authorized class actions. The linchpin of the arbitrator's analysis was his conclusion that the no-civil-action provision and the mandatory arbitration provision were co-extensive; everything excluded from litigation by the no-civil-action provision had to be (and thus could be) arbitrated under the mandatory arbitration provision. "Having prohibited [in the no-civil-action provision] all conceivably possible civil actions," the arbitrator reasoned, the mandatory arbitration provision:

> takes this universal and unlimited class of prohibited civil actions and says, "and all such disputes shall be submitted to final and binding arbitration . . . ."
>
> This means that [the mandatory arbitration provision of the] clause sends to arbitration "all such disputes," which, apart from the prohibition [in the no-civil-action provision],

> could have been brought in the form of any conceivable civil action. Since there can be no dispute in any court without a civil action of some sort, the disputes that the [mandatory arbitration provision of the] clause sends to arbitration are *the same universal class of disputes* that the [no-civil-action provision of the] clause prohibits as civil actions before any court. It follows that the intent of [the first sentence of paragraph 11], read as a whole, is to vest in the arbitration process everything that is prohibited from the court process.

J.A. 31 (emphasis added).[6]

Because class actions are among the proceedings barred by the no-civil-action provision, the arbitrator concluded, they must be among the matters that are subject to the mandatory arbitration clause.

> A class action is plainly one of the possible forms of civil action that could be brought in a court concerning a dispute arising under this Agreement. . . .
>
> Therefore, because all that is prohibited by the first part of [the first sentence of paragraph 11] is vested in arbitration by its second part, I find that the arbitration clause must have been intended to authorize class actions in arbitration.

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6. The arbitrator uses the phrase "clause" to refer to the entirety of the first sentence of paragraph 11, and refers to the no-civil-action provision as "[t]he introductory phrase." Because that sentence includes two distinct provisions, the bracketed material has been inserted to avoid confusion.

J.A. 31-32. The arbitrator believed that Oxford, having invoked the first sentence of the arbitration paragraph "to prohibit a class action in court, . . . ought to be bound by judicial estoppel from arguing in this arbitration that the class action part of the case is not governed by the [mandatory arbitration] clause." J.A. 32. The arbitrator rejected Oxford's arguments that class arbitration was precluded by other provisions of the agreement. J.A. 33-36.

Following the arbitrator's 2003 decision that the agreement permitted class actions, the parties proceeded to litigate whether a class action was appropriate under the particular circumstances of this case. In 2005 the arbitrator decided that the arbitration should proceed as a certified class action, and issued an "Award" defining the class and delineating the class claims to be resolved. J.A. 38-55. Oxford filed suit in federal court under section 10 of the FAA to vacate the award. The district court refused to vacate either the arbitrator's 2003 interpretation of the arbitration paragraph or the arbitrator's 2005 decision to certify a class action. Pet. App. 69a-72a. Oxford appealed only the portion of the district court's decision regarding the 2005 Award certifying a class, and did not dispute on appeal the 2003 arbitral decision interpreting the arbitration paragraph. The Third Circuit affirmed the district court decision refusing to vacate the Award. Pet. App. 55a-59a.

In 2010 the arbitrator dismissed on the merits the most important aspect of Sutter's state statutory prompt-payment claims. Sutter sought to vacate that arbitration decision in district court under section 10(a)(4) of the FAA. The court refused to vacate the arbitrator's decision.[7]

7. *Sutter v. Oxford Health Plans, LLC*, Civ. No. 10-4903 (GEB)(D.N.J. 2011).

Also in 2010, following this Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010),Oxford renewed its challenge to the arbitrator's interpretation of the arbitration paragraph. Although Oxford raised a variety of objections to the arbitrator's 2003 decision, it did *not* challenge the arbitrator's earlier holding that under the arbitration paragraph the mandatory arbitration provision applied to all the matters that were excluded from court by the no-civil-action provision. And again, Oxford did not contest that the question of interpretation of the agreement was properly before the arbitrator; indeed, Oxford itself insisted that the arbitrator decide the issue once more.

The arbitrator carefully reviewed this Court's opinion in *Stolt-Nielsen*, and concluded that it was consistent with his earlier 2003 decision. In *Stolt-Nielsen,* the arbitrator noted, the parties stipulated that they had never reached any agreement regarding class arbitration; the arbitrators in that case thus had no cause to interpret the written agreement that the parties had signed. In this case, the arbitrator pointed out, there was no such stipulation, and he was thus empowered and required to interpret the arbitration paragraph of the parties' written agreement. J.A. 68-71.

The arbitrator's 2010 decision again rested on his view that the no-civil-action provision and the mandatory arbitration provision were co-extensive. The arbitrator emphasized that the no-civil-action provision clearly applied to a class action.

> No civil action, in my view, means no civil action, of any form whatsoever. . . . [A] class action

> is a form of civil action . . . . "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.

J.A. 73. Conversely, the arbitrator pointed out, if class actions were outside the scope of the mandatory arbitration clause, they would also be outside the scope of the co-extensive no-civil-action clause; Oxford itself, however, had invoked the no-civil-action provision to defeat the state court class action.

> Oxford persuaded the New Jersey court . . . that Dr. Sutter's class action in court was required by the clause in question to be sent to arbitration. . . .
>
> [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. Oxford would have to have misled the New Jersey court, and the court class action should be reinstated. This is another way of describing why Oxford should be judicially estopped from advancing this argument.

J.A. 75.

Responding to Oxford's objection that his 2003 order had noted that class arbitration was not excluded from the first sentence of the arbitration paragraph, the arbitrator explained that his original order merely pointed out that the inclusive language of the mandatory arbitration provision was properly read—in the absence of any specific

exclusion—to encompass everything within the scope of the no-civil-action provision, which itself included class actions.

> Oxford argues that the [2003] Award relied on the absence of specific exclusion of class-action arbitration from this clause to indicate that it was the intention of the parties to include class arbitration[.] If true, this reasoning would run afoul of *Stolt-Nielsen*. However, the [2003] Award was not based on such reasoning. The absence of such an exclusion was not something that had to be relied on to divine the meaning of the clause. It merely corroborated what was already obvious from the language of the clause itself. "All" [in the mandatory arbitration provision] means all. . . . [I]f it had been the parties' intention to exclude class actions from the clause, in the face of such sweeping language, normal drafting would have suggested a specific exclusion.

J.A. 73. For its part, Oxford did not argue that the no-civil-action provision did not apply to class actions.

Oxford moved to reopen the district court action it had originally filed in 2005, and asked the court to vacate the arbitrator's 2010 decision. The district court rejected Oxford's contention that under *Stolt-Nielsen* an arbitrator can only order class proceedings if the underlying agreement expressly uses words such as "class action." Pet. App. 28a. The district court also declined, as Oxford had urged, "to revisit and reconsider virtually every aspect of [the 2010] Order." Pet. App. 27a. "Viewed in sum, Oxford's arguments advocate for a standard that

appears closer to *de novo* than deferential review." Pet. App. 27a-28a.

The Third Circuit affirmed. The appellate court, like the district court, held that *Stolt-Nielsen* does not require an explicit reference to class actions. Pet. App. 13a n.5. The court of appeals rejected Oxford's contention that the arbitrator's detailed analysis of the contractual terms was not undertaken in good faith, but was instead a "pretext for the imposition of his policy preferences." Pet. App. 14a. "Oxford's allegations of pretext are simply dressed-up arguments that the arbitrator interpreted its agreement erroneously." *Id.* 15a. Oxford had raised a number of arguments of "factual or legal error" in the arbitrator's decision (*id.* 16a); the Third Circuit held that those contentions were "uncognizable." *Id.* Section 10 of the FAA, the court of appeals reasoned, permits an award to be vacated "only upon one of the four narrow grounds enumerated in [section 10]. . . . Those grounds are exclusive." *Id.* 6a. Section 10 does not authorize a federal court to "entertain claims that an arbitrator made factual or legal errors." *Id.* 5a.

The court of appeals denied Oxford's petition for rehearing en banc. This Court granted certiorari. 133 S. Ct. 786 (2012).

## SUMMARY OF ARGUMENT

This is a case about the finality of an arbitral decision under the Federal Arbitration Act. Section 10 authorizes a court to vacate an arbitral decision "only in very unusual circumstances." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). This case does not present any of the exceptional circumstances specified in section 10.

In an application to vacate under section 10(a)(4) of the FAA, challenging an arbitrator's decision regarding the meaning of a contract, the plaintiff can only establish that the arbitrator "exceeded [his] powers" by showing either (1) that the arbitrator had no power to interpret the contract, or (2) that the arbitrator's decision was not actually based on an interpretation of the contract. An attempted demonstration that the arbitrator misconstrued the contract could not establish, as section 10(a)(4) requires, that the arbitrator "exceeded [his] powers." The power to interpret a contract includes the power to interpret the contract incorrectly.

In this case the arbitrator was clearly authorized to determine the meaning of the arbitration paragraph. Oxford itself repeatedly submitted that very question to the arbitrator. The arbitrator's decision to order class arbitration was based on his interpretation of the arbitration paragraph.

This case is quite unlike *Stolt-Nielsen*. There the arbitrators exceeded their powers by resting their decision on an issue they had no authority to resolve, deciding based on their own policy preferences whether a default rule in favor of class actions was "the best rule to be applied in the situation," rather than determining what default rule was required by the FAA, federal maritime law, or New York law. Here, on the other hand, the arbitrator *did* base his decision on the relevant governing standard, the meaning of the agreement between Oxford and Sutter.

This Court should not, as Oxford appears to propose, create some new scheme for "meaningful review" or "judicial . . . policing" of the correctness of an arbitrator's

decision. The grounds set out in section 10 for vacating an arbitrator's decision are exclusive. Permitting judicial reconsideration of the correctness of an arbitrator's decision would destroy the finality of arbitral decisions that is the foundation of arbitration under the FAA.

Although the correctness of the arbitrator's interpretation of the arbitration paragraph is not subject to judicial review, that interpretation was sound. The arbitrator reasonably concluded that the mandatory arbitration provision of the agreement referred to arbitration the same matters that the no-civil-action provision excluded from court. Oxford itself insisted in the prior state court proceedings that the two provisions were co-extensive. The state court would have had no authority under the FAA to stay or dismiss the class claims, as Oxford requested and the state court ordered, unless those claims were covered by the mandatory arbitration provision of the agreement between Oxford and Sutter, and not merely by the no-civil-action provision.

## INTRODUCTION

This is a case about the finality of arbitral decisions under the Federal Arbitration Act. This Court long ago admonished that permitting judicial review of an award for legal or factual error would result in "a substitution of the judgment of the [court] in place of the judge chosen by the parties, and would make an award the commencement, not the end, of litigation." *Burchell v. Marsh,* 58 U.S. 344 (1854).

Section 10 of the FAA authorizes a court to vacate an arbitral decision "only in very unusual circumstances."

*First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). That strict limitation on the grounds on which an award can be overturned under section 10 is "needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 588 (2008). Permitting a party to challenge an award on broader grounds would "open[] the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process,' . . . and bring arbitration theory to grief in post-arbitration process." *Id.* (*quoting Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.,* 341 F. 3d 987, 998 (9th Cir. 2003)).

Oxford itself invoked the limitations imposed by section 10 in an earlier phase of this litigation. In 2010 the arbitrator issued an order rejecting on the merits the most important of Sutter's state statutory prompt-payment claims; the total value of the dismissed claims was several million dollars.[8] When Sutter filed suit under section 10(a)(4) of the FAA challenging that adverse decision, Oxford forcefully and successfully argued that federal courts had no authority to review the merits of an arbitral decision.[9]

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8. Brief in Support of Plaintiff's Motion to Vacate Procedural Order No. 19, *Sutter v. Oxford Health Plan, LLC*, 1-5.

9. Brief in Opposition to Plaintiff Class's Application to Vacate Procedural Order No. 19 and in Support of Motion to Dismiss Verified Complaint, 12 ("To demonstrate that the Arbitrator exceeded his powers, it is not enough for the Class to show that the arbitrator 'committed an error – or even a serious error.' *Stolt-Nielsen*. The Class must show that the Arbitrator's ruling is so irrational that no basis for it can be inferred or rationally derived from the facts of the case or the parties' arguments and

In 2010 the arbitrator also rejected Oxford's request that he rescind his earlier determination that the arbitration paragraph authorizes class proceedings. Oxford challenged that 2010 arbitral decision under section 10(a)(4) in an action before the same judge who heard Sutter's section 10(a)(4) action; it is Oxford's attack on that 2010 arbitral decision that is at issue in this case. In this Court Oxford now argues that section 10(a)(4) mandates careful judicial scrutiny of the correctness of an arbitrator's decision, insisting that such thorough "judicial . . . policing" (Pet. Br. 14)—precisely the judicial role Oxford adamantly opposed in response to Sutter's own action under section 10(a)(4)—is required by the FAA.

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submissions to the Arbitrator." (footnote omitted)); Reply Brief in Further Support of Oxford's Motion to Dismiss the Verified Complaint, 6 ("[A]n arbitrator's ruling must be 'viewed in context' to see whether a basis can be inferred from the arbitration record."), 6-7 ("Sutter also unfairly criticizes the Arbitrator for the brevity of his ruling. . . . Absent a requirement for a 'reasoned' award, an arbitrator's ruling need not provide any explanation."), 9 ("[E]ven if the Arbitrator seriously misinterpreted the commentary, that would not establish that . . . he . . . exceeded his powers. *See Stolt-Nielsen* . . . ('even a serious error' does not establish that arbitrator exceeded his powers.")), 12 ("Sutter contends that the Arbitrator's ruling is an error, perhaps even serious error. But, even if Sutter were right, this does not mean that the Arbitrator . . . exceeded his powers, as required for vacatur."); Brief in Opposition to Plaintiff Class's Application to Vacate Procedural Order No. 19 and In Support of Motion to Dismiss Verified Complaint, 1-2 (section 10(a)(4) requires "a showing that the Arbitrator's ruling was so irrational that it could not have been rationally derived from the facts of the case or the parties arguments and submissions"), 12 ("To demonstrate that the Arbitrator exceeded his powers, . . . [t]he Class must show that the Arbitrator's ruling is so irrational that no basis for it can be inferred or rationally derived from the facts of the case or the parties' arguments and submissions to the Arbitrator.")

The meaning of the strict limitations established by section 10 of the FAA on the grounds on which an arbitral decision may be vacated, however, does not vary depending on which party prevailed before an arbitrator or on which provision of a contract an arbitrator may have interpreted. The agreement between Oxford and Sutter provided that the arbitration decision would be "final and binding." Oxford is not entitled, merely because the decision in this instance was in favor of Sutter, to downgrade the arbitrator's decision to tentative and advisory.

## I. SECTION 10(a)(4) ONLY PERMITS VACATUR OF AN ARBITRATOR'S DECISION ON EXCEPTIONALLY NARROW GROUNDS

Section 10(a)(4) of the FAA authorizes a court to vacate an award "where the arbitrators have exceeded their powers." 9 U.S.C. § 10(a)(4). The statutory language concerns only whether the arbitrators had the "power" to issue the award, not whether the arbitrators exercised that power correctly. Section 10 as a whole is concerned with "extreme arbitral misconduct," *Hall Street*, 552 U.S. at 586, not arbitral errors. "Section 10 . . . , after all, addresses egregious departures from the parties' agreed-upon arbitration: 'corruption,' 'fraud,' 'evident partiality,' 'misconduct,' 'misbehavior,' [and] 'exceed[ing] . . . powers[.]' . . . . 'Fraud' and a mistake of law are not cut from the same cloth." *Id.*

The powers of an arbitrator derive from the contract in which the parties have agreed that certain claims or issues are to be resolved by arbitration. It is the scope of the "powers" conferred on an arbitrator by that contract to determine the specified disputes that is the

touchstone of section 10(a)(4).[10] Where a party argues that the arbitrator's resolution of a particular issue exceeded his or her powers under section 10(a)(4), the controlling question is not whether that issue was correctly decided, but whether the arbitrator had the authority to decide the issue at all. "[A]rbitrators . . . exceed[] their authority [if they go] beyond the limits of the submission," and decide a matter "not contained in the submission." *Burchell v. Marsh*, 58 U.S. 344, 350-51 (1854).

Arbitrators can exceed their power in either of two ways. First, arbitrators exceed their powers if they resolve a dispute that the parties have not submitted for arbitration. For example, in the labor context if a union and employer asked the arbitrators to decide whether a particular employee was improperly dismissed, the arbitrators would exceed their authority if they (instead or also) decided that the worker was underpaid. Second, arbitrators would exceed their powers if they resolve a submitted dispute on a ground different from that agreed upon by the parties. Thus if in a commercial dispute the parties agreed to arbitrate the validity of a contract, and also agreed that the issue should be governed by New York law, the arbitrators would exceed their powers if they invalidated the contract on the ground that it

10. The Question Presented framed by Oxford is "[w]hether an arbitrator exceeds his powers *under the Federal Arbitration Act* by determining that the parties affirmatively 'agreed to authorize class arbitration,' *Stolt-Nielsen*, 130 S. Ct. at 1776, based solely on their use of broad contractual language . . . ." (Pet. Br. I)(emphasis added and omitted). That misapprehends the issue raised by an application for vacatur under section 10(a)(4); the question in such a case is whether the arbitrator exceeded the powers conferred by the parties' agreement, not by the FAA.

violated California law. In the latter case the grounds on which an arbitrator made a determination are relevant under section 10(a)(4), *not* because it matters whether the arbitrator got the right answer, but because the arbitrator's reasoning reveals whether the arbitrator was resolving the right question. The arbitrator only has the authority to decide a dispute applying the standard agreed upon, expressly or implicitly, by the parties.

Litigation under section 10(a)(4) may present a need to determine what question was submitted to the arbitrators and/or to ascertain what question the arbitrators actually decided. *Stolt-Nielsen* presented both types of situations. First, the arbitrators in that case would have exceeded their powers if they had decided whether the parties had agreed to authorize class arbitration,[11] because the parties had not presented a dispute over that question to the arbitrators. "[T]he panel had no occasion to 'ascertain the parties' intention' in the present case because the parties were in complete agreement regarding their intent." 130 S. Ct. at 1770. The parties had stipulated that there was no agreement between them regarding the permissibility of class proceedings. "This stipulation left no room for an inquiry regarding the parties' intent, and any inquiry into that settled question would have been outside the panel's assigned task." *Id.* Second, the issue that was properly before the arbitrators, this Court held, was to identify under the FAA, New York law, or maritime law, the appropriate default rule in the absence of an agreement

11. It was unclear whether the arbitrators had actually done so. The Court noted that the arbitrators' opinion "makes a few references to intent." 130 S. Ct. at 1770.

between the parties.[12] But that was not the question that the arbitrators had in fact decided. This Court concluded from the face of the arbitral decision that the arbitrators had not "identif[ied] and appl[ied] a rule of decision derived from the FAA or either maritime or New York law." 130 S. Ct. at 1770; *see* 130 S. Ct. at 1768.

> Rather than inquiring whether the FAA, maritime law, or New York law contains a "default rule" under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation.

*Id.* at 1768-69. The arbitrators exceeded their powers in *Stolt-Nielsen*, not because they failed to correctly develop "the best rule to be applied in such a situation," but because they had no power to devise or adopt such a "best rule" at all.

The question in this case is whether the arbitrator exceeded his powers when he interpreted the arbitration paragraph to authorize class arbitration. But where arbitrators interpret a contract and then issue an award based on that interpretation, the party challenging that award does not establish that the arbitrators "exceeded their powers" merely by persuading a court that the

12. "Because the parties had agreed their agreement was 'silent' in the sense that they had not reached any agreement on the issue of class arbitration, the arbitrators' proper task was to identify the rule of law that governs in that situation." 130 S. Ct. at 1768.

arbitrators' interpretation was mistaken. The power to interpret a contract includes the power to interpret the contract incorrectly.

A claim that an arbitrator's construction of a contract was incorrect therefore is not cognizable under section 10(a)(4) or any other provision of the FAA. "Whether the arbitrators misconstrued a contract is not open to judicial review." *Bernhardt v. Polygraphic Co. of America,* 350 U.S. 198, 203 n.4 (1956).[13] "[T]he courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on . . . [a] misinterpretation of the contract." *United Paperworkers Int'l Union, AFL-CIO, v. Misco, Inc.,* 484 U.S. 29, 36 (1987).

> Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of . . . the meaning of the contract that they have agreed to accept. . . . [T]he parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract.

*Id.* at 38-39. "It is the arbitrator's construction [of the contract] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because

13. "Judicial review of a[n] . . . arbitration decision pursuant to . . . an agreement is very limited. Courts are not authorized to review the arbitrator's decision . . . despite allegations that the decision . . . misinterprets the parties' agreement." *Major League Baseball Players Ass'n v. Garvey,* 532 U.S. 504, 509 (2001).

their interpretation of the contract is different from his." *Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599 (1960); *see Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 62 (2000) ("[the parties] have 'bargained for' the 'arbitrator's construction' of their agreement") (*quoting Enterprise Wheel*).

These decisions derive from the broader rule that courts may not overturn an arbitrator's decision on the ground that the arbitrator made an error of law or fact. "Courts . . . do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. . . . [I]mprovident, even silly, fact-finding . . . is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38-39 (1987). "If the award is within the submission and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact." *Burchell v. Marsh,* 58 U.S. 344, 350 (1854). "It is not enough for [challengers] to show that the panel committed an error—or even a serious error." *Stolt-Nielsen*, 130 S. Ct. at 1767. Parties agree to final and binding arbitration not because they are certain that an arbitrator will not make a mistake, even on rare occasion an egregious error, but because they conclude that the risk of error is outweighed by the greater benefits of finality.

To be sure, the power of an arbitrator ultimately derives from the contract authorizing arbitration, and the arbitrator's power to issue a particular award may rest in part or in whole on the meaning of a contractual provision. But that does not mean that an arbitrator

exceeds his or her powers when he or she bases an award on an interpretation of a contract that a court may believe is incorrect. The parties in such a situation have agreed not only that the availability of an award will be based on the meaning of their contract, but also that the arbitrator has the final responsibility for determining what that meaning *is*. A court therefore may not hold that an arbitrator exceeded his or her authority because it believes the award at issue was based on a misinterpretation of the contract; in the losing party's section 10(a)(4) challenge to the award, the arbitrator's interpretation of that contract is final and binding on the court as well as the parties.

In *Enterprise Wheel*, for example, the party opposing the award argued "that by applying correct principles of law to the interpretation of the collective bargaining agreement it can be determined that the agreement did not [authorize the disputed award], and that therefore the arbitrator's decision was not based upon the contract." 363 U.S. at 598-99. This Court emphatically disagreed:

> The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final.

*Id*. That principle applies equally when the arbitrator construes a contract provision regarding the rights and obligations of the parties (such as how much a physician should be paid for setting a broken leg) and when the arbitrator construes a contract provision regarding how

the arbitration is to proceed. An arbitrator's interpretation of a contract is within his powers so long as the arbitrator's decision arguably draws its essence from that contract. *See* pp. 33-36, *infra*.

*Stolt-Nielsen* does not alter this longstanding principle. *Stolt-Nielsen* holds that a party may not be compelled 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 (emphasis added and omitted). Where the parties have agreed that the arbitrator is to construe the underlying agreement, it is for the arbitrator to determine whether that standard has been met. In such a case *Stolt-Nielsen* does not divide responsibility for construing the agreement between the court and the arbitrator, with the court making a threshold determination about whether there is enough contractual foundation to permit (but not necessarily require) the conclusion that there was an agreement to class arbitration, and the arbitrator being limited to deciding whether or not to draw such an inference. Rather, as in other cases where there is a dispute over the meaning of a contract whose interpretation is a matter for arbitration, "[t]he courts . . . have no business weighing the merits of the [disputed interpretation], . . . [and] determining whether there is particular language in the written instrument which will *support* the claim." *United Steeleworkers of America v. American Mfg. Co.,* 363 U.S. 564, 568 (1960)(emphasis added).

## II. THE ARBITRATOR'S INTERPRETATION OF THE ARBITRATION PARAGRAPH OF THE CONTRACT MAY NOT BE VACATED UNDER SECTION 10(a)(4)

In this case, unlike *Stolt-Nielsen*, the arbitrator decided the particular question submitted to him by the parties and resolved that issue on the proper grounds. The arbitrator therefore did not "exceed[ his] powers" in ordering class arbitration.

### A. The Dispute Regarding the Meaning of The Arbitration Paragraph Was Properly Submitted to The Arbitrator

(1) The question of whether the arbitrator should determine if the arbitration paragraph authorized class proceedings first arose when this case was in the New Jersey state court. Sutter asked that court to order that any arbitration proceed as a class action. Oxford objected that only the arbitrator himself could decide whether there should be class arbitration.

> Procedures for [a]rbitration [m]ust [b]e [d]ecided by the [a]rbitrator. Sutter's . . . argument . . . that the Court 'should first certify this matter as a class action . . . "is impermissible as a matter of law." . . . [A]s the New Jersey Appellate Division has held, once a court determines that a particular dispute is arbitrable, all procedural issues such as class certification are to be resolved by the arbitrator.[14]

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14. Letter of Marc De Leeuw to Hon. Stephen J. Bernstein, Oct. 24, 2002, 1-2 (emphasis omitted).

The state court accepted Oxford's contention, ordering that "all procedural issues including, but not limited to, the determination of class certification, shall be resolved by the arbitrator." J.A. 26.

Likewise, in the proceedings before the arbitrator, Oxford repeatedly insisted that it was for the arbitrator to determine whether the agreement authorized a class action. At an early conference "[t]he parties in this case . . . agreed that [the arbitrator] should proceed to make the determination." J.A. 30. Oxford itself asked the arbitrator to resolve that question by filing a "Motion for an Order That 'Class Arbitration' Is Not Available Under Dr. Sutter's Contract With Oxford."[15] Oxford argued that "the arbitrator should decide the threshold question of whether 'class arbitration' is permitted by the terms of the contract."[16] The state court, Oxford argued, "stated that it had no legal authority to decide that question . . . , and left to the Arbitrator the question . . . . Oxford does not dispute the Arbitrator's authority to decide this question."[17] "[T]he broad authority given to the arbitrator to resolve 'any dispute arising out of this agreement,'" Oxford explained, meant "that the arbitrator has the power to ascertain whether the parties contemplated class arbitration in their agreement—a power that Oxford does not contest."[18]

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15. Motion for an Order That 'Class Arbitration' Is Not Available Under Dr. Sutter's Contract With Oxford, Aug. 4, 2003.

16. *Id.*

17. Oxford's Reply Brief in Further Support of Its Motion For An Order That 'Class Arbitration' Is Not Available Under Dr. Sutter's Contract With Oxford, 5.

18. *Id.* 5 (emphasis added); *see id.* at 1 (determination of whether the agreement permits class actions is "the Arbitrator's task").

In 2010 *Stolt-Nielsen* explained that *Bazzle* had not decided that the availability of a class action must be submitted to an arbitrator. 130 S. Ct. at 1772. Oxford now understood that it was not required to submit the issue to the arbitrator, noting that this Court in *Stolt-Nielsen* had "suggested that this threshold determination *may* be made by courts, not arbitrators, given that the *Bazzle* judgment was decided only by a plurality."[19] Despite that understanding, rather than seeking to return to court to argue that the class action issue was a question of arbitrability that a court must decide, or reserving its right to wait until the end of the arbitration to advance that argument in court, Oxford chose again to submit the issue to the arbitrator. Oxford filed a motion asking the arbitrator to revisit his interpretation of the arbitration paragraph and to hold that the paragraph did not authorize class actions.[20] Had the arbitrator resolved that motion in Oxford's favor, the company would have been entitled to invoke section 10 to limit any judicial challenge by Sutter to the arbitrator's decision.

(2) As explained above, the FAA only authorizes a court to vacate an arbitral decision in one of the narrow circumstances set out in section 10(a) of the Act; under certain circumstances not relevant here an award may be modified or corrected under section 11. Otherwise, the court "*must* grant . . . an order [confirming the award] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 . . . ." 9 U.S.C. § 9

19. *See* Oxford Health Plans, Inc.'s Motion for Modification of Clause Construction Award, 3 n.6 (emphasis added). Oxford quoted at length the discussion of this issue in *Stolt-Nielsen*.

20. *Id.*

(emphasis added). This Court has recognized only one other circumstance in which an arbitral award may be challenged in a proceeding under the FAA. If an arbitrator decides a "question of arbitrability," and the parties did not consent to the submission of that issue to the arbitrator, a party under the FAA may obtain in court a de novo determination of that question. That exception does not apply here, as Oxford itself recognizes.

An issue is a question of arbitrability "in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided [it]." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). Questions of arbitrability are "far more limited" than the full range of "gateway" issues that an arbitrator might need to resolve before addressing the merits of a dispute. *Id.* This Court has recognized two such questions of arbitrability: "whether the parties are bound by a given arbitration clause" and whether an arbitration clause "applies to a particular type of controversy." 537 U.S. at 84. This Court has not decided whether the availability of class proceedings is a question of arbitrability, and need not do so in this case,[21] because even an issue that does constitute a question of arbitrability need not be decided by a court if the parties have agreed instead that the question will be submitted to the arbitrator.

> We have recognized that parties can agree to arbitrate "gateway" questions of "arbitrability,"

21. In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003), the plurality concluded that whether an agreement authorizes class arbitration is not a question of arbitrability. Three members of the Court would have concluded otherwise. 539 U.S. at 456-57 (Rehnquist, C.J., dissenting).

> such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. . . . This line of cases merely reflects the principle that arbitration is a matter of contract.

*Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2777 (2010)(footnote omitted).

Thus though a party may resist an action to compel arbitration by asserting that there is an issue of arbitrability that the court should resolve before ordering arbitration, the court must leave such a question to the arbitrator when the parties have agreed to submit it to arbitration. *See id.* Likewise, where a question of arbitrability arises in the course of the arbitration proceeding, a party dissatisfied by the arbitrator's resolution of that question is not entitled to a de novo judicial determination of that issue if that party consented to the determination of that issue by the arbitrator, and thus failed to preserve the issue for later presentation to the court. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 946 (1995).

Here, during the arbitral proceedings in this case, it was Oxford itself that repeatedly asked the arbitrator to decide whether the arbitration paragraph authorized class arbitration. And in the courts below, Oxford relied exclusively on FAA section 10 as the basis for its challenge to the arbitrator's class arbitration determination, with no suggestion that the class arbitration issue was a question of arbitrability subject to de novo judicial decision. In footnote 9 of its brief in this Court, Oxford concedes that it did not preserve any claim of entitlement to de novo review and that no such claim is now before this Court.

> [U]nder *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*. The issue is not squarely presented in this case because in 2003 the parties here, like those in *Stolt-Nielsen* . . . , 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 instance . . . , and Oxford did not argue for *de novo* review on this basis in the lower courts.

Pet. Br. 38-39 n.9. As Oxford acknowledges, it is too late in the day to now contend that the interpretation of the arbitration paragraph was a question of arbitrability that could only be resolved by the court. Oxford long ago agreed, indeed insisted, that the arbitrator should determine whether the agreement authorized class proceedings.

In addition, once this case returned to federal court in 2010 Oxford only challenged the *correctness* of the arbitrator's interpretation of the arbitration provision. Unlike the plaintiffs in *First Options,* Oxford never challenged the arbitrator's *authority* to decide this question. In *Stolt-Nielsen* this Court declined to consider whether the availability of class proceedings is ordinarily a question of arbitrability to be resolved by a court, because the parties there had agreed to submit that issue to the arbitrators and neither party argued that that submission was impermissible. 130 S. Ct. 1772. The same is true here. As in *Stolt-Nielsen*, the only issue before the Court is whether the arbitral decision can be vacated under section 10.

Oxford does not suggest that it is entitled at this juncture to challenge the arbitrator's power to determine whether the arbitration paragraph authorized class proceedings. Rather, Oxford appears to contend that when a duly authorized arbitrator does decide a question of arbitrability properly submitted to him with the parties' agreement, a judicial challenge to such a decision is not limited to the specific grounds set out in section 10 of the FAA regarding ordinary arbitral decisions. Rather, according to Oxford, such a decision must be given special scrutiny by the courts; the correctness of arbitral decisions regarding questions of arbitrability must be subjected to "meaningful," "independent," or "plausibil[ity]" review. And such review is required here, Oxford suggests, because whether a contract authorized class actions is a question of arbitrability and therefore an arbitrator's resolution of that issue, even when agreed to by the parties, requires special judicial scrutiny. Pet. Br. 35-37.

But however significant a question of arbitrability may be (and even assuming arguendo that the availability of class arbitration is a question of arbitrability), once the parties submit such a question to the arbitrator, this Court has squarely held that the arbitrator's decision on that issue is subject only to the same limited section 10 scrutiny that would apply to any other arbitral decision.

> Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standards courts apply when they review any other matter that parties have

> agreed to arbitrate. . . . That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. *See, e.g.,* 9 U.S.C. § 10.

*First Options*, 514 U.S. at 943 (emphasis in original).

Thus, regardless of whether the availability of class arbitration is a question of arbitrability, because the parties submitted that issue for resolution by the arbitrator, and because Oxford did not in the courts below question the arbitrator's authority to determine that issue, the arbitrator's decision in this Court can only be challenged under section 10 of the FAA.

### B. The Arbitrator Decided The Case Under The Contract

The arbitrator's decision in this case was based on a construction of the agreement between Oxford and Sutter, and therefore did not "exceed[ his] powers" within the meaning of section 10(a)(4).

When the question before arbitrators concerns the interpretation of a contract, arbitrators act within the scope of their powers if "the essence of" the arbitral opinion is based on that contract. "[A]n arbitrator is confined to interpretation and application of the . . . agreement. . . . He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the . . . agreement." *Steelworkers of America v. Enterprise Wheel and Car Corp.,* 363 U.S. 593, 597 (1960); *see Eastern Associated Coal Corp.,* 531

U.S. at 466 (*quoting Misco); Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987)(award legitimate so long as it "'draws its essence from the . . . agreement'")(*quoting Enterprise Wheel*).

Whether an arbitrator's decision drew its essence from the agreement in question is determined by the content of that decision, "the arbitrator's words." *Enterprise Wheel*, 363 U.S. at 598. In an analogous situation in *Stolt-Nielsen*, in determining whether the arbitrators there had based their decision (as they should have) on the FAA, federal maritime law or state law, this Court looked to the face of the arbitrator's opinion.

> Had they engaged in that undertaking, they presumably would have *looked* either to the FAA itself or to one of the two bodies of law that the parties claimed were governing, *i.e.* either federal maritime law or New York law. But the panel did not *consider* whether the FAA provides the rule of decision in such a situation; nor did the panel attempt to *determine* what rule would govern under either maritime or New York law . . . . The panel did not *mention* whether any of th[e] decision [it relied on] were based on a rule derived from the FAA or on maritime or New York law. . . . [The panel developed its own common law rule] [r]ather than *inquiring* whether the FAA, maritime law, or New York law contains [such a rule] . . . .

130 S. Ct. at 1768-69 (emphasis added).

The arbitrator's opinions in this case easily meet the *Enterprise Wheel* standard; unlike the arbitrators in *Stolt-Nielsen*, the arbitrator did "look[] to," "consider," and "mention," the governing standard—here the meaning of the contract—and "attempt[ed] to determine" and "inquir[ed into]" what that contract meant. The first arbitral opinion contains an extended discussion of the arbitration paragraph (J.A. 31-32), the agreement as a whole (*id.* 33), the alternate dispute resolution provision in the agreement (*id.* 34-36), and the significance of the provision incorporating the rules of the American Arbitration Association (*id.* 36). The second arbitral decision contained another specific analysis of the language of the agreement, including an analysis of the phrase "no civil action" and the term "all" (*id.* 73-76), as well as an evaluation of the significance of the interpretations of the arbitration provision which the parties had advanced in the earlier state court litigation. Oxford's merits brief in this Court discusses (and criticizes) at length the arbitrator's analysis of the arbitration agreement; Oxford objects that the arbitrator's "textual analysis" was "irrational" and even "contorted." Pet. Br. 26, 31. But Oxford does not deny that the arbitrator's decisions contain precisely the discussion of the relevant material which was fatally absent in *Stolt-Nielsen*.

Oxford suggests that, despite the arbitrator's extensive discussion of the contract itself, he might have actually based his decision on a belief that class actions are highly desirable. "The record in this case *suggests* that the best explanation for the arbitrator's contorted attempts at textual analysis *may* be . . . a policy preference." Pet. Br. 31 (emphasis added). But a court can find that an arbitrator exceeded his authority in construing a contract

only if the arbitrator's decision is unambiguously based solely on considerations other than the agreement itself. In *Enterprise Wheel* it was unclear whether the arbitrator had attempted to interpret the agreement, or instead had based his decision solely on certain extraneous legislation. 363 U.S. at 597-98 ("opinion of the arbitrator . . . is ambiguous"). Even under those circumstances, this Court held, the arbitrator's decision had to be enforced.

> A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable . . . .

363 U.S. at 598.

By contrast, in *Stolt-Nielsen* the Court found that the arbitrators had exceeded their powers because the "conclusion [was] inescapable" that they had based their decision solely on public policy considerations, rather than on the proper governing standard. 130 S. Ct. at 1769. Absent such circumstances, however, an arbitrator's decision must be upheld, even though its basis may not be entirely clear.

> [T]he arbitrator's award settling a dispute with respect to the interpretation . . . of a[n] . . . agreement must draw its essence from the contract . . . . [B]ut as long as the arbitrator is even *arguably* construing or applying

> the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

*Misco*, 484 U.S. at 38 (emphasis added). As Oxford itself pointed out in opposing Sutter's own section 10(a)(4) action, "'a reviewing court should presume that an arbitrator acted within the scope of his or her authority' and . . . 'this presumption may not be rebutted by an ambiguity in a written opinion.'" (*quoting Metromedia Energy , Inc. v. Enserch Energy Services, Inc.,* 409 F.3d 574, 581 (3d Cir. 2005))(ellipsis added).[22]

Throughout this litigation Oxford has questioned the arbitrator's motives. In the district court Oxford argued that the arbitrator would have paid more attention to Oxford's evidence if he "was actually desirous of determining the parties' intent." Pet. App. 15a. In the court of appeals Oxford asserted that the arbitrator's interpretation of the text of the arbitration paragraph was merely a "pretext." Pet. App. 14a-15a. In this Court Oxford suggests that some covert policy preference "provides the most apparent explanation for the arbitrator's decision." Pet. Br. 13.[23] The evidence of such an improper motive,

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22. Reply Brief in Further Support of Oxford's Motion to Dismiss the Verified Complaint, 6.

23. *See also* Pet. Br. 32 ("when this arbitrator concluded that the parties' arbitration clause 'must have been intended to authorized class actions' ([Pet. App.] 48a), that conclusion was driven largely if not entirely by his policy view concerning what procedural options Sutter ought to have"; suggesting that the arbitrator was not "faithfully enforcing the arbitration agreement

Oxford suggests, is to be found in the arbitrator's resort to "contorted" reasoning. *Id.* 31. But section 10(a)(4) does not authorize courts to conduct an investigation into the subjective motives of an arbitrator.[24] If an inquiry into an arbitrator's motives could be grounded merely on asserted defects in an arbitrator's reasoning, virtually any arbitral decision would be subject to attack as a mere subterfuge concocted by a dissembling arbitrator. This Court warned long ago that courts must not "treat the arbitrator as guilty of corrupt partiality, merely because their award is not such an one as the chancellor would have given. We are all too prone, perhaps, to impute either weakness of intellect or corrupt motives to those who differ with us in opinion." *Burchell v. Marsh,* 58 U.S. 344, 350 (1854).

## III. OXFORD'S ARGUMENTS FOR EXPANDING REVIEW OF ARBITRATORS' DECISIONS ARE INCONSISTENT WITH THE FEDERAL ARBITRATION ACT

### A. Judicial Review of An Arbitrator's Decisions Is Limited To The Circumstances in Section 10

Oxford maintains that federal courts must provide redress in at least some cases in which an arbitrator has erred. It is unclear, however, whether Oxford contends that judicial consideration of such asserted errors should be available regarding all arbitrator errors, only serious

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that the parties before him actually made"), 39 (the arbitrator merely "purported to construe the parties' agreement").

24. Oxford did not challenge the award under section 10(a)(2), on grounds of "evident partiality," or under section 10(a)(3), for "misbehavior by which the rights of any party have been prejudiced."

errors, only errors regarding particular issues, or only errors in favor of claimants. Oxford does not appear to contend that whenever arbitrators make mistakes they have ipso facto "exceeded their powers" within the meaning of section 10(a)(4). Rather, Oxford seems to argue more broadly—and vaguely—that "meaningful review" or "judicial policing" would further "the purpose of the FAA." Pet. Br. 37.

The simple answer to this argument is that "the nonplenary grounds for judicial review in § 10 of the FAA are exclusive." *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2781 (2010); *see Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008) ("§§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification"). Federal courts have no authority to add to the narrow list of circumstances in which Congress thought it appropriate to authorize vacatur of an arbitral decision.

The finality that is the cornerstone of arbitration would be fatally undermined if disappointed parties could obtain judicial consideration of whether arbitrators, although acting within their powers, had made some category of error, however that category might be defined. Judicial efforts to delineate the types of errors that could be corrected by a court would spawn a generation of litigation. At a time when arbitrators are deciding individual claims that often involve millions (and sometimes billions) of dollars, claimants and respondents alike would have every reason to attempt to persuade federal judges that their cases involved errors sufficiently serious to warrant judicial intervention. The stakes in many arbitration cases—and not only or predominantly

in class actions—are simply too great to expect litigants to do anything else.

The mere prospect of some type of merits based judicial review would alter the nature of the arbitration process itself. As the American Arbitration Association warned in *Hall Street*,

> facing the prospect of enhanced judicial scrutiny, arbitrators will feel obliged to conduct arbitration in a manner similar to traditional litigation. For instance, arbitrators are likely to demand more formalized evidentiary procedures and findings of fact, and feel compelled to create a record and a reasoned decision that will withstand court review. In turn, in the absence of a reasoned decision and complete and interpretable record, a district court tasked with applying a more searching legal or factual review of an arbitrator's award will likely demand more thorough briefing and submissions from the parties, which could effectively mean re-trying issues already decided by the arbitral tribunal.

Brief of Amicus Curiae American Arbitration Association in Support of Affirmance, 8.

### B. Oxford Offers No Sound Basis for Permitting Non-Section 10 Judicial Review of the Correctness of An Arbitrator's Award

Oxford offers several justifications for judicial review of the correctness of an arbitrator's decision. None

provides a persuasive basis for disregarding the narrow limits in section 10.

Oxford contends that meaningful judicial review would encourage use of arbitration.

> Effective judicial checks are . . . 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.

Pet. Br. 36. The petitioner in *Hall Street* advanced the same argument.[25] It is possible that judicial scrutiny of the correctness of an arbitrator's decisions might be attractive to some parties considering arbitration (particularly parties who thought they might lose in arbitration); but the prospect that the availability of judicial review would lead to increased post-arbitration litigation would also undermine the finality that for many parties is the most attractive aspect of arbitration. Which result is more likely, or more desirable, is not a matter for this Court to decide: Congress already made its choice in the FAA when it limited review to the narrow grounds specified in section 10. Thus in *Hall Street* this Court refused to express a view on the policy debated about whether judicial review of the correctness of arbitral decisions would increase use of arbitration (because the parties would have more confidence that arbitrator errors would

25. Brief for Petitioner, No. 06-989, 38-40.

be corrected) or decrease arbitration (because arbitration would be more likely to be followed by time-consuming and expensive appeals). 552 U.S. at 589. "We do not know who, if anyone, is right, and so cannot say whether [*Hall Street*'s] reading of the statute is more of a threat to the popularity of arbitrators or to that of courts. But whatever the consequences of our holding, the statutory text gives us no business to expand the statutory grounds." 552 U.S. at 589.

Oxford also argues that judicial review of arbitration decisions is essential because there is a considerable danger that arbitrators will be biased. Petitioner warns that there are issues "on which arbitrators may have strong policy views that they may find difficult to put aside." Pet. Br. 37. But that objection is not cognizable under section 10(a)(4). Oxford did not challenge the award in this case under section 10(a)(2), which which permits a court to vacate an award where there was "evident partiality . . . in the arbitrators." 9 U.S.C. § 10(a)(2). The procedures of the American Arbitration Association and other organizations, however, provide the parties with effective tools to assure the selection of an unbiased arbitrator, and the parties are free to craft any additional procedures they please to guarantee that result.

More specifically, Oxford argues that:

> 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 . . . [that] will substantially increase the length and scope of the proceedings.

Pet. Br. 37-38. Importantly, Oxford's purported concern is in no way limited to class actions. If such conduct by arbitrators were indeed a problem, it would occur most often when a respondent filed a dispositive motion (such as a motion to dismiss on limitations grounds) that if granted would terminate the proceedings, and thus end the compensation to the arbitrator; those motions are common in non-class actions. Parties concerned about that risk can minimize any undesirable incentives by selecting an arbitrator who is sufficiently in demand, as an arbitrator or as an attorney, that his or her income would not depend on how long any particular arbitration proceeding lasted, or by providing that a different arbitrator decide such dispositive issues. Of course, a respondent could still argue that there was a risk that arbitrators would prolong the arbitral process because they found the subject matter particularly fascinating or the lawyers especially skillful. But the textual guarantee of finality cannot be disregarded on that basis. Congress enacted the Federal Arbitration Act, not because it regarded arbitration as a dangerous bias-prone process in need of "judicial policing," but because it wanted to permit parties to select *final* binding arbitration where they concluded it was in their interest to do so.

Oxford also insists that judicial review of the merits of arbitral decisions is essential to protect "the promise of *Stolt-Nielsen*." Pet. Br. 35. But the FAA was adopted to codify, not overturn, the well-established rule that a court has no authority to correct an arbitrator's asserted errors, even when those errors concern statutory or legal commitments of great significance. Arbitrators who hear claims under Title VII of the Civil Rights Act, for example, are entrusted with keeping the nation's promise of racial non-discrimination, a commitment memorialized in three constitutional amendments and rooted in the great issues

that gave rise to the Civil War. Arbitrators who decide securities claims by investors who may have lost their life savings are responsible for keeping the promise of the federal securities laws, adopted to prevent a recurrence of a series of economic collapses, from the latest of which the country has yet to fully recover. If arbitrators are to be accorded the responsibility for keeping national promises of such singular importance, they can be trusted as well to take seriously their responsibilities to heed this Court's interpretations of the FAA.

### C. Oxford Fails to Offer A Coherent Standard of Non-Section 10 Judicial Review

It is unclear what standard Oxford is proposing courts should use in reviewing the correctness of an arbitrator's decisions.[26] Oxford offers several different approaches, with significant variations within each. And in some passages petitioner suggests the Court simply announce that the arbitrator's decision was sufficiently unsound to require vacatur, and leave for another day the fashioning of an actual standard that courts would apply in reviewing a challenge to the correctness of a decision.

At one end of the spectrum, Oxford asserts that "the arbitrator exceeded his powers by imposing class arbitration in the absence of actual authorization by the

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26. One thing that is clear is that Oxford does *not* ask this Court to apply the "manifest disregard" standard that has been utilized by some lower courts. This Court has twice declined to decide whether the FAA authorizes or permits courts to use such a standard, and need not do so in this case. *See Stolt-Nielsen*, 130 S. Ct. 1768 n.3; *Hall Street Associates*, 522 U.S. at 584-85; Pet. App. 27a n.3.

parties." Pet. Br. 33 (capitalization omitted). To apply that standard, a court would have to decide de novo what the parties had "actual[ly] authoriz[ed]," i.e. the meaning of the contractual provision at issue. That approach would apply in any case in which a party contended that the parties in their contract did not "actual[ly] authoriz[e]" an order that an arbitrator "impos[ed]." The standard could be invoked, for example, whenever a party objected that the contract at issue did not authorize the arbitrator to impose an award of punitive damages, to direct discovery, or to provide any relief for a claim. Elsewhere in its brief petitioner describes the role of the courts as "judicial . . . policing." *Id.* 14. This formulation suggests that there is a substantial danger that arbitrators will deliberately issue unsound awards, a problem that would warrant especially vigilant judicial scrutiny of arbitral decisions, de novo review with an attitude.

On several occasions Oxford calls for "meaningful review" of the correctness of an arbitrator's decision. Pet. Br. 34. This is not in itself a substantive standard, but is merely vaguely descriptive of the level of scrutiny that courts should apply. It seems to suggest that the courts should double-check the decisions of arbitrators with sufficient care that at least most (but not necessarily all) arbitrator errors will be corrected by the courts. Other passages insist that the review must be "independent," suggesting that judges should not give any weight to the arbitrator's view of the evidence or understanding of a contract. *Id.* 11 ("meaningful independent review"), 38 ("meaningful degree of independent review").

Oxford also proffers what appears to be a substantive standard. An arbitrator's order under a contract, it insists,

must have a "contractual basis." Pet. Br. 14, 15.[27] Often this phrase appears with a limiting adjective, such as "sound" (*id.* 21), "specific" (*id.* 28), "legitimate" (*id.* 33), "plausible" (*id.* 34), or "proper" contractual basis (*id.* 38). It is unclear whether these passages mean (a) that a court must find that an order was authorized by the contract (that would require a de novo interpretation of the contract), (b) that a court must find that the arbitrator's interpretation of the contract had at least some support in the contract (a standard perhaps analogous to the requirement under the Administrative Procedure Act that an agency decision be supported by substantial evidence), or (c) that the arbitrator's decision must on its face be based on an interpretation of the contract (that would be the traditional interpretation of section 10(a)(4), *see* pp. 18-25, *supra*). It is unclear how the adjectives "sound," "specific," "legitimate" or "plausible" refine this standard.

In yet a fourth variant, Oxford asserts that courts must determine whether the arbitrator's decision was "plausible" (*id.* 13, 14, 33), requiring courts to assess the "soundness of th[e] reasoning" of the arbitrator (*id.* 11). This seems to propose a standard similar to the requirement in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), that there be enough support for a contention that a court could reasonably infer that a particular conclusion is correct.

It is unclear whether Oxford's proposed standard, whatever it might be, would apply in all or only in certain

27. Elsewhere Oxford states that courts must "ensure that an arbitrator has a legal basis" for his determination. Pet. Br. 39. That principle would extend beyond disputes about the proper construction of a contract.

cases. The justifications adduced by petitioner for judicial review of the correctness of an arbitral decision have different implications. Insofar as Oxford contends that judicial review would encourage more widespread use of arbitration, any judicial review standard should logically apply to all arbitral decisions. On the other hand, if judicial review were based on Oxford's contention that arbitrators might be biased in resolving a particular issue by the hope that a decision prolonging the arbitration would result in greater arbitral fees, judicial review would only be warranted in certain types of decisions (e.g., decisions whether to dismiss or hold hearings on claims), and then only if they increased (rather than lowered) the arbitrator's potential fees. For example, judicial review would be required if an arbitrator denied a motion to dismiss on statute of limitations grounds, but not if the arbitrator granted such a motion. Oxford's assertion that "meaningful judicial oversight is particularly important in the context of class arbitration," (*id.* 37), suggests that the level of judicial scrutiny should vary depending on what issue the arbitrator decided, and perhaps on which side prevailed. Oxford does not, however, explain how this would work or specify what standard the lower courts would use to determine the other types of situations in which "judicial oversight is particularly important."

Finally, Oxford suggests the Court could simply hold that the arbitrator's reasoning is "unsustainable under any standard of review." Pet. Br. 12; *see id.* 39 ("the arbitrator's stated reasoning here is so deficient that it cannot be sustained under *any* meaningful standard of review)(emphasis in original). If the Court were to vacate the award in that manner, it would commit federal and state courts administering the FAA to scrutinizing the correctness of arbitral decisions without any guidance

from this Court, and leave for the years ahead all the issues that would raise regarding what the standard of judicial review will be and when it will apply.

## IV. THE ARBITRATOR PROPERLY CONCLUDED THAT THE ARBITRATION PARAGRAPH AUTHORIZES CLASS ARBITRATION

For the reasons set out above, the arbitrator's interpretation of the arbitration paragraph did not exceed his powers, and the correctness of that interpretation is not subject to judicial review under any of Oxford's proffered standards. Even if the arbitrator's interpretation of the contract were reviewable, however, it was correct.

(1) The foundation of the arbitrator's decision was his conclusion that the scope of the no civil-action-provision and the scope of the mandatory arbitration provision were the same. Because the no-civil-action provision applied to class claims—and the state judge in response to Oxford's motion had indeed dismissed the class claims as well as the individual claims—the arbitrator concluded that the mandatory arbitration provision must require, and thus permit, arbitration of those same claims. J.A. 31-32, 73-76.

Oxford insists that the arbitrator's premise that the two provisions are co-extensive "cannot survive even cursory analysis." Pet. 22; *see* Pet. Br. 25. But the arbitrator's interpretation of the relationship of the two provisions was precisely the interpretation that Oxford itself advanced in the state court proceedings. *See* pp. 4-6, *supra*. The arbitrator knew that Oxford had done so, because the state court transcript containing Oxford's explanation of the overlap of the two provisions was part

of the record before him. An arbitrator who adopts a party's own interpretation of a contract cannot be faulted in subsequent litigation after the party decides to change its position.

Moreover, Oxford never disavowed in proceedings before the arbitrator its position that the two provisions are co-extensive, and certainly did not in those proceedings affirmatively advance its current contention that the no-civil-action clause is broader than the mandatory arbitration clause. Oxford's failure to do so was entirely understandable. Oxford knew in 2003 that if it argued otherwise Sutter could point to the state court transcript and could add to the record the similar representations Oxford had made in its state court briefs. Indeed, had Oxford in the 2003 (or 2010) arbitration proceedings disavowed the representation it had made in state court, Sutter might well have had a basis for reopening the state-court class action. [28]

Oxford's failure to argue to the arbitrator the reading of the contract that it now advances precludes it from challenging the arbitrator's decision on that basis. "Parties to arbitration proceedings cannot sit idle while an arbitration decision is rendered and then, if the decision is adverse, seek to attack the award collaterally on grounds not raised before the arbitrator." *United Steelworkers of America v. Smoke-Craft, Inc.*, 652 F.2d 1356, 1360 (9th Cir. 1981).

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28. During a 2004 arbitral hearing Oxford's counsel observed that "if your Honor rules that a class is not certifiable, then Mr. Katz may very well choose to go into New Jersey Supreme Court. That would be his choice." Transcript of Proceedings, Oct. 29, 2004, 34.

(2) The arbitrator's opinion rested on what he correctly perceived to be the interpretation of the arbitration paragraph that was implicit in Oxford's use of that paragraph to attack Sutter's state court class claims. Oxford's invocation of the paragraph in this manner necessarily assumed that both provisions applied to the class claims. "[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. Oxford would have to have misled the New Jersey court, and the court class action should be reinstated." J.A. 75.

The arbitrator's analysis reflects a sound understanding of the parties' agreement in the context of the Federal Arbitration Act. Section 2 of the FAA provides that agreements to arbitrate are generally valid, and section 4 authorizes federal district courts to "direct the parties to proceed to arbitration" of arbitrable claims. Section 3 provides that a court shall stay proceedings regarding any issue "referable to arbitration." Thus incidental to an order directing parties to arbitrate a claim, a court will stay proceedings regarding that claim; in some instances, as here, courts dismiss such claims.[29] As Oxford observes, arbitration agreements sometimes contain provisions intended to make clear that the particular claims that go to arbitration will not be heard in court.

But none of these provisions of the FAA applies to a promise not to sue over certain claims if that promise is *not* tied to a congruent provision requiring arbitration

29. This Court need not decide in this case whether the FAA authorizes or permits such dismissals.

of those claims. A "naked" no-civil-action provision is simply outside the scope of the FAA. If the contract between Sutter and Oxford had only forbidden Sutter to bring a class action, and had contained no arbitration provision at all, the FAA would have had nothing to say about that prohibition. New Jersey could have declared that prohibition invalid, and the FAA would have provided no basis for staying (or dismissing) a class action in state court. The FAA is similarly inapplicable to a non-arbitrable claim, or to an agreement not to enforce such a claim, even if it happens to be contained in the same complaint as an arbitrable claim that is subject to the FAA.[30]

In the instant case, if (as Oxford now contends) the mandatory arbitration provision applied only to Sutter's individual claims, but not to the state court class claims, the no-civil-action provision would have been, with regard to the class claims, a naked civil action bar, wholly outside the scope of the FAA. The state court would have had no authority under the FAA to stay or dismiss the class claims; rather, after staying or dismissing Sutter's individual claims, that court would have had to make a separate evaluation under New Jersey law as to whether Sutter could continue to represent a class even though his own individual claims were being resolved in another

30. Where a civil action contains two claims, only one of which is arbitrable, the arbitrable claim alone is subject to the FAA. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 20 and n.23 (1983). Section 3 of the FAA requires that proceedings regarding the arbitrable claim be stayed, but the FAA itself says nothing about how the remaining claim is to be treated. Courts would apply non-FAA federal or state law standards in deciding how to handle that remaining claim.

forum.[31] That is why the arbitrator correctly recognized the inconsistency between the state court's dismissal of the class claims and Oxford's insistence that the mandatory arbitration provision did not apply to the class claims. The dismissal, obtained by Oxford under the FAA, of the state court class claims could have been correct only if the mandatory arbitration provision itself *did* apply to those claims. The arbitrator thus fairly concluded that Oxford's reliance on the arbitration paragraph in its 2002 challenge to Sutter's state court class action claims represented "Oxford's original interpretation of what the clause mean[t]." J.A. 74 n.2.

The reasonableness of that conclusion is confirmed by the manner in which Oxford even in this Court describes the relationship between the no-civil-action provision and the mandatory arbitration provision. Oxford repeatedly states that the function of the no-civil-action provision was to exclude from court the very claims there were to be arbitrated.[32] In its merits brief Oxford

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31. Construing Federal Rule of Civil Procedure 23, the Third Circuit has held that "[s]o long as a class representative has a live claim at the time he moves for a class certification, neither a pending motion nor a certified class action need be dismissed if his individual claim subsequently becomes moot." *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124,135-36 (3d Cir. 2000)(opinion joined by Alito, J.). New Jersey courts treat federal cases as persuasive authority in construing the state class action rules. In this case Sutter moved for class certification in September, 2002, and the state court did not dismiss his claims until October 25, 2002.

32. Inconsistent with the passages quoted above, Oxford also states that the purpose of the no-civil-action provision was simply to make clear that the *non*-class claims being referred to arbitration could not be pursued in court. Pet. Br. 23-24. But

explains that "[t]he wording of the arbitration clause is wholly unremarkable, banning litigation of disputes in court and instead referring *them* to arbitration." Pet. Br. 12-13 (emphasis added). In its petition reply brief Oxford explained that "[b]road 'any dispute' arbitration provisions may be phrased in different ways, but they have a common gist: *All* disputes go to arbitration, not to court." R. Br. for Pet., 4 (emphasis added). But if that is correct, the arbitrator properly concluded that because (as Oxford itself had argued in state court) the no-civil-action provision precluded litigation of the class claims in state court, the mandatory arbitration provision necessarily applied to those claims as well.

(3) Oxford also argues that it does not matter whether the no-civil-action and mandatory arbitration provisions are co-extensive, because "a class action is not a special 'form[] of civil action' (Pet. App. 48a), . . . [but] a procedural device . . . to resolve multiple individual disputes at the same time." Pet. Br. 25. This argument was not advanced by Oxford in any of its briefs in the arbitration, and cannot be raised in this Court for the first time. It is also incorrect. Lawyers and non-lawyers alike use the phrase "class action" to refer to a *lawsuit* in which a plaintiff seeks to represent a class. That is why the term "action" (not "procedural device") appears in the phrase "class action." A lawsuit in which the plaintiff seeks to represent a class is a class *action*; a motion for class certification would be a *procedural* issue. *See* J.A. 26.

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if that is correct it is impossible to understand how the no-civil-action provision could have been applied to the class claims under the FAA; there would have been no basis in the FAA for Oxford's attack on the state court class claims or for staying or dismissing those claims.

(4) The arbitrator commented in his 2003 opinion that it would be surprising if the no-civil-action provision applied to class claims, but the mandatory arbitration provision did not. J.A. 30-32. That observation simply reiterated the arbitrator's recognition that, as Oxford itself had argued, the two provisions were interrelated and, consistent with the FAA, provided that the claims that could not be litigated were the same claims subject to arbitration. This passage does not, as Oxford contends, constitute some sort of endorsement of class proceedings as particularly desirable. Unlike the arbitration panel in *Stolt-Nielsen*, the arbitrator did not suggest that "class arbitration is beneficial in 'a wide variety of settings.'" 130 S. Ct. at 1769.

Nor did the arbitrator hold, as Oxford insists, that the mere existence of a broad provision for arbitration is sufficient to warrant an inference that an agreement authorizes class arbitration. Oxford rests this assertion on the arbitrator's comment about the unique breadth of the language of the agreement. The wording of the mandatory arbitration provision, Oxford insists, is not at all unique, but simply a standard provision directing that disputes be resolved in arbitration. Pet. Br. 22-23. But the arbitrator's comment about the breadth of the agreement language refers to the wording of the introductory no-civil-action provision, not on the language of the mandatory arbitration provision.

> The clause is much broader even than the usual broad arbitration clause. The introductory phrase, "No civil action concerning any dispute arising under this agreement shall be instituted before any court," is unique in my experience and seems to be drafted to be as broad as can

> be. "No civil action" must mean no civil action of any kind whatsoever. The clause prohibits civil actions in law, equity, admiralty or even probate. No such action shall be instituted in "any court." Any court includes any Federal or State Court, any foreign court or the Court at the Hague. Taken together, this phrase has the effect of prohibiting any conceivable court action concerning any dispute under the Agreement. It would not be possible to draft a broader or more encompassing clause.

J.A. 31.

The arbitrator did not hold that authorization of class arbitration can be inferred merely from the absence of an express prohibition against such proceedings. The arbitrator reasoned only that the absence of any express provision regarding class actions was significant in this particular case because he had concluded, consistent with Oxford's own statements about the meaning of the agreement, that the no-civil-action provision (which does apply to class actions) was co-extensive with the mandatory arbitration provision (whose meaning was at issue).

> [B]ecause all that is prohibited by the first part of the clause is vested in arbitration by its second part, I find that the arbitration clause must have been intended to authorize class actions in arbitration. Indeed, 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 [no-civil-action] prohibition.

J.A. 32. The arbitrator did not suggest that the absence of such an express prohibition against class actions in arbitration would have been probative, still less decisive, in the absence of the interconnection between the no-civil-action provision and the mandatory arbitration provision.

The arbitrator's decision was correct. But even if this Court would decide the matter differently, there is no question that his decision was arguably based on an interpretation of the contract, which is all that section 10(a)(4) requires.

## CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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