No. 12-135

IN THE
Supreme Court of the United States

OXFORD HEALTH PLANS LLC

Petitioner,

v.

JOHN IVAN SUTTER, M.D.,

Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

HENRY M. SNEATH*
PRESIDENT
DRI—THE VOICE OF THE DEFENSE BAR
55 West Monroe, Suite 1105
Chicago, IL 60603
(312) 795-1101
hsneath@psmn.com

JERROLD J. GANZFRIED
JOHN F. STANTON
Holland & Knight LLP
800 17th Street NW Suite 1100
Washington, DC 20006
(202) 469-5151
jerry.ganzfried@hklaw.com

Counsel for Amicus Curiae
*Counsel of Record

August 29, 2012

No. 12-135

IN THE
Supreme Court of the United States

OXFORD HEALTH PLANS LLC

Petitioner,

v.

JOHN IVAN SUTTER, M.D.,

Respondent.

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

MOTION OF DRI – THE VOICE OF THE DEFENSE BAR FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* SUPPORTING PETITIONER

Pursuant to Rule 37.2(b) of the Rules of this Court, DRI – The Voice of the Defense Bar ("DRI") hereby requests leave to file the accompanying *amicus curiae* brief in support of petitioner. DRI has obtained petitioner's consent, but respondent's counsel has not responded to the DRI's request for consent.

The question presented in this case significantly affects the interests of DRI and its members. DRI is an international organization of more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills,

effectiveness, and professionalism of defense attorneys. Consistent with this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. To that end, DRI regularly files *amicus curiae* briefs in cases that raise issues of concern to its members.

Arbitration is an issue of particular interest since DRI members often advise or represent clients with respect to the enforceability of arbitration agreements. Indeed, DRI has submitted several *amicus* briefs in recent years in cases presenting issues under the Federal Arbitration Act (FAA) before this Court. *See*, *e.g.*, *Am. Express Co. v. Italian Colors Restaurant*, No. 12-133 (petition for cert. filed July 30 2012); *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

Unlike litigation, private arbitration is purely a matter of consent, not coercion. By agreeing to arbitrate, parties are able to avoid costly and time consuming litigation by submitting to a streamlined yet fair process based upon the mutual consent of the parties. Compelling parties to resolve disputes through costly, time-consuming, and high-stakes class-wide arbitration, when the parties have not agreed to do so, frustrates the parties' intent, undermines their agreements, and erodes the benefits offered by arbitration as an alternative to litigation. Imposing class arbitration on parties who have not agreed to that procedure conflicts with the central goal of the FAA: to ensure that arbitration

agreements are enforced strictly according to the terms adopted by the parties. Parties agree to arbitration because it offers an alternative to the dispute-resolution processes already available in courts. The FAA ensures not only that arbitration agreements are enforceable, but also that hostility to arbitration is not permitted to transform arbitration by replicating the most expensive and formal aspects of court litigation when the parties have not agreed to do so.

DRI and its members thus have a vital interest in the issues raised in the petition. The Third Circuit held that the parties agreed to class-wide arbitration based solely on a clause in individual contracts that – without saying a word about class arbitration – merely required the parties to arbitrate all disputes arising from their contract. Drawing on its members' extensive practical experience, DRI is uniquely well suited to explain why this Court should grant review and reverse a decision that is flatly inconsistent with Supreme Court precedent. If allowed to stand, the decision below will adversely affect the judicial system and the rule of law by subjecting parties to expensive, protracted proceedings to which they never agreed when contracting for arbitration.

For these reasons, DRI respectfully requests that the Court grant its motion for leave to file an *amicus curiae* brief in support of petitioner.

Respectfully submitted,

HENRY M. SNEATH*
PRESIDENT
DRI—THE VOICE OF
THE DEFENSE BAR
55 West Monroe,
Suite 1105
Chicago, IL 60603
(312) 795-1101
hsneath@psmn.com

JERROLD J. GANZFRIED
JOHN F. STANTON
Holland & Knight LLP
800 17th Street NW
Suite 1100
Washington, DC 20006
(202) 469-5151
jerry.ganzfried@hklaw.com

Counsel for Amicus Curiae
*Counsel of Record

August 29, 2012

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

ARTICLES AND SECONDARY AUTHORITIES

No. 12-135

IN THE
Supreme Court of the United States

OXFORD HEALTH PLANS LLC

Petitioner,

v.

JOHN IVAN SUTTER, M.D.,

Respondent.

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

BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is set forth in the accompanying motion for leave to file this brief.

INTRODUCTION

Arbitration is favored under federal law and the laws of many states because it is inexpensive,

[1] Counsel of record received notice more than 10 days prior to the due date that *amicus* intended to file this brief. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

streamlined, and efficient. As this Court has recognized, class arbitration is, by contrast, a markedly different procedure that offers none of these advantages. It is costly, risky, and cumbersome – the very attributes that generally motivate parties to choose traditional arbitration over litigation in the first place.

The Third Circuit charted a course that is incompatible with this Court's guidance, particularly in *Stolt-Nielsen*, that an arbitrator may not order classwide arbitration when an arbitration agreement is "silent" on class arbitration. Here, the arbitrator committed that exact error even though the contract makes no mention of class claims, class procedures, or class arbitration. Pet. App. 37a-42a.

This brief addresses reasons the Court should resolve the substantial, recurring issue presented in this case. Arbitration agreements are commonplace in every corner of the economy, and parties have come to expect that such agreements will be honored in accordance with their terms.

REASONS FOR GRANTING THE PETITION

The petition shows, in compelling detail, how this case satisfies the primary purposes of certiorari jurisdiction over judgments from the federal courts of appeal: to secure uniformity of decisions among the circuits and to resolve questions of importance to the public interest. *See, e.g., Braxton v. United States,* 500 U.S. 344, 347-48 (1991); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 43-44 (1983); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). *See also U.S. Courts of Appeal are Split on the Interpretation of Stolt-Nielsen on Class Actions,*

67-JUL Disp. Resol. J. 4 (May-July 2012) (noting split and suggesting "that additional post-*Concepcion* guidance by the United States Supreme Court would be welcome"); Zupanec, *Law and Motion,* 27 No. 7 Federal Litigator (July 2012) (similar). Accordingly, this brief will not rehearse the existing, and growing, intercircuit conflict. In truth, the irreconcilable split in the circuits is only the tip of the iceberg, as this issue has proven to be extraordinarily vexing to trial courts.[2]

---

[2] Many district courts have allowed classwide arbitration in the absence of any explicit assent–often for the same reasons articulated by the court of appeals here. *See, e.g., Yahoo! Inc. v. Iversen*, 836 F. Supp.2d 1007, 1012-13 (N.D. Cal. 2011); *Smith & Wollensky Rest. Group, Inc. v. Passow,* 2011 WL 148302, at *1 (D. Mass. Jan. 18, 2011); *La. Health Serv. Indem. Co. v. Gambro A B,* 756 F. Supp. 2d 760, 762 (W.D. La. 2010). In contrast, many other district courts have correctly concluded, as compelled by *Stolt-Nielsen*, that class-wide arbitration is impermissible under an arbitration agreement that is altogether silent on the topic. *See, e.g., Bernal v. Burnett,* 2011 WL 2182903 at *3, *8 (D. Colo. June 6, 2011); *D'Antuono v. Service Road Corp.,* 789 F. Supp. 2d 308, 337, 344 (D. Conn. 2011); *Sutherland v. Ernst & Young LLP,* 768 F. Supp. 2d 547, 554 (S.D.N.Y. 2011); *United Food & Comm'l Workers, Local 21 v. Multicare Health Sys.,* 2011 WL 834141, at *3 (W.D. Wash. Mar. 3, 2011); *In re Checking Account Overdraft Litig.,* 2010 WL 3361127, at *2 (S.D. Fla. Aug. 23, 2010).

Likewise, consistent with the court of appeals here and the majority opinion in *Jock v. Sterling Jewelers, Inc.,* 646 F.3d 114, 119-27 (2d Cir. 2011), *cert. denied,* 132 S. Ct. 1742 (2012), many district courts have latched onto the stipulation in *Stolt-Nielsen* to justify an incorrectly narrow reading of that case. *See, e.g., S. Comm's Servs., Inc. v. Thomas,* 829 F. Supp.2d 1324, 1338 (N.D. Ga. 2011) (agreeing with *Jock* because, *inter alia,* that "court distinguished *Stolt-Nielsen* on the facts because although the plaintiffs at one point conceded the agreement was silent regarding class arbitration, this was not the same thing as stipulating the parties had reached no agreement on the issue");

I. THE DECISION BELOW MISREADS THIS COURT'S PRECEDENTS

Prior to *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444 (2003), it was generally agreed that "absent an express provision in the parties' arbitration agreement, the duty to rigorously enforce arbitration agreements 'in accordance with the terms thereof' as set forth in section 4 of the FAA bars district courts from . . . requir[ing] consolidated arbitration, even where consolidation would promote the expeditious resolution of related claims." *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 274-75 (7th Cir. 1995) (citing numerous circuit decisions holding same).

After *Bazzle* – and based on a misperception of this Court's disposition – some courts concluded that class arbitration could proceed as long as the contract did not "forbid" class arbitration. In other words, class arbitration proceeded if the agreement was merely "silent" on the issue. *See, e.g., Shroyer v. New Cingular Wireless Servs.,* 498 F.3d 976, 992 (9th Cir. 2007) (reading *Bazzle* to be an "implicit endorsement" of class arbitration); *Trumper v. Travelers Indem. Co.,* 2006 WL 6553086, at *1 (S.D. Tex. Jan. 9, 2006)

Opalinski v. Robert Half Corp., 2011 WL 4729009, at *3 (D. N.J. Oct. 6, 2011) (similar reasoning); *Aracri v. Dillard's, Inc.,* 2011 WL 1388613, at *4 (S.D. Ohio Mar. 29, 2011) (same). In contrast, consistent with *Reed v. Fla. Metro. Univ. Inc.,* 681 F.3d 630, 638-46 (5th Cir. 2012) and the *Jock* dissent (646 F.3d at 127-33 (Winter, J., dissenting)), other district courts have expressly rejected the argument that *Stolt-Nielsen* applies only where the parties "stipulated that there was no agreement between them to arbitrate class claims." *Goodale v. George S. May Int'l Co.,* 2011 WL 1337349, at *2 (N.D. Ill. Apr. 5, 2011) (no agreement to class arbitration when agreement was silent; characterizing attempt to distinguish *Stolt-Nielsen* as an attempt to "split the finest of hairs").

("class arbitration is permissible under the FAA wherever the governing contract does not expressly prohibit such arbitration"; citing *Bazzle*).

Such rulings led to an explosion of classwide arbitrations. The American Arbitration Association ("AAA") and the Judicial Arbitration & Mediation Services ("JAMS") implemented class arbitration procedures for the first time. *See* AAA Supp. Rules for Class Arbitrations (eff. Oct. 8, 2003), *available at* http://adr.org/sp.asp?id=21936; JAMS Class Action Procedures (eff. Feb. 2005), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS_Class_Action_Procedures-2005.pdf. As a mechanism for arbitrators to decide the availability of class arbitration in a given case, both the AAA and JAMS procedures call for a "clause construction" award that determines not whether the parties actually "agreed" to class arbitration, but merely whether the contract "permits" class arbitration. *See* AAA Supplementary Rules for Class Arbitrations, Rule 3; JAMS Class Action Procedures, Rule 2.

Since arbitrators viewed their task at that stage as solely to determine, in effect, whether the arbitration agreement *did not forbid* class actions (and thereby "permitted" them), it is not surprising that arbitrators interpreted silent arbitration agreements to "permit" class actions – and thereby ordered class arbitration to proceed – in overwhelming numbers. A study found that as of August 2008, 65 out of 67 silent arbitration agreements - or 97% - had been interpreted by arbitrators to authorize class arbitration. Baker, *Class Action Arbitration*, 10 Cardozo J. of Conflict Resol. 335, 348 (2009). To the same effect, the AAA *amicus* brief in *Stolt-Nielsen* reported that in 102

"clause construction awards" where the parties contested whether class arbitration was permitted, class arbitration prevailed in 95 cases. Brief of American Arbitration Association at 22, *Stolt-Nielsen v. AnimalFeeds Int'l Corp.,* No. 08-1198, available at http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_08_1198_NeutralAmCuAAA.authcheckdam.pdf; *see also* Brief of CTIA - The Wireless Association at 11 & Appendix, *Stolt-Nielsen v. AnimalFeeds Int'l Corp.,* No. 08-1198, *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-1198_PetitionerAmCuCTIA.pdf.

This empirical data is supported by comments from the arbitrators themselves. As one arbitrator acknowledged:

> the overwhelming majority of Clause Construction Awards under [AAA] Class Arbitration Rules have held that, where the arbitration clause contains broad language similar to that here, and is silent on whether a class proceeding is contemplated or not, class arbitration is permitted.

Partial Final Clause Construction Award And Rulings on Respondents' Motions To Dismiss at 9, *Depianti v. Bradley Mktg Enters., Inc.*, AAA No. 11 114 00838 07 (AAA Aug. 1, 2008) *available at* http://www.adr.org/si.asp?id=5442; *accord* Clancy, *Re-Evaluating Bazzle: the Supreme Court's Celebrated 2003 Decision Says Much Less About Class Action Arbitration Than Many Assume*, 7 Class Action Lit. Rept. (BNA) 649, at p. 2 (Sept. 22, 2006) (noting that arbitrators issuing decisions overwhelmingly favor

class arbitration – even where there is no evidence the parties intended to allow it).

This was the pertinent legal landscape until this Court explained in *Stolt-Nielsen* that

> [A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so. . . . The critical point, in the view of the arbitration panel, was that petitioners did not establish that the parties to the charter agreements intended to *preclude* class arbitration. . . . [T]he panel regarded the agreement's silence on the question of class arbitration as dispositive. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.

130 S.Ct. at 1775 (emphasis in original; internal quotations and citations omitted).

This Court anchored its holding on the bedrock principle that arbitration under the FAA is based on "consent, not coercion." *Id.* at 1773 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.,* 489 U.S. 468, 479 (1989)). Because "[t]he central purpose" of the FAA is "to ensure 'that private agreements to arbitrate are enforced according to their terms,'" parties may structure their arbitration agreements as they see fit, specify the governing rules, and specify *with whom* they choose to arbitrate their disputes. *Id.* at 1773-74 (quoting *Volt,* 489 U.S. at 479).

Accordingly, an arbitrator may not infer an implicit agreement to authorize class-action arbitration from the absence of an explicit agreement "to *preclude* class arbitration." *Id.* at 1775 (emphasis in original). "[T]he differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 1776.[3]

If not reviewed and reversed, the Third Circuit's ruling provides a roadmap for nullifying or evading *Stolt-Nielsen.* For example, the court of appeals relied heavily on the "any dispute" language of the parties' agreement to support the arbitrator's finding of assent to class arbitration. But most arbitration agreements that are "silent" on class arbitration contain the same "any dispute" language present in the agreement here. *See, e.g., Stolt-Nielsen,* 130 S.Ct. at 1765; *Reed,* 681 F.3d at 642-43; *Jock,* 646 F.3d at 116. As the Fifth Circuit explained, reliance on the "any dispute" language of an arbitration agreement

[3] Consistent with that holding, the Court reiterated in *Concepcion* that imposing "manufactured" class arbitration on parties who had not agreed to it "interfere[d] with fundamental attributes of arbitration" and thus violated the FAA. *See* 131 S.Ct. 1748. Central to the Court's analysis is the recognition that "'changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental,'" they "sacrifice[] the principal advantage of arbitration - its informality - and make[] the process slower, more costly, and more likely to generate procedural morass than final judgment. *Id.* at 1750, 1751 (quoting *Stolt-Nielsen,* 130 S. Ct. at 1776). Consequently, the Court once again concluded that class arbitration is "not arbitration as envisioned by the FAA" and therefore may not be required absent agreement of the parties. *Id.* at 1753.

to find asset to class arbitration effectively nullifies *Stolt-Nielsen*. *Reed,* 681 F.3d at 643 (a "class arbitration award based upon an 'any dispute' clause would be insufficient under *Stolt–Nielsen* [because] a general arbitration clause, according to the *Stolt–Nielsen* Court, does not authorize class arbitration because class arbitration differs too much from individual arbitration") (quotation and citation omitted).

Similarly, even where an agreement contains no provision whatsoever reflecting assent to class arbitration, a plaintiff will unilaterally have *carte blanche* to avoid *Stolt-Nielsen* simply by refusing to stipulate that there is "no agreement" on the subject. *Cf. Jock,* 646 F.3d at 129 n.2 (Winter, J., dissenting) ("Given my colleagues' narrow reading of the decision … *Stolt-Nielsen* has been rendered an insignificant precedent in this circuit"). The experience of DRI members bears out this concern. Subsequent to *Stolt-Nielsen* there have been numerous instances of arbitrators and courts limiting this Court's holding to the context of a stipulated "no agreement" or conjuring up justifications for class arbitration in contracts that fall far short of affirmative "consent to resolve … disputes in class proceedings." *Stolt-Nielsen,* 130 S.Ct. at 1776.

II. THE ISSUE PRESENTED IS IMPORTANT, RECURRING, AND PRIMED FOR REVIEW

A. The Third Circuit Decision Eliminates Vital Benefits of Arbitration

Arbitration is the "oldest known method of settlements of disputes." *McAmis v. Panhandle E.*

Pipeline Co., 273 S.W.2d 789, 794 (Mo. App. 1954). This Court has long favored arbitration as a means of dispute resolution. *See Burchell v. Marsh*, 58 U.S. 344, 349 (1854) ("As a mode of settling disputes, [arbitration] should receive every encouragement from courts of equity"). Congress confirmed the strong national policy in favor of arbitration by enacting the FAA. *See, e.g., CompuCredit Corp. v. Greenwood,* 132 S.Ct. 665, 669 (2012) (citing several authorities); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983) ("Congress's clear intent, in the FAA, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible").

It is well-recognized that "[b]y agreeing to arbitrate . . . a party . . . trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 628 (1985). The benefits of arbitration have been repeatedly recognized by this Court: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. *See, e.g., Concepcion,* 131 S.Ct. at 1749; *Stolt-Nielsen,* 130 S.Ct. at 1775; *accord* Rice, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for A Judicial Standard,* 45 Hou. L. Rev. 215, 246 (2008) ("Proponents of arbitration, and particularly of the mandatory arbitration clause, hail it as a boon to efficiency for our already-burdened judiciary as well as an economic advantage for both parties of a dispute").

Just as emphatically, however, the attributes of efficiency and simplicity do not exist in class arbitration, which by its nature is protracted, complex and public. *Cf.* Clancy & Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 72 (2007) ("class arbitration is a proceeding of profoundly different substance and scope, in which many of millions of dollars and the company's future could be at stake"); Baker, *Class Action Arbitration,* 10 Cardozo J. of Conflict Resol. at 364 ("The fact that the procedural device of class treatment is not available in arbitration is part and parcel of arbitration's ability to offer simplicity, informality, and expedition characteristics that generally make arbitration an attractive vehicle for resolution of low-value claims").

Real-life experience with classwide arbitration bears out these concerns. As the AAA recited to this Court in its *Stolt-Nielsen amicus* brief, of the 283 class arbitrations AAA administered "in the nearly six years that the Class Rules have been in effect … no class arbitration conducted under the Rules has resulted in a final award on the merits[.]" Brief of American Arbitration Association at 22-23, *Stolt-Nielsen v. AnimalFeeds Int'l Corp.,* No. 08-1198.

In that same *amicus* brief, AAA recounted statistics showing that the median and mean times for class arbitrations to traverse just the clause construction and class determination phases hovered around two years. *Id.* at 24; *accord Concepcion,* 131 S.Ct. at 1751 (citing statistics showing that class arbitration takes far longer than bilateral arbitration). And that was even before those cases

reached any consideration of the merits. Specific cases, of course, can take much longer. As just one example, an arbitration that has been pending for more than four years has not progressed beyond the determination whether to proceed on a class-wide basis, and is still awaiting judicial consideration of the arbitrator's decision on that subject. *See Rivera, et al. v. Corinthian College, Inc., et al.,* No. 11 434 01075 08 (AAA claim filed May 28, 2008). Even if that case moves ahead, there will not be consideration of the merits until more than five years after the arbitration commenced.

Aside from the added expense of such lengthy disputes over the administrative form proceedings will take, class arbitrations pose an unacceptable potential for abuse. Some have suggested that an inherent conflict of interest lurks in a situation where arbitrators, who are paid by the hour, decide whether the proceedings over which they preside will be simple, efficient and inexpensive, or complex, protracted and costly.[4] *Cf. Com. Coatings Corp. v.*

---

[4] *See, e.g.,* Clancy & Stein, *An Uninvited Guest,* 63 Bus. Law. at 73-74 (noting that arbitrators' rulings in class arbitration are "fraught with financial conflicts of interest" because "a decision to certify a class almost certainly would . . . increase the arbitrator's compensation for the case"); Deruelle & Roesch, *Gaming the Rigged Class Arbitration Game: How We Got Here and Where We Go Now – Part I*, The Metropolitan Corporate Counsel, August 2007, at p. 9, *available at* http://www. metrocorpcounsel.com/pdf/2007/August/09.pdf ("Simply put, arbitrators necessarily have a 'financial interest' in prolonging an arbitration, and especially a class arbitration, since the more time they devote to a case, the more money they will make"); Burch, *Necessity Never Made a Good Bargain: When Consumer Arbitration Agreements Prohibit Class Relief*, 31 Fla. St. U. L. Rev. 1005, 1031, 1034 (2004) ("Arbitrators may have a financial incentive to certify a class because the longer

Cont. Cas. Co., 393 U.S. 145, 150 (1968) (vacating an arbitration award and holding that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias").

Further, even in the usual course, "the vast majority of certified class actions settle, most soon after certification." Bone & Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1291 (2002) ("[E]mpirical studies…confirm what most class action lawyers know to be true").[5] The same trend holds for class arbitration. *See* Baker, *Class Action Arbitration,* 10 Cardozo J. of Conflict Resol. at 353-54 (noting that as of August 2008, no class arbitration cases had reached a decision on the merits "there being a tendency for many cases to settle after the class arbitration award"). This is because class actions place defendants in the untenable position of betting the company on the outcome. Defendants face intense

---

the arbitrator spends on the case the more money the arbitrator receives"); Carter, *High Court Says Let the Arbitrator Decide*, 2 No. 25 ABA J. E-Report 5 (June 27, 2003) (quoting chair of ABA Dispute Resolution Section's Arbitration Committee as saying "I think arbitrators will be inclined to find class action arbitration is appropriate because there is an economic incentive to do so"); *see also generally* Powell & Bales, *Ethical Problems in Class Arbitration,* 2011 J. Disp. Resol. 309, 320-29 (2011).

[5] *See also* Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification [leads to] settlement, not full-fledged testing of the plaintiffs' case by trial."); Willging & Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 647 (2006) ("[A]lmost all certified class actions settle").

pressure to settle even if an adverse judgment seems "improbable." *See Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008); *accord Rhone-Poulenc,* 51 F.3d at 1298.

Indeed, this Court has noted the "risk of 'in terrorem' settlements that class actions entail" because when "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Concepcion,* 131 S. Ct. at 1752 (citing *Kohen v. Pac. Inv. Mgmt. Co. LLC,* 571 F.3d 672, 677-78 (7th Cir. 2009)). As Judge Posner has explained:

> When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good. [The defendant] has good reason not to want to be hit with a multi-hundred-million-dollar claim that will embroil it in protracted and costly litigation—the class has more than a thousand members, and determining the value of their claims, were liability established, might thus require more than a thousand separate hearings.

Kohen, 571 F.3d at 677-78.[6] Fear of negative publicity is also a motivating factor to settle even

---

[6] *See also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 (3d Cir. 2001) ("granting [class] certification may generate unwarranted pressure to settle nonmeritorious or marginal claims"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Class certification

weak class claims. Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 La. L. Rev. 157, 222 (2004).

The strain this places on the individuals and businesses DRI's members represent is extreme. The attendant costs of a major lawsuit amplified by the complex vagaries of class action treatment could sound the death knell for new or financially fragile companies. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform of the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J.L. & Pub. Pol'y 607, 612 (2010). The ripple effects of exorbitant settlements are felt throughout the economy and are particularly invidious when the enormity of potential classwide recovery masks a substantively non-meritorious case *See, e.g.,* Bohn & Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. Pa. L. Rev. 903, 970 (1996) (Describing "strike suits" designed to obtain "the defendants' cost savings from avoiding the litigation, distraction, and reputation costs of responding to the plaintiffs' complaint" rather than the true worth of the claim). The court of appeals' holding in this case, if left uncorrected by this Court, will exacerbate these problems and engender "blackmail settlements." *Rhone-Poulenc,* 51 F.3d at 1298 (citing Friendly, *Federal Jurisdiction: A General View* 120 (1973)).

---

magnifies and strengthens the number of unmeritorious claims[. This] creates insurmountable pressure on defendants to settle…. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low") (citations omitted).

B. Class Arbitration Lacks Many Procedural Safeguards Present in Ordinary Litigation

All of the adverse practical ramifications of the Third Circuit decision are magnified further by the lack of procedural safeguards of class arbitration. Given the "in terrorem" effects of blackmail settlements, this Court was exactly correct in finding it "hard to believe that defendants would bet the company with no effective means of review." *Concepcion,* 131 S. Ct. at 1752. *See Stolt-Nielsen*, 130 S.Ct. at 1775-76 ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. But the relative benefits of a class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through classwide arbitration").

The opportunities for judicial and appellate review are narrowly circumscribed in the arbitration context. The FAA provides that a court may vacate an arbitrator's substantive award of relief on the merits only in the event of fraud, corruption, bias, misconduct or misbehavior by the arbitrators, or where the arbitrators exceeded their powers or failed to make a "final and definite" award. *See* 9 U.S.C. §10(a). Courts' powers to modify such an arbitration award are limited to cases involving material miscalculations or mistakes, errors in form, and rulings on issues not before the arbitrator. *See id.* §11. These grounds for review may not be expanded by agreement of the parties. *Hall Street Assoc's v.*

Mattel, Inc., 128 S.Ct. 1396 (2008). Such limitations on judicial review raise serious questions of fairness for all parties to class arbitration. *Cf.* Clancy & Stein, *An Uninvited Guest,* 63 Bus. Law. at 71 ("[f]irst and foremost, a decision by the arbitrator with respect to class certification and an ultimate award are virtually non-appealable"; quotation omitted).

It is not only the lack of searching judicial review that makes class arbitration inherently perilous for defendants. Arbitration also lacks many salutary procedural mechanisms readily available in litigation, such as motions to dismiss and motions for summary judgment. *See* Fed. R. Civ. P. 12(b)(6) & 56. These procedures can end meritless and frivolous litigation before discovery or trial. But in arbitration, defendants lack the right to be heard on a motion to dismiss. Dispositive motions in arbitration are not encouraged and are rarely granted.[7] Indeed, "[s]ummary judgment in AAA arbitration is so rare as to be statistically insignificant." Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. Rev. 105, 113 (2003). Absent such basic procedural mechanisms to end meritless class claims at a pre-trial stage, defendants may force even greater pressure to settle class arbitration than class action litigation. Where the parties never expressly agreed to class arbitration in the first place, there is no

---

[7] *See, e.g.,* Sherwyn, *Because it Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 1 Berkeley J. Emp. & Lab. L. 1, 27 & n. 122 (2003); Steinberg, *A Decade After McMahon: Securities Arbitration: Better for Investors Than the Courts?,* 62 Brooklyn L. Rev. 1503, 1513-14 & n. 56 (1996).

supportable basis for unleashing such coercive pressure.

Equally as important, a highly valued attribute of single party v. single party arbitration is the desire to preserve confidentiality. That benefit, too, is lost in class arbitration since such proceedings result in publicly available awards. Typically, arbitration awards are confidential (*see* AAA Supplementary Rule 9(a)) and arbitrators are generally discouraged from writing opinions explaining the rationale for their awards. *See, e.g., United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 598 (1960); DOMKE ON COMMERCIAL ARBITRATION §29:06 (G. White rev. ed. 1984). But class arbitration is antithetical to confidentiality, and in AAA class arbitrations the parties can expect their demands and all rulings will be publicly posted on the Internet. *See generally* AAA Searchable Class Arbitration Docket, *available at* http://www.adr.org/sp.asp?id=25562. That aspect of class arbitration poses a particular dilemma for defendants whose records and dealings with absent class members are subject to the strictures of privacy law – most especially, for example, educational institutions, medical and health related businesses, and employers.

Finally, vital due process guarantees present in litigation are non-existent in class arbitration. Because arbitration agreements are binding only on parties, any potential class members who have no arbitration agreements, or whose agreements do not cover the dispute at issue, should be unaffected by the arbitrator's final award. In *Moses H. Cone*, this Court held that where a party has related disputes with two different parties – one with an arbitration

agreement and one without – each case must proceed in a separate forum:

> [T]he relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement. Under the [FAA], an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.

460 U.S. at 20 (emphasis in original; footnote omitted). It is well-settled, moreover, that a contract cannot bind a non-party. *See, e.g., EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

As a result, in class arbitration, if an arbitrator has issued an award in favor of the plaintiff class, the defendant(s) could still face additional litigation – even class litigation – by purported class members. Most directly, this threat exists for absent class members not subject to an arbitration agreement; but the threat exists as well for absent class members with arbitration agreements who did not receive the full panoply of due process notice and procedural regularity that must precede judgments in class action litigation. Although this burden may reasonably be imposed on defendants whose contracts expressly permit class arbitration, it is an unreasonable burden for those whose contracts do not.

C. Review is Warranted Now

The real-life experience of how arbitrators have misapplied this Court's precedents has subjected

defendants to complex, high-stakes, class arbitration procedures to which they never agreed. That result is incompatible with the principle that contractual agreement is the cornerstone on which the entire arbitration system rests. Even worse, defendants coerced into class arbitration are deprived of substantial rights, including the benefits of finality and repose even if they prevail on the merits. That result is incompatible with the principal justifications for permitting class action litigation in the courts in the first place, *viz.,* class-wide finality and repose. Under such a regime, with "millions of dollars and perhaps the company's future…at risk," and absent "the safeguards litigation provides[,] the consequences of an unreviewable arbitral error are so great that arbitration is no longer a viable option." Clancy & Stein, *An Uninvited Guest,* 63 Bus. Law. at 71, 73-74 (citations omitted). The experience of DRI members confirms that these risks are real.

Further guidance from this Court continues to be needed because, as a practical matter, parties cannot revisit and revise all their contracts containing arbitration agreements whenever another conflicting decision comes along imposing new and different standards for saying no to class arbitration. In the real world in which DRI's members function, arbitrators often see – and will continue to see – contracts drafted long before anyone could reasonably have considered class arbitration a subject for negotiation. For example, the form of contract at issue in *Stolt-Nielsen* was developed more than 50 years earlier. *See Stolt-Nielsen,* 130 S.Ct. at 1765.

And even if it were remotely feasible to expect that every contract be revised to insert whatever new

magic words a court requires to preclude class arbitration, there is no certainty that such clauses will be enforced by the next court. The existing circuit conflict and even greater disarray in the district courts and among arbitrators establish this point. Further examples are provided by the decision of the California Supreme Court that this Court reversed in *Concepcion,* and the series of decisions by the Second Circuit in *In re Am. Express Merchants' Litig.*, 667 F.3d 204 (2d Cir.) (refusing to enforce arbitration agreement's ban on class actions ostensibly because it would prevent many plaintiffs from obtaining effective relief), *pet. for rehearing en banc denied,* 681 F.3d 139 (2d Cir.), *pet. for cert. filed,* No. 12-133 (July 30, 2012).[8]

The existing practical problems created by this issue are painfully acute for the nation's employers since expressly forbidding class arbitrations may result in an unfair labor charge from the National Labor Relations Board ("NLRB"). Earlier this year, the NLRB held that requiring all employment-related disputes to be resolved through individual arbitration (and disallowing class claims) violated the National Labor Relations Act ("NLRA") because it prohibited the exercise of substantive rights protected by section 7 of the NLRA. *See In re D.R. Horton, Inc.,* 357 NLRB No. 184, 2012 WL 36274 (2012). Although no

---

[8] DRI is filing an *amicus curiae* brief in No. 12-133 urging that the Court grant the *American Express* petition for certiorari. Each case – *American Express* and this one – independently warrants certiorari. Since both are pending at the same time, the Court has an ideal opportunity to resolve pressing questions concerning the availability of class arbitration in a broad context that will greatly benefit millions of businesses and individuals. Accordingly, DRI submits that both petitions should be granted.

court of appeals has yet spoken on the matter, district courts are already deeply divided on whether *D.R. Horton* is consistent with this Court's precedents.[9]

Hence, unless this Court grants certiorari and clarifies the law, employers who enter arbitration agreements with their employees will continue to face an untenable clash of conflicting standards. Under the court of appeals decision here (and *Jock)*, an employer risks class arbitration if it does not expressly disclaim the availability of class-based relief. But under *D.R. Horton*, if the employer includes an express waiver of class actions in arbitration agreements, it could be committing an unfair labor practice in the eyes of the NLRB.

Based on the extensive experience of its members, DRI submits that the intensely practical points discussed in this *amicus* brief weigh heavily in favor of certiorari. At the end of the day, this case is an ideal vehicle for resolving a persistent circuit conflict on an important issue of federal law. This Court's review is fully warranted.

---

[9] *Compare Delock v. Securitas Sec. Servs. USA, Inc.,* – F.Supp.2d –, 2012 WL 3150391, at **4-5 (E.D. Ark. 2012); *Morvant v. P.F. Chang's China Bistro, Inc.,* 2012 WL 1604851, at *9 (N.D. Cal. May 7, 2012); *Jasso v. Money Mart Express, Inc.,* – F. Supp.2d –, 2012 WL 1309171 at **7-10 (N.D. Cal. Apr. 13, 2012), *Palmer v. Convergys Corp.,* 2012 WL 425256, at *3 (M.D. Ga. Feb. 9, 2012); *and LaVoice v. UBS Fin. Servs., Inc.,* 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012) (all rejecting *D.R. Horton*); *with Herrington v. Waterstone Mortg. Corp.,* 2012 WL 1242318 (W.D. Wis. Mar. 16, 2012); *and Owen v. Bristol Care, Inc.,* 2012 WL 1192005 (W.D. Mo. Feb. 28, 2012) (following *D.R. Horton*).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY M. SNEATH*
PRESIDENT
DRI—THE VOICE OF
THE DEFENSE BAR
55 West Monroe,
Suite 1105
Chicago, IL 60603
(312) 795-1101
hsneath@psmn.com

JERROLD J. GANZFRIED
JOHN F. STANTON
Holland & Knight LLP
800 17th Street NW
Suite 1100
Washington, DC 20006
(202) 469-5151
jerry.ganzfried@hklaw.com

Counsel for Amicus Curiae
*Counsel of Record

August 29, 2012