No. 12-135

IN THE
Supreme Court of the United States

OXFORD HEALTH PLANS LLC

Petitioner,

v.

JOHN IVAN SUTTER, M.D.,

Respondent.

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

BRIEF AMICUS CURIAE OF DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI — The Voice of the Defense Bar ("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 in drafting contracts and in subsequent proceedings. Frequently, such contractual disputes address the enforceability of arbitration agreements. Based on the informed interest and relevant experience of its members, DRI has submitted several *amicus* briefs in recent years in cases presenting issues under the Federal Arbitration Act (FAA). *E.g.*, *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 594 (cert. granted Nov. 9, 2012); *AT&T Mobility LLC v.*

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[1] Letters of consent have been filed with the Clerk. 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.

Concepcion, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

DRI and its members thus have a vital interest in the issues presented in this case. In light of its members' extensive practical experience, DRI is uniquely well suited to explain why this Court should reverse the Third Circuit's opinion.

INTRODUCTION AND SUMMARY OF ARGUMENT

Arbitration agreements are commonplace in every corner of the economy, and parties expect that such agreements will be honored in accordance with the terms to which they consented. Consistent with the strong market preference for arbitration, federal law and the laws of many states favor this alternative form of dispute resolution precisely because it is inexpensive, streamlined, and efficient. As this Court has recognized, class arbitration is, in contrast to bilateral arbitration, 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 bilateral arbitration over litigation in the first place.

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 Federal Arbitration Act (FAA): to ensure that arbitration agreements are enforced strictly

according to the terms adopted by the parties. 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 judicial proceedings.

Arbitrators and lower courts that misapply this Court's precedents have 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 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 even in the courts, *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: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 71, 73-74 (2007) (citations omitted). The experience of DRI members confirms that these risks are real.

The Third Circuit in this case incorrectly imposed 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. This decision is contrary to 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. 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.

ARGUMENT

I. THE DECISION BELOW MISREADS THIS COURT'S PRECEDENTS

A. The Mistaken Foundation for the Recent Growth of Class Arbitration

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);

Travelers Indem. Co., 2006 WL 6553086, at *1 (S.D. Tex. Jan. 9, 2006) ("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. In relatively short order, 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. May 1, 2009), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures-2009.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 (AAA), or "can proceed on behalf of a class" (JAMS). *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 frequently interpreted silent arbitration agreements to "permit" class actions. 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 AAA 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 (hereinafter "AAA *Stolt-Nielsen* Brief"); *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 directly from arbitrators. As one 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. Rpt. (BNA) 649, 2 (2006) (noting that arbitrators issuing decisions overwhelmingly favor class arbitration – even where there is no evidence the parties intended to allow it).

B. This Court Corrects the Misreading of *Bazzle*

These misperceptions of *Bazzle* permeated the 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)); *see also*

Rock Co. v. Int'l Broth. of Teamsters, 130 S. Ct. 2847, 2857 (2010) (same). 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. *Stolt-Nielsen,* 130 S. Ct. 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.[2]

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[2] 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.

C. The Third Circuit Decision Effectively Nullifies *Stolt-Nielsen*

The Third Circuit's ruling in this case provides a roadmap for nullifying or evading *Stolt-Nielsen*. For example, the court of appeals relied heavily on the contract's "any dispute" language 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. *See, e.g., Stolt-Nielsen,* 130 S. Ct. at 1765; *Reed v. Fla. Metro. Univ. Inc.,* 681 F.3d 630, 642-43 (5th Cir. 2012); *Jock v. Sterling Jewelers, Inc.,* 646 F.3d 114, 116 (2d Cir. 2011), *cert. denied,* 132 S. Ct. 1742 (2012).

As the Fifth Circuit correctly noted in identical circumstances, reliance on the "any dispute" language of an arbitration agreement to find assent 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); *accord Bernal v. Burnett,* 793 F. Supp.2d 1280, 1287-88 (D. Colo. 2011).

Similarly, even where an agreement contains no provision 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"); *see also Goodale v. George S. May Int'l Co.,* 2011 WL 1337349, at *2 (N.D. Ill. Apr. 5, 2011) (rejecting argument that *Stolt-Nielsen* applies only where the parties "stipulated that there was no agreement between them to arbitrate class claims," and characterizing argument as an attempt to "split the finest of hairs").

The experience of DRI members bears out this concern. Subsequent to *Stolt-Nielsen*, many arbitrators and courts limited this Court's holding to the context of a stipulated "no agreement." Some have conjured 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.[3] This Court should close the pathway that allows such end-runs around its decisions.

II. FLAWS IN THE THIRD CIRCUIT'S ANALYSIS PROVIDE ADDITIONAL REASONS FOR REVERSAL

A. The Third Circuit Decision Eliminates Vital Benefits of Arbitration

It is well-recognized that "[b]y agreeing to arbitrate . . . a party . . . trades the procedures and opportunity for review of the courtroom for the

[3] *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).

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.[4] In contrast to the informality, streamlining, and expedition that are hallmarks of individual arbitration, class arbitration requires complex procedures that blur the distinction between litigation and arbitration. For example, the AAA's

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[4] *Cf.* Clancy & Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History,* 63 Bus. Law. at 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").

class arbitration rules largely replicate the federal rules of civil procedure. *See* AAA, Supplementary Rules for Class Arbitrations, *at* http://www.adr.org/sp.asp?id =21936. Therefore, just as in court, class arbitration requires discovery, full briefing, an evidentiary hearing, and a written ruling on class certification. If a class is certified, absent class members must be notified and given an opportunity to opt out. *Id.*, Rule 6. The parties must then engage in protracted and expensive merits discovery typical of high-stakes class litigation. And, finally, there must be a full hearing — with an opportunity for the defendant to present individualized defenses — and a written award on the merits. *Id.*, Rule 7. Alternatively, if there is a settlement, there must be another round of notice to class members, an opportunity to file objections, more briefing, a fairness hearing, and a written ruling. *Id.*, Rule 8.

As these procedures confirm, the cost savings of individual arbitration do not translate to class arbitration. Indeed, since it entails substantial arbitrators' fees that have "no equivalent in a traditional, judicial class action," class arbitration may prove even more expensive to the parties than its judicial counterpart. Clancy & Stein, *An Uninvited Guest,* 63 Bus. Law. at 64. At a minimum, it is clear that, unlike individual arbitration, class-wide arbitration is *not* a "less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995).

Empirical data on class arbitration confirm that the procedure is just as cumbersome as a judicial class action, if not more so. AAA statistics show that

"the median time frame from filing (an AAA class arbitration) to settlement, withdrawal, or dismissal is 583 days with a mean of 630 days." AAA *Stolt-Nielsen* Brief at 24. While 19–21 months might seem today to be a reasonable period in which to resolve the merits of a class dispute, that is not what these statistics reflect. Rather, 85% of the cases included in the average were terminated *before any ruling on class certification*—and *none* "resulted in a final award on the merits." AAA *Stolt-Nielsen* Brief at 24. Thus, like its court-administered counterpart, class-wide arbitration is likely to take years to complete. The delay inherent in class arbitration stands in stark contrast to the speed and efficiency of individual consumer arbitration, which, on average, results in an award on the merits in only six months—only four months if a customer elects to have the case decided on documentary submissions alone.[5]

Further examination of real experience with class arbitration reinforces the basis for concern with the decision below. As the AAA recited to this Court, 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[.]" AAA *Stolt-Nielsen* Brief at 22-23.

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

[5] AAA, *Analysis of the AAA's Consumer Arbitration Caseload*, *at* http://www.adr.org/si.asp?Id=5027.

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 almost five 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, consideration of the merits will not even begin 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.[6] *Cf. Com. Coatings Corp. v.*

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[6] *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'

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").[7] Such concerns are reinforced by statistics indicating that arbitrators are more than twice as likely as judges to certify a class. According to the AAA, arbitrators granted 24 of the first 42 contested class-certification motions filed under the AAA rules—a grant rate of 57.14%. AAA *Stolt-Nielsen* Brief at 22. In contrast, studies of putative class actions filed in state and federal courts revealed a certification rate under 25%. *See* Willging & Wheatman, Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?, 81 Notre

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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 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 generally* Powell & Bales, *Ethical Problems in Class Arbitration,* 2011 J. Disp. Resol. 309, 320-29 (2011).

[7] *Accord Tumey v. Ohio,* 273 U.S. 510, 523, 533 (1927) (a party "might . . . with reason" fear a judge who "has a direct, personal, substantial pecuniary interest in reaching a conclusion against him"); *Barcon Assoc., Inc. v. Tri-County Asphalt Corp.,* 430 A.2d 214, 219 (N.J. 1981) (arbitrators must "avoid not only actual partiality but also the appearance of partiality" because of "the need to maintain the integrity of arbitration and public faith in the process").

Dame L. Rev. 591, 645 (2006) (certification rate of 24%); Administrative Office of the California Courts, *Class Certification In California*, at A1, tbl.A-1 (Feb. 2010) (certification in 22.3% of 1,294 putative class actions terminated in California state courts), *available at http://www.courtinfo.ca.gov/reference/documents/classaction-certification.pdf*. *Accord In re Rhone-Poulenc Rorer, Inc.,* 51 F.3d 1293, 1299 (7th Cir. 1995) ("We have no reason to suppose that [a judge] wants to preside over an unwieldy class action").

Further, 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").[8] 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 without regard to the strength of plaintiffs' claim. Defendants face

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[8] *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").

intense 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.

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 one court 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; *see Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC,* 2010 WL 3855552, at *28 (E.D. Pa. Sept. 30, 2010) (same).[9] Fear of negative publicity is also a

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[9] *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

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

This pressure places extreme strain on the individuals and businesses DRI's members represent. Most starkly, 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

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nonmeritorious or marginal claims"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Class certification 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); *accord* Barnett, *The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 Mo. L. Rev. 207, 208 (2010) (similar point).

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)).

Even if the attendant costs of class arbitration do not imperil a defendant company's financial well-being, it is beyond cavil that the public will benefit if companies can protect themselves from the high costs of arbitration and/or paying frivolous class claims. "[W]hatever lowers costs to businesses tends over time to lower prices to consumers. . . . [T]he size of the price reduction caused by enforcement of consumer arbitration agreements will vary. . . . But it is inconsistent with basic economics to question the existence of the price reduction." Ware, *The Case For Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions And Arbitration Fees,* 5 J. Am. Arb. 255-56 (2006); *accord* Rice, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for A Judicial Standard,* 45 Hous. L. Rev. 215, 247 (2008) ("Because companies are able to keep their costs down by mitigating risk, they will pass cost savings on to the consumer in the form of lowered prices").[10]

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[10] In an analogous context, this Court has recognized that customers' whose contracts include a forum-selection clause "benefit in the form of reduced (prices) reflecting the savings that (a company) enjoys by limiting the fora in which it may be sued." *Carnival Cruise Line, Inc. v. Shute*, 499 U.S. 485, 594 (1991); *see also, e.g.*, *Boomer v. AT&T Corp.*, 309 F.3d 404, 419 n.7 (7th Cir. 2002) ("arbitration offers cost-saving benefits to telecommunication providers and these benefits are reflected in a lower cost of doing business that in competition are passed along to customers") (quotation omitted).

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

All of the adverse practical ramifications of the Third Circuit decision are magnified further by the lack of procedural safeguards that plagues 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").

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). Judicial power to modify such an arbitration award is 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. For sound practical reasons, the fact that "decision(s) by the arbitrator with respect to class certification and an ultimate award are virtually non-appealable . . . terrifies corporate defendants." Clancy & Stein, *An Uninvited Guest,* 63 Bus. Law. at 71 (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. For example, this Court has recognized the values of pleading standards in class actions designed to ensure that meritless cases are dismissed at an early stage before a defendant is subjected to expensive and protracted discovery. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) (holding, in class action context, that "district courts must be especially alert to identify frivolous claims brought to extort nuisance settlements…"). These procedures can end meritless and frivolous litigation before discovery or trial.

In arbitration, however, defendants lack the right to be heard on a motion to dismiss. Moreover, dispositive motions in arbitration are not encouraged and are rarely granted.[11] Indeed, "(s)ummary

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[11] *See, e.g.,* Sherwyn, *Because it Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the*

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).[12] This procedural limitation is widely accepted in bilateral arbitration as part and parcel of arbitration's informality and streamlined nature. In class arbitration, however, the unavailability of early dispositive motions exposes defendants to the expense of discovery and even a merits hearing on worthless claims. *Cf. Twombly*, 550 U.S. at 559 ("the threat of discovery expense will push cost-conscious defendants to settle even anemic cases"). Where the parties never expressly agreed to class arbitration, there is no 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 discouraged from writing opinions explaining the rationale for their awards. *See, e.g., United Steelworkers v. Enterprise Wheel & Car Corp.,* 363

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).

[12] Perhaps this characteristic of arbitration is an extension of the conventional wisdom that an award may be vacated because the arbitrator refused to hear enough evidence but not because he or she heard too much. *Cf.* 9 U.S.C. §10(a)(3).

U.S. 593, 598 (1960); DOMKE ON COMMERCIAL ARBITRATION §29:06 (G. White rev. ed. 1984). But class arbitration is antithetical to confidentiality. 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. Aside from being fully counter-intuitive, there is no valid or principled basis for concluding that absent class members should lose their rights to confidentiality and privacy when someone else files a class-wide claim.

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 Memorial Hospital v. Mercury Construction Corp.,* 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. 1, 20 (1983) (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, if an arbitrator issues an award in favor of the plaintiff class, the defendant(s) could still face additional litigation – even additional class litigation – from purported class members. Most directly, this threat exists from absent class members not subject to an arbitration agreement; but the threat exists as well from 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 such burdens may reasonably be imposed on defendants whose contracts expressly permit class arbitration, it is an unreasonable onus with which to saddle defendants whose contracts do not.

Where parties (including absent class members) have entered into contracts that unambiguously specify class arbitration as a chosen method of dispute resolution, then the absence of such safeguards is something to which the parties have agreed. In those particular circumstances, fidelity to the contractual terms would warrant class arbitration. But where the parties (including absent class members) have not expressly waived their

constitutional protections required for class actions, it is wrong to subject parties to class arbitration.

For all of these reasons, it would be a profound mistake to permit class arbitration to proceed where the contract does not unambiguously so provide. The rationale for this conclusion in the context of domestic contracts and disputes is even more compelling in the context of transnational contracts. Under the FAA, international arbitration contracts are subject to treaties and multilateral agreements. 9 U.S.C. §§ 202, 208. But, there is serious question whether class arbitration could satisfy even the most elementary requirements for an enforceable award under international standards to which the United States is a signatory. *See, e.g.,* Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns,* 30 U. Pa. J. Int'l 1, 46-47 (2008).

For example, the Rules of the Inter-American Commercial Arbitration Commission require that a request for arbitration must contain the names and addresses of the parties. Inter-American Commercial Arbitration Commission Rules, at Art. 3 (amended Apr. 1, 2002), *available at* http://www.adr.org/sp.asp?id=22093. Class arbitration fails that basic test. *Cf.*, Strong, *Enforcing Class Arbitrations*, 30 U. Pa. J. Int'l at 44 ("neither [JAMS nor AAA] arbitral rules creates procedures that necessarily address civil law concerns [regarding notice] about representative actions").

Likewise, the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T.

2517, 330 U.N.T.S. 38 (1958), allows jurisdictions to decline to enforce a foreign arbitration award on various grounds, including where the award "contains decisions on matters beyond the scope of the submission to arbitration," *id.* at art. V(1)(d). It also allows signatories to refuse enforcement that "would be contrary to the public policy of [the enforcing] country." *Id.* at art. V(2)(b). Foreign jurisdictions may reach different conclusions on each of these issues when they confront involuntary class arbitration imposed by U.S. arbitrators on the basis of an "any dispute" clause. *See, e.g.*, Lew, Mistelis & Kroll, *Comparative International Commercial Arbitration* (2003) ¶¶16-94 ("There is a real issue whether an arbitration award rendered in multiparty proceedings can be enforced"); *id.* ¶¶16-97 (similar).

Based on the extensive experience of its members, DRI submits that the decision below misreads this Court's precedents, misperceives the obligation to enforce arbitration agreements in accordance with their express terms, and misunderstands the realities of class action arbitration. Those fundamental errors should be corrected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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