

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 OXFORD HEALTH PLANS LLC, :

4 Petitioner : No. 12-135

5 v. :

6 JOHN IVAN SUTTER :

7 - - - - - x

8 Washington, D.C.

9 Monday, March 25, 2013

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 10:04 a.m.

14 APPEARANCES:

15 SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of

16 Petitioner.

17 ERIC D. KATZ, ESQ., Roseland, New Jersey; on behalf of

18 Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 12-135, Oxford Health
5 Plans v. Florida.

6 Mr. Waxman?

7 ORAL ARGUMENT OF SETH P. WAXMAN

8 ON BEHALF OF THE PETITIONER

9 MR. WAXMAN: Mr. Chief Justice, and may it
10 please the Court:

11 In Stolt-Nielsen, this Court held first that
12 a party may not be compelled to submit to arbitration
13 unless there is a contractual basis for concluding that
14 the party agreed to do so. And second, that because
15 class arbitration changes the nature of arbitration to
16 such a degree that it cannot be presumed that parties
17 consented to class arbitration simply by agreeing to
18 submit their disputes to an arbitrator. That precisely
19 describes this case.

20 The agreement commits the parties to submit
21 their disputes to arbitration and says nothing about
22 class arbitration. There is no extrinsic evidence
23 suggesting that the parties ever considered such a
24 prospect, and there is no background principle of State
25 law that favors it.

1 JUSTICE GINSBURG: But -- about the parties
2 never considering it, when this case was in the New
3 Jersey courts, Oxford explained -- this is in the red
4 brief at page 27 that's quoting Oxford's counsel then,
5 that "the arbitrator has the power to ascertain whether
6 the parties contemplated class arbitration in their
7 agreements." A power in the arbitrator that Oxford does
8 not contest. Does it -- that seems to be a recognition
9 by Oxford that -- that class arbitration was
10 contemplated.

11 MR. WAXMAN: Well, Justice Ginsburg, two
12 things. First of all, if you look at page 10 -- or page
13 14, footnote 7 of our yellow brief, you'll see all of
14 the references made in the advocacy before the State
15 court judge by my -- my brother here, not recognizing
16 repeatedly that what Oxford was asking for was a
17 dismissal and a transfer to individual arbitration --
18 bilateral arbitration.

19 There was no mistake, whatsoever, in the New
20 Jersey State courts that Oxford's position was that --

21 JUSTICE SOTOMAYOR: Mr. Waxman --

22 CHIEF JUSTICE ROBERTS: Finish your answer.

23 MR. WAXMAN: Yes -- that bilateral
24 arbitration was what was requested, and -- but there was
25 similarly no dispute that both parties -- certainly

1 Oxford took the position based on an understanding of
2 New Jersey law at the time because this Court hadn't
3 decided class action question, that the decision would
4 be submitted in the first instance to the arbitrator as
5 it was in Stolt-Nielsen.

6 Yes, Justice Sotomayor. I apologize.

7 JUSTICE SOTOMAYOR: That's my question. Did
8 you never -- you never argued that it was beyond the
9 power of the arbitrator to decide this question, did
10 you?

11 MR. WAXMAN: In the first instance, no.

12 JUSTICE SOTOMAYOR: And do you take the
13 position that this is a -- always an arbitrator's
14 question when all disputes are supposed to be submitted,
15 or was just -- was there just a mistake here?

16 MR. WAXMAN: Well, I think there was a
17 mistake here. I think it was -- it was understandable,
18 in light of the state of the law in 2002. But we --

19 JUSTICE SOTOMAYOR: So why should we rewrite
20 our standard of review to accommodate your client's
21 error? Because that's really what you're asking us to
22 do.

23 MR. WAXMAN: I'm --

24 JUSTICE SOTOMAYOR: More than once we have
25 said an error of law or fact is not a basis to say that

1 an arbitrator exceeded his or her powers.

2 MR. WAXMAN: Oh, Justice Sotomayor, we are
3 not asking the Court to vary in any material respect the
4 highly deferential standard that's reflected in Section
5 10(a)(4) of the Federal Arbitration Act.

6 But we are asking that that generally
7 applicable standard of review be applied to a question
8 with a very strong empirical presumption that the FAA
9 has attached to it and this Court has announced, which
10 is, that absent an actual agreement by the contracting
11 parties that they will permit their disputes to be
12 arbitrated on a class basis, an inference that may not,
13 as a matter of Federal law, be derived from an agreement
14 to submit all disputes to arbitration --

15 JUSTICE KENNEDY: So your rule is that
16 although we must defer to an arbitrator's interpretation
17 of the contract, in this case, there is an exception
18 because?

19 MR. WAXMAN: Well, in this case, you defer,
20 as you always do, but you -- you have to provide --
21 there is some level of review. It's not just because
22 the arbitrator says I've looked at the contract and I
23 think this.

24 As this Court has said over and over again,
25 including in *Stolt*, just saying something is so doesn't

1 make it so. There is deferential review, but there is
2 review. And the review is of a proposition that this
3 Court has now said twice strongly presumes that there
4 is -- there is no agreement to arbitrate as a class
5 unless it is clearly shown to be so and that that
6 showing is not satisfied by an all-disputes clause.

7 JUSTICE KENNEDY: So -- so we make that rule
8 just with reference to the word "arbitration" when it's
9 in the class action context, or does this apply to other
10 words as well?

11 MR. WAXMAN: Well, I think --

12 JUSTICE KENNEDY: I'm -- I'm just not sure
13 what the --

14 MR. WAXMAN: So I -- I think -- I mean, this
15 Court has recognized repeatedly that class -- that the
16 question of class versus bilateral arbitration is a
17 special kind of question under the FAA as to which the
18 Federal Arbitration Act itself applies a rule of
19 decision.

20 And therefore, the question I suppose is,
21 when a court looks at a -- an assertion by an arbitrator
22 that the language of the contract permits -- and in this
23 case, the arbitrator found that it required class
24 arbitration, a court has to ascertain whether that
25 assertion of fact is at least plausible, or, to use the

1 vernacular of this Court in Stolt-Nielsen, the Court
2 said in Stolt-Nielsen that the stipulation left no room
3 for an argument that the parties had agreed.

4 And similarly here, the --

5 JUSTICE GINSBURG: But there was no -- in
6 Stolt-Nielsen, the parties stipulated that the contract
7 said nothing on the issue of class proceeding. In this
8 case, we have no such stipulation --

9 MR. WAXMAN: Correct.

10 JUSTICE GINSBURG: -- and the arbitrator is
11 interpreting a term of the contract, the ordinary rule
12 is that -- that the arbitration -- arbitrator's
13 interpretation of a contract term, wrong or right,
14 unless it's off the wall, is -- is not to be overturned.

15 MR. WAXMAN: Well, Justice Ginsburg, the --
16 everyone agrees in this case, as one would have to,
17 based on the holding in Stolt-Nielsen, that if the --
18 this arbitration clause in this case just said all
19 disputes will be arbitrated, not litigated, that the
20 arbitrator could not -- the arbitrator would be reversed
21 if it -- if he found that that indicated an actual
22 agreement of the parties to class arbitration. That is
23 inconsistent with the actual holding in Stolt-Nielsen.

24 And in this case, that sentence is
25 indistinguishable from that orthodox clause. All that

1 we --

2 JUSTICE SCALIA: You're -- you're saying
3 that this is off the wall. That's your -- to put it
4 in -- in Justice Ginsburg's terms, right?

5 MR. WAXMAN: Well, not to be pejorative, but
6 I would say this, in the vernacular of Stolt-Nielsen,
7 this language, quote, "leaves no room" for a conclusion
8 that the parties agree to arbitrate on the facts --

9 JUSTICE SCALIA: So you're saying -- you're
10 saying that the -- that the deference which we give to
11 arbitrator's statement of fact, like the deference we
12 give to a lower court's adjudication of fact, has a
13 limit, that at some point, the distortion of fact
14 becomes an issue, a question of law rather than fact,
15 right?

16 MR. WAXMAN: Yes. And in this case, a
17 question of Federal arbitration.

18 JUSTICE SCALIA: Do you have other examples
19 from other -- other review that we've given to
20 arbitrators' factual decisions?

21 MR. WAXMAN: Well --

22 JUSTICE SCALIA: I mean, I -- I don't want
23 to adopt a special rule for -- for class actions, but
24 if -- if you're telling me this is just a general
25 principle, that at some point if it's too much off the

1 wall, it becomes an error of law and -- and we can
2 reverse it. What -- what other examples do -- do we
3 have?

4 MR. WAXMAN: Well, let me -- let me -- let
5 me refer you to Stolt-Nielsen first, and then to a
6 hypothetical example that my brother gives.

7 JUSTICE SCALIA: No, I want a case.
8 You're --

9 MR. WAXMAN: Okay. Stolt-Nielsen said --
10 I -- I --

11 JUSTICE SCALIA: But that is a class action
12 case. I -- I don't care what it said. I want a --

13 MR. WAXMAN: Oh, you mean a non-class action
14 case.

15 JUSTICE SCALIA: I want a case where we
16 have, or where Federal courts have with our approval,
17 disregarded a -- a factual finding by an arbitrator
18 because the factual finding was too much off the wall.
19 That there was simply not enough basis to support it.

20 MR. WAXMAN: Justice Scalia, I can't -- I'm
21 sort of trying to scroll through all your arbitration
22 decisions. I can't -- there may be. I can't think of a
23 holding of this -- well, no, I guess -- I guess First
24 Options is an example in which the arbitrator found that
25 the parties had agreed to let the arbitrator decide the

1 arbitrability question. And this Court held that that
2 was wrong as a matter of fact.

3 The Court reviewed the -- the facts of the
4 case and said there is no way that the Kaplans agreed to
5 have the arbitrability question submitted.

6 And if I may -- I realize this isn't an
7 actual case -- but my brother gives the example of a
8 form of deferential review, which would allow a court to
9 examine and reverse an arbitrator's decision in a
10 context in which the arbitration agreement says, this is
11 going to be arbitrated under California law, and the
12 arbitrator says, well, I'm going to apply New York law
13 in this case because -- I don't know, the parties have
14 all moved to New York and they like New York and they
15 litigate in New York.

16 My brother says that is reviewable and
17 reversible. And that's exactly what we have here. We
18 have here a clause that this Court has said cannot
19 suffice to establish actual agreement to arbitrate as a
20 class.

21 And the arbitrator has said nonetheless, I
22 have read it that way.

23 CHIEF JUSTICE ROBERTS: Yes, but it's not
24 exactly -- this is not the only clause that provides for
25 arbitration. It is not the standard boilerplate so you

1 could say when he interprets it, he's really making a
2 decision about arbitrability. And you can follow -- I
3 mean, you may disagree with it, I may disagree with
4 it -- but you understand the reasoning. It says, no
5 civil action be brought, all such disputes will go to
6 arbitration, this is a class action, this is a civil
7 action, so it must go to arbitration, and therefore,
8 it's there.

9 Now, you -- you may not agree with it, but
10 it -- it at least purports to be an interpretation of
11 the language rather than a general rule.

12 MR. WAXMAN: The fact -- the fact that the
13 arbitration clause -- the sentence has two clauses. One
14 says, you cannot bring a civil action in court about any
15 dispute under this agreement, you must settle your
16 disputes in arbitration, is completely orthodox.

17 And as we point out at page 24, note 3 of
18 our blue brief, it's quite arguably required by New
19 Jersey law and laws of other States that say to be
20 perfectly -- it is -- you have to be perfectly clear
21 when you are telling a contract -- a contracting
22 counterparty that disputes will be arbitrated. You have
23 to tell them that that means that they cannot bring
24 their disputes in court.

25 And a rule -- a reading of this -- I mean,

1 I -- I submit to you that, consistent with grammar and
2 ordinary meaning of words, it cannot be plausibly read
3 to say that you can't bring a civil action about any
4 dispute in court means that you can -- you are agreeing
5 to arbitrate your dispute on a class basis, for a whole
6 variety of reasons.

7 JUSTICE KAGAN: Mr. Waxman, could I just ask
8 you what you think the standard is under 10(a)(4)
9 because my understanding of the standard was that a
10 court had to find that an arbitrator was exceeding his
11 powers, was acting outside the scope of his authority --

12 MR. WAXMAN: Yes.

13 JUSTICE KAGAN: And that we have said quite
14 a number of times that the fact that the arbitrator
15 committed an error and even a serious error is not
16 enough, that he had to be doing something that was
17 simply outside the scope of his authority. Do you agree
18 with that or disagree with that? And if you disagree
19 with that, what's your standard for what we should be
20 thinking about in -- under 10(a)(4).

21 MR. WAXMAN: I agree with that as a
22 proposition of what review is under 10(a)(4), that is
23 whether the arbitrator exceeded his authority. In this
24 case, in the context of the question about actual
25 agreement to arbitrate on a class -- as a class, this

1 Court has interpreted Federal law to require evidence of
2 a contractual basis of actual agreement between the
3 parties and has precluded, as a matter of Federal law,
4 an arbitrator from inferring such agreement from an
5 all-disputes clause.

6 JUSTICE KAGAN: And you don't disagree, do
7 you, that this arbitrator -- if you read his opinion,
8 you might think it's terribly wrong, but that what he's
9 doing is trying to construe a contract.

10 MR. WAXMAN: I think that -- I mean, trying
11 I think is not a defense. What I would say, in
12 addition --

13 JUSTICE KAGAN: Yes, but he is going -- but
14 he's looking at the words, that he's trying to figure
15 out what the parties agreed on when there's no explicit
16 statement about what the parties agreed on.

17 MR. WAXMAN: Right, but he did not take
18 cognizance of the holding of this Court in
19 Stolt-Nielsen, reiterated in Concepcion, that you may
20 not infer intent from an agreement to submit to
21 arbitration. And more fundamentally, he did not heed
22 the presumption in the Federal -- under the Federal
23 Arbitration Act that this Court's holdings in those two
24 cases reflects.

25 That is, there -- this Court said in

1 Concepcion that it would be hard to imagine that -- hard
2 to believe that defendants would ever bet the company
3 with no effective means of review.

4 There is therefore a presumption in the law
5 that, absent a very clear statement of a meeting of the
6 parties' minds there is no consent. But he indulged the
7 opposite presumption. His presumption was --

8 JUSTICE KAGAN: So now you're saying that he
9 exceeded his authority because he didn't apply a kind of
10 clear statement presumption. But I don't think that
11 we've ever suggested that there is such a clear
12 statement presumption. In Stolt-Nielsen, we said that
13 if the parties have stipulated that they haven't agreed
14 on anything, then we're not going to accept class
15 arbitration.

16 But we've not said that in the process of
17 construing an agreement there is a clear statement rule.
18 Now, maybe we should have said that, but -- you know,
19 it's -- it's no place in our case law now.

20 MR. WAXMAN: Justice Kagan --

21 JUSTICE KAGAN: Am I wrong?

22 MR. WAXMAN: We are not -- you didn't say
23 the words "clear statement." You -- what you said in
24 Stolt-Nielsen -- what you held in Stolt-Nielsen was not
25 simply that parties who have stipulated can't be forced

1 into class arbitration. What you held was that you
2 cannot have class arbitration in the absence of
3 affirmative agreement that is not evidenced by an
4 all-disputes clause. And the -- that background -- that
5 strong presumption must, as a matter of Federal law,
6 inform the arbitrator's decision.

7 And in this case, not only didn't it because
8 you said, look, an all-disputes clause doesn't suffice.
9 And he said, well, there's the word "civil action" in
10 here and I think that that not only suffices, but that
11 indicates an actual agreement to require class
12 arbitration. That doesn't pass any test. It doesn't --

13 JUSTICE GINSBURG: It was a combination of
14 the two provisions. He said that everything that is
15 excluded by the first provision is included in the
16 second. And he also said something, which may or may
17 not be so. He said that this particular way of
18 describing the -- the -- what's arbitrable, this is an
19 unusual wording. We have -- there's no civil action in
20 the first clause and then arbitration in the second. He
21 said that he had never seen this particular language.
22 Is he wrong in -- in saying that this language is
23 unusual?

24 MR. WAXMAN: Arbitration clauses that say,
25 in one form of words or another, that you may not bring

1 any dispute to court, you must bring all disputes to
2 arbitration, is -- is utterly commonplace. There was
3 a -- there was a clause in the Steelworkers' trilogy. I
4 mean, they -- there's a lot of citation to Enterprise
5 Wheel in this case.

6 The -- the provision in -- in the
7 Steelworkers agreement, and virtually all labor
8 agreements, make this explicit. It's not precisely
9 every single article and preposition in the clause here,
10 but it is functionally indistinct. The same was true --

11 JUSTICE GINSBURG: Was this -- was this a --
12 well, was this an experienced arbitrator?

13 MR. WAXMAN: I -- so far as the record
14 shows, yes. But my -- whether he was right or wrong
15 about this, I submit to you two things: Number one,
16 there is no way -- three things:

17 Number one, there is no way consistent with
18 the rules of grammar that one can read this sentence as
19 sending class actions to arbitration -- requiring class
20 arbitration.

21 Number two, there is no heed by the
22 arbitrator -- Number two is that -- that for all intents
23 and purposes this clause is the clause that is orthodox,
24 that was at issue in Stolt-Nielsen. It's the same as
25 the one the Fifth Circuit decided and the Second Circuit

1 decided in the cases -- the other cases that created the
2 split here. It's the same as the standard labor clause
3 that was at issue in the Steelworkers v. Enterprise
4 Wheel.

5 And -- and this is my other point -- it is
6 plain from the arbitrator's decisions, both in his 2003
7 decision and in his post-Stolt-Nielsen 2010 decision, that
8 he not only was not applying the Federal law presumption
9 that this Court identified in Stolt and Concepcion, but
10 he was applying the opposite presumption.

11 He said in 2003 that because -- if this --
12 if this clause wouldn't be construed to permit or
13 require class arbitration, it would mean that the
14 parties had agreed not to resolve their disputes in any
15 forum using a class manner, and that would be, quote,
16 "so bizarre, it would require an express provision."

17 In 2010, he said, well, I overshot the mark
18 here. But the point is still the same. And this is on
19 page 41a -- 40a and 41a of the petition appendix. He
20 said, the -- the point is that if he is not allowed to
21 bring a class proceeding in arbitration when he at least
22 presumptively was in State court, that would be so
23 strange that, "If the clause," and I'm quoting from the
24 second full paragraph on 41a, "If the clause cannot
25 permit Dr. Sutter's court class action to go to

1 arbitration, then Dr. Sutter's original class action
2 must be outside of the arbitration agreement
3 altogether."

4 In other words, he was indulging a
5 presumption that it is so unnatural --

6 JUSTICE BREYER: That -- that comes under
7 our basic thing -- as I read this, the difference was
8 between this and Stolt-Nielsen, you have two parties
9 here and they both say, arbitrator, you decide whether
10 or not this language, that says nothing about it, did
11 encompass class or not.

12 In Stolt-Nielsen, the claimant, who wanted
13 arbitration, agreed that the clause said nothing about
14 it. So, given his concession there, the only way it
15 could have gotten in is if the arbitrator was doing some
16 policy thing. Given the lack of any similar concession
17 here, the way that the arbitrator got it in is he read
18 this ambiguous language, looked at the situation, and
19 said, hmm, guess it's in.

20 Now, in the latter case, we should presume
21 everything from the arbitrator's favor. Former case,
22 no, they've admitted that it wasn't in the clause.
23 Okay. So that -- now, what's the response to that?

24 MR. WAXMAN: So the arbitrator -- so a
25 couple of responses. The arbitrators in Stolt-Nielsen

1 didn't apply -- didn't construe AnimalFeeds' lawyers'
2 concession at oral argument before the arbitrators the
3 same way this Court did. What it said was that it is
4 looking at the language of the contract and as this
5 Court's majority opinion points out, there are several
6 textual references in the arbitrators' decision, and
7 they decided, well, we're interpreting this, applying, I
8 think they said, New York principles, that the parties
9 didn't agree to preclude it, therefore, they must be
10 understood to have permitted it.

11 What this Court said is, as a matter of law,
12 no. Silence doesn't mean consent. Consent can only be
13 shown in this type of decision by an actual agreement.
14 The Court italicized the word "agreement" twice in its
15 opinion. And it doesn't show actual agreement if you
16 just agree to arbitrate, not litigate, your disputes.

17 JUSTICE ALITO: Out of curiosity,
18 Mr. Waxman, in a case like this, how is the arbitrator
19 paid? Is the arbitrator paid by the hour or a flat fee?

20 MR. WAXMAN: I am not sure, Justice Alito,
21 if the record shows. I believe it's by the hour.

22 The -- the point is that what this
23 Court's -- the fact that there was a stipulation that
24 the Court identified in Stolt-Nielsen made it easier to
25 apply the principle that you -- that -- that actual

1 agreement is required, but you can't infer it from an
2 all-disputes clause to the case. The Court said that
3 the stipulation, quote, "left no room for an inquiry
4 regarding the parties' consent."

5 JUSTICE SOTOMAYOR: Mr. Waxman, how wrong
6 does an arbitrator's decision have to be to become an
7 issue of law? Meaning -- because that's the rule you're
8 proposing. I used to think that exceeding your powers
9 was deciding an issue the parties hadn't agreed to
10 arbitrate, but here you've conceded that you gave the
11 issue to the arbitrator. So he hasn't exceeded his
12 power to construe the contract with respect to this
13 dispute, do you agree with that?

14 MR. WAXMAN: Yes, I do, but --

15 JUSTICE SOTOMAYOR: All right. So what
16 instead you're saying is that "exceeded your powers"
17 means that an error the arbitrator makes has to be of
18 what quality?

19 MR. WAXMAN: If you -- so if you -- an
20 arbitrator exceeds his powers if it -- if he decides to
21 arbitrate a subject matter that the parties have not
22 agreed to arbitrate. He -- he exceeds -- he or she
23 exceeds his or her power if they -- if he or she
24 decides, as this Court stated in *Stolt-Nielsen*, that you
25 agreed to arbitrate with someone with whom you didn't

1 agree to arbitrate. That is this case.

2 And as I said, we are not at the -- if you
3 asked -- I don't -- I would apply -- I think you could
4 simply apply the standard that you applied in
5 Stolt-Nielsen, which is the "leave no room" standard,
6 which is pretty darn deferential, and you would have to
7 find that this sentence, in light of Federal law as
8 announced by Stolt-Nielsen, leaves no room for a
9 conclusion that the parties, that Oxford and Dr. Sutter,
10 actually agreed to class arbitration regarding their
11 disputes.

12 JUSTICE GINSBURG: Well, of course, this
13 was -- this was an adhesion contract, so there's no --
14 it was drafted by Oxford. And you made a point about
15 betting the house, that the company wouldn't have agreed
16 to it. But on the side of the doctor, he has a
17 \$10,000 -- a \$1,000 claim, and he is saying that without
18 a class proceeding, there is -- there is essentially no
19 means to enforce the contract against Oxford, that none
20 of these parties, none of the, what was it, 13,000
21 doctors, none of them could enforce the contract because
22 the expense would be much greater than the \$1,000 they
23 could get at the end.

24 MR. WAXMAN: Justice Ginsburg, neither the
25 arbitrator nor any of the courts below made any finding

1 about whether this is a contract of adhesion or whether
2 this is a so-called negative value case.

3 There was litigation over Federal court
4 subject matter jurisdiction and the court found that
5 there was, in part based on evidence that Oxford
6 submitted, that there were many claims that were far in
7 excess of \$75,000. And it is not true that Dr. Sutter's
8 claims as he brought them to arbitration was \$1,000 or
9 anything like it.

10 May I reserve the balance of my time?

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Katz?

13 ORAL ARGUMENT OF ERIC D. KATZ

14 ON BEHALF OF THE RESPONDENT

15 MR. KATZ: Mr. Chief Justice, and may it
16 please the Court:

17 I would like to start out by discussing the
18 applicable standard. There are only two ways a losing
19 party can vacate an arbitration award under 10(a)(4),
20 which is the only standard that applies here. It's the
21 only question that came up to this Court on cert and --
22 under the exceeding powers standard. Number one, the
23 arbitrator had no authority to interpret the contract;
24 or number 2, the award was based not on an
25 interpretation of the contract.

1 Oxford cannot satisfy either of those
2 standards here. Oxford does not dispute that the
3 arbitrator interpreted the contract. Oxford's sole
4 dispute here or challenge is that the -- that the
5 arbitrator interpreted the contract incorrectly.

6 JUSTICE SCALIA: That's -- that's all he has
7 to do is saying -- you know, I'm -- I'm interpreting the
8 contract, and whatever he says is okay then, right?

9 MR. KATZ: Justice --

10 JUSTICE SCALIA: I mean, we -- we were
11 concerned in Stolt-Nielsen about a -- a -- a company
12 betting the company, right, on -- on class action
13 whenever -- whenever it agrees to arbitration because
14 class arbitration -- you know, will bankrupt the company
15 and without an appeal to the court or -- you know,
16 not -- not -- not much of an appeal anyway. And you're
17 saying that, in effect, you do bet the company every
18 time.

19 So long as you leave it up to the arbitrator
20 to decide whether there's a class action allowed or not,
21 which most agreements probably do, he can find whatever
22 he likes, right? He can find -- so long as he says, I'm
23 interpreting the agreement, it can be as wildly
24 inconsistent with the agreement as you like and there's
25 nothing the courts can do about it.

1 MR. KATZ: Justice Scalia, Stolt-Nielsen
2 taught us that the language of the contract or any other
3 evidence has to demonstrate the -- that the parties
4 agreed to class arbitration. Stolt-Nielsen did not
5 alter this 10(a)(4) standard, the same standard which
6 before it was codified --

7 JUSTICE SCALIA: And you think that standard
8 -- all that standard means is that the arbitrator has to
9 say is, I am interpreting the contract, even though what
10 he says is flatly, visibly, unquestionably contrary to
11 what the contract says, and the court has to accept
12 that, so long as he says, I'm interpreting the contract.

13 MR. KATZ: This Court's jurisprudence for
14 almost 2 centuries has held just exactly that.

15 JUSTICE SCALIA: Just exactly that?

16 JUSTICE BREYER: Well, I don't think so. I
17 thought it said that -- that the award -- if the award
18 displays manifest disregard, or words like that. I
19 mean, Misco is -- is not absolute. Misco has a narrow
20 exception, and that exception is where there's just no
21 basis in the contract for the decision. And so I
22 thought you were arguing that here that's clearly not
23 so, there is a basis.

24 MR. KATZ: Well, there -- well, there is a
25 basis. What Misco -- as I understand what Misco teaches

1 is that it has to be unambiguous, that the arbitrator --

2 JUSTICE BREYER: That's a different thing,
3 that's a different thing. It doesn't say whatever he
4 says about the contract, he wins. It says what he says
5 about the contract, it is not just manifestly wrong, it
6 isn't just plain language to the contrary, and et
7 cetera. There is language in the cases to that effect.
8 So I would be repeating myself, but are you saying there
9 is no loophole no matter how tiny? That's news to me.

10 MR. KATZ: Well, Justice Breyer, I don't
11 think manifest disregard -- certainly, manifest
12 disregard is not a standard by which this matter has
13 come up before the Court. And this Court has held in
14 Hall Street and other cases that 10(a)(4) is the
15 exclusive ground set forth by Congress, that this Court
16 did not have the authority -- and I'm quoting the
17 Court -- it "did not have the authority to expand."

18 JUSTICE BREYER: All right. Suppose I
19 think, since I wrote the words in First Options, that
20 something like manifest disregard or totally ignoring
21 plain law is a ground for reversing an arbitrator, even
22 an arbitrator. Now, suppose I think that. Then do I
23 decide against you?

24 MR. KATZ: No, Justice Breyer, because here
25 both sides, not only in 2003, but in 2010 after

1 Stolt-Nielsen, came to the arbitrator and said, we want
2 you to decide it. They told the arbitrator at that
3 time, look at the agreement, look at what transpired in
4 2002, back when this matter was in the superior court
5 and make your decision.

6 So the arbitrator applied the law that --
7 and applied the -- the standard that he was told to
8 apply. He didn't just disregard it. He didn't make a
9 decision saying, I don't care what you are telling me to
10 do.

11 JUSTICE SCALIA: What supports his decision?
12 I mean, you -- you say that. What -- what supports his
13 decision that the parties here agreed, agreed, that's
14 the standard. Did they agree to class arbitration?
15 What -- what supports that?

16 MR. KATZ: Justice Scalia, they did agree.
17 When we were in court in 2002, Oxford represented to the
18 State court judge there that not only are the disputes
19 going to arbitration, but all actions regarding the
20 disputes.

21 And the judge specifically relied upon that,
22 expressly relied upon that, in not sending just the
23 disputes, but sending everything that had been asserted
24 by Dr. Sutter, including the claims of the class. And
25 the arbitrator --

1 JUSTICE SCALIA: I don't understand. There
2 is a distinction between all disputes and all actions
3 relating to the dispute?

4 MR. KATZ: Oxford made that distinction in
5 2002. In fact -- and we point this out in our brief on
6 page 5, the red brief, where Oxford has expressly --
7 it's both on page 5 and page 6 and I will refer to page
8 6, the top of 6. This is Oxford's counsel in 2002.
9 "The contract" --

10 JUSTICE SCALIA: The top of page 6?

11 MR. KATZ: The top of page 6, Your Honor.

12 JUSTICE SCALIA: Yes.

13 MR. KATZ: Plaintiff quoted the contract
14 here as saying "that any dispute under the contract
15 needs to be arbitrated." That's wrong, the contract
16 says "actions concerning any dispute." That was what
17 Oxford has always argued at all times before the
18 arbitrator. The arbitrator understood that.

19 The arbitrator interpreted the agreement.
20 It's based both on the agreement and on the
21 representations made by Oxford as to what its own
22 agreement meant.

23 CHIEF JUSTICE ROBERTS: I think that's
24 inconsistent with the law that's developed -- actually
25 in fairness to the arbitrator, after he'd made his

1 initial decision, which is that if you have something
2 that just says disputes and doesn't address the issue of
3 class arbitration at all, that you can't have class
4 arbitration.

5 MR. KATZ: The arbitrator, however,
6 Mr. Chief Justice, cannot be faulted or -- or his award
7 vacated based upon changes or arguments that were never
8 made at the time. The parties made their arguments to
9 the arbitrator. Oxford, if you will, sat on the
10 sidelines.

11 And this Court has also held that a party cannot
12 sit on the sidelines, wait till the award comes down,
13 and when it's against them then raise new arguments for
14 the first time. Oxford --

15 CHIEF JUSTICE ROBERTS: Could you get
16 back -- I'm sorry, go ahead.

17 MR. KATZ: I'm sorry. I was just going to
18 finish saying, Oxford could have raised these arguments
19 and maybe at the end of the day, if they raised those
20 arguments, they would have carried the day.

21 But I respectfully submit, as this Court has
22 repeatedly held, that courts do not have the authority
23 to second-guess the arbitrator and make decisions or
24 come up with a resolution that would have been different
25 with the arbitrator just because they disagree.

1 JUSTICE SOTOMAYOR: Can I --

2 CHIEF JUSTICE ROBERTS: Getting back to
3 Justice Breyer's question, I thought his -- First
4 Options is fairly strong authority for him because there
5 you have a situation with the arbitrator determining
6 that a particular entity or individual is bound by the
7 agreement. And we said that's something that we will
8 review de novo, without deference. Why isn't it the
9 same here?

10 In other words, not everything an arbitrator
11 says is subject to the deferential standard of review,
12 even if he purports to say I'm interpreting the
13 agreement, which I think the arbitrator in First Options
14 did?

15 MR. KATZ: Here, Mr. Chief Justice, the
16 arbitrator did exactly what the parties had asked him to
17 do, though. He did not venture and do something outside
18 of what the parties had asked him.

19 The parties specifically presented the
20 question to the arbitrator as to whether class
21 arbitrations were available and specifically directed
22 the arbitrator both to the agreement -- the language in
23 the agreement, as well as the representations and the
24 submissions that were made below in the court system in
25 making their respective arguments.

1 JUSTICE SOTOMAYOR: Can I see --

2 JUSTICE GINSBURG: I thought that Oxford
3 conceded that it did not preserve any question of
4 entitlement to de novo review.

5 MR. KATZ: That is correct. Oxford has
6 always maintained that it was the arbitrator's decision
7 to make, and in 2010, even after Stolt-Nielsen, came
8 back to the arbitrator and asked the arbitrator to
9 reconsider his opinion from 2003. The -- Oxford had
10 never, until after losing this case obviously, has
11 Oxford sought the Court for the first time for a de novo
12 interpretation.

13 JUSTICE SOTOMAYOR: Counsel -- counsel, you
14 seem -- I don't know. I see two questions here. The
15 first was an arbitrator exceeds his power if he decides
16 a question is arbitral when it's not. And -- but here
17 there is no dispute about that because you are right,
18 your adversary submitted this question to arbitration.
19 And that's what I'm hearing you respond. He did,
20 there's no question, he said the arbitrator has to
21 decide this issue.

22 Justice Breyer raised the second question.
23 Assuming he could, is there any remaining power in the
24 Court to overturn his decision? And Justice Breyer
25 said, if the standard is manifest disregard of fact and

1 law, why would you still win?

2 Because your adversary is saying, the law is
3 clear. You have to find some hook in the agreement to
4 agree to class action -- arbitration, and he says there
5 is none. That's basically his position, that the
6 arbitrator's decision on its substance manifestly
7 disregarded the law. So that's the question that I
8 believe is extant still.

9 MR. KATZ: Answering that -- answering that
10 hypothetical, assuming that was --

11 JUSTICE SOTOMAYOR: Was it a hypothetical?
12 (Laughter.)

13 MR. KATZ: Well, if there was a manifest
14 disregard --

15 JUSTICE SOTOMAYOR: No, I want to say why
16 there wasn't. I want you to explain why there wasn't
17 one.

18 MR. KATZ: Well, the arbitrator did not
19 manifestly disregard. The arbitrator did what the
20 parties wanted the arbitrator to do.

21 JUSTICE BREYER: Look, I'm going to say
22 something and you are going to say, that's right, that's
23 just what I wanted, and that won't do me any good if you
24 don't think of it. The arbitrator in front of me, so
25 you better tell me why I'm wrong because they certainly

1 will and they are in the briefs.

2 Mr. Arbitrator, this class -- this language
3 here says all disputes will go to arbitration. It
4 doesn't say whether they are supposed to be class or can
5 be or can't be. You decide what it means.

6 And the arbitrator thinks, hmm, all, hmm, it
7 doesn't say, but I got to reach a decision. So what
8 kind of a case is it? Small claims. And then it says
9 something about court suits where they have class. Hmm,
10 gets his magic 8-ball out and, whatever it is, he says,
11 that's what it means. It means it could include class,
12 too. Okay?

13 Where in our case law is that a manifest
14 disregard? He's looked at the language, there were two
15 plausible constructions, he came up with one of them.
16 What's the problem? Now, that's of course their
17 problem, but if you just say yes and don't go into why
18 they are saying no it's not going to help me.

19 MR. KATZ: Well, I don't believe that is --
20 Justice Breyer, I don't believe that is a manifest
21 disregard.

22 JUSTICE BREYER: So -- obviously you don't.

23 (Laughter.)

24 MR. KATZ: And the reason being is that the
25 arbitrator based his determination on the standards or

1 the materials that were put forth before him, the
2 agreement and the evidence, and he made a decision.

3 JUSTICE SCALIA: But that's not enough. As
4 stated by Justice Breyer, he has to have come to a
5 plausible construction. It's not enough that he said,
6 I'm construing the contract. I have looked at the terms
7 of the contract and what the parties' said, and my
8 construction of the contract is X. That's not enough.
9 It has to be plausible.

10 MR. KATZ: Yes.

11 JUSTICE SCALIA: Now, why is this plausible?

12 MR. KATZ: Well, with all due respect,
13 Justice Scalia, I don't think plausibility comes into
14 play.

15 JUSTICE BREYER: Use whatever word you want.
16 Manifest disregard, stick to the law. Now, suppose the
17 arbitrator had said this, it doesn't say how to do it.
18 I see how you do it, you get out a magic 8-ball. Now,
19 we would strike that down because that is not relevant.
20 But he didn't say magic 8-ball. He said class. And
21 there are many class arbitrations. So it isn't quite
22 magic 8-ball.

23 Now, you explain to me --

24 JUSTICE SCALIA: What's a magic 8-ball? I
25 don't know what you are talking about.

1 (Laughter.)

2 JUSTICE BREYER: A magic 8-ball is you
3 have -- that's a little thing, it's the -- it's a
4 non-sportsman's equivalent of throwing darts.

5 (Laughter.)

6 JUSTICE GINSBURG: Why don't you, Mr. Katz,
7 why don't you concentrate on what the arbitrator himself
8 said? Mr. Waxman said this clause wasn't unusual, but
9 the arbitrator said, I've never seen anything like this.

10 MR. KATZ: Justice Ginsburg, what the
11 arbitrator had found was that the "no civil action" part
12 of the clause was -- was coextensive. It was completely
13 interrelated with the mandatory arbitration provision.
14 In other words, what the arbitrator found was that
15 everything that was prohibited from being filed in a
16 litigation in the court had to be arbitrated, and that
17 was based on not only --

18 JUSTICE ALITO: Can I ask you a question on
19 something a little bit different? Did the arbitrator
20 have -- how many parties were there to this agreement?
21 There is Oxford on one side and how many doctors on the
22 other side?

23 MR. KATZ: Well, this specific agreement was
24 Dr. Sutter and Oxford, but there are 20,000 physicians
25 who had signed the same agreement.

1 JUSTICE ALITO: All right, so 20,000. And
2 the effect of the arbitrator's decision is that all of
3 those 20,000 doctors are deemed to have agreed to class
4 arbitration, right?

5 MR. KATZ: Correct.

6 JUSTICE ALITO: And if we assume -- if I ask
7 you to assume, for the sake of argument, that this
8 agreement does not constitute an agreement to engage in
9 class arbitration, where did the arbitrator get the
10 authority to make that holding with respect to all of
11 these absent class members?

12 MR. KATZ: Well, the arbitrate --

13 JUSTICE ALITO: If they didn't agree to
14 class arbitration, how can they -- and they didn't agree
15 to have the arbitrator decide whether the agreement
16 calls for -- for class arbitration. How did he purport
17 to bind them to that decision?

18 MR. KATZ: Well, the arbitrator made the
19 decision based on the language and the evidence
20 presented before him and finding that it authorized
21 class arbitration. That was the determination that was
22 made initially.

23 JUSTICE GINSBURG: Is the -- is the contract
24 authorized it as for Dr. Sutter, all of the others are
25 similarly situated, they got the same contracts?

1 MR. KATZ: They all -- they all had the --

2 JUSTICE GINSBURG: So either the contract
3 means what the arbitrator said it meant or it doesn't.
4 If it means what the arbitrator said it meant, then
5 everybody's bound.

6 MR. KATZ: That -- that is correct. Now,
7 ultimately, when the matter was certified --

8 JUSTICE ALITO: Wait a minute. Where did he
9 get the authority to make that decision to interpret the
10 contract with respect to them?

11 MR. KATZ: Well, the --

12 JUSTICE ALITO: You're saying he can do it
13 with respect to Oxford because Oxford agreed to have the
14 arbitrator decide whether this calls for class
15 arbitration. But these other people didn't. They
16 didn't agree to have the arbitrator decide whether it
17 calls for class arbitration.

18 MR. KATZ: Well, Justice Alito, this -- this
19 is no different than in any other contract
20 interpretation issue. The arbitrator makes a
21 determination based upon the reading of the language and
22 what the parties are telling him that language means.

23 CHIEF JUSTICE ROBERTS: But the difference
24 is in First Options. The one thing First Options says
25 is the question of who's going to be bound by

1 arbitration is decided by the court de novo. And in the
2 class context, you are binding 19,999 individuals who
3 did not agree to be bound, depending upon the particular
4 interpretation.

5 MR. KATZ: But Stolt-Nielsen, which the
6 arbitrator faithfully reviewed, analyzed, and followed,
7 makes clear that you can have class arbitration as long
8 as the arbitrator determines that the contracting
9 parties to that agreement establish that class
10 arbitration is available.

11 JUSTICE SCALIA: Did these other people
12 agree to this arbitrator? I mean, they might have said,
13 this arbitrator, he's a wild guy, he's going to say
14 that -- that we agreed to class action. We didn't agree
15 to class -- I don't want this arbitrator.

16 They didn't agree to this arbitrator. Why
17 should they be bound by -- by whatever he says?

18 MR. KATZ: Well, for one thing,
19 Justice Scalia, that's exactly what Oxford wanted.
20 Oxford argued that the class action should go into
21 arbitration.

22 JUSTICE KENNEDY: Could they -- could they
23 opt out?

24 MR. KATZ: Well, ultimately, they could --
25 they could opt out when it was certified. And I want

1 to -- I'd like to be clear on a point, if I may.

2 JUSTICE SCALIA: How can they opt out if
3 they've agreed to class arbitration?

4 MR. KATZ: Well, they can opt out of the
5 class and pursue, if they wanted to at that point, an
6 individual arbitration if that's what they chose to do.

7 JUSTICE SCALIA: Are you sure? It seems to
8 me if they've agreed to class arbitration, they've
9 agreed to class arbitration.

10 MR. KATZ: Well, they -- they proceeded --
11 they agreed for the matter to proceed as a class
12 proceeding. But the matters --

13 JUSTICE GINSBURG: And those -- and there
14 are rules that governed that, right?

15 MR. KATZ: That is correct, Justice
16 Ginsburg. That is before we get to the issue of whether
17 the class itself be certified.

18 JUSTICE KENNEDY: But -- but how could --
19 how could they opt out if the arbitrator said -- says,
20 as Justice Scalia and Justice Alito are suggesting, we
21 have -- I have jurisdiction to decide this case. I
22 decide that there is a class action, all these people
23 are in the class.

24 MR. KATZ: Justice Kennedy, the
25 determination that this matter could proceed as a class

1 arbitration was only the first issue that was decided.
2 We then engaged in the procedural mechanism by which the
3 matter could be certified and that they could --

4 JUSTICE ALITO: Well, presumably they could
5 opt out, but did they agree to be bound by this unless
6 they opted out? That's not the usual way people are
7 bound by litigations.

8 MR. KATZ: But everyone, Justice Alito,
9 everyone signs the same agreement. And therefore, if
10 the arbitrator's going to make a determination here --

11 JUSTICE ALITO: No, but I think you're --
12 you're not -- you're not accepting my assumption that
13 this is an incorrect interpretation of the contract.
14 That's the assumption. This is incorrect. If we were
15 reviewing this as an appellate court reviewing the
16 interpretation of the contract under Stolt-Nielsen, we
17 would say, this is wrong. This is really wrong. Okay?
18 Assume that to be the case.

19 Then how are they -- how are these absent
20 people bound? And it's really not an answer to say,
21 well, they can opt out. If they didn't agree to be
22 bound by this arbitrator's decision, then they didn't
23 agree to be bound absent by opting out, which is an
24 unusual procedure for being bound by an agreement.

25 JUSTICE GINSBURG: You would never have

1 class action arbitration if that were so.

2 MR. KATZ: If -- if it was --

3 JUSTICE GINSBURG: It would be impossible
4 because you could never get in advance -- they find out
5 that by getting notice and then they decide whether they
6 want to stay with it or opt out.

7 MR. KATZ: Well, in any class arbitration,
8 the arbitrator is not going to decide the same questions
9 as to the 20,000 of the same agreements. It's decided
10 based upon the class representative who brings the
11 matter.

12 And even if the arbitrator was wrong,
13 Justice Alito, I submit that under 10(a)(4) in the
14 applicable standard, that even in Concepcion, this Court
15 said 10(a)(4) is -- is not an issue of mistake, it's an
16 issue of misconduct. And that's not what we have here.
17 If there was a mistake, that still would not be enough
18 with respect to the courts to have vacated the
19 arbitrator's determination on this matter.

20 CHIEF JUSTICE ROBERTS: And this may not --
21 I'm not sure it's relevant, but it -- it might be. I
22 thought the purpose of arbitration was to decide these
23 things quickly. This has been going on 11 years, right?

24 (Laughter.)

25 MR. KATZ: This has been going on 11 years.

1 That is true. It's been going on --

2 CHIEF JUSTICE ROBERTS: It's not -- it's not
3 a facetious question because I think one of the concerns
4 about class arbitration is that it -- it eliminates the
5 supposed benefits of arbitration because you can't have
6 sort of quick and rough and ready determinations when
7 it's going to bind 20,000 people.

8 MR. KATZ: Well, class arbitration is, as in
9 many arbitrations in this day and age, involves complex
10 issues, that sometimes you have major corporations doing
11 battle over -- over major agreements that they know at
12 the time involved big ticket items.

13 JUSTICE KENNEDY: Well, let me ask -- ask
14 you this question because I think it's consistent with
15 the answer you're giving to the Chief Justice, a little
16 bit different, though. Suppose you have -- and this is
17 a hypothetical case, this is not this case because I
18 don't know the facts. Suppose you have an attorney in a
19 small town, well respected, doesn't have a great big
20 practice, and he's chosen as the arbitrator.

21 And if he arbitrates the one case, he's
22 going to get a fee of, I don't know, \$10,000. He
23 says -- you know, if this is a class arbitration, I can
24 keep this going for 11 years, I will make a million
25 dollars.

1 Does he have the obligation to say, I'm
2 going to decide the class action issue under this theory
3 that is decided here, and after I do that, since I have
4 a conflict, I'll bow out. I'll just say, there is a
5 class action, and then I will leave it for some other
6 arbitrator. Does he have that obligation? And if he
7 doesn't, should that bear on our decision here?

8 MR. KATZ: Justice Kennedy, that should not
9 bear on the decision here because this matter comes up
10 under 10(a)(4). If there were questions about the
11 partiality of the arbitrator, then I want to rule in
12 favor of Katz because I want to prolong this thing as
13 long as possible, then perhaps Oxford should have
14 brought the matter under 10(a)(2) and --

15 JUSTICE GINSBURG: How long -- can we
16 straighten out this 11 years? How many years was this
17 in the New Jersey courts before there was ever an
18 arbitrator appointed?

19 MR. KATZ: Well, the matter wasn't in the
20 New Jersey courts for that long, but various points in
21 time because the AAA rules allow for a -- a filing of
22 a Federal suit to vacate Oxford, on multiple
23 occasions --

24 JUSTICE KENNEDY: But -- but tell me why --
25 why is that a factor or not a factor in -- in our

1 decision? That should not be a factor in our decision?

2 MR. KATZ: Partiality is not a factor,
3 Justice Kennedy --

4 CHIEF JUSTICE ROBERTS: Well, but surely --

5 MR. KATZ: -- in this decision.

6 CHIEF JUSTICE ROBERTS: I'm sorry. Finish
7 your answer.

8 MR. KATZ: In this decision, because
9 partiality or what could potentially be perceived as a
10 subjective intent, so the arbitrator does not play under
11 10(a)(4).

12 CHIEF JUSTICE ROBERTS: But under --
13 under -- that provision, the partiality provision, is
14 addressed to favoring one party as opposed to another
15 party.

16 I think Justice Kennedy's question goes to
17 an institutional concern about an arbitrator making a
18 decision of this sort that goes, not to -- not to
19 partiality between parties, but a problem about the way
20 the system would work, that would create an incentive
21 for an arbitrator, implicit or explicit, to reach a
22 ruling that expands his authority.

23 MR. KATZ: Well, arbitrators -- I would
24 submit that an arbitrator who was doing something that
25 was -- that was documented or perceived to be crazy --

1 and pardon my vernacular -- or just way out of line,
2 then I'd submit that arbitrator is not going to be hired
3 again.

4 JUSTICE GINSBURG: How many -- how -- what
5 is the history of class actions and arbitrations? There
6 are at least enough of them so that the AAA has a set of
7 rules about how you handle class arbitrations, right?

8 MR. KATZ: That's correct. I think it's
9 important -- if I could just address a couple of points
10 regarding that.

11 JUSTICE SCALIA: How many have there been?
12 Have there been dozens, hundreds, thousands?

13 MR. KATZ: Well, I don't know --

14 JUSTICE SCALIA: Do you have any idea?

15 MR. KATZ: Well -- I don't think there has
16 been thousands, but there -- I know there have certainly
17 been a number so far that the American Arbitration
18 Association has set forth rules --

19 JUSTICE SCALIA: I'm sure there's been a
20 number. What's the number?

21 MR. KATZ: I -- I don't -- I don't know the
22 number.

23 JUSTICE SCALIA: It could be less than 100?

24 MR. KATZ: I wouldn't know that,
25 Justice Scalia.

1 But -- if I may point this out, class
2 arbitrations were certainly in existence at the time
3 that this matter was sent into class arbitration. And
4 in fact, I think it's also worthy to understand that
5 when I brought this matter in superior court, I argued
6 that the class action should be kept in court, but it
7 was Oxford's argument that everything including the
8 class action go into arbitration.

9 It was Oxford's interpretation of its own
10 clause that the arbitrator relied upon, which puts this
11 case completely outside of Stolt-Nielsen, where in
12 Stolt-Nielsen, the arbitrator fashioned his -- their own
13 rules based on some policy preference about arbitrations
14 -- about class actions which wasn't present here.

15 And if I could address an issue that was
16 raised about -- that the arbitrator discussed something
17 was bizarre. In 2003, that was a pre- -- so that
18 was prior to Stolt-Nielsen -- the arbitrator expressly
19 disavowed that in his 2010 opinion. And he made it very
20 clear that he based his decision on the interpretation
21 of the agreement as well as the representations made as
22 to what that agreement meant to the court system.

23 I think this Court has recognized for 2
24 centuries that an arbitrator's error in law or fact
25 cannot be the grounds for a vacatur.

1 CHIEF JUSTICE ROBERTS: I'm sorry to just
2 interrupt. For most of that two centuries, courts
3 refused to enforce arbitration agreements. That's the
4 whole reason we have the FAA.

5 MR. KATZ: But here, both sides, Mr. Chief
6 Justice, expressly asked the arbitrator. This is not a
7 question of arbitrability because both sides wanted the
8 arbitrator to make that decision. Then even after 2010,
9 when it came to light that Bazzle -- there was a
10 plurality and the issue of whether it's a question of
11 arbitrability is an open question, Oxford didn't go
12 running to court then.

13 Instead, it went back to the arbitrator and
14 said, we want you to reconsider your 2003 decision. And
15 the arbitrator again went through the analysis of
16 interpreting the agreement and the representations made
17 by the parties about what that agreement meant.

18 I submit we have to -- if we trust
19 arbitrators to handle such important issues as civil
20 rights issues and other very important matters of
21 singular importance, we have to expect that they will
22 follow the precepts of this Court and the FAA as to what
23 constitutes grounds for class arbitration.

24 I think the Third Circuit should be
25 affirmed, if there are no other questions.

1 CHIEF JUSTICE ROBERTS: Thank you, Mr. Katz.
2 Mr. Waxman, you have 2 minutes remaining.

3 REBUTTAL ARGUMENT OF SETH P. WAXMAN

4 ON BEHALF OF THE PETITIONER

5 MR. WAXMAN: Thank you.

6 I have three points, two small ones and one
7 significant one.

8 The first small one is that this notion,
9 this canard, that we told the district -- the State
10 court judge that class actions should be sent to
11 arbitration is dispensed with on pages 13 and 14 of our
12 reply brief, following the sentence, "Tellingly, Sutter
13 resorts in part to misrepresenting Oxford's previous
14 positions."

15 And I refer the Court again specifically to
16 footnote 7 on page 14, where we quote my brother's
17 statements to the State court judge explaining that what
18 we were asking for was, quote, "a motion to compel
19 individual arbitration."

20 The second small point goes to the issue of
21 what the number is of class arbitrations. I also don't
22 know that. But we know that as of this Court's decision
23 in Stolt-Nielsen because this was reported in the AAA
24 amicus brief, that not a single final decision had been
25 rendered prior to -- as of the time of Stolt-Nielsen, in

1 any class arbitration.

2 The AAA class arbitration rules were adopted
3 after this Court's decision in Bazzle, which left open
4 the possibility, a possibility that the arbitrator in
5 this case said was surprising because the arbitrator
6 said quite correctly that everyone expected that in
7 Bazzle this Court would say there's no such thing as
8 class arbitration.

9 JUSTICE KENNEDY: What is your significant
10 point?

11 (Laughter.)

12 MR. WAXMAN: I can't go back 200 years, but
13 let's just go to 1960 in terms of the standard. And in
14 the Steelworkers v. the Enterprise Wheel case, what this
15 Court held was, quote, "An award is legitimate only so
16 long as it draws its essence from the agreement. When
17 the arbitrator's words manifest an infidelity to this
18 obligation, courts have no choice but to refuse
19 enforcement of the award."

20 And our submission is that this award, the
21 conclusion that the all-disputes provision here
22 manifested an actual agreement by the parties to class
23 arbitration, cannot possibly be reconciled with the
24 plain language or Stolt-Nielsen's holding.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Waxman. Counsel.

3 The case is submitted.

4 (Whereupon, at 11:03 a.m., the case in the
5 above-entitled matter was submitted.)

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