No. 20-1313

In The Supreme Court of the United States

DIMITRI SHIVKOV, INDIVIDUALLY AND AS A TRUSTEE OF THE PHOENIX 2010 REVOCABLE TRUST, ET AL.,

Petitioners,

v.

ARTEX RISK SOLUTIONS, INC., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondents' Brief in Opposition ("Opposition") asks the wrong question. The threshold issue here is "who decides" the availability of class arbitration—not which way that decision should go. By focusing on the wrong question, Respondents overlook what the parties bargained for: "It is the arbitrator's construction [of the contract] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Oxford Health Plans, LLC v. Sutter*, 569 U.S. 564, 573 (2013) (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960)). Further, an arbitrator's decision "even arguably construing or applying the contract" is final "regardless of a court's view of its (de)merits." *Id.* at 569.

Respondents are thus mistaken that the "who decides" question is merely academic. It is central. And a court begs, rather than answers, this question when it commandeers an arbitrable issue (such as whether the parties agreed to class arbitration) and answers it as a matter of law. The language of the agreement to arbitrate should control "who decides."

Respondents also draw the wrong conclusion from circuit-court decisions holding that class arbitration presents a gateway question of arbitrability. The consensus reached in those decisions does not follow from an independent textual analysis of the Federal Arbitration Act ("FAA"). It instead rests on a common

interpretation of dicta from this Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). If the circuit courts are misconstruing *Stolt-Nielsen*, then the only way to rectify this error is through guidance from this Court.

This case is a good candidate for Supreme Court review. It is not unusual in a way that would limit its application to future cases. And by taking this case, the Court could resolve unnecessary and unfortunate circuit splits regarding the interpretation of American Arbitration Association ("AAA") arbitration agreements. It could also clarify that the text of the FAA does not reserve for courts the class-arbitration issue as a gateway question of arbitrability. This Court should therefore grant the Petition and reverse the judgment.

ARGUMENT

I. Who decides the availability of class arbitration is not an academic exercise—it is a key part of the bargain when parties select the AAA as their forum.

Based on their interpretation of the agreement and *Stolt-Nielsen*, Respondents argue that class arbitration will never be permitted in this case. (Opp. at 7-9). By jumping to this substantive conclusion, Respondents and the Ninth Circuit (as well as the other circuit courts that hold that incorporation of the AAA rules does not delegate the class issue to arbitrators) deprive the parties of their bargain to have arbitrators

decide this important issue. *See Oxford Health*, 569 U.S. at 573. Respondents' argument also obscures the significant circuit split on the "who decides" issue.

The substantive outcome here is not preordained. Arbitrators may reach whatever decision they choose as long as they are "even arguably construing or applying the contract." *Id.* Thus, in *Oxford Health*, the parties stipulated that the arbitrator would decide whether the parties agreed to class arbitration. Before the arbitrator was an arbitration clause that provided:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator.

Id. at 566.

The *Oxford Health* arbitrator "focused on the text of the arbitration clause" and found that it allowed for class arbitration. *Id.* In so ruling, the arbitrator reasoned that the parties referred to arbitration all disputes that could have been instituted in court but for the clause. *Id.* at 566-67. A class action, the arbitrator observed, "is plainly one of the possible forms of civil action that could be brought in a court absent the agreement." *Id.* at 567 (internal quotation marks omitted).

Oxford Health Plans, LLC sought vacatur of the arbitrator's class decision under Section 10(a)(4) of the

FAA (9 U.S.C. § 10(a)(4)). Both the district court and the Third Circuit denied this relief. This Court unanimously affirmed the denial of vacatur. It held: "So long as the arbitrator was arguably construing the contract—which this one was—a court may not correct his mistakes under § 10(a)(4)." *Id.* at 572. When an arbitrator construes a contract, "[t]he arbitrator's construction holds, however good, bad, or ugly." *Id.* at 573.[1]

The arbitration clause here parallels the one in *Oxford Health*:

> You and we agree that in the event of any dispute that cannot be resolved between the parties, that we will agree to seek to resolve such disputes through mediation in Mesa, Arizona, and if that fails, that all disputes will be subject to binding arbitration in Mesa, Arizona, with arbitrators to be agreed upon by the parties, and if no agreement is reached, then arbitrated by the American Arbitration Association (AAA).

See App. at 10. But here, Petitioners have raised the additional argument, which *Oxford Health* did not discuss, that the AAA Rules supply a textual basis for finding an agreement to arbitrate as a class. This is

[1] Justices Alito and Thomas concurred to clarify their view that the arbitrator got it wrong in construing the *Oxford Health* clause to allow for class arbitration. But they acknowledged that there was nothing to be done about this error under the plain language of the FAA. *Oxford Health*, 569 U.S. at 573-75 (Alito, J., concurring). By stipulating to the "who decides" question, the parties in *Oxford Health* ended court involvement construing the arbitration agreement.

because the AAA Rules adopt a framework that contemplates class arbitration and because the AAA Rules, as Respondents point out (Opp. at 11-12 n.7) both here and in proceedings below, were drafted to implement the AAA's reading of *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). The AAA read *Bazzle* to permit class arbitration when the parties were silent on the question.[2] AAA Policy on Class Arbitrations (2005), available at adr.org (last visited June 3, 2021).

An arbitrator could read the clause here as the *Oxford Health* arbitrator did: by reading the term "all disputes" to encompass class disputes. Or an arbitrator could find that the AAA Rules supply "more than mere silence on the issue." *Stolt-Nielsen*, 559 U.S. at 687. Or an arbitrator could find that the parties, by agreeing to the AAA Rules, agreed to abide by a pre-*Stolt-Nielsen* framework when silence sufficed to permit

[2] Respondents argue (Opp. at 8 n.1) that the AAA Rules prohibit using the "existence" of those rules as "a factor * * * in favor of * * * permitting the arbitration to proceed on a class basis." *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599-600 (6th Cir. 2013). But that AAA Rule must be read together with Respondents' concession that the AAA Rules implement a pre-*Stolt-Nielsen* framework when silence on class arbitration was enough. Read in that context, the AAA Rules ensure that the existence of the AAA Rules do not create ambiguity on the class arbitration question when the parties otherwise expressly prohibited class arbitration in their agreement. And, in all events, the AAA Rules still supply more than "mere silence on the issue" of class arbitration. *Stolt-Nielsen*, 559 U.S. at 687.

class arbitration.[3] Or an arbitrator could reject these readings and find the agreement does not authorize class arbitration.

The point is that it is the arbitrator's decision to make. Under *Oxford Health*, the arbitrator's position more than matters; it controls. Once the Court resolves the "who decides" question, there is ordinarily nothing left for it to decide. In *Oxford Health*, the parties stipulated the answer to the "who decides" question. Here, that question must be answered either by the parties' agreement or by deciding whether class arbitration presents a gateway question of arbitrability.

II. Treating class arbitration as a gateway question of arbitrability cannot be reconciled with the FAA's text.

Respondents make no attempt in their Opposition to reconcile the FAA's plain text with the treatment of class arbitration as a gateway question of arbitrability. (Opp. at 9-11). They instead emphasize that eight circuits agree that class arbitration is a gateway issue[4]

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[3] The parties were free to agree to the arbitration procedures of their choosing, including an agreement to the pre-*Stolt-Nielsen* presumption that silence sufficed to authorize class arbitration. "Parties may generally shape [arbitration] agreements to their liking by specifying with whom they will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019).

[4] *20/20 Commc'ns, Inc. v. Crawford*, 930 F.3d 715, 718-19 (5th Cir. 2019); *Herrington v. Waterstone Mortg. Corp.*, 907 F.3d 502, 507 (7th Cir. 2018); *JPay, Inc. v. Kobel*, 904 F.3d 923, 935-36

and two have assumed that it is.[5] *Id.* But these authorities, like Respondents, have bypassed a textual analysis of the FAA.

Chief Judge Tymkovich's concurrence in the Tenth Circuit's *Dish Network* case falls short of creating a circuit split, but nevertheless illustrates the lack of unanimity on class arbitration being a gateway issue. *Dish Network*, 900 F.3d at 1255. The FAA reserves for courts the power to enforce arbitration agreements whenever "the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4. But "[t]he right to combine claims does not fall into this 'threshold' or 'gateway' category because it has nothing to do with whether the underlying controversy can proceed to arbitration." *Dish Network*, 900 F.3d at 1255 (Tymkovich, J., concurring).

Urging fidelity to the plain language of the FAA is not a "quixotic revolution" as Respondents argue. (Opp. at 11). It presents an important question worthy of Supreme Court review.

(11th Cir. 2018); *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972 (8th Cir. 2017); *Del Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 869 (4th Cir. 2016); *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326, 335 (3d Cir. 2014); *Reed Elsevier*, 734 F.3d at 599.

[5] *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 395 (2d Cir. 2018); *Dish Network LLC v. Ray*, 900 F.3d 1240, 1245 (10th Cir. 2018).

III. This case is a good vehicle for resolving circuit splits.

This case puts three circuit splits in play:

(1) whether specifying the AAA as an arbitration forum without also specifically mentioning the AAA Rules creates ambiguity on whether AAA Rules will apply to the AAA arbitration;[6]

(2) whether invoking the AAA Rules clearly and unmistakably delegates to the arbitrator the discrete question whether the arbitration may proceed as a class;[7] and

(3) whether designating the AAA as the default dispute-resolution method, while acknowledging the parties may also mediate or

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[6] *See Idea Nuova, Inc. v. GM Licensing Grp.*, 617 F.3d 177, 181 (2d Cir. 2010); *P&P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 867 (10th Cir. 1999). *Contra Shivkov v. Artex Risk Sols., Inc.*, 974 F.3d 1051, 1069 (9th Cir. 2020).

[7] *See JPay, Inc. v. Kobel*, 904 F.3d 923, 936 (11th Cir. 2018); *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1245-46 (10th Cir. 2018); *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 397-99 (2d Cir. 2018); *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015); *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 635 (5th Cir. 2012)*, abrogated in part on other grounds by Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013). *Contra Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972-73 (8th Cir. 2017); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 763-65 (3d Cir. 2016); *Reed Elsevier*, 734 F.3d at 599-600.

> otherwise resolve their dispute, creates ambiguity on whether AAA Rules will apply.[8]

The Ninth Circuit decision below creates the first and third of these circuit splits. Respondents nevertheless argue that these circuit splits are not bona fide splits because the issues here are distinguishable, for various reasons, from the issues in *Idea Nuova*, *P&P Indus.*, and *Belnap*. (Opp. at 11-18). The problem with Respondents' proposed distinctions is that they are either immaterial or drive Respondents right into another circuit split.

As to circuit split number three, arbitration before the default arbitration forum specified in the parties' agreement was no more of a contingency here than it was in *Belnap*. In *Belnap*, the Tenth Circuit reviewed an arbitration clause that provided:

> No Disputant may prosecute any suit until and unless the Disputants have submitted the issues to mediation and, if necessary, to arbitration * * * in accordance with the rules of JAMS * * * or another suitable dispute resolution service agreeable to their respective attorneys.

Belnap, 844 F.3d at 1281-82. Here, the district court and the Ninth Circuit reviewed an arbitration clause that provided:

> You and we agree that in the event of any dispute that cannot be resolved between the

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[8] *See Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1282 (10th Cir. 2017). *Contra Shivkov*, 974 F.3d at 1069.

> parties, that we will agree to seek to resolve such disputes through mediation in Mesa, Arizona, and if that fails, that all disputes will be subject to binding arbitration in Mesa, Arizona, with arbitrators to be agreed upon by the parties, and if no agreement is reached, then arbitrated by the American Arbitration Association (AAA).

See App. at 10. Both the clause here and the one in *Belnap* call for mediation first and arbitration before a default arbitration forum second—JAMS in *Belnap* and the AAA here—unless the parties otherwise agreed to arbitrate elsewhere.

Respondents argue the supposed contingent nature of arbitration before the AAA distinguishes this case from *Idea Nuova* and *P&P Indus.*, where arbitration was not contingent. (Opp. at 12-14). Respondents' attempt to eliminate circuit split number one between the Ninth Circuit here and the Second and Tenth Circuits in *Idea Nuova* and *P&P Indus.* drives Respondents into circuit split number three. To hold that this case is beyond the reach of *Idea Nuova* and *P&P Indus.* because arbitration was contingent here (but not there) means that the Tenth Circuit got it wrong in *Belnap* (and the Ninth Circuit got it right in *Shivkov*) when the Tenth Circuit found no contingency in similar language.

Respondents invoke circuit split number two when they distinguish this case from *Idea Nuova*, *P&P Indus.*, and *Belnap* because this case involves class arbitration and those cases did not. (Opp. at 14-15). AAA

Rules state that the arbitrator "shall determine * * * whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." AAA Supplementary R. for Class Arbitrations ("Supplementary Rules") 3 (available at https://www.adr.org/sites/default/files/Supplementary_Rules_for_Class_Arbitrations.pdf). Accordingly, most circuits that have considered the question have held that incorporating AAA Rules clearly and unmistakably delegates the class-arbitration decision to the arbitrators. *See*, *supra*, note 7 and cases cited therein. A minority of circuits have gone the other way. *See id.* These circuits find that class arbitration is special, and the parties must do more than generally incorporate AAA Rules to delegate the class-arbitration decision to arbitrators. *See id.*

The unstated premise of Respondents' distinction is that class arbitration is special, and courts must treat class-arbitration rules differently from other rules. Thus, unless the minority position on AAA Rule incorporation is correct, Respondents cannot distinguish this case from *Idea Nuova*, *P&P Indus.*, and *Belnap* on the ground that this case involves class arbitration. The majority rule—that general incorporation of AAA Rules incorporates all rules including the class-arbitration rules—make this supposed distinction a nullity.

That Respondents cannot prevail without creating a new circuit split or exacerbating an existing one shows that this case is a good vehicle for resolving these splits. The decisions that "look past" the Ninth

Circuit's decision below (Opp. at 17) do so by relying on the same circuit-splitting distinctions that Respondents urge. *See Quantum Fluids LLC v. Kleen Concepts LLC*, No. CV-20-02287-PHX-DWL, 2021 WL 242104, at *5 n.2 (D. Ariz. Jan. 25, 2021) (distinguishing *Shivkov* by emphasizing the clause in *Shivkov*, unlike the clause before that court, specified AAA arbitration but did not expressly incorporate the AAA Rules, which is a distinction that *Idea Nuova* and *P&P Indus.* reject); *see McKenzie v. Brannan*, 496 F. Supp. 3d 518, 538 (D. Me. 2020) (distinguishing *Shivkov* because arbitration was a supposed contingency here, which is a distinction that *Belnap* rejects).

Moreover, the clause in *McKenzie*, like the one here, did not explicitly incorporate the AAA rules, but the court still held that the parties delegated arbitrability issues to the arbitrators. 496 F. Supp. 3d at 536, 539. Agreements that fail to specifically incorporate AAA rules are, thus, hardly "unusual."[9] *McKenzie* is also further evidence of the significant split between circuits that require incorporation of arbitral rules for delegation purposes and those that do not.

The issues presented here have divided the courts below. Division on these issues unsettles parties' settled expectations and encourages forum shopping

[9] *See also*, *e.g.*, *Idea Nuova*, 617 F.3d at 181; *P&P Indus.*, 179 F.3d at 867.

because the AAA operates nationwide. This Court should resolve these divisions.[10]

CONCLUSION

Plaintiffs respectfully request that this Court grant the Petition and reverse the Ninth Circuit's decision.

June 7, 2021

Respectfully submitted,

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[10] Respondents also argue that this case is a poor candidate for Supreme Court review because Petitioners "alleged that the Agreements did not allow arbitration at all." (Opp. at 17). But Federal Rule 8(d)(2) expressly allows alternative pleading like this: "A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient."

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