No. 25-855

IN THE

Supreme Court of the United States

THE VISIONARY, BOOKS + CAFE, LLC,

Petitioner,

v.

BANK OZK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* GEORGE A. BERMANN IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES:

Cited Authorities

Page

STATUTES AND RULES:

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae George A. Bermann is the Jean Monnet Professor of European Union Law, Walter Gellhorn Professor of Law, and Director of the Center for International Commercial and Investment Arbitration at Columbia Law School. He has been a faculty member at Columbia Law School since 1975, and both teaches and writes extensively on transnational dispute resolution, European Union Law, administrative law, and comparative law. He is also an affiliated faculty member of both the MIDS Masters Program in International Dispute Settlement in Geneva and the International Dispute Resolution LLM Program at the School of Law of Sciences Po in Paris.

For more than four decades, Professor Bermann has been an active international arbitrator in commercial and investment disputes. He is the Chief Reporter of the American Law Institute's *Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* (Am. Law. Inst., Proposed Final Draft 2019), a project that began in 2007 and was completed in 2019. He is also co-author of the *UNCITRAL Guide to the New York Convention on the Recognition and Enforcement of*

1. Pursuant to this Court's Rule 37.2, counsel of record received timely notice of intent to file this amicus brief. Further, pursuant to this Court's Rule 37.6, Amicus states that counsel for petitioner assisted in the preparation of this brief. Counsel for petitioner also paid the costs associated with printing and filing the brief directly to the filing service. No party or counsel for a party, other than as disclosed, and no person or entity other than amicus curiae or their counsel, made a monetary contribution to the preparation or submission of this brief.

Foreign Arbitral Awards, chair of the Global Advisory Board of the New York International Arbitration Center, co-editor-in-chief of the *American Review of International Arbitration*, and a founding member of the International Chamber of Commerce International Court of Arbitration's Governing Body.

SUMMARY OF THE ARGUMENT

Section 10(a)(4) of the Federal Arbitration Act authorizes courts to vacate arbitral awards that exceed the powers the parties agreed to confer. This Court has repeatedly emphasized that arbitral authority is rooted in consent, and that, while arbitral determinations on the merits warrant extreme judicial deference, it remains primarily for courts to decide whether and, if so, which matters, the parties agreed to submit to arbitration, and how. It is for this fundamental reason that courts presumptively retain authority to determine whether, in reaching their decisions, tribunals remained within the scope of the authority conferred upon them.

It is true that in *Oxford Health Plans LLC v. Sutter*, the Court reiterated the limited role of courts in reviewing an arbitrator's interpretation of a contract, explaining that an award may not be vacated under §10(a)(4) so long as the arbitrator was "arguably construing" the agreement. 569 U.S. 564, 569 (2013). However, *Oxford Health* arose in the narrow context in which the parties had expressly submitted to the tribunal's primary authority to determine whether the parties agreed to the resolution of disputes through class arbitration. *Id.* at 565 ("The parties agreed that the arbitrator should decide whether their contract authorized class arbitration[] . . . ."). Thus, the *Oxford*

Health parties displaced the usual presumption that courts independently determine arbitrability. The Court's deference in that case rested on a delegation premise not present in the ordinary §10(a)(4) context. *Oxford Health* did not purport to eliminate the inquiry—central to *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), and reaffirmed in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010)—into whether the arbitrator acted within the scope of power the parties actually conferred.[2]

Unfortunately, lower courts have increasingly read *Oxford Health* as ceding to tribunals primary decision-making power over the scope of authority conferred by parties on arbitral tribunals. They have thereby conflated questions of general contract interpretation (which fall within the domain of tribunals) with the specific question of whether, in reaching their decisions, tribunals remained within the limits of their authority as defined by the parties (a matter falling within the domain of courts). The very purpose of §10(a)(4) of the Federal Arbitration Act was precisely to allow courts to make fully independent determinations of the scope of arbitral authority.

In the Fifth Circuit, for example, a single panel decision framed the statutory inquiry as whether the arbitrators

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2. **This brief does not address arbitrability, delegation, or the pre-award allocation of decision-making authority between courts and arbitrators.** The sole issue discussed here is the scope of judicial review under §10(a)(4) after an arbitral award has issued—specifically, whether a court's finding that the arbitrator interpreted the contract is dispositive of the statutory inquiry into whether the arbitrator exceeded the powers actually conferred by the parties.

had "(even arguably) interpreted" the agreement and articulated a test for identifying interpretation without separately assessing whether the award exceeded the powers granted by the parties. District courts within that circuit have since adopted that approach and applied it as a substitute for evaluating arbitral power, citing *Oxford Health* as reinforcing that approach. They wrongly treat the language of *Oxford Health* as foreclosing an inquiry into whether an arbitrator exceeded his or her powers. The mere fact of contract interpretation is being used to supplant respect for judicial responsibility under §10(a)(4) for ensuring that arbitrators remain within the bounds established by the parties in their agreement to arbitrate.

Thus, a grant of certiorari would not entail revisiting this Court's deferential approach to arbitral interpretation of contracts.[3] It would require only reaffirming that the fact that the arbitrator interpreted the contract does not exhaust the inquiry under §10(a)(4), and that courts must still determine whether a tribunal acted within the bounds of power the parties actually conferred on it. Absent such reaffirmation, lower court misunderstanding and misapplication of *Oxford Health* are apt to continue. Lower courts need to be reminded that *Oxford Health* did not displace the understanding that courts retain primary authority for delimiting the scope of arbitral authority.

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3. Judicial deference is due when the arbitrator reaches decisions on the merits and procedure, and deference is not due when the arbitrator reaches a decision on the scope of the arbitration. But even deference to an arbitrator's decision on the merits is still limited by §10(a)(4).

ARGUMENT

I. Fifth Circuit Practice Illustrates How *Oxford Health* Has Been Misread to Treat Contract Interpretation as Obviating Judicial Authority under §10(a)(4)

In *BNSF Railway Co. v. Alstom Transportation, Inc.*, 777 F.3d 785 (5th Cir. 2015), a Fifth Circuit panel, relying on *Oxford Health*, framed the inquiry under §10(a)(4) as whether the arbitrators had "(even arguably) interpreted" the parties' agreement. *BNSF*, 777 F.3d at 788. The panel treated that question as dispositive of whether the arbitrators had the authority to exercise contract interpretation in the first place. Of course, *Oxford Health* arose in the narrow context in which the parties had expressly submitted to the tribunal's primary authority to determine whether the parties agreed to the resolution of disputes through class arbitration.

In articulating that approach, the *BNSF* panel made two analytically troubling moves. First, it treated contract interpretation as the sole question relevant to vacatur under §10(a)(4). *Id.* Second, it then focused entirely on the question whether the tribunal had in fact engaged in contract interpretation. *Id.* To that end, it articulated a three-factor framework for deciding whether the tribunal had done so, thus bypassing the question of whether the tribunal had authority to engage in that interpretation.[4]

4. The *BNSF* 3-factor framework for determining whether the arbitrator had interpreted the contract included: (1) Whether the arbitrator identifies her task as interpreting the contract; (2) whether she cites and analyzes the text of the contract; and (3) whether her conclusions are framed in terms of the contract's meaning. *BNSF*, 777 F. 3d at 788, *citing Oxford Health.*

To be sure, the panel in *BNSF* did not announce a generally applicable rule eliminating in all cases judicial authority to make the determination mandated by §10(a)(4). Nor has any subsequent Fifth Circuit panel squarely held that an arbitrator's contract interpretation categorically forecloses review under §10(a)(4).

Nevertheless, a number of district courts within the Fifth Circuit have relied on *BNSF* for the general proposition that the only question on review of an arbitral award under §10(a)(4) is whether the arbitrator interpreted the contract. Some courts have even adopted that formulation as a categorical rule, citing *BNSF* to conclude that once contract interpretation is found by the court, the review is complete. Other courts have gone further and applied the three-factor framework articulated in *BNSF* to conclude that an arbitrator's engagement in interpretation was dispositive of the §10(a)(4) inquiry.[5]

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5. District courts applying *BNSF* have taken two closely related approaches. Some courts cite *BNSF* for the proposition that the sole inquiry under §10(a)(4) is whether the arbitrator interpreted the contract, and conclude that once interpretation is identified, vacatur is foreclosed. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith Inc. v. Palombo*, 2022 U.S. Dist. LEXIS 179880 (S.D. Tex. 2022); *Hanor Law Firm v. Aquavit Pharms., Inc.*, 2022 U.S. Dist. LEXIS 252993 (W.D. Tex. 2022); *Dream Med. Grp., LLC v. Old S. Trading Co., LLC*, 2022 U.S. Dist. LEXIS 108844 (S.D. Tex. 2022). Other courts have adopted the same premise but have further applied the three-factor framework articulated in *BNSF* to determine whether the arbitrator engaged in interpretation, treating satisfaction of that framework as dispositive of the §10(a)(4) inquiry. *See, e.g., Saint Paul Commodities, Inc. v. Oleo-X, LLC*, 2025 U.S. Dist. LEXIS 197252 (S.D. Miss. 2025); *Consol. Wealth Holdings v. O'Neal*, 2021 U.S. Dist. LEXIS 176871 (S.D.

In either form, the analysis functions in the same way: once a court concludes, either categorically or under the *BNSF* framework, that the arbitrator interpreted the agreement, further inquiry into whether the tribunal acted within the scope of power the parties actually conferred on it is treated as superfluous. This reflects not a settled appellate rule, but a pattern of divergence, in which language from a single panel decision has been understood by lower courts to collapse the statutory inquiry under §10(a)(4) into a simple threshold determination of whether the arbitrator interpreted the contract. The *BNSF* approach appears to carry additional weight with various district courts by virtue of the panel's invocation of *Oxford Health* for purported authority for that approach. The Fifth Circuit's analysis documents how *Oxford Health* has been misread to treat the fact of contract interpretation as a proxy for determining whether a tribunal respected the limitations on its authority as defined by the terms in which the parties consented to arbitrate. It bears repeating: *Oxford Health* arose in the narrow context in which the parties had expressly submitted a class arbitrability question to the tribunal, not a post-award review under §10(a)(4).

Tex. 2021); *Battle v. Reinhart Foodservice La., LLC*, 2017 U.S. Dist. LEXIS 74034 (W.D. La. 2017).

II. Treating Contract Interpretation as a Proxy for Arbitral Power Undermines the Consent-Based Limits Presupposed by §10(a)(4)

§10(a)(4) of the Federal Arbitration Act reflects a basic premise of arbitration law: arbitrators possess only those powers the parties agreed to confer on them. This Court has repeatedly emphasized that arbitral power is rooted in consent, and that judicial review under §10(a)(4) serves as a limited but essential safeguard against awards that exceed the bounds of the parties' agreement.

Reading *Oxford Health* to treat an arbitrator's purported contract interpretation as dispositive of compliance with §10(a)(4) risks collapsing that safeguard. If the statutory inquiry turns solely on whether an arbitrator can plausibly characterize an award as interpretive, then the statutory question of whether the arbitrator acted within the scope of his powers is never reached. Over time, contract interpretation becomes not just some evidence of conformity with the arbitrator's limited powers under §10(a)(4), but a substitute for a determination of arbitral jurisdiction altogether.

The conflation described here has important practical consequences. Arbitration agreements frequently reflect limits on the powers conferred by the parties, including remedial constraints or other contractual restrictions that §10(a)(4) presupposes remain judicially cognizable after an award is issued. Where courts treat the fact of contract interpretation alone as sufficient to satisfy §10(a)(4), those contractual limits become unenforceable in practice. It also creates incentives that this Court has previously cautioned against. Under this practice, arbitrators need only frame

their reasoning as contract interpretation to insulate an award from review under §10(a)(4). The distinction between interpretation and arbitral authority—central to *First Options* and reaffirmed in subsequent decisions—thus risks erosion. Again, *Oxford Health* should be read in light of its facts—the *Oxford Health* parties had expressly submitted an arbitral authority question to the tribunal: the question of whether the parties had agreed to the resolution of disputes through class arbitration. As such, *Oxford Health* should not be read as a blueprint for how to review an award under §10(a)(4).

Clarification by this Court would not in the least call into question the deferential posture toward contract interpretation by tribunals articulated in *Oxford Health*. It would require only reaffirming that the mere fact that a court finds that an arbitrator engaged in contract interpretation does not exhaust the statutory inquiry under §10(a)(4). Absent such reaffirmance and clarification, decisions by lower courts in the Fifth Circuit and elsewhere risk continuing to read *Oxford Health* for what it does not say, thereby quietly displacing the consent-based limits that the FAA requires.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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