IN THE SUPREME COURT OF THE UNITED STATES

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OXFORD HEALTH PLANS LLC, :

Petitioner : No. 12-135

v. :

JOHN IVAN SUTTER :

- x

Washington, D.C.

Monday, March 25, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

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

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

C O N T E N T S

P R O C E E D I N G S

(10:04 a.m.)

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

Mr. Waxman?

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

JUSTICE SOTOMAYOR: Mr. Waxman --

CHIEF JUSTICE ROBERTS: Finish your answer.

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

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

Yes, Justice Sotomayor. I apologize.

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

MR. WAXMAN: In the first instance, no.

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

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

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

MR. WAXMAN: I'm --

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

an arbitrator exceeded his or her powers.

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

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

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

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

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

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

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

MR. WAXMAN: Well, I think --

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

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

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

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

And similarly here, the --

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

MR. WAXMAN: Correct.

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

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

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

we --

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

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

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

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

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

MR. WAXMAN: Well --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. WAXMAN: Yes.

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

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

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

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

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

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

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

That is, there -- this Court said in

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

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

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

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

MR. WAXMAN: Justice Kagan --

JUSTICE KAGAN: Am I wrong?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

agree to arbitrate. That is this case.

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

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

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

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

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

May I reserve the balance of my time?

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Katz?

ORAL ARGUMENT OF ERIC D. KATZ

ON BEHALF OF THE RESPONDENT

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

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

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

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

MR. KATZ: Justice --

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

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

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

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

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

JUSTICE SCALIA: Just exactly that?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: The top of page 6?

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

JUSTICE SCALIA: Yes.

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

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: Can I --

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

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

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

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

JUSTICE SOTOMAYOR: Can I see --

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

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

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

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

law, why would you still win?

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

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

JUSTICE SOTOMAYOR: Was it a hypothetical?

(Laughter.)

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

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

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

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

will and they are in the briefs.

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

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

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

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

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

(Laughter.)

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

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

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

MR. KATZ: Yes.

JUSTICE SCALIA: Now, why is this plausible?

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

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

Now, you explain to me --

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

(Laughter.)

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

(Laughter.)

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

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

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

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

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

MR. KATZ: Correct.

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

MR. KATZ: Well, the arbitrate --

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

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

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

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

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

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

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

MR. KATZ: Well, the --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: You would never have

class action arbitration if that were so.

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

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

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

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

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Well, but surely --

MR. KATZ: -- in this decision.

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: Do you have any idea?

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

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

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

JUSTICE SCALIA: It could be less than 100?

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Katz.

Mr. Waxman, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONER

MR. WAXMAN: Thank you.

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

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

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

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

any class arbitration.

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

JUSTICE KENNEDY: What is your significant point?

(Laughter.)

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

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

Thank you.

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

The case is submitted.

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