No. 12-135

In The
Supreme Court of the United States

OXFORD HEALTH PLANS, LLC,
Petitioner,
v.
JOHN IVAN SUTTER, M.D.,
Respondent.

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

BRIEF AMICI CURIAE OF THE AMERICAN MEDICAL ASSOCIATION AND THE MEDICAL SOCIETY OF NEW JERSEY IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The question presented is:

Whether an arbitrator impermissibly imposes his own policy considerations when, as part of his interpretation of an arbitration agreement, he takes into consideration the likelihood that the parties intended the "bizarre result" of leaving one party with no practicable means of enforcing the contract.

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INTEREST OF AMICI CURIAE

The American Medical Association (AMA) and the Medical Society of New Jersey (MSNJ) (together, the "Amici") respectfully submit this brief amicus curiae in support of the Respondent.[1] The AMA is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups, seated in the AMA's House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. Its members practice in every state, including New Jersey, and in every specialty.

The AMA joins this brief in its own person and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, nonprofit state medical societies to represent the views of organized medicine in the courts.

Amicus MSNJ is the largest professional association of physicians, residents, and medical

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.
Pursuant to Rule 37.6, the Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Amici, their members, or their counsel made a monetary contribution to this brief's preparation or submission.

students in the state of New Jersey. Through state specialty society eligibility on MSNJ's Board of Trustees and House of Delegates, and its open Policy & Strategy Panel meetings, virtually all physicians in the state of New Jersey may have a voice in MSNJ's policy making process. MSNJ's mission is to promote the betterment of the public health and the science and the art of medicine, to enlighten public opinion in regard to the problems of medicine, and to safeguard the rights of the practitioners of medicine.

Together, the Amici represent hundreds of thousands of doctors, in New Jersey and across the nation. The Amici devote a significant amount of their resources to assisting doctors with contract issues that arise in relationships with health insurance companies. As a result, the Amici have developed extensive knowledge about those contracts, the claims and disputes that arise under those contracts, and how those contracts are or are not enforced. The vast majority of those doctors are parties to arbitration agreements that health insurers like Petitioner, Oxford Health Plans LLC ("Petitioner" or "Oxford"), mandate for all of their in-network doctors. In-network doctors have no choice but to accept the arbitration agreements. Moreover, for the reasons discussed below, most disputes between individual in-network doctors like those involved in this case and health insurance companies like Oxford involve small dollar amounts that cannot effectively be resolved in individual arbitrations. Thus, if the claims must be arbitrated, in the absence of a class arbitration device, physicians and medical associations like the AMA and MSNJ will have no effective means by which to bring their

claims against insurers, permitting insurers to breach their agreements with physicians with impunity. Thus, it is in the interest of protecting the basic contractual, statutory, and financial rights of their members, the doctors of America, that the Amici submit this brief to present to the Court the practical implications of Oxford's arguments here.

SUMMARY OF ARGUMENT

The Amici agree strongly with Appellee-Respondent that the Court should not engage in a *de novo* interpretation of the parties' arbitration clause, which is what it appears Petitioner requests that the Court do. The unassailable principle that the judgment of an arbitrator must be afforded the utmost deference – a principle that this Court reaffirmed in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 130 S. Ct. 1758, 1767 (2010) – requires that the Court not second-guess the arbitrator's contract analysis.[2]

However, the Court also stated in *Stolt-Nielsen* that an arbitrator "exceed[s] his powers" when he imposes his "own view of sound policy regarding class arbitration." *Id.* at 1767-68. Seizing upon this, Petitioner has argued that the arbitrator here improperly applied his own policy preferences when he observed that leaving doctors with no class action device would be a "bizarre result." *See* Brief for Petitioner ("Pet. Br.") at 31.

To the contrary, the Amici submit that consideration of the fact that physicians are effectively precluded from enforcing their contracts with insurers in the absence of a class device is not a

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[2] In *Stolt-Nielsen*, the Court confirmed that in order to have an award vacated, a litigant "must clear a high hurdle. It is not enough for petitioners to show that the panel committed an error – or even a serious error." *Id.* at 1767. Thus, this Court made clear that where "there is a contractual basis for concluding" that the parties agreed to class arbitration, *id.* at 1763, based upon an arbitrator's application of state-law principles of contract interpretation, *id.* at 1773, a court may not disturb the arbitrator's determination.

"policy" consideration, but rather is a matter of contract interpretation pursuant to venerable state law contract interpretation principles, which *Stolt-Nielsen* confirms is the proper role of an arbitrator in such circumstances. *Id.* at 1773. Specifically, the arbitrator's determination here was proper pursuant to the principle of New Jersey contract law that "'[a]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.'" *Arnold M. Diamond, Inc. v. Gulf Coast Trailing Co*., 180 F.3d 518, 522 (3d Cir. N.J. 1999) (quoting Restatement (Second) of Contracts § 203 (1981)); *see also Anfield v. Love*, 5 N.J. Super. 347, 351 (App. Div. 1949) (stating that "[a]n interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, unlawful or of no effect") (citing Restatement (Second) of Contracts § 203). Thus, the arbitrator's analysis here must be given the traditional deference accorded to an arbitrator's contractual interpretation. *Stolt-Nielsen* 130 S. Ct. at 1767. The question presented therefore does not concern the preemptive effect of the Federal Arbitration Act (the "FAA"); it concerns only a contractual dispute over whether an arbitration clause permits class arbitration.

As is set forth below, the Amici's specialized knowledge regarding the types of claims that typically arise between doctors and health insurers confirms that the absence of a class action device, with the lack of any alternative method for resolving

those relatively small claims, leaves doctors with no practicable means of enforcing their contracts with insurers. For the reasons discussed in greater detail below, to interpret a broadly-worded arbitration clause[3] that states that "all . . . disputes shall be submitted . . . to . . . arbitration" and does not expressly specify whether or not class arbitration is permitted[4] as *not* permitting class arbitration, when doctors have no effective alternative method for bringing their individual claims, would leave doctors with no recourse at all, even where, as here, there is no evidence that they intended to waive their rights to contractual remedies.

Additionally, medical associations like the AMA and MSNJ, who have an interest in enforcing

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[3] Significantly, in *Stolt-Nielsen* this Court did not reject the idea that the breadth of an arbitration agreement could be viewed as a valid "contractual basis" for finding that the parties agreed to class arbitration. Instead, the majority expressly never reached the question because of the parties' stipulation that there was no agreement. 130 S. Ct. at 1770 ("The panel also commented on the breadth of the language of the [contract], but since the only task that was left for the panel, in light of the parties' stipulation, was to identify the governing rule applicable . . . the particular wording of the [contract] was quite beside the point." (emphasis added)).

[4] While Petitioner maintains that the arbitration agreement here is "silent" on the issue of class arbitration, as is discussed more fully below, the mere absence of the words "class arbitration" in the arbitration clause does not equate to silence. Rather, the arbitration agreement clearly speaks to "all disputes" being brought exclusively in arbitration. As is also detailed below, this clearly excludes the use of small claims court, as well as class actions in court, and if interpreted as also excluding class claims in arbitration, effectively precludes any enforcement of doctors' contractual and statutory rights, without an express waiver.

fiduciary-based actions under federal or state law, would be precluded from obtaining injunctive relief on behalf of their members. Injunctive relief is the exclusive remedy associations like the AMA and MSNJ may seek to protect the contractual and financial rights of their members.

Since health insurers like Oxford know that arbitration is a seldom-used and ineffective way of bringing individual claims, they can violate their contracts with doctors with impunity, underpaying doctors and leaving them with no effective means to challenge such underpayments. As is further discussed below, this lack of any recourse, in a contract of adhesion such as the contracts doctors are compelled to enter into with insurers, and with no notice to doctors that they have waived all practicable means of enforcing their contracts, would render the arbitration clause unreasonable, and would leave portions of the clause to no effect.

Pursuant to state-law contract interpretation principles, and not public policy, such an interpretation is to be avoided, and thus the arbitrator's determination that the lack of a class device would be a "bizarre result" led properly to his rejection of such an interpretation. Because this Court has unequivocally stated that extreme deference must be given to an arbitrator who has found a contractual basis for concluding that the parties agreed to class arbitration, Petitioner's request that this Court conduct a *de novo* inquiry into the propriety of that determination must fail.

ARGUMENT

I

AN INTERPRETATION OF THE ARBITRATION CLAUSE AS EXCLUDING A CLASS DEVICE, WITH NO OTHER REASONABLE ALTERNATIVE FOR RESOLVING DOCTORS' CLAIMS AGAINST OXFORD, WOULD VIOLATE STATE CONTRACT INTERPRETATION PRINCIPLES

The Amici know from their vast experience with Oxford's standard participating physician contract and ones like it that limiting doctors to individual arbitration – without a class device or another option such as bringing a claim in small claims court – would indeed leave doctors without any practicable means to enforce their contractual and statutory rights. [5]

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[5] As is demonstrated in Section IV, *infra*, this is not a policy argument, but rather is one of contract interpretation under the principle of New Jersey contract interpretation law that "'[a]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.'" *Arnold M. Diamond, Inc.*, 180 F.3d at 522)); *see also Anfield v. Love*, 5 N.J. Super. at 351. For the reasons set forth herein, reading the arbitration clause here as excluding a class device would effectively allow no claims, in court *or* in arbitration, and thus would be an "unreasonable" contract interpretation that would render "to no effect" the portion of the arbitration clause stating that "all such disputes shall be submitted . . . to . . . arbitration." *See* Joint Appendix ("J.A.") 73. Accordingly, the arbitrator's rejection of such a reading was simply the proper application of that principle of contract interpretation.

A. Individual Arbitration Is Not a Viable Means for Doctors to Bring Their Claims Against Oxford and Other Health Insurers

Health insurers such as Oxford regularly mandate arbitration agreements for all of their in-network doctors. Doctors needing to participate in insurers' health care networks in order to be able to treat patients who are enrollees in those networks have no choice but to accept the arbitration agreements. Moreover, most disputes between individual in-network doctors like those involved in this case and health insurance companies like Oxford involve small dollar amounts that cannot effectively be resolved in individual arbitrations. Thus, if the claims must be arbitrated – and insurers like Oxford insist that they must – in the absence of a class arbitration device, doctors will have no realistic means by which to bring their claims against insurers, permitting insurers to breach their agreements with doctors with impunity and without recourse on the part of doctors.

1. The Typical Claim by a Doctor Against an Insurer Is Relatively Small

The types of disputes that frequently arise between doctors and insurers include disputes such as those underlying the claims brought by Dr. Sutter in this arbitration – billing disputes arising out of insurers' application (or misapplication) of billing codes, known as "Current Procedural Terminology codes" or "CPT codes," developed by the AMA, that are submitted by doctors when they make claims for

payment for services provided to enrollees in insurers' healthcare networks. For example, a doctor and insurer may differ over the proper level of a so-called "evaluation and management" procedure (coded "1" for the simplest procedure, through "5" for the most complex) or the proper use of a so-called "modifier" code, which is appended to a coded claim to indicate a heightened degree of care that should result in increased payment, but which insurers like Oxford routinely deny. Indeed, modifier 25 is a frequently used modifier that Oxford has automatically and improperly denied in claims from class members in this case during much of the class period. Some of these disputes are valued in the tens of dollars, and others are in the hundreds. It is a rare dispute between an in-network doctor and a health insurance company that involves more than one thousand dollars.

2. Prosecuting Such Small Claims in Individual Arbitration Is Impossible, Given the Costs of Arbitration

There are many reasons why doctors cannot prosecute their claims through individual arbitration. First, the cost of bringing an arbitration will almost always exceed the amount an individual doctor could potentially recover through arbitration. Putting aside the legal fees that doctors must pay to level the playing field against health insurance companies that are always represented by experienced and able counsel, the doctor's share of the arbitrator's fees alone exceed the value of most claims.

In one study, the mean and median per-day fees of the responding arbitrators were greater than $1,000, and at least one arbitrator charged up to $5,000 for a single day.[6] As reported by the American Arbitration Association itself, pursuant to changes that will take effect on March 1, 2013,[7] "[a]rbitrators serving on a case with an in-person or telephonic hearing will receive compensation at a rate of $1,500 per day," and "[a]rbitrators serving on a case with a desk arbitration/documents only hearing will receive compensation at a rate of $750 per day."[8] These fees are in addition to an initial filing fee of $200.[9] Obviously, it is utterly infeasible for a doctor to pay those kinds of fees to bring a claim worth under $1,000. Even the rare claim for several thousands of dollars becomes untenable in the face of even a single day's arbitrator fees, let alone the prospect of multiple days before an arbitrator.

Moreover, arbitration costs add up because, in addition to daily fees for time spent actually hearing the arbitration, there are fees for each task an arbitrator is requested to perform—*e.g.*, billing by the hour for issuing written findings of fact and conclusions of law (tasks that courts undertake

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[6] *See* Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. Mich. J.L. Reform 813, 833 (2008).

[7] AAA, *Costs of Arbitration (including AAA Administrative Fees)*, http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2009593&RevisionSelectionMethod=LatestReleased (last visited February 20, 2013), at 1.

[8] *Id.*

[9] *Id.*

without additional payment).[10] As a result, one study concluded that forum costs "can be up to *five thousand percent higher* in arbitration than in court litigation."[11]

In addition to the arbitration fees, there is also a high cost for doctors and their staff to take time from their practices to devote to arbitration. Every hour that doctors spend in arbitration is an hour that they could be devoting to patients and billing Oxford or another health insurance company for their services. Every hour that a staff member spends in preparing for and participating in arbitration is an hour that could be devoted (or that someone else has to devote) to other tasks in the doctor's office. Ultimately, the cost of bringing a claim in arbitration so far outweighs the value of any individual claim that the class action procedure is the only practicable method for resolving disputes between doctors and health insurance companies like Oxford.

Further, the types of claims asserted here, in which the propriety of the adjustments an insurer makes to the billing codes doctors have submitted (the insurer's "editing" of the claim) is disputed, require the analysis of experts in proper CPT coding and claims editing and payment, as well as the analysis of experts in analyzing claims data. The expert fees involved in obtaining this kind of analysis, which routinely run into many thousands of dollars, dwarf any potential recovery by an

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[10] Public Citizen, *The Costs of Arbitration* (April 2002), www.citizen.org/documents/ACF110A.PDF (last visited February 20, 2013), at 43.

[11] *Id.* at 1 (emphasis added).

individual physician, rendering it impossible to bring such claims individually.

3. Individual Arbitrations, Even If They Were Brought, Could Not Adequately Address the Pervasive Practices at Issue in Cases Like This One

Even if doctors were to bring individual arbitrations, such arbitrations are particularly unlikely to provide an effective means of redressing the kinds of pervasive practices challenged by Dr. Sutter in this arbitration. Dr. Sutter's arbitration Demand asserted claims for violation of various statutes, including the New Jersey Consumer Fraud Act, the New Jersey Prompt Payment Act, and the Healthcare Information Networks and Technologies Act, on the basis of the systemic wrongful practices by Oxford that are alleged in the Demand. The limited scope of individual arbitrations would not permit physicians the opportunity to present evidence of the systemic, pervasive nature of the wrongful practices alleged. Such disjointed arbitrations, if they were brought at all, would not allow physicians to effectively vindicate their statutory causes of action, as this Court has stated is *required* for an arbitration clause to be enforced. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-28 (1991).

The fact that no overarching pattern of wrongful conduct could possibly be litigated or remedied in an individual arbitration is undoubtedly

a central reason why Oxford has so vociferously opposed every effort by doctors to bring these types of claims on a class-wide basis. Over the course of more than a decade, Oxford has done everything in its power to avoid class treatment of the claims here, repeatedly seeking to undo the arbitrator's determination that class arbitration is permitted, through motions to the arbitrator, motions to the district court, and multiple appeals, finally going so far as to come before this venerable Court, to avoid resolving the merits of this dispute on a class-wide basis. As discussed in Section I.A.4 below, this zealous opposition to class treatment – which at this point has likely cost Oxford more in legal fees and arbitrator fees than even a judgment on behalf of the class would have – would seem to have more behind it than simply the desire to avoid paying the claims of a class.

4. Individual Arbitrations Do Not Provide Injunctive Relief, Which Is Not Only Inefficient, But Also Disenfranchises Medical Societies From Pursuing the Only Kind of Relief to Which They Are Entitled

Individual arbitrations do not provide a critical remedy sought in many class actions: injunctive relief to stop the misconduct at issue – here, to enjoin wrongful editing of physician claims to reduce payments. Thus, even if Respondent were to obtain an arbitral award, this remedy would not enjoin Oxford from continuing its practices as to

every other physician in New Jersey, who would have to arbitrate his or her future claims one after the other.

Repeated arbitrations without the possibility of injunctive relief are inefficient not only for physicians, but also for Oxford. If efficiency were Oxford's real goal, it would welcome class arbitration, as such a procedure would adjudicate all similar claims at once and have *res judicata* effect. Nevertheless, it is evident that Oxford would rather pay hundreds of claims individually in arbitration (to the extent such claims could and would be filed) and continue its practices unabated so that it would never have to stop its wrongful – and lucrative – conduct.

The AMA and MSNJ, in their associational capacity, have an interest in pursuing injunctive relief to compel health insurers to discontinue the practice of under-reimbursing physicians, which is the kind of relief they seek as part of their participation alongside individual physicians in class actions. Pursuant to the test set forth by this Court in *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977), "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." The associations' standing on behalf of their members is limited to injunctive relief, not damages or benefits. *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 515 (1975)).

However, if the members of an association have to arbitrate their claims, the association will not be permitted to bring a suit in court on its members' behalf, because the first prong of the *Hunt* test, requiring that an association's "members would otherwise have standing to sue in their own right," will not be satisfied. *Id.* And because the association does not have a contract with the insurer, and thus there is no arbitration clause between the association and the insurer, the association will not be permitted to bring a claim in arbitration on its members' behalf. Therefore, individual arbitration disenfranchises the AMA, MSNJ, and other medical associations, and prevents the members of those associations from obtaining the only type of relief associations are permitted to seek on behalf of their members – injunctive relief – which is a critical component of the associations' efforts to protect the basic contractual and financial interests of their physician members.

5. If Doctors Must Arbitrate Their Claims Against Health Insurers, Class Arbitration Is the Only Viable Means for Them To Do So

In her dissent in *Stolt-Nielsen*, Justice Ginsberg noted that "[w]hen adjudication is costly and individual claims are no more than modest in size, class proceedings may be 'the thing,' *i.e.*, without them, potential claimants will have little, if any, incentive to seek vindication of their rights." 130 S. Ct. at 1775 (citing *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617 (1997); *Carnegie v.*

Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.")). That is precisely the Amici's point here.

In its Comments to the Bureau of Financial Protection in Response to Request for Information for Study of Pre-Dispute Arbitration Agreements,[12] the public interest law firm of Public Justice, P.C., observed, in the context of consumer lending agreements, that "the principal effect of mandatory arbitration clauses . . . *is to wipe away claims*."[13] Public Justice explained: "An enormous body of evidence supports the proposition that class action bans in arbitration clauses serve to suppress consumers from pursuing claims against lenders (or other corporate defendants)."[14] Reviewing years' worth of data on the question, Public Justice concluded that "[t]he broad data, as well as a number of potent evidentiary records in particular cases confirms the obvious – that if consumers must each individually pursue their claims in arbitration, lenders will be immunized from liability for all but a tiny proportion of the legal wrongs they may commit."[15] Similarly, if doctors are required to pursue their claims in individual arbitration,

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[12] Docket No. CFPB-2012-0017, June 23, 2012, http://publicjustice.net/sites/default/files/downloads/PublicJustiPublicJusticeCom_ReMandatoryArbitration_Jun2012.pdf. (last visited Feb. 28, 2013)

[13] *Id.* at 8 (emphasis added).

[14] *Id.* at 14.

[15] *Id.* at 4.

insurers will be immunized from liability for their wrongful underpayments of doctors.

B. In the Absence of an Alternative Such as Small Claims Court, Doctors Are Left With No Means By Which to Bring Claims Against Oxford

As is discussed in greater detail below, this case is readily distinguishable from *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), for a variety of reasons. An important distinction is the fact that in *Concepcion*, pursuant to the terms of the contract at issue, the consumer had the option of going to small claims court instead of to arbitration. *Id.* at 1744. Here, there is no such alternative option, as the arbitration clause expressly states that "no civil action concerning any dispute arising under [the parties'] agreement shall be instituted before *any* court." J.A. 30 (emphasis added). If physicians could take their claims to small claims court, they might have a viable means to bring at least certain of their claims without incurring the extraordinary costs of individual arbitration noted above.

To begin with, in small claims court, unlike in arbitration, doctors would not have to pay the arbitrator's fees. Parties in small claims court can also avoid paying attorneys' fees by appearing *pro se*. Plaintiffs in small claims court are generally unrepresented because the process of the court is designed to allow access to the courts at minimal expense.[16] For example, cases brought in small

[16] *See* 121 Am. Jur. Trials 189 (2011); *A Guide to Small Claims*

claims court in New York City are automatically placed on the court's evening calendar so that most people do not have to miss work to bring their lawsuits,[17] which is vital for physicians with small practices who might be financially harmed if they missed one or more days of work. Moreover, the filing fees are generally less than in arbitration. For example, in New York City, the cost to file a small claim is $15-$20.[18] The cost for filing a complaint in New Jersey small claims court is $15 for one defendant and $2 for each additional defendant.[19] An example of the fees from a Pennsylvania small claims court ranges from $25 for a $600 claim to $65 for a claim of $10,000.[20] And claimants who are not able to afford filing fees may have the fees waived.[21]

The process of pursuing a claim in small claims court is straightforward. In New Jersey, for example, a complaint form is available from the Clerk of the Special Civil Part in the county in which

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Court, N.Y. State Unified Court Sys., http://www.courts.state.ny.us/ithaca/city/webpageguidetosmallclaims.html (last visited Feb. 23, 2013) ("it is not necessary to have an attorney since Small Claims Court is meant to be a 'people's court' where claims may be tried speedily, informally, and inexpensively.").

[17] *New York City Civil Court Small Claims Part In General*, N.Y. STATE UNIFIED COURT SYS., http://www.nycourts.gov/courts/nyc/smallclaims/general.shtml (last visited Feb. 23, 2013).

[18] N.Y. Prac., Enforcing Judgments and Collecting Debts § 3:405

[19] 3 N.J. Prac., Civil Practice Forms § 1:18 (6th ed.)

[20] 121 Am. Jur. Trials 189

[21] *See Small Claims FAQ*, N.J. Courts, http://www.judiciary.state.nj.us/civil/civ-02.htm#FileComSC (last visited Feb. 23, 2013).

the case is filed, and requires only the complainant's and defendant's contact information, amount of damages, why defendant owes complainant money, whether the parties are in other litigation, and the complainant's signature.[22] The court clerk generally makes the process as easy as possible for a complainant by taking care of the service to defendant and also providing a complaint packet for self-represented litigants with accompanying instructions.[23] On the day of the trial, the court may have a mediator help the litigants settle the case.[24] And if a judge does hear the case, a claimant can have a more level playing field against a corporation because the rules of evidence are relaxed.[25] Accordingly, the possibility of bringing claims in small claims court would largely alleviate many of the burdens imposed by individual arbitration.

However, unlike the arbitration clause in *Concepcion*, Oxford's arbitration clause clearly forecloses the use of small claims court by physicians, as is noted above. And as is shown at length above, limiting physicians solely to individual arbitration leaves them without *any* effective means of enforcing their contractual and statutory rights, despite the fact that they did not expressly waive their remedies – a "bizarre" result indeed.

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[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] 121 Am. Jur. Trials 189.

II

THIS COURT'S OPINION IN *STOLT-NIELSEN* DOES NOT PRECLUDE CONSIDERATION OF THESE FACTORS UNDER THE CIRCUMSTANCES PRESENTED HERE

In her dissent in *Stolt-Nielsen*, Justice Ginsberg pointed out several "stopping points" in the majority's opinion that clearly support the Amici's position here. First, she noted that "by observing that 'the parties [in *Stolt-Nielsen*] are sophisticated business entities,' and 'that it is customary for the shipper to choose the charter party that is used for a particular shipment,' the Court apparently spares from its affirmative-authorization requirement contracts of adhesion presented on a take-it-or-leave-it basis." 130 S. Ct. at 1783. Indeed, this Court's repeated observation in *Stolt-Nielsen* that the parties there were both "sophisticated *business* entities," *e.g.*, *id.* at 1775 (emphasis added), is a significant distinction between that case and this one.

Here, the parties are a huge corporation and its team of contracting lawyers on the one hand, and a pediatrician on the other hand. While Dr. Sutter and other physicians in the class, and for that matter all of the Amici's members, are obviously well-educated individuals, their expertise is in medicine, not business. To be certain, doctors are no experts in the niceties of contract law or the negotiation of arbitration agreements. And doctors ordinarily are not represented by counsel when they are presented with participating physician agreements by insurers, which are offered on a take-it-or-leave-it basis, with very little time to review the terms, and commonly

contain arbitration clauses like the one at issue here. Notably, most of the Amici's members have individual contracts with insurers, many of which automatically renew after an initial contract period, with no opportunity to renegotiate. The contracts also frequently state that any new payment policies that the insurer implements in the future are "incorporated by reference" into the existing contracts. Further, even if the parties were on equal footing with respect to the level of "sophistication" in matters of business, the number of alternative parties with whom a physician can contract in the New Jersey market is small, giving each insurer disproportionate bargaining power over physicians.[26] Thus, unlike in *Stolt-Nielsen*, the only "sophisticated *business* entit[y]" in this case is Oxford.

Moreover, while in *Stolt-Nielsen* it was "customary for the shipper [*i.e.*, the party who was the proponent of class arbitration in that case] to choose the [standard industry contract] that is used for a particular shipment," 130 S. Ct. at 1775, here it was Oxford – the *opponent* to class arbitration – who not only chose the arbitration clause, but drafted the clause, compelled doctors to enter into it, and insisted upon enforcement of the arbitration clause when doctors tried to litigate their claims. Indeed, it is by no means "customary" for there to be *any* negotiation of contracts between Oxford and its participating physicians. As is

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[26] Consolidation and mergers of insurance companies have left only Aetna, Inc., Horizon Blue Cross Blue Shield of New Jersey, Cigna HealthCare, and United Healthcare Services, Inc. and its subsidiary Oxford with any substantial footprint in the New Jersey private payor market.

alleged in Claimant's Demand for Arbitration (the "Demand"), Oxford's in-network physician agreements and those of other insurers are offered on a take-it-or-leave-it basis, with no individual negotiation of terms:

> The Insurer Defendants have developed and maintained their provider networks by requiring Sutter and the members of the Plaintiff Sub-Classes to execute standardized, one-sided contracts of adhesion. It is indisputable that there is no arms-length negotiating between the Insurer Defendants and the Plaintiffs regarding the terms and conditions of the provider agreements, and the plaintiffs are forced to accept these take-it-or-leave-it contracts. In fact, there is simply no alternative available if the plaintiffs want access to the vast patient bases that receive their health insurance from the Insurer Defendants. In short, Sutter and the members of the Plaintiff Sub-Classes are placed in the untenable position of either accepting the unconscionable terms and conditions presented to them or deciding to no longer provide services to members in the defendants' plans.

Demand ¶ 16. For these reasons, among others, the instant case does not fall within the factual framework that was presented to the Court in *Stolt-*

Nielsen, and thus merits the consideration of different factors by the Court, including those presented by the Amici herein.

III

THE AMICI'S POSITION DOES NOT RUN COUNTER TO THIS COURT'S DECISION IN *AT&T MOBILITY LLC V. CONCEPCION*

As is noted above, this case is readily distinguishable from the one presented to this Court in *Concepcion*, 131 S. Ct. 1740, in which the Court rejected the application of state law to declare an express class arbitration waiver unconscionable and unenforceable. In addition to the availability of the option of bringing one's claims in small claims court that was present in *Concepcion*, discussed above, the waiver of a class device was *express* in *Concepcion*, and thus there was no need for anyone to *interpret* the contract to determine whether the parties had agreed to class arbitration. Thus, principles of contract interpretation such as those cited above never came into play. Indeed, in *Concepcion*, the invalidation of the class arbitration ban was admittedly and expressly based upon a state *policy* determination that such bans are unconscionable in certain circumstances. *Id.* at 1745.

Further, the invalidation of the class arbitration waiver in *Concepcion* came from a court, not an arbitrator. Accordingly, direct, searching review of the court's analysis was entirely proper there, as the fundamental underlying principle at work here – extreme deference to an arbitrator's interpretation of a contract that he or she has been

charged by the parties with interpreting – was entirely absent.

As this Court observed in *Concepcion*, "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.* at 1748. The notion that an arbitrator's determination on a question that the parties expressly entrusted to him to decide should be subjected to repeated review by multiple courts runs directly counter to this very principle. Here, the parties expressly agreed to have the arbitrator decide the question of whether class arbitration was permitted under their agreement. *See* J.A. 29. The arbitrator decided that question. Petitioner's repeatedly running from arbitration to court, and then pursuing appeal after appeal in an ongoing effort to undo the arbitrator's decision, is inconsistent with the parties' agreement, and does quite the opposite of "facilitat[ing] streamlined proceedings." *Concepcion*, 131 S. Ct. at 1748. The parties did not agree to a hybrid arbitration/litigation arrangement that places the rulings of the arbitrator on the same plane as the decisions of a trial court, which are subject to direct appellate review. The parties agreed to let the arbitrator decide, with only the most limited review by a court, in only the most egregious of circumstances; under the FAA, that agreement must be enforced according to its terms.

Despite being the party who required arbitration of physician claims under its contracts in the first place, and who successfully moved to compel arbitration of this dispute some eleven years ago,

Petitioner has exhibited an utter unwillingness to allow the arbitrator hearing this matter to get on with his job of adjudicating the claims at issue. As is set forth in the Third Circuit's opinion below,[27] the arbitrator first determined that class arbitration was permitted under the parties' agreement in his clause construction award almost ten years ago, in September of 2003. Upon certification of the class in 2005, Petitioner moved in court to vacate the panel's class certification award. When that failed, Petitioner appealed to the Third Circuit, and again failed. When this Court decided *Stolt-Nielsen*, Petitioner went back to the arbitrator and moved for reconsideration of the 2003 clause construction award. When the arbitrator issued his Procedural Order No. 18 denying Petitioner's motion for reconsideration and reaffirming his determination that class arbitration is permitted under the parties' arbitration clause, Petitioner moved the district court to reopen the federal case and to vacate Procedural Order No. 18. When the district court denied the motion to vacate, Oxford appealed again to the Third Circuit.[28] And when the Third Circuit once again affirmed the arbitrator's clause construction award, almost *nine years* after the arbitrator first determined that class arbitration was permitted, Oxford came to the Supreme Court on a Petition for Writ of Certiorari.

The *Sutter* case is not unique in this regard. In a virtually identical case brought against Oxford by physicians in New York, *Robert Scher, M.D. v.*

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[27] *Sutter v. Oxford Health Plans, LLC*, 675 F.3d 215, 217-18 (3d Cir. 2012).
[28] *Id.*

Oxford Health Plans, Inc. and Oxford Health Plans of New York, Inc., AAA Case No. 11 193 00548 05, Oxford has exhibited a similar unwillingness to allow the three-person arbitration panel hearing that case to do its job. When the Panel ruled against Oxford and issued its Clause Construction Award permitting class arbitration, Oxford moved to vacate the award in New York Supreme Court. Oxford won its motion to vacate, only to have that decision reversed on Claimant's appeal.[29] When the Panel certified the class in a unanimous opinion, Oxford returned to court with a motion to vacate that decision. When that failed,[30] Oxford appealed. In the meantime, Oxford made a motion to the Panel to decertify the class on the basis of *Stolt-Nielsen*, arguing once again that class arbitration is not permitted under the parties' contract. The Panel rejected that argument, and the Appellate Division subsequently rejected it too, on Oxford's appeal.[31] It was only when the parties finally settled the case in late 2012 that Oxford's long pattern of trying to undo class arbitration in the *Scher* case finally came to an end.

Such repeated judicial review itself has made the arbitration procedure extremely costly and inefficient for doctors even when class arbitration has been permitted. For that reason, the Court should carefully consider the scope of judicial review

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[29] *Cheng v. Oxford Health Plans, Inc.*, 45 A.D.3d 356, 846 N.Y.S.2d 16, 2007 N.Y. Slip Op. 8757 (1st Dep't 2007).

[30] *See Cheng v. Oxford Health Plans, Inc.*, 2009 N.Y. Misc. LEXIS 5081; 2009 NY Slip Op 32602(U) (Sup. Ct. NY County, 2009).

[31] *See Cheng v. Oxford Health Plans, Inc.*, 84 A.D.3d 673, 923 N.Y.S.2d 533, 2011 N.Y. Slip Op. 4508 (1st Dep't 2011).

proposed by Petitioner, and make clear that arbitration remains a system separate from the court system, with arbitration awards not open to appellate review to the same extent as decisions by courts. If Oxford and other insurance companies so prefer the oversight of the courts, they should not have insisted upon arbitration in the first place.

IV

THE ARBITRATOR'S CONSIDERATION OF THE "BIZARRE RESULT" OF A LACK OF A CLASS DEVICE WAS NOT THE APPLICATION OF THE ARBITRATOR'S POLICY PREFERENCES, BUT THE APPLICATION OF STATE-LAW CONTRACT INTERPRETATION PRINCIPLES, WHICH SHOULD BE ACCORDED DEFERENCE

Oxford has argued that the arbitrator here has "exceed[ed] his powers" by imposing his "own view of sound policy regarding class arbitration," as is purportedly shown by his comment that leaving doctors with no class action device would be a "bizarre result." Pet. Br. at 31 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1767-68). To the contrary, the Amici submit that consideration of the fact that doctors are effectively precluded from bringing claims against insurers in the absence of a class device is not a "policy" consideration at all, but rather is a matter of contract interpretation, and thus must be given the traditional deference accorded to an arbitrator's contractual interpretation.

It is a principle of general contract interpretation, recognized in New Jersey and elsewhere, that "'[a]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.'" *Arnold M. Diamond, Inc.*, 180 F.3d at 522 (3d Cir. N.J. 1999) (quoting Restatement (Second) of Contracts § 203 (1981)); *See also Anfield*, 5 N.J. Super. at 351. Leaving aside the question of whether an arbitration clause that excludes class arbitration would be exculpatory and thus "unlawful" under New Jersey law in the circumstances presented here,[32] reading the arbitration clause here as

[32] Another well-established principle of contract interpretation in New Jersey is that exculpatory clauses are unenforceable, and thus would be "unlawful." *See, e.g.*, *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 189 N.J. 1, 19 (N.J. 2006) (citing *McCarthy v. NASCAR, Inc.*, 48 N.J. 539, 542, 226 A.2d 713 (1967)). While this Court rejected the application of a similar state law principle to render express class action waivers unenforceable as exculpatory and thus unconscionable under the circumstances presented in *Concepcion*, 131 S. Ct. 1740, the Amici submit that this case is clearly distinguishable from *Concepcion* for several reasons set forth above. However, the Court need not reach the question of whether the arbitration clause here would be exculpatory and "unlawful" if it did not permit class arbitration, as the arbitrator here did not base his determination on such a finding. Instead, as is discussed below, the arbitrator found that it simply did not make sense, and was inconsistent with the express language of the clause itself, to read the clause as not permitting class arbitration. Thus, because such a reading would "leave[] a part of [the arbitration clause] unreasonable . . . or of no effect," and thus would violate New Jersey contract interpretation principles, the question of whether it would also render it "unlawful" need not be considered here. *Anfield*, 5 N.J. Super. at 351.

excluding a class device would be an "unreasonable" contract interpretation that would render "to no effect" the portion of the arbitration clause stating that "all such disputes shall be submitted . . . to . . . arbitration." *See* J.A. 73. While the arbitration clause states that *all* claims shall be brought in arbitration, the lack of a class device would effectively allow *no* claims, in court *or* in arbitration, as discussed above. Thus, under New Jersey contract interpretation principles, such an interpretation was properly rejected by the arbitrator.

Significantly, there is no need for this Court to speculate about what the arbitrator was thinking when he made the "bizarre result" observation, as he has subsequently made clear exactly what was behind that comment. When Oxford moved for reconsideration of the initial Clause Construction Award in the wake of *Stolt-Nielsen*, the arbitrator himself stated that his original determination "involved no . . . adventures into public policy but was rather concerned solely with the parties' intent as evidenced by the words of the arbitration clause itself."[33] J.A. 69. The arbitrator went on to explain that rather than being "silent" on the issue of class

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[33] Petitioner's challenge clearly implies that the arbitrator was dissembling when he unequivocally denied that he had based his decision on policy considerations. But Petitioner has not argued, let alone demonstrated, that there was any "corruption" or other "misconduct" or "misbehavior" on the part of the arbitrator, as would justify vacating the award under 9 U.S.C. § 10(a), so the suggestion that the arbitrator was flatly dishonest about the bases for his original clause construction award should be rejected out of hand.

arbitration, the arbitration clause here spoke quite clearly to the permissibility of class arbitration:

> The arbitration clause speaks of "no civil action [being brought in any court]." No civil action, in my view means no civil action, of any form whatsoever. Since a class action is a form of civil action, the clause can be paraphrased: "No class action concerning any dispute arising under this agreement shall be instituted before any court, and all such disputes shall be submitted . . . to . . . arbitration." "No civil action" simply cannot, as a matter or English, be read to exclude any particular civil proceeding, including a class action, from its coverage.
>
> Therefore, the text of the clause itself authorizes, indeed requires, class-action arbitration.

Id. at 73. A contrary reading would conflict directly with the plain-English meaning of the words of the contract and the principles of contract interpretation discussed above. Policy considerations plainly were not behind the arbitrator's determination.

Any other interpretation of the arbitration clause would have violated the legal principle against interpretations that are not "reasonable" or that leave part of an agreement "to no effect." The clause is not silent on the issue of class arbitration, but rather, clearly encompasses class actions within the disputes that must be brought in arbitration.

The arbitrator's observation that an alternative reading would render a "bizarre" result reflects only his application of sound contract-interpretation principles, and not the improper consideration of his own policy preferences.

CONCLUSION

For the reasons stated above, the decision below should be affirmed.

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Respectfully submitted,

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