No.

IN THE
Supreme Court of the United States

DAVID OPALINSKI, AND JAMES MCCABE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

ROBERT HALF INTERNATIONAL, INC. AND ROBERT HALF CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

SHANNON LISS-RIORDAN
Counsel of Record
LICHTEN & LISS-RIORDAN, P.C.
729 Boylston Street
Suite 2000
Boston, MA 02116
617-994-5800
sliss@llrlaw.com
Counsel for Petitioners

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QUESTION PRESENTED

In Oxford Health Plans, LLC v. Sutter, 133 S. Ct. 2064 (2013), this Court refused to disturb an arbitrator's decision that an arbitration clause which did not expressly mention class arbitration nevertheless allowed for class arbitration. Although allowing the arbitrator's decision to stand in that case, the Court reiterated that it "has not yet decided whether the availability of class arbitration is a question of arbitrability" for the court to decide, or a matter for the arbitrator. Id. at 2068 n.2. Following that statement, there is now a significant split of authority among the Circuit Courts of Appeal on this question. The Third Circuit below, along with the Fourth and Sixth Circuits, have held that only a court can decide whether an arbitration clause allows for class arbitration, while the First, Second, Fifth, Seventh, and Eleventh Circuits have held that an arbitrator can make that decision.

Thus, the question presented following Oxford Health, is:

1. Where an arbitration agreement does not expressly refer to class arbitration, is the determination of whether class arbitration is permitted by the agreement a question of arbitrability for the court to decide or a question of interpretation and procedure to be decided by the arbitrator?

PARTIES TO THE PROCEEDING

Petitioners are David Opalinski and James McCabe on behalf of themselves and all others similarly situated.

Respondents are Robert Half International, Inc. and Robert Half Corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes

INTRODUCTION

Petitioners David Opalinski and James McCabe respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in the matter of Opalinski v. Robert Half Intl. Inc, 2017 WL 395968 (3d Cir. Jan. 30, 2017) ("Opalinski II"). In the decision below, the Third Circuit held that the availability of class arbitration is a gateway question of arbitrability for the District Court to decide. The Third Circuit affirmed the decision of the District Court, which held that the parties' agreements did not provide for class arbitration, and dismissed the action with prejudice. See Opalinski v. Robert Half Intl. Inc., 2015 WL 7306420 (D.N.J. Nov. 19, 2015), Appendix ("Appx.") at 18a. The District Court decision had directly contradicted the Arbitrator's previous decision in this case, which held that the parties' agreement allowed for class-wide arbitration. See Arbitrator's Partial Clause Construction Award, dated May 31, 2012, Appx. at 61a. Thus, this case now clearly presents for this Court the question of whose decision on the availability of class arbitration should be followed – the District Court or the Arbitrator. The Third Circuit's decision is part of a widening Circuit split on this question, which is now ripe for this Court to resolve.[1]

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[1] The Third Circuit deferred to its previous opinion in Opalinski v. Robert Half Int'l, Inc., 761 F.3d 326 (3d Cir. 2014) ("Opalinski I"). Plaintiff-Appellants in Opalinski I petitioned this Court for *certiorari*, but the petition was denied. See Opalinski v. Robert Half Intern., Inc., 135 S. Ct. 1530 (2015), Appx. at 33a.

In Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2068 n. 2 (2013), this Court let stand an arbitration ruling that allowed class arbitration even though it was not specifically referenced in the agreement, holding that it "has not yet decided whether the availability of class arbitration is a question of arbitrability," and expressly leaving this question to be resolved for another day. Four years later, this open question has still not been answered, and is now the subject of an express division among the Circuits. Indeed, in light of this uncertainty, litigants now face uncertainty and increased costs, and in some cases, such as this one, have undergone full clause construction briefing before *both* an arbitrator and a court, only to get conflicting decisions on the issue.

The Third Circuit's holdings in Opalinski I and II have contributed to the widening Circuit split regarding the question of whether, when not expressly addressed by the parties' agreement, the availability of class arbitration is a question for the District Court or the arbitrator to decide. Disagreeing with Opalinski I, the Fifth Circuit has held that this is a question for the arbitrator to decide, see Robinson v. J & K Admin. Mgt. Services, Inc., 817 F.3d 193 (5th Cir. 2016), cert. denied, 137 S. Ct. 373 (2016), and the Second and Eleventh Circuits have presumptively held as such, upholding arbitration awards that permitted class arbitration. See S. Commc'ns Servs., Inc. v. Thomas, 720 F.3d 1352 (11th Cir. 2013), cert. denied, 134 S. Ct. 1001 (2014); DIRECTV, LLC v. Arndt, 546 F. App'x 836 (11th Cir. 2013); Jock v. Sterling Jewelers Inc., 646 F.3d 113 (2d Cir. 2011). The First and Seventh Circuits have found that an arbitrator should determine the availability of asso-

ciational or consolidated arbitration, which are similar in nature to class arbitration. See Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd., 683 F.3d 18 (1st Cir. 2012); Blue Cross Blue Shield of Massachusetts, Inc. v. BCS Ins. Co., 671 F.3d 635 (7th Cir. 2011). By contrast, the Third, Fourth, and Sixth Circuits have reached the exact opposite conclusion - that the availability of class arbitration is a gateway question for the District Court to decide. See Opalinski II, 2017 WL 395968; Dell Webb Communities, Inc. v. Carlson, 817 F.3d 867 (4th Cir. 2016), cert. denied sub nom. Carlson v. Dell Webb Communities, Inc., 137 S. Ct. 567 (2016); Opalinski I, 761 F.3d 326[2]; Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett, 734 F.3d 594, 598 (6th Cir. 2013), cert. denied, 134 S. Ct. 2291 (U.S. 2014).[3]

The Court should take this opportunity to resolve this uncertainty and answer the question left

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[2] The Third Circuit's decision in Opalinski I conflicted with two prior decisions from that Circuit, in which it had held that the availability of class arbitration was a question for the arbitrator. See Quilloin v. Tenet Healthsystem Philadelphia, Inc., 673 F.3d 221 (3d Cir. 2012); Vilches v. The Travelers Co., Inc., 413 F. App'x 487 (3d Cir. 2011).

[3] In 99 Restaurants v. Kiran, 1st Cir. No. 14-1135, this same question was recognized to be an important issue by the First Circuit, which solicited amicus briefing to help resolve this question. The case was later withdrawn as moot. Thus, no decision was issued by the First Circuit in Kiran, but the case serves as further evidence that the question of who should decide the availability of class-wide procedures – an arbitrator or a court – is recurring and important enough that the First Circuit requested additional briefing from interested amici. See Case No. 14-1135 (Minute Order dated 10/17/14).

open in Oxford Health of whether "the availability of class arbitration is a so-called 'question of arbitrability' . . . presumptively for courts to decide" (id. at 2068 n. 2) or a "procedural question[] which grow[s] out of the dispute and bear[s] on its final disposition, . . . presumptively *not* for the judge, but for an arbitrator, to decide." Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002) (internal quotation omitted).

Indeed, this case presents a prime example of the manner in which defendants have been able to exploit this unsettled area of law to their advantage, getting two bites at the apple while attempting to prevent a case from proceeding as a class action. Here, Robert Half moved to compel Plaintiffs' claims for unpaid overtime under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq*. to arbitration, and after that motion was granted, did not oppose the arbitrator determining whether the parties' agreement allowed for class arbitration. The parties underwent extensive clause construction briefing, and the arbitrator ultimately held that the agreements allowed for class arbitration. See Appx., at 62a. Only then, after receiving an unfavorable ruling from the arbitrator, did Robert Half turn back to the court, arguing that the availability of class arbitration was a question for the District Court, rather than an arbitrator, to decide. The District Court confirmed the Arbitrator's clause construction award, and only then, did Robert Half appeal the confirmation on the grounds that this should not have been a question for the Arbitrator in the first place. Then, after the Third Circuit ruled in Robert Half's favor in Opalinski I, it remanded the matter to the District Court, which ultimately held that the parties'

agreements did not allow for class arbitration, directly contradicting the Arbitrator's decision. See Appx. at 17a. Thus, due to the uncertainty surrounding this issue, Robert Half has greatly prolonged these proceedings and made multiple attempts at defeating class arbitration, until settling on a forum that issued the ruling it sought. This case presents a prime example of the gamesmanship in which parties can partake, exploiting the uncertainty of the "who decides" issue to their advantage.

This delay and repetitive briefing completely undercuts the arguments typically made in favor of arbitration: its "lower costs, greater efficiency and speed." AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1751 (2011). Here, Robert Half essentially got two bites at the apple by successfully moving to compel arbitration and then running back to court when it did not like the result it obtained in arbitration (despite not having previously challenged the court's allowing the arbitrator to decide this issue).

Because the arbitrator and District Court here reached different conclusions regarding the same exact question -- the availability of class arbitration, this issue has become especially ripe for this Court to consider in this case. This Court should grant *certiorari* to resolve the significant Circuit split on this important question and provide a final resolution for the parties in this matter.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit is available at Opalinski v. Robert Half Intl. Inc, 2017 WL 395968 (3d Cir. Jan. 30, 2017) ("Opalinski II"), and is reproduced in the appendix at 3a. The previous Third Circuit decision, on which the panel in Opalinski II relied, is available at Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 335 (3d Cir. 2014) ("Opalinski I"), and is reproduced in the appendix at 36a. The decision of the United States District Court for the District of New Jersey dated November 19, 2015, determining that Robert Half's arbitration agreement did not provide for class-wide arbitration, is available at Opalinski v. Robert Half Intl. Inc., 2015 WL 7306420 (D.N.J. Nov. 19, 2015), and reproduced in the appendix at, 18a. The clause construction award of the arbitrator, finding that Robert Half's arbitration agreement did provide for class-wide arbitration, is reproduced in the appendix at 61a. The decision of the United States District Court for the District of New Jersey dated October 6, 2011, granting Defendant's motion to compel arbitration and ordering that the arbitrator decide the question "of whether class arbitration is permitted," is available at Opalinski v. Robert Half Int'l, Inc., 2011 WL 4729009, *3 (D.N.J. Oct. 6, 2011) and is reproduced in the appendix at 79a. The decision of the United States District Court for the District of New Jersey dated December 3, 2012, denying Robert Half' Motion to Vacate the arbitrator's partial final award on clause construction is available at Opalinski v. Robert Half Int'l, Inc., 2012 WL 6026674 (D.N.J. Dec. 3, 2012), and is reproduced in the appendix at 53a.

JURISDICTION

The Court of Appeals entered its judgment on January 30, 2017. Appx. 3a.[4] A petition for rehearing *en banc* was denied on March 6, 2017. Appx. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 9 and 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 9 and 10, are reproduced at App. 99a.

STATEMENT OF THE CASE

A. This Court's Decisions Regarding Class Arbitration

In 2003, in Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 452-3 (2003), a plurality of the Court found the availability of class-wide arbitration procedures in an agreement that did not expressly reference class arbitration was for the arbitrator to decide because "it concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties ... [, but only] contract interpretation and arbitration procedures." Though this decision was only a plurality opinion, it has remained uncontradicted since it was decided.

Seven years later in Stolt-Nielsen S.A. v. Animal-Feeds Int'l Corp., 559 U.S. 662, 684 (2010), this Court held that, "a party may not be compelled under the FAA to submit to class arbitration unless there is

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[4] This Order was later amended on March 23, 2017, to remove an erroneously included attorney from the case caption.

a contractual basis for concluding that the party *agreed* to do so." (emphasis in original). Thus, the Court found that in determining whether class-wide arbitration was available, an arbitrator must analyze the intent of the parties as evidenced by their agreement, to determine whether it provides for class-wide procedures. Id. at 685. Nowhere in the Stolt-Nielsen opinion did the Court suggest that the District Court rather than the arbitrator should have decided the availability of class-wide arbitration. Instead, the Court reversed because the arbitrator's award improperly inferred that "the parties' mere silence on the issue of class-action arbitration constitute[d] consent to [it]" and wrongly "regarded the agreement's silence . . . as dispositive." Id. at 684, 687.[5]

Three years later, in Oxford Health, the Court elaborated on its holding in Stolt-Nielsen by review-

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[5] In reaching this decision, the Stolt-Nielsen Court highlighted certain "fundamental" differences between individual and class arbitration. 559 U.S. at 686. However, it did so not to comment on who should decide the availability of class-wide arbitration, but rather to emphasize that whoever makes that decision should not lightly infer that an agreement to arbitrate necessarily implies consent to class arbitration. Id. at 686-87 ("We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings"). Indeed, the language employed by the Court implicitly approved of an arbitrator making such a determination, so long as it was based upon the parties' agreement, and not inferred from "mere silence." Id.

ing an arbitrator's interpretation of an agreement that did not expressly reference class-wide arbitration. In Oxford Health, the Court made clear that "the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." 133 S. Ct. at 2068. There, as in this case, "the arbitrator focused on the arbitration clause's text, analyzing . . . the scope of both what it barred from court and what it sent to arbitration" and concluded "based on that textual exegesis, that the clause on its face expresses the parties' intent that class action arbitration can be maintained." Id. at 2069 (internal quotation omitted). This Court concluded that the arbitrator "did what the parties had asked: He considered their contract and decided whether it reflected an agreement to permit class proceedings." Id. The same is true in this case, where the arbitrator interpreted the text of the parties' agreement in a twelve-page clause construction award, ultimately concluding that the parties intended class proceedings to be available based on "generally-accepted principles of contract interpretation." Appx. at 69a.

Thus, the Oxford Health Court held that an arbitrator does not exceed his or her authority merely by interpreting an arbitration agreement that does not expressly reference class arbitration as nevertheless allowing for class arbitration. So long as the arbitrator "even arguably interpreted the parties' contract," the arbitrator's determination is valid. Oxford Health, 133 S. Ct. at 2068. In reaching this conclusion, the Court made clear that it was considering only whether the arbitrator exceeded his or her powers under § 10(a)(4) of the FAA and not whether the question was improperly submitted to the arbitrator

in the first place. Indeed, the Court indicated that "whether the availability of class arbitration is a question of arbitrability" for the court, rather than a procedural question for the arbitrator, remained an open question after Stolt-Nielson and remains an open question to date. Id. at 2068, n. 2.

Four years after this Court issued its ruling in Oxford Health, this crucial and frequently recurring question of who decides the availability of class arbitration has yet to be answered. In the interim, a significant Circuit split has continued to unfold, with the Third, Fourth, and Sixth Circuits holding that this decision should be made by a court, see *supra* at 3, and the First, Second, Fifth, Seventh, and Eleventh Circuits indicating that an arbitrator should decide this question. See Robinson v. J & K Admin. Mgt. Services, Inc., 817 F.3d 193 (5th Cir. 2016), cert. denied, 137 S. Ct. 373 (2016) (holding availability of class-wide arbitration is question for arbitrator to decide); S. Commc'ns Servs., Inc. v. Thomas, 720 F.3d 1352 (11th Cir. 2013), cert. denied, 134 S. Ct. 1001 (2014) (affirming District Court's order denying motion to vacate award in which arbitrator interpreted contract to allow for class arbitration); DIRECTV, LLC v. Arndt, 546 F. App'x at 839 (11th Cir. 2013) (reversing District Court order vacating arbitration award, finding that arbitrator did not exceed her powers in holding agreement allowed for collective arbitration); Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd., 683 F.3d 18 (1st Cir. 2012) (holding that the availability of associational arbitration was the kind of "more limited question . . . an arbitrator would typically decide"); Jock v. Sterling Jewelers Inc., 646 F.3d 113 (2d Cir. 2011) (holding whether the parties' agreement authorized associational arbi-

tration was for the arbitrators to decide); Blue Cross Blue Shield of Massachusetts, Inc. v. BCS Ins. Co., 671 F.3d 635 (7th Cir. 2011) (holding arbitrators are entitled to decide whether a consolidated arbitration proceeding is permissible under the applicable arbitration agreements).[6]

Prior to the Third Circuit's decisions in Opalinski I and II, it had likewise upheld arbitrators' decisions that found arbitration agreements that did not expressly refer to class arbitration to nevertheless allow class arbitration. See Quilloin v. Tenet Healthsystem Philadelphia, Inc., 673 F.3d 221 (3d Cir. 2012); Vilches v. The Travelers Co., Inc., 413 F. App'x 487 (3d Cir. 2011).[7] However, with the Third

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[6] Disparate rulings from District Courts on this issue also show the confusion underlying this Circuit split. While several District Courts considering the question after Oxford Health have determined that the availability of class arbitration procedures is one for the arbitrator to decide (see, e.g., Meadows v. Dickey's Barbecue Restaurants Inc., 2016 WL 7386138 (N.D. Cal. Dec. 21, 2016); Williams-Bell v. Perry Johnson Registars, Inc., 2015 WL 6741819 (N.D. Ill. Jan. 8, 2015); In re A2P SMS Antitrust Litig., 2014 WL 2445756 (S.D.N.Y. May 29, 2014); Lee v. JPMorgan Chase & Co., 982 F. Supp. 2d 1109 (C.D. Cal. 2013); Kovachev v. Pizza Hut, Inc., 2013 WL 4401373 (N.D. Ill. Aug. 15, 2013); Karp v. Cigna Healthcare, Inc., 882 F. Supp. 2d 199 (D. Mass. 2012)), others, within the same Circuits, have held that this is an issue reserved for the court (see, e.g., Shore v. Johnson & Bell, 2017 WL 714123, *2 (N.D. Ill. Feb. 22, 2017) (noting the division among the courts in the District on this issue); Henderson v. U.S Pat. Commn., Ltd., 188 F. Supp. 3d 798, 806 (N.D. Ill. 2016); Cobarruviaz v. Maplebear, Inc., 143 F. Supp. 3d 930, 945 (N.D. Cal. 2015)).

[7] Despite the fact that the Third Circuit clearly broke from its own prior precedent with its decision in Opalinski I, Petitioners' request for *en banc* review was denied. Appx, at 34a.

Circuit's reversal on this issue in Opalinski I and II, it has now joined the Fourth Circuit in Dell Webb Communities, Inc. v. Carlson, 817 F.3d 867 (4th Cir. 2016), cert. denied sub nom. Carlson v. Dell Webb Communities, Inc., 137 S. Ct. 567 (2016), and Sixth Circuit in Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett, 734 F.3d 594, 598 (6th Cir. 2013), cert. denied, 134 S. Ct. 2291 (2014), in which the Circuit courts ruled that whether an arbitration agreement permits class-wide arbitration is a "gateway matter" of arbitrability for the District Court.

In Reed Elsevier, the Sixth Circuit relied on language in Stolt-Nielsen and Concepcion for the proposition that because class-wide arbitration is "fundamental[ly]" different from bilateral arbitration, such an important question must be reserved to the Court. 734 F.3d at 598. Reed Elsevier appeared to decide that decisions of "fundamental" consequence must be decided by a court rather than an arbitrator, when in fact this Court has indicated that the distinction turns on whether the issue is one the parties typically would expect a court to decide. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (noting that a question of arbitrability applies "in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter"). The Third Circuit relied heavily on the flawed reasoning of Reed Elsevier in reaching its decision here.

The reasoning of the Fourth Circuit in Dell Webb is similarly flawed. Analyzing the Supreme Court's decisions in Bazzle, Stolt-Nielsen, and Oxford Health, the Fourth Circuit concluded that "[t]he evolution of the Court's cases are but a short step away from the conclusion that whether an arbitration

agreement authorizes class arbitration presents a question as to the arbitrator's inherent power, which requires judicial review." Dell Webb, 817 F.3d at 875. In fact, the majority of Circuit Courts analyzing this case law have reached the opposite conclusion. See *supra* at 2-3.[8] Thus, the Fourth Circuit was also incorrect in its assertion that "those circuit courts to have considered the question have concluded that, 'unless the parties clearly and unmistakably provide otherwise,' whether an arbitration agreement permits class arbitration is a question of arbitrability for the court." Dell Webb, 817 F.3d at 876. In so holding, it ignored the many Circuit Courts that have disagreed. However, the Dell Webb and Opalinski decisions show that the flawed reasoning first put forth in Reed Elsevier has continued to be compounded.

It is important that the Court now settle the matter left open by Oxford Health and provide the lower courts with clear guidance on this question.

B. Factual and Procedural Background

Robert Half is an international staffing company that employs thousands of "staffing managers" across the country whose duties are to sell job-placement services to other businesses and place temporary workers at those businesses. Petitioners are former staffing managers who worked for Robert Half in New Jersey. Appx. at 19a. Petitioners brought suit as a collective action on April 23, 2010, claiming that

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[8] Those opinions which were reached prior to this Court's decision in Oxford Health analyzed this question in light of the Court's rulings in Bazzle and Stolt-Nielsen.

Robert Half misclassified its staffing managers as exempt from overtime and thus failed to pay those employees overtime compensation for hours they routinely worked beyond 40 per week in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207. Appx. at 64a.[9] When Robert Half moved to compel arbitration, more than a year after the case was filed, the District Court agreed the case should go to arbitration but left the decision of whether class arbitration was available to the arbitrator, citing the Third Circuit's unpublished decision in Vilches v. The Travelers Companies, Inc., 413 F. App'x 487 (3d Cir. 2011). Appx. at 85a-86a.[10] After full clause-construction briefing by the parties, the arbitrator determined that the contract permitted class-wide arbitration. Appx. at 62a, 77a.

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[9] Several Robert Half staffing managers prevailed at trial, proving they were non-exempt under California state law and thus entitled to overtime, and this verdict was affirmed on appeal. Pellegrino v. Robert Half Int'l, Inc., 181 Cal. App. 4th 713, as modified on denial of reh'g (Feb. 25, 2010). A class action challenging the exempt status for all Robert Half staffing managers in California was later settled for $19 million and approved by the court in Laffitte v. Robert Half Int'l, Inc., 2014 WL 5470463, *1 (Cal. Ct. App. Oct. 29, 2014). Through use of its arbitration clause, Robert Half has thus far managed to avoid class-wide adjudication of the question of whether its nationwide practice of classifying staffing managers as exempt violates the FLSA.

[10] Robert Half made no objection at that time to letting the arbitrator decide that question. See Opalinski v. Robert Half Int'l, Inc., Civ. A. No. 10-2069 (D.N.J.), Dkt. 54-1. Although Petitioners argued that Robert Half had therefore waived this argument, the Third Circuit was later willing to overlook this waiver, ruling that "waiver . . . [did] not apply in this instance." Appx. at 40a.

It was only after the arbitrator reached her conclusion that class arbitration was contemplated by the parties' agreement that Robert Half argued for the first time that the availability of class proceedings was a question of arbitrability, which should have been decided by the District Court, rather than the arbitrator. After receiving the arbitrator's clause construction award, Robert Half sought to vacate the award on the grounds that the arbitrator had exceeded her authority, but making its argument about who should decide the question – the court or the arbitrator – in a single footnote. See Dkt. 68-3 at 19, n.2. When the District Court denied Robert Half's motion to vacate the arbitrator's award, Opalinski v. Robert Half Int'l, Inc., 2012 WL 6026674 (D.N.J. Dec. 3, 2012), Appx. at 53a, Robert Half then appealed to the Third Circuit, raising the arguments that the arbitrator exceeded her powers under the FAA and that the permissibility of class arbitration was an issue for the District Court rather than the arbitrator.

Robert Half then moved to stay proceedings pending the outcome of this Court's decision in Oxford Health, arguing that the case would clarify whether an arbitrator exceeds her authority by allowing arbitration of class disputes based on an agreement that does not explicitly refer to class arbitration. After this Court's ruling in Oxford Health clarified that an arbitrator may indeed construe such an agreement to permit class arbitration, so long as the arbitrator interprets the parties' contract, Robert Half then argued that the issue should never have been before the arbitrator in the first place. Robert Half had not even raised an opposition to the arbitrator deciding this issue when the District Court first decided to compel arbitration and leave the question to the arbi-

trator. Later, in moving to vacate the arbitrator's decision, Robert Half mentioned it only in passing in a brief, undeveloped footnote.

But after this Court's ruling in Oxford Health, Robert Half seized on the footnote that said that the Court was not deciding whether the issue was properly decided by a court or an arbitrator. It then argued to the Third Circuit that the arbitrator never should have been allowed to decide this issue in the first place. The Third Circuit agreed with this argument, overlooking the fact that Robert Half had waived this argument, and dramatically departing from the Circuit's prior precedent on this exact issue[11], as well as the weight of authority from other Circuits. The Third Circuit held that "whether an agreement provides for class-wide arbitration is a 'question of arbitrability' to be decided by the District Court." Appx. at 44a.

Following that decision in Opalinski I, the case was remanded to the District Court, which then reached the exact opposite conclusion from the arbitrator. The court determined that the parties' arbitration agreement did *not* provide for class-wide arbitration. Opalinski v. Robert Half Intl. Inc., 2015 WL 7306420 (D.N.J. Nov. 19, 2015), Appx. at 17a. Thus, the question of whether the availability of class-wide arbitration is for the court or the arbitrator to decide became a dispositive issue in this case, since the arbitrator had held that the agreement allowed for class-wide arbitration, but the District Court had held that it did not. Plaintiffs appealed the District

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[11] Vilches, 413 F. App'x 487; Quilloin, 673 F.3d 221.

Court's ruling, arguing again that the panel in Opalinski I had failed to follow two prior Third Circuit panel decisions, Vilches and Quilloin, despite the fact that those decisions had never been reconsidered *en banc*. The panel nevertheless held itself bound by Opalinski I, thus compounding the prior panel's error.[12] Plaintiffs petitioned the Third Circuit to grant rehearing *en banc* in Opalinski II, and on March 6, 2017, this petition was denied. See Appx, at 2a.

Since the last time this case came before this Court (in March 2015), the Circuit split over the

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[12] Plaintiffs also argued that the District Court had erred in determining that the parties' agreements do not permit class arbitration, and as one ground argued that such a determination would render them invalid under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.* Plaintiffs had raised this argument below to the District Court (see Opalinski v. Robert Half Int'l, Inc., Civ. A. No. 02069, Dkt. 71, at 10-11 n. 3, 4 (Aug. 2, 2012)), though they did not emphasize it there or raise it in later briefing before the District Court because at the time, this argument had not been adopted by any Circuit Court. The panel determined that Plaintiffs had waived the argument (because it had been raised only in footnotes), Opalinski II, Appx., at 15a n. 7 – despite the fact that the prior panel held that Robert Half had not waived the "who decides" question, even though it had raised the issue only in a footnote prior to arguing it in Opalinski I. See Appx, at 40a. Nevertheless, the question of whether an employer can prohibit class actions through the use of arbitration agreements is now pending before this Court in Lewis v. Epic Sys. Corp., U.S. S. Ct. No. 16-285 (Jan. 13, 2017); Morris v. Ernst & Young, U.S. S. Ct. No. 16-300 (Jan. 13, 2017); NLRB v. Murphy Oil USA, Inc., U.S. S. Ct. No. 16-307 (Jan. 13, 2017), and, thus, should the Court rule that class waivers in employee arbitration agreements violate the NLRA, the District Court's conclusion that Robert Half's arbitration agreement does not allow for class actions will no longer stand.

question of whether a court or arbitrator should decide the question of whether an arbitration clause (that does not expressly refer to class actions) allows for class arbitration has widened. The Fourth Circuit (and the Third Circuit again) has now also sided with the Sixth Circuit on this issue, holding that it is an issue of arbitrability for the court. See *supra* at 3. But now the Fifth Circuit has joined the First, Second, Seventh, and Eleventh Circuits, holding that it is an issue for the arbitrator. See *supra* at 2-3.

REASONS FOR GRANTING THE PETITION

I. The Third Circuit's Decision Below Has Deepened a Circuit Split Over Whether the Availability of Class Arbitration is a Question of Arbitrability

The Courts of Appeals are now deeply divided on the question left open in Oxford Health of who decides whether an arbitration clause allows for class arbitration. As explained above, the First, Second, Fifth, Seventh, and Eleventh Circuits have indicated that an arbitrator, and not a court, should determine the availability of class-wide, consolidated, or associational arbitration (similar in nature to class-wide arbitration). See *supra* at 2-3.[13] Likewise, several

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[13] In these cases, the courts followed the same reasoning of this Court in Oxford Health to uphold arbitrators' awards, construing agreements that do not expressly reference class-wide arbitration to permit it. For example, in DIRECTV, LLC, 546 F. App'x 836, the Eleventh Circuit reversed a district court ruling, which had granted a petition to vacate an arbitration award finding class-wide arbitration permissible. In DIRECTV,

(*Footnote continued*)

District Courts in the First, Second, Seventh, and Ninth Circuits have found that arbitrators and not courts should decide the availability of class-wide procedures (though some courts in these districts have held the question is for a court to decide). See fn. 6, *supra*.

These courts have recognized that whether plaintiffs can proceed in arbitration on a group or individual basis, "does not implicate the validity of the arbitration agreement or present any question of whether [plaintiff's] particular claims come under the arbitration agreement," but rather "is a matter of contract interpretation which the parties have agreed to submit to arbitration." Fantastic Sams Franchise Corp, 683 F.3d at 21, 25. In other words, "the availability of class arbitration does not go to the power of the arbitrators to hear the dispute, but rather to an issue that simply pertains to the conduct of proceedings that are properly before the arbitrator." In re A2P SMS Antitrust Litig., 2014 WL 2445756, *10.

By contrast, in Opalinski I and now again in Opalinski II, the Third Circuit joined the Sixth Circuit in Reed Elsevier, Inc. (and now the Fourth Circuit in Dell Webb), in finding that the availability of class-wide arbitration procedures is a question of ar-

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LLC, as in this case and Oxford Health, the parties submitted the question of whether class-wide arbitration was permitted under the terms of the agreement to an arbitrator, and the Defendant objected only when the arbitrator ruled against it. The Eleventh Circuit noted that "[b]ecause the arbitrator arguably interpreted the parties' agreements, the district court should have ended its inquiry and denied [the] petition for vacatur." Id. at 840.

bitrability presumptively for the court. Appx., at 8a.[14] The Third, Fourth, and Sixth Circuits have read this Court's dicta in Stolt-Nielson regarding the differences between class-wide and individual arbitration as highlighting the fundamental importance of the question and as requiring a court to determine the issue.

Thus, while the Third, Fourth, and Sixth Circuits read Stolt-Nielson and Oxford Health to require a court to resolve the availability of class-wide arbitration, even though this Court in Oxford Health let stand an arbitrator's ruling on the question, numerous other courts have noted that this Court expressly reserved the question in Oxford Health and that "*Stolt–Nielsen* does not fundamentally alter the focus of the analysis of when to submit questions of class

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[14] The Third Circuit had previously held in Quilloin, 673 F.3d 221, and Vilches, 413 F. App'x 487, that the availability of class-wide arbitration "is a question of interpretation and procedure for the arbitrator," and not a question of arbitrability for the court. Quilloin, 673 F.3d at 232. However, in Opalinski I and then in Opalinski II, the Third Circuit reversed course, dismissing Quilloin as dicta (and declining to address Vilches), and following the reasoning of the Sixth Circuit instead. The Third Circuit's reversal of its own prior opinions highlights the confusion and uncertainty caused by this open question. Indeed, the District Court opinion specifically referenced Vilches as the basis for its initial decision that an arbitrator should determine the availability of class-wide procedures. Opalinski v. Robert Half Int'l, Inc., 2011 WL 4729009, *3 (D.N.J. Oct. 6, 2011), Appx., at 86a. Meanwhile, more than *seven years* after this case was filed, the merits of Petitioners' FLSA claims have yet to be reached. Similar outcomes and delays and confusion will continue to be widespread in the absence of clear guidance from this Court.

or collective arbitrability to arbitration; instead it acknowledges that the Supreme Court has never answered that question." Robinson, 817 F.3d at 197. These courts have looked to this Court's earlier decisions in Howsam and Bazzle, which counsel against taking matters away from the arbitrator.[15] This fundamental difference of opinion is likely to continue unabated in the absence of further guidance from this Court.

II. The Third Circuit's Decision Below is Incorrect and Merits Further Review

Not only is there a growing split among the Circuit courts on the question presented here, but the Third Circuit's decision on this issue is wrong on the merits and should be reviewed. As the First, Second, Fifth, Seventh, and Eleventh Circuits have recognized, and what this Court expressly acknowledged in Oxford Health, Stolt–Nielsen did not "decide[] whether the availability of class arbitration is a question of arbitrability." 133 S. Ct. at 2068, n. 2. Thus, the Third Circuit's heavy reliance in Opalinski I on Stolt-Nielson for the proposition that the availability of class-wide relief is a question of arbitrability was misplaced, and this error was compounded when the Third Circuit held in Opalinski II that it was

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[15] Howsam explained the framework for determining whether an issue should be decided by a court or an arbitrator, distinguishing between gateway "questions of arbitrability" for the courts and "procedural" questions for the arbitrator. 537 U.S. at 84-85. In Bazzle, this Court noted that only in "limited instances" would the parties intend courts rather than arbitrators to decide a particular matter. 539 U.S. at 452.

bound by this earlier decision. Stolt-Nielsen's comparison of individual and class arbitration was simply a commentary on why class-wide procedures should not be "infer[red] solely from the fact of the parties' agreement to arbitrate" and should not be understood as a judgment that such decisions are inappropriate to submit to arbitrators. 559 U.S. at 685. See also In re A2P SMS Antitrust Litig., 2014 WL 2445756, *11 (S.D.N.Y. May 29, 2014) ("under Stolt–Nielsen these differences are primarily relevant to deciding the availability of such class arbitration, not the antecedent question of whether that decision is assigned to the Court or the arbitrator").

The issue is not for a court simply because class arbitration could lead to a significant judgment; arbitrators frequently are called upon to decide large and important cases. Given that Robert Half was sued in a potentially large case, and given that it did not expressly provide in its arbitration agreement that class actions are not allowed, it took its chances by compelling the case to arbitration (and then again by not objecting when the District Court ruled that the arbitrator would decide if the case could proceed on a class-wide basis). Indeed, Robert Half asked to have the case decided by an arbitrator with the American Arbitration Association ("AAA"), whose rules provide for the arbitrator to decide this very question.[16]

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[16] A number of courts have held that when a party chooses to use an arbitration provider whose rules allow for the arbitrator to decide the question of whether an arbitration clause allows for class arbitration, then the party has consented to have this question decided by the arbitrator. See, e.g., Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1373 (Fed. Cir. 2006) (agreement "which incorporates the AAA . . . clearly and unmistakably

(*Footnote continued*)

Indeed, arbitrators are routinely called upon to decide questions that result in "fundamental" consequences to the parties, such as determining whether a party is entitled to any remedies. No one disputes that "a panel of arbitrators could resolve one [plaintiff's] claim and then apply that decision to [] others via doctrines of claim preclusion or issue preclusion," and deciding "whether it would be simpler and cheaper to handle [multiple] claims separately or together is the sort of issue an adjudicator—whether judge or arbitrator—resolves all the time." Blue Cross Blue Shield of Massachusetts, Inc., 671 F.3d at 639. In fact, arbitrators decide such questions all the time, as expressly provided for by the AAA Supplementary Rules for Class Action Arbitration. See Rule 3: Construction of the Arbitration Clause.

Furthermore, Bazzle, 539 U.S. 444 (2003), although only a plurality opinion, suggests that the arbitrator *should* decide the availability of class arbitration, not the courts. There, the plurality found that determining whether an agreement permits class arbitration is not one of the "limited circumstances" when parties expect a court, rather than an arbitrator, to decide the issue in the first instance. 539 U.S. at 452-53. When viewed alongside this Court's precedent counseling a narrow interpretation

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shows the parties' intent to delegate the issue of determining arbitrability to an arbitrator"); Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1332–33 (11th Cir.2005) (same); Contec Corp. v. Remote Solution Co., 398 F.3d 205, 208 (2d Cir. 2005) (same); Silec Cable S.A.S. v. Alcoa Fjardaal, SF, 2012 WL 5906535, *18 (W.D. Pa. Nov. 26, 2012); Way Servs., Inc. v. Adecco N. Am., LLC, 2007 WL 1775393, *4 (E.D. Pa. June 18, 2007).

of questions of arbitrability and a national policy in favor of arbitration,[17] the natural conclusion is that an arbitrator should decide the availability of class-wide relief. Clearly, Robert Half was content to have an arbitrator decide Petitioner's case – and indeed urged that result before the District Court in moving to compel arbitration – but then attempted to escape the arbitrator deciding this particular issue *only after the arbitrator ruled against it on this question.*

This Court has long recognized a "national policy favoring arbitration" and has held that "any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration." Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 298 (2010) (internal quotations omitted). With this point in mind, "courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration." BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1207 (2014). By contrast, a court should determine only the "narrow" and "limited" questions of arbitrability, such as "whether the parties are bound by a given arbitration clause" or "whether an arbitration clause in a concededly bind-

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[17] See Bazzle, 539 U.S. at 452 (noting that only in "limited circumstances, [should] courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter" and finding that "whether the contracts forbid class arbitration-does not fall into this narrow exception" because "[i]t concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties"); see also Howsam, 537 U.S. at 83–84 ("the Court has [] long recognized and enforced a "liberal federal policy favoring arbitration agreements…").

ing contract applies to a particular type of controversy." Howsam v, 537 U.S. at 84. Whether class-wide arbitration is available is not a question of arbitrability because it does not go to whether a valid agreement to arbitrate the particular dispute exists. Indeed, the parties here do not dispute the validity of the arbitration agreement or its applicability to the FLSA claims advanced by Plaintiffs. Instead, the question concerns what procedural mechanisms are available to the Plaintiffs who want to pursue these FLSA claims.

In its decision in Opalinski I, the Third Circuit relied heavily on Justice Alito's concurrence in Oxford Health, cautioning that "[c]ourts should be wary of concluding that the availability of classwide arbitration is for the arbitrator to decide, as that decision implicates the rights of absent class members without their consent." Opalinski I, 761 F.3d at 333 (citing Oxford Health, 133 S. Ct. at 2072) (Alito, J. concurring)).[18] This same factor was highlighted in Stolt-Nielsen, 559 U.S. at 686, as a "difference[] between bilateral and class-action arbitration" that counsels against presuming that the parties agreed to class-wide arbitration. The Third Circuit inter-

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[18] All staffing managers who would be part of this case are bound by Robert Half's arbitration clause so that it does not matter whether they "consent" to arbitrate or not. Moreover, AAA rules contain class rules like Fed. R. Civ. P. 23, which would allow staffing managers who do not want to participate in the case to opt out of the class. Thus, there is no risk that they would be bound by a ruling in this case without their consent. See AAA Supplementary Rules for Class Arbitrations, Rule 5(c) ("The Class Determination Award shall state when and how members of the class may be excluded from the class arbitration").

preted this language to mean that the availability of class-action procedures implicated "*whose* claims an arbitrator may decide" and was "thus a question of arbitrability to be decided by the court." Id. at 332-3 (emphasis added).

However, the cases cited by the Third Circuit in Opalinski I in support of this proposition are clearly distinguishable decisions in which courts decided whether third parties who were never parties to an arbitration agreement could nevertheless be bound by the agreement's terms. See, e.g., First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942-43 (1995) (finding whether business owners were personally bound by an arbitration agreement they had signed on behalf of their wholly owned company was a question of arbitrability for the courts); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546-47 (1964) (holding that whether a company was bound by an arbitration agreement signed by a company with which it had merged was a question of arbitrability for the courts); Allstate Settlement Corp. v. Rapid Settlements, Ltd., 559 F.3d 164, 170 (3d Cir. 2009) (finding that whether a third-party insurer was bound by obligee's arbitration agreement was a question of arbitrability for the courts).

Here, by contrast, there is no question regarding whether Opalinski, McCabe, and all other similarly situated Robert Half staffing managers who would be potential class members in this case are bound by Robert Half's arbitration agreement. The only question is with respect to how those claims may proceed – individually or as a class. Thus, the analogy to cases regarding who is bound by an arbitration agreement is wholly inapposite. Moreover, it was *not* suggested in Stolt-Nielson that the mere fact of "ad-

judicat[ing] the rights of absent parties" rendered the class arbitrability decision inappropriate for an arbitrator. 559 U.S. at 686-87. Indeed, the American Arbitration Association (AAA) Supplementary Rules for Class Action Arbitration expressly provide for arbitrators to make this very determination. See Rule 3: Construction of the Arbitration Clause. Likewise, a plurality of this Court indicated in Bazzle that such a decision was appropriately before the arbitrator.

That the availability of class-wide arbitration is not a question of arbitrability for the court is borne out by this Court's precedent. In BG Grp., PLC v. Republic of Argentina, 134 S. Ct. at 1207, this Court found that a requirement in a treaty that disputes be submitted first to a local tribunal for eighteen months prior to moving for international arbitration was a procedural issue for the arbitrator to decide, rather than the courts. In reaching this conclusion, the Court noted that the litigation provision in the agreement "determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all." Id. (emphasis in original). As in BG Grp., the provision here determines the method by which the duty to arbitrate will be carried out, not whether there is a contractual duty to arbitrate at all or who is bound by the agreement. The parties here do not dispute that the arbitration agreement applies to them and all similarly situated employees, and specifically to their FLSA claims. Indeed, the only question before the arbitrator was whether the Plaintiffs could proceed on an individual or class basis, and this question is quintessentially procedural and presumptively for the arbitrator.

III. The Question Presented Is Important, Recurring, And Ripe For Review

The question of whether the availability of class-wide arbitration is for the arbitrator or a court to decide is one of significant importance. Arbitration has its advantages, but only if the rules for invoking it are predictable and fair. It is critical that clear, uniform rules apply to whether or not courts or arbitrators decide the availability of class arbitration. Conflicting opinions by the Courts of Appeals "encourage and reward forum shopping," by allowing parties to bring suit in one jurisdiction or the other and then challenge the appropriateness of that venue if they do not like the result. Southland v. Keating, 465 U.S. 1, 15 (1984) ("We are unwilling to attribute to Congress the intent, . . . to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted"). If parties are to view arbitration as a worthwhile alternative to litigation, they need to have confidence that the courts will not undermine the federal policy in favor of arbitration and will act consistently in their treatment of the parties' agreement.

Indeed, this case exemplifies the problem: an arbitrator ruled one way, and the court ruled the other way. Robert Half was able to use the uncertainty over which forum should decide the issue of the availability of class-wide arbitration, in order to try to escape the ruling that it did not like from the arbitrator.

Persistent uncertainty over who should decide the availability of class-wide arbitration thus allows parties like Robert Half in this case, to "rerun the mat-

ter in a court," just as this Court expressly decried in Oxford Health, 133 S. Ct. at 2071. Indeed, parties may, as occurred here, fight over whether the court should compel arbitration, and then fight out the availability of class arbitration before the arbitrator, only to return to court to argue that the issue should never have been in front of the arbitrator in the first place. This result undermines the utility of arbitration, needlessly delays reaching the merits of the issues, and allows the losing party to unfairly take a second bite at the apple. Such is the case here, where seven years after bringing suit, Plaintiffs have yet to reach the merits of their FLSA claims.

Furthermore, forcing courts to decide whether class-wide procedures are available imposes significant burdens on parties and courts and transforms a process that was meant to produce "efficiency" into a "procedural morass." Concepcion, 131 S. Ct. at 1751. Arbitrators are well-equipped to determine whether an agreement provides for class-wide procedures and can do so more effectively and at a lower cost. As this Court noted in Howsam, "the law [should] assume an expectation that aligns (1) decisionmaker with (2) comparative expertise [because it] will help better to secure a fair and expeditious resolution of the underlying controversy - a goal of arbitration systems and judicial systems alike." 537 U.S. at 85. Indeed, "[t]he relevant question here is what *kind of arbitration proceeding* the parties agreed to, which [concerns] . . . contract interpretation and arbitration procedures." Bazzle, 539 U.S. at 445 (emphasis in original). This Court has held that "[a]rbitrators are well situated to answer [such] question[s]." Id. Thus, where an agreement does not expressly mention class procedures, courts "should presume that

parties intend to give their disputes to the most able decisionmaker on a given issue, both for contractual and public policy reasons." Marie v. Allied Home Mortgage Corp., 402 F.3d 1, 10 (1st Cir. 2005).

Here, "the most able decisionmaker" is the arbitrator who is skilled in contract interpretation and is well-suited to determine the scope of the arbitration proceeding to which the parties have agreed. This point is further borne out by the fact that the AAA has Supplementary Rules for Class Action Arbitration, which include a specific procedure for submitting the question of class arbitrability to the arbitrator. See Supplementary Rules for Class Arbitration Rule 3 ("Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class…."). Review of the Third Circuit's decisions in Opalinski I and II here would provide clarity and relieve courts of the burden of briefing and determining the "who decides" question, in the face of now significant conflicting caselaw among the Circuits on this question.

The question presented here, regarding who decides class arbitrability, is also widely recurrent. Multiple Circuit Courts have confronted the issue, and numerous district courts have squarely addressed the question of who should determine the availability of class arbitration. See *supra* at 10-11 & n. 6. They have reached conflicting results, based upon the uncertainty left open by this Court in Oxford Health.

Finally, this issue is clearly ripe for review. The conflict among the Circuits that has arisen is now

squarely presented with nearly every Circuit weighing in and requires resolution by this Court. Multiple courts have now drawn out and exhaustively explored their differing lines of argument and differing interpretations of Stolt-Nielson, Oxford Health, and Bazzle. These conflicting interpretations are not likely to change or evolve meaningfully through additional decisions in other courts. Moreover, this case is the right vehicle for resolving this question. First, it it encapsulates these conflicting opinions through the Third Circuit's own shift from Quilloin and Vilches to its decisions in Opalinski I and II. Second, because the arbitrator and District Court issued conflicting decisions regarding whether the parties' agreement allowed for class arbitration, the question of who decides this issue is now dispositive in the outcome of this case.

The Third Circuit's complete reversal on the "who decides" question, coupled with the seven-year battle that has been waged by the parties in this action – briefing the same issue before both the arbitrator and the District Court – is symbolic of the confusion and uncertainty surrounding this open question and the need for guidance from this Court. For all these reasons, the Court should grant *certiorari* and provide the Circuit and District Courts guidance on this important and increasingly prevalent issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Shannon Liss-Riordan
Counsel of Record
Lichten & Liss-Riordan, P.C.
729 Boylston Street, Suite 2000
Boston, MA 02116
(617) 994-5800
sliss@llrlaw.com

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