No. 16-1456

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

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Petitioners are David Opalinski and James McCabe on behalf of themselves and all others similarly situated (collectively referred to herein as "Plaintiffs").

Respondents are Robert Half International, Inc., and Robert Half Corporation (collectively referred to herein as "Robert Half").

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes

Other Authorities

INTRODUCTION

In its Opposition to Plaintiffs' petition for a writ of certiorari, Defendant Robert Half argues that (1) there is no Circuit split for this Court to resolve on the question of who should presumptively decide the availability of class-wide arbitration; (2) that the question is of little practical significance because of the increasing use of class action waivers in arbitration agreements; and (3) that the Third Circuit's finding that the question of the availability of class arbitration is for the arbitrator to decide was correct on the merits. Robert Half's arguments are misplaced because there is a clear, ongoing difference of opinion among the federal courts as to who should decide this question, which has only widened since Plaintiffs filed their first petition for a writ of certiorari in Opalinski I in 2014. Moreover, the very existence of numerous cases on this subject reflect that many businesses have not included express class action waivers in their arbitration agreements. Thus, the question of whether there is a presumption that the court or arbitrator should decide the availability of class-wide arbitration, where the agreement does not expressly address this question, has not disappeared since Plaintiffs filed their first petition for a writ of certiorari in 2014, will not disappear any time soon, and this Court's guidance is urgently needed.

Indeed, the history of this very case, explained in detail in Plaintiffs' opening petition, highlights the procedural pitfalls created by the currently uncertain legal landscape. The very uncertainty in the law which Plaintiffs now ask this Court to resolve result-

ed in years of litigation in this matter, allowing Robert Half to take a second bite at the apple when it was not satisfied by the arbitrator's ruling regarding the availability of class-wide arbitration. Because the arbitrator ruled that class arbitration was available under the parties' agreement, and the District Court ruled that it was not, the question of whether there is a presumption that the court or arbitrator should decide the availability of class-wide arbitration has effectively become the dispositive issue in this case.

This Court should put the continuing uncertainty in the "who decides" question to rest by answering the question left open in Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2068 (2013). In light of the costly uncertainty brought about by the doctrine as it currently stands, which has only proliferated in the intervening years since Plaintiffs' previous petition in Opalinski I, Plaintiffs now urge this Court to grant certiorari and resolve this issue.

I. There Is A Clear Circuit Split Regarding Whether The Availability Of Class-wide Arbitration Is A 'Question of Arbitrability' For the Courts.

Robert Half's contention that "there is no circuit split regarding whether determining the availability of class arbitration constitutes a 'question of arbitrability' presumptively for the court," Opp. at 1, 10-19, is belied by the numerous decisions that have split on this issue since this Court's decision in Oxford Health expressly left the question open. First,

although the Circuit Court decisions cited by Plaintiffs may not address the issue as directly as the Third Circuit did here, they clearly approve of arbitrators deciding the availability of class-wide arbitration. Second, contrary to Robert Half's bold assertion that "[t]here is no conflict," several district courts (including many since Plaintiffs filed their petition in Opalinski I) have directly confronted this question and have concluded that the availability of class-wide arbitration is a procedural question, presumptively for the arbitrator to decide. See infra, fns. 3-8. For these reasons, this question clearly merits the Court's attention as this ongoing difference of opinion among the federal courts will continue (and has continued) since Opalinski I without intervention from this Court.

Robert Half strains to argue that Fifth Circuit's decision in Robinson v. J & K Admin. Mgt. Services, Inc., 817 F.3d 193 (5th Cir. 2016), cert. denied, 137 S. Ct. 373 (2016), is not directly on point here, when that court explicitly stated: "[t]he issue [before the court] is who decides if the arbitration agreement permits class or collective procedures." Id. at 198. Much like the agreement at issue here, the language in the Robinson arbitration agreement was extremely broad and did not expressly address who should decide the availability of class-wide arbitration. Id. at 197. The Fifth Circuit held that the agreement's broad language left the availability of class-wide arbitration presumptively up to the arbitrator to decide. Id. at 197-98. In so holding, the court compared this language to that in Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 452-3 (2003), in which the agreement stated that "[a]ll disputes, claims or controversies arising from or relating to this con-

tract" were subject to arbitration – the same language in the parties' agreement here. See Robinson, 817 F.3d at 198. Thus, contrary to Robert Half's contention, Robinson is based upon facts that were quite similar to Opalinski I and II, but the Fifth Circuit simply reached the opposite conclusion from the Third Circuit.

The opinions to which Plaintiffs have cited from the First, Second, Seventh, and Eleventh Circuits have also endorsed the view that the availability of class-wide arbitration is a question presumptively for the arbitrator to decide. For example, in DIRECTV, LLC v. Arndt, 546 F. App'x 836, 837 (11th Cir. 2013), the Eleventh Circuit reversed a district court's decision vacating an arbitrator's award determining the availability of class-wide arbitration. The district court had found the arbitrator exceeded her powers under the Federal Arbitration Act, 9 U.S.C.A. § 10 (a)(4), but the Eleventh Circuit held that the award did not exceed the arbitrator's powers. Id. at 839. Thus, the court clearly addressed the "who decides" question implicitly because, if the availability of class-wide arbitration was a gateway issue for courts to decide, then presumably the Eleventh Circuit would have found that the arbitrator *had* exceeded her powers in deciding the question. It did not.[1]

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[1] The same reasoning applies to S. Commc'ns Servs., Inc. v. Thomas, 720 F.3d 1352 (11th Cir. 2013), in which the Eleventh Circuit affirmed a district court decision approving an arbitrator's decision that class-wide arbitration was available under the parties' agreement, and Jock v. Sterling Jewelers

(*Footnote continued*)

Similarly, while Robert Half points out that Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd., 683 F.3d 18, 24-25 (1st Cir. 2012), addressed associational arbitration for ten members who were already each before the arbitrator individually, there is no reason that the court's reasoning would be limited to associational arbitration and not apply to class arbitration as well. The First Circuit noted that, "[u]nlike a 'question of arbitrability,' the parties' dispute in this case does not implicate the validity of the arbitration agreement or present any question of whether FSRO's particular claims come under the arbitration agreement." Id. at 25. The same holds true here, where the parties do not dispute the validity of the arbitration agreement or that it applies to the particular wage claims at issue here. Moreover, just as in Fantastic Sams, any class that is certified would only include other parties who are also bound by an arbitration clause. Class members would be given an opportunity to opt out if they do not want to proceed before the arbitrator that certified the class. See AAA Supplementary Rules for Class Arbitrations, Rule 5(c).

Likewise, Robert Half argues that Blue Cross Blue Shield of Massachusetts, Inc. v. BCS Ins. Co., 671 F.3d 635, 640 (7th Cir. 2011), did not determine that the availability of class-wide arbitration was a

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Inc., 646 F.3d 113 (2d Cir. 2011), in which the Second Circuit reversed a district court decision that had vacated an arbitrator's award that had construed an agreement to allow for class-wide arbitration.

procedural question rather than a gateway question because that case addressed the availability of consolidated arbitration. But other courts have applied the reasoning of Blue Cross Blue Shield to the question of who should decide the availability of class-wide arbitration and have cited it for the proposition that this is presumptively a question for the arbitrator, *not* the courts. See Williams-Bell v. Perry Johnson Registars, Inc., 2015 WL 6741819, *6 (N.D. Ill. 2015); Cramer v. Bank of Am., N.A., 2013 WL 2384313, *4 (N.D. Ill. May 30, 2013); Chatman v. Pizza Hut, Inc., 2013 WL 2285804, *8 (N.D. Ill. May 23, 2013)[2]; Price v. NCR Corp., 908 F. Supp. 2d 935, 941 (N.D. Ill. 2012). While the Blue Cross Blue Shield court distinguished class arbitrations from consolidated arbitrations in its decision, as shown by the several decisions cited above, its reasoning is easily extended to the question of who should decide the availability of class-wide arbitration.

That these Circuit Court decisions stand for the conclusion that arbitrators presumptively should decide the availability of class-wide arbitration is further underscored by the numerous lower court decisions which cite them for that very proposition. Indeed, numerous lower court decisions post-Oxford Health from within the 2nd,[3] 5th,[4] 7th,[5] 9th,[6] 10th,[7]

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[2] In Chatman, the court explicitly noted that "[c]onsolidated arbitration resembles consolidated litigation." Id. (citing Fed. R. Civ. P. 42(a)).

[3] See, e.g., Wells Fargo Advisors, L.L.C. v. Tucker, 195 F. Supp. 3d 543, 547 (S.D.N.Y. 2016); Rossi v. SCI Funeral Services of New York, Inc., 2016 WL

(*Footnote continued*)

524253, *8 (E.D.N.Y. Jan. 28, 2016); Edwards v. Macy's Inc., 2015 WL 4104718, *12 (S.D.N.Y. June 30, 2015); In re A2P SMS Antitrust Litig., 2014 WL 2445756 (S.D.N.Y. May 29, 2014); Guida v. Home Sav. of Am., Inc., 793 F. Supp. 2d 611, 619 (E.D.N.Y. 2011).

[4] See, e.g., 20/20 Communications, Inc. v. Blevins, 2017 WL 527959, *1 (N.D. Tex. Feb. 7, 2017); Langston v. Premier Directional Drilling, L.P., 203 F. Supp. 3d 777, 784 (S.D. Tex. 2016).

[5] See, e.g., Williams-Bell, 2015 WL 6741819, *6; Kovachev v. Pizza Hut, Inc., 2013 WL 4401373 (N.D. Ill. Aug. 15, 2013); Cramer, 2013 WL 2384313, *3-4; Chatman, 2013 WL 2285804, *8; Price, 908 F. Supp. 2d at 945; Collier v. Real Time Staffing Servs., Inc., 2012 WL 1204715, *5 (N.D. Ill. Apr. 11, 2012).

[6] See, e.g., Lee v. JPMorgan Chase & Co., 982 F. Supp. 2d 1109 (C.D. Cal. 2013); Okechukwu v. DEM Enterprises, Inc., 2012 WL 4470537, *2–3 (N.D. Cal. Sept. 27, 2012); Hesse v. Sprint Spectrum L.P., 2012 WL 529419, *3-4 (W.D. Wash. Feb. 17, 2012).

[7] See, e.g., Belnap v. Iasis Healthcare, 844 F.3d 1272, 1285 n. 9 (10th Cir. 2017); Hedrick v. BNC National Bank, 186 F. Supp. 3d 1189, 1195 (D. Kan. 2016); Fisher v. General Steel Domestic Sales, LLC, 2010 WL 3791181, *2-3 (D. Colo. Sept. 22, 2010).

and 11th[8] Circuits have addressed the "who decides" issue head on and have decided that, where the parties' agreement does not expressly state who should decide, the question is presumptively for an arbitrator, *not* a court. These decisions are in *direct conflict* with the Third, Fourth, Sixth, and Eighth Circuit's opinions in Opalinski I and Opalinski II, Dell Webb Communities, Inc. v. Carlson, 817 F.3d 867 (4th Cir. 2016), cert. denied, 137 S. Ct. 567 (2016); Reed Elsevier, Inc. v. Crockett, 734 F.3d 594 (6th Cir. 2013); and Catamaran Corporation v. Towncrest Pharmacy, 864 F.3d 966, 969 (8th Cir. 2017).[9] Thus, there is

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[8] Federal National Mortgage Association v. Prowant, 209 F. Supp. 3d 1295, 1310 (N.D. Ga. 2016).

[9] Robert Half contends that the Ninth Circuit has also held that the availability of class-wide arbitration is a gateway issue for courts to decide. The decision Robert Half cites for this proposition is an unpublished and non-precedential opinion in which the Ninth Circuit summarily affirmed a lower court decision, affirming the district court's decision to compel individual arbitration, with virtually no analysis or explanation. See Eshagh v. Terminix Int'l Co., L.P., 588 F. App'x 703, 703 (9th Cir. 2014). Indeed, several District Courts in the Ninth Circuit faced with the "who decides" issue after the issuance of Eshagh have noted that this Circuit has yet to decide this issue. See, e.g., Armenta v. Staffworks, LLC, 2017 WL 3118778, *7 (S.D. Cal. July 21, 2017); Crook v. Wyndham Vacation Ownership, Inc., 2015 WL 4452111, *3 (N.D. Cal. July 20, 2015).

still a clear split of opinion among the Circuits which is ongoing and unlikely to abate any time soon.

II. The Practical Significance Of The "Who Decides" Question is Ongoing And Continues To Threaten The Efficiency Of The Arbitral Process.

The situation on the ground plainly contradicts Robert Half's contention that parties will simply insert class action waivers into their agreements and avoid the "who decides" question altogether. As a practical matter, it takes businesses years to update their forms and practices to respond to Supreme Court precedent. Although businesses with corporate counsel heavily involved with these issues may have adjusted their employment agreements' language to include such waivers, many companies still use arbitration agreements that do not expressly specify whether class arbitrations are allowed. Thus, this issue will continue to surface for years to come.

Indeed, Robert Half made this exact argument in opposing Plaintiffs' petition for a writ of certiorari in Opalinski I, and yet, two and a half years later, courts continue to regularly confront this issue. See, e.g., Catamaran Corp., 864 F.3d 966 (8th Cir. 2017); Robinson, 817 F.3d 193 (5th Cir. 2016); Dell Webb, 817 F.3d 867 (4th Cir. 2016); Johns v. Pluckers, Inc., 2017 WL 4326359, *4 (W.D. Tex. Sept. 29, 2017); Spirit Airlines, Inc. v. Maizes, 2017 WL 4155476, *3 (S.D. Fla. Sept. 19, 2017); Shore v. Johnson & Bell, 2017 WL 714123, *2 (N.D. Ill. Feb. 22, 2017); Dent v. Encana Oil & Gas, 166 F. Supp. 3d 1210, 1213 (D.

Colo. 2016); Hedrick, 186 F. Supp. 3d 1189, 1195 (D. Kan. 2016); Henderson v. U.S Patent Commission, Ltd., 188 F. Supp. 3d 798, 802 (N.D. Ill. 2016); Wells Fargo Advisors, L.L.C. v. Tucker, 195 F. Supp. 3d 543, 547 (S.D.N.Y. 2016); Rossi, 2016 WL 524253, *8. (E.D.N.Y. Jan. 28, 2016); Prowant, 209 F. Supp. 3d 1295, 1310 (N.D. Ga. 2016). Other litigants should be spared the years that the parties in this case have spent litigating the "who decides" issue, which has left them without a decision on the merits of their claims for unpaid overtime more than seven years after they were filed. This Court should now answer the question that it left open in Oxford Health and make a determination on the "who decides" issue once and for all.

III. The Third Circuit's Decisions in Opalinski I and II are Wrongly Decided

As explained in greater detail in Plaintiffs' opening petition, the Third Circuit's decision in Opalinski II merely compounded the error that the court had earlier made in Opalinski I, improperly relying upon Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010), for the proposition that the availability of class-wide relief is a question of arbitrability, despite the fact that this Court explicitly noted in Oxford Health that its opinion in that case did not decide the question.[10]

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[10] The Third Circuit also erred in Opalinski II in rejecting Plaintiffs' argument that the parties' agreement had delegated authority to determine the availability of class-wide arbitration to the arbitrator, because the agreement had incorporated the

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Indeed, the Supreme Court of California's recent decision in Sandquist v. Lebo Automotive, Inc., 1 Cal. 5th 233 (Cal. 2016), while decided under California state law, set forth the roadmap for finding that the availability of class arbitration is presumptively for the arbitrator to decide where the parties' agreement does not expressly address this question, that this Court should now follow.

First, the Sandquist court held that it should consider the parties' likely expectations about allocation of responsibility, noting that "referring preliminary issues to the courts can cause serious delay and confusion, thus robbing the arbitration procedure of much of its value to the parties." Id. at 247. The court held that this factor weighed in favor of arbitration because it would not assume that the parties "expected or preferred a notably less efficient allocation of decisionmaking authority." Id.

Next, the court held that it was proper for the arbitrator to presumptively decide because all doubts should be resolved in favor of arbitration." Id. And lastly, the court held that where, as here, the arbitration agreement is a contract of adhesion, it should

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AAA Rules. See Plaintiffs' Opening Petition, p. 22 n. 16. The Third Circuit rejected this argument on the ground that the AAA Supplementary Rules did not exist when the parties entered into these agreements in 2001 and 2002, but Robert Half still did not change its agreement with Plaintiffs even after these Rules took effect in 2003.

be construed against its drafter. Id. at 247-48.[11]

Each of these arguments apply with equal force to the facts at issue in Opalinski II. Thus, this Court should grant Plaintiffs' petition and, for the reasons stated in the opening petition and herein, should agree with those Circuits which have held that the availability of class-wide arbitration is a question presumptively for the arbitrator to decide.

CONCLUSION

For all the reasons set forth in Petitioner's petition for a writ of certiorari and this Reply, the petition should be granted.

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[11] See also Network Capital Funding Corp. v. Papke, 2017 WL 3097873 (Cal. Ct. App. July 21, 2017), relying upon Sandquist to find that the availability of class arbitration is a question for the arbitrator to decide.

Respectfully submitted,

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