

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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LAMPS PLUS, INC., ET AL., )  
                                  ) Petitioners, )  
                                  ) v. ) No. 17-988  
FRANK VARELA, )  
                                  ) Respondent. )  
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Pages: 1 through 67  
Place: Washington, D.C.  
Date: October 29, 2018

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LAMPS PLUS, INC., ET AL., )

Petitioners, )

v. ) No. 17-988

FRANK VARELA, )

Respondent. )

- - - - -

Washington, D.C.

Monday, October 29, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

ANDREW J. PINCUS, ESQ., Washington, D.C.; on behalf of the Petitioners.

MICHELE M. VERCOSKI, ESQ., Ontario, California; on behalf of the Respondent.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 17-988, Lamps Plus versus Varela.

Mr. Pincus.

ORAL ARGUMENT OF ANDREW J. PINCUS  
ON BEHALF OF THE PETITIONERS

MR. PINCUS: Thank you, Mr. Chief Justice, and may it please the Court:

This Court has repeatedly recognized that the changes brought about by the shift from bilateral arbitration to class action arbitration are fundamental.

The question in this case is what standard a court should apply in determining whether an arbitration agreement authorizes class arbitration.

As a threshold matter, we think it's clear that federal law imposes a minimum standard that must be satisfied in order to permit class arbitration. The Court made that clear in *Stolt-Nielsen*, where it said a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual

1 basis for concluding that the party agreed to  
2 do so.

3 JUSTICE SOTOMAYOR: But don't you make  
4 that determination under state law? I didn't  
5 think the FAA in any way undoes state law,  
6 unless the basis of the state law is directed  
7 only at arbitration, which isn't the case --

8 MR. PINCUS: I don't think --

9 Mr. SOTOMAYOR: Here.

10 MR. PINCUS: -- that's correct, Your  
11 Honor. The clear and unmistakable standard  
12 that was being discussed in the last case is a  
13 -- is a standard that the FAA imposes.

14 JUSTICE SOTOMAYOR: Well, that's a  
15 standard that's basically dicta because there  
16 the parties agree the agreement didn't. So --

17 MR. PINCUS: No, but -- but in First  
18 Options, where the Court adopted that standard,  
19 the Court said that it was the FAA that imposes  
20 the clear and unmistakable requirement before  
21 the -- before --

22 JUSTICE SOTOMAYOR: I -- I --

23 MR. PINCUS: -- an arbitration  
24 agreement may be construed to delegate gateway  
25 issues to the arbitrator.

1           JUSTICE SOTOMAYOR: I -- I do have one  
2 important question for me. You claim there's  
3 jurisdiction for you to appeal this case.

4           Let's assume the plaintiff or the  
5 Petitioner, or I guess it would be the  
6 Respondent here -- either way, that a party who  
7 seeks class arbitration is denied class  
8 arbitration. Can they appeal directly to us?

9           MR. PINCUS: If -- if the case is in  
10 the same posture as this one where the district  
11 court dismissed the action, then -- then the --  
12 the provision that we rely on,  
13 Section 16(a)(3), would provide for an appeal.

14           JUSTICE SOTOMAYOR: So what's good for  
15 the goose is good for the gander?

16           MR. PINCUS: A -- absolutely, Your  
17 Honor. And that's --

18           JUSTICE SOTOMAYOR: All right. So  
19 we're going to be filled with all of these  
20 interim orders denying or granting class  
21 arbitration, as the case may be, because each  
22 losing party will have the opportunity to come  
23 to us and the arbitration won't proceed?

24           MR. PINCUS: Well, it's not just class  
25 arbitration. Today, in the lower courts, when

1 a lower court dismisses a case and grants  
2 arbitration -- in favor of an order granting  
3 arbitration, those -- those cases are  
4 immediately appealable in courts like the Ninth  
5 Circuit, and there are many, many appeals  
6 pending right now in the Ninth Circuit on that  
7 basis.

8 JUSTICE SOTOMAYOR: The courts aren't  
9 staying those cases?

10 MR. PINCUS: Excuse me?

11 JUSTICE SOTOMAYOR: They haven't --

12 MR. PINCUS: Some courts stay them and  
13 some courts don't, Your Honor.

14 JUSTICE BREYER: Why? I mean,  
15 throughout -- again, throughout law, there's  
16 always a fight between making interlocutory  
17 matters immediately appealable, which, if you  
18 do, will often save a lot of money, and waiting  
19 'til the end. And the normal decision here is  
20 wait 'til the end. And then there are  
21 exceptions, mandamus and certifying a question.

22 When we read the statute, it says what  
23 the district court shall do if he is satisfied  
24 that this is arbitrable, shall on application  
25 of one of the parties stay the trial of the

1 action until the arbitration has been had.

2 This judge didn't do it, and you  
3 didn't -- your -- your predecessor didn't ask  
4 him to do it. So this seems like a fluke.  
5 But, if we were to say these are appealable,  
6 it's not only contrary to a very basic  
7 principle of -- of -- of how to run courts, but  
8 it's also, because of that, going to have just  
9 the effect Justice Sotomayor said.

10 MR. PINCUS: Well, a couple of  
11 answers, Your Honor. This -- this case is in  
12 the exact same posture as Randolph, where the  
13 Court made the initial decision that 16(a)(3),  
14 coupled with a dismissal, provides for an  
15 immediate appeal.

16 The Court in Randolph noted that there  
17 was a question about the question that Your  
18 Honor raises, whether it's proper for a  
19 district court to issue a stay or to dismiss  
20 the case, and said that didn't -- that wasn't  
21 briefed, it wasn't a question before the court,  
22 it wasn't going to decide it. This case is in  
23 -- in the same posture.

24 It may be that the Court should take a  
25 case to decide the question whether district

1 courts have the power to dismiss rather than  
2 stay, but the issue is not presented here and  
3 hasn't been briefed here.

4 JUSTICE KAGAN: May I ask, Mr. Pincus,  
5 if you could go back to the -- the substantive  
6 argument?

7 So, in -- in a strange kind of way, it  
8 occurred to me, as Mr. Geysner was speaking,  
9 your position is very similar to Mr. Geysner's.  
10 You both have these very broad -- this very  
11 broad contractual language, right? He had a  
12 broad delegation clause, and you have  
13 contractual language that refers to all  
14 disputes, claims, or controversies in lieu of  
15 any and all suits or other civil legal  
16 proceedings.

17 And -- and what I hear you to be  
18 saying is essentially that you want to say  
19 except for class suits. Is that right?

20 MR. PINCUS: I don't think so, Your  
21 Honor. I -- I think what -- what -- what this  
22 case brings before the Court, as I said, is the  
23 question that Stolt-Nielsen didn't address.  
24 What Stolt-Nielsen said was --

25 JUSTICE KAGAN: Well, I -- I'm --

1 MR. PINCUS: -- silence isn't enough

2 --

3 JUSTICE KAGAN: I'm just thinking as a  
4 -- as a matter first of -- of just contract  
5 law, because he said what we have here is we  
6 can't really believe that the parties agree --  
7 agreed to include a certain set of things. And  
8 -- and I hear you to be saying the same thing.  
9 We can't really believe that the parties agreed  
10 to be speaking of class claims.

11 MR. PINCUS: I think the contractual  
12 language here is actually quite clear. The --  
13 the language you quote -- that Your Honor  
14 quoted is language about what can't be done.

15 There's a provision, and it appears on  
16 pages 24a to 25a of the petition appendix,  
17 that's captioned -- that's headed Claims  
18 Covered by the arbitration provision. And it  
19 says, "The company and I mutually consent to  
20 the resolution of all claims or controversies,  
21 past, present, or future, that I may have  
22 against the company or against its officers" --  
23 and I'll skip some language, blah, blah,  
24 blah -- "or that the company may have against  
25 me. Specifically, the company and I mutually

1 consent to the resolution by arbitration of all  
2 claims that may hereafter arise in connection  
3 with my employment or any of the parties'  
4 rights or obligations arising under this  
5 agreement."

6 So we think the agreement is actually  
7 quite clear. And this isn't a case where we're  
8 asking --

9 JUSTICE KAGAN: Well, it seems to me,  
10 I mean, there's -- there's language that's in  
11 favor of each side's position. The "all  
12 disputes, claims, or controversies," "all suits  
13 or other legal proceedings" goes against you.  
14 You would suggest that "I, me, and my" cuts for  
15 you.

16 You know, I'm -- I'm -- I'm not quite  
17 sure that that's the case, but -- you know,  
18 because it's an agreement between these two  
19 parties about suits, and the question is, what  
20 kind of suits is it about and whether there's a  
21 kind of implicit exception for class claims in  
22 suits.

23 MR. PINCUS: I don't think it's about  
24 an implicit concept -- exception, Your Honor.  
25 In Stolt-Nielsen, the Court said we can't

1 presume from a -- an arbitration -- the fact of  
2 an arbitration agreement that the parties have  
3 agreed to class arbitration because of the  
4 fundamental differences.

5 JUSTICE KAGAN: Yes, but in --

6 MR. PINCUS: And --

7 JUSTICE KAGAN: In Stolt-Nielsen,  
8 there was no contract. There was no agreement.  
9 And, you -- you know, everybody understood  
10 there was a stipulation to the effect that  
11 there was no agreement on this issue and -- and  
12 -- and instead there was just a -- a policy  
13 determination.

14 But, here, there is a contract. And  
15 the question is, what does the contract mean?  
16 Does it mean all disputes, claims, or  
17 controversies? Or does it mean all disputes,  
18 claims, or controversies, except class  
19 disputes, claims, and controversies because we  
20 really think that not -- that the party would  
21 not -- that the party who drafted the contract  
22 would not have agreed to that?

23 MR. PINCUS: Well, I -- I guess I'll  
24 -- there are a couple of questions embodied in  
25 your question, I think. I -- I think --

1 Stolt-Nielsen, there was an agreement. The  
2 parties agreed that the agreement didn't speak  
3 to the question of class arbitration.

4 We think this agreement too doesn't  
5 speak to the question of class arbitration.

6 JUSTICE KAGAN: Well, we would never  
7 say --

8 MR. PINCUS: But -- but --

9 JUSTICE KAGAN: -- that in general. A  
10 general clause usually speaks to the things  
11 inside it. If I say all furniture, it usually  
12 means tables and chairs. If I say all  
13 clothing, it usually means pants and shirts.  
14 And we don't insist that everybody lay out all  
15 the subcategories of things.

16 So this question is here you have an  
17 overall, you know, term, "disputes, claims, or  
18 controversies." Why wouldn't you include class  
19 disputes, claims, or controversies, unless  
20 there's some kind of special contractual  
21 interpretive rule coming in that we wouldn't  
22 apply in other contexts?

23 MR. PINCUS: Well, we think  
24 Stolt-Nielsen said that there is a special  
25 contractual rule and -- and that there are --

1 there are two possibilities there.

2 We think the most sensible rule is to  
3 apply the clear and unmistakable standard  
4 because of the fundamental change that arises  
5 from class arbitration to -- from bilateral  
6 arbitration to class arbitration.

7 One of the -- one --

8 JUSTICE SOTOMAYOR: Now we're creating  
9 a federal common law --

10 MR. PINCUS: Well --

11 JUSTICE SOTOMAYOR: -- something we're  
12 loathe to do in virtually every other context?

13 MR. PINCUS: Well --

14 JUSTICE SOTOMAYOR: I think --

15 MR. PINCUS: -- just --

16 JUSTICE SOTOMAYOR: -- we were very  
17 clear that it's a matter of contract and state  
18 law controls that.

19 MR. PINCUS: I -- I think the Court  
20 has not been clear, Your Honor. Again, First  
21 Options specifically says that, although  
22 contractual interpretation is generally a  
23 question of state law, in this context, the  
24 court created, based on the FAA, a special  
25 interpretive rule that said --

1 JUSTICE SOTOMAYOR: That's really  
2 interesting.

3 MR. PINCUS: -- clear --

4 JUSTICE SOTOMAYOR: Where does the FAA  
5 give us that right?

6 MR. PINCUS: The Court many years ago  
7 in Moses Cone said there was another  
8 contractual rule, which says that close  
9 questions about arbitrability should go to  
10 arbitrability because of the policy embodied in  
11 the FAA.

12 JUSTICE BREYER: Look, I want you to  
13 finish that. Are you finished?

14 MR. PINCUS: Well, I was just going to  
15 respond to Justice Sotomayor's question about  
16 where the -- where that comes from in the FAA.

17 And I think it comes from Section 4 of  
18 the FAA. What the Court has said and what the  
19 Court said both in First Options and in  
20 Stolt-Nielsen where the Court made this exact  
21 same point about the general rule being federal  
22 -- being state law, but there being an FAA  
23 overlay, is that it comes from the requirement  
24 in Section 4 that the parties be directed to  
25 proceed to arbitration in accordance with the

1 terms of the agreement.

2 And I think in both contexts what the  
3 Court has said is that this is to find -- to be  
4 sure that it is the terms of the agreement in  
5 this special case.

6 In the -- in the case addressed by  
7 First Options, the gateway issues, the concern  
8 is this is a delegation of very broad power to  
9 the arbitrator, and, therefore, there should be  
10 certainty that the parties are delegating that  
11 party -- power to the arbitrator.

12 Here, again, delegation of  
13 extraordinarily broad power to the arbitrator,  
14 as this Court has discussed in a number of  
15 opinions about class arbitration, therefore, we  
16 think the same test should apply.

17 JUSTICE BREYER: All right.

18 JUSTICE SOTOMAYOR: So is your -- I'm  
19 sorry.

20 JUSTICE BREYER: No, you go ahead.

21 JUSTICE SOTOMAYOR: Is your position  
22 that the decision below was right on state law?  
23 Basically, you're not quarrelling that this  
24 contract was ambiguous, that it was susceptible  
25 to the meaning Petitioner -- that Respondent

1 gave it, and that under California law, that  
2 would encompass this claim because they weren't  
3 the drafters?

4 Is your position now that federal  
5 common law is superseding state law --

6 MR. PINCUS: Well, I -- I think our  
7 position --

8 JUSTICE SOTOMAYOR: -- on how to  
9 interpret a contract?

10 MR. PINCUS: -- I think our position  
11 has consistently been that our -- our principal  
12 argument is that there is a federal rule that  
13 Stolt-Nielsen identified --

14 JUSTICE SOTOMAYOR: I -- I asked you a  
15 different question.

16 MR. PINCUS: And our position on -- on  
17 California law is we think that the lower court  
18 did wrongly apply California law and applied it  
19 in a way to reach a result, and -- and we point  
20 to the two California court of appeals -- court  
21 --

22 JUSTICE KAGAN: Okay.

23 MR. PINCUS: -- of appeal decisions.

24 JUSTICE KAGAN: But if I got you  
25 right, your said your principal position is

1 that there's a federal rule that would come in  
2 even if the California courts got California  
3 law right, and that in many cases analogous to  
4 this, you would have read this contract to  
5 include both class claims and individual  
6 claims.

7 MR. PINCUS: Well --

8 JUSTICE KAGAN: It's really a federal  
9 rule that you're asking for.

10 MR. PINCUS: We -- we are advocating a  
11 federal rule. I -- I would say that the Court  
12 looks at the cases cited in our petition,  
13 there's no court applying -- looking at the  
14 issue de novo rather than at an arbitrator's  
15 decision that has construed language like this  
16 to encompass class arbitration.

17 JUSTICE KAGAN: Right. You know, I  
18 guess I gave you a bunch of reasons why, in  
19 looking at a normal contract, under normal  
20 contractual principles, you might think that  
21 all this extremely general language included  
22 everything inside it. But you're saying, no,  
23 even if you think that, there's a federal law  
24 that comes into play.

25 MR. PINCUS: Just -- just, Your Honor,

1 as in the case of the question of whether a  
2 contract delegates arbitrability to the  
3 arbitrator. If the state -- relevant state law  
4 would construe the clause to delegate to -- --  
5 to -- would construe the contract to make that  
6 delegation, what First Options says is, no,  
7 that's not enough.

8 JUSTICE KAGAN: Right. I'm not --

9 MR. PINCUS: We have to have clear and  
10 unmistakable language.

11 JUSTICE KAGAN: I'm just trying to get  
12 a handle on what you're saying.

13 MR. PINCUS: Yes.

14 JUSTICE KAGAN: So -- so you're saying  
15 it's a federal rule. So I guess my question  
16 is, where does the federal rule come from?

17 MR. PINCUS: I think it comes from  
18 exactly the same place as the First Options  
19 rule and -- and from the discussion of this  
20 very issue in Stolt-Nielsen. It's -- it's  
21 constructive to look at Stolt-Nielsen.

22 I -- I understand, Your Honor, that --  
23 that -- that Stolt-Nielsen didn't decide the  
24 content of the standard, but Stolt-Nielsen  
25 talked about the fact that interpretation of an

1 arbitration agreement is generally a matter of  
2 state law, and went on to talk about the fact  
3 that the critical question in the FAA is that  
4 contracts be interpreted according to their  
5 terms, pointing to the language in Section 4,  
6 and it concluded, it said, from these  
7 principles it follows that a party may not be  
8 compelled under the FAA to submit to class  
9 arbitration unless there is a contractual basis  
10 for concluding the party agreed to do so. It  
11 didn't --

12 JUSTICE KAGAN: Quite right.

13 MR. PINCUS: It didn't --

14 JUSTICE KAGAN: So Stolt-Nielsen  
15 said -- but Stolt-Nielsen was a case where  
16 there clearly -- where the Court specifically  
17 said there was no intent of the parties, there  
18 was no agreement as to the particular issue in  
19 front of it.

20 So, in my hypothetical where the --  
21 the -- the court is saying: Well, under state  
22 law, we would interpret this to understand that  
23 there was an intent of the parties and that  
24 there was an agreement as to this question,  
25 you're saying, notwithstanding that

1 Stolt-Nielsen said that we didn't decide that  
2 question, that a federal rule comes into play.

3 And I guess I'm going to ask the same  
4 question because I don't think it comes from  
5 Stolt-Nielsen, where there was no agreement at  
6 all. So where does the federal rule come from?

7 MR. PINCUS: I think it comes from the  
8 same place that the Moses Cone presumption  
9 comes from and the First Options presumption,  
10 the rule of clear and unmistakability comes  
11 from, and the Howsam rule of clear and  
12 unmistakable requirement comes from, which is  
13 Section 4.

14 What the Court has said is, with  
15 respect to some critical questions, it wants --  
16 there is a federal rule of decision that comes  
17 from Section 4 to make certain that the  
18 authority delegated to the arbitrator has, in  
19 fact, been delegated.

20 JUSTICE KAVANAUGH: You're --

21 JUSTICE KAGAN: See, I thought -- go  
22 ahead.

23 JUSTICE KAVANAUGH: Go ahead.

24 JUSTICE KAGAN: Please.

25 JUSTICE KAVANAUGH: You're saying if

1 -- even if it's a questionable interpretation  
2 of that statutory language, again, similar to  
3 the last case with Justice Kagan's question,  
4 the precedent, the ship has sailed?

5 MR. PINCUS: Well, I --

6 JUSTICE KAVANAUGH: In Stolt-Nielsen  
7 --

8 MR. PINCUS: -- think the ship has  
9 certainly sailed --

10 JUSTICE KAVANAUGH: In Stolt-Nielsen,  
11 at least you're saying the ship's a long way --  
12 a long way off --

13 MR. PINCUS: I think --

14 JUSTICE KAVANAUGH: -- because --

15 MR. PINCUS: I think --

16 JUSTICE KAVANAUGH: -- because

17 Stolt-Nielsen said that you needed something on  
18 the order of express language or indicated or  
19 hinted at least is what you're saying here?

20 MR. PINCUS: I -- I think it's  
21 impossible to read the discussion on  
22 Stolt-Nielsen on pages 681 to 685 and conclude  
23 anything other than the fact that the court  
24 concluded there that there was a federal rule  
25 of interpretation that it didn't have to flesh

1 -- it said at Footnote 10, in fact, we don't  
2 have to decide what that standard is because --

3 JUSTICE KAGAN: Because the only  
4 federal rule was that it needed to be based on  
5 an agreement of the parties, because it said  
6 arbitration is a matter of consent, and that's  
7 all over the Arbitration Act.

8 But the question of how to understand  
9 whether parties have consented, that's usually  
10 a question of state law.

11 MR. PINCUS: Except --

12 JUSTICE KAGAN: And you are saying a  
13 federal rule should come in and say,  
14 notwithstanding state law saying that these two  
15 parties have agreed to something, the federal  
16 rule under the Arbitration Act says no.

17 MR. PINCUS: Well --

18 JUSTICE KAGAN: And usually what the  
19 Federal Arbitration Act does is it -- it surely  
20 does come into play when you're afraid that the  
21 state law is discriminating against arbitration  
22 agreements.

23 But where there is no such concern --  
24 and I don't think that there is such a concern  
25 if the state -- if the state courts just say

1 we're going to treat general language as  
2 including everything inside it -- then I don't  
3 see where the federal law comes into play to  
4 create a different contract interpretive rule.

5 MR. PINCUS: Well, First Options and  
6 Howsam were not concerned with discrimination.  
7 They were concerned with being certain that  
8 when significant power is being assigned to the  
9 arbitrator, that the -- that there be clear and  
10 unmistakable indication that that was the  
11 parties' intent.

12 JUSTICE GINSBURG: How can that -- how  
13 can there be clear and unmistakable here?  
14 Let's take Concepcion, where the concern was  
15 that these arbitration agreements supposedly  
16 based on consent were adhesion contracts, and  
17 Concepcion said the court -- the court said  
18 that the states remain free to take steps  
19 addressing concerns attending adhesion  
20 contracts. One such step would be to require  
21 that the class action waiver provision in  
22 adhesion agreements be highlighted. But here  
23 we don't even have a waiver provision.

24 So Concepcion suggests waiver should  
25 be highlighted so the party subjected to it

1 will understand that. And here you're asking  
2 us to declare clear -- clear and certain, a  
3 provision that doesn't say class action -- we  
4 waive class actions.

5 MR. PINCUS: Well, this -- this might  
6 be a different case if the question were  
7 whether class actions are excluded from the  
8 agreement. And my friends haven't argued that.  
9 This -- the -- the question here is whether  
10 this extraordinary procedure called class  
11 arbitration is going to be authorized.

12 And -- and so I think there the  
13 question where we're talking about whether to  
14 delegate that power to the arbitrator does  
15 raise exactly the same concerns that motivated  
16 the Court in these -- in these other contexts.

17 JUSTICE BREYER: Can -- can I go back  
18 for a second to the procedural problem? You --  
19 you're plaintiff and you bring a case, and you  
20 say, Judge, I want you to send this to  
21 arbitration, right? And the other side says,  
22 no, Judge, we want you to decide the issue.

23 That's a normal case. And many, many  
24 cases like that will have difficult issues,  
25 like the one before us.

1           And so Section 3 of the arbitration  
2 agreement seems to say what the judge is  
3 supposed to do. Judge, if you think -- stay  
4 the trial, send it to arbitration, if you think  
5 that's the result. By the way, Judge, if you  
6 think there's a tough issue in this case, you  
7 can always certify it. And if one of the  
8 parties thinks there's a tough issue and you  
9 won't certify it, they can always ask for  
10 mandamus. That's like a million cases. And  
11 this is one of them.

12           So, if the judge makes a mistake and  
13 writes the word "dismissal" or if one of the  
14 parties would really like to appeal even though  
15 the judge has no reason for it, they can say,  
16 Judge, write "dismiss"; and then he writes  
17 "dismiss" and then suddenly it becomes  
18 appealable? I mean, you say, well, that's  
19 never been decided. I'd say, all right, but  
20 that's a threshold issue; maybe then we should  
21 DIG the case.

22           MR. PINCUS: Well, the -- the Court  
23 did decide the issue in Randolph. And -- and  
24 Randolph was in the -- the same posture here,  
25 where there was an order --

1 JUSTICE BREYER: Well, maybe we got it  
2 wrong.

3 MR. PINCUS: -- on arbitration.

4 JUSTICE BREYER: Maybe it wasn't fully  
5 argued and --

6 MR. PINCUS: Well, I think --

7 JUSTICE BREYER: -- and then I just  
8 don't see why we should treat this area of the  
9 law when here, unlike the other areas, there is  
10 Section 3.

11 Why should --

12 MR. PINCUS: Your Honor --

13 JUSTICE BREYER: -- we treat it  
14 differently and suddenly reach a tough issue  
15 when the statute seems to say don't?

16 MR. PINCUS: Well, a couple of -- a  
17 couple of answers. I -- I think it's important  
18 for the Court to reach the issue here because  
19 the reality is, if a case is sent to class  
20 arbitration, it almost certainly is going to  
21 settle.

22 The Court has talked a lot about the  
23 coercive -- the -- the --

24 JUSTICE BREYER: That's true.

25 MR. PINCUS: -- inexorable pressure to

1 settle in courts in class litigation. Class  
2 litigation in arbitration is 100 times worse  
3 because the very limited standard of review at  
4 the other end.

5 So the reality is, if all cases were  
6 stayed and the case could never be appealed at  
7 this stage, the question of what the standard  
8 is for deciding whether a contract authorizing  
9 class arbitration is would never be decided.

10 There is a conflict right now in the  
11 courts of appeals about whether dismissal is a  
12 permissible -- is a permissible step after a  
13 court has ordered arbitration or whether a stay  
14 is only permissible.

15 The Court could certainly grant one of  
16 those petitions and decide it. The -- the  
17 irony --

18 JUSTICE GINSBURG: But if that -- if  
19 that were -- were the case, that the district  
20 court has no authority to dismiss, must simply  
21 stay the case in court, would you agree that  
22 that is not a final judgment, there's no  
23 appeal?

24 MR. PINCUS: Well, the Court addressed  
25 this question in Randolph, which, as I say, was

1 in this posture, and said that the fact that --  
2 the -- the question whether the district court  
3 had the power to dismiss, A, was not before it  
4 and did not preclude it from hearing the case.

5 I think if the -- if this Court were  
6 to hold that a stay was -- was the only  
7 permissible option, then, obviously, there  
8 wouldn't be an appeal. But, as I say, there  
9 are many, many cases in which dismissals are  
10 ordered and which there are appeals. And the  
11 irony of this case, frankly, is the shoes are  
12 on the other foot.

13 Typically, what happens is arbitration  
14 is ordered, especially in the Ninth Circuit.  
15 Plaintiffs seek dismissal so they can  
16 immediately appeal the arbitration order. And  
17 in the Ninth Circuit, that's permissible. And,  
18 typically, defendants resist that.

19 So that's just a -- an issue that  
20 is --

21 JUSTICE KAVANAUGH: Can I --

22 JUSTICE SOTOMAYOR: In how many of  
23 those cases -- in how many of those cases is --  
24 in this case, the Respondents did not ask for a  
25 stay, correct?

1 MR. PINCUS: True.

2 JUSTICE SOTOMAYOR: And so the statute  
3 seems permissive. It says if a party asks for  
4 a stay. But there wasn't a request for one,  
5 correct?

6 MR. PINCUS: I believe that's right.

7 JUSTICE SOTOMAYOR: And in those Ninth  
8 Circuit cases, even if there's a request for a  
9 stay --

10 MR. PINCUS: Yes.

11 JUSTICE SOTOMAYOR: -- they hold --

12 MR. PINCUS: The Ninth Circuit takes  
13 the position that the district court has the  
14 option of whether or not to dismiss or stay.

15 JUSTICE SOTOMAYOR: So it then gives  
16 the district court the power to decide what's  
17 appealable or not?

18 MR. PINCUS: Yes.

19 JUSTICE KAVANAUGH: If you just had --  
20 if you just had the statute and not  
21 Stolt-Nielsen or the other precedents you've  
22 cited, in response to Justice Kagan's question,  
23 how would you answer where does it come from?

24 MR. PINCUS: I -- I -- I would still  
25 say that it -- it comes from the language of

1 the statute, which says --

2 JUSTICE KAVANAUGH: Which -- which  
3 language?

4 MR. PINCUS: -- in accordance -- shall  
5 make an order directing the parties to proceed  
6 to arbitration, in accordance with the terms of  
7 the agreement, and that some issues confer some  
8 -- some decisions confer such power on the  
9 arbitrator that federal law -- before federal  
10 law confers that power on the arbitrator,  
11 federal law wants to be very sure that -- that  
12 the parties have intended --

13 JUSTICE GORSUCH: Well --

14 MR. PINCUS: -- that result.

15 JUSTICE GORSUCH: Well, Mr. Pincus,  
16 could one read that same language as suggesting  
17 not that the district court gets the  
18 opportunity to decide the nature of the  
19 arbitration but merely whether there's an  
20 agreement to arbitrate and that procedures like  
21 class or individualized proceedings are not  
22 within the scope of what Section 4 contemplates  
23 and that the error here is really that the  
24 district court shouldn't have gotten in the  
25 business of specifying the procedures that

1 would be followed in arbitration?

2 MR. PINCUS: Well, many -- many  
3 arbitration agreements expressly allocate the  
4 authority to decide this question to the -- to  
5 the arbitrator because it is such -- to the  
6 court, rather, because it's such an important  
7 question.

8 JUSTICE GORSUCH: Well, I understand  
9 that --

10 MR. PINCUS: This -- this case --

11 JUSTICE GORSUCH: -- but that would  
12 then come within the context of the -- of the  
13 statutory language, is there an agreement to  
14 arbitrate. But that's not the language we have  
15 here.

16 MR. PINCUS: No. But the parties  
17 submitted the question to the district court.  
18 I think they essentially agreed that -- that it  
19 was appropriate for the district court to  
20 decide it.

21 JUSTICE KAGAN: One quick one,  
22 Mr. Pincus. You say in your brief that you do  
23 not necessarily argue for a clear statement  
24 rule. You agree that you didn't make that  
25 argument below.

1           So what language, short of a clear  
2 statement, would lead you to conclude that this  
3 agreement was intended to authorize class  
4 arbitration?

5           MR. PINCUS: That it was not intended  
6 to authorize --

7           JUSTICE KAGAN: No --

8           MR. PINCUS: -- class --

9           JUSTICE KAGAN: -- I mean what would  
10 be enough for you to switch your position,  
11 essentially? Like if this -- if this -- if --  
12 you -- you say a clear statement rule isn't  
13 required, but, you know, what -- what kind of  
14 language would say, ah, I can see that the  
15 parties agreed to class arbitration there?

16           MR. PINCUS: If there wasn't the  
17 provision that I read and the -- the agreement  
18 simply said we agree that we can bring any  
19 lawsuits that we could bring against one  
20 another in court. But that's very different  
21 language than there is here, which talks about  
22 claims, which talks about my claims, and the  
23 only place that lawsuits is talked about is the  
24 "in lieu" section, which is basically saying  
25 what you can't do.

1 I'd like to reserve the balance of my  
2 time.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Ms. Vercoski.

6 ORAL ARGUMENT OF MICHELE M. VERCOSKI  
7 ON BEHALF OF THE RESPONDENT

8 MS. VERCOSKI: Yes, Mr. Chief Justice,  
9 and may it please the Court:

10 In this case, were the court within  
11 the appellate jurisdiction and thus properly  
12 before this Court, this Court should rule that  
13 the FAA does not preempt the application of  
14 neutral state contract principles to determine  
15 whether an arbitration agreement permits  
16 arbitration here.

17 CHIEF JUSTICE ROBERTS: Well, the  
18 question really is whether they're neutral  
19 principles. As I understand it, the -- the  
20 argument is that applying these principles has  
21 a peculiar impact on arbitration agreements  
22 since it authorizes a type of arbitration that  
23 is -- is like a poison pill that basically said  
24 in prior cases is fundamentally inconsistent  
25 with arbitration.

1 MS. VERCOSKI: Right. But they have  
2 said in -- in -- in espousing the -- the policy  
3 rule that the default might be bilateral  
4 arbitration. But what gives precedence to that  
5 is, at first and foremost, we have to construe  
6 the contract and give intent to the parties.  
7 And that is consistent with the FAA.

8 And a class arbitration, as to whether  
9 or not that applies in a class arbitration  
10 agreement, is not the same as the issue of  
11 arbitrability and doesn't rise to a special  
12 standard. So what's left is just the  
13 application of contract principles to determine  
14 the parties' intent as to what they applied  
15 with class arbitration.

16 JUSTICE GINSBURG: Nowadays, many  
17 arbitration contracts, many adhesion contracts,  
18 do put in explicit class action waivers. So if  
19 -- let's say you're right. We're not doing  
20 very much, are we, because contracts will  
21 specifically say that class action is waived?

22 MS. VERCOSKI: If that is the case,  
23 Your Honor, and it is clear and explicit that  
24 there is a class action waiver, then, yes, the  
25 parties' intent has to rule out under contract

1 rules.

2 JUSTICE GINSBURG: So if -- if, as I  
3 suggested before, if we say that, then all the  
4 parties who want to arbitrate bilaterally will  
5 simply put in their contract a class action is  
6 waived and the party to that adhesion contract  
7 can't do anything about that.

8 MS. VERCOSKI: They can't do anything  
9 about that if that's clear and unmistakable,  
10 and so we have to give intent to the parties.  
11 And at the same token, if the parties did agree  
12 to proceed with class arbitration, that too  
13 under the FAA would be required to enforce the  
14 parties' intent.

15 JUSTICE GINSBURG: So, here, where the  
16 concern is lawyers that are less than the best  
17 and didn't put in a class action waiver,  
18 those -- those contracts, in those cases, class  
19 arbitration will be permitted?

20 MS. VERCOSKI: Well, it depends on the  
21 language of the -- of the actual agreement.  
22 And to the extent that the terms speak to class  
23 arbitration, even if it's not explicit, we have  
24 to determine the difference between whether  
25 it's silent and whether there's something there

1 that supports a class arbitration, whether or  
2 not it's explicit with the words class  
3 arbitration.

4 And in order to do that, the norm  
5 under the FAA is that we employ neutral  
6 contract interpretation principles, like we  
7 would to all contracts to determine what the  
8 parties' intent was with respect to class  
9 arbitration.

10 CHIEF JUSTICE ROBERTS: Well, but, I  
11 mean, it's, I guess, Justice Jackson's phrase,  
12 I mean, the FAA is not a suicide pact. So, if  
13 the FAA says enforce the contracts according to  
14 its terms, but one of the terms, as our prior  
15 precedents say, is fundamentally inconsistent  
16 with arbitration itself, then, presumably, the  
17 FAA would preclude that term.

18 MS. VERCOSKI: Yes, that would be an  
19 exception to the normal rule because that is  
20 elevated and -- and the FAA had determined  
21 that, first and foremost, that the policy  
22 overrides that we want to enforce arbitration  
23 agreements, to the extent they're ambiguous,  
24 unlike the normal rule, when interpreting  
25 ancillary issues with respect to that

1 agreement, when it comes to arbitration, issues  
2 of arbitrability, the default rule is they are  
3 construed in -- in favor of arbitration. And  
4 that's consistent with the FAA's doctrine.

5 JUSTICE BREYER: The FAA has rules  
6 that govern class arbitration, don't they?

7 MS. VERCOSKI: They do, but it's not  
8 federal common rule that supplants --

9 JUSTICE BREYER: No, no, I'm just  
10 saying this is an arbitration association and  
11 the arbitration association has rules governing  
12 class arbitration, so they must not see class  
13 arbitration as a poison pill. They must think  
14 that class arbitration has a place at least in  
15 some cases.

16 MS. VERCOSKI: Correct, to the extent  
17 that the parties did agree to -- to do so. And  
18 that agreement has to --

19 CHIEF JUSTICE ROBERTS: Well, I  
20 thought the --

21 MS. VERCOSKI: -- be enforced.

22 CHIEF JUSTICE ROBERTS: I thought  
23 those same rules specify that the rules  
24 themselves do not provide a basis for assuming  
25 there's class arbitration.

1 MS. VERCOSKI: There's no assumption  
2 one way or the other. What happens is that the  
3 courts have to construe based on state contract  
4 law principles that determine what the  
5 objective intent was of the parties at the time  
6 of enforcing the agreement. And the plain  
7 terms are given -- the -- the terms of the  
8 contract are given their plain and ordinary  
9 meaning. And that -- that is the first step.

10 JUSTICE GORSUCH: Counsel, if -- if  
11 this is enough, this contract under ordinary  
12 and plain state law principles where it often  
13 in the text speaks of my claims and me and I --

14 MS. VERCOSKI: Right.

15 JUSTICE GORSUCH: -- if -- if that's  
16 enough, what do we do with the due process  
17 problem that Justice Alito pointed out in  
18 Oxford Health where you would have potentially  
19 class members purportedly bound by an  
20 arbitration, this is in a court of law, where  
21 we can adjudicate absent class members rights  
22 consistent with the Fourteenth Amendment  
23 because of the procedural protections  
24 associated with court proceedings.

25 What do we do about those absent class

1 members in opt-out classes permitted by  
2 whatever arbitrable forum's rules prevail?

3 MS. VERCOSKI: Well, first of all, the  
4 -- the policy issues with respect to due  
5 process are outside of the question presented.  
6 But even if this Court were to consider those,  
7 this is an antecedent --

8 JUSTICE GORSUCH: Should --

9 MS. VERCOSKI: -- question.

10 JUSTICE GORSUCH: -- we -- should we  
11 ignore them in considering the impact here of  
12 the Arbitration Act and normal contract  
13 principles and whether normal contract  
14 principles would abide due process, for  
15 example?

16 MS. VERCOSKI: The -- the -- to the  
17 extent that due process concerns come into  
18 play, that's at a much later stage of the game.  
19 What is at issue here --

20 JUSTICE GINSBURG: Well, what happens  
21 --

22 MS. VERCOSKI: -- is we simply have a  
23 --

24 JUSTICE GINSBURG: -- in the -- in the  
25 arbitration? So suppose it's a class. If it

1 were in court, there would be notice to all the  
2 class members.

3 Would that have to be done in the  
4 arbitration, notice -- give notice to everyone  
5 who was within the class?

6 MS. VERCOSKI: Right. So, at first,  
7 with our agreement here, the court, the  
8 district court just found that the agreement  
9 provides for a class arbitration and -- and  
10 goes to the arbitrator to determine whether or  
11 not that will ultimately be certified.

12 So the antecedent question of the  
13 court finding that the agreement here provides  
14 language that encompasses and anticipates and  
15 allows the parties to go forward with  
16 arbitration, which will now go to the  
17 arbitrator to decide, and they are subject to  
18 the same exact rules as a court of law when  
19 determining whether or not they're going to  
20 certify that class.

21 JUSTICE ALITO: But do you think --

22 MS. VERCOSKI: And --

23 JUSTICE ALITO: -- that -- that absent  
24 class members who didn't agree to arbitration  
25 could be bound by the decision of the

1 arbitrator?

2 MS. VERCOSKI: Yes, they can.

3 JUSTICE ALITO: How?

4 MS. VERCOSKI: Because down -- if they  
5 do decide to certify the class, they could  
6 employ the same due process protections, such  
7 as opt-out procedures. And at that point, an  
8 absent class member will have the opportunity  
9 to opt out. Or they can limit it to an opt-in  
10 proceeding. And at the end of the day, the --  
11 when the arbitrator does make that decision,  
12 there is a review process.

13 JUSTICE ALITO: Well, if they have a  
14 legal claim, how can they be deprived of their  
15 legal claim pursuant to an arbitration award if  
16 they never agreed to arbitration? I thought  
17 arbitration was a matter of contract.

18 MS. VERCOSKI: Well, in the first  
19 instance, it's a matter of contract right as to  
20 whether or not the contract actually will  
21 permit the proceedings.

22 Now the -- the arbitrator might get  
23 that issue and decide it doesn't meet the  
24 threshold. There is no way to certify the  
25 class. So then we're back to individual

1 arbitration.

2           So that's why this is a very premature  
3 question. And due process concerns are not  
4 related to the antecedent question as to  
5 whether or not construing this particular  
6 arbitration agreement by the court, all -- all  
7 she's saying is not ultimately that it is  
8 certifiable. She's just saying that it is --  
9 the contract does support that the issue of  
10 whether or not the class can be certified goes  
11 to the arbitrator for ultimate decision.

12           So the due process concerns are not  
13 involved in the first instance in just a strict  
14 contract interpretation. There are no  
15 decisions made on absent class members or who  
16 they will be. That's --

17           JUSTICE ALITO: Suppose -- I'm sorry.

18           MS. VERCOSKI: No, that's okay.

19           JUSTICE ALITO: Excuse me.

20           MS. VERCOSKI: That's just an issue  
21 that's resolved later on down the road. And  
22 it's the same issues that apply in a court of  
23 law that would apply in an arbitration, the  
24 same exact protections.

25           And then they have the built-in review

1 process where there's a partial final decision  
2 made by the arbitrator that can be appealable  
3 by either side depending on the outcome.

4 CHIEF JUSTICE ROBERTS: Well, under an  
5 extraordinarily deferential standard of review.

6 MS. VERCOSKI: For the arbitrator,  
7 yes, for -- for their decision on class  
8 arbitration. But like in this case, the order  
9 in the first instance by the district court  
10 finding that the actual agreement did  
11 contemplate class proceedings to be given to an  
12 arbitrator -- an arbitrator to decide whether  
13 or not class -- class certification is  
14 appropriate, those two orders would be combined  
15 and the deferential standard --

16 JUSTICE SOTOMAYOR: So why did you let  
17 --

18 MS. VERCOSKI: -- would apply.

19 JUSTICE SOTOMAYOR: So why did you let  
20 the court decide that issue?

21 MS. VERCOSKI: We wanted the court to  
22 decide the issue because, in the beginning, we  
23 were also questioning the issue of  
24 arbitrability as to whether or not the data  
25 breach claims that we were alleging even fell

1 within the -- in the scope of the arbitration  
2 agreement. And the issue of arbitrability was  
3 decided --

4 JUSTICE SOTOMAYOR: Well, it seems to  
5 me --

6 MS. VERCOSKI: -- below.

7 JUSTICE SOTOMAYOR: I'm not quite sure  
8 why you did what you did, but it seems to me  
9 that that would have been clearly for the  
10 arbitrators under the terms of this contract  
11 because it's related to -- it --

12 MS. VERCOSKI: The arbitrator -- yes,  
13 the agreement at issue definitely did have a  
14 delegation clause that gave the ability for the  
15 arbitrator to decide these decisions. When it  
16 was filed in district court on behalf of Frank  
17 Varela, the issues of -- it wasn't just the  
18 class --

19 JUSTICE SOTOMAYOR: You know --

20 MS. VERCOSKI: -- issue involved.

21 JUSTICE SOTOMAYOR: -- class action is  
22 a procedural process.

23 MS. VERCOSKI: Correct.

24 JUSTICE SOTOMAYOR: And, in my mind,  
25 that quintessentially is always an arbitrator's

1 question, what -- when you hold the hearings,  
2 how you hold them, where. All of those things  
3 are typically arbitrator decisions. So it  
4 seems to me that under normal circumstances you  
5 wouldn't have a court decide that, so I think  
6 Justice -- Justice Gorsuch's earlier point, but  
7 here instead you chose the court to make that  
8 decision.

9 MS. VERCOSKI: Right. Both parties  
10 did. Nobody objected.

11 JUSTICE GORSUCH: And what is the  
12 context of that then? So the court says that I  
13 order class arbitration. Is the arbitrator  
14 bound by that? If the arbitrator finds that  
15 the rules are -- are not met in -- under the  
16 FAA rules that are required for class actions,  
17 can -- is he -- is he forbidden from proceeding  
18 with individualized proceedings nonetheless?

19 Does he -- is he forbidden from  
20 engaging in the normal kind of inquiry as to  
21 whether a class would be superior or preferable  
22 in some way than I assume the FAA rules have  
23 some -- some analogue to?

24 MS. VERCOSKI: They do. So the rules  
25 incorporated within --

1 JUSTICE GORSUCH: So -- so is -- is  
2 the arbitrator forbidden from making those  
3 inquiries by this ruling?

4 MS. VERCOSKI: It -- the way that the  
5 JAMS and the AAA class arbitration issues are  
6 drafted, they say that whether a court decided  
7 the threshold issue as to whether the contract  
8 provided a basis to permit the class -- to --  
9 to permit the parties to go on a class  
10 arbitration basis, that doesn't stop the  
11 inquiry.

12 So it -- it appears from the rules  
13 that the arbitrator has to give deference to  
14 that initial threshold ruling, but that doesn't  
15 mean that they have to ultimately certify the  
16 class.

17 JUSTICE GORSUCH: So -- so --

18 MS. VERCOSKI: It doesn't mean the --

19 JUSTICE GORSUCH: Why are we bothering  
20 with it then? I mean, if at the end of the day  
21 we're going to have this large dispute in  
22 district court over whether the contract  
23 permits this or that procedure, I mean, are we  
24 going to have disputes over whether it permits  
25 discovery? And that's a contract issue that

1 the parties negotiated? Other kinds of  
2 procedures that might be allowed or disallowed  
3 in a -- in an arbitration proceeding? It seems  
4 like a lot of collateral expense and -- and  
5 difficulty that seems kind of a little  
6 inconsistent with the idea of getting to  
7 arbitration quickly and that the district court  
8 proceedings are supposed to be summary. Help  
9 me out with that.

10 MS. VERCOSKI: Right, if you're  
11 expanding it to issues beyond class arbitration  
12 and including them --

13 JUSTICE GORSUCH: Well, you expand it  
14 beyond the question of -- up -- thumbs up or  
15 down on arbitration.

16 MS. VERCOSKI: Right, and --

17 JUSTICE GORSUCH: To --

18 Ms. Vercoski: -- what --

19 JUSTICE GORSUCH: To what kind of  
20 procedures that arbitration might address.

21 MS. VERCOSKI: Right. That -- that  
22 can go to a court if the -- if the parties  
23 submitted to that. And I don't think it's a  
24 long, extensive proceeding. It's -- it's done  
25 on a motion to dismiss --

1 JUSTICE GORSUCH: Well, here we are.

2 (Laughter.)

3 MS. VERCOSKI: I know. Well, we --  
4 because we shouldn't have been here, there  
5 should have been no appeal. There was  
6 absolutely no right to appeal. It should have  
7 went right to the arbitrator.

8 JUSTICE SOTOMAYOR: But wait a minute.  
9 Why did you not ask for a stay?

10 MS. VERCOSKI: We did not ask for a  
11 stay at the time because we were ready to go  
12 and for expediency and --

13 JUSTICE SOTOMAYOR: Yeah --

14 MS. VERCOSKI: -- to get the benefits.

15 JUSTICE SOTOMAYOR: So you -- you --

16 MS. VERCOSKI: So -- so we were fine  
17 proceeding on a class basis and were ready to  
18 go to arbitration. Lamps Plus fought that and  
19 issued a stay because they didn't agree with  
20 the way -- they didn't get the -- what they  
21 wanted in asking for the order to compel --  
22 compel arbitration.

23 JUSTICE GINSBURG: Suppose that you --

24 MS. VERCOSKI: They got -- they got  
25 their order compelling it, but they -- they

1 didn't like that it wasn't limited to an  
2 individual basis.

3 JUSTICE GINSBURG: Suppose you --  
4 suppose the district court dismissed your court  
5 claims and then ordered bilateral arbitration.  
6 Would you have an appeal?

7 MS. VERCOSKI: I would not. It would  
8 be interlocutory, and it would be barred by FAA  
9 Section 16.

10 JUSTICE GINSBURG: Where you would be  
11 stuck with what -- whatever the -- if the court  
12 said bilateral, you have no appeal; if it says  
13 class action, the other side, you say also has  
14 no appeal?

15 MS. VERCOSKI: On that particular  
16 issue alone in that order, isolated, looking at  
17 the order to compel arbitration, yes, I  
18 wouldn't have a basis. But if it was ordered  
19 in conjunction with an order dismissing my  
20 claims on a -- with -- on prejudice or without  
21 prejudice, then that would be a final ruling  
22 against me that would be an grievance to my  
23 -- to my client.

24 JUSTICE GINSBURG: But --

25 CHIEF JUSTICE ROBERTS: Under -- under

1     Randolph?

2                   MS. VERCOSKI:  But you would have a  
3     final -- under Randolph.  That would -- I would  
4     fit with -- with under Randolph and I would  
5     have a basis because that motion to dismiss  
6     would be final and allow me to appeal under  
7     16(a)(3) under the FAA, and the basis for that  
8     would be the incorrect ruling on the -- the  
9     district court ordering me into -- to compel  
10    arbitration.  So I would have a basis for that.

11                   Unlike Lamps Plus, they could not turn  
12    a non-appealable issue all the way into an  
13    appealable issue because they're the ones who  
14    asked the court to order the -- the dismissal  
15    of my client's claims.

16                   Initially, they did it with prejudice  
17    below, and they got it without prejudice.  And  
18    if that were a stay instead like, arguably, the  
19    FAA requires under Section 3, that if you are  
20    ordering the claims to proceed to -- to  
21    arbitration, it should -- actually, the  
22    language says it "shall" issue a stay instead  
23    of a dismissal without prejudice.

24                   But, if we have the stay, it wouldn't  
25    be a final order.  But if -- if it were

1 reversed and I had -- I was challenging the  
2 order compelling arbitration in -- in  
3 conjunction with a final order dismissing my  
4 claims, I would be aggrieved because now I'm --  
5 I'm out of those claims.

6 JUSTICE KAVANAUGH: Counsel --

7 JUSTICE ALITO: So, if there's a  
8 contract between two businesses, and business A  
9 drafts the contract, business B accepts the  
10 contract, there's nothing in the contract about  
11 arbitration, but a state court -- but it -- it  
12 turns out that A, which -- the party that  
13 drafted the contract, doesn't want arbitration.  
14 B, the party that did not draft the contract,  
15 does want arbitration. There's no -- no  
16 arbitration clause in the contract. But the  
17 state court says contra proferentem, this goes  
18 to arbitration; that's state law.

19 Would that be permitted?

20 MS. VERCOSKI: That the -- that it  
21 would err on the side of not finding for  
22 arbitration because it would be construed  
23 against the drafter who was --

24 JUSTICE ALITO: It would err on the  
25 side of --

1 MS. VERCOSKI: -- doing the proposing?

2 JUSTICE ALITO: -- finding arbitration  
3 because the -- the -- it was -- it was drafted  
4 by the party that objects to arbitration.

5 MS. VERCOSKI: So, in that case, there  
6 is a special rule under the FAA that, instead  
7 of construing it against a drafter, the FAA  
8 trumps that situation where you have to  
9 construe it in favor of arbitrability.

10 JUSTICE BREYER: This is --

11 JUSTICE ALITO: This is -- this would  
12 be a decision in favor of arbitrability.

13 MS. VERCOSKI: Right.

14 JUSTICE ALITO: So what's the  
15 difference between that situation and the  
16 situation here?

17 MS. VERCOSKI: Well, the -- there was  
18 a decision issuing a --

19 JUSTICE ALITO: In other words, if  
20 state law -- if state law governs, that's the  
21 decision under state law in this hypothetical,  
22 there must be arbitration even in the absence  
23 of any arbitration clause whatsoever. That's  
24 state law.

25 So that would be -- would that be

1 consistent with the -- allowed under the FAA?

2 MS. VERCOSKI: It would be --

3 JUSTICE ALITO: And if not, doesn't  
4 that show that the FAA imposes some rules that  
5 super -- that supersede state law?

6 MS. VERCOSKI: Right. Well, if it's  
7 consistent with the way the state law came out  
8 and found in favor of arbitration, then it  
9 wouldn't be in conflict with the FAA.

10 JUSTICE BREYER: Here is the problem  
11 like that that I'm having: All that you have  
12 in the California law, all we have here is the  
13 contract says in lieu of any and all lawsuits  
14 we're going to have arbitration. Okay?

15 And then it says claims will be  
16 arbitrated if there are claims that would have  
17 been available as a matter of law. Nothing  
18 other than that. And --

19 MS. VERCOSKI: In the contract at  
20 issue?

21 JUSTICE BREYER: And -- in the  
22 contract at issue, I gather. And -- and then,  
23 on the basis of that, California, unlike most  
24 places, which insist on more than that to  
25 create ambiguity, say that's enough to create

1       ambiguity and, therefore, we have class  
2       arbitration.

3               Now what is my problem? I dissented  
4       in Stolt-Nielsen. I think I did.

5               (Laughter.)

6               JUSTICE BREYER: I'm not sure. But I  
7       lost. If I did, I lost. And what the majority  
8       said was you cannot infer class authorization  
9       solely from the fact of the parties' agreement  
10      to arbitrate.

11              So, on the merits, what they're saying  
12      is, hey, that's all you have here. And  
13      California says that's -- they have a special  
14      rule, unlike any other place, that's enough to  
15      create ambiguity and ambiguity against the  
16      drafter.

17              Well, if that's enough to create  
18      ambiguity and ambiguity against the drafter,  
19      then we have what Stolt-Nielsen says you  
20      shouldn't have. Now I could say we should  
21      overrule Stolt-Nielsen. I think I won't get  
22      too far.

23              (Laughter.)

24              MS. VERCOSKI: Uh-huh.

25              JUSTICE BREYER: And so we have the

1 case right there with the language. We have  
2 the California language in the contract. And  
3 we have a special rule --

4 MS. VERCOSKI: Right.

5 JUSTICE BREYER: -- which is their  
6 right, I guess, that we find ambiguity there,  
7 though the textbooks say don't, okay?

8 So that's the main point on the merits  
9 as I see it. And I'm asking the question  
10 because I want to know your response.

11 MS. VERCOSKI: Well, first of all, in  
12 Stolt-Nielsen, they did not interpret the  
13 agreement's language at all. They said that  
14 there was an agreement, a side agreement  
15 between the parties expressly -- expressly  
16 stated that we have no agreement on class  
17 arbitration.

18 So we're not even going to look at the  
19 contract. They gave it to the arbitrators and  
20 the arbitrators found that class arbitration  
21 applied simply on policy basis.

22 This is not the contract here. There  
23 absolutely are provisions that support -- they  
24 are very broad and they -- they encompass class  
25 proceedings.

1           JUSTICE SOTOMAYOR: The problem I have  
2 is the following, because it -- it's following  
3 up on Justice Alito's question, okay?

4           There are at least two or three  
5 California lower courts and at least one court  
6 of appeals who have seen contracts almost  
7 identical to this --

8           MS. VERCOSKI: Yes.

9           JUSTICE SOTOMAYOR: -- and said,  
10 contrary to the lower court, to the lower court  
11 here, to the Ninth Circuit, that that language  
12 is not enough to have a foothold in the  
13 contract under California law, because the  
14 words "the waiver of all lawsuits or other  
15 civil legal proceedings," you have to submit  
16 everything to arbitration, don't say anything  
17 about the nature, the procedural nature, of  
18 that arbitration. That's been their reasoning.

19           And they look at all of the I's and my  
20 claims of this contract and say that shows just  
21 a bilateral intent.

22           MS. VERCOSKI: Yes, it --

23           JUSTICE SOTOMAYOR: And so those  
24 courts, unlike the court here, is basically  
25 saying that the court below misapplied state

1 law.

2 Now are we supposed to give deference  
3 to the state court on its interpretation of  
4 state law, or are we supposed to check to make  
5 sure that they are, in fact, following state  
6 law?

7 MS. VERCOSKI: Well, that's not even  
8 an issue here because --

9 JUSTICE SOTOMAYOR: Well, it is an  
10 issue --

11 MS. VERCOSKI: Well, it's an issue --

12 JUSTICE SOTOMAYOR: -- because, if  
13 this contract doesn't speak at all, there's no  
14 foothold.

15 MS. VERCOSKI: Our contract absolutely  
16 does. The contracts that the -- that Lamps  
17 Plus cited is from two appellate courts and the  
18 state court, and their language was very  
19 limited and not even nearly as broad as our  
20 provisions. And we have --

21 JUSTICE BREYER: So what's the best  
22 statement in the contract that supports you?

23 MS. VERCOSKI: In our contract, the  
24 very best one is arbitration shall be in lieu  
25 of any and all lawsuits or civil legal

1 proceedings relating to my employment. That  
2 arbitration will be in lieu of a set of actions  
3 that includes class actions and allows for  
4 class actions.

5 And the language, when contrasted with  
6 the language of the state appellate courts,  
7 they were limited specifically to the --

8 JUSTICE SOTOMAYOR: My problem with  
9 that is arbitration isn't law proceedings by  
10 definition. You did have some discovery rules  
11 here, but by nature, the discovery rules in  
12 arbitration, are procedural issue, are  
13 different than a lawsuit. So are notice  
14 requirements and interrogatories. Everything's  
15 different procedurally.

16 Why are you thinking that class action  
17 proceedings are -- are a special proceeding  
18 that you're entitled to bring somewhere else?

19 MS. VERCOSKI: Well, I'm not thinking  
20 that it's special. I'm thinking that to the  
21 extent that the parties have it in their  
22 contract, we have to give their intent, first  
23 and foremost, the -- the equal -- we have to  
24 enforce it under the FAA.

25 That's their overarching principle, is

1 that we look at the intent and we enforce the  
2 contracts according to their intent.

3 So those two lower state contract  
4 interpretations, they didn't find ambiguity at  
5 all. The language there was much more limiting  
6 into the individual claims that were able to be  
7 brought by that individual only with respect to  
8 his employment against his employer and vice  
9 versa.

10 Our phrases are far more sweeping  
11 where Mr. Varela assented to "waiver of any  
12 right I may have to file" a legal -- "a lawsuit  
13 or civil legal proceeding relating to my  
14 employment with the company." Relating to my  
15 employment, the data breach, but for his  
16 employment, the data breach wouldn't have  
17 occurred.

18 To the extent he has claims out of the  
19 data breach, that encompasses claims of -- of  
20 other workers that were subject to the same --

21 JUSTICE SOTOMAYOR: No, it doesn't.

22 MS. VERCOSKI: -- set of  
23 circumstances.

24 JUSTICE SOTOMAYOR: No, he's granted  
25 that right as a procedural right in the

1 lawsuit. The operative question here is, is he  
2 entitled to that in an arbitration?

3 MS. VERCOSKI: He absolutely is.

4 JUSTICE SOTOMAYOR: That's a separate  
5 --

6 MS. VERCOSKI: Because the word  
7 "proceeding" is extremely broad and it includes  
8 legal actions or procedures. A civil  
9 arbitration or a class action is absolutely a  
10 proceeding.

11 And not only that, controversies,  
12 disputes, a class action is a controversy or a  
13 dispute. And anything that was supposed to be  
14 brought in a court of law that could have been  
15 brought now has to be brought in arbitration.  
16 And it doesn't say that those claims cannot be  
17 or that they are waived from -- from being  
18 brought in arbitration.

19 And the fact that it's -- you know,  
20 the -- Lamps Plus argues that there is  
21 bilateral language that I, me, my employment,  
22 that doesn't -- it doesn't modify the term "my  
23 individual employment" or my "individual  
24 claims." "My employment" encompasses all kinds  
25 of different claims that arise out of this

1 employment, including the data breach.

2 And because whatever Mr. Varela could  
3 bring in a court of law individually, he is  
4 entitled to also bring those claims on a  
5 class-wide basis in arbitration, because "in  
6 lieu of" means a set of actions that could have  
7 been brought in a court of law, now have to be  
8 brought into arbitration.

9 And that does not limit his right to  
10 bringing the proceedings on an aggregate basis.  
11 That doesn't change the nature of the claims or  
12 the parties' rights. The only thing it changes  
13 is the way that the proceedings are processed  
14 in arbitration.

15 And it doesn't stop there. The  
16 language goes even broader to encompass all  
17 remedies that could have been issued in a court  
18 of law.

19 JUSTICE SOTOMAYOR: Class action is  
20 not a remedy.

21 MS. VERCOSKI: No, class action's not  
22 a remedy, but remedies can be awarded and are  
23 awarded through class actions.

24 JUSTICE SOTOMAYOR: To other people,  
25 not him.

1           MS. VERCOSKI: To other people, but  
2 there's nothing that prohibits him from  
3 bringing an arbitration, only his individual  
4 claims. When they said arising out of his  
5 employment, it doesn't say his employment and  
6 -- and that includes, and only includes, his  
7 individual claims relating to his employment.

8           JUSTICE KAVANAUGH: Counsel, in -- the  
9 dissenting judge below said that the Ninth  
10 Circuit's decision was a palpable evasion of  
11 Stolt-Nielsen. And picking up on Justice  
12 Breyer's question, who asked you how you would  
13 distinguish Stolt-Nielsen, you said, one, the  
14 court there did not interpret the agreements  
15 language at all.

16           Is there anything else you'd like to  
17 add to how you would distinguish Stolt-Nielsen?

18           MS. VERCOSKI: Absolutely. We are on  
19 all fours with Stolt-Nielsen because what  
20 Stolt-Nielsen said expressly was what we need  
21 is a contractual basis in order to find that  
22 the parties intended to proceed on the class  
23 arbitration basis.

24           And it doesn't say that it needs to  
25 say class arbitration expressly, so there we

1 have a -- we have a situation versus silent and  
2 expressly. And what we're trying to look for,  
3 what supplies that contractual basis is the  
4 daylight in between that.

5 And if we look at Oxford Health, the  
6 -- the arbitrator there was permitted to  
7 construe the -- to construe the arbitration  
8 agreement just by looking at the contract  
9 language.

10 And although on review they had to  
11 give him deference, they -- they stated that  
12 they might not have agreed with his  
13 interpretation, but if we were going to go with  
14 a clear and unmistakable new policy that Lamps  
15 Plus wants this Court to adopt, then  
16 Stolt-Nielsen -- sorry, Oxford Health would  
17 have been completely erroneous.

18 CHIEF JUSTICE ROBERTS: Thank --

19 MS. VERCOSKI: And that should have  
20 been overruled.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 MS. VERCOSKI: Thank you.

24 CHIEF JUSTICE ROBERTS: Four minutes,  
25 Mr. Pincus.

1 REBUTTAL ARGUMENT OF ANDREW J. PINCUS  
2 ON BEHALF OF THE PETITIONERS

3 MR. PINCUS: Thank you, Mr. Chief  
4 Justice. Just -- just a couple of points.

5 Justice Breyer mentioned that -- the  
6 AAA rules on class arbitration. There are a  
7 number of decisions, hundreds of decisions  
8 reported on the AAA website. There are only  
9 eight that are decisions that go to the merits.

10 Five approved settlements. One is a  
11 dismissal. One is in favor of the defendant.  
12 And there's one for the plaintiff. So they  
13 really, for -- for all the years that class  
14 arbitrations have been in process, they really  
15 haven't produced a lot at the -- the end of the  
16 line.

17 Justice Gorsuch raised the due process  
18 issue, and I think that's another reason why  
19 the clear and unmistakable standard makes  
20 sense. There's a serious risk that if the  
21 standard applied below were allowed to -- to  
22 prevail, then the class arbitration would  
23 proceed.

24 Let's say the defendant won. Then  
25 every class member would then argue in the

1 future, when the defendant sought to enforce  
2 that judgment, I didn't agree to class  
3 arbitration, so I'm not bound by that judgment.  
4 A clear and unmistakable -- and certainly --

5 JUSTICE GINSBURG: Wouldn't they be  
6 bound if they got notice and an opportunity to  
7 opt out?

8 MR. PINCUS: I think there are serious  
9 questions that were pointed out by Justice  
10 Alito in -- in his Oxford Health dissent about  
11 whether an arbitration to which they didn't  
12 consent could bind them, especially if they  
13 could prevail on an argument that the  
14 arbitration agreement did not provide for class  
15 arbitration.

16 That would be their argument. And,  
17 ironically, the defendant would then be arguing  
18 for class arbitration. The -- the class -- a  
19 putative class member would say no, and the  
20 putative class member would say you should  
21 construe the ambiguous agreement against me by  
22 saying there's no -- there's no arbitration.

23 So that's another reason why we think  
24 the clear and unmistakable standard makes  
25 sense.

1           Justice Gorsuch, you asked about  
2           whether the arbitrator would be bound by the  
3           district court's decision. The arbitrator's  
4           bound under Rule 1(c) of the AAA rules by the  
5           decision that the arbitration agreement  
6           authorizes class arbitration.

7           Obviously, the arbitrator then would  
8           have to go through the process to see whether  
9           the rules for certifying a class were met, but  
10          he couldn't or she couldn't contradict the  
11          court's determination that class arbitration  
12          was authorized.

13          And -- and then just -- my friend  
14          relies -- places a lot of reliance on the "in  
15          lieu of" sentence in the agreement, but -- but  
16          what that says is what arbitration is instead  
17          of. It doesn't say what can be arbitrated.

18          And what can be arbitrated is covered  
19          by the claims covered by the arbitration  
20          provision, and that's the provision that has  
21          the I's and the my's.

22          Unless the Court has any further  
23          questions.

24          CHIEF JUSTICE ROBERTS: Thank you,  
25          counsel. The case is submitted.

1                   (Whereupon, at 12:09 p.m., the case  
2 adjourned.)

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