No. 17A-

In the Supreme Court of the United States

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,
APPLICANTS,

V.

FRANK VARELA,

RESPONDENT.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicants Lamps Plus, Inc., Lamps Plus Centennial, Inc., and Lamps Plus Holdings, Inc. (collectively, "Lamps Plus") respectfully request a 30-day extension of time, to and including January 10, 2018, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

The court of appeals entered judgment on August 3, 2017. Lamps Plus filed a timely petition for rehearing or rehearing en banc on August 17, 2017. The petition for rehearing was denied on September 11, 2017. Unless extended, the time for filing a petition for a writ of certiorari will expire on December 11, 2017. The

[1] Pursuant to Rule 29.6 of the Rules of this Court, applicants state that applicant Lamps Plus Holdings, Inc. is the parent corporation to applicants Lamps Plus, Inc. and Lamps Plus Centennial, Inc. No publicly held corporation owns a ten percent interest in Lamps Plus, Inc.; Lamps Centennial, Inc.; or Lamps Plus Holdings, Inc.

jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). A copy of the Ninth Circuit's opinion and the order denying rehearing are attached.

1. This case squarely presents the substantial and important question, left open by *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010): whether an arbitration provision that makes no reference to class arbitration nonetheless affords a court a "contractual basis for concluding" that the parties have "*agreed* to" class arbitration. *Id.* at 684 (emphasis in original). *Stolt-Nielsen* made clear that courts may *not* "presume" such consent from "mere silence on the issue of class-arbitration," but left for another day the question of what "more" the Federal Arbitration Act ("FAA") requires to demonstrate mutual assent to class arbitration. *Id.* at 687.

The opinion of the panel majority—consisting of Judges Reinhardt and Wardlaw—resolves that question in a manner fundamentally incompatible with *Stolt-Nielsen* itself. As the dissenting member of the panel put it, the decision below amounts to a "palpable evasion of *Stolt-Nielsen*." --- F. App'x ----, 2017 WL 3309944, at *2 (Fernandez, J., dissenting). The *Varela* majority concluded that (a) the absence of any language addressing the availability of class arbitration created contractual ambiguity as to the question; and (b) that the court would infer from any such ambiguity that the parties had consented to class arbitration.

2. Respondent Varela is an employee of applicant Lamps Plus, and executed a standalone arbitration agreement in connection with his employment (the "Agreement"). As the panel acknowledged, the Agreement "includes no express

mention of class proceedings." 2017 WL 3309944, at *1. It provides that the employee and the company "mutually consent to the resolution by arbitration of all claims or controversies" that "*I* [the employee] may have against the Company * * * or that the Company * * * may have against *me*" "aris[ing] in connection with "*my* employment, or any of the parties' rights and obligations arising under this Agreement." ER 140 (emphasis added).

Notwithstanding the Agreement, Varela filed a putative class action in federal district court in March 2016. Lamps Plus moved to compel individual arbitration. The district court granted the motion to arbitrate, but ordered the parties to proceed on a class (not individual) basis. The court held the Agreement was "ambiguous" regarding consent to class arbitration and such ambiguity should be construed against Lamps Plus, because it was the drafter.

A divided Ninth Circuit panel affirmed. The majority concluded that the Agreement contained "ambiguity" as to whether the parties agreed to class arbitration based on the following language:

(a) the waiver of "any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company";

(b) the waiver of "any right I may have to resolve employment disputes through trial by judge or jury"; and

(c) the agreement that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment."

2017 WL 3309944, at *1.

Based on this language, the majority asserted that "*the most reasonable*[] interpretation of this expansive language is that it [implicitly] authorizes class arbitration" (*id.* (emphasis in original)), and also pointed to the doctrine that contractual ambiguities should be "construed against the drafter" (*id.*). The majority further inferred "support[]" for its interpretation from the *absence* of any reference to class actions in other parts of the arbitration clause, and from the arbitration clause's coverage of all "claims or controversies" the parties might have against each other. *Id.* at *2.

3. The certiorari petition will explain that the Ninth Circuit's divination of contractual consent to class arbitration from language found in virtually any standard arbitration clause cannot be squared with *Stolt-Nielsen* and *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011). In *Stolt-Nielsen*, this Court recognized that "the differences between bilateral and class-action arbitration are too great" for arbitrators or courts to presume "that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Stolt-Nielsen*, 559 U.S. at 687. Because "[a]rbitration 'is a matter of consent, not coercion,'" *Oxford Health Plans LLC* v. *Sutter*, 133 S. Ct. 2064, 2071 (2013) (Alito, J., concurring) (quoting *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)), courts may not properly infer "'[a]n implicit agreement to authorize class-action arbitration * * * from the fact of the parties' agreement to arbitrate.'" *Id.* (alterations in original) (quoting *Stolt-Nielsen*, 559 U.S. at 685).

This Court's decision in *Concepcion* further underscored the differences between class arbitration and individual arbitration. The Court held that state laws "[r]equiring the availability of classwide arbitration interfere[] with fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA." 563 U.S. at 344. As this Court put it, "class arbitration" is "*not* arbitration as envisioned by the FAA" and "lacks its benefits." *Id.* at 350-51 (emphasis added). In particular, "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348.

In light of the dramatic differences between class and individual arbitration identified in *Stolt-Nielsen* and *Concepcion*, the Ninth Circuit's decision cannot stand. Although the panel protested otherwise, its decision involved precisely the type of "interpretive acrobatics" (2017 WL 3309944, at *1) that this Court has previously rejected, *see DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468-71 (2015).

For example, the language that "'arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings'" (2017 WL 3309944, at *1) simply states that arbitration is an alternative to litigation in court; it does not mean that the arbitration will take place under the same *procedures* available in court, such as the class device. Likewise, the majority's reasoning that class procedures are available because "arbitrable claims are those that 'would have been available to the parties by law'" (*id.* at *2) confuses substantive claims with procedural rules. The majority

itself acknowledged in the very next paragraph that "a class action is a procedural device * * * rather than a separate or distinct claim" (*id.* (quotation marks omitted)).

Thus, as Judge Fernandez's dissent succinctly explains, "the Agreement was not ambiguous," and the panel majority's reasoning amounts to a "palpable evasion of *Stolt-Nielsen*." *Id.* at *2. That "evasion" of this Court's precedents makes this case a strong candidate for summary reversal.

In addition, by departing from this Court's clear guidance, the *Varela* majority created a conflict among the courts of appeals that independently warrants this Court's review. Other circuits applying *Stolt-Nielsen* have consistently rejected similar efforts to transform standard arbitration terms, such as those relied on by the Ninth Circuit here, into an "implicit" agreement to class arbitration. *See, e.g.*, *Reed Elsevier, Inc. ex rel. LexisNexis Div.* v. *Crockett*, 734 F.3d 594, 599 (6th Cir. 2013) ("The principal reason to conclude that this arbitration clause does not authorize classwide arbitration is that the clause nowhere mentions it."); *accord* *Reed* v. *Fla. Metro. Univ., Inc.*, 681 F.3d 630, 643-44 (5th Cir. 2012), *abrogated on other grounds by Oxford Health Plans LLC* v. *Sutter*, 569 U.S. 564 (2013); *Dominium Austin Partners, L.L.C.* v. *Emerson*, 248 F.3d 720, 728-29 (8th Cir. 2001); *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995).

The Third Circuit, for example, refused to infer consent to class arbitration from the parties' broad agreement to arbitrate "[a]ny dispute or claim," *Opalinski* v. *Robert Half Int'l Inc.*, 677 F. App'x 738, 742 (3d Cir. 2017) (quotation marks

omitted)—language materially identical to that from which the Ninth Circuit inferred a contractual basis for class arbitration here. The Third Circuit rejected the precise approach that the decision below adopted, holding it fundamentally incompatible with *Stolt-Nielsen*: "the Supreme Court was clear * * * that '[a]n implicit agreement to authorize class-action arbitration' cannot be inferred 'solely from the fact of the parties' agreement to arbitrate.'" *Id.* (quoting *Stolt–Nielsen*, 559 U.S. at 685).

4. Lamps Plus respectfully requests a 30-day extension to file the petition for a writ of certiorari because the undersigned counsel were retained only recently to prepare the petition.

In addition, undersigned counsel primarily responsible for preparing the petition have responsibility for a number of other matters in this and other courts with proximate due dates. These include: petition for a writ of certiorari due on December 4, 2017 in *Spokeo, Inc.* v. *Robins*, No. 17A493 (S. Ct.); reply in support of petition for certiorari due on December 12, 2017 in *Kindred Hospitals* v. *Klemish*, No. 17-365 (S. Ct.); opening brief due on December 6, 2017 in *Perez* v. *DIRECTV, LLC*, No. 17-55764 (9th Cir.); and opening brief due on December 11, 2017 in *In re Tropp*, No. 17-2503 (Fed Cir.).

For the foregoing reasons, the application for a 30-day extension, to and including January 10, 2018, within which to file a petition for a writ of certiorari in this case should be granted.

Respectfully submitted.

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