No.

In the Supreme Court of the United States

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

Petitioners,

v.

FRANK VARELA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Stolt-Nielsen, S.A.* v. *AnimalFeeds International Corp.* this Court held that a court could not order arbitration to proceed using class procedures unless there was a "contractual basis" for concluding that the parties have "*agreed* to" class arbitration. 559 U.S. 662, 684 (2010) (emphasis in original). This Court explained that courts may not "presume" such consent from "mere silence on the issue of class arbitration" or "from the fact of the parties' agreement to arbitrate." *Id.* at 685, 687.

The arbitration clause at issue here did not mention class arbitration. A divided Ninth Circuit panel majority (Reinhardt & Wardlaw, JJ.) nonetheless inferred mutual assent to class arbitration from such standard language as the parties' agreement that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings" and a description of the substantive claims subject to arbitration. App., *infra*, 3a-4a.

The question presented is:

Whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.

RULE 29.6 STATEMENT

Petitioner Lamps Plus Holdings, Inc. is the parent corporation to petitioners Lamps Plus, Inc. and Lamps Plus Centennial, Inc. No publicly held corporation owns a 10% or more ownership interest in Lamps Plus, Inc.; Lamps Centennial, Inc.; or Lamps Plus Holdings, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Lamps Plus, Inc., Lamps Plus Centennial, Inc., and Lamps Plus Holdings, Inc. (collectively, Lamps Plus) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is reported at 701 F. App'x 670. The order of the court of appeals denying rehearing (App., *infra*, 6a) is unreported. The order of the district court denying in part Lamps Plus's motion to compel individual arbitration and instead compelling arbitration on a class-wide basis (App., *infra*, 7a-23a) is unreported, but is available at 2016 WL 9110161.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2017. App., *infra*, 1a. The court of appeals denied a timely petition for rehearing or rehearing en banc on September 11, 2017. App., *infra*, 6a. On November 28, 2017, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including January 10, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the

> Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

This Court has repeatedly held 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 S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 687 (2010). Because "class arbitration" is "not arbitration as envisioned by the" Federal Arbitration Act (FAA) and "lacks its benefits," *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350-51 (2011), arbitrators or courts may not infer "[a]n implicit agreement to authorize class-action arbitration * * * from the fact of the parties' agreement to arbitrate." *Stolt-Nielsen*, 559 U.S. at 685, 687.

But that is exactly what the panel majority of Judges Reinhardt and Wardlaw did below. By infer-

ring an agreement to class arbitration from standard arbitration-clause provisions, the court below equated the agreement to arbitrate with an agreement to arbitrate on a class basis.

Yet this Court has squarely held that the FAA "requires more" (*Stolt-Nielsen*, 559 U.S. at 687): namely, a "contractual basis for concluding" that the parties have in fact "*agreed* to" class arbitration (*id.* at 686). That result follows naturally from the FAA's "rule[] of fundamental importance" that "arbitration 'is a matter of consent, not coercion.'" *Id.* at 681 (quoting *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.,* 489 U.S. 468, 479 (1989)); accord *Oxford Health Plans LLC* v. *Sutter*, 569 U.S. 564, 565 (2013) ("Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them.").

As Judge Fernandez succinctly observed in dissent, the decision below is a "palpable evasion of *Stolt-Nielsen*." App., *infra*, 5a. The panel majority simply disregarded numerous terms in the parties' arbitration agreement that plainly contemplate bilateral arbitration, and instead purported to divine contractual consent to class arbitration from language found in virtually any standard arbitration clause.

By providing, for example, that "'arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings'" (App., *infra*, 3a), the contract simply identifies arbitration as the agreed-upon substitute for litigation in court. That and similar contract language does not mean that the arbitration will take place under the same *procedures* available in court, such as the class device. And the majority confused substantive claims and remedies with procedural

rules when it inferred authority for class arbitration from statements that "arbitrable claims are those that 'would have been available to the parties by law'" and that the arbitrator is allowed "to 'award any remedy allowed by applicable law.'" *Id.* at 4a. As the majority itself elsewhere acknowledged, "a class action is a procedural device * * * rather than a separate or distinct claim." *Ibid.* (quotation marks omitted).

Although the panel protested otherwise, its decision involved precisely the type of state-law "interpretive acrobatics" (App., *infra*, 3a) to support its policy preference for class actions that this Court has rejected as incompatible with the FAA, see *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468-71 (2015).

By departing from this Court's clear guidance, the panel majority also created a conflict with several other circuits, which have uniformly rejected similar efforts to equate standard arbitration terms with an implicit agreement to class arbitration. Review is thus independently warranted to ensure uniform application of the FAA and underscore that standard language authorizing arbitration of "any and all claims" and waiving the parties' rights to file lawsuits in court does not supply the "contractual basis" needed to "support a finding that the parties agreed to authorize class-action arbitration." *Stolt-Nielsen*, 559 U.S. at 687 n.10.

Moreover, the practical consequences of the Ninth Circuit's failure to adhere to this Court's precedents are substantial. If permitted to stand, the decision below will embolden other courts to impose class arbitration on parties that never agreed to it—elevating a policy preference for the class-action de-

vice over the FAA's "basic precept that arbitration is a matter of consent, not coercion." *Stolt-Nielsen*, 559 U.S. at 681 (quotation marks omitted).

This Court's review is therefore essential. And the panel majority's "palpable evasion" of this Court's precedents (App., *infra*, 5a) is so clear as to warrant summary reversal.

A. The Arbitration Agreement Between Lamps Plus And Varela.

Respondent Frank Varela is an employee of Lamps Plus. App., *infra*, 8a. At the beginning of his employment, Varela and a representative of Lamps Plus signed a standalone arbitration agreement (the "Agreement"). *Id.* at 24a-35a.[1]

The Agreement covers "all claims or controversies ('claims'), past, present or future that I may have against the Company or against its offers, directors, employees or agents * * * or that the Company may have against me." App., *infra*, 24a. The Agreement further provides: "Specifically, the Company and *I* mutually consent to the resolution by arbitration of all claims that may hereafter arise in connection with *my* employment, or any of the parties' rights and obligations arising under this Agreement." *Id.* at 24a-25a (emphasis added).

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[1] Arbitration is a voluntary term and condition of employment; employees are permitted to opt out of arbitration within 3 days after executing the agreement. App., *infra*, 27a; ER 138. ("ER __" refers to the Excerpts of Record in the court of appeals.) It is undisputed that Varela did not opt out of arbitration. App., *infra*, 10a; ER 138.

The Agreement also informs the employee at the outset that agreeing to arbitration waives his or her right to resolve disputes with Lamps Plus in court:

> I understand that by entering into this Agreement, I am waiving any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company and am waiving any right I may have to resolve employment disputes through trial by judge or jury. I agree that arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment.

App., *infra*, 24a.

The Agreement specifies that the arbitration will be administered by the American Arbitration Association (AAA) or JAMS (App., *infra*, 25a)—two widely-respected arbitration forums.[2] The arbitrator, once appointed, "is authorized to award any remedy allowed by applicable law." *Id.* at 26a.

B. Proceedings Below.

1. In early 2016, Lamps Plus was the victim of a successful "phishing" attack. An unknown third party spoofed the email address of a high-level Lamps Plus employee and sent an email to an actual Lamps Plus employee requesting employees' W-2 tax forms. ER 152. The employee, thinking she was responding

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[2] It is undisputed that Varela's arbitration agreement includes both the document he signed titled "ARBITRATION PROVISION" (App., *infra*, 24a) as well as "ATTACHMENT A," which sets forth in more detail the "LAMPS PLUS EMPLOYMENT ARBITRATION RULES AND PROCEDURES" (*id.* at 29a). See ER 137-138.

to a supervisor's legitimate request, sent copies of current and former employees' 2015 W-2 forms to the third party. App., *infra*, 11a; ER 152.

2. Soon after this attack, respondent Varela filed a putative class action lawsuit in California federal court, asserting statutory and common-law claims related to the data breach. ER 178-202. Lamps Plus moved to "compel arbitration on an individual basis" pursuant to Varela's arbitration agreement. ER 144.

The district court purported to grant the motion, but in fact denied the request for individual arbitration, instead ordering that arbitration take place on a class-wide basis. App., *infra*, 20a-22a. The district court recognized that Varela had entered into a binding arbitration agreement and that his claims in this case fall within the scope of that agreement. *Id.* at 13a-14a. The court further rejected Varela's unconscionability challenges to the enforceability of his agreement. *Id.* at 15a-20a.

On the issue of class arbitration, however, the district court accepted Varela's argument that "the language stating that 'all claims' arising in connection with Varela's employment shall be arbitrated is broad enough to encompass class claims as well as individual claims, or is at least ambiguous and should be construed against the drafter." App., *infra*, 21a.[3]

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[3] In interpreting the arbitration agreement to authorize class arbitration, the district court also sua sponte questioned whether a waiver of class procedures in arbitration would be enforceable in the employment context. App., *infra*, 22a (citing *Lewis* v. *Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), which was subsequently followed by the Ninth Circuit in *Morris* v.

3. A divided Ninth Circuit panel affirmed the district court's order compelling class rather than individual arbitration. App., *infra*, 1a-5a.

In a per curiam opinion, Judges Reinhardt and Wardlaw discerned "ambiguity" as to whether the parties agreed to class arbitration based on the following language:

- 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";
- the waiver of "any right I may have to resolve employment disputes through trial by judge or jury"; and
- the agreement that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment."

App., *infra*, 3a.

Based on this language, the majority maintained that "*the most reasonable*[] interpretation of this expansive language is that it authorizes class arbitration." App., *infra*, 3a. And the majority also relied upon the state-law doctrine that contractual ambiguities should be "construed against the drafter." *Id.* at 3a-4a.

Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016)). (This Court granted review in both cases. 137 S. Ct. 809 (2017).)

The Ninth Circuit, however, affirmed solely on the basis that (in the panel's view) the contract authorized class arbitration. App., *infra*, 1a-5a. Indeed, at oral argument, Judge Reinhardt discouraged Varela from relying on *Morris*, stating that it would be "unwise" to do so in light of this Court's grant of certiorari. See Oral Arg. at 17:10-18:10, https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000011909.

The majority further inferred "support[]" for its interpretation from (1) the *absence* of any reference to class actions in other parts of the arbitration clause; (2) the arbitration clause's coverage of all "claims or controversies" the parties might have against each other; and (3) the provision in the arbitration clause authorizing the arbitrator to "'award any remedy allowed by applicable law.'" App., *infra*, 3a-4a.

Judge Fernandez dissented. His dissent reads in full:

> I respectfully dissent because, as I see it, the Agreement was not ambiguous. We should not allow Varela to enlist us in this palpable evasion of *Stolt-Nielsen* * * *.

App., *infra*, 5a (citation omitted).

REASONS FOR GRANTING THE PETITION

The decision below conflicts with this Court's clear holdings that the FAA preempts state law that would compel parties to an arbitration agreement to submit to class arbitration without a contractual basis for concluding that the parties agreed to that procedure. By purporting to find such a basis in standard contract language stating that arbitration substitutes for court proceedings and that the parties agreed to arbitrate "all claims or controversies" between them, the panel majority engaged in a "palpable evasion of *Stolt-Nielsen*." App., *infra*, 5a.

This Court could not have been clearer that, in light of the fundamental differences between class and individual arbitration, the FAA prohibits exactly what the panel below did here: inferring "[a]n implicit agreement to authorize class-action arbitration

* * * from the fact of the parties' agreement to arbitrate." *Stolt-Nielsen*, 559 U.S. at 685; accord *Oxford Health*, 569 U.S. at 573 (Alito, J., concurring) (quoting same). And the panel's implausible interpretation of the contract in favor of its preference for class procedures is the kind of strained reasoning that this Court recently rejected in *Imburgia*, 136 S. Ct. at 468-71.

Moreover, the Ninth Circuit's "palpable evasion of *Stolt-Nielsen*" created a conflict with an unbroken line of decisions by other circuits. Those courts of appeals have 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.

This case is an ideal vehicle to address the question presented. It arises out of federal court; the question presented was the sole basis for the decision below; and the parties have not disputed that a court—rather than an arbitrator—should decide whether the arbitration clause permits class procedures. That judicial determination can thus be reviewed de novo, without the constraints imposed by the FAA's limited grounds for review of an arbitrator's decisions. See *Oxford Health*, 569 U.S. at 571-73.

Finally, the decision below represents yet another effort by a court hostile to bilateral arbitration—the type of arbitration "envisioned by the FAA" (*Concepcion*, 563 U.S. at 351)—to circumvent this Court's arbitration precedents. This Court has repeatedly intervened—often summarily—to reject similar evasions. See, *e.g., Kindred Nursing Ctrs. Ltd. P'Ship* v. *Clark*, 137 S. Ct. 1421 (2017); *Imburgia*, 136 S. Ct. 463; *Nitro-Lift Technologies, L.L.C.* v. *Howard*, 568

U.S. 17 (2012) (per curiam); *Marmet Health Care Ctr., Inc.* v. *Brown*, 565 U.S. 530 (2012) (per curiam).

Here, too, review and reversal of the decision below is warranted to preserve the integrity of this Court's precedents and ensure nationwide uniformity on a question of fundamental importance.

A. The Decision Below Contravenes The FAA And Defies This Court's Precedents.

1. Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House*, 534 U.S. 279, 289 (2002) (quotation marks omitted). This Court has thus stated repeatedly that the "primary purpose" of the FAA is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt*, 489 U.S. at 479; see also *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 688 (1996); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995).

An agreement to arbitrate on an individual basis, or "bilateral arbitration," is the form of arbitration "envisioned by the FAA." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 348 (2011). As this Court has explained on multiple occasions, in bilateral arbitration the "'parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution,'" including "'lower costs'" and "'greater efficiency and speed.'" *Ibid.* (quoting *Stolt-Nielsen*, 559 U.S. at 685); see also

14 Penn Plaza LLC v. *Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995) (recognizing that one of the "advantages" of arbitration is that it is "cheaper and faster than litigation") (quotation marks omitted).

By contrast, "class arbitration" is "*not* arbitration as envisioned by the FAA" and "lacks its benefits." *Concepcion*, 563 U.S. at 350-51 (emphasis added). That is because "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 addition, "class arbitration greatly increases risks to defendants," because "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable" in light of the limited judicial review available. *Id.* at 350.

Because "the relative benefits of class-action arbitration are much less assured," this Court held in *Stolt-Nielsen* that before "a party may * * * be compelled under the FAA to submit to class arbitration," there must be a "contractual basis for concluding" that the parties have "*agreed* to" that procedure. 559 U.S. at 684, 686. This Court further made clear that courts may *not* "presume" such consent from "mere silence on the issue of class-arbitration" or infer "[a]n implicit agreement to authorize class-action arbitration * * * from the fact of the parties' agreement to arbitrate." *Id.* at 685, 687. Instead, as a matter of substantive federal law, "the FAA requires more." *Id.* at 687. In light of the parties' stipulation in that case

"that there was 'no agreement' on the issue of class-action arbitration," however, this Court left open the question of "what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." *Id.* at 687 n.10.

2. The panel majority's opinion cannot be squared with the settled principles just discussed. The panel purported to recognize these principles. App., *infra*, 2a. But it then proceeded to ignore them by resolving the question left open in *Stolt-Nielsen* in a manner fundamentally incompatible with *Stolt-Nielsen* itself. None of the provisions relied on by the panel majority even remotely supports an inference that the parties "agreed to authorize" class arbitration.

At the outset, the panel relied on the Agreement's statement that the employee's agreement to arbitrate is a "waiver of 'any right I may have to file a lawsuit or other civil action or proceeding relating to *my* employment with the Company'" and of "'any right I may have to resolve employment disputes through trial by judge or jury.'" App., *infra*, 3a (emphasis added). But as this Court recently reiterated, "a waiver of the right to go to court and to receive a jury trial" is "*the primary characteristic* of an arbitration agreement." *Kindred Nursing Ctrs.*, 137 S. Ct. at 1427 (emphasis added).

The panel's reasoning thus renders *Stolt-Nielsen* a nullity. If contractual language describing this "primary characteristic" were enough, then *any* arbitration agreement that does not expressly waive class procedures could support an inference that the parties agreed to class arbitration. Yet this Court has clearly held that "the FAA requires more" than "the fact of the parties' agreement to arbitrate" to

support an "implicit agreement to authorize class-action arbitration." 559 U.S. at 685.

Similarly, the passage of the Agreement here stating that "'arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings'" (App., *infra*, 3a) simply means that arbitration replaces litigation in court. It does not mean that the arbitration will duplicate the *procedures* available in court, such as the class device.[4]

Indeed, under the majority's approach, that language would also entitle a party to demand that the arbitration process include other court procedures unless the agreement expressly disclaims them, including "the Federal Rules of Civil Procedure" and "a discovery process rivaling that in litigation." *Concepcion*, 563 U.S. at 351. But those procedures, like the class-action device, also are "not arbitration as envisioned by the FAA" and "lack[] its benefits." *Ibid.* General language stating the obvious proposition that binding arbitration is a substitute for court proceedings cannot support an inference that the parties agreed to jettison the "fundamental attributes of arbitration," including "*streamlined* proceedings." *Id.* at 344 (emphasis added).

The panel majority next brushed aside the multiple portions of the Agreement demonstrating the parties' intent to engage in traditional, bilateral arbitration. For example, the Agreement limits the scope of the claims covered by arbitration to "claims or controversies" that "*I* may have against the Company

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[4] See, *e.g.*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "in lieu of" as "[i]nstead of or in place of"); WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY (Deluxe ed. 1996) (similarly defining "in lieu of" as "instead of" or "in place of").

* * * 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*." App., *infra*, 24a-25a (emphasis added).

Yet the majority concluded that this language was irrelevant because "Varela's claims against the company include those that could be brought as part of a class." *Id.* at 4a. And it further reasoned that the Agreement's authorization of arbitration for claims that "'would have been available to the parties by law'" "obviously include[s] claims as part of a class proceeding." *Ibid.*[5]

That interpretation makes no sense. Because a class action is nothing more than the sum of each class member's individual claims, Rule 23 cannot transform the claims of *other* employees into *Varela*'s claims, and those other individuals' claims plainly do not relate to *Varela*'s employment with Lamps Plus.

That basic principle has long been established. Nearly four decades ago, this Court recognized that the class action is merely a procedural device, "ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980); see also *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion) (a class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged"). The panel majority itself recognized this

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[5] The Agreement also limited the parties to one deposition per side (subject to the arbitrator's discretion to allow additional depositions). App., *infra*, 32a. That presumptive limit on discovery is impossible to square with the panel majority's conclusion that the parties agreed to authorize class arbitration.

rule in the very next paragraph, acknowledging that "a class action is a procedural device * * * rather than a separate or distinct claim." App., *infra*, 4a (quotation marks omitted).

Moreover, the broad range of substantive disputes subject to arbitration (App., *infra*, 4a) says nothing about the procedures under which the arbitration will be conducted; in particular, it does not address whether class procedures are available for the resolution of any dispute. In other words, this passage of the Agreement simply demonstrates that Varela and Lamps Plus agreed "to submit their disputes to an arbitrator"—nothing more. That agreement is precisely what this Court held *cannot* supply the basis for "[a]n implicit agreement to authorize class-action arbitration." *Stolt-Nielsen*, 559 U.S. at 685.[6]

For similar reasons, the Agreement's provision authorizing the arbitrator to "'award any remedy allowed by applicable law'" cannot support the panel majority's interpretation. App., *infra*, 4a. A class action is not itself a remedy, but rather, again, simply a procedural device for aggregating multiple requests for underlying substantive relief.

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[6] Notably, the Agreement says only that the AAA or JAMS employment arbitration rules shall apply (App., *infra*, 25a-26a, 29a), with no reference to the AAA Supplementary Rules for Class Arbitrations (see https://www.adr.org/sites/default/files/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf) or the JAMS Class Action Procedures (see https://www.jamsadr.com/rules-class-action-procedures/). And the procedures addressed in the Agreement repeatedly refer to "*either* party," further reinforcing the Agreement's bilateral nature. App., *infra*, 29a-31a (emphasis added).

In contrast with Judges Reinhardt and Wardlaw's purported application of California law, multiple California state courts have rejected arguments that similarly worded arbitration provisions in the employment context can support an implicit agreement to class arbitration. See *Nelsen* v. *Legacy Partners Residential, Inc.*, 207 Cal.App.4th 1115 (2012); *Kinecta Alternative Fin. Solutions, Inc.* v. *Super. Ct.*, 205 Cal.App.4th 506 (2012), disapproved of on other grounds by *Sandquist* v. *Lebo Auto., Inc.*, 1 Cal. 5th 233 (2016). In *Kinecta*, the Court of Appeal applied *Stolt-Nielsen* to "conclude that the parties did not agree to authorize class arbitration in their arbitration agreement" through language authorizing arbitration of "'any claim, dispute, and/or controversy that either *I* may have against the Credit Union * * * or the Credit Union may have against *me*, arising from, related to, or having any relationship or connection whatsoever with *my* seeking employment with, employment by, or other association with the Credit Union.'" 205 Cal.App.4th at 519.

Like the arbitration provision here (App., *infra*, 25a), the arbitration agreement in *Kinecta* covered employment disputes under a variety of enumerated state and federal statutes. *Id.* at 511 n.1. And also like the arbitration provision here (App., *infra*, 24a-25a), the arbitration agreement "ma[de] no reference to employee groups or to other employees," instead "refer[ring] exclusively to 'I,' 'me,' and 'my' (designating [the employee])." 205 Cal.App.4th at 517; see also *Nelsen*, 207 Cal.App.4th at 1130 (following *Kinecta* in a "nearly identical" case).

This directly contrary "California case law" further reveals that the panel majority's opinion is far from a neutral application of ordinary state-law con-

tract principles. *Imburgia*, 136 S. Ct. at 469. Rather, it is a "unique," result-oriented interpretation (*ibid.*), transparently motivated by the panel majority's preference for the class device and desire to "eva[de]" this Court's decisions in *Stolt-Nielsen* and *Concepcion*. App., *infra*, 5a.

3. Finally, the panel majority "cannot salvage its decision" (*Kindred Nursing Ctrs.*, 137 S. Ct. at 1427) by reliance on the state-law canon of contractual interpretation providing that ambiguous terms are construed against the drafter. App., *infra*, 3a-4a. That doctrine cannot be relied on to manufacture consent to class arbitration when, as here, the arbitration clause itself lacks any indication of an agreement to use class procedures.

To begin with, the canon is inapposite because there are no ambiguous terms to interpret for all of the reasons discussed above. As the dissent put it, "the Agreement was not ambiguous." App., *infra*, 5a.

In any event, the FAA forecloses the panel majority's reliance on a state-law canon to manufacture the consent to class arbitration that the "*FAA* requires" as a matter of federal law. *Stolt-Nielsen*, 559 U.S. at 687 (emphasis added). As this Court explained in *Stolt-Nielsen*, "[w]hile the interpretation of an arbitration agreement is *generally* a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion." *Id.* at 681 (emphasis added; quotation marks omitted). And in *Concepcion*, the Court held that "class arbitration, to the extent it is manufactured by [application of a state law doctrine] rather than consensual, is inconsistent with the FAA." 563 U.S. at 348.

Thus, the majority's invocation of this state-law canon cannot save its patently erroneous interpretation of the parties' arbitration agreement. As this Court pointed out in *Imburgia*, "the reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was." 136 S. Ct. at 470.

B. The Decision Below Conflicts With The Decisions Of Several Other Circuits.

By departing from this Court's clear guidance, Judges Reinhardt and Wardlaw 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 into an "implicit" agreement to class arbitration.

The Sixth Circuit has *three* times rejected arguments indistinguishable from those relied on below. First, in *Reed Elsevier, Inc. ex rel. LexisNexis Div.* v. *Crockett*, 734 F.3d 594, (6th Cir. 2013), the court declined to infer an agreement to class arbitration from language providing for arbitration of "any controversy, claim, or counterclaim * * * arising out of or in connection with this Order." *Id.* at 599. "The principal reason to conclude that this arbitration clause does not authorize classwide arbitration," the court began, "is that the clause nowhere mentions it." *Ibid.* And a "second reason," the court continued, "is that the clause limits its scope to claims 'arising from or in connection with *this Order*,' as opposed to other customers' orders." *Ibid.* The court further rejected as irrelevant the plaintiff's argument "that the agreement does not expressly exclude the possibility of classwide arbitration," explaining that "the agreement does not include it either"— explicitly or

implicitly—"which is what the agreement needs to do in order for us to force that momentous consequence upon the parties here." *Id.* at 600.

A year later, the Sixth Circuit reached the same conclusion in construing an employment agreement that called for arbitration of "[a]ny Claim arising out of or relating to this Agreement." *Huffman* v. *Hilltop Cos., LLC*, 747 F.3d 391, 393 (6th Cir. 2014). The Court explained: "As was * * * the case in *Reed Elsevier*, here the parties' arbitration clause nowhere mentions classwide arbitration. We therefore conclude that the arbitration clause does not authorize classwide arbitration, and hold that the plaintiffs must proceed individually." *Id.* at 398-99 (citation omitted).

Most recently, in *AlixPartners, LLP* v. *Brewington*, another employment arbitration case, the court discerned no agreement to class arbitration in language providing for the arbitration of "any dispute arising out of or in connection with any aspect of this Agreement" and providing that "all substantive rights and remedies" shall be available in arbitration. 836 F.3d 543, 547 (6th Cir. 2016). The court explained that this language constituted merely "silen[ce] on the availability of classwide arbitration, and we may not presume from 'mere silence' that the parties consented to it." *Id.* at 553 (quoting *Stolt-Nielsen*, 559 U.S. at 687). The court further reasoned that class arbitration could not be inferred because "the clause limits its scope to claims 'arising out of or in connection with any aspect of *this Agreement*,' as opposed to other employees' and/or potential employees' agreements." *Ibid.*

The Third Circuit has also refused to infer consent to class arbitration from the parties' broad

agreement to arbitrate "[a]ny dispute or claim arising out of or relating to Employee's employment * * * or any provision of this Agreement," *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 arbitration agreement likewise contained similar language requiring arbitration "to the fullest extent permitted by law." *Opalinski* v. *Robert Half Int'l, Inc.*, 2015 WL 7306420, at *1 (D.N.J. Nov. 18, 2015), *aff'd* 677 F. App'x 738.

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.'" 677 F. App'x at 742 (quoting *Stolt–Nielsen*, 559 U.S. at 685). The court explained that the "problem" with the plaintiffs' reliance on broad "any dispute or claim" language is twofold: (1) it "misses the critical point" that the agreement refers to claims that "relate to the *particular* employee's employment, not *any* employee's employment"; and (2) it "shows only the parties' general intent to arbitrate their disputes," which cannot support an inference of "an intent to arbitrate class claims." *Ibid.*

The decision below is also irreconcilable with the Fifth Circuit's application of *Stolt-Nielsen*. See *Reed* v. *Fla. Metro. Univ., Inc.*, 681 F.3d 630, 643-44 (5th Cir. 2012), abrogated on other grounds by *Oxford*

Health, 569 U.S. 564.[7] In *Reed*, the plaintiff agreed to arbitrate "any dispute arising from my enrollment" and the agreement provided that "[a]ny remedy available from a court under the law shall be available in the arbitration." 681 F.3d at 641. The Fifth Circuit explained that neither of these provisions "even remotely relates to or authorizes class arbitration." *Id.* at 642. Specifically, the "'any dispute' clause is a standard provision that may be found, in one form or another, in many arbitration agreements." *Ibid.* And the "remedy" provision says nothing about the availability of a class action, which is a "procedural device": "while a class action may lead to certain types of remedies or relief, a class action is not *itself* a remedy." *Id.* at 643.

Two other circuits had refused even before *Stolt-Nielsen* to order class arbitration when the arbitration clause made "no provision for arbitration as a class." *Dominium Austin Partners, L.L.C.* v. *Emerson*, 248 F.3d 720, 728-29 (8th Cir. 2001); see also *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995). *Stolt-Nielsen* confirmed that these circuits' approach was correct.

C. The Decision Below Is Exceptionally Important.

The decision below warrants this Court's review for several reasons.

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[7] In *Reed*, the Fifth Circuit reviewed an arbitrator's contract interpretation. 681 F.3d at 646. This Court's decision in *Oxford Health* makes clear that the Fifth Circuit was not permitted to override the arbitrator's determination in light of the limited judicial review under Section 10 of the FAA. But *Reed's* analysis would apply fully to the *de novo* review of a district court's contract interpretation.

1. Consistency in the lower courts on the application of the FAA is a matter of considerable practical significance. This Court has long recognized that "private parties have likely written contracts relying on [its FAA precedent] as authority" (*Allied-Bruce Terminix Cos.*, 513 U.S. at 272), which means that departure from the FAA's principles will create confusion about the application of arbitration agreements and lead to the defeat of the contracting parties' expectations.

As demonstrated by the numerous cases cited above (at 19-22), the issue presented arises with considerable frequency. The frequency of the issue presented—and the outlier status of the decision below—are further reinforced by district court decisions from across the country, which have followed this Court's guidance in *Stolt-Nielsen* and refused to infer an agreement to class arbitration from standard arbitration terms.[8]

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[8] See, *e.g.*, *JPay, Inc.* v. *Kobel*, 2017 WL 3218218, at *4-5 (S.D. Fla. July 28, 2017) (broad agreement to arbitrate "Any [] dispute, claim, or controversy among the Parties" does not suffice; holding that "concerns" about small value of individual claims "are not a basis for adding a term to an arbitration agreement on which the parties did not clearly agree") (alteration in original); *Del Webb Communities, Inc.* v. *Carlson*, 2017 WL 1050139, at *2 (D.S.C. Feb. 1, 2017) (following Sixth Circuit's decision in *Reed Elsevier* in construing sales agreement with similar language); *Henderson* v. *U.S. Patent Comm'n, Ltd.*, 188 F. Supp. 3d 798, 809-10 (N.D. Ill. 2016) ("(1) bilateral arbitration language such as that in the [agreements at issue] is silent as to the issue of class arbitration; and (2) silence is not sufficient to permit class arbitration."); *NCR Corp.* v. *Jones*, 157 F. Supp. 3d 460, 467-71 (W.D.N.C. 2016) (agreement to arbitrate "every possible claim * * * arising out of or relating in any way to my employment" and language that parties "intend for this Agreement to

This conflict yields the untenable result that a party within the Ninth Circuit can be subjected to class arbitration while similarly-situated parties elsewhere will not. And if permitted to stand, the decision below could embolden other courts to elevate their preferences for class procedures over the FAA's primary purpose of enforcing arbitration agreements according to their terms. This Court's intervention is needed to ensure that parties' rights under the FAA do not depend on the forum in which they seek to enforce an arbitration agreement.

2. The practical consequences are especially acute when class-action procedures are superimposed upon arbitration absent clear agreement by the parties.

Ensuring robust consent to class arbitration is critical because "the 'changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental.'" *Concepcion*, 563 U.S. at

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be interpreted broadly to allow arbitration of as many disputes as possible" does not suffice; plaintiff's request to read that language to permit class arbitration "flies in the face of binding precedent requiring the court to do exactly the opposite"); *Bird* v. *Turner*, 2015 WL 5168575, at *9 (N.D. W. Va. Sept. 1, 2015) ("[T]he arbitration agreement does not indicate that the parties consented to class arbitration" when the agreement "does not mention class arbitration" and "is put in terms of bilateral disputes"); *Hickey* v. *Brinker Int'l Payroll Co.*, 2014 WL 622883, at *4 (D. Colo. Feb. 18, 2014) (agreement to arbitrate "any legal or equitable claims or disputes arising out of or in connection with employment" amounts to "mere silence" on the issue of class or collective arbitration); *Smith* v. *BT Conferencing, Inc.*, 2013 WL 5937313, at *9 (S.D. Ohio Nov. 5, 2013) (agreement to arbitrate "any dispute * * * arising out of or relating to my employment" is "silent regarding class arbitration" and "plain language" covers only employee's disputes, not "disputes arising out of the employment of others").

347 (quoting *Stolt-Nielsen*, 559 U.S. at 686); see also pages 11-13, *supra*. Indeed, class arbitration is a worst-of-both worlds hybrid of arbitration and litigation.

On the one hand, the expedition, informality, and cost-savings of traditional bilateral arbitration are lost. Class arbitration "*requires* procedural formality" and "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." *Concepcion*, 563 U.S. at 349-50; see also *Stolt-Nielsen*, 559 U.S. at 686. And it raises the "commercial stakes" to defendants to a "comparable" level "to those of class-action litigation." *Stolt-Nielsen*, 559 U.S. at 686.

On the other hand, the extremely limited judicial review of the arbitrator's decisions remains intact. This combination of enormous stakes and minimal review "greatly increases risks to defendants." *Concepcion*, 563 U.S. at 350. Many defendants are willing to forego meaningful judicial review in an individual arbitration because of their desire for a less costly and less adversarial method of resolving disputes. See *Concepcion*, 563 U.S. at 350; *Stolt-Nielsen*, 559 U.S. at 685. But the calculus changes "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once," creating an "unacceptable" risk of error and subjecting defendants to the hydraulic pressure of "settling questionable claims." *Concepcion*, 563 U.S. at 350.

Beyond the lack of effective judicial review, the *res judicata* effect of a class arbitration is unsettled at best. Because arbitration "is a matter of consent, not coercion" (*Volt*, 489 U.S. at 479), when an arbi-

tration agreement does not clearly authorize class arbitration, absent class members would have a powerful due process argument that they did not agree to be bound by an award resulting from an arbitration proceeding in which they did not participate. As Justice Alito put it in his *Oxford Health* concurrence (joined by Justice Thomas), "[w]ith no reason to think that the absent class members ever agreed to class arbitration, it is far from clear that they will be bound by the arbitrator's ultimate resolution of this dispute." 569 U.S. at 574 (Alito, J., concurring).

At a minimum, these due process concerns increase the procedural complexity required. See *Concepcion*, 563 U.S. at 333 ("If procedures are too informal, absent class members would not be bound by the arbitration."). And even the notice and opt-out procedures employed in class-action litigation in court may not suffice: "at least where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members" who "have not submitted themselves to th[e] arbitrator's authority in any way." *Oxford Health*, 569 U.S. at 574-75 (Alito, J., concurring). The upshot of a class arbitration's vulnerability to collateral attack is that "absent class members [can] unfairly 'claim the benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.'" *Id.* at 575 (quoting *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 546-47 (1974)). That result is palpably unfair.

For all of these reasons, "[a]rbitration is poorly suited to the higher stakes of class litigation." *Concepcion*, 563 U.S. at 350. And if garden-variety arbi-

tration agreements like the one in this case can be interpreted to permit class arbitration, defendants who have entered into such agreements will be deterred from enforcing them whenever the claims at issue are potentially subject to class-wide treatment. It is hard to imagine a result more inimical to the strong federal policy favoring arbitration embodied by the FAA.

3. The approach taken by the court below is especially questionable for the reasons discussed above. In fact, given the "obvious" nature of the error below (*Gonzales* v. *Thomas*, 547 U.S. 183, 185 (2006)), the Court might wish to consider summary reversal. The Court has taken that step several times in recent years to set aside manifest failures by lower courts to adhere to this Court's arbitration rulings. See *Nitro-Lift Techs.*, 568 U.S. at 20 (lower court "disregard[ed] this Court's precedents on the FAA"); *Marmet*, 565 U.S. at 531 (lower court erred "by misreading and disregarding the precedents of this Court interpreting the FAA"); *KPMG LLP* v. *Cocchi*, 565 U.S. 18, 22 (2011) (per curiam) (lower court "fail[ed] to give effect to the plain meaning of the [FAA]"); see also *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 56-58 (2002) (per curiam) (lower court refused to apply the FAA by taking an "improperly cramped view of Congress' Commerce Clause power" that was inconsistent with this Court's holdings). And this Court also, of course, has recently overturned other flawed arbitration rulings after plenary review. See *Kindred Nursing Ctrs.*, 137 S. Ct. at 1427-28; *Imburgia*, 136 S. Ct. at 468-71.

4. Finally, this case is an ideal vehicle. It arises out of federal court, so it does not implicate the views expressed by one member of this Court that the FAA

does not apply in state court proceedings. The case also cleanly presents a *judicial* construction of the parties' arbitration agreement rather than an arbitral one—the latter of which is reviewed only under the limited grounds for review of arbitral awards.

In *Oxford Health*, for example, this Court refused to overturn an *arbitrator*'s determination that a similarly "garden-variety arbitration clause" that "lack[ed] any of the terms or features that would indicate an agreement to use class procedures" supported class arbitration "because, *and only because*, it is not properly addressed to a court" given the forgiving standard of review for an arbitrator's decision. 569 U.S. at 572 (emphasis added). As the concurring Justices put it, "[i]f we were reviewing the arbitrator's interpretation of the contract *de novo,* we would have little trouble concluding that he improperly inferred '[a]n implicit agreement to authorize class-action arbitration * * * from the fact of the parties' agreement to arbitrate.'" *Id.* at 574 (Alito, J.) (quoting *Stolt-Nielsen*, 559 U.S. at 685). Here, review is indeed "*de novo*," and under that standard, the decision below cries out for reversal.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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