No. 17-988

IN THE

Supreme Court of the United States

LAMPS PLUS, INC., *ET AL.*

Petitioners,

v.

FRANK VARELA,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the court of appeals err in construing the distinctive language of the arbitration agreement at issue in this case to authorize class arbitration?

2. Did the court of appeals have appellate jurisdiction over the petitioners' appeal of the district court's order granting their motion to compel arbitration, directing arbitration to proceed, and dismissing respondent's claims without prejudice?

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INTRODUCTION

In this case, a panel of the court of appeals, in an unpublished, non-precedential decision, followed this Court's holding in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), that "a party may not be compelled under the F[edera] A[rbitration] A[ct] to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 684. To determine whether there was a contractual basis for class arbitration, the court, consistent with *Stolt-Nielsen* and other Federal Arbitration Act ("FAA") precedents, applied generally applicable principles of California contract law to the specific language of the particular arbitration agreement before it, and concluded that the contract permitted class arbitration. The court accordingly affirmed a district court decision compelling arbitration of the parties' underlying dispute, including claims asserted on a class basis (should the arbitrator decide to certify a class).

Such a factbound application of contract law principles within the framework of federal arbitration law established by this Court does not merit further review. The decision creates no intercircuit conflict and does not threaten to impose class arbitration wholesale on parties who did not agree to it. It offers only a reasonable interpretation of a single contract to determine the parties' intent in light of background principles of state contract law.

Those reasons are more than sufficient to warrant denial of the petition for a writ of certiorari. But there is another barrier to review in this case: a substantial question whether this case was properly in the court of appeals to begin with. The jurisdictional

statute applicable to orders concerning arbitration, 9 U.S.C. § 16, provides that "[a]n appeal may be taken from … an order … *denying* a petition under section 3 of this title to order arbitration to proceed." *Id.* § 16(a)(1)(B). In the absence of a certification order under 28 U.S.C. § 1292(b), however, "an appeal may *not* be taken from an interlocutory order … *directing arbitration to proceed* under section 4 of this title." *Id.* § 16(b)(2) (emphasis added). Here, the district court's order *granted* petitioners' motion to compel arbitration and directed arbitration to proceed, and there was no § 1292(b) certification. The case thus falls outside the scope of appellate jurisdiction over interlocutory orders regarding arbitration.

Although the district court also dismissed *respondent's* claims without prejudice pending arbitration, that order, which petitioners actively sought, does not itself aggrieve petitioners or provide them standing to appeal. *Cf. Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017). And if the court of appeals lacked jurisdiction to decide the merits, this Court likewise has no jurisdiction to do so: This Court's jurisdiction is limited to cases properly "in" the court of appeals, 28 U.S.C. § 1254, and it has no jurisdiction under § 1254 to decide issues that fall outside the scope of the lower courts' appellate jurisdiction. *See*, *e.g.*, *Will v. Hallock*, 546 U.S. 345, 349 (2006).

The case's jurisdictional posture underscores the inadvisability of granting review of a factbound challenge to a correct interpretation of a single contract. Other considerations also weigh against review.

First, the dispute between the parties has not been finally resolved, and it is possible that a class will never be certified or that the claims will be re-

solved in a way that moots any question of class proceedings. The lack of finality, together with the possibility of review at some later stage of the case should it become warranted, is a strong reason for the Court to avoid taking up this case. Second, the case implicates other potentially dispositive issues not addressed by the court of appeals, rendering it a particularly poor candidate for review. Finally, the issue raised is of rapidly diminishing importance in view of the dramatic increase in the use of arbitration provisions that incorporate express prohibitions on class proceedings.

STATEMENT

Respondent Frank Varela has been an employee of petitioner Lamps Plus, Inc., since 2007. In March 2016, Lamps Plus allowed a criminal to gain access to copies of W-2 income and tax withholding statements of approximately 1,300 of its employees, including Mr. Varela. As a result, a fraudulent 2015 federal income tax return was filed in Mr. Varela's name.

Mr. Varela filed suit in the United States District Court for the Central District of California against Lamps Plus, Inc., and two related corporations (collectively referred to herein as "Lamps Plus") asserting federal and state-law claims on behalf of a class consisting of current and former employees of Lamps Plus and others injured by the information breach. Lamps Plus moved to compel arbitration under the terms of an arbitration agreement in Mr. Varela's employment agreement, which provides for arbitration of "all claims that may … arise in connection with [his] employment." Pet. App. 25a. The arbitration provision further provides (among other things)

that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment," *id.* at 24a, that all claims "that, in the absence of this Agreement, would have been available to the parties by law" are arbitrable, and that the arbitrator "is authorized to award any remedy allowed by applicable law," *id.* at 26a.

Lamps Plus contended that the agreement authorized arbitration only of Mr. Varela's individual claims and did not permit him to assert claims on behalf of a class either in court or in arbitration. Simultaneously, Lamps Plus also moved for dismissal of all Mr. Varela's claims. Mr. Varela opposed arbitration on numerous grounds, including that his claims were outside the scope of the agreement and that the agreement was unconscionable under California law. He also contended that, if arbitration were to proceed, he should be allowed to seek to represent a class in the arbitration.

The district court granted Lamps Plus's motion to compel arbitration over Mr. Varela's objections. The court concluded that the dispute arose in connection with his employment and thus was within the scope of the arbitration agreement. With respect to unconscionability, the court found that the agreement was procedurally unconscionable because it was a contract of adhesion imposed on him as a condition of employment. However, the court found that the agreement was not substantively unconscionable because it did not impose excessive fees on Mr. Varela, its remedial provisions were not unfairly one-sided, and its limits on discovery did not unduly curtail necessary discovery.

The court, however, ruled that the agreement authorized class arbitration and thus declined to limit its order compelling arbitration to Mr. Varela's individual claims. The court recognized that under *Stolt-Nielsen*, a party may not be compelled to participate in class arbitration absent a contractual basis for concluding that it agreed to do so. Pet. App. 21a. The court found, however, that the language of the agreement was ambiguous as to whether it allowed arbitration of class claims. Construing that ambiguity against the drafter of the agreement, Lamps Plus, the court concluded that there was a contractual basis for class arbitration. *Id.* at 22a. The court also observed that a waiver of class claims "in the employment context would likely not be enforceable" under the National Labor Relations Act ("NLRA"). *Id.* (citing *Lewis v. Epic Sys. Corp.,* 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017)).

Based on these conclusions, the court granted Lamps Plus's motion to compel arbitration, and, in light of that ruling, granted its motion to dismiss Mr. Varela's claims, without prejudice. Pet. App. 23a.

Lamps Plus appealed the court's ruling in its favor to the Ninth Circuit, arguing that it was aggrieved by the court's refusal to limit its order compelling arbitration to Mr. Varela's individual claims. Mr. Varela contended that the district court had properly construed the agreement to authorize class arbitration. In addition, relying on the Ninth Circuit's decision in *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017), which postdated the district court's decision, Mr. Varela argued that the agreement would be unlawful under the NLRA if it allowed only individual arbitration.

The Ninth Circuit affirmed in an unpublished, non-precedential opinion, finding that the parties had agreed to class arbitration. Pet. App. 2a. The court began by recognizing that, under *Stolt-Nielsen*, parties may be compelled to arbitrate on a class basis only if they have contractually agreed to do so. *Id.* The court also recognized that the agreement's failure to mention class arbitration expressly was not dispositive under *Stolt-Nielsen*; rather, the question was whether their contract was properly interpreted to reflect agreement on class arbitration. *Id.*

To determine whether the contract permitted class arbitration, the court applied "state-law contract principles," which govern interpretation of arbitration agreements. *Id.* (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). Consistent with California contract-law principles, the court first considered the text of the contract and found it ambiguous. The court focused particular attention on the contract's distinctive language providing for arbitration "in lieu of any and all lawsuits or other civil legal proceedings," together with other broad language including permission to assert all "claims that would have been available to the parties by law." Pet. App. 3a–4a. The court pointed out that class claims would have been available to respondent in court, and that "class proceedings" are encompassed in the phrase "civil legal proceedings." *Id.* Although the court did not find that the contractual language on its face unambiguously permitted class proceedings, it concluded that its terms, taken together, "can be reasonably read to allow for class arbitration." *Id.* at 3a.

Because the contract was "capable of two or more constructions, both of which are reasonable," *id.*

(quoting *Powerine Oil Co. v. Super. Ct.*, 118 P.3d 589, 598 (Cal. 2005)), the court applied the California contract-law principle that "[a]mbiguity is construed against the drafter" of a contract, *id.*—"a rule that 'applies with peculiar force in the case of a contract of adhesion,'" *id.* (quoting *Sandquist v. Lebo Auto., Inc.*, 376 P.3d 506, 514 (Cal. 2016)). The court therefore concluded that "the construction posited by Varela"—*i.e.*, "that the ambiguous Agreement permits class arbitration"—was proper under California contract law and supplied "the necessary 'contractual basis' for agreement to class arbitration" under *Stolt-Nielsen*. *Id.* at 4a–5a.

Judge Fernandez filed a two-sentence dissenting statement. All the members of the panel, however, voted to deny Lamps Plus's petition for panel rehearing and either voted to deny or recommended denial of its petition for rehearing en banc. No judge of the Ninth Circuit requested a vote on the petition for rehearing en banc.

REASONS FOR DENYING THE WRIT

I. The court of appeals' construction of the arbitration agreement in this case does not present an issue meriting review.

A. The lower court's decision that there is a contractual basis for class arbitration correctly applies both the FAA as construed in *Stolt-Nielsen* and the state contract-law principles that govern construction of arbitration agreements.

The court of appeals' decision followed exactly the course laid down by this Court for determining whether an arbitration agreement authorizes class

proceedings: It applied the FAA-based principle that class arbitration is permissible only if there is a contractual basis for it, and it then turned to generally applicable state contract law to ascertain whether such a contractual basis existed. Although Lamps Plus attempts to characterize its petition as raising a question of federal law, its argument for further review is fundamentally an assertion that the court erred in determining whether the contract authorizes class arbitration. Such a fact-specific challenge to a non-precedential application of state contract law is not suitable for review by this Court.

This Court has repeatedly held that the determination of the scope of arbitration under an agreement subject to the FAA is a matter of contract construction governed by "ordinary state-law principles" of contract law. *First Options*, 514 U.S. at 944. As the Court put it in *Stolt-Nielsen*, "the interpretation of an arbitration agreement is generally a matter of state law." 559 U.S. at 681.

Where the question is whether an arbitration agreement permits class arbitration, *Stolt-Nielsen* holds that the FAA displaces otherwise applicable state law only if, and to the extent that, state law would impose class arbitration for policy reasons rather than on the basis of contract-law principles that "give effect to the contractual rights and expectations of the parties." *Id.* at 682 (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.,* 489 U.S. 468, 479 (1989)). Thus, under *Stolt-Nielsen*, "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 684. The Court reiterated this statement of *Stolt-Nielsen*'s holding in *Oxford Health Plans LLC v.*

Sutter, 569 U.S. 564, 567 (2013), and it emphasized the limits on that holding by explaining that the Court had "overturned the arbitral decision [in *Stolt-Nielsen*] because it lacked *any* contractual basis for ordering class procedures." *Id*. at 571.

In holding that class arbitration must have a contractual basis beyond the mere existence of an agreement to arbitrate, *Stolt-Nielsen* in no way suggests that the Court was displacing the state contract-law principles that, under the FAA, normally govern whether a proffered construction of an arbitration agreement has a contractual basis. Indeed, *Stolt-Nielsen*'s citation of *Volt* for the proposition that class arbitration is a matter of the "contractual rights and expectations of the parties," 559 U.S. at 682 (quoting 489 U.S. at 479), indicates that state law retains its primary role, because one of the key holdings of *Volt* is that determining the extent of those contractual rights and expectations is a matter of state law. *See* 489 U.S. at 474. Nothing in *Stolt-Nielsen* indicates that in requiring a contractual basis for class arbitration, the Court also silently required the creation of a new federal common law of contracts to replace state law in determining whether such a contractual basis exists.

Consistent with *Stolt-Nielsen*, the panel in this case acknowledged that class arbitration would be permissible only if it had a contractual basis—that is, if the parties agreed to it. Pet. App. 2a. The court also recognized, consistent with both *Stolt-Nielsen* and *Oxford Health Plans*, that the absence of express language in the agreement was not determinative of

this point. *See id.*[1] The panel therefore turned to state-law contract principles to determine whether the agreement was properly interpreted to authorize class arbitration. *See id*. It carefully parsed the contractual language and found ambiguity on the basis of multiple provisions indicating that class proceedings, like other all other "civil legal proceedings," could reasonably be understood to be within the scope of arbitration under the agreement. *Id*. at 3a–4a. And it turned to the well-established California contract-law principle of construing ambiguous provisions against the drafter to resolve their ambiguity. *Id*. at 3a–5a.

The panel's decision thus fully respects *Stolt-Nielsen*'s holding that class arbitration requires a contractual basis, as well as the longstanding principle that state contract law defines the "contractual rights and expectations of the parties," *Volt*, 489 U.S. at 479), and determines whether a contractual basis for class arbitration exists. The panel's reliance on the principle of construing ambiguous provisions against the drafter is consistent with governing state law, and this Court has specifically endorsed application of that state-law principle in determining the intentions of the parties to an arbitration agreement. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62–63 & nn. 9–10 (1995).

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[1] Lamps Plus does not appear to contend that the panel erred in recognizing that *Stolt-Nielsen* does not require an *express* reference to class arbitration. *Oxford Health Plans*, where the contract likewise did not expressly mention class arbitration, rules out any possibility that *Stolt-Nielsen* requires an express contractual reference to class arbitration.

The court of appeals' application of state-law contract principles to construe the distinctive language of a specific agreement—a decision that has no precedential effect and could not in any event have controlling force on state-law matters—does not merit review by this Court. This Court has emphasized that it "does not sit to review" the "question[s] of state law" implicated in "interpretation of private contracts," including arbitration agreements. *Volt*, 489 U.S. at 474. The contention that the court of appeals misconstrued the contract in this case raises exactly such a question.

B. The court of appeals' decision does not conflict with this Court's precedents.

1. Lamps Plus acknowledges that the decision below correctly stated *Stolt-Nielsen*'s holding and held that the required contractual basis for class arbitration was present here. Pet. 13. But Lamps Plus argues that the decision effectively "renders *Stolt-Nielsen* a nullity" by relying on reasoning under which "*any* arbitration agreement" without an express class-action prohibition could be said to authorize class arbitration. *Id*. According to Lamps Plus, the decision below is therefore contrary to *Stolt-Nielsen*'s holding that an "implicit agreement to authorize class-action arbitration" cannot be "infer[red] solely from the fact of the parties' agreement to arbitrate." 559 U.S. at 685; *see* Pet. 13–14.

The court of appeals did not, however, infer agreement to class arbitration solely from features that are common to all arbitration agreements, as Lamps Plus contends. Nowhere in the court of appeals' opinion does the court suggest that any of the particular provisions of the agreement that Lamps

Plus argues are inherent in all arbitration agreements (such as waiver of a right to a jury, Pet. 13), would by itself create ambiguity as to whether class proceedings are authorized. Rather than analyzing particular clauses in isolation, as Lamps Plus does, the court looked at the agreement as a whole and found that its unique *combination* of provisions indicating the arbitrability of all forms of "civil legal proceedings," as well as all "claims that would have been available to the parties" and "any remedy" that would be allowed for such claims, created ambiguity. *See* Pet. App. 3a–4a.

Lamps Plus's assertion that this language, viewed as a whole, means nothing more than what is inherent in any arbitration agreement is unfounded. At most, Lamps Plus's arguments suggest that no one phrase in the agreement, by itself, clearly means that class arbitration is available. In other words, Lamps Plus's arguments amount to no more than an assertion that the passages in isolation do not *unambiguously* provide that class arbitration is available. Lamps Plus's efforts to demonstrate that the language can be read differently from the way the court of appeals read it only underscore the correctness of the court's holding that the contract is ambiguous.[2]

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[2] Lamps Plus's assertion that the court of appeals' reliance on the language regarding "civil legal *proceedings*" must be incorrect because it implies that all "*procedures*" applicable in court would necessarily apply in arbitration, Pet. 14, is particularly unpersuasive because of its confusion of two different terms. Moreover, the contractual language cited by the court could not create ambiguity as to whether civil discovery procedures would apply in arbitration, *see id.*, because the agreement expressly addresses discovery and other procedural matters, *see*

(*Footnote continued*)

Lamps Plus's arguments also overlook that this Court has already held that *Stolt-Nielsen* is not "nullified" by contractual interpretations that are based on the breadth of an arbitration clause's terms. In *Oxford Health Plans*, an arbitrator found an agreement to class arbitration based on language providing for arbitration of all disputes that could be presented in a "civil action." 569 U.S. at 566. The petitioner there, like Lamps Plus here, argued that such a construction was directly contrary to *Stolt-Nielsen*'s prohibition on finding agreement to authorize class arbitration solely from the fact of an agreement to arbitrate. *See Oxford Health Plans*, Br. for Pet'r i, 18, 22, 39; Reply Br. 1. This Court, however, rejected the argument that the arbitrator's interpretation exceeded his authority under *Stolt-Nielsen*. *See* 569 U.S. at 570–72.

The Court's ultimate disposition of the case, to be sure, also rested on its view that the *sufficiency* of the arbitrator's contract construction was not subject to judicial review (a limitation not applicable to review of a court's determination). *See id*. at 571–72. But if the arbitrator's decision had nullified *Stolt-Nielsen* by inferring agreement to class arbitration solely from an agreement to arbitrate—something *Stolt-Nielsen* specifically held was beyond the power of an arbitrator, *see* 559 U.S. at 685—the outcome would have been different. And if the arbitrator's ruling in *Oxford Health Plans* did not violate *Stolt-*

Pet. App. 29a–35a. By contrast, reading the agreement to authorize class arbitration proceedings does not contradict its procedural provisions, which incorporate AAA and JAMS rules, *see* Pet. App. 25a–26a, that provide for class proceedings where authorized by the parties' agreement.

Nielsen's prohibition on inferring agreement to class arbitration solely from agreement to arbitrate, it follows that the court's decision here, which had a much more extensive textual basis, also did not "nullify" *Stolt-Nielsen*.

2. Lamps Plus's argument that the lower court's application of state-law contract principles is contrary to this Court's precedents, because it reflects impermissible "hostility" to arbitration, is likewise misguided. An application of state-law contract principles to an arbitration agreement may be preempted by the FAA if a state court "would not interpret contracts other than arbitration contracts the same way." *DIRECTV v. Imburgia*, 136 S. Ct. 463, 469 (2015). But Lamps Plus's factbound arguments that the court of appeals was wrong in interpreting this contract fall far short of demonstrating that only hostility toward arbitration could account for the court's ruling, or that it would not have found similar ambiguities in another type of contract. Nor is there anything in the court's ruling that "is too tailor-made to arbitration agreements" to pass muster under the FAA. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427 (2017).

Lamps Plus's citation to California state-court decisions that found no ambiguity as to the availability of class arbitration under other arbitration agreements, *see* Pet. 17–18, adds nothing to its claim that the decision below reflects impermissible hostility to arbitration. The decisions Lamps Plus cites involved agreements that used materially different language that focused much more clearly on the individual claims of the plaintiff. *See* Pet. 17. Lamps Plus points to nothing in those decisions that addresses language similar to that which the panel below considered de-

cisive in its determination that the agreement in this case is ambiguous.

Lamps Plus's invocation of the California state-court decisions only demonstrates that the principles of California contract law applied below are not hostile to arbitration and do not lead to determinations that class arbitration is authorized solely because parties have agreed to arbitrate. The decisions also underscore that review of the court of appeals' application of state-law contract principles is an unsound use of this Court's decisional resources because only the state courts can authoritatively determine how those principles apply to any particular contractual language. If, as Lamps Plus asserts, an agreement like the one in this case is not properly viewed as ambiguous under California law, the California courts—and only the California courts—can make that clear.

3. Lamps Plus's contention that the panel's reliance on the state-law principle that ambiguity is to be construed against the drafter of a contract conflicts with this Court's precedents is also baseless. This Court has explicitly recognized that application of that principle is fully consistent with the FAA's requirement that arbitration agreements be enforced as written. In fact, this Court has used the principle itself to determine what parties assented to when they agreed to arbitrate. *See Mastrobuono*, 514 U.S. at 62–63. And nothing in *Stolt-Nielsen* or *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), suggests that the Court intended to rule out use of this canon of construction in determining whether the parties to an agreement intended to allow class arbitration. Those decisions reject reliance on state-law principles to "manufacture[]" class arbitration for

policy reasons, *Concepcion*, 553 U.S. at 348, but cast no doubt on the use of state-law rules aimed at determining what parties assented to when they agreed to ambiguous terms. Moreover, the forceful application of the principle of construction against the drafter of a contract of adhesion is consistent with *Concepcion*'s explicit recognition that "[s]tates remain free to take steps addressing the concerns that attend contracts of adhesion." 563 U.S. at 347 n.61.

Likewise, this Court's decision in *Imburgia* casts no doubt on the viability of state contract law requiring that ambiguous provisions be construed against the drafter. *Imburgia*'s statement about the "limits" of the canon referred only to the Court's holding that it could not be applied *in the absence of ambiguity*. 136 S. Ct. at 470. Nothing in *Imburgia* suggests that, if this Court had found that a state court applying state law even-handedly could have found the contract in that case ambiguous, the Court would have held that application of the construction-against-the-drafter principle was impermissible under the FAA.

Indeed, such a holding would have been anomalous because nothing about the principle of construing a contract against the drafter "discriminat[es]" against arbitration either "on its face" or "covertly." *Kindred*, 137 S. Ct. at 1426. There is no reason to believe that ambiguity is an inherent feature of arbitration agreements or that canons of construction applicable to ambiguous agreements have a "disproportionate impact" on arbitration clauses. *Concepcion*, 563 U.S. at 342. And the Court's own application of the principle to an arbitration agreement in *Mastrobuono* negates any suggestion that it is inconsistent with the FAA's "principal purpose of ensuring

that private arbitration agreements are enforced according to their terms." *Volt*, 489 U.S. at 478.

C. This case does not implicate any conflict among the circuits.

Lamps Plus's claim of an intercircuit conflict rests on citation of a handful of cases that it claims interpreted contract language similar to the terms at issue here as not authorizing class arbitration. Even taken at face value, however, that contention would not demonstrate a conflict among the circuits on an important question of federal law. The assertedly conflicting decisions involve only whether particular contracts authorize class arbitration. That issue is one governed by state-law principles of contract construction, and the cases in question applied laws of different states. "Conflicting" constructions even of identical contract language under the laws of different states do not amount to a decisional conflict within the meaning of this Court's Rule 10(a), which reflects the principles governing this Court's exercise of its certiorari jurisdiction. Indeed, this Court cannot resolve such conflicts, as it has no power to issue authoritative rulings on state-law contract issues. *See Imburgia*, 136 S. Ct. at 468.

In any event, all of the supposedly conflicting decisions Lamps Plus invokes involved agreements with terms materially different from those of the contract at issue here. In *Reed Elsevier, Inc. ex rel. LexisNexis Division v. Crockett*, 734 F.3d 594 (6th Cir. 2013), the arbitration agreement concerned only claims that might arise out of a particular order for a commercial product, and it did not contain language comparable to that here concerning arbitration of all "civil legal proceedings" and "claims that would be

available to the parties" in them. Such language was likewise missing from the agreements in *Huffman v. Hilltop Cos., LLC*, 747 F.3d 391 (6th Cir. 2014), which involved a clause applicable only to claims arising from a particular agreement, and in *AlixPartners, LLP v. Brewington*, 836 F.3d 543 (6th Cir. 2016), which also was limited to claims arising out of a particular agreement and preserved the parties' *substantive* rights without, like the contract in this case, specifying its applicability to all "civil legal proceedings."

The Third Circuit's decision in *Opalinski v. Robert Half Int'l Inc.*, 677 F. App'x 738 (3d Cir. 2017), not only was unpublished and non-precedential, like the decision below, but also involved an agreement that lacked critical language relied on by the court in this case. Notably, the opinion in *Opalinski* did not contest that the contract construction issue before it was governed by New Jersey contract law and that the state's doctrine of construing ambiguities against the drafter could be applied if the contract were ambiguous. *See id.* at 742–43.

Equally unfounded is Lamps Plus's reliance on *Reed v. Florida Metropolitan University, Inc.*, 681 F.3d 630 (5th Cir. 2012). Not only the result, but also the reasoning of *Reed* was abrogated by this Court in *Oxford Health Plans*: *Reed* was based principally on the view that the absence of an express reference to class arbitration meant that the agreement could not be construed to authorize arbitration under *Stolt-Nielsen* because it was "silent" on the matter. *See* 681 F.3d at 642. This Court rejected that reading of *Stolt-Nielsen* in *Oxford Health Plans*, when it emphasized that the decision barred only class arbitration without a contractual basis, and did not require that the

contractual basis be express. *See* 569 U.S. at 571. The Fifth Circuit has not returned to the issue since *Reed*, but a recent and extensively reasoned district court opinion from that circuit has held, consistently with the decision below, that even language that does not refer specifically to class arbitration may suffice to delegate to an arbitrator the decision whether to allow arbitration on a classwide basis. *Langston v. Premier Directional Drilling, L.P.*, 203 F. Supp. 3d 777 (S.D. Tex. 2016).

Finally, Lamps Plus cites two decisions predating *Stolt-Nielsen*: *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001), and *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995) Neither aids its cause. Those decisions, as Lamps Plus points out (Pet. 22) anticipated *Stolt-Nielsen*'s holding that a contractual basis for class arbitration is required, but say nothing about what constitutes a sufficient contractual basis in light of *Stolt-Nielsen*.

Importantly, none of the post-*Stolt-Nielsen* cases Lamps Plus cites holds that the FAA preempts the application of state contract-law principles to allow class arbitration under the terms of a contract materially identical to the contract here. In the absence of any such ruling, the contention that there is a circuit conflict over an issue of federal law is baseless. In the end, Lamps Plus's citations establish only that when an issue depends on the application of state-law contract principles to specific contractual language, different courts applying different states' laws to different contracts may reach different results. That truism provides no justification for review of the fact-specific state-law contract decision below.

II. The court of appeals' jurisdiction over this case was highly doubtful.

This Court's jurisdiction depends on whether a case was properly "in" the court of appeals. 28 U.S.C. § 1254; *see*, *e.g.*, *Nixon v. Fitzgerald,* 457 U.S. 731, 742 (1982); *United States v. Nixon*, 418 U.S. 683, 690 (1974). If this Court were to accept review, it would be required, in order to determine its own jurisdiction, to consider whether the court of appeals had jurisdiction over the appeal. Jurisdiction was not contested in the court of appeals and the panel did not discuss it, but there is significant reason to doubt the court's jurisdiction. The need to address a problematic jurisdictional issue before this Court could reach the question Lamps Plus seeks to present makes this case an exceptionally poor candidate for review.

The district court in this case compelled arbitration on the motion of Lamps Plus. The FAA permits appeals from *denials* of motions to order arbitration, *see* 9 U.S.C. § 16(a)(1)(B), but bars appeals from interlocutory orders directing arbitration to proceed. 9 U.S.C. § 16(b)(2). A court of appeals may not consider an appeal's merits in the face of such an express statutory denial of jurisdiction. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981).

The FAA is designed "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). As the Fourth Circuit explained, "Congress sought to prevent parties from frustrating arbitration through lengthy preliminary appeals." *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 730 (4th Cir. 1991). Indeed, the Second Circuit has held that, in general, "a

party cannot appeal a district court's order unless, at the end of the day, the parties are forced to settle their dispute other than by arbitration." *Augustea Impb Et Salvataggi v. Mitsubishi Corp.*, 126 F.3d 95, 99 (2d Cir. 1997). Appellate courts thus routinely refuse appeals from interlocutory orders favoring arbitration. *See, e.g.*, *Preferred Care of Del., Inc. v. Estate of Hopkins*, 845 F.3d 765, 768 (6th Cir. 2017).

Attempting to skirt the FAA's limits on appellate jurisdiction, Lamps Plus characterizes the district court as having "denied the request for individual arbitration." Pet. 7. But the FAA's text is plain: "[A]n appeal may not be taken from an interlocutory order … directing arbitration to proceed under section 4 of this title." 9 U.S.C. § 16(b)(2). Faced with district court orders compelling arbitration, "albeit not in the first-choice" manner for the party wishing to enforce the arbitration agreement, courts of appeals have uniformly concluded that they lack appellate jurisdiction to reach the merits. *Al Rushaid v. Nat'l Oilwell Varco, Inc.*, 814 F.3d 300, 304 (5th Cir. 2016); *see also Blue Cross Blue Shield of Mass., Inc. v. BCS Ins. Co.*, 671 F.3d 635, 637–38 (7th Cir. 2011).

In *Al Rushaid*, the Fifth Circuit considered whether it had appellate jurisdiction over an order that compelled arbitration but denied the defendant's request that the arbitration take place before the International Chamber of Commerce. *Id.* at 303. Concluding that taking jurisdiction would frustrate § 16's purpose of promoting arbitration, the court held that it lacked jurisdiction. *Id.* at 304; *see also Bushley v. Credit Suisse First Boston*, 360 F.3d 1149, 1154 (9th Cir. 2004) (holding the court lacked jurisdiction to hear an appeal of an order denying arbitration in front of one body in favor of arbitration before anoth-

er); *Augustea*, 126 F.3d at 98 (holding the court lacked jurisdiction to hear an appeal over an order to arbitrate in London instead of New York).

Similarly, in *Blue Cross*, the Seventh Circuit held that an order denying a motion seeking to direct arbitrators to "hold separate rather than consolidated proceedings" was not a refusal to "order arbitration to proceed" within the meaning of 9 U.S.C. § 16(a)(1)(B), 671 F.3d at 638, even though the moving party described its motion as a petition "to compel a de-consolidated arbitration," *id.* at 636. As Chief Judge Easterbrook explained, an order that *allows* arbitration to proceed, albeit not in the procedural manner preferred by a party, does not fall within the scope of §16(a)(1)(B) regardless of a party's "artful pleading": Calling such an order a refusal to direct arbitration to proceed "does not make it so." *Id*. at 638; *see also id*. ("Unlike Humpty Dumpty, … a litigant cannot use words any way it pleases. … Abraham Lincoln once was asked how many legs a donkey has if you call its tail a leg. His answer was four: calling a tail a leg does not make it one.").

The reasoning of the courts of appeals in these cases remains correct and is applicable here. If parties may appeal every pro-arbitration order that does not precisely comport with their wishes, the FAA's policy of "rapid and unobstructed enforcement of arbitration agreements" will be thwarted. *Moses H. Cone*, 460 U.S. at 22. Parties could engage in lengthy appellate litigation over the proper forum, the proper arbitrator, and the proper location of the arbitration under the agreement before the arbitration even began. *See Blue Cross*, 671 F.3d at 638.

Recognizing the weakness of reliance on § 16(a)(1)(B), Lamps Plus asserted in the jurisdictional statement in its brief below that appellate jurisdiction was also proper under 28 U.S.C. § 1291 and 9 U.S.C. § 16(a)(3) because the district court dismissed Mr. Varela's claims without prejudice. An order dismissing a plaintiff's claims in favor of arbitration was deemed final by this Court for purposes of appeal by the plaintiff in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 85–87 (2000). There, the dismissal was "with prejudice," and the Court deemed it final because it "disposed of the entire case on the merits" and left the court "nothing to do but execute the judgment." *Id*. at 86.

Here, by contrast, the dismissal was *without prejudice* and resolved nothing on the merits.[3] Importantly, moreover, the dismissal here was on Lamp Plus's motion and was not adverse to Lamps Plus. Lamps Plus's appeal did not even seek to set it aside. This Court has recently held that a party cannot manufacture finality of an otherwise unappealable interlocutory order by engineering the dismissal of a matter—even where, unlike here, the dismissal is with prejudice. *Microsoft*, 137 S. Ct. at 1712–15. Moreover, a party is generally not aggrieved by, and hence cannot appeal, an order granting relief it re-

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[3] The Ninth Circuit and other circuits have extended *Randolph* to allow appeals by plaintiffs whose claims have been dismissed without prejudice in favor of arbitration. *See*, *e.g.*, *Interactive Flight Techs., Inc. v. Swissair Swiss Air Transport Co.*, 249 F.3d 1177 (9th Cir. 2001). Assuming their correctness, however, such decisions offer little support for an appeal by a *defendant* who procures dismissal without prejudice of the plaintiff's claims.

quested. *See id*. at 1717 (Thomas, J., concurring in the judgment). It would be nonsensical to allow a defendant to appeal an otherwise unappealable order just because it succeeded in convincing a district court to give it *more* relief than it needed by dismissing the plaintiff's claims without prejudice rather than staying them.

These principles strongly indicate that the Ninth Circuit lacked appellate jurisdiction. If the Court were to grant certiorari on the question Lamps Plus seeks to present, it would necessarily have to wrestle with this jurisdictional issue before reaching the merits—and to do so without the benefit of a decision below addressing the jurisdictional issue. By contrast, denial of certiorari avoids the need to consider the issue and leaves the parties in the same position they would be in if the court of appeals' decision were vacated for lack of jurisdiction: subject to a district court order directing arbitration to proceed.

III. A range of additional considerations make this case a poor choice for review.

1. Review is also unwarranted because the decision below was not final and did not conclude the dispute between the parties: It represents only an initial step in the litigation. This Court typically avoids taking up cases in an interlocutory posture. *See Va. Mil. Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."). Although Mr. Varela's action has been dismissed without prejudice pending arbitration, that dismissal is hardly a final resolution of this controversy. Arbitration, and potentially one or more

rounds of judicial proceedings seeking to confirm or vacate an arbitration award, are likely to occur before this case reaches a truly final judgment.

In the course of those proceedings, any number of events could occur that would obviate any need to decide whether the arbitration agreement here permits class proceedings. The arbitrator might not certify a class, or might dispose of the case on the merits adversely to Mr. Varela's claims. Alternatively, if the case does proceed on a class basis, further review of the issue presented here would be possible either at the conclusion of the arbitration, on an application for judicial confirmation or vacatur of a final award, or potentially even through proceedings to confirm or vacate a "partial" award regarding class certification, as in *Stolt-Nielsen*. *See* 559 U.S. at 669–70. If review were otherwise appropriate, it would be better informed both by the arbitrator's own construction of the agreement and by the arbitrator's and lower courts' consideration of the appropriateness of class certification.

2. Review of the correctness of the court of appeals' reading of the arbitration agreement here would also be ill-advised because it is as yet unsettled by this Court whether that issue is properly a question for a court or an arbitrator. In both *Stolt-Nielsen* and *Oxford Health Plans*, the decision whether class arbitration was permissible under the arbitration agreements at issue had been made by arbitrators, and the Court applied the highly deferential standard of review applicable to arbitrators' decisions on matters properly submitted to them by the parties. *See Oxford Health Plans*, 569 U.S. at 568–72; *Stolt-Nielsen*, 559 U.S. at 671–72. The Court in *Oxford Health Plans*, however, noted that it was

an open question whether the issue of contractual authorization for class arbitration was a "gateway" issue properly subject to judicial determination or a question for the arbitrator, 559 U.S. at 569 n.2, and the Court has not yet decided that issue.

In this case, the lower court proceeded on the assumption that the issue is one for judicial determination. The parties did not brief the correctness of that view in the court of appeals, and the panel's opinion does not address it. It would be imprudent for this Court, however, to address the correctness of a court's decision on the availability of class arbitration without first addressing the antecedent question whether the issue is properly one for the court. A decision about *how* courts should decide whether contracts authorize arbitration would be wasted effort if the Court were ultimately to conclude that courts should not decide such issues in the first instance. This case, however, is not the appropriate choice for consideration of that antecedent question because neither the parties nor the courts addressed it below, and this Court does not generally decide issues not raised or decided below. *See Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 n.16 (2016).

3. In the Ninth Circuit, Mr. Varela's argument for affirmance rested in large part on an argument different from the one ultimately decided by the panel—namely, that the NLRA renders unenforceable employment agreements that have the effect of banning concerted legal actions by employees, including class actions. That question is currently pending before this Court in three consolidated cases, *Epic Systems Corp. v. Lewis*, No. 16-285, *Ernst & Young LLP v. Morris*, No. 16-300, and *NLRB v. Murphy Oil Co.*, No. 16-307, which were argued on October 2, 2017.

The Ninth Circuit's ruling on the contractual authorization issue made it unnecessary for it to reach the question presented by those cases. This Court may of course deny certiorari here on the contractual authorization question presented by Lamps Plus without any need to hold the petition for those decisions, but it cannot *reverse* the judgment that Mr. Varela may seek to represent a class unless it reverses in *Morris* and *Lewis* and affirms in *Murphy Oil*.

4. Finally, Lamps Plus's assertion that the issue here is so important that it requires review notwithstanding all the considerations discussed above is untenable. Whether class arbitration is contractually authorized by the terms of a particular arbitration agreement that does not expressly address class proceedings is a question of rapidly diminishing importance. In the wake of *Concepcion* and *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), which hold that express provisions in arbitration agreements banning class actions are enforceable under the FAA, "[i]t has become routine … for powerful economic enterprises to write into their form contracts with consumers and employees no-class-action arbitration clauses." *Imburgia*, 136 S. Ct. at 471 (Ginsburg, J., dissenting). The ubiquity of such provisions renders the question of how to interpret agreements that do not include them ever less significant as more time passes and express class action bans proliferate.

Meanwhile, appellate decisions addressing whether class arbitration is available under clauses that do not expressly address class proceedings have been relatively few in number since *Stolt-Nielsen*, as the small number of allegedly conflicting cases cited by Lamps Plus illustrates. Cases in which courts

have construed arbitration agreements to permit class arbitration are rarer still. The suggestion that a single, non-precedential decision addressing the distinctive language of one arbitration agreement is likely to open the floodgates to class arbitration in cases where, unlike this one, it lacks the required contractual basis under *Stolt-Nielsen* is utterly implausible.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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