No. 17-988

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 Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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.

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INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the Retail Litigation Center has participated as an amicus in more than 100 cases of greatest importance to retailers.

The members of the RLC have a strong interest in the outcome of this proceeding. Relying on the legislative policy reflected in the Federal Arbitration Act ("FAA"), and this Court's consistent endorsement of the federal policy favoring arbitration, many of the RLC's members and affiliates enter into arbitration agreements with their employees. They do so because arbitration allows all parties to resolve disputes quickly

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[1] Pursuant to this Court's Rule 37.3(a), counsel for all parties consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court.

The RLC's members enter into arbitration agreements on the premise that arbitration will be conducted on an individual, rather than a class or collective, basis. As this Court recently explained, "permitting any party in arbitration to demand classwide proceedings despite the traditionally individualized and informal nature of arbitration" would "'sacrific[e] the principal advantage of arbitration—its informality—and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347, 348 (2011) (alterations in original)).

The Ninth Circuit's decision would allow courts to impose class arbitration procedures to which contracting parties never consented, to the detriment of both employers and employees, as well as plaintiffs and defendants. Therefore, the members of the RLC have a strong interest in this proceeding.

SUMMARY OF ARGUMENT

The Court should hold that an arbitration agreement does not permit class arbitration unless it contains a clear and unmistakeable statement that class arbitration is authorized, and that a class member can be bound by a decision in a class arbitration brought by a different class member. Such a clear and

unmistakeable statement should appear not only in the arbitration agreement of the class representative, but also in the arbitration agreements of all other class members.

In several contexts, this Court applies a clear-and-unmistakeable standard in resolving disputes under the Federal Arbitration Act. First, when deciding whether a particular merits-related dispute falls within the scope of a valid arbitration agreement, this Court applies a presumption that the dispute is arbitrable, requiring clear contrary language to rebut that presumption. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995). That standard reflects the strong federal policy favoring arbitration. *Id.* Second, when deciding whether a question of arbitrability is arbitrable, this Court applies a presumption that a court decides that question, submitting it to arbitration only if there is "clear and unmistakeable" language to the contrary. *Id.* This is because of a background presumption that parties generally intend disputes over the arbitrability of a dispute to be resolved in court. *Id.* Third, only "clear and unmistakeable" language in a collective bargaining agreement can require an employee to submit individual statutory claims to arbitration. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80-81 (1998). This standard reflect the Court's concern that the interests of unions and of individual employees may diverge. *Id.*

Those authorities support applying a clear-and-unmistakeable standard to the question of whether an arbitration agreement authorizes class arbitration. First, there is a strong federal policy favoring bilateral

arbitration. Second, parties who enter into arbitration agreements generally intend for disputes to be resolved via bilateral rather than class arbitration. Third, in view of the inherent conflicts of interest between class counsel and absent class members, a class member should not be deemed to have consented to being part of a class unless there is clear language in the arbitration agreement stating that the class member may be bound by a decision in a class arbitration brought by a different class member.

Adoption of a clear-and-unmistakeable standard is consistent with *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013). In *Oxford*, this Court declined to disturb an arbitrator's decision that an agreement authorized class arbitration, even though that agreement did not contain clear and unmistakeable language. But the basis for the Court's decision was that the parties had agreed to submit that question to the arbitrator, and there was no basis for reversing the arbitrator under the applicable standard of review. Here, by contrast, this Court reviews the Ninth Circuit's decision de novo.

A clear-and-unmistakeable standard would also ensure that a classwide award could bind absent class members. In *Oxford*, a concurrence raised the concern that a classwide arbitration decision might not bind absent class members that had not agreed in their arbitration agreements to be part of an opt-out class in arbitration. But if there is clear and unmistakeable language in an arbitration agreement that a class member both agreed to class arbitration and could be

part of an opt-out class, then the classwide result could bind them.

ARGUMENT

The RLC agrees with Petitioners that the Federal Arbitration Act preempts an interpretation of the arbitration agreement in this case that would permit class arbitration. As Petitioners correctly state, the generic language in this arbitration agreement does not come close to establishing the parties' intent to authorize class procedures, particularly in view of the tradition of bilateral arbitration.

But rather than merely holding that this particular arbitration agreement does not authorize class arbitration, the Court should adopt a general legal standard for deciding whether an arbitration agreement authorizes class arbitration. In particular, the Court should hold that arbitration agreements do not permit class arbitration unless there is clear and unmistakeable evidence that the parties so intended. This standard would not be satisfied unless the arbitration agreement explicitly states both that a contracting party could arbitrate on behalf of a class, and that the contracting party could be bound by a class arbitration brought by a different class member.

Because the arbitration agreement here does not contain any such explicit statement, the judgment of the Ninth Circuit should be reversed.

I. ARBITRATION AGREEMENTS SHOULD NOT BE INTERPRETED TO PERMIT CLASS ARBITRATION UNLESS THERE IS CLEAR AND UNMISTAKEABLE EVIDENCE THAT THE PARTIES SO INTENDED.

A. This Court Has Repeatedly Applied a Clear-and-Unmistakeable Standard Under the FAA.

On three occasions, this Court has adopted a clear-and-unmistakeable standard for resolving particular types of disputes relating to the interpretation of arbitration agreements. Those authorities support applying the same standard to the question of whether an arbitration agreement authorizes class arbitration.

First, this Court has held that in disputes over "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement," "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *First Options*, 514 U.S. at 944-45 (quotation marks omitted). The Court has based that standard on the strong federal policy favoring arbitration. *See id.* at 945 ("[G]iven the law's permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter" (citations omitted)). That federal policy is grounded in the Federal Arbitration Act, which clearly and unmistakeably requires

arbitration agreements to be enforced according to their terms. *Epic Systems*, 138 S. Ct. at 1621 (noting that the "liberal federal policy favoring arbitration agreements" reflects "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts" (quotation marks omitted)).

Second, this Court has held that "[t]he question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the question of arbitrability, is an issue for judicial determination unless the parties clearly and unmistakeably provide otherwise." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (internal quotation marks omitted). For instance, "a gateway dispute about whether the parties are bound by a given arbitration clause," or "a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy," is for the court unless there is a clear and unmistakeable statement in the arbitration agreement. *Id.* at 84. The Court has reasoned that "the 'who (primarily) should decide arbitrability' question" is "rather arcane," and a "party often might not focus upon that question." *First Options*, 514 U.S. at 945 (internal quotation marks omitted). Thus, "given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often

force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.*

Third, this Court has held that collective-bargaining agreements may obligate union members to arbitrate certain types of employment discrimination claims, but only if they do so "clearly and unmistakeably." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 251 (2009). The "'clear and unmistakeable' standard [is] not applicable" to "an individual's waiver of his own rights"; rather, it applies only to "a union's waiver of the rights of represented employees." *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 80-81 (1998). This Court has justified the clear-and-unmistakeable standard on the basis of the "potential disparity in interests between a union and an employee," as well as the "tension between collective representation and individual statutory rights." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

B. This Court's Cases Support Applying a Clear-and-Unmistakeable Standard in this Case.

In the three arbitration cases in which this Court has adopted a clear-and-unmistakeable standard, the Court offered three different rationales: the liberal federal policy favoring arbitration; the desire to honor the parties' intent; and a concern about a contracting party not adequately representing the interests of the party required to arbitrate. All three of those rationales support applying a clear-and-unmistakeable

standard to the question of whether an arbitration agreement authorizes class arbitration.

First, federal policy supports the application of a clear-and-unmistakeable standard. There is a liberal federal policy favoring *bilateral* arbitration. As the Court explained in *AT&T Mobility LLC v. Concepcion*, while there is a "national policy favoring arbitration," "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." 563 U.S. 333, 346, 348 (2018) (internal quotation marks omitted). The Court explained that "class arbitration *requires* procedural formality" and "greatly increases risks to defendants." *Id.* at 349-50. It further found that "[a]rbitration is poorly suited to the higher stakes of class litigation," in light of the limited scope of judicial review. *Id.* at 350. The Court concluded that a rule invalidating bilateral arbitration agreements "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 352 (quotation marks omitted). Just as the liberal federal policy favoring arbitration supports expansive interpretation of arbitration agreements unless there is clear language to the contrary, so it should support construing agreements to require bilateral arbitration unless there is clear language to the contrary.

Second, the goal of honoring parties' intent supports the application of a clear-and-unmistakeable standard. As the Court explained in *Stolt-Nielsen SA v. AnimalFeeds International Corp.*, "class-action

arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." 559 U.S. 662, 685 (2010). "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Id.* "But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration." *Id.* at 685-86. The Court then cited the discussion in *First Options* that parties may not have intended to arbitrate arbitrability. *Id.* at 686 (citing *First Options*, 514 U.S. at 945). Of course, in *First Options*, that concern persuaded the Court to adopt a clear-and-unmistakeable standard for purposes of determining whether parties agreed to arbitrate arbitrability. Likewise here, the Court should adopt the same clear-and-unmistakeable standard for purposes of determining whether parties agreed to conduct class arbitration.

Third, the goal of protecting third parties supports the application of a clear-and-unmistakeable standard. As explained below, there is serious doubt as to whether it is even possible to bind an absent class member to an arbitration award if the class member has not agreed in the arbitration agreement that he may be part of a class. But even if it were possible to bind class members without such an express statement in the arbitration agreement, a serious conflict of

interest would arise between class counsel and named class representatives on the one hand, and other class members on the other. In a typical class action settlement, class counsel recovers millions of dollars, with incentive payments to the named class representative, while class members may recover pennies while irrevocably losing their claims. *See, e.g.*, Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 618-19 (2010); John H. Beisner et al., *Class Action 'Cops': Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441 (2005). These concerns are heightened in the context of class arbitration, where class members who object to a settlement have no right to appeal. *Concepcion*, 563 U.S. at 350-51. Just as in the collective-bargaining context, this conflict of interest supports eschewing class arbitration unless the consent of all sides is unmistakeably clear.

C. Application of a Clear-and-Unmistakeable Standard is Consistent with *Oxford*.

A clear-and-unmistakeable standard is fully consistent with *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013).

In *Oxford*, this Court held that an arbitrator did not exceed its powers by interpreting an arbitration agreement to authorize class arbitration, even though the arbitration agreement did not contain a clear statement authorizing class arbitration. The Court was emphatic, however, that it was not agreeing with the arbitrator's interpretation: "Nothing we say in this

opinion should be taken to reflect any agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading." *Id.* at 572. Rather, its decision was entirely based on the deferential standard of review applicable to arbitration awards: "[C]onvincing a court of an arbitrator's error—even his grave error—is not enough. So long as the arbitrator was 'arguably construing' the contract—which this one was—a court may not correct his mistakes … The potential for those mistakes is the price of agreeing to arbitration." *Id.* at 572-73.

By contrast, in this case, the court, not the arbitrator, was tasked with deciding whether the contract at issue authorizes class arbitration. Thus, unlike in *Oxford*, this Court may engage in *de novo* review of the Ninth Circuit's interpretation of the arbitration agreement. And in connection with that *de novo* review, this Court can and should hold that a clear-and-unmistakeable standard applies when determining whether an arbitration agreement authorizes class arbitration.

To be sure, if this Court adopts a clear-and-unmistakeable standard, then future arbitrators, bound to apply Supreme Court precedent, would likely hold that contracts similar to the contract at issue in *Oxford* do not permit class arbitration. But this does not mean that *Oxford* was wrongly decided. An arbitrator cannot be reversed for failing to be clairvoyant. As such, because the arbitrator in *Oxford* applied the law in existence at the time of his decision, that decision had to be upheld under the applicable standard of review. At the same time, adopting the clear-and-

unmistakeable standard will not only constrain future judges, but will also put future arbitrators on notice that even when the decision is delegated to them, they should not authorize class arbitration unless the class members have agreed to such a procedure in the arbitration agreement.

D. A Clear-and-Unmistakeable Standard Would Obviate the Concerns Expressed in the *Oxford* Concurrence.

In *Oxford*, Justice Alito, joined by Justice Thomas, filed a concurring opinion expressing doubt as to whether the class arbitration at issue would bind absent class members who had not opted out of the class arbitration. A clear-and-unmistakeable standard would obviate the concerns expressed in that opinion.

The *Oxford* concurrence explained that "[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 [a] dispute." *Id.* at 574 (Alito, J., concurring). That is because arbitration "is a matter of consent, not coercion," and a class member who "has not authorized an arbitrator" to issue a classwide award cannot be bound by his award. *Id.* (internal quotation marks omitted). "The distribution of opt-out notices does not cure this fundamental flaw," because "an offeree's silence does not normally modify the terms of a contract." *Id.* "Accordingly, 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 authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used." *Id.* at 574-75.

The concurrence further explained that if a class arbitration award does not bind absent class members, there is a risk of unfairness to defendants: "Class arbitrations that are vulnerable to collateral attack allow absent class members to unfairly claim the benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." *Id.* at 575 (internal quotation marks omitted). Put another way, if the plaintiff class prevails in the arbitration, then the class members will doubtless collect the spoils. But if the plaintiff class loses in the arbitration, the class members can claim that the award does not bind them, and then initiate their own arbitrations.[2]

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[2] Similar concerns arise with claims brought under California's Private Attorneys General Act ("PAGA"). That statute authorizes plaintiffs to bring lawsuits closely analogous to class actions—it authorizes any "aggrieved employee" to recover civil penalties on a representative basis by alleging violations of California labor law on behalf of not only himself, but also "other current or former employees." Cal. Lab. Code § 2699(a). A divided Ninth Circuit recently held that a plaintiff may bring a PAGA claim notwithstanding a bilateral arbitration agreement; the dissent explained that the court's decision "displays th[e] same 'judicial hostility' to arbitration agreements" that led to the FAA's enactment. *See Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015); *id.* at 440 (N.R. Smith, J., dissenting) (citation omitted). Yet because PAGA claims are nominally brought on behalf of the state, it is far from clear that a PAGA claim would bar future class members from bringing their own bilateral arbitration demands. *Id.* at 436 (majority opinion) ("Because a

A clear-and-unmistakeable standard would resolve those issues. If a class member agrees in an arbitration agreement to having a claim resolved in a class arbitration, the class member would plainly be bound by a class arbitration award. And in that scenario, there would be no risk of a heads-I-win-tails-you-lose arbitration: defendants could arbitrate class claims, secure in the knowledge that a judgment or settlement would bind all class members who did not opt out, just like in litigation. Thus, a clear-and-unmistakeable standard would promote fairness both for class members and for class action defendants.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

PAGA action is a statutory action for penalties brought as a proxy for the state, rather than a procedure for resolving the claims of other employees, there is no need to protect absent employees' due process rights in PAGA arbitrations."). The Court may wish to consider granting a currently-pending petition for certiorari to decide whether PAGA claims are consistent with the FAA. *See* Petition for Writ of Certiorari, *Five Star Senior Living Inc. v. Lefevre*, 86 U.S.L.W. 3567 (U.S. Feb. 23, 2018) (No. 17-1470), 2018 WL 1961027.

Respectfully submitted,

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