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 CONTRACT LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Did the court of appeals err in interpreting the arbitration agreement in this case, which contained no express term addressing class arbitration, to authorize such proceedings?

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are contract law scholars. Their interest is in the sound development of federal law regarding the interpretation and application of the Federal Arbitration Act with due regard to settled principles of state contract law. They submit this brief to clarify for the Court the role of state contract law rules of interpretation in defining the scope and content of parties' contractual agreement.

SUMMARY OF ARGUMENT

I. The Federal Arbitration Act directs courts to enforce arbitration agreements under generally applicable state contract law. That rule requires courts to determine the content of agreements to arbitrate, like any other contract, according to state contract law.

II. That requirement applies with equal force with respect to the interpretation of ambiguous agreements to arbitrate. Accordingly, state contract law supplies rules of contract interpretation to resolve those ambiguities in order to determine the content of the parties' agreement to arbitrate.

III. Universally accepted and widely applicable contract law supports the court of appeals' interpretation of the arbitration agreement in this case. That consensus, which directs courts to interpret an ambiguous

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

contract term against the interest of the drafting party, is accepted by every State, this Court, the leading treatises, and prominent scholarship. Under that interpretative rule, courts sensibly construe ambiguous arbitration clauses to authorize class proceedings.

ARGUMENT

I. STATE CONTRACT LAW GOVERNS THE SCOPE AND CONTENT OF THE PARTIES' AGREEMENT TO ARBITRATE.

The Federal Arbitration Act authorizes the federal courts to issue "an order directing that . . . arbitration proceed *in the manner provided for in [the parties'] agreement*." 9 U.S.C. § 4 (emphasis added). That statutory command reflects Congress's determination that "arbitration is simply a matter of contract between the parties." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). *See also Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) ("This text reflects the overarching principle that arbitration is a matter of contract."); *Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010) ("The FAA reflects the fundamental principle that arbitration is a matter of contract."); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (arbitration agreements are "a matter of consent, not coercion."). And this Court has recognized that the FAA does not "purport[] to alter background principles of state contract law regarding the scope of [arbitration] agreements." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009).

Against the background of state contract law, the FAA's "basic purpose" is "to 'ensure judicial

enforcement of privately made agreements to arbitrate.'" *First Options*, 514 U.S. at 945 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985)). *See also Volt*, 489 U.S. at 478 (observing that the FAA's "passage 'was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.'" (quoting *Dean Witter*, 470 U.S. at 220)). The statutory scheme therefore "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)). *See also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (noting that the FAA "place[s] arbitration agreements 'upon the same footing as other contracts.'" (quoting H.R. Rep. No. 68-96 at 1-2 (1924))).

Agreements to arbitrate by class proceedings are, just like any agreement to arbitrate, subject to state contract law. And because arbitration agreements are, like all contracts, founded on the bedrock of consent, "parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. Accordingly, they may "specify by contract the rules under which that arbitration will be conducted." *Id. See also Hall St. Assoc., LLC v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) ("[T]he FAA lets parties tailor some, even many, features of arbitration by contract, including . . . procedure and choice of substantive law.") (internal citation omitted). Aggregate adjudication of claims is one such procedural choice reserved for the parties: "Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them." *Oxford Health Plans LLC v. Sutter*,

569 U.S. 564, 565-66 (2013) (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010)).

Because class arbitration procedures are a matter of contract, 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." *Stolt-Nielsen*, 559 U.S. at 684. Sometimes it is straightforward to determine that the parties had not agreed to class arbitration. In *Stolt-Nielsen*, this Court confronted a contract which the parties stipulated that "no agreement . . . has been reached" on whether the contract authorized class procedures. *Id.* at 669. Faced with a contract that all conceded contained no agreement with respect to class arbitration, this Court held that the arbitral panel erred in ordering such proceedings. The reason the panel erred was that it had usurped the role of state contract law: "Rather than inquiring whether the FAA, maritime law, or New York law contains a 'default rule' under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation." *Id.* at 673-74.[2] In accord with its recognition of the primacy of substantive contract law in determining the content of an agreement to arbitrate,

[2] The contract at issue in *Stolt-Nielsen* was a "standard contract" for the carriage of goods by ship "known in the maritime trade as a charter party." *Stolt-Nielsen*, 559 U.S. at 666. Accordingly, and unlike this case, maritime law therefore served as the source of substantive law in addition to state contract law.

this Court rejected the panel's attempt "simply [to] impose[] its own conception of sound policy." *Id.* at 675.

Just as a party may not be bound to class arbitration absent its consent, this Court in *Oxford Health* recognized that a party may not escape class proceedings when such a contractual basis for finding its consent is present. *See Oxford Health*, 569 U.S. at 570-71. In that case, the arbitrator "construe[d] the arbitration clause in the ordinary way to glean the parties' intent" and "found that the arbitration clause unambiguously evinced an intention to allow class arbitration." *Id.* at 567-68. The arbitrator thus "did construe the contract (focusing, per usual, on its language), and did find an agreement to permit class arbitration." *Id.* at 571. Whereas in the arbitral panel in *Stolt-Nielsen* "abandoned [its] interpretive role," 559 U.S. at 673-74, the arbitrator in *Oxford Health* correctly relied on substantive contract law to "provide[] an interpretation of the contract resolving the disputed issue." 569 U.S. at 573. This Court accordingly held that it must affirm the arbitrator's order of class proceedings. *Id.*

The FAA's foundation in state contract law, a grounding this Court has repeatedly recognized, is consistent with this Court's longstanding recognition of a federal policy favoring arbitration. "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt*, 489 U.S. at 476. Congress's "'preeminent concern . . . in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [the Court] rigorously enforce agreements to arbitrate.'" *Mitsubishi*

Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625–26 (1985) (quoting *Dean Witter*, 470 U.S. at 221). Because "arbitration agreements, like other contracts, 'are enforced according to their terms' and according to the intentions of the parties," *First Options*, 514 U.S. at 947 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54 (1995)), the federal policy favoring the enforcement of arbitration agreements requires courts to respect the arbitral procedures the parties agreed to in the contract, including when they agree to class procedures.

This Court has recognized only a limited exception to the rule that state contract law governs arbitration agreements. Because "courts must place arbitration agreements on an equal footing with other contracts," a state may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 341 (2011) (citations and quotation marks omitted). That limited exception serves to ensure equal treatment of arbitration agreements by "displac[ing] any rule that covertly . . . disfavor[s] contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). Such specific targeting to disfavor arbitration as such demarcates the limit of the FAA's preemption of state contract law. *See, e.g.*, *Rent-a-Center*, 561 U.S. at 68 ("Like other contracts, however, [arbitration agreements] may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.") (citation and quotation marks omitted).

Beyond that limited exception, however, this Court has consistently made clear that arbitration agreements are a matter of contract and that courts should apply substantive state contract law to them as they would any other contract.

II. STATE CONTRACT LAW PROVIDES RULES OF INTERPRETATION THAT DETERMINE THE CONTENT OF THE PARTIES' AGREEMENT.

The general principle that state contract law governs the scope and content of a contract applies in full force to interpreting ambiguities in an arbitration agreement. "[T]he interpretation of a contract is ordinarily a matter of state law to which [this Court] defer[s]." *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (citation omitted). *See also First Options*, 514 U.S. at 944 (the interpretation of arbitration agreements requires courts to "apply ordinary state-law principles that govern the formation of contracts") (citations omitted); *Mastrobuono*, 514 U.S. at 60 n.4; *Volt*, 489 U.S. at 474.

In accord with that principle, this Court has refused to revisit the interpretation of arbitration agreements under state law. In *Volt*, this Court confronted a contract with a choice-of-law provision designating California law to govern disputes arising from the contract. *Volt*, 489 U.S. at 470. The California court, applying state contract law, interpreted that term to "incorporate[] the California rules of arbitration," even though neither the choice-of-law provision nor the arbitration clause in the contract expressly addressed those procedures. *Id*. This Court rejected the petitioner's attempt to "convince[e] [the Court] that the [lower court] erred

in interpreting the choice-of-law provision to mean that the parties had incorporated the California rules of arbitration into their arbitration agreement." *Id.* at 474. It refused even to consider the merits of the lower court's interpretation of the contract, because "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Id.*

This Court has departed from that deference only in circumstances not present here. In *Imburgia*, this Court rejected the lower court's interpretation of the phrase "law of your state" to include a California statute that had been invalidated by the Court's decision in *Concepcion*. 136 S. Ct. at 471. The Court based its holding on the "conclu[sion] that California courts would not interpret contracts other than arbitration contracts the same way." *Id.* at 469. Because the lower court's "interpretation of this arbitration contract [was] unique, restricted to that field," *id.*, that interpretation was not, in the Court's view, the application of generally applicable contract principles. The FAA therefore preempted the lower court's interpretation of the contract only because it arose from a legal rule that, like the unconscionability rule in *Concepcion*, specifically targeted and disfavored arbitration.

Because there is no indication that the arbitration agreement here has been interpreted in a way different from other contracts, its proper interpretation was rendered by reference to generally applicable state contract law.

III. STATES SENSIBLY ADOPT RULES OF CONTRACT INTERPRETATION THAT CONSTRUE AMBIGUOUS ARBITRATION AGREEMENTS AGAINST THEIR DRAFTERS TO PERMIT CLASS PROCEEDINGS.

The FAA thus respects States' authority to craft generally applicable rules of contract interpretation that apply to arbitration agreements. When the terms of a contract contain an ambiguity, courts must employ background rules of interpretation to determine the content of the parties' agreement. The court of appeals here relied on a sensible and universally recognized rule of interpretation: that courts interpret ambiguous contractual terms against the interest of the drafting party. That rule of contract law finds support in the law of every State, in this Court's cases, in the leading treatises, and in the academic literature.

As the court of appeals recognized, "[i]n California, a contract is ambiguous 'when it is capable of two or more constructions, both of which are reasonable.'" Pet. App. 2a-3a (quoting *Powerine Oil Co. v. Superior Court of L.A.*, 118 P.3d 589, 598 (Cal. 2005)). The arbitration clause at issue in this case does not expressly address whether class proceedings are permitted or prohibited. *See* Pet. App. 9a.[3] In the absence of any

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[3] In *Stolt-Nielsen*, this Court based its decision on the parties' stipulation that the contract there was "'silent' with respect to class arbitration." 559 U.S. at 668. The Court explained that this stipulation "did not simply mean that the clause made no express reference to class arbitration. Rather . . . '[a]ll the parties agree[d] that . . . there's been no agreement that has been reached on that issue.'" *Id.* at 668-69 (citation omitted, first alteration in original). The arbitration clause at issue in this case is *not* "silent" in that sense. It is "silent" *only* in the sense that it contains no "express

express textual indication (or any other indication) in the contract to determine whether the parties agreed to permit or to prohibit class arbitration, the contract was ambiguous with respect to which set of arbitral procedures apply. The court of appeals then properly looked to state contract law rules of interpretation to determine the content of the parties' agreement.

The court of appeals accordingly relied on California's longstanding rule of contract interpretation that "[a]mbiguity is construed against the drafter, a rule that 'applies with peculiar force in the case of a contract of adhesion.'" Pet. App. 3a (quoting *Sandquist v. Lebo Auto., Inc.*, 376 P.3d 506, 514 (Cal. 2016)). The court below thus engaged in precisely the inquiry this Court found lacking in *Stolt-Nielsen*: determining whether California law "contains a 'default rule' under which an arbitration clause is construed as allowing class arbitration in the absence of express consent." *Stolt-Nielsen*, 559 U.S. at 673-74.

The California courts' rule comports with the unanimous consensus among States. Every state supreme court has adopted the principle that an ambiguous

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reference" to class arbitration. The core issue in this case is whether, in the absence of such an express textual indication, the parties agreed to permit or to prohibit class proceedings. The Court in *Stolt-Nielsen* expressly declined to address that question: "We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here, as noted, the parties stipulated that there was 'no agreement' on the issue of class-action arbitration." *Id.* at 687 n.10.

contract should be interpreted against its drafter.[4] Those cases apply the rule to virtually every type of

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[4] *See, e.g.*, *Daphne Auto., LLC v. E. Shore Neurology Clinic, Inc.*, 245 So. 3d 599 (Ala. 2017); *Donahue v. Ledgends, Inc.*, 331 P.3d 342 (Alaska 2014); *Andrews v. Blake*, 69 P.3d 7 (Ariz. 2003); *Carter v. Four Seasons Funding Corp.*, 97 S.W.3d 387 (Ark. 2003); *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814 (Colo. 2004) (en banc); *Ramirez v. Health Net of the Ne., Inc.*, 938 A.2d 576 (Conn. 2008); *Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624 (Del. 2003); *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161 (Fla. 2003); *Ga. Farm Bureau Mut. Ins. Co. v. Smith*, 784 S.E.2d 422 (Ga. 2016); *Koga Eng'g & Constr., Inc. v. State*, 222 P.3d 979 (Haw. 2010); *Fed. Nat'l Mortg. Ass'n v. Hafer*, 351 P.3d 622 (Idaho 2015); *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 860 N.E.2d 307 (Ill. 2006); *State v. Smith*, 71 N.E.3d 368 (Ind. 2017); *Peak v. Adams*, 799 N.W.2d 535 (Iowa 2011); *Liggatt v. Emp'rs' Mut. Cas. Co.*, 46 P.3d 1120 (Kan. 2002); *Ky. Emp'rs' Mut. Ins. v. Ellington*, 459 S.W.3d 876 (Ky. 2015); *Prejean v. Guillory*, 38 So. 3d 274 (La. 2010); *State Farm Mut. Auto. Ins. Co. v. Koshy*, 995 A.2d 651 (Me. 2010); *MAMSI Life & Health Ins. Co. v. Callaway*, 825 A.2d 995 (Md. 2003); *James B. Nutter & Co. v. Estate of Murphy*, 88 N.E.3d 1133 (Mass. 2018); *People v. Yamat*, 714 N.W.2d 335 (Mich. 2006); *Staffing Specifix, Inc. v. Tempworks Mgmt. Servs, Inc.*, 913 N.W.2d 687 (Minn. 2018); *Dalton v. Cellular S., Inc.*, 20 So. 3d 1227 (Miss. 2009); *Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d 772 (Mo. 2005); *Mont. Health Network, Inc. v. Great Falls Orthopedic Assocs.*, 353 P.3d 483 (Mont. 2015); *Beveridge v. Savage*, 830 N.W.2d 482 (Neb. 2013); *Am. First Fed. Credit Union v. Soro*, 359 P.3d 105 (Nev. 2015); *State Farm Mut. Auto. Ins. Co. v. Desfosses*, 536 A.2d 205 (N.H. 1987); *Roach v. BM Motoring, LLC*, 155 A.3d 985 (N.J. 2017); *Berlangieri v. Running Elk Corp.*, 76 P.3d 1098 (N.M. 2003); *Village of Ilion v. County of Herkimer*, 18 N.E.3d 359 (N.Y. 2014); *Baxley v. Nationwide Mut. Ins. Co.*, 430 S.E.2d 895 (N.C. 1993); *Northstar Founders, LLC v. Hayden Capital USA, LLC*, 855 N.W.2d 614 (N.D. 2014); *World Harvest Church v. Grange Mut. Cas. Co.*, 68 N.E.3d 738 (Ohio 2016); *McMinn v. City of Okla. City*, 952 P.2d 517 (Okla. 1997); *ZRZ Realty Co. v. Beneficial Fire & Cas. Ins. Co.*, 241 P.3d 710

contract and term, extending far beyond the context of arbitration. The rule's longstanding and universal application has put every contracting party, especially the sophisticated parties who are likely to be disadvantaged by it, on notice that contracts they draft lack clarity at their peril.

In accord with that unanimous consensus among the States, this Court has long recognized "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Mastrobuono*, 514 U.S. at 62 (citations omitted). The Court has further incorporated into federal law the "general maxim that a contract should be construed most strongly against the drafter." *United States v. Seckinger*, 397 U.S. 203, 210 (1970). Accordingly, under the FAA when a party "draft[s] an ambiguous document . . . [it] cannot now claim the benefit of the doubt." *Mastrobuono*, 514 U.S. at 63.

(Ore. 2010), *modified on other grounds*, 249 P.3d 111 (Ore. 2011) (en banc); *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286 (Pa. 2007); *Haviland v. Simmons*, 45 A.3d 1246 (R.I. 2012); *Hueble v. S.C. Dep't of Nat. Res.*, 785 S.E.2d 461 (S.C. 2016); *Citibank (S.D.), N.A. v. Hauff*, 668 N.W.2d 528 (S.D. 2003); *West v. Shelby Cty. Healthcare Corp.*, 459 S.W.3d 33 (Tenn. 2014); *Lopez v. Muñoz, Hockema & Reed, LLP*, 22 S.W.3d 857 (Tex. 2000); *Ellsworth v. Am. Arbitration Ass'n*, 148 P.3d 983 (Utah 2006); *Southwick v. City of Rutland*, 35 A.3d 113 (Vt. 2011); *Cappo Mgmt. V, Inc. v. Britt*, 711 S.E.2d 209 (Va. 2011); *Sprague v. Safeco Ins. Co. of Am.*, 276 P.3d 1270 (Wash. 2012); *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, 693 S.E.2d 53 (W. Va. 2010); *Md. Arms Ltd. P'ship v. Connell*, 786 N.W.2d 15 (Wisc. 2010); *BNSF Ry. Co. v. Box Creek Mineral Ltd. P'ship*, 420 P.3d 161 (Wyo. 2018).

The leading contracts treatises confirm that principle's universal acceptance and wide application. The Restatement explains that "[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds." Restatement (Second) of Contracts § 206 (1981). This Court has quoted the Restatement's rationale for that rule approvingly: "'Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning.'" *Mastrobuono*, 514 U.S. at 63 n.10 (quoting *id.*, Comment *a*). *Accord* 11 Williston on Contracts § 32:12 ("Since the language is presumptively within the control of the party drafting the agreement, it is a generally accepted principle that any ambiguity in that language will be interpreted against the drafter.") (rev. 2018); 5 Corbin on Contracts § 24.27 (rev. 2018); 2 Farnsworth, Contracts § 7.11 (rev. 2018).

That rule serves to ensure the parties' actual agreement to the terms of the contract. The academic literature often analyzes contract rules that disfavor the better informed, drafting party as "information-forcing default rules." *See, e.g.*, J. H. Verkerke, *Legal Ignorance and Information-Forcing Rules*, 56 Wm. & Mary L. Rev. 899, 906 (2015); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87, 91 (1989); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*,

89 Yale L.J. 1261, 1299-1300 (1980). By setting the default rule to what the drafting party does *not* prefer as a "penalty," the law provides the drafter with an incentive to include an express term in the contract. That express term, in turn, serves to inform the non-drafting party of the terms of the deal.

This Court has similarly recognized that sensible rationale. In *Mastrobuono*, this Court grounded its interpretation of the arbitration agreement disfavoring the drafting party by noting the information asymmetry between the parties. The Court explained that, "[a]s a practical matter, it seems unlikely that [the non-drafting parties] were actually aware of New York's bifurcated approach to punitive damages, or that they had any idea that by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right." *Mastrobuono*, 514 U.S. at 63. In light of that likely lack of knowledge of the background legal rule, the Court was "unwilling to impute th[at] intent" to the non-drafting party. *Id.*

So too with class arbitration waivers. Sophisticated firms that draft consumer and employment contracts, typically with the assistance of skilled counsel, are far more likely to know the background rules of contract law than are their consumer and employee counterparties. When those counterparties are unaware of the background contract rules that apply to a contract that does not expressly state whether class proceedings are permitted or prohibited, they do not consent to the arbitration agreement to the same degree that they would with full knowledge. That is particularly true in the modern era where most people are aware that class action litigation is generally available but have no

reason to suspect that the opposite would be true in arbitration. A default rule of interpretation that presumes the parties have agreed to class arbitration unless the contract expressly provides otherwise thus serves to enhance contractual consent to arbitration agreements by putting all parties on notice of the arbitral procedures they have agreed to adopt.

That rule of interpretation comports with the requirements of the FAA. This Court previously contemplated state law rules that serve to ensure that both parties to the arbitration agreement are fully aware of the procedures to which they are bound. In *Concepcion*, while holding that a blunt prohibition on class waivers conflicts with the FAA, the Court reassured States that they "remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted." 563 U.S. at 346-47 n.6. It is difficult to see how a requirement that class waivers be highlighted would be consistent with the FAA while, as petitioners would have it, a default rule of interpretation that requires a class waiver to be explicitly stated in the first place would run afoul of the FAA.

The rule's modest result—that drafting parties are free to draft a contract that favors their interest by prohibiting class arbitration, but if they wish to do so they must do so explicitly by agreement—comports with the FAA's fundamental grounding in contract law. Just like the common-sense requirement that parties must expressly state an agreement to arbitrate—the default rule is that they have *not* agreed to arbitration—the sensible state contract rule that requires parties to

expressly waive class procedures comports with universally accepted, generally applicable rules of state contract law and is consistent with the FAA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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