No. 19-1382

IN THE

Supreme Court of the United States

STERLING JEWELERS, INC.,

Petitioner,

v.

LARYSSA JOCK, *et al.*,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONER

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The Center for Workplace Compliance (CWC) respectfully submits this brief *amicus curiae* with the consent of the parties. The brief supports the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes approximately 200 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and requirements.

CWC member companies, many of which conduct business in numerous states, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment nondiscrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using arbitration and other forms of alternative dispute resolution. Many CWC member companies thus have adopted company-wide policies requiring the use of binding, individual arbitration to resolve all employment-related disputes. Those policies primarily are designed to promote relatively prompt, informal resolution of individual disputes, thus avoiding costly, complex, and protracted litigation in state or federal court.

Accordingly, the issue presented in this case is extremely important to the nationwide constituency

that CWC represents. The Second Circuit ruled incorrectly that courts should defer to an arbitrator's decision to permit classwide arbitration from an agreement that does not expressly provide for class arbitration under the theory that ambiguity plus *contra proferentem* were enough to compel class procedures. Indeed, the arbitrator never actually found consent to class arbitration to be express or implied. The Second Circuit then compounded this mistake by incorrectly ruling that some 70,000 absent class members should be bound to class arbitration simply because they signed an arbitration agreement that nowhere mentions class procedures.

This Court's decision as to whether absent class members can be bound to class arbitration based on agreements that do not affirmatively prohibit class procedures will have substantial legal and practical impacts on all employers who utilize arbitration as a means of resolving employment disputes.

CWC has participated in numerous cases addressing the enforceability of arbitration agreements. *See, e.g., Lamps Plus v. Varela*, 139 S. Ct. 1407 (2019); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). Because of its experience in these matters, CWC is especially well-situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Sterling Jewelers maintains a dispute resolution program, known as the RESOLVE Program, that is offered to employees as a condition of employment. Pet. App. 298a-299a. The RESOLVE Program establishes procedures that an employee signing the agreement must use for any dispute regarding any alleged unlawful act concerning his or her employment under numerous employment laws, subject to certain exceptions not relevant here. *Id.* According to the agreement, it is to be interpreted under Ohio law. Pet. App. 300a.

The last step in the RESOLVE Program is binding arbitration. Pet. App. 298a-301a. The text of the arbitration agreement and the RESOLVE Program's arbitration rules and accompanying brochure strongly indicate that the agreement contemplates bilateral arbitration claims only, although it does not contain an express class action waiver. Pet. App. 298a-317a. For example, the agreement uses terms strongly suggesting bilateral arbitration is contemplated ("*I* am waiving *my* right to obtain any legal or equitable relief … through any governmental agency or court, and *I* am also waiving *my* right to commence any court action"). Pet. App. 298a-299a (emphasis added).

In addition, the arbitration rules and brochure provide that the arbitrator must have a license to practice law in the applicable state of dispute, Pet. App. 302a, and that the arbitration will take place at a "location near the site where the complaint arose [utilizing] the substantive law of the jurisdiction where the complaint arose." Pet. App. 310a. Likewise, the arbitration brochure provides numerous examples of the benefits of arbitration offered through the RESOLVE Program as contrasted with litigation.

Pet. App. 315a-316a. All described benefits apply to bilateral arbitration, not to class arbitration. *Id*.

In 2008, the Respondents in this case filed a putative class action in the United States District Court for the Southern District of New York, then immediately instituted a putative class arbitration before the American Arbitration Association. Pet. 8. Respondents then moved for the district court to refer the matter to the arbitrator as a single classwide dispute, while Sterling objected and moved for a declaration that arbitration could only be bilateral. *Id*.

The court granted the respondents' motion and denied the petitioner's motion. The arbitrator proceeded to issue a Clause Construction Award, determining that class procedures were available over Sterling's objections to the arbitrator's decision and authority to decide the question. Pet. App. 291a-297a. In the arbitrator's decision, she acknowledged that the agreement did not mention class claims. Pet. App. 294a. She also did not find implicit consent to class arbitration. *Id.* Instead, she looked to Ohio law and applied *contra proferentem*, the doctrine construing ambiguous contract terms against the drafter of the contract, to decide the availability of class procedures. Pet. App. 294a-296a. Specifically, the arbitrator found that the agreement did not clearly prohibit class arbitration. Pet. App. 295a. Consequently, she construed the agreement against Sterling and allowed the class arbitration to proceed. Pet. App. 296a-297a.

Sterling moved the district court to vacate the arbitrator's Award, but the court denied the motion, based on then-controlling Circuit precedent in *JLM Industries, Inc. v. Stolt-Nielsen SA*, 387 F.3d 163 (2d Cir. 2004), *rev'd*, 559 U.S. 662 (2010). Pet. App. 109a-120a. After this Court reversed that precedent in

Stolt-Neilsen, the district court vacated the Award. Pet. App. 101a, 107a-108a. However, a divided panel of the Second Circuit vacated the district court's decision and reinstated the Award. Pet. App. 80a-81a (*Jock I*). According to the Second Circuit, *Stolt-Nielsen* did not apply because in this case the parties had not stipulated that their arbitration agreement is silent regarding class arbitration. Pet. App. 73a. The Second Circuit further assumed that the arbitrator did not base her decision on policy grounds but instead the arbitrator's decision had a "colorable justification under Ohio law," namely that Ohio law does not bar class arbitration. Pet. App. 74a.

On February 2, 2015, the arbitrator issued a Class Determination Award, certifying a mandatory nationwide class for Title VII declaratory and injunctive relief based on respondents' disparate impact claims. Pet. App. 139a-290a. The certified class consists of female current and former Sterling employees since July 22, 2004. Pet. App. 290a. The arbitrator concluded that absent class members were bound because each had signed a RESOLVE agreement providing for arbitration and assigning questions of arbitrability and procedure to the arbitrator. Pet. App. 288a-289a. There are now approximately 70,000 class members, only 254 of whom opted in or are named plaintiffs. Pet. 12.

After two intervening appeals, the district court vacated the Class Determination Award to the extent that the award included individuals who have not affirmatively opted in to the arbitral proceedings. Pet. App. 26a. According to the district court, the Federal Arbitration Act (FAA) does not authorize arbitrators to bind individuals who have not "submitted themselves to the Arbitrator's authority in any way." Pet.

App. 24a (quoting *Oxford Health*, 569 U.S. at 574 (Alito, J., concurring) (internal quotations omitted)).

While the appeal of the Class Determination vacatur was pending before the Second Circuit, this Court decided *Lamps Plus*, holding that a court cannot compel arbitration merely by finding an agreement to be ambiguous as to class arbitration and construing it against the drafter. Pet. 2-3. As stated in *Lamps Plus*, "courts may not infer consent to participate in class arbitration absent an affirmative 'contractual basis for concluding that the party agreed to do so.'" *Lamps Plus, Inc. v. Varela,* 139 S. Ct. 1407, 1416 (2019) (quoting *Stolt-Nielsen*, 559 U.S. at 684). "Neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself." *Id.* at 1417 (footnote omitted). The Court further determined that *contra proferentem* is a policy-based doctrine that does not establish consent. *Id.* at 1417-18.

Despite this Court's ruling, the Second Circuit reinstated the arbitrator's Class Determination Award distinguishing this case from *Lamps Plus* because the FAA's deferential standard of review did not apply in that case as it does here. Pet. App. 1a-17a (*Jock IV*). The Second Circuit further emphasized that "an arbitration agreement may be interpreted to include implicit consent to class procedures." Pet. App. 17a. However, the court did not claim that the arbitrator had found implied consent and it did not address the arbitrator's reliance on *contra proferentem*, which remains the only theory supporting the claim that the arbitration agreement somehow includes a silent contractual basis for class arbitration binding some 70,000 absent class members.

SUMMARY OF REASONS FOR GRANTING THE PETITION

This Court has "often observed that the [Federal] Arbitration Act requires courts 'rigorously' to 'enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (citation omitted); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) ("Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties'") (citation omitted). This is because arbitration "is a matter of consent, not coercion." *Volt Info. Scis., Inc. v. Bd. of Trustees*, 489 U.S. 468, 479 (1989).

In *Stolt-Nielsen*, this Court held that under the FAA, a party to an arbitration agreement cannot be forced to submit to class arbitration procedures "unless there is a contractual basis for concluding that the party *agreed* to do so," 559 U.S. at 684, cautioning arbitrators not to "presume, consistent with their limited powers under the FAA, that the parties' mere silence" is enough to make such a finding. *Id.* at 687 (footnote omitted). In *Lamps Plus* this Court further held that ambiguity does not provide "a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself." 139 S. Ct. at 1417 (footnote omitted).

And yet, the court below defied these clear commands, by allowing an arbitrator to infer from construction of a standard arbitration agreement, which nowhere mentioned class procedures, that the parties

to it had authorized the use of class procedures merely by construing ambiguity against the drafter. The court below then compounded this mistake by finding that some 70,000 absent class members had consented to class procedures by signing an arbitration agreement that nowhere mentions class arbitration.

Petitioners correctly contend that, because a contractual basis must exist in order to conclude that an agreement was reached to arbitrate on a classwide basis, inferring such an agreement from standard contractual terms and through *contra proferentem* is at odds with the FAA and this Court's longstanding arbitration jurisprudence. Doing so would require parties to affirmatively waive class arbitration for fear that their silence would be misconstrued as implied consent to class arbitration, contrary to *Stolt-Nielsen*.

Affirmative consent to class arbitration is profoundly important, given the fundamental changes that class procedures impose on traditional bilateral arbitration. Parties, particularly employers, select arbitration over litigation in order to settle disputes relatively quickly and efficiently. Introducing class procedures erases these advantages, while simultaneously limiting one key protection offered by litigation: access to judicial review. Thus, compared to class litigation, class arbitration offers all of the burdens and none of the benefits. While parties are free to authorize the use of class procedures in arbitration, such authorization must be explicit. Only such an affirmative agreement can serve as a sufficient contractual basis for concluding that the parties authorized class arbitration.

Review of the decision below is needed to correct the Second Circuit's clear deviation from the plain text of the FAA, and equally important, to provide for a clear

and consistent standard that the courts, arbitrators, and employers may follow in drafting and interpreting arbitration agreements.

REASONS FOR GRANTING THE PETITION

I. REVIEW OF THE DECISION BELOW IS WARRANTED TO RESOLVE ISSUES OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

A. This Court's FAA Jurisprudence Precludes Courts From Imposing Class Arbitration Absent Unmistakable Indicia That The Parties Intended To Authorize Such Procedures

The Federal Arbitration Act (FAA) provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has observed repeatedly, Congress enacted the FAA in "response to hostility of American courts to the enforcement of arbitration agreements, [thus] compel[ling] judicial enforcement of a wide range of written arbitration agreements." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001); see also *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) ("Congress directed courts to abandon their hostility and instead treat arbitration agreements as 'valid, irrevocable, and enforceable'") (citation omitted). In short, the FAA represents "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), *superseded by statute on other grounds*, Federal Arbitration Act, 9 U.S.C. § 16.

In *Jock I*, the second circuit deferred to the arbitrator's determination that class arbitration claims could proceed under the agreement based on finding that the agreement did not unambiguously prohibit class arbitration and should be construed against its drafter. Pet. App. 77a-78a. In *Jock IV*, the court compounded this error by determining that some 70,000 absent class members could also be bound to class arbitration proceedings, despite the agreement's silence as to the availability of such procedures and notwithstanding substantial evidence that the agreement contemplated only bilateral arbitration. Pet. App. 3a-4a. Because the decision below impermissibly conflicts with the plain text of the FAA and is inconsistent with well-established legal principles reiterated time and again by this Court, it must be reversed.

1. The FAA requires that a valid arbitration agreement be enforced as the parties actually wrote it

In enforcing arbitration agreements, courts are not free to substitute their own judgment, but rather must enforce the terms as written. The FAA instructs that, once a court finds that parties have agreed to arbitrate, "the court *shall make* an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement*." 9 U.S.C. § 4 (emphasis added). Thus, the Court has "often observed that the Arbitration Act requires courts 'rigorously' to 'enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted.'" *Epic Systems*, 138 S. Ct. at 1621 (quoting *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013)); see also *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559

U.S. 662, 682 (2010) ("Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties'") (citation omitted); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (noting that the FAA "places arbitration agreements on equal footing with all other contracts"). Indeed, the FAA's "principal purpose [is] ensuring that private arbitration agreements are enforced according to their terms," *Volt Info.*, 489 U.S. at 478, reflecting the notion that arbitration "is a matter of consent, not coercion." *Id*. at 479.

Further, parties to an arbitration agreement are "generally free to structure their arbitration agreements as they see fit." *Stolt-Nielsen*, 559 U.S. at 683 (citations and internal quotations omitted). Parties are accorded discretion in choosing their own arbitration processes because doing so "allow[s] for efficient, streamlined procedures tailored to the type of dispute." *AT&T Mobility*, 563 U.S. at 344. Even statutory rights generally cannot override an agreement to arbitrate, "'unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citation omitted).

This precept is no less true in the context of arbitration agreements between employee and employer, even when the dispute involves matters of such importance as discrimination. This is because the Court "has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law." *Circuit City Stores*,

532 U.S. at 123; *see also Gilmer*, 500 U.S. at 26 ("'[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute'") (citation omitted). In short, "the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Boyd*, 470 U.S. 213, 218 (1985) (citations omitted).

2. Where an arbitration agreement is silent as to the availability of class arbitration, *Stolt-Nielsen* and *Lamps Plus* bar the forced imposition of such procedures where no contractual basis exists for doing so

In *Stolt-Nielsen*, this Court held that "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." 559 U.S. at 684; *see also Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 565 (2013) ("Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them") (citation omitted).

A contractual basis cannot be inferred merely from the agreement to arbitrate itself. As this Court explained in *Stolt-Nielsen*, "it cannot be presumed the parties consented to [class arbitration] by simply agreeing to submit their disputes to an arbitrator." 559 U.S. at 685. In other words, a court may not conclude that two parties agreed to class arbitration just because they entered into a broad arbitration agreement without any reference to class arbitration.

In *Lamps Plus* this Court further refined this principle, holding that "[n]either silence nor ambiguity provides a sufficient basis for concluding that the parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself." 139 S. Ct. at 1417 (footnote omitted).

a. Inferring consent from public policy does not constitute a contractual basis for imposing class arbitration

For an arbitration agreement to provide a "contractual basis" for concluding that the parties agreed to permit classwide arbitration, the contract must affirmatively state the parties' agreement to use class procedures. Contrary to the Second Circuit's decision permitting the class arbitration based on inferred consent, an arbitration agreement without any reference to class procedures does not contain a contractual basis from which it can be concluded that the parties agreed to settle disputes through classwide arbitration.

While *Stolt-Nielsen* does not address directly what constitutes a sufficient "contractual basis" on which to find that the parties to an arbitration agreement effectively – if not explicitly – agreed to the availability of class arbitration procedures, it plainly cautions arbitrators not to "presume, consistent with their limited powers under the FAA, that the parties' mere silence" is enough to make such a finding. 559 U.S. at 687 (footnote omitted). To the contrary, arbitrators must establish that the parties affirmatively "'agree[] to authorize' class arbitration, not merely that they fail to bar such a proceeding." *Reed v. Fla. Metro. Univ.*, 681 F.3d 630, 644 (5th Cir. 2012) (citation

omitted), *abrogated on other grounds, Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013).

In *Reed v. Florida Metropolitan University*, for instance, the Fifth Circuit rejected an arbitrator's conclusion that a broadly worded arbitration clause implicitly authorized class arbitration procedures. 681 F.3d at 641. There, the court considered a contract clause stating that "any dispute arising from [the contract], no matter how described, pleaded or styled, shall be resolved by binding arbitration …." *Id*. Treating the agreement's "any dispute" clause as "a standard provision that may be found, in one form or another, in many arbitration agreements," *id.* at 642, the court determined that under *Stolt-Nielsen*, more than the mere "fact of the parties' agreement to arbitrate" is required to establish a contractual basis for ordering class arbitration. *Id.* (citation omitted). Rather:

> For a court to read additional provisions into [a] contract, the implication must clearly arise from the language used, or be indispensable to effectuate the intent of the parties. It must appear that the implication was so clearly contemplated by the parties that they deem it unnecessary to express it.

Id. at 640 n.10 (citations omitted).

The Sixth Circuit came to the same conclusion when it considered a similarly broad agreement, containing standard language that the parties would resolve "any controversy … by binding arbitration," and omitting any reference to classwide arbitration. *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013). Finding that this standard language merely represented "'the fact of the parties' agreement to arbi-

trate,'" *id.* at 600 (citation omitted), the court held that *Stolt-Nielsen* precluded an inference that the parties intended to use classwide procedures: "The principal reason to conclude that this arbitration clause does not authorize classwide arbitration is that the clause nowhere mentions it." *Id*. at 599.

In an analogous context, the Fourth Circuit interpreted the term "contractual basis" to mean that an agreement must "unmistakably provide" evidence of an agreement. *Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 875, 877 (4th Cir. 2016). In considering whether two parties had agreed for an arbitrator to decide the availability of class procedures, the Fourth Circuit held that because the arbitration agreement "did not unmistakably provide that the arbitrator would decide whether their agreement authorizes class arbitration," *id*. at 877, and in fact said "nothing at all about the subject," *id.*, there was no contractual basis for concluding that they agreed to have an arbitrator decide on the availability of class procedures.

Even prior to *Stolt-Nielsen*, most courts of appeals held that the FAA precludes the imposition of class-based arbitration or consolidation of individual arbitrations where the arbitration agreement itself is silent as to the availability of such procedures. *See Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219 (2d Cir. 2001); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000); *Del E. Webb Constr. v. Richardson Hosp. Auth*., 823 F.2d 145 (5th Cir. 1987), *abrogated on other grounds by Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *American Centennial Ins. Co. v. National Cas. Co*., 951 F.2d 107 (6th Cir. 1991); *Champ v. Siegel Trading Co*., 55 F.3d 269 (7th Cir. 1995); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir.

2001); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814 (11th Cir. 2001). Some courts went a step further, expressing the logical view that class arbitration categorically is unavailable in the absence of contract language affirmatively authorizing the procedure. In *Champ v. Siegel Trading Co.*, for example, the Seventh Circuit ruled that the FAA prohibits a court from ordering classwide arbitration "absent a provision in the parties' arbitration agreement providing for class treatment of disputes ...." 55 F.3d at 271. It determined that since the arbitration agreement at issue was silent as to class arbitration, "[f]or a federal court to read such a term into the parties' agreement would 'disrupt[] the negotiated risk/benefit allocation and direct[] [the parties] to proceed with a different sort of arbitration.'" *Id.* at 275 (citation omitted).

Despite this Court's direct admonition in *Stolt-Nielsen*, in *Jock I* the court below compelled class arbitration essentially based on nothing more than the agreement to arbitrate. Pet. App. 53a. Rather than interpret the agreement according to its plain meaning, the court made an inference exactly of the type prohibited by *Stolt-Nielsen*, overriding the clear terms of the agreement and failing to adhere to the FAA's requirement to enforce arbitration agreements as they are written. *Id.*

Here, in *Jock IV*, the Second Circuit compounded that mistake by finding that the absent class members consented to be bound by classwide proceedings simply by signing an arbitration agreement that provides questions of arbitrability should be addressed by an arbitrator. Pet. App. 2a. In *Jock IV*, the Second Circuit never revisited the issue of whether Sterling

and each of the absent class members consented to class arbitration.

b. A contractual basis for class arbitration cannot be based on the doctrine of *contra proferentem*

In *Lamps Plus*, a case involving interpretation of an arbitration agreement under California law, the Ninth Circuit found that the agreement was ambiguous noting that "[o]n the one hand … certain phrases in the agreement seemed to contemplate 'purely binary claims,'" 139 S. Ct. at 1413 (citation omitted), while other parts of the agreement—including standard clauses typically found in arbitration agreements—"were capacious enough to include class arbitration." *Id*. The Ninth Circuit applied *contra proferentem* under California law to construe the agreement against the drafter.

However, this Court explicitly rejected the Ninth Circuit's reliance on *contra proferentem*. *Contra proferentem* is not an appropriate doctrine to be used to determine whether the parties consented to class procedures because *contra proferentem* "is triggered only after a court determines that it *cannot* discern the intent of the parties." *Id.* at 1417. In fact, "*contra proferentem* seeks ends other than the intent of the parties." *Id.*

In *Jock I*, the Second Circuit held that the arbitrator could have found class claims permissible merely by construing ambiguity against the drafter. Pet. App. 52a-92a. But the arbitrator made no such finding. Instead, she relied on *contra proferentem* under Ohio law. In doing so, she determined that the agreement did not prohibit class arbitration, Pet. App. 295a, and that the lack of an explicit contractual clause prohib-

iting class arbitration should be construed against Sterling, Pet. App. 296a, a decision at odds with both *Stolt-Nielsen* and *Lamps Plus*.

In *Jock IV*, the Second Circuit compounded that mistake. Instead of relying on *Lamps Plus*, the Second Circuit incorrectly distinguished it, because in *Lamps Plus* a court made the class arbitration decision while here an arbitrator made the determination, and that interpretation was entitled to deference under the FAA. While the absent class members signed the arbitration agreements, "an arbitrator's erroneous interpretation of contracts that do not authorize class arbitration cannot bind someone who has not authorized the arbitrator to make that determination." *Oxford Health*, 569 U.S. at 574 (Alito, J., concurring). The arbitrator's erroneous interpretation permitting class procedures cannot now bind 70,000 absent class members.

B. Because Such Procedures Fundamentally Change The Nature Of Arbitration, An Agreement To Allow Class Proceedings Must Be Explicit

Class arbitration differs fundamentally from bilateral arbitration. As this Court has said, "class-action arbitration changes the nature of arbitration," *Stolt-Nielsen*, 559 U.S. at 685, by trading "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness," for slower and costlier procedures that come to resemble litigation. *Epic Systems*, 138 S. Ct. at 1623. *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate ... a party … trades the procedures and opportunity for review of the courtroom for the simplicity, informality,

and expedition of arbitration"); *AT&T Mobility*, 563 U.S. at 348 ("[S]witch[ing] 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"). In the end, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id*. at 344. So significant is the switch from bilateral to class arbitration that there must be no doubt as to whether the parties intended to authorize its use. Only explicit terms contained in the arbitration agreement can provide this assurance.

Because class arbitration represents a fundamental departure from what the FAA envisioned, this Court has recognized the critical importance of ensuring that the parties to an arbitration agreement have authorized class procedures. Inferring agreement to classwide arbitration from standard arbitration language that nowhere mentions class proceedings, as the lower court did, turns the agreement on its head, contravening this Court's repeated exhortation to enforce arbitration agreements as they are written. *See, e.g., Epic Systems*, 138 S. Ct. at 1632; *AT&T Mobility*, 563 U.S. at 344. Under the lower court's reasoning parties could only avoid class procedures by expressly disapproving of them. This would directly undermine *Stolt-Nielsen*'s requirement that an arbitration agreement must contain a contractual basis for concluding that the parties approved of class procedures. 559 U.S. at 684.

II. PERMITTING LOWER COURTS TO SO NARROWLY INTERPRET *STOLT-NIELSEN* AND *LAMPS PLUS* WOULD UNDERMINE THE CONSIDERABLE BENEFITS OF BILATERAL ARBITRATION IN THE EMPLOYMENT CONTEXT

As an alternative to litigation, arbitration provides the "promise of quicker, more informal, and often cheaper resolutions for everyone involved," *Epic Systems*, 138 S. Ct. at 1621 (citation omitted), replacing lengthy and complex court proceedings. "A prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results," *AT&T Mobility*, 563 U.S. at 346 (citation and internal quotations omitted), by making use of "the traditionally individualized and informal nature of arbitration." *Epic Systems*, 138 S. Ct. at 1623.

In fact, "the relative informality of arbitration is one of the chief reasons that parties select arbitration." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009), as it "reduc[es] the cost and increase[es] the speed of dispute resolution." *AT&T Mobility*, 563 U.S. at 345 (citations omitted). Indeed, "[p]arties generally favor arbitration precisely because of the economics of dispute resolution," *14 Penn Plaza*, 556 U.S. at 257, as it provides the "'essential virtue of resolving disputes straightaway.'" *Oxford Health*, 569 U.S. at 568 (citation omitted).

Resolving disputes quickly and inexpensively is "of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores*, 532 U.S. at 123. Thus, many employers have adopted alternative dispute resolution programs with a mandatory arbitration component primarily in an effort to

reduce litigation costs and to minimize ill will between the parties to a dispute.

In sum, bilateral arbitration is a crucially important tool for employers, enabling relatively efficient dispute resolution – in exchange for waiving procedures that would otherwise protect them. This includes the opportunity for judicial review. *See AT&T Mobility*, 563 U.S. at 350 (the FAA "allows a court to vacate an arbitral award *only* where the award was procured by corruption, fraud, or undue means") (citation and internal quotation omitted). In short, typically "[t]he arbitrator's construction holds, however good, bad, or ugly." *Oxford Health*, 569 U.S. at 573.

Class arbitration, on the other hand, offers all of the burdens and none of the benefits of bilateral arbitration. Classwide arbitration "*requires* procedural formality," *AT&T Mobility*, 563 U.S. at 349, while simultaneously "greatly increas[ing] risks to defendants" due to the general unavailability of judicial review. *Id.* at 350. Thus, the calculus underlying bilateral arbitration agreements – where costly but protective procedures are exchanged for more-efficient proceedings – no longer holds, due to the higher risks that attach to matters involving multiple disputants. On a classwide basis, then, "the risk of an error will often become unacceptable [and, therefore, f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Id.*

Allowing an arbitration to proceed as a class action even where the contract does not clearly allow for it would profoundly undermine the efficiencies of arbitrating workplace disputes. "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment

litigation ...." *Circuit City Stores*, 532 U.S. at 123. In particular:

> The time and cost of pursuing a claim through traditional methods of litigation present the most glaring and formidable obstacles to relief for employment discrimination victims. While it might not make a difference to the upper level managerial worker who can afford the services of an expensive lawyer, and who can withstand the grueling process of litigation, those employees who are less financially sound are chronically unable to attract the services of a quality lawyer. For example, experienced litigators maintain that good plaintiff's attorneys will accept only one in a hundred discrimination claimants who seek their help. For those claimants who are denied the services because of their financial situation, the simpler, cheaper process of arbitration is the most feasible recourse.

Craig Hanlon, *Reason Over Rhetoric: The Case for Enforcing Pre-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 5 Cardozo J. Conflict Resol. 2 (2003).

The financial and other benefits that the parties derive from employment arbitration are likely to disappear altogether if they are forced to submit to complex, class-based arbitration even where the underlying agreement does not provide for class arbitration procedures. In addition to increasing the costs, adjudicating claims on a classwide basis brings a level of complexity that undermines many of the core advantages of arbitration. As this Court noted in *Epic Systems*, if class arbitration were the rule:

> [A]rbitrators would have to decide whether the named class representatives are sufficiently representative and typical of the class; what kind of notice, opportunity to be heard, and right to opt out absent class members should enjoy; and how discovery should be altered in light of the classwide nature of the proceedings. All of which would take much time and effort, and introduce new risks and costs for both sides. In the Court's judgment, the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace.

138 S. Ct. at 1623 (citations omitted).

Parties choose arbitration for its efficiency, which is derived from the absence of protective but burdensome litigation procedures. Classwide arbitration reintroduces those very same procedures and inefficiencies, and while parties are free to make this decision, logic and this Court's precedent dictate that an agreement to do so must be evident on its face. Inferring an agreement to engage in classwide arbitration ignores the reasons that parties agree to enter into arbitration in the first place.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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