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 IN OPPOSITION

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QUESTION PRESENTED

The arbitrator certified a class of employees, including employees who did not affirmatively opt into the specific arbitration proceeding before her, to pursue declaratory and injunctive relief against their employer for discrimination. All class members agreed to arbitrate their claims on materially identical terms and all agreed to submit the question of class arbitration to an arbitrator. The employer likewise agreed that the arbitrator should decide the question of class arbitration. Did the arbitrator exceed her powers, 9 U.S.C. § 10(a)(4), by certifying the class?

RELATED PROCEEDINGS

In addition to those listed in the Petition, the related proceedings include the following in the United States Supreme Court:

Sterling Jewelers Inc. v. Jock, No. 11-693 (Mar. 19, 2012)

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INTRODUCTION

Sterling Jewelers, Inc. requires its employees to agree to arbitration as a condition of employment. The arbitration agreement vests the arbitrator with broad powers to determine whether class arbitration procedures are permissible and, if so, what type of procedures are warranted.

Unhappy with the arbitrator's lawful exercise of those powers, Sterling has appealed both the clause construction award and the class determination award. In its decade-long effort to disturb the awards, Sterling has multiplied the time and cost of this proceeding, which has made four trips to the Second Circuit. The searching judicial review that Sterling seeks is directly contrary to the Federal Arbitration Act ("FAA"), which affords only the narrowest review to arbitral decisions on issues that the parties entrusted to the arbitrator.

Sterling's attacks on the arbitrator's awards are no more persuasive now than they were in 2012, when this Court denied Sterling's prior petition for certiorari. Then, Sterling argued that the Second Circuit's opinion in *Jock I*—which held that the arbitrator did not exceed her powers when she concluded that the arbitration agreement authorized class proceedings—contravened *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 559 U.S. 662 (2010). This Court denied certiorari and, a year later in *Oxford Health Plans LLC* v. *Sutter*, 569 U.S. 564 (2013), rejected the very interpretation of *Stolt-Nielsen* that Sterling had advanced in its petition (and that Sterling attempts to advance again here).

Now, Sterling petitions for review of the Second Circuit's unanimous decision in *Jock IV* affirming the arbitrator's authority to certify a class with absent class members. Sterling concedes there is no conflict of authority on this question. And Sterling has little to say about the purported errors below. Instead, Sterling mostly reprises the same arguments it made in its prior petition that the Second Circuit's decision in *Jock I* is contrary *Stolt-Nielsen*. Only now, Sterling says *Jock I* also contravenes this Court's recent decision in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).

There is no basis for this Court's review. Sterling is seeking only correction of what it views as the arbitrator's error. Its petition is premised on a misreading of the arbitral awards and a misapplication of this Court's precedents. Worse still, Sterling asks this Court to effectively overrule its decision in *Oxford Health*, which already rejected the same arguments Sterling presents. Sterling warns of dire consequences if this Court declines to intervene in this particular case. Many resemble the consequences Sterling predicted in its last failed petition, which—despite the same arguments about urgency and recurrence—never came to pass. Others reveal the true impetus for Sterling's petition: its policy disagreement with the very idea of class arbitration proceedings.

As Sterling itself emphasizes, however, all arbitration proceedings are a matter of contract. Just as arbitrators cannot impose their policy choices to require class arbitration where parties have not agreed to it, a court cannot impose its policy choices to preclude class arbitration where they have. Sterling is free to revise

its employment agreements going forward. But the agreement at issue in this case affords only limited judicial review of the arbitrator's decision, and Sterling has not identified any sound reason for this Court's intervention.

STATEMENT

Respondents are current and former female employees of Sterling, a nationwide retail jeweler. They allege that Sterling has paid women in its stores less than their male counterparts and promoted them less often.

In 2005, Respondent Laryssa Jock filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). Pet. App. 55a. Eighteen other women also filed charges. *Ibid.* After investigation, the EEOC "determined that Sterling subjected [Respondents] and a class of female employees with retail sales responsibilities nationwide to a pattern or practice of sex discrimination." Pet. App. 55a-56a (quotation marks and first bracket omitted). In particular, "Sterling promoted male employees at a statistically significant, higher rate than similarly situated female employees" and "compensated male employees at a statistically significant, higher rate than similarly situated female employees." Pet. App. 56a (brackets and quotation marks omitted).

Respondents also filed complaints of discrimination through the "Sterling RESOLVE Program," a dispute resolution mechanism Sterling requires all employees to agree to as a condition of employment. Pet. 5-6; Pet. App. 301a.

A. Sterling RESOLVE Program

RESOLVE is a multi-step complaint and mediation process that culminates in arbitration. Pet. App. 298a-301a. Through RESOLVE, employees waive their rights to "obtain any legal or equitable relief" in federal or state court for discrimination, wage-and-hour, or similar claims. Pet. App. 298a-299a. They receive in return the right to "seek and be awarded equal remedy through [RESOLVE]." Pet. App. 299a. Sterling and each employee agree that if a dispute reaches arbitration, the arbitrator has "the power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction," and that the arbitrator's decision is "final and binding upon the parties." *Ibid.* Sterling promises employees that any decision in their favor "is protected" and "**[t]he Company cannot appeal**." Pet. App. 316a (emphasis in original).

The parties also agree to rules that will govern any arbitration. They include the Sterling RESOLVE Program Arbitration Rules, as well as the American Arbitration Association's ("AAA's") National Rules for the Resolution of Employment Disputes and the Supplementary Rules for Class Arbitrations. Pet. App. 299a. Those rules grant broad powers to the arbitrator. Under the RESOLVE Program Arbitration Rules, "[q]uestions of arbitrability (that is whether an issue is subject to arbitration under this Agreement) shall be decided by the arbitrator," and the same is true for "procedural questions." Pet. App. 305a. As Sterling concedes, this delegation encompasses disputes about an employee's ability to arbitrate as a class or collective

action. JA209.[1] The Supplementary Rules for Class Arbitrations reinforce this conclusion: they likewise delegate questions of class arbitrability to the arbitrator. JA434-436.

The rules also specify how the arbitrator exercises these broad powers when presented with a demand for class arbitration. The arbitrator first determines whether the agreement between the parties permits class proceedings and renders a "Clause Construction Award" on that threshold issue. *Ibid.* If the arbitrator concludes that class proceedings are allowed, the arbitrator then determines what, if any, class should be certified—guided by criteria that largely track Rule 23 of the Federal Rules of Civil Procedure—and renders a "Class Determination Award." JA435. When the criteria for certification are satisfied, the arbitrator is authorized to certify a traditional "opt out" class, or, in exceptional circumstances, a mandatory class. JA436-437. The reach of any class is limited to employees who signed the same arbitration agreement as the class representative or a materially identical one. JA435.

Here, Respondents attempted mediation under RESOLVE and then invoked the program's arbitration provision. They filed a demand for class arbitration with the AAA, asserting disparate-treatment and disparate-impact claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., as well as claims under the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d). Respondents also filed a protective action in the District

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[1] "JA" refers to the Joint Appendix in the Second Circuit for *Jock IV*.

Court due to certain doubts about the RESOLVE Agreement's enforceability—a move the District Court deemed "perfectly reasonable." JA218. In that action, Sterling argued that the District Court was required to decide whether class proceedings were available under RESOLVE. JA215. The District Court disagreed, finding it "crystal clear" that the arbitrator could and should answer that question. JA216, 219.

B. Clause Construction Award

The parties then submitted that question to the arbitrator. Pet. App. 57a.[2] Respondents argued the RESOLVE Agreement allowed class arbitration; Sterling said it did not. Sterling went further and presented argument about the *type* of class arbitration allowed under the Agreement. According to Sterling, the arbitrator was required to decide at the outset "what types of class arbitration are permitted under the RESOLVE program" and whether opt-out procedures would be allowed. JA283 (capitalization omitted). While Respondents agreed with Sterling that the arbitrator had authority over those questions, Respondents argued that questions about what type of class could be certified were premature at the initial clause-construction stage and properly reserved for the later class-determination phase. JA321.

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[2] Sterling now claims the arbitrator decided that question over Sterling's "objections to the arbitrator's … authority." Pet. 8 (citing Pet. App. 291a-297a). Not so. Sterling made no such objections to the arbitrator's authority and, to the contrary, clearly asked the arbitrator to decide the availability and type of class proceedings. *See* Pet. App. 292a; *see also supra* at 6.

The parties' chosen arbitrator, Hon. Kathleen A. Roberts (Ret.), issued a Clause Construction Award in 2009. Pet. App. 291a. She explained that her task was contract interpretation—that is, applying Ohio law to determine the intent of the parties with respect to class arbitration. Pet. App. 294a-295a. She then proceeded to determine that intent in accordance with the governing authority at the time, *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). Pet. App. 295a.

The arbitrator concluded that class arbitration was permitted under RESOLVE. Pet. App. 295a-296a. She reached that conclusion by examining the intent of the parties as "evidenced by the contractual language," which neither expressly authorized nor forbade class arbitration. Pet. App. 295a. The contractual language included a statement empowering the arbitrator "to award any types of legal or equitable relief that would be available in a court of competent jurisdiction." Pet. App. 296a. The arbitrator found this statement to be evidence of "the right to participate in a collective action," reinforced by Sterling's admission that it had "deliberately not revised the RESOLVE Arbitration Agreement to include an express prohibition [of class arbitration], despite numerous arbitral decisions that class claims are permitted in the absence of an express prohibition." *Ibid.* Sterling's forbearance was notable given evidence in the record that Sterling had modified its *consumer* agreements to explicitly ban class arbitration, but had decided not to make the corresponding change to the RESOLVE Agreement. JA226, 234-236.

Sterling asked the District Court to vacate the Clause Construction Award. The District Court initially refused, holding that the RESOLVE Agreement was broad and the arbitrator "clearly had the power to reach the issue." Pet. App. 115a. Yet the District Court later changed course, Pet. App. 94a, based on what proved to be an over-reading of the Supreme Court's intervening decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010).

Stolt-Nielsen addressed whether an arbitral panel exceeds its authority under the FAA by imposing class arbitration on parties who stipulated they had reached no agreement on that issue. 559 U.S. at 666. This Court answered yes: "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 684 (emphasis in original). There was no conceivable contractual basis in *Stolt-Nielsen* on which to find the parties agreed to class arbitration, since the parties had stipulated they reached "no agreement" on that issue. *Ibid.* Thus, the arbitral panel could not have engaged in contract interpretation; it "simply imposed its own conception of sound policy." *Id.* at 675.

In *Jock I*, the Second Circuit rejected the District Court's application of *Stolt-Nielsen* and reinstated the Clause Construction Award. Pet. App. 54a. *Stolt-Nielsen* did not apply, the court explained, because the parties did not stipulate—and the arbitrator did not find—"that the parties had reached no agreement on the issue." Pet. App. 72a. Furthermore, the fact that the RESOLVE Agreement did not *expressly* authorize class arbitration was beside the point: "*Stolt-Nielsen* did not

hold that the intent to agree to arbitration must be stated expressly in an arbitration agreement." Pet. App. 77a (citing *Stolt-Nielsen*, 559 U.S. at 687 n.10). Thus, the court held, the arbitrator acted within her powers when she examined "the language of the contract to determine the parties' implicit intent to permit class arbitration." Pet. App. 76a. Her conclusion was (at a minimum) "not unreasonable," and so it satisfied the FAA's highly deferential standard of review. Pet. App. 79a. The court then went further, strongly suggesting that the arbitrator's interpretation was not just permissible, but actually correct. As the court explained, a contrary ruling would fail to give effect to the rights and expectations of employees who signed an agreement giving them "all remedies and rights that would otherwise be available in court or before a government agency." *Ibid.*

After the Second Circuit denied en banc review, Pet. App. 124a, Sterling filed a petition for certiorari. Sterling asked this Court to decide whether the Second Circuit contravened *Stolt-Nielsen* by upholding the Clause Construction Award. *See* Petition for Certiorari at i, *Sterling Jewelers, Inc. v. Jock*, 565 U.S. 1259 (2012) (No. 11-693), 2011 WL 6046211 ("*Jock I* Pet."). According to Sterling, the arbitrator did not find that the parties had agreed to class arbitration either explicitly or implicitly. *Id.* at 7. Sterling insisted that only bilateral arbitration was permitted, emphasizing the very same provisions of the RESOLVE Agreement as in its present petition. *Compare id.* at 3, *with* Pet. 24-25. In addition, Sterling argued the Second Circuit's disregard of *Stolt-Nielsen* was so obvious as to warrant

summary reversal, and warned of grave consequences if the Court failed to intervene. *Jock I* Pet. at 8, 18, 22. The Court denied the petition. Pet. App. 51a.

C. Class Determination Award

The arbitration then moved to the next stage: deciding what classes, if any, should be certified. Respondents sought certification with respect to their disparate-treatment and disparate-impact claims under Title VII and their EPA claims. In opposition, Sterling argued that Respondents could not meet the certification criteria and lacked "standing" to represent any women who had not affirmatively opted into this specific arbitration proceeding. *See* Pet. App. 148a. However, Sterling stipulated that each putative class member joined RESOLVE through a materially identical agreement, Pet. App. 276a, and Sterling agreed that the arbitrator was empowered to decide the "standing" question. JA484-486.

In a lengthy and detailed opinion, the arbitrator granted the certification motion in part. Pet. App. 139a-290a. She certified a class as to the Title VII disparate-impact claims for declaratory and injunctive relief, consisting of all women employed in Sterling's retail stores starting in 2004 who had signed the RESOLVE Agreement. Pet. App. 263a. Her ruling provided that any putative class member who wished would have an opportunity to opt out. Pet. App. 279a. The arbitrator also considered and rejected Sterling's "standing" argument against certification of the Title VII class. She explained that all Sterling employees had agreed to the RESOLVE Program, which is governed by rules empowering the arbitrator to decide whether the

Agreement permits class arbitration. Pet. App. 288a-289a. Thus, each Sterling employee already agreed that an arbitrator would have authority to decide the issue for purposes of a proposed class proceeding—including to certify a class including that employee. *Ibid.*

As to the EPA claims, the arbitrator denied certification of an opt-out class because that statute provides its own opt-in procedure for a collective action. Pet. App. 284a-286a; *see* 29 U.S.C. § 216(b). The arbitrator also declined to certify a Title VII damages class under Rule 23(b)(3) for the time being, finding that individual claims for monetary damages could not "be fairly adjudicated on a representative basis" in light of the range of individual circumstances bearing on eligibility for back-pay. Pet. App. 277a-278a.

D. Decision Below

Sterling again challenged the arbitrator's decision. Sterling argued in the District Court that the arbitrator overstepped her authority by certifying a class that included employees other than those who affirmatively opted into the proceeding. *See* Pet. App. 38a-39a. As before, the District Court initially rejected Sterling's argument. Pet. App. 49a. But after the Second Circuit vacated and remanded for further consideration, Pet. App. 28a-32a, the District Court changed course. The District Court reasoned that although the parties to the arbitration were stuck with the arbitrator's "wrong" interpretation of the RESOLVE Agreement, other employees should not be. Pet. App. 22a-26a. The District Court ignored the fact that the Second Circuit had already rejected in *Jock I* the District Court's views about the arbitrator's "wrong" interpretation.

The Second Circuit disagreed with the District Court and reinstated the Class Determination Award. Pet. App. 17a. The Second Circuit held that "the arbitrator's determination that the agreement permits class arbitration binds the absent class members because, by signing the RESOLVE Agreement, they, no less than the parties, bargained for the arbitrator's construction of that agreement with respect to class arbitrability." Pet. App. 3a.

The Second Circuit recognized that it was operating under the "extremely deferential standard of review" mandated by the FAA. Pet. App. 8a. Under that standard, a court may vacate an arbitral award only "where the arbitrator[] exceeded [his or her] powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made." *Ibid.* (quoting 9 U.S.C. § 10(a)(4) (alterations in original)). Sterling argued that a more searching standard of review should apply to a decision affecting absent class members, but the Second Circuit disagreed. Pet. App. 9a-12a. Opting in was not necessary to consent to the arbitrator's authority, the court explained, because all putative class members manifested their consent when they signed the RESOLVE Agreement. Pet. App. 11a-12a. The Agreement delegated questions of both arbitrability and procedure to the arbitrator. Pet. App. 12a. The Agreement also provided for the application of AAA Rules to the arbitration, reconfirming each employee's "agreement to have the arbitrator decide the question of class arbitrability." Pet. App. 11a. In other words, all signatories agreed that the availability of class arbitration was for the

arbitrator to decide, and all agreed to be bound by an arbitrator's decision whether to certify a class.

Those provisions demonstrated that absent class members, just like Respondents, "bargained for the arbitrator's construction of their agreement," including on the issue of class arbitration. Pet. App. 13a (quoting *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013)). The Second Circuit explained: "It is not for us, as a court, to decide whether the arbitrator's class certification decision was correct on the merits of issues such as commonality and typicality." Pet. App. 14a. The court's role was constrained to deciding whether "the arbitrator had the authority to reach such issues even with respect to the absent class members." *Ibid.* That authority was plain on the face of the materially identical Agreement each putative class member signed. "To hold otherwise would be inconsistent with the nature of class litigation and would in effect negate the power of the arbitrator to decide the question of class arbitrability." Pet. App. 15a.

The Second Circuit also addressed *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), which issued while Sterling's appeal was pending. In *Lamps Plus*, the Court announced a narrow holding: "Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis." 139 S. Ct. at 1419. The Court assumed without deciding that the arbitration agreement before it was ambiguous *id.* at 1414, and held that ambiguity alone does not constitute a contractual basis to compel class arbitration, *id.* at 1416. The Court also rejected the Ninth Circuit's resort to the doctrine of *contra proferentem* to resolve

ambiguity against the drafter. *Id.* at 1417. Because "*contra proferentem* is by definition triggered only after a court determines that it cannot discern the intent of the parties," *ibid.*, it is a public policy default that "cannot substitute for the requisite affirmative 'contractual basis for concluding that the part[ies] *agreed* to [class arbitration]." *Id.* at 1419 (quoting *Stolt-Nielsen*, 559 U.S. at 684 (alternations and emphasis in original)).

The Second Circuit found *Lamps Plus* distinguishable for multiple reasons. First, *Lamps Plus* involved a different standard of review: because the parties in *Lamps Plus* agreed that a court should decide the availability of class arbitration, appellate review of that decision was plenary. Pet. App. 16a. Here, by contrast, the parties agreed that the decision was for the arbitrator to make, triggering the FAA's deferential standard of review. *Ibid.* Second, *Lamps Plus* did not disturb "the proposition, affirmed in *Stolt-Nielsen*, that an arbitration agreement may be interpreted to include implicit consent to class procedures." Pet. App. 16a-17a. Indeed, although the petitioner and *amici* in *Lamps Plus* urged this Court to include a "clear statement" rule with respect to class arbitration, this Court declined to do so. Pet. App. 17a. Finally, the Second Circuit explained, its reasoning in *Jock I* was "fully consistent with the Supreme Court's decision in the more analogous case of *Oxford Health*." *Ibid.* For these reasons, the Second Circuit found that *Lamps Plus* did not undermine the reasoning in *Jock I* upholding the arbitrator's Class Determination Award. Pet. App. 16a-17a.

Sterling now seeks review of the Second Circuit's unanimous decision.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict of Authority.

As Sterling concedes, there is no circuit split on the question presented. Pet. 4. In fact, Sterling admits the decision below is the "first decision of a court of appeals" on the question presented. Pet. 25. Despite Sterling's claim that the petition presents an urgent and recurring issue, Sterling identifies only one other decision addressing this question, and acknowledges it does not conflict with the decision below. Pet. 25-28 (citing *Ala. Psychiatric Servs., P.C. v. Lazenby*, 292 So. 3d 295 (Ala. 2019)).

Lacking a circuit split, Sterling depicts the decision below as in conflict with *Stolt-Nielsen* and *Lamps Plus*. As for *Stolt-Nielsen*, Sterling already had its chance to persuade this Court to review the Second Circuit's application of that case to these facts. *See supra* at 9-10. And Sterling's arguments are even weaker now than they were when this Court denied certiorari almost a decade ago. Indeed, these arguments are effectively foreclosed by this Court's intervening decision in *Oxford Health*. As for *Lamps Plus*, the Second Circuit carefully considered, and correctly rejected, Sterling's claims about its application here, which misunderstand the reasoning behind the arbitrator's decision as well as the standard of judicial review. There is no basis for granting certiorari.

A. The decision below respects *Stolt-Nielsen*.

The decision below relied on *Stolt-Nielsen* for two basic propositions. First, "an extremely deferential standard of review" applies where, as here, the parties agree that an arbitrator will construe their agreement. Pet. App. 8a (citing *Stolt-Nielsen*, 559 U.S. at 671). Second, "an arbitration agreement may be interpreted to include implicit consent to class procedures." Pet. App. 16a-17a (noting this proposition was "affirmed in *Stolt-Nielsen*"). Sterling does not seriously dispute either proposition. Instead, Sterling tries to relitigate the Second Circuit's decision from a decade ago in *Jock I*.

Even assuming this Court is willing to reconsider Sterling's arguments about the application of *Stolt-Nielsen* to the Clause Construction Award, those arguments are even weaker now because they are contrary to *Oxford Health*. In *Oxford Health*, as here, "[t]he parties agreed that the arbitrator should decide whether their contract authorized class arbitration." 569 U.S. at 566. There, as here, the arbitrator correctly understood the task as interpreting the intent of the parties based on the text of their agreement. *Ibid.* There, as here, the arbitrator looked to the language of the contract to perform that task, reasoning that because the agreement directed the parties to arbitrate "'the same universal class of disputes' that it barred the parties from bringing 'as civil actions' in court," the agreement evinced an intent to allow in arbitration everything that it prohibited from court—including a class action. *Id.* at 566-67. There, as here, it did not

matter that the agreement lacked an express statement authorizing class arbitration; the parties expressed their intent implicitly through a general statement about the broad class of disputes subject to arbitration. *Id.* at 567-68.

The Court granted certiorari in *Oxford Health* to address the proper level of judicial review for the arbitrator's decision. Where the parties submit the question of class arbitration to an arbitrator, and the arbitrator makes a good-faith attempt to interpret their contract, what level of judicial review does the FAA permit? 569 U.S. at 568. The Court confronted a circuit split on that question and identified *Jock I* as a decision presenting "similar circumstances" to *Oxford Health*. *Id.* at 568 & n.1. The Supreme Court resolved that split by endorsing the Second Circuit's approach in *Jock I* and holding that Section 10(a)(4) of the FAA does *not* allow a court to vacate an arbitral award in these circumstances. *Id.* at 568.

The Court considered and rejected the same misreading of *Stolt-Nielsen* that Sterling advances here. As the Court explained, the key inquiry under Section 10(a)(4) of the FAA is not whether the arbitrator articulated a *sufficient* contractual basis for the decision—it is whether the arbitrator had "*any* contractual basis for ordering class procedures." *Oxford Health*, 569 U.S. at 571 (emphasis in original). There was no contractual basis whatsoever for the decision in *Stolt-Nielsen* because the parties entered into an "unusual stipulation" that they "had never reached an agreement" on class arbitration. *Ibid.* That stipulation meant the arbitral panel in *Stolt-Nielsen* "was not—indeed, could

not have been"—engaged in interpreting the parties' agreement. *Ibid.* By contrast, the arbitrator in *Oxford Health* (like the arbitrator here) "did construe the contract" and "did find an agreement to permit class arbitration." *Ibid.* "[T]o overturn his decision," then, a court "would have to rely on a finding that he misapprehended the parties' intent." *Ibid.* Such a finding would go beyond the limited scope of judicial review the FAA allows. *Id.* at 571-72.

Oxford Health confirms that the Second Circuit understood *Stolt-Nielsen*'s reach. Sterling criticizes the Second Circuit for reading *Stolt-Nielsen* too narrowly and relying overmuch on the "idiosyncratic" stipulation at issue there. Pet. 4 (quotation marks omitted); *see also* Pet. 14, 26, 27-28. Yet *Oxford Health* itself emphasized that "unusual stipulation," which precluded any finding that the arbitral panel was acting within its authority. 569 U.S. at 571. The stipulation was the very reason this Court held that "*Stolt–Nielsen* and [*Oxford Health*] thus fall on opposite sides of the line that § 10(a)(4) draws to delimit judicial review of arbitral decisions." *Id.* at 572. The Second Circuit did not evade *Stolt-Nielsen* or render that decision a nullity; it applied *Stolt-Nielsen* precisely as *Oxford Health* intended. The evasion here is entirely Sterling's: its reading of *Stolt-Nielsen*, if adopted, would require this Court to effectively overrule the central holding in *Oxford Health*.

B. *Lamps Plus* is inapposite.

Beyond merely reprising the same arguments about *Stolt-Nielsen* from its prior failed petition, Sterling adds one new argument: it says the decision below contravenes *Lamps Plus*. This argument again

attempts to focus the Court on the Clause Construction Award from a decade ago rather than the Class Determination Award that was the subject of the current appeal. And again, even if the Court were to allow Sterling to reach back in time and challenge the Clause Construction Award anew, *Lamps Plus* would not change anything. The Second Circuit correctly determined that *Lamps Plus* has no bearing on this dispute for two principal reasons.

First, *Lamps Plus* came to the Court in a fundamentally different posture. In *Lamps Plus*, the parties did *not* submit the question of class arbitration to the arbitrator. This Court therefore interpreted the arbitration agreement *de novo*, unconstrained by the highly deferential standard applied in *Oxford Health*. Here, by contrast, the parties expressly "submitted to the arbitrator the question whether the RESOLVE agreement permitted or prohibited class arbitration." Pet. App. 57a; *see supra* at 6. As a result, *Lamps Plus* falls on the other side "of the line that § 10(a)(4) draws to delimit judicial review of arbitral decisions." *Oxford Health*, 569 U.S. at 572. The precedent that governs here is "the more analogous case of *Oxford Health*."[3] Pet. App. 17a. Under that precedent, the only question is whether the arbitrator "was arguably construing the

[3] The Supreme Court of Alabama reached the same result in *Lazenby*. It distinguished *Lamps Plus* and relied on *Oxford Health* instead. 292 So. 3d at 307-08 ("[O]ur review of an arbitrator's award is very limited under 9 U.S.C. § 10(a)(4), *see Oxford Health*; that was not a factor in *Lamps Plus*.").

contract," and for the same reasons this Court found in *Oxford Health*, the answer here is yes.

Second, contrary to Sterling's representations, *Lamps Plus* did not foreclose implicit consent as a basis for finding agreement to class arbitration. *Lamps Plus* left "undisturbed the proposition, affirmed in *Stolt-Nielsen*, that an arbitration agreement may be interpreted to include implicit consent to class procedures." Pet. App. 16a-17a. Because the arbitrator in this case grounded her Clause Construction Award in the implicit intent of the parties as manifested in the language of the contract and the actions of the parties, *Lamps Plus* has no bearing. Therefore, even assuming for argument's sake that the Second Circuit misunderstood the standard of review, *see* Pet. 4, the decision below stands: the arbitrator did not simply find the RESOLVE Agreement ambiguous and use the doctrine of *contra proferentem* to resolve an ambiguity.

Sterling misreads both the Clause Construction Award and *Lamps Plus* in its attempt to persuade this Court to revisit the arbitral decision that was the subject of its failed petition for certiorari in 2012. In the Clause Construction Award, the arbitrator never concluded the agreement was ambiguous. The term "ambiguous" does not appear in her decision at all. Instead, the arbitrator found that "contracts are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language." Pet. App. 295a. Looking to that language, she noted that the contract provided that employees may "pursue any dispute, claim, or controversy ('claim') against Sterling … which could have otherwise been brought before an appropriate

government or administrative agency or in an appropriate court." Pet. App. 294a. The arbitrator found further evidence of the parties' intent in their course of action: Sterling had "deliberately not revised the RESOLVE Arbitration Agreement to include an express prohibition" on class claims. Pet. App. 296. And while the arbitrator's analysis of the parties' intent was buttressed by the doctrine of *contra proferentem*, it did not depend on it. Pet. App. 295a-296a.

When the Second Circuit reviewed and affirmed the arbitrator's decision in *Jock I*, it did not find any ambiguity either. *Contra* Pet. 3, 19. Sterling's claim to the contrary is perplexing: the Second Circuit not once used the word "ambiguous" in its opinion, which featured an extended discussion of implicit consent as a basis for authorizing class arbitration. Pet. App. 72a-79a. As to the doctrine of *contra proferentem*, Sterling itself acknowledged below that the doctrine was a "non-issue" for review of the Class Determination Award. Sterling Br. at 33-34 (2d Cir. Apr. 6, 2018), Dkt. 92. Sterling is simply wrong to claim that the arbitrator's decision involved the same error as *Lamps Plus*, even setting aside the important difference in the standard of review.

To the extent Sterling claims that *Lamps Plus* rejected implicit consent, Sterling is mistaken. *Lamps Plus* did not adopt a clear statement rule, even though Lamps Plus and its *amici* urged the Court to do so. *See, e.g.*, Brief for Petitioners at 27-29, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) (No. 17-988), 2018 WL 3374999; Brief of Retail Litigation Center, Inc. as *Amicus Curiae* in Support of Petitioners at 6-15, *Lamps*

Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019) (No. 17-988), 2018 WL 3435305.[4] The Court instead vindicated a long line of precedent recognizing that parties to arbitration agreements—like parties to any other type of contract—"are generally free to structure their arbitration agreements as they see fit." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). Indeed, a clear statement rule would "fail[] to put arbitration agreements on an equal plane with other contracts," *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426-27 (2017), in which parties are free to express their intent implicitly as well as explicitly.

If anything, *Lamps Plus* undercuts Sterling's position. At oral argument, Lamps Plus's counsel was asked, "[W]hat language, short of a clear statement, would lead you to conclude that this agreement was intended to authorize class arbitration?" Transcript of Oral Argument at 31:5-8, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) (No. 17-988). Counsel responded that it would have sufficed for the Lamps Plus agreement to state that "we agree that we can bring any lawsuits that we could bring against one another in court." *Id.* at 31:18-22. That is precisely what the RESOLVE Agreement says. *See* Pet. App. 298a. In other words, there was no question in *Lamps Plus* that

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[4] Similarly, the Center for Workplace Compliance's *amicus* brief in this case urges the Court to adopt such a rule. *E.g.*, Brief of Center for Workplace Compliance as *Amicus Curiae* in Support of Petitioners at 14, 19-20.

the type of language at issue here authorizes class arbitration.

C. This Court's intervention is unnecessary.

Sterling insists that, without immediate correction, the decision below will unleash a parade of horribles within and beyond the Second Circuit. Pet. 4-5, 26-28. Of course, Sterling prophesized many of the same "problems" in its unsuccessful petition for certiorari nearly a decade ago. Sterling claimed that if the Court declined to grant certiorari, *Jock I* would "effectively abrogate *Stolt-Nielsen* within the Second Circuit." *Jock I* Pet. 8. That abrogation would have far-reaching consequences, Sterling warned: among others, it would "encourage forum shopping by parties who wish to take advantage of the Second Circuit's refusal to follow the dictates of *Stolt-Nielsen*," and "discourage corporate defendants within the Second Circuit from enforcing their rights to compel arbitration in appropriate case." *Ibid.* Tellingly, neither Sterling nor its *amici* present any evidence that those problems have materialized.

To begin, there is no basis for Sterling's prediction that *Stolt-Nielsen* and *Lamps Plus* "will be broadly inapplicable in one of the Nation's largest and most commercially important circuits." Pet. 26. Apart from the decision below, which is fully consistent with *Stolt-Nielsen*, Sterling does not cite a single example of a Second Circuit decision misapplying that precedent since it issued a decade ago. Moreover, Sterling has not cited any evidence that the Second Circuit—or any other court for that matter—is misapplying *Lamps Plus*.

Sterling also warns that the decision below would severely limit judicial review where, as here, parties agree to delegate the question of class arbitration to the arbitrator. Pet. 22. But nothing *requires* parties to delegate this question; parties are free to structure their agreements as they see fit. *Volt Info. Scis.*, 489 U.S. at 479; *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019). Employers like Sterling often elect to delegate many or all questions to the arbitrator, precisely *because* such delegation limits judicial review. *See* Pet. 26-27. Conversely, parties may choose to reserve certain questions for the court because they value plenary judicial review over the efficiencies captured by delegation. *Cf. Lamps Plus*, 139 S. Ct. at 1413. The choices are clear, as are the attendant risks and benefits and the corresponding level of judicial review. Sterling chose delegation when it crafted the RESOLVE Program, and having made that choice, it cannot now complain about the limitations on judicial review. Those limitations are a product of the FAA, not any mistake below.

Sterling's warnings of recurrence are also suspect. According to Sterling, the question presented "will recur with considerable frequency in the employment context and beyond." Pet. 26. That is so, Sterling claims, because many arbitration agreements delegate the class arbitration question. Pet. 26-27. But the problem of recurrence does not follow. Delegation means only that the arbitrator has *authority* to answer this question in the first instance—not that the arbitrator will construe the agreement to authorize class arbitration, much less that the arbitrator will then certify a class. Moreover,

delegation does not strip courts of authority to vacate arbitral awards when the arbitrator exceeds his or her authority—including when the arbitrator fails to engage in contract interpretation at all. *Oxford Health*, 569 U.S. at 571. Even more to the point, companies like Sterling are free to require class action waivers as part of their arbitration agreements. This Court has broadly approved of these waivers in both consumer and employment contracts. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Studies show their use is common.[5] Indeed, Sterling itself added a class action waiver to its *consumer* agreements well over a decade ago. JA226, 234-236. Given this reality, Sterling's claims of recurrence ring hollow, and it is unsurprising that Sterling cannot point to any conflicting authority—and only one other case even involving the question presented.

The real problems flow not from rejecting Sterling's arguments, but from adopting them. For starters,

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[5] *E.g.*, Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. Online 233, 234 (2019) (finding that 78 companies in the Fortune 100 have consumer arbitration agreements with class action waivers); Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Econ. Pol'y Inst., (Apr. 6, 2018) (finding that even prior to this Court's decision in *Epic*, more than half of non-union private-sector employers required arbitration, and approximately one-third of them also imposed class action waivers); *see also* Brief of Center for Workplace Compliance as *Amicus Curiae* in Support of Petitioners at 2 (stating that "[m]any" member companies mandate individual arbitration to resolve employment disputes).

Sterling's arguments would render *Oxford Health* a dead letter. Sterling is not shy about that fact—while citing repeatedly to Justice Alito's concurrence, Sterling fails to grapple with the majority opinion and makes arguments that cannot be squared with its holding. *E.g.*, Pet. 25 n.3 (arguing that the same type of language deemed sufficient to uphold the arbitral decision in *Oxford Health* cannot sustain the decision here). Even more fundamentally, Sterling seeks a dramatic expansion of the judiciary's role in reviewing decisions committed to arbitrators. While Sterling says this case "vividly illustrates" the problems of class arbitration, Pet. 29, it more vividly illustrates a different problem: losers in arbitration seeking a second (and in this case a third and fourth) bite at the apple and burdening the judiciary with requests to review arbitral decisions they dislike. Sterling's conception of judicial review—where arbitral awards are subject to judicial revision a decade after the fact, following several intervening appeals—presents the real threat to the efficiency and finality arbitration is meant to achieve.

II. The Decision Below Was Correct.

Sterling's petition relitigates the issues in *Jock I* yet has very little to say about any purported errors in *Jock IV*. The decision below reached a straightforward conclusion: all employees agreed to materially identical terms for arbitration, including provisions entrusting the question of class arbitration to an arbitrator, so all employees consented to be bound by an arbitrator's decision finding class proceedings were both permitted and warranted.

A. The arbitrator had contractual authority to bind all putative class members.

Seeking only error correction, and without identifying any conflict of authority on the question, Sterling argues that absent class members never agreed to the arbitrator's authority to include them in a certified class. Pet. 21-22. Not only does that argument fail to warrant this Court's review, it is wrong. All employees agreed that, if any employee initiated a putative class proceeding, the arbitrator in *that* proceeding would be empowered to decide class arbitrability—and, if appropriate, to certify a class encompassing other employees and their claims. The arbitrator thus had full authority for her Class Determination Award.

The RESOLVE Agreement ousts courts from all aspects of an employee's job-related legal disputes. It requires that "any dispute" touching on those matters must be submitted to arbitration. Under the Agreement, "matters for the arbitrator" include "[q]uestions of arbitrability" as well as "procedural questions." Pet. App. 305a. Based on these clear and unmistakable statements within Sterling's own rules, an employee would have every reason to anticipate that the issue of her potential inclusion in a class arbitration would be decided by an arbitrator appointed under the RESOLVE Program—not by a federal judge. *Cf. First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995) (inquiring whether an issue is "a matter [the parties] reasonably would have thought a judge, not an arbitrator, would decide"). Likewise, no Sterling employee could have expected that a decision allowing

her claims against Sterling to be resolved in a particular procedural manner would be invalidated by a federal court. Under the FAA, these employees are entitled to the benefit of their bargain, even if Sterling now regrets the bargain it made. *See Oxford Health*, 569 U.S. at 573.

The rules incorporated into the RESOLVE Program by reference only confirm this result.[6] The RESOLVE Agreement states that arbitrations are conducted "with the AAA" and according to that organization's rules. JA129. AAA arbitrators, when faced with a putative class proceeding, are bound to apply the Supplementary Rules. Those rules provide that the arbitrator will be responsible for determining class arbitrability and, if appropriate, certifying opt-out or mandatory classes. *See* JA434-436. Thus, it should hardly come as a surprise to any Sterling employee that an arbitrator exercising authority under RESOLVE's auspices would follow the rules of the arbitral forum; construe the agreement to allow class arbitration under Supplementary Rule 3; and then proceed to certify a class that presumptively includes that employee under Supplementary Rule 4.

By joining a program that operates on these terms, each employee necessarily agreed that she could be made a member of a class in a case brought by a fellow employee. In other words, allowing Respondents the benefit of their bargain with Sterling does not thwart the expectations of absent class members. At the time

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[6] Because Sterling's own rules governing arbitrations under the RESOLVE Program plainly delegate these questions to the arbitrator, Respondents need not, and do not, rely exclusively on the incorporation of AAA Rules. *See supra* at 4-5.

of joining RESOLVE, the populations of potential class members and potential class representatives are one and the same. Each employee gives his or her arbitrator the authority to allow a bona fide class proceeding if that arbitrator determines that the RESOLVE Agreement permits it. And, in joining a program that operates on those terms, each employee necessarily also agrees that she can be made a member of such a class. That commonsense and symmetrical reading serves the fundamental objective of the FAA: "giv[ing] effect to the contractual rights and expectations of the parties." *Volt Info. Scis.*, 489 U.S. at 479.

Until recently, Sterling understood RESOLVE to work in precisely this way. At the outset of this arbitration, Sterling urged the arbitrator that "if class arbitration is permitted under the RESOLVE agreements, *this arbitrator* must determine *what types* of class arbitration proceedings are permitted." JA283-284 (emphasis added; capitalization omitted). While Sterling argued that an opt-in procedure should apply to the EPA because of its unique statutory scheme, it did not even occur to Sterling to dispute that "Rule 23-like procedures would apply to the named claimants' Title VII claims." JA284 (capitalization omitted). If that proposition appeared obvious to Sterling, it was surely reasonable for Sterling's employees to understand their bargain in the same way.

Sterling's belated objections rest on a misapplication of Justice Alito's concurring opinion in *Oxford Health*. Writing for himself and Justice Thomas, Justice Alito posited that some class arbitrations may be "vulnerable to collateral attack" because "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." 569 U.S. at 574-75 (Alito, J., concurring). But under the RESOLVE Agreement, each employee *did* authorize a future arbitrator to make a determination about the availability of class arbitration, just as each authorized a future arbitrator to decide whether the employee herself could proceed on behalf of an opt-out or mandatory class. Given the RESOLVE Agreement's express assignment of such questions to an arbitrator—a feature conspicuously absent in the *Oxford Health* contract, *see id.* at 569 n.2 (majority opinion)—Justice Alito's concurrence does not help Sterling.

B. The arbitrator's decision is, at a minimum, binding on Sterling.

Even if the arbitrator was wrong about her authority to bind absent class members (and she was not), there is no dispute that *Sterling* submitted the question to her for decision. Having obtained an answer it does not like, Sterling may not now leverage the asserted rights of third parties to "rerun the matter in a court." *Oxford Health*, 569 U.S. at 573. Rather, whatever the rights of third parties may be, Sterling can obtain at most the exceedingly deferential review afforded by the FAA to parties who elect an arbitral determination. And because the arbitrator's decision here undoubtedly "provided an interpretation of the contract," Sterling "must now live with [its] choice." *Ibid.*

The decision below correctly articulated the "extremely deferential standard of review" that applies when parties bargain for an arbitral decision. Pet. App.

8a. In such circumstances, a court may vacate the decision "only 'where the arbitrator[] exceeded [his or her] powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.'" *Ibid.* (quoting 9 U.S.C. § 10(a)(4) (alterations in original)). Awards therefore withstand judicial review when the arbitrator "even arguably" construed or applied the contract. *Oxford Health*, 569 U.S. at 569 (quotation marks and alterations omitted); *accord Stolt-Nielsen*, 559 U.S. at 672. That same standard applies to questions concerning the extent of the arbitrator's own authority. *See First Options*, 514 U.S. at 943 ("Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate.").

Sterling cannot seriously dispute the standard of review. From the inception of this case in 2008 through the conclusion of class-certification briefing in 2014, Sterling repeatedly urged the arbitrator to decide the very questions it now claims the arbitrator lacked authority to decide. When the parties briefed the clause-construction question in 2008 and 2009, Sterling asked the arbitrator to go beyond a simple decision on the availability of some form of class proceeding, and decide "what types of class arbitration proceedings are permitted under the RESOLVE Program." JA283 (capitalization omitted); *see supra* at 6. As Sterling saw it, "an essential part of an arbitration agreement is 'what kind of arbitration proceeding the parties agreed to.'"

JA283 (quoting *Green Tree Fin. Corp.*, 539 U.S. at 452-53). Accordingly, Sterling said, "this arbitrator" should decide a range of procedural issues at the outset—including whether potential classes would be state-by-state or nationwide and, importantly, whether class members would be required to "opt-in" to the proceeding. JA283-288. Although Respondents contended that decisions on these issues would be premature at the clause-construction phase, Respondents agreed that these were issues for the arbitrator to decide.

When these questions actually became ripe at the class-determination stage, Sterling again submitted them to the arbitrator. Indeed, Sterling argued for some ninety pages that the conditions for class certification were not met. At the close of its brief, Sterling also argued in a single line that the arbitrator "should deny Claimants' motion for the independent reason that absent class members did not agree to have an arbitrator decide whether to adjudicate their cases through the vehicle of a class arbitration." JA484. Critically, however, Sterling did not dispute that the issue it raised—whether absent class members had or had not agreed to the arbitrator's authority—was for the arbitrator to decide. *See* JA486. Rather, Sterling adhered to its longstanding position that, under RESOLVE, an arbitrator "should rule on her own jurisdiction"—including deciding for herself "the limits on the Arbitrator's authority under [RESOLVE] with respect [to] … procedural conditions precedent to arbitration." JA254. Sterling thus once again clearly and unmistakably submitted the issue of opt-in

procedures to the arbitrator—including the question of an arbitrator's own authority to decide on their necessity.

Sterling cannot now leverage the rights of third parties to escape its choice to submit the issue of class procedures to the arbitrator. Sterling participated in selecting this arbitrator and bargained for the ruling she made. Accordingly, even if the arbitrator were mistaken about her power to bind absent class members—leaving Sterling exposed (at least in theory) to further disparate-impact claims—the costs that Sterling and its employees would bear as a result are no different in kind than the costs any party may suffer from an erroneous arbitral award by which it agreed ahead of time to be bound.

Neither Sterling nor its *amici* have mustered any authority to the contrary. Sterling once again relies on Justice Alito's concurrence in *Oxford Health*, which suggested that the potential for erroneous class-arbitrability decisions to give rise to collateral litigation by absent class members was reason for presuming the parties intended a court, rather than the arbitrator, to decide the issue in the first place. 569 U.S. at 575 (Alito, J., concurring); *cf. id.* at 569 n.2 (majority opinion) (noting that open question). But Justice Alito did not suggest that a defendant, *having submitted the relevant question to the arbitrator*, could nonetheless vacate an award by asserting the interests of those absent parties. To the contrary, Justices Alito and Thomas joined the majority opinion precisely *because* the defendant had submitted the relevant question to arbitration. *Id.* at 573-75 (Alito, J., concurring). The logic of Justice Alito's

concurrence thus applies with no less force here. A party attempting to vacate an arbitral award, after the party itself has submitted the relevant issue to the arbitrator for decision, may not seek shelter in the rights of third parties. *See* 569 U.S. at 573 (Alito, J., concurring) (explaining that the defendant "consented to the arbitrator's authority by conceding that he should decide in the first instance whether the contract authorizes class arbitration" (quotation marks omitted)). While Sterling's fear that a classwide judgment could fail to bind other employees might have been a reason for Sterling not to submit the question of class procedures to the arbitrator, it is not a valid reason for a court to relieve Sterling of the consequences of its own voluntary choice to do so.

C. The decision below does not present "due process problems."

Sterling hypothesizes a litany of "due process problems" with the decision below premised on the argument that absent class members did not consent to be bound by a class arbitration. Pet. 21-22 (capitalization omitted). Once that faulty premise is dispatched, *see supra* at 27-30, Sterling's "problems" with the decision below are nothing more than objections to standard features of class proceedings. For example, Sterling complains that absent class members did not exhaust the other steps of the RESOLVE Program and did not affirmatively opt in. But that is true of class proceedings in Title VII discrimination

matters generally, regardless of whether they occur in court or in arbitration.[7]

Sterling also complains that it will suffer because the ultimate resolution of class claims will not bind absent class members. According to this theory, the class arbitration is a no-win situation for Sterling. If Sterling prevails, absent class members can nonetheless argue their claims remain viable because they never agreed to the arbitration proceeding in the first place. Pet. 23; *see also* Brief of Retail Litigation Center as *Amicus Curiae* in Support of Petitioners at 14-15. But aside from their misreading and misapplication of Justice Alito's concurrence in *Oxford Health*, neither Sterling nor its *amici* offer a shred of support for that concern. In the proceedings below, Respondents challenged Sterling to identify any case in which a court or an arbitrator had ever accepted the argument Sterling fears absent class members will advance. Sterling did not then and has not now identified any such case, demonstrating that these "due process problems" are illusory.

As Sterling finally admits, its real complaint is that class arbitration should not exist. Pet. 24-25. Sterling says class arbitration is "inconsistent" with "the bilateral arbitration Congress envisioned when enacting the FAA." Pet. 25. Sterling also says the duration and expense of the proceedings in this case are not what the parties intended. Pet. 29. But Sterling's complaints

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[7] Notably, Sterling is not contesting exhaustion as to the employees who opted in. Nor does Sterling address the efficiency captured by resolving those 254 claims in a single proceeding, as opposed to the same number of individual arbitrations.

about why this case has failed to achieve the goals of arbitration—"last[ing] 12 years, under complex rules, with four appeals and at great cost," Pet. 25—are fully attributable to *Sterling's* repeated attempts to obtain judicial intervention it never bargained for. Sterling promised its employees that the arbitrator's decision would be "protected" if the arbitrator ruled for the employee and "**[t]he Company cannot appeal.**" Pet. App. 316a (emphasis in original). Sterling asked the arbitrator to resolve the clause construction and class determination issues, and if Sterling had accepted the arbitrator's decisions on those issues as it promised it would, none of those four appeals would have been necessary. Sterling was free, and remains free, to modify its employment agreements to preclude class arbitrations or to remove certain decisions from the arbitrator. Sterling has declined to do so. While Sterling may be unhappy with the result of that choice, there is no violation of due process to correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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