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

REPLY BRIEF FOR PETITIONER

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Nothing in respondents' brief in opposition changes that certiorari is warranted because this case presents an important and recurring question of federal law, the Second Circuit's decision conflicts with this Court's precedents, and this is a perfect vehicle for resolving it.

The question presented is this: Can an arbitrator compel class arbitration without finding that the parties agreed to it, and instead merely by construing ambiguity against the drafter? This Court has already granted certiorari twice to establish that the answer is no. The Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, sets a bright-line rule: Class arbitration cannot be compelled absent an "affirmative 'contractual basis for concluding that the part[ies] *agreed* to [it].'" *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1419 (2019) (quoting *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010)). "Neither silence nor ambiguity" is sufficient. *Id.*

at 1417. And "*contra proferentem* cannot substitute" for the requisite finding of affirmative consent, because it is "based on public policy considerations" and "seeks ends other than the intent of the parties." *Id.* at 1417, 1419.

The Second Circuit's contrary conclusion conflicts with—and powerfully undermines—this Court's decisions. Under the Second Circuit's divide-and-conquer approach, consent is unnecessary and ambiguity is sufficient in typical arbitration cases in which arbitrators (not courts) decide whether class arbitration can proceed: *Stolt-Nielsen* applies only when the agreement is "silent," and *Lamps Plus* only when courts (not arbitrators) decide class arbitrability. But respondents do not dispute that a plaintiff can largely avoid "silence" simply by refusing to stipulate to it. Nor do they dispute that parties typically assign the class-arbitrability question to arbitrators, not courts. See Pet. 26 (citing study finding that "perhaps 90%" of arbitration agreements assign such questions to arbitrators); Retail Litig. Ctr. (RLC) Br. 3 ("Most of Amici's members' arbitration agreements also assign questions of arbitrability … to the arbitrator."). The Second Circuit's approach thus obviates this Court's precedents in run-of-the-mill arbitration cases.

This case—with 70,000 absent class members—is also a perfect vehicle, because it vividly illustrates the problems caused by mandating class arbitration without consent. The RESOLVE Agreement requires an individualized step process, always speaks in the singular, and a chart emphasizes that the parties selected arbitration because it is faster, cheaper, and simpler than litigation. See Pet. 6-7. The arbitrator, however, disclaimed as "problematic" any inquiry into the parties' intent. Pet. App. 295a. She instead found ambiguity by pointing to a ubiquitous contract provision (allowing the

arbitrator to grant the same relief as a court), then construed the ambiguity against Sterling. *Id.* at 295a-296a. The result of sidestepping the required inquiry into intent? 12 years of litigation, with extensive, complex proceedings including four appeals, and a massive class, thus utterly defeating the parties' reasons for arbitrating in the first place.

This case also demonstrates that using *contra proferentem* as a substitute for consent causes serious due process problems. The Second Circuit allowed the arbitrator to bind 70,000 absent class members merely because they signed a RESOLVE Agreement. Respondents contend that no constitutional problem arises because the absent class members consented, but the arbitrator never found that they *actually* consented (expressly or implicitly) to class procedures. The arbitrator manufactured *fictitious* consent by determining that the Agreement is ambiguous and construing it against the drafter. The absent class members, however, did not even draft the Agreement. Extending that same rationale to bind absent class members thus effectively guarantees that the private arbitrator will bind individuals who never consented to her authority. That causes on a vast scale the heads-I-win, tails-you-lose problem Justice Alito foresaw in *Oxford Health Plans LLC* v. *Sutter,* 569 U.S. 564, 574-575 (2013) (Alito, J., concurring).

Respondents' brief in opposition is largely an effort to duck the question. Following *Lamps Plus*, they newly contend (Br. in Opp. 20-21) that the arbitrator found affirmative consent and merely used *contra proferentem* to "buttress[]" her conclusion without "depend[ing]" on it. For years, respondents said the opposite to this Court, the Second Circuit, and the district court. And the arbitrator's superficial two-paragraph analysis makes clear that respondents' original description was

correct. The arbitrator never found consent, express or implied, and instead relied on *contra proferentem*. Unlike in *Oxford Health*, the arbitrator disclaimed the appropriate inquiry as "problematic" and, as in *Stolt-Nielsen*, overstepped her role by mandating class procedures based on considerations of public policy. Pet. App. 295a-296a. The Second Circuit nonetheless allowed this super-sized class arbitration to proceed in contravention of this Court's precedents. Certiorari is warranted.

A. The Question Presented Is Important And Recurring

Respondents do not dispute that, in practice, arbitrators typically decide questions of arbitrability and procedure. As a result, the question presented is at least as important as the question in *Lamps Plus* and far more important than the unusual fact-pattern in *Stolt-Nielsen*. Indeed, the Second Circuit's decision sharply undercuts the real-world relevance of *Stolt-Nielsen* and *Lamps Plus* by eliminating the FAA's requirement of consent in ordinary situations in which an arbitrator (not a court) decides whether class procedures are available under an ambiguous agreement.

To make matters worse, the Second Circuit's rule "encourage[s] and reward[s] forum shopping," *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 (1984), particularly against nationwide businesses. Respondents do not dispute that "[i]t is common for arbitration agreements to provide, as this one did, for arbitration to occur 'near the site where the complaint arose.'" RLC Br. 18 (quoting Pet. App. 310a). Plaintiffs' lawyers thus need only find a single client located in the Second Circuit (or Alabama) to export its pro-class-arbitration rule nationwide.

Respondents contend (Br. in Opp. 25) that Sterling and others could avoid this issue by adding class waivers. But that was true in *Stolt-Nielsen* and *Lamps Plus* as well. *Stolt-Nielsen* and *Lamps Plus* establish, however, that it is unnecessary to add an affirmative waiver; the FAA prohibits class arbitration without affirmative *consent*. Respondents' approach thus penalizes companies that have relied on this Court's decisions to leave their existing agreements undisturbed.

Respondents contend (Br. in Opp. 24) that, even if arbitrators usually decide the class-arbitration question, that does not necessarily mean they will authorize class arbitration or certify a class. Again, that was equally true in *Stolt-Nielsen* and *Lamps Plus*. Before those decisions, silence or ambiguity did not necessarily guarantee class procedures, much less class certification. What warranted review in *Lamps Plus* was the logically antecedent question of *what standard to apply* when deciding whether class procedures are available, and in particular whether ambiguity is enough. That question arises every time an agreement is ambiguous and a court decides. This case presents exactly the same important and recurring question, except when an arbitrator decides—which happens far more often.

This case also demonstrates how little it takes for an arbitrator to find ambiguity, construe it against the drafter, and thereby defeat the parties' reasons for selecting arbitration in the first place. See Ctr. for Workplace Compliance Br. 8-9. Notwithstanding that the Agreement includes an individualized step process and other provisions strongly indicating the parties intended only bilateral arbitration, see Pet. 6-7, the arbitrator found no clear class waiver because the Agreement also authorized her to award the same legal or equitable re-

lief available in court. Pet. App. 296a. But class procedures are not a remedy or form of relief; they are a procedural device. And respondents do not dispute that arbitral agreements typically contain similar language, which is effectively required. See RLC Br. 11; *e.g.*, JAMS, *Policy on Employment Arbitration Minimum Standards of Procedural Fairness*, Standard No. 1 (July 15, 2019) (requiring such authority); AAA Employment Due Process Protocol § C.5 (encouraging such authority); see also *Am. Express Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 235-236 (2013) (noting that an agreement may be unenforceable if it prospectively waives "a party's right to pursue statutory remedies"). The arbitrator thus compelled class arbitration—and bound 70,000 absent class members—based on little or nothing more than "the fact of the parties' agreement to arbitrate." *Stolt-Nielsen*, 559 U.S. at 685.

Remarkably, respondents contend (Br. in Opp. 22) that *Lamps Plus* hurts Sterling because Lamps Plus's counsel at oral argument described hypothetical language that he viewed as sufficient for a court to find affirmative consent. The Agreement, however, lacks the features he hypothesized: It provides for arbitration of "claims," not "lawsuits," Pet. App. 298a-299a. The arbitrator's error is also more fundamental because she never found affirmative consent *at all*. She disclaimed the need to find intent and mandated class arbitration merely because Sterling drafted an agreement without a clear class waiver. The Second Circuit's decision nonetheless allowing the class arbitration to proceed—and binding 70,000 absent class members—flouts both *Lamps Plus* and *Stolt-Nielsen*.[1]

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[1] Contrary to respondents' contention (Br. in Opp. 28), the AAA Supplementary Rules for Class Arbitration shed little or no light

B. The Arbitrator Relied On *Contra Proferentem* And Never Found Affirmative Consent

Respondents seek to avoid the conflict with *Stolt-Nielsen* and *Lamps Plus* by asserting that the arbitrator issued a decision altogether different from the one she wrote. They state that she "correctly understood [her] task as interpreting the intent of the parties based on the text," "did find an agreement to permit class arbitration," and merely "buttressed" her analysis with *contra proferentem* without "depend[ing] on it." Br. in Opp. 16, 18, 21 (citation omitted).

That claim is baseless and years of respondents' own representations contradict it. Before *Lamps Plus*, respondents repeatedly admitted that the arbitrator did not find consent and instead depended on *contra proferentem*. They told the district court that "there's nothing explicit in the [arbitrator's] clause construction that provides for a finding of assent by the parties." Pet. App. 101a. The district court found that respondents "concede[d], as they must" that the decision "did not by its terms rest upon a finding that the parties manifested any affirmative intention to permit class arbitration." *Ibid.* They told the Second Circuit that, "[i]n the face of such ambiguity, the Arbitrator applied the doctrine of *contra proferentem*." Resps. *Jock I* C.A. Reply Br. 22 (Dec. 15, 2010). And they told this Court that the arbitrator "applied the traditional principle … that ambiguous terms should be construed against their drafter" and "construe[d] any ambiguity about the parties' intentions

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here. The arbitrator did not rely on those rules in compelling class arbitration and the AAA adopted them *after* several respondents (and many absent class members) entered into a RESOLVE Agreement. See Pet. 27 n.5.

against Sterling, the drafter." Br. in Opp. 5, 21, No. 11-693 (Feb. 6, 2012).

Both lower courts recognized the same thing: "[T]he arbitrator construed the absence of an express prohibition on class claims against the contract's drafter, Sterling." Pet. App. 58a; see *id.* at 101a-102a (district court).

The arbitrator's short two-paragraph analysis also belies respondents' novel characterization. "[A]t the outset," the arbitrator disavowed the proper focus on intent, describing "the very concept of intent [as] problematic in the context of a contract of adhesion." *Id.* at 295a. She next turned to *contra proferentem*, stating that because "the contract was drafted by Sterling and was not the product of negotiation, it was incumbent on Sterling to ensure that all material terms, especially those adverse to the employee, were clearly expressed." *Id.* at 295a-296a. She looked to the text only to determine that it did not clearly waive class procedures: "[A]greeing to a step process for individual claims does not manifest an intent to waive the right to participate in a collective action, where, as here, the Agreement expressly gives the Arbitrator the 'power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction.'" *Id.* at 296a. Finding no unambiguous class waiver, the arbitrator stopped there: "CONCLUSION—The RESOLVE Arbitration Agreements cannot be construed to prohibit class arbitration." *Ibid.*

The arbitrator thus depended entirely on *contra proferentem*. Nowhere did she make the FAA's requisite finding of affirmative consent, and in particular nowhere found "implicit intent," as Respondents contend (Br. in Opp. 20). Under *Stolt-Nielsen* and *Lamps Plus*, the arbitrator therefore exceeded her authority under FAA § 10(a)(4). As Judge Winter's dissent aptly put it,

consent cannot "be inferred from an arbitration agreement's 'silence' or 'failure to preclude' class arbitrations, much less from thin air." Pet. App. 84a.

Respondents' attempt to obfuscate the arbitrator's rationale ultimately backfires. It illustrates that respondents must recognize that *Stolt-Nielsen* and *Lamps Plus* prohibit an arbitrator from compelling class arbitration merely on the basis of ambiguity. Unable to deny that such a ruling conflicts with this Court's precedents, respondents have tried to contend that the arbitrator rendered a fundamentally different ruling. The arbitrator's decision, however, speaks for itself.

C. *Oxford Health* Is Inapposite and the Second Circuit's Decision Raises Serious Due Process Problems

1. Contrary to respondents' contentions (Br. in Opp. 15-23), Sterling's position is fully consistent with *Oxford Health*. The critical difference between this case and *Oxford Health* is that, unlike in *Oxford Health*, the arbitrator never found that the parties affirmatively agreed to class arbitration.

This Court in *Oxford Health* highlighted that distinction. The Court explained that, in *Stolt-Nielsen*, "the arbitrators did not construe the parties' contract, and did not identify any agreement authorizing class proceedings." *Oxford Health*, 569 U.S. at 571. By contrast, the arbitrator in *Oxford Health* "construe[d] the contract (focusing, per usual, on its language), and did find an agreement to permit class arbitration." *Ibid.* Specifically, the arbitrator performed a "textual exegesis" and determined that the contract "'expresses the parties' intent that class action arbitration can be maintained.'" *Id.* at 570 (citation omitted). Indeed, he stated that his "sole[]" concern was textual evidence of intent, and he found the text "unambiguous[]." *Id.* at 568, 570. And

courts may "vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly." *Id.* at 572.

Here, as in *Stolt-Nielsen* but unlike in *Oxford Health*, the arbitrator "did not construe the parties' contract" to "identify any agreement authorizing class proceedings" and never "decided whether it reflected an agreement to permit class proceedings." *Id.* at 571. She "strayed from [her] delegated task," *id.* at 572, by disclaiming as "problematic" an inquiry into intent and reviewed the Agreement merely to find no unambiguous class waiver, Pet. App. 295a-296a. Having found ambiguity, she relied on considerations of public policy divorced from intent to compel class arbitration. See *ibid.*

Contrary to respondents' assertions (Br. in Opp. 30, 33), Sterling thus did not "bargain[] for the [arbitrator's] ruling." In conflict with *Stolt-Nielsen* and *Lamps Plus* (and unlike in *Oxford Health*), the arbitrator exceeded her authority under FAA § 10(a)(4).[2]

Respondents' arguments again rest on the false premise that the arbitrator "f[ou]nd an agreement to permit class arbitration," Br. in Opp. 18 (quoting *Oxford Health*, 569 U.S. at 571), and merely used *contra proferentem* to "buttress[]" her decision without "depend[ing] on it," *id.* at 21. As set forth above, see pp. 7-9, *supra*, that is flat wrong.

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[2] Contrary to respondents' contentions (Br. in Opp. 6 n.2), Sterling objected to the arbitrator's authority to decide the question, arguing in the district court that only the court could decide the class-arbitrability question. See 564 F. Supp. 2d 307, 310. Sterling also repeatedly objected to her authority in subsequent proceedings. See, *e.g.,* Pet. *Jock II* C.A. Reply Br. 6-8 (June 3, 2016).

2. The court of appeals' decision raises serious due process problems on a vast scale, as it empowered a private arbitrator to bind 70,000 absent class members without finding that they actually agreed to class arbitration. Respondents downplay the issue, contending (Br. in Opp. 26-27) that absent class members got what they bargained for when they agreed to have an arbitrator decide questions of arbitrability and procedure.

Of course, *actual* consent to class procedures would avoid due process concerns because parties may voluntarily submit to private arbitration and affirmatively authorize class procedures. But the arbitrator never found that each signatory *actually* consented to class arbitration. She used *contra proferentem* as a legal fiction to substitute for Sterling's lack of consent.

That legal fiction not only conflicts with *Lamps Plus*, but also exacerbates the due process problem. The arbitrator effectively construed the contract in favor of the named plaintiffs *but against the absent class members*—notwithstanding that they all stand in the same position as signatories (not drafters) of the Agreement. See RLC Br. 15. That is nonsensical and opens the door to collateral attack by absent class members who contend that they cannot be bound because they did not, in fact, consent. See *Oxford Health*, 569 U.S. at 575 (Alito, J., concurring).

D. This Is An Ideal Vehicle

This case is an ideal vehicle because it vividly illustrates the problems of allowing class arbitration to proceed—and to bind absent class members—without affirmative consent, and the question presented is outcome dispositive. If an arbitrator cannot use *contra proferentem* as a substitute for consent, then the judgment must be reversed and the class decertified.

Respondents note (*e.g.*, Br. in Opp. 1, 15) that this Court denied Sterling's initial petition for a writ of certiorari. But this Court's review is plenary and encompasses the entire case, not just the latest appeal. See, *e.g.*, *Google LLC* v. *Oracle Am., Inc.*, 140 S. Ct. 520 (2019) (granting a second certiorari petition, including on a question raised in an earlier petition that was denied).

The need for this Court's review is also more pressing today. The Second Circuit's decisions now conflict with and undermine two decisions of this Court, not just one. And the arbitrator bound 70,000 absent class members without finding that they actually consented. The decision thus raises due process problems that were not fully ripe at the time of Sterling's prior petition.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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