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1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -
3 LAMPS PLUS, INC., ET AL.,)
4 Petitioners,)
5 v.) No. 17-988
6 FRANK VARELA,)
7 Respondent.)
8 - - - - -

9
10 Washington, D.C.
11 Monday, October 29, 2018
12

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 11:06 a.m.
16

17 APPEARANCES:
18 ANDREW J. PINCUS, ESQ., Washington, D.C.; on behalf
19 of the Petitioners.
20 MICHELE M. VERCOSKI, ESQ., Ontario, California; on
21 behalf of the Respondent.
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1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 17-988, Lamps Plus versus
5 Varela.

6 Mr. Pincus.

7 ORAL ARGUMENT OF ANDREW J. PINCUS

8 ON BEHALF OF THE PETITIONERS

9 MR. PINCUS: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 This Court has repeatedly recognized
12 that the changes brought about by the shift
13 from bilateral arbitration to class action
14 arbitration are fundamental.

15 The question in this case is what
16 standard a court should apply in determining
17 whether an arbitration agreement authorizes
18 class arbitration.

19 As a threshold matter, we think it's
20 clear that federal law imposes a minimum
21 standard that must be satisfied in order to
22 permit class arbitration. The Court made that
23 clear in Stolt-Nielsen, where it said a party
24 may not be compelled under the FAA to submit to
25 class arbitration unless there is a contractual

1 basis for concluding that the party agreed to
2 do so.

3 JUSTICE SOTOMAYOR: But don't you make
4 that determination under state law? I didn't
5 think the FAA in any way undoes state law,
6 unless the basis of the state law is directed
7 only at arbitration, which isn't the case here.

8 MR. PINCUS: I don't think that's
9 correct, Your Honor. The clear and
10 unmistakable standard that was being discussed
11 in the last case is a -- is a standard that the
12 FAA imposes.

13 JUSTICE SOTOMAYOR: Well, that's a
14 standard that's basically dicta because there
15 the parties agree the agreement didn't. So --

16 MR. PINCUS: No, but -- but in First
17 Options, where the Court adopted that standard,
18 the Court said that it was the FAA that imposes
19 the clear and unmistakable requirement before
20 the -- before an arbitration agreement may be
21 construed to delegate gateway issues to the
22 arbitrator.

23 JUSTICE SOTOMAYOR: I -- I do have one
24 more question for me. You claim there's
25 jurisdiction for you to appeal this case.

1 Let's assume the plaintiff or the
2 Petitioner, or I guess it would be the
3 Respondent here -- either way, that a party who
4 seeks class arbitration is denied class
5 arbitration. Can they appeal directly to us?

6 MR. PINCUS: If -- if the case is in
7 the same posture as this one where the district
8 court dismissed the action, then -- then the --
9 the provision that we rely on,
10 Section 16(a)(3), would provide for an appeal.

11 JUSTICE SOTOMAYOR: So what's good for
12 the goose is good for the gander?

13 MR. PINCUS: Absolutely, Your Honor.
14 And that's --

15 JUSTICE SOTOMAYOR: All right. So
16 we're going to be filled with all of these
17 interim orders denying or granting class
18 arbitration, as the case may be, because each
19 losing party will have the opportunity to come
20 to us and the arbitration won't proceed?

21 MR. PINCUS: Well, it's not just class
22 arbitration. Today, in the lower courts, when
23 a lower court dismisses a case and grants
24 arbitration -- in favor of an order granting
25 arbitration, those -- those cases are

1 immediately appealable in courts like the Ninth
2 Circuit. And there are many, many appeals
3 pending right now in the Ninth Circuit on that
4 basis.

5 JUSTICE SOTOMAYOR: The courts aren't
6 staying those cases?

7 MR. PINCUS: Excuse me?

8 JUSTICE SOTOMAYOR: They haven't --

9 MR. PINCUS: Some courts stay them and
10 some courts don't, Your Honor.

11 JUSTICE BREYER: Why? I mean,
12 throughout -- again, throughout law, there's
13 always a fight between making interlocutory
14 matters immediately appealable, which, if you
15 do, will often save a lot of money, and waiting
16 'til the end. And the normal decision here is
17 wait 'til the end. And then there are
18 exceptions, mandamus and certifying a question.

19 When we read the statute, it says what
20 the district court shall do if he is satisfied
21 that this is arbitrable, shall on application
22 of one of the parties stay the trial of the
23 action until the arbitration has been had.

24 This judge didn't do it, and you
25 didn't -- your predecessor didn't ask him to do

1 it. So this seems like a fluke. But, if we
2 were to say these are appealable, it's not only
3 contrary to a very basic principle of -- of how
4 to run courts, but it's also, because of that,
5 going to have just the effect Justice Sotomayor
6 said.

7 MR. PINCUS: Well, a couple of
8 answers, Your Honor. This case is in the exact
9 same posture as Randolph, where the Court made
10 the initial decision that 16(a)(3), coupled
11 with a dismissal, provides for an immediate
12 appeal.

13 The Court in Randolph noted that there
14 was a question about the question that Your
15 Honor raises, whether it's proper for a
16 district court to issue a stay or to dismiss
17 the case, and said that didn't -- that wasn't
18 briefed, it wasn't a question before the court,
19 it wasn't going to decide it. This case is in
20 -- in the same posture.

21 It may be that the Court should take a
22 case to decide the question whether district
23 courts have the power to dismiss rather than
24 stay, but the issue is not presented here and
25 hasn't been briefed here.

1 JUSTICE KAGAN: May I ask, Mr. Pincus,
2 if you could go back to the -- the substantive
3 argument?

4 So, in -- in a strange kind of way, it
5 occurred to me, as Mr. Geyser was speaking,
6 your position is very similar to Mr. Geyser's.
7 You both have these very broad -- this very
8 broad contractual language, right? He had a
9 broad delegation clause, and you have
10 contractual language that refers to all
11 disputes, claims, or controversies in lieu of
12 any and all suits or other civil legal
13 proceedings.

14 And -- and what I hear you to be
15 saying is essentially that you want to say
16 except for class suits. Is that right?

17 MR. PINCUS: I don't think so, Your
18 Honor. I -- I think what -- what -- what this
19 case brings before the Court, as I said, is the
20 question that Stolt-Nielsen didn't address.
21 What Stolt-Nielsen said was silence isn't
22 enough --

23 JUSTICE KAGAN: Well, I -- I'm just
24 thinking as a -- as a matter first of -- of
25 just contract law, because he said what we have

1 here is we can't really believe that the
2 parties agreed to include a certain set of
3 things. And -- and I hear you to be saying the
4 same thing. We can't really believe that the
5 parties agreed to be speaking of class claims.

6 MR. PINCUS: I think the contractual
7 language here is actually quite clear. The --
8 the language you quote -- that Your Honor
9 quoted is language about what can't be done.

10 There's a provision, and it appears on
11 pages 24a to 25a of the petition appendix,
12 that's captioned -- that's headed Claims
13 Covered by the arbitration provision. And it
14 says, "The company and I mutually consent to
15 the resolution of all claims or controversies,
16 past, present, or future, that I may have
17 against the company or against its officers" --
18 and I'll skip some language, blah, blah,
19 blah -- "or that the company may have against
20 me. Specifically, the company and I mutually
21 consent to the resolution by arbitration of all
22 claims that may hereafter arise in connection
23 with my employment or any of the parties'
24 rights or obligations arising under this
25 agreement."

1 So we think the agreement is actually
2 quite clear. And this isn't a case where we're
3 asking --

4 JUSTICE KAGAN: Well, it seems to me,
5 I mean, there's -- there's language that's in
6 favor of each side's position. The "all
7 disputes, claims, or controversies," "all suits
8 or other legal proceedings" goes against you.
9 You would suggest that "I, me, and my" cuts for
10 you.

11 You know, I'm -- I'm -- I'm not quite
12 sure that that's the case, but -- you know,
13 because it's an agreement between these two
14 parties about suits, and the question is, what
15 kind of suits is it about and whether there's a
16 kind of implicit exception for class claims in
17 suits.

18 MR. PINCUS: I don't think it's about
19 an implicit concept -- exception, Your Honor.
20 In Stolt-Nielsen, the Court said we can't
21 presume from a -- an arbitration -- the fact of
22 an arbitration agreement that the parties have
23 agreed to class arbitration because of the
24 fundamental differences. And --

25 JUSTICE KAGAN: Yes, but in -- in

1 Stolt-Nielsen, there was no contract. There
2 was no agreement. And, you know, everybody
3 understood there was a stipulation to the
4 effect that there was no agreement on this
5 issue and -- and -- and instead there was just
6 a -- a policy determination.

7 But, here, there is a contract. And
8 the question is, what does the contract mean?
9 Does it mean all disputes, claims, or
10 controversies? Or does it mean all disputes,
11 claims, or controversies, except class
12 disputes, claims, and controversies because we
13 really think that not -- that the party would
14 not -- that the party who drafted the contract
15 would not have agreed to that?

16 MR. PINCUS: Well, I -- I guess I'll
17 -- there are a couple of questions embodied in
18 your question, I think. I -- I think --
19 Stolt-Nielsen, there was an agreement. The
20 parties agreed that the agreement didn't speak
21 to the question of class arbitration.

22 We think this agreement too doesn't
23 speak to the question of class arbitration.

24 JUSTICE KAGAN: Well, we would never
25 say --

1 MR. PINCUS: But -- but --

2 JUSTICE KAGAN: -- that in general. A
3 general clause usually speaks to the things
4 inside it. If I say all furniture, it usually
5 means tables and chairs. If I say all
6 clothing, it usually means pants and shirts.
7 And we don't insist that everybody lay out all
8 the subcategories of things.

9 So this question is here you have an
10 overall, you know, term, "disputes, claims, or
11 controversies." Why wouldn't you include class
12 disputes, claims, or controversies, unless
13 there's some kind of special contractual
14 interpretive rule coming in that we wouldn't
15 apply in other contexts?

16 MR. PINCUS: Well, we think
17 Stolt-Nielsen said that there is a special
18 contractual rule and that there are -- there
19 are two possibilities there.

20 We think the most sensible rule is to
21 apply the clear and unmistakable standard
22 because of the fundamental change that arises
23 from class arbitration to -- from bilateral
24 arbitration to class arbitration.

25 One of the -- one --

1 JUSTICE SOTOMAYOR: Now we're creating
2 a federal common law --

3 MR. PINCUS: Well --

4 JUSTICE SOTOMAYOR: -- something we're
5 loathe to do in virtually every other context?

6 MR. PINCUS: Well, just --

7 JUSTICE SOTOMAYOR: I think we were
8 very clear that it's a matter of contract and
9 state law controls that.

10 MR. PINCUS: I -- I think the Court
11 has not been clear, Your Honor. Again, First
12 Options specifically says that, although
13 contractual interpretation is generally a
14 question of state law, in this context, the
15 court created, based on the FAA, a special
16 interpretive rule that said --

17 JUSTICE SOTOMAYOR: That's really
18 interesting.

19 MR. PINCUS: -- clear --

20 JUSTICE SOTOMAYOR: Where does the FAA
21 give us that right?

22 MR. PINCUS: The Court many years ago
23 in *Moses Cone* said there was another
24 contractual rule, which says that close
25 questions about arbitrability should go to

1 arbitrability because of the policy embodied in
2 the FAA.

3 JUSTICE BREYER: Look, I want you to
4 finish that. Are you finished?

5 MR. PINCUS: Well, I was just going to
6 respond to Justice Sotomayor's question about
7 where the -- where that comes from in the FAA.

8 And I think it comes from Section 4 of
9 the FAA. What the Court has said and what the
10 Court said both in First Options and in
11 Stolt-Nielsen where the Court made this exact
12 same point about the general rule being federal
13 -- being state law, but there being an FAA
14 overlay, is that it comes from the requirement
15 in Section 4 that the parties be directed to
16 proceed to arbitration in accordance with the
17 terms of the agreement.

18 And I think in both contexts what the
19 Court has said is that this is to find -- to be
20 sure that it is the terms of the agreement in
21 this special case.

22 In the -- in the case addressed by
23 First Options, the gateway issues, the concern
24 is this is a delegation of very broad power to
25 the arbitrator, and, therefore, there should be

1 certainty that the parties are delegating that
2 power to the arbitrator.

3 Here, again, delegation of
4 extraordinarily broad power to the arbitrator,
5 as this Court has discussed in a number of
6 opinions about class arbitration, therefore, we
7 think the same test should apply.

8 JUSTICE BREYER: All right.

9 JUSTICE SOTOMAYOR: So is your -- I'm
10 sorry.

11 JUSTICE BREYER: No, you go ahead.

12 JUSTICE SOTOMAYOR: Is your position
13 that the decision below was right on state law?
14 Basically, you're not quarrelling that this
15 contract was ambiguous, that it was susceptible
16 to the meaning Petitioner -- that Respondent
17 gave it, and that under California law, that
18 would encompass this claim because they weren't
19 the drafters?

20 Is your position now that federal
21 common law is superseding state law --

22 MR. PINCUS: Well, I -- I think our
23 position --

24 JUSTICE SOTOMAYOR: -- on how to
25 interpret a contract?

1 MR. PINCUS: -- I think our position
2 has consistently been that our principal
3 argument is that there is a federal rule that
4 Stolt-Nielsen identified --

5 JUSTICE SOTOMAYOR: I -- I asked you a
6 different question.

7 MR. PINCUS: And our position on -- on
8 California law is we think that the lower court
9 did wrongly apply California law and applied it
10 in a way to reach a result, and -- and we point
11 to the two California court of appeals -- court
12 of appeal decisions.

13 JUSTICE KAGAN: Okay. But if I got
14 you right, you said your principal position is
15 that there's a federal rule that would come in
16 even if the California courts got California
17 law right, and that in many cases analogous to
18 this, you would have read this contract to
19 include both class claims and individual
20 claims.

21 MR. PINCUS: Well --

22 JUSTICE KAGAN: It's really a federal
23 rule that you're asking for.

24 MR. PINCUS: We -- we are advocating a
25 federal rule. I -- I would say that if the

1 Court looks at the cases cited in our petition,
2 there's no court applying -- looking at the
3 issue de novo rather than at an arbitrator's
4 decision that has construed language like this
5 to encompass class arbitration.

6 JUSTICE KAGAN: Right. You know, I
7 guess I gave you a bunch of reasons why, in
8 looking at a normal contract, under normal
9 contractual principles, you might think that
10 all this extremely general language included
11 everything inside it. But you're saying, no,
12 even if you think that, there's a federal law
13 that comes into play.

14 MR. PINCUS: Just -- just, Your Honor,
15 as in the case of the question of whether a
16 contract delegates arbitrability to the
17 arbitrator. If the state -- relevant state law
18 would construe the clause to delegate -- would
19 construe the contract to make that delegation,
20 what First Options says is, no, that's not
21 enough.

22 JUSTICE KAGAN: Right. I'm not --

23 MR. PINCUS: We have to have clear and
24 unmistakable language.

25 JUSTICE KAGAN: I'm just trying to get

1 a handle on what you're saying.

2 MR. PINCUS: Yes.

3 JUSTICE KAGAN: So -- so you're saying
4 it's a federal rule. So I guess my question
5 is, where does the federal rule come from?

6 MR. PINCUS: I think it comes from
7 exactly the same place as the First Options
8 rule and -- and from the discussion of this
9 very issue in Stolt-Nielsen. It's -- it's
10 constructive to look at Stolt-Nielsen.

11 I -- I understand, Your Honor, that --
12 that -- that Stolt-Nielsen didn't decide the
13 content of the standard, but Stolt-Nielsen
14 talked about the fact that interpretation of an
15 arbitration agreement is generally a matter of
16 state law, and went on to talk about the fact
17 that the critical question in the FAA is that
18 contracts be interpreted according to their
19 terms, pointing to the language in Section 4,
20 and it concluded, it said, from these
21 principles it follows that a party may not be
22 compelled under the FAA to submit to class
23 arbitration unless there is a contractual basis
24 for concluding the party agreed to do so. It
25 didn't --

1 JUSTICE KAGAN: Quite right. So
2 Stolt-Nielsen said -- but Stolt-Nielsen was a
3 case where there clearly -- where the Court
4 specifically said there was no intent of the
5 parties, there was no agreement as to the
6 particular issue in front of it.

7 So, in my hypothetical where the --
8 the -- the court is saying: Well, under state
9 law, we would interpret this to understand that
10 there was an intent of the parties and that
11 there was an agreement as to this question,
12 you're saying, notwithstanding that
13 Stolt-Nielsen said that we didn't decide that
14 question, that a federal rule comes into play.

15 And I guess I'm going to ask the same
16 question because I don't think it comes from
17 Stolt-Nielsen, where there was no agreement at
18 all. So where does the federal rule come from?

19 MR. PINCUS: I think it comes from the
20 same place that the Moses Cone presumption
21 comes from and the First Options presumption,
22 the rule of clear and unmistakability comes
23 from, and the Howsam rule of clear and
24 unmistakable requirement comes from, which is
25 Section 4.

1 What the Court has said is, with
2 respect to some critical questions, it wants --
3 there is a federal rule of decision that comes
4 from Section 4 to make certain that the
5 authority delegated to the arbitrator has, in
6 fact, been delegated.

7 JUSTICE KAVANAUGH: You're --

8 JUSTICE KAGAN: See, I thought -- go
9 ahead.

10 JUSTICE KAVANAUGH: Go ahead.

11 JUSTICE KAGAN: Please.

12 JUSTICE KAVANAUGH: You're saying if
13 -- even if it's a questionable interpretation
14 of that statutory language, again, similar to
15 the last case with Justice Kagan's question,
16 the precedent, the ship has sailed?

17 MR. PINCUS: Well, I think the ship
18 has certainly sailed --

19 JUSTICE KAVANAUGH: In Stolt-Nielsen
20 -- in Stolt-Nielsen, at least you're saying the
21 ship's a long way -- a long way off --

22 MR. PINCUS: I think -- I think --

23 JUSTICE KAVANAUGH: -- because --
24 because Stolt-Nielsen said that you needed
25 something on the order of express language or

1 indicated or hinted at least is what you're
2 saying here?

3 MR. PINCUS: I think it's impossible
4 to read the discussion on Stolt-Nielsen on
5 pages 681 to 685 and conclude anything other
6 than the fact that the court concluded there
7 that there was a federal rule of interpretation
8 that it didn't have to flesh -- it said at
9 Footnote 10, in fact, we don't have to decide
10 what that standard is because --

11 JUSTICE KAGAN: Because the only
12 federal rule was that it needed to be based on
13 an agreement of the parties, because it said
14 arbitration is a matter of consent, and that's
15 all over the Arbitration Act.

16 But the question of how to understand
17 whether parties have consented, that's usually
18 a question of state law.

19 MR. PINCUS: Except --

20 JUSTICE KAGAN: And you are saying a
21 federal rule should come in and say,
22 notwithstanding state law saying that these two
23 parties have agreed to something, the federal
24 rule under the Arbitration Act says no.

25 MR. PINCUS: Well --

1 JUSTICE KAGAN: And usually what the
2 Federal Arbitration Act does is it -- it surely
3 does come into play when you're afraid that the
4 state law is discriminating against arbitration
5 agreements.

6 But where there is no such concern --
7 and I don't think that there is such a concern
8 if the state -- if the state courts just say
9 we're going to treat general language as
10 including everything inside it -- then I don't
11 see where the federal law comes into play to
12 create a different contract interpretive rule.

13 MR. PINCUS: Well, First Options and
14 Howsam were not concerned with discrimination.
15 They were concerned with being certain that
16 when significant power is being assigned to the
17 arbitrator, that the -- that there be clear and
18 unmistakable indication that that was the
19 parties' intent.

20 JUSTICE GINSBURG: How can that -- how
21 can there be clear and unmistakable here?
22 Let's take Concepcion, where the concern was
23 that these arbitration agreements supposedly
24 based on consent were adhesion contracts, and
25 Concepcion said the court -- the court said

1 that the states remain free to take steps
2 addressing concerns attending adhesion
3 contracts. One such step would be to require
4 that the class action waiver provision in
5 adhesion agreements be highlighted. But here
6 we don't even have a waiver provision.

7 So Concepcion suggests waiver should
8 be highlighted so the party subjected to it
9 will understand that. And here you're asking
10 us to declare clear -- clear and certain, a
11 provision that doesn't say class action -- we
12 waive class actions.

13 MR. PINCUS: Well, this -- this might
14 be a different case if the question were
15 whether class actions are excluded from the
16 agreement. And my friends haven't argued that.
17 This -- the -- the question here is whether
18 this extraordinary procedure called class
19 arbitration is going to be authorized.

20 And -- and so I think there the
21 question where we're talking about whether to
22 delegate that power to the arbitrator does
23 raise exactly the same concerns that motivated
24 the Court in these -- in these other contexts.

25 JUSTICE BREYER: Can -- can I go back

1 for a second to the procedural problem? You --
2 you're plaintiff and you bring a case, and you
3 say, Judge, I want you to send this to
4 arbitration, right? And the other side says,
5 no, Judge, we want you to decide the issue.

6 That's a normal case. And many, many
7 cases like that will have difficult issues,
8 like the one before us.

9 And so Section 3 of the arbitration
10 agreement seems to say what the judge is
11 supposed to do. Judge, if you think -- stay
12 the trial, send it to arbitration, if you think
13 that's the result. By the way, Judge, if you
14 think there's a tough issue in this case, you
15 can always certify it. And if one of the
16 parties thinks there's a tough issue and you
17 won't certify it, they can always ask for
18 mandamus. That's like a million cases. And
19 this is one of them.

20 So, if the judge makes a mistake and
21 writes the word "dismissal" or if one of the
22 parties would really like to appeal even though
23 the judge has no reason for it, they can say,
24 Judge, write "dismiss"; and then he writes
25 "dismiss" and then suddenly it becomes

1 appealable? I mean, you say, well, that's
2 never been decided. I'd say, all right, but
3 that's a threshold issue; maybe then we should
4 DIG the case.

5 MR. PINCUS: Well, the -- the Court
6 did decide the issue in Randolph. And -- and
7 Randolph was in the same posture here, where
8 there was an order --

9 JUSTICE BREYER: Well, maybe we got it
10 wrong.

11 MR. PINCUS: -- on arbitration.

12 JUSTICE BREYER: Maybe it wasn't fully
13 argued and --

14 MR. PINCUS: Well, I think --

15 JUSTICE BREYER: -- and then I just
16 don't see why we should treat this area of the
17 law when here, unlike the other areas, there is
18 Section 3.

19 MR. PINCUS: Your Honor --

20 JUSTICE BREYER: Why should we treat
21 it differently and suddenly reach a tough issue
22 when the statute seems to say don't?

23 MR. PINCUS: Well, a couple of -- a
24 couple of answers. I -- I think it's important
25 for the Court to reach the issue here because

1 the reality is, if a case is sent to class
2 arbitration, it almost certainly is going to
3 settle.

4 The Court has talked a lot about the
5 coercive -- the -- the --

6 JUSTICE BREYER: That's true.

7 MR. PINCUS: -- inexorable pressure to
8 settle in courts in class litigation. Class
9 litigation in arbitration is 100 times worse
10 because of the very limited standard of review
11 at the other end.

12 So the reality is, if all cases were
13 stayed and the case could never be appealed at
14 this stage, the question of what the standard
15 is for deciding whether a contract authorizing
16 class arbitration is would never be decided.

17 There is a conflict right now in the
18 courts of appeals about whether dismissal is a
19 permissible -- is a permissible step after a
20 court has ordered arbitration or whether a stay
21 is only permissible.

22 The Court could certainly grant one of
23 those petitions and decide it. The -- the
24 irony --

25 JUSTICE GINSBURG: But if that -- if

1 that were -- were the case, that the district
2 court has no authority to dismiss, must simply
3 stay the case in court, would you agree that
4 that is not a final judgment, there's no
5 appeal?

6 MR. PINCUS: Well, the Court addressed
7 this question in Randolph, which, as I say, was
8 in this posture, and said that the fact that --
9 the -- the question whether the district court
10 had the power to dismiss, A, was not before it
11 and did not preclude it from hearing the case.

12 I think if the -- if this Court were
13 to hold that a stay was -- was the only
14 permissible option, then, obviously, there
15 wouldn't be an appeal. But, as I say, there
16 are many, many cases in which dismissals are
17 ordered and which there are appeals. And the
18 irony of this case, frankly, is the shoes are
19 on the other foot.

20 Typically, what happens is arbitration
21 is ordered, especially in the Ninth Circuit.
22 Plaintiffs seek dismissal so they can
23 immediately appeal the arbitration order. And
24 in the Ninth Circuit, that's permissible. And,
25 typically, defendants resist that.

1 So that's just a -- an issue that
2 is --

3 JUSTICE SOTOMAYOR: In how many of
4 those cases -- in how many of those cases is --
5 in this case, the Respondents did not ask for a
6 stay, correct?

7 MR. PINCUS: True.

8 JUSTICE SOTOMAYOR: And so the statute
9 seems permissive. It says if a party asks for
10 a stay. But there wasn't a request for one,
11 correct?

12 MR. PINCUS: I believe that's right.

13 JUSTICE SOTOMAYOR: And in those Ninth
14 Circuit cases, even if there's a request for a
15 stay --

16 MR. PINCUS: Yes.

17 JUSTICE SOTOMAYOR: -- they hold --

18 MR. PINCUS: The Ninth Circuit takes
19 the position that the district court has the
20 option of whether or not to dismiss or stay.

21 JUSTICE SOTOMAYOR: So it then gives
22 the district court the power to decide what's
23 appealable or not?

24 MR. PINCUS: Yes.

25 JUSTICE KAVANAUGH: If you just had --

1 if you just had the statute and not
2 Stolt-Nielsen or the other precedents you've
3 cited, in response to Justice Kagan's question,
4 how would you answer where does it come from?

5 MR. PINCUS: I -- I would still say
6 that it -- it comes from the language of the
7 statute, which says --

8 JUSTICE KAVANAUGH: Which -- which
9 language?

10 MR. PINCUS: -- in accordance -- shall
11 make an order directing the parties to proceed
12 to arbitration, in accordance with the terms of
13 the agreement, and that some issues confer some
14 -- some decisions confer such power on the
15 arbitrator that federal law -- before federal
16 law confers that power on the arbitrator,
17 federal law wants to be very sure that -- that
18 the parties have intended that result.

19 JUSTICE GORSUCH: Well, Mr. Pincus,
20 could one read that same language as suggesting
21 not that the district court gets the
22 opportunity to decide the nature of the
23 arbitration but merely whether there's an
24 agreement to arbitrate and that procedures like
25 class or individualized proceedings are not

1 within the scope of what Section 4 contemplates
2 and that the error here is really that the
3 district court shouldn't have gotten in the
4 business of specifying the procedures that
5 would be followed in arbitration?

6 MR. PINCUS: Well, many -- many
7 arbitration agreements expressly allocate the
8 authority to decide this question to the -- to
9 the arbitrator because it is such -- to the
10 court, rather, because it's such an important
11 question.

12 JUSTICE GORSUCH: Well, I understand
13 that --

14 MR. PINCUS: This -- this case --

15 JUSTICE GORSUCH: -- but that would
16 then come within the context of the -- of the
17 statutory language, is there an agreement to
18 arbitrate. But that's not the language we have
19 here.

20 MR. PINCUS: No. But the parties
21 submitted the question to the district court.
22 I think they essentially agreed that -- that it
23 was appropriate for the district court to
24 decide it.

25 JUSTICE KAGAN: One quick one,

1 Mr. Pincus. You say in your brief that you do
2 not necessarily argue for a clear statement
3 rule. You agree that you didn't make that
4 argument below.

5 So what language, short of a clear
6 statement, would lead you to conclude that this
7 agreement was intended to authorize class
8 arbitration?

9 MR. PINCUS: That it was not intended
10 to authorize class --

11 JUSTICE KAGAN: No, I mean what would
12 be enough for you to switch your position,
13 essentially? Like if this -- if this -- if --
14 you say a clear statement rule isn't required,
15 but, you know, what -- what kind of language
16 would say, ah, I can see that the parties
17 agreed to class arbitration there?

18 MR. PINCUS: If there wasn't the
19 provision that I read and the -- the agreement
20 simply said we agree that we can bring any
21 lawsuits that we could bring against one
22 another in court. But that's very different
23 language than there is here, which talks about
24 claims, which talks about my claims, and the
25 only place that lawsuits is talked about is the

1 "in lieu" section, which is basically saying
2 what you can't do.

3 I'd like to reserve the balance of my
4 time.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Ms. Vercoski.

8 ORAL ARGUMENT OF MICHELE M. VERCOSKI
9 ON BEHALF OF THE RESPONDENT

10 MS. VERCOSKI: Yes, Mr. Chief Justice,
11 and may it please the Court:

12 In this case, were the court within
13 the appellate jurisdiction and thus properly
14 before this Court, this Court should rule that
15 the FAA does not preempt the application of
16 neutral state contract principles to determine
17 whether an arbitration agreement permits
18 arbitration here.

19 CHIEF JUSTICE ROBERTS: Well, the
20 question really is whether they're neutral
21 principles. As I understand it, the -- the
22 argument is that applying these principles has
23 a peculiar impact on arbitration agreements
24 since it authorizes a type of arbitration that
25 is -- is like a poison pill that basically said

1 in prior cases is fundamentally inconsistent
2 with arbitration.

3 MS. VERCOSKI: Right. But they have
4 said in -- in -- in espousing the -- the policy
5 rule that the default might be bilateral
6 arbitration. But what gives precedence to that
7 is, first and foremost, we have to construe the
8 contract and give intent to the parties. And
9 that is consistent with the FAA.

10 And a class arbitration, as to whether
11 or not that applies in a class arbitration
12 agreement, is not the same as the issue of
13 arbitrability and doesn't rise to a special
14 standard. So what's left is just the
15 application of contract principles to determine
16 the parties' intent as to what they applied
17 with class arbitration.

18 JUSTICE GINSBURG: Nowadays, many
19 arbitration contracts, many adhesion contracts,
20 do put in explicit class action waivers. So if
21 -- let's say you're right. We're not doing
22 very much, are we, because contracts will
23 specifically say that class action is waived?

24 MS. VERCOSKI: If that is the case,
25 Your Honor, and it is clear and explicit that

1 there is a class action waiver, then, yes, the
2 parties' intent has to rule out under contract
3 rules.

4 JUSTICE GINSBURG: So if -- if, as I
5 suggested before, if we say that, then all the
6 parties who want to arbitrate bilaterally will
7 simply put in their contract a class action is
8 waived and the party to that adhesion contract
9 can't do anything about that.

10 MS. VERCOSKI: They can't do anything
11 about that if that's clear and unmistakable,
12 and so we have to give intent to the parties.
13 And at the same token, if the parties did agree
14 to proceed with class arbitration, that too
15 under the FAA would be required to enforce the
16 parties' intent.

17 JUSTICE GINSBURG: So, here, where the
18 concern is lawyers that are less than the best
19 and didn't put in a class action waiver,
20 those -- those contracts, in those cases, class
21 arbitration will be permitted?

22 MS. VERCOSKI: Well, it depends on the
23 language of the -- of the actual agreement.
24 And to the extent that the terms speak to class
25 arbitration, even if it's not explicit, we have

1 to determine the difference between whether
2 it's silent and whether there's something there
3 that supports a class arbitration, whether or
4 not it's explicit with the words class
5 arbitration.

6 And in order to do that, the norm
7 under the FAA is that we employ neutral
8 contract interpretation principles, like we
9 would to all contracts to determine what the
10 parties' intent was with respect to class
11 arbitration.

12 CHIEF JUSTICE ROBERTS: Well, but, I
13 mean, it's, I guess, Justice Jackson's phrase,
14 I mean, the FAA is not a suicide pact. So, if
15 the FAA says enforce the contracts according to
16 its terms, but one of the terms, as our prior
17 precedents say, is fundamentally inconsistent
18 with arbitration itself, then, presumably, the
19 FAA would preclude that term.

20 MS. VERCOSKI: Yes, that would be an
21 exception to the normal rule because that is
22 elevated and -- and the FAA had determined
23 that, first and foremost, that the policy
24 overrides that we want to enforce arbitration
25 agreements, to the extent they're ambiguous,

1 unlike the normal rule, when interpreting
2 ancillary issues with respect to that
3 agreement, when it comes to arbitration, issues
4 of arbitrability, the default rule is they are
5 construed in -- in favor of arbitration. And
6 that's consistent with the FAA's doctrine.

7 JUSTICE BREYER: The FAA has rules
8 that govern class arbitration, don't they?

9 MS. VERCOSKI: They do, but it's not
10 federal common rule that supplants --

11 JUSTICE BREYER: No, no, I'm just
12 saying this is an arbitration association and
13 the arbitration association has rules governing
14 class arbitration, so they must not see class
15 arbitration as a poison pill. They must think
16 that class arbitration has a place at least in
17 some cases.

18 MS. VERCOSKI: Correct, to the extent
19 that the parties did agree to -- to do so. And
20 that agreement has to --

21 CHIEF JUSTICE ROBERTS: Well, I
22 thought the --

23 MR. VERCOSKI: -- be enforced.

24 CHIEF JUSTICE ROBERTS: I thought
25 those same rules specify that the rules

1 themselves do not provide a basis for assuming
2 there's class arbitration.

3 MS. VERCOSKI: There's no assumption
4 one way or the other. What happens is that the
5 courts have to construe based on state contract
6 law principles that determine what the
7 objective intent was of the parties at the time
8 of enforcing the agreement. And the plain
9 terms are given -- the terms of the contract
10 are given their plain and ordinary meaning.
11 And that -- that is the first step.

12 JUSTICE GORSUCH: Counsel, if -- if
13 this is enough, this contract under ordinary
14 and plain state law principles where it often
15 in the text speaks of my claims and me and I --

16 MS. VERCOSKI: Right.

17 JUSTICE GORSUCH: -- if -- if that's
18 enough, what do we do with the due process
19 problem that Justice Alito pointed out in
20 Oxford Health where you would have potentially
21 class members purportedly bound by an
22 arbitration, this is in a court of law, where
23 we can adjudicate absent class members rights
24 consistent with the Fourteenth Amendment
25 because of the procedural protections

1 associated with court proceedings.

2 What do we do about those absent class
3 members in opt-out classes permitted by
4 whatever arbitrable forum's rules prevail?

5 MS. VERCOSKI: Well, first of all, the
6 -- the policy issues with respect to due
7 process are outside of the question presented.
8 But even if this Court were to consider those,
9 this is an antecedent question.

10 JUSTICE GORSUCH: Should we -- should
11 we ignore them in considering the impact here
12 of the Arbitration Act and normal contract
13 principles and whether normal contract
14 principles would abide due process, for
15 example?

16 MS. VERCOSKI: The -- to the extent
17 that due process concerns come into play,
18 that's at a much later stage of the game. What
19 is at issue here is we simply have a --

20 JUSTICE GINSBURG: Well, what happens
21 in the -- in the arbitration? So suppose it's
22 a class. If it were in court, there would be
23 notice to all the class members.

24 Would that have to be done in the
25 arbitration, notice -- give notice to everyone

1 who was within the class?

2 MS. VERCOSKI: Right. So, at first,
3 with our agreement here, the court, the
4 district court just found that the agreement
5 provides for a class arbitration and -- and
6 goes to the arbitrator to determine whether or
7 not that will ultimately be certified.

8 So the antecedent question of the
9 court finding that the agreement here provides
10 language that encompasses and anticipates and
11 allows the parties to go forward with
12 arbitration, which will now go to the
13 arbitrator to decide, and they are subject to
14 the same exact rules as a court of law when
15 determining whether or not they're going to
16 certify that class. And --

17 JUSTICE ALITO: But do you think that
18 -- that absent class members who didn't agree
19 to arbitration could be bound by the decision
20 of the arbitrator?

21 MS. VERCOSKI: Yes, they can.

22 JUSTICE ALITO: How?

23 MS. VERCOSKI: Because down -- if they
24 do decide to certify the class, they could
25 employ the same due process protections, such

1 as opt-out procedures. And at that point, an
2 absent class member will have the opportunity
3 to opt out. Or they can limit it to an opt-in
4 proceeding. And at the end of the day, the --
5 when the arbitrator does make that decision,
6 there is a review process.

7 JUSTICE ALITO: Well, if they have a
8 legal claim, how can they be deprived of their
9 legal claim pursuant to an arbitration award if
10 they never agreed to arbitration? I thought
11 arbitration was a matter of contract.

12 MS. VERCOSKI: Well, in the first
13 instance, it's a matter of contract right as to
14 whether or not the contract actually will
15 permit the proceedings.

16 Now the -- the arbitrator might get
17 that issue and decide it doesn't meet the
18 threshold. There is no way to certify the
19 class. So then we're back to individual
20 arbitration.

21 So that's why this is a very premature
22 question. And due process concerns are not
23 related to the antecedent question as to
24 whether or not construing this particular
25 arbitration agreement by the court, all she's

1 saying is not ultimately that it is
 2 certifiable. She's just saying that it is --
 3 the contract does support that the issue of
 4 whether or not the class can be certified goes
 5 to the arbitrator for ultimate decision.

6 So the due process concerns are not
 7 involved in the first instance in just a strict
 8 contract interpretation. There are no
 9 decisions made on absent class members or who
 10 they will be. That's --

11 JUSTICE ALITO: Suppose -- I'm sorry.

12 MS. VERCOSKI: No, that's okay.
 13 That's just an issue that's resolved later on
 14 down the road. And it's the same issues that
 15 apply in a court of law that would apply in an
 16 arbitration, the same exact protections.

17 And then they have the built-in review
 18 process where there's a partial final decision
 19 made by the arbitrator that can be appealable
 20 by either side depending on the outcome.

21 CHIEF JUSTICE ROBERTS: Well, under an
 22 extraordinarily deferential standard of review.

23 MS. VERCOSKI: For the arbitrator,
 24 yes, for -- for their decision on class
 25 arbitration. But like in this case, the order

1 in the first instance by the district court
2 finding that the actual agreement did
3 contemplate class proceedings to be given to an
4 arbitrator -- an arbitrator to decide whether
5 or not class -- class certification is
6 appropriate, those two orders would be combined
7 and the deferential standard --

8 JUSTICE SOTOMAYOR: So why did you let
9 --

10 MS. VERCOSKI: -- would apply.

11 JUSTICE SOTOMAYOR: So why did you let
12 the court decide that issue?

13 MS. VERCOSKI: We wanted the court to
14 decide the issue because, in the beginning, we
15 were also questioning the issue of
16 arbitrability as to whether or not the data
17 breach claims that we were alleging even fell
18 within the -- in the scope of the arbitration
19 agreement. And the issue of arbitrability was
20 decided below.

21 JUSTICE SOTOMAYOR: Well, it seems to
22 me -- I'm not quite sure why you did what you
23 did, but it seems to me that that would have
24 been clearly for the arbitrators under the
25 terms of this contract because it's related to

1 -- it --

2 MS. VERCOSKI: The arbitrator -- yes,
3 the agreement at issue definitely did have a
4 delegation clause that gave the ability for the
5 arbitrator to decide these decisions. When it
6 was filed in district court on behalf of Frank
7 Varela, the issues of -- it wasn't just the
8 class --

9 JUSTICE SOTOMAYOR: You know --

10 MS. VERCOSKI: -- issue involved.

11 JUSTICE SOTOMAYOR: -- class action is
12 a procedural process.

13 MS. VERCOSKI: Correct.

14 JUSTICE SOTOMAYOR: And, in my mind,
15 that quintessentially is always an arbitrator's
16 question, what -- when you hold the hearings,
17 how you hold them, where. All of those things
18 are typically arbitrator decisions. So it
19 seems to me that under normal circumstances you
20 wouldn't have a court decide that, so I think
21 Justice Gorsuch's earlier point, but here
22 instead you chose the court to make that
23 decision.

24 MS. VERCOSKI: Right. Both parties
25 did. Nobody objected.

1 JUSTICE GORSUCH: And what is the
2 context of that then? So the court says that I
3 order class arbitration. Is the arbitrator
4 bound by that? If the arbitrator finds that
5 the rules are -- are not met in -- under the
6 FAA rules that are required for class actions,
7 can -- is he -- is he forbidden from proceeding
8 with individualized proceedings nonetheless?

9 Does he -- is he forbidden from
10 engaging in the normal kind of inquiry as to
11 whether a class would be superior or preferable
12 in some way than I assume the FAA rules have
13 some -- some analogue to?

14 MS. VERCOSKI: They do. So the rules
15 incorporated within --

16 JUSTICE GORSUCH: So -- so is -- is
17 the arbitrator forbidden from making those
18 inquiries by this ruling?

19 MS. VERCOSKI: It -- the way that the
20 JAMS and the AAA class arbitration issues are
21 drafted, they say that whether a court decided
22 the threshold issue as to whether the contract
23 provided a basis to permit the class -- to --
24 to permit the parties to go on a class
25 arbitration basis, that doesn't stop the

1 inquiry.

2 So it -- it appears from the rules
3 that the arbitrator has to give deference to
4 that initial threshold ruling, but that doesn't
5 mean that they have to ultimately certify the
6 class.

7 JUSTICE GORSUCH: So -- so why are we
8 bothering --

9 MS. VERCOSKI: It doesn't mean the --

10 JUSTICE GORSUCH: -- with it then? I
11 mean, if at the end of the day we're going to
12 have this large dispute in district court over
13 whether the contract permits this or that
14 procedure, I mean, are we going to have
15 disputes over whether it permits discovery?
16 And that's a contract issue that the parties
17 negotiated? Other kinds of procedures that
18 might be allowed or disallowed in a -- in an
19 arbitration proceeding? It seems like a lot of
20 collateral expense and -- and difficulty that
21 seems kind of a little inconsistent with the
22 idea of getting to arbitration quickly and that
23 the district court proceedings are supposed to
24 be summary. Help me out with that.

25 MS. VERCOSKI: Right, if you're

1 expanding it to issues beyond class arbitration
2 and including them --

3 JUSTICE GORSUCH: Well, you expand it
4 beyond the question of -- up -- thumbs up or
5 down on arbitration.

6 MS. VERCOSKI: Right, and what --

7 JUSTICE GORSUCH: To -- to what kind
8 of procedures that arbitration might address.

9 MS. VERCOSKI: Right. That -- that
10 can go to a court if the -- if the parties
11 submitted to that. And I don't think it's a
12 long, extensive proceeding. It's -- it's done
13 on a motion to dismiss --

14 JUSTICE GORSUCH: Well, here we are.

15 (Laughter.)

16 MS. VERCOSKI: I know. Well, we --
17 because we shouldn't have been here, there
18 should have been no appeal. There was
19 absolutely no right to appeal. It should have
20 went right to the arbitrator.

21 JUSTICE SOTOMAYOR: Well, wait a
22 minute. Why did you not ask for a stay?

23 MS. VERCOSKI: We did not ask for a
24 stay at the time because we were ready to go
25 and for expediency and --

1 JUSTICE SOTOMAYOR: Yeah, so you --
2 you --

3 MS. VERCOSKI: -- to get the benefits.
4 So -- so we were fine proceeding on a class
5 basis and were ready to go to arbitration.
6 Lamps Plus fought that and issued a stay
7 because they didn't agree with the way -- they
8 didn't get the -- what they wanted in asking
9 for the order to compel -- compel arbitration.

10 JUSTICE GINSBURG: Suppose that you --

11 MS. VERCOSKI: They got -- they got
12 their order compelling it, but they -- they
13 didn't like that it wasn't limited to an
14 individual basis.

15 JUSTICE GINSBURG: Suppose you --
16 suppose the district court dismissed your court
17 claims and then ordered bilateral arbitration.
18 Would you have an appeal?

19 MS. VERCOSKI: I would not. It would
20 be interlocutory, and it would be barred by FAA
21 Section 16.

22 JUSTICE GINSBURG: Where you would be
23 stuck with what -- whatever the -- if the court
24 said bilateral, you have no appeal; if it says
25 class action, the other side, you say also has

1 no appeal?

2 MS. VERCOSKI: On that particular
3 issue alone in that order, isolated, looking at
4 the order to compel arbitration, yes, I
5 wouldn't have a basis. But if it was ordered
6 in conjunction with an order dismissing my
7 claims on a -- with -- on prejudice or without
8 prejudice, then that would be a final ruling
9 against me that would be an aggrievance to my
10 -- to my client.

11 JUSTICE GINSBURG: But --

12 CHIEF JUSTICE ROBERTS: Under -- under
13 Randolph?

14 MS. VERCOSKI: But you would have a
15 final -- under Randolph. That would -- I would
16 fit with -- with under Randolph and I would
17 have a basis because that motion to dismiss
18 would be final and allow me to appeal under
19 16(a)(3) under the FAA, and the basis for that
20 would be the incorrect ruling on the -- the
21 district court ordering me into -- to compel
22 arbitration. So I would have a basis for that.

23 Unlike Lamps Plus, they could not turn
24 a non-appealable issue all the way into an
25 appealable issue because they're the ones who

1 asked the court to order the -- the dismissal
2 of my client's claims.

3 Initially, they did it with prejudice
4 below, and they got it without prejudice. And
5 if that were a stay instead like, arguably, the
6 FAA requires under Section 3, that if you are
7 ordering the claims to proceed to -- to
8 arbitration, it should -- actually, the
9 language says it "shall" issue a stay instead
10 of a dismissal without prejudice.

11 But, if we have the stay, it wouldn't
12 be a final order. But if -- if it were
13 reversed and I had -- I was challenging the
14 order compelling arbitration in -- in
15 conjunction with a final order dismissing my
16 claims, I would be aggrieved because now I'm --
17 I'm out of those claims.

18 JUSTICE ALITO: So, counsel, if
19 there's a contract between two businesses, and
20 business A drafts the contract, business B
21 accepts the contract, there's nothing in the
22 contract about arbitration, but a state court
23 -- but it turns out that A, which -- the party
24 that drafted the contract, doesn't want
25 arbitration. B, the party that did not draft

1 the contract, does want arbitration. There's
2 no -- no arbitration clause in the contract.
3 But the state court says contra proferentem,
4 this goes to arbitration; that's state law.

5 Would that be permitted?

6 MS. VERCOSKI: That the -- that it
7 would err on the side of not finding for
8 arbitration because it would be construed
9 against the drafter who was --

10 JUSTICE ALITO: It would err on the
11 side of --

12 MS. VERCOSKI: -- doing the proposing?

13 JUSTICE ALITO: -- finding arbitration
14 because the -- the -- it was -- it was drafted
15 by the party that objects to arbitration.

16 MS. VERCOSKI: So, in that case, there
17 is a special rule under the FAA that, instead
18 of construing it against a drafter, the FAA
19 trumps that situation where you have to
20 construe it in favor of arbitrability.

21 JUSTICE BREYER: This is --

22 JUSTICE ALITO: This is -- this would
23 be a decision in favor of arbitrability.

24 MS. VERCOSKI: Right.

25 JUSTICE ALITO: So what's the

1 difference between that situation and the
2 situation here?

3 MS. VERCOSKI: Well, the -- there was
4 a decision issuing a --

5 JUSTICE ALITO: In other words, if
6 state law -- if state law governs, that's the
7 decision under state law in this hypothetical,
8 there must be arbitration even in the absence
9 of any arbitration clause whatsoever. That's
10 state law.

11 So that would be -- would that be
12 consistent with the -- allowed under the FAA?

13 MS. VERCOSKI: It would be --

14 JUSTICE ALITO: And if not, doesn't
15 that show that the FAA imposes some rules that
16 super -- that supersede state law?

17 MS. VERCOSKI: Right. Well, if it's
18 consistent with the way the state law came out
19 and found in favor of arbitration, then it
20 wouldn't be in conflict with the FAA.

21 JUSTICE BREYER: Here is the problem
22 like that that I'm having: All that you have
23 in the California law, all we have here is the
24 contract says in lieu of any and all lawsuits
25 we're going to have arbitration. Okay?

1 And then it says claims will be
2 arbitrated if there are claims that would have
3 been available as a matter of law. Nothing
4 other than that. And --

5 MS. VERCOSKI: In the contract at
6 issue?

7 JUSTICE BREYER: In the contract at
8 issue, I gather. And -- and then, on the basis
9 of that, California, unlike most places, which
10 insist on more than that to create ambiguity,
11 say that's enough to create ambiguity and,
12 therefore, we have class arbitration.

13 Now what is my problem? I dissented
14 in Stolt-Nielsen. I think I did.

15 (Laughter.)

16 JUSTICE BREYER: I'm not sure. But I
17 lost. If I did, I lost. And what the majority
18 said was you cannot infer class authorization
19 solely from the fact of the parties' agreement
20 to arbitrate.

21 So, on the merits, what they're saying
22 is, hey, that's all you have here. And
23 California says that's -- they have a special
24 rule, unlike any other place, that's enough to
25 create ambiguity and ambiguity against the

1 drafter.

2 Well, if that's enough to create
3 ambiguity and ambiguity against the drafter,
4 then we have what Stolt-Nielsen says you
5 shouldn't have. Now I could say we should
6 overrule Stolt-Nielsen. I think I won't get
7 too far.

8 (Laughter.)

9 MS. VERCOSKI: Uh-huh.

10 JUSTICE BREYER: And so we have the
11 case right there with the language. We have
12 the California language in the contract.

13 MS. VERCOSKI: Right.

14 JUSTICE BREYER: And we have a special
15 rule, which is their right, I guess, that we
16 find ambiguity there, though the textbooks say
17 don't, okay?

18 So that's the main point on the merits
19 as I see it. And I'm asking the question
20 because I want to know your response.

21 MS. VERCOSKI: Well, first of all, in
22 Stolt-Nielsen, they did not interpret the
23 agreement's language at all. They said that
24 there was an agreement, a side agreement
25 between the parties that expressly stated that

1 we have no agreement on class arbitration.

2 So we're not even going to look at the
3 contract. They gave it to the arbitrators and
4 the arbitrators found that class arbitration
5 applied simply on policy basis.

6 This is not the contract here. There
7 absolutely are provisions that support -- they
8 are very broad and they -- they encompass class
9 proceedings.

10 JUSTICE SOTOMAYOR: The problem I have
11 is the following, because it -- it's following
12 up on Justice Alito's question, okay?

13 There are at least two or three
14 California lower courts and at least one court
15 of appeals who have seen contracts almost
16 identical to this --

17 MS. VERCOSKI: Yes.

18 JUSTICE SOTOMAYOR: -- and said,
19 contrary to the lower court, to the lower court
20 here, to the Ninth Circuit, that that language
21 is not enough to have a foothold in the
22 contract under California law, because the
23 words "the waiver of all lawsuits or other
24 civil legal proceedings," you have to submit
25 everything to arbitration, don't say anything

1 about the nature, the procedural nature, of
2 that arbitration. That's been their reasoning.

3 And they look at all of the I's and my
4 claims of this contract and say that shows just
5 a bilateral intent.

6 MS. VERCOSKI: Yes, it --

7 JUSTICE SOTOMAYOR: And so those
8 courts, unlike the court here, is basically
9 saying that the court below misapplied state
10 law.

11 Now are we supposed to give deference
12 to the state court on its interpretation of
13 state law, or are we supposed to check to make
14 sure that they are, in fact, following state
15 law?

16 MS. VERCOSKI: Well, that's not even
17 an issue here because --

18 JUSTICE SOTOMAYOR: Well, it is an
19 issue --

20 MS. VERCOSKI: Well, it's an issue --

21 JUSTICE SOTOMAYOR: -- because, if
22 this contract doesn't speak at all, there's no
23 foothold.

24 MS. VERCOSKI: Our contract absolutely
25 does. The contracts that the -- that Lamps

1 Plus cited is from two appellate courts and the
2 state court, and their language was very
3 limited and not even nearly as broad as our
4 provisions. And we have --

5 JUSTICE BREYER: So what's the best
6 statement in the contract that supports you?

7 MS. VERCOSKI: In our contract, the
8 very best one is arbitration shall be in lieu
9 of any and all lawsuits or civil legal
10 proceedings relating to my employment. That
11 arbitration will be in lieu of a set of actions
12 that includes class actions and allows for
13 class actions.

14 And the language, when contrasted with
15 the language of the state appellate courts,
16 they were limited specifically to the --

17 JUSTICE SOTOMAYOR: My problem with
18 that is arbitration isn't law proceedings by
19 definition. You did have some discovery rules
20 here, but by nature, the discovery rules in
21 arbitration, a procedural issue, are different
22 than a lawsuit. So are notice requirements and
23 interrogatories. Everything's different
24 procedurally.

25 Why are you thinking that class action

1 proceedings are -- are a special proceeding
2 that you're entitled to bring somewhere else?

3 MS. VERCOSKI: Well, I'm not thinking
4 that it's special. I'm thinking that to the
5 extent that the parties have it in their
6 contract, we have to give their intent, first
7 and foremost, the -- the equal -- we have to
8 enforce it under the FAA.

9 That's their overarching principle, is
10 that we look at the intent and we enforce the
11 contracts according to their intent.

12 So those two lower state contract
13 interpretations, they didn't find ambiguity at
14 all. The language there was much more limiting
15 into the individual claims that were able to be
16 brought by that individual only with respect to
17 his employment against his employer and vice
18 versa.

19 Our phrases are far more sweeping
20 where Mr. Varela assented to "waiver of any
21 right I may have to file" a legal -- "a lawsuit
22 or civil legal proceeding relating to my
23 employment with the company." Relating to my
24 employment, the data breach, but for his
25 employment, the data breach wouldn't have

1 occurred.

2 To the extent he has claims out of the
3 data breach, that encompasses claims of -- of
4 other workers that were subject to the same set
5 of circumstances.

6 JUSTICE SOTOMAYOR: No, it doesn't.
7 No, he's granted that right as a procedural
8 right in the lawsuit. The operative question
9 here is, is he entitled to that in an
10 arbitration?

11 MS. VERCOSKI: He absolutely is.

12 JUSTICE SOTOMAYOR: That's a separate
13 --

14 MS. VERCOSKI: Because the word
15 "proceeding" is extremely broad and it includes
16 legal actions or procedures. A civil
17 arbitration or a class action is absolutely a
18 proceeding.

19 And not only that, controversies,
20 disputes, a class action is a controversy or a
21 dispute. And anything that was supposed to be
22 brought in a court of law that could have been
23 brought now has to be brought in arbitration.
24 And it doesn't say that those claims cannot be
25 or that they are waived from -- from being

1 brought in arbitration.

2 And the fact that it's -- you know,
3 the -- Lamps Plus argues that there is
4 bilateral language that I, me, my employment,
5 that doesn't -- it doesn't modify the term "my
6 individual employment" or my "individual
7 claims." "My employment" encompasses all kinds
8 of different claims that arise out of this
9 employment, including the data breach.

10 And because whatever Mr. Varela could
11 bring in a court of law individually, he is
12 entitled to also bring those claims on a
13 class-wide basis in arbitration, because "in
14 lieu of" means a set of actions that could have
15 been brought in a court of law, now have to be
16 brought into arbitration.

17 And that does not limit his right to
18 bringing the proceedings on an aggregate basis.
19 That doesn't change the nature of the claims or
20 the parties' rights. The only thing it changes
21 is the way that the proceedings are processed
22 in arbitration.

23 And it doesn't stop there. The
24 language goes even broader to encompass all
25 remedies that could have been issued in a court

1 of law.

2 JUSTICE SOTOMAYOR: Class action is
3 not a remedy.

4 MS. VERCOSKI: No, class action's not
5 a remedy, but remedies can be awarded and are
6 awarded through class actions.

7 JUSTICE SOTOMAYOR: To other people,
8 not him.

9 MS. VERCOSKI: To other people, but
10 there's nothing that prohibits him from
11 bringing an arbitration, only his individual
12 claims. When they said arising out of his
13 employment, it doesn't say his employment and
14 that includes, and only includes, his
15 individual claims relating to his employment.

16 JUSTICE KAVANAUGH: Counsel, in -- the
17 dissenting judge below said that the Ninth
18 Circuit's decision was a palpable evasion of
19 Stolt-Nielsen. And picking up on Justice
20 Breyer's question, who asked you how you would
21 distinguish Stolt-Nielsen, you said, one, the
22 court there did not interpret the agreements
23 language at all.

24 Is there anything else you'd like to
25 add to how you would distinguish Stolt-Nielsen?

1 MS. VERCOSKI: Absolutely. We are on
2 all fours with Stolt-Nielsen because what
3 Stolt-Nielsen said expressly was what we need
4 is a contractual basis in order to find that
5 the parties intended to proceed on the class
6 arbitration basis.

7 And it doesn't say that it needs to
8 say class arbitration expressly, so there we
9 have a -- we have a situation versus silent and
10 expressly. And what we're trying to look for,
11 what supplies that contractual basis is the
12 daylight in between that.

13 And if we look at Oxford Health, the
14 -- the arbitrator there was permitted to
15 construe the -- to construe the arbitration
16 agreement just by looking at the contract
17 language.

18 And although on review they had to
19 give him deference, they -- they stated that
20 they might not have agreed with his
21 interpretation, but if we were going to go with
22 a clear and unmistakable new policy that Lamps
23 Plus wants this Court to adopt, then
24 Stolt-Nielsen -- sorry, Oxford Health would
25 have been completely erroneous.

1 CHIEF JUSTICE ROBERTS: Thank you.

2 MS. VERCOSKI: And that should have
3 been overruled.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 MS. VERCOSKI: Thank you.

7 CHIEF JUSTICE ROBERTS: Four minutes,
8 Mr. Pincus.

9 REBUTTAL ARGUMENT OF ANDREW J. PINCUS
10 ON BEHALF OF THE PETITIONERS

11 MR. PINCUS: Thank you, Mr. Chief
12 Justice. Just a couple of points.

13 Justice Breyer mentioned that -- the
14 AAA rules on class arbitration. There are a
15 number of decisions, hundreds of decisions
16 reported on the AAA website. There are only
17 eight that are decisions that go to the merits.

18 Five approved settlements. One is a
19 dismissal. One is in favor of the defendant.
20 And there's one for the plaintiff. So they
21 really, for -- for all the years that class
22 arbitrations have been in process, they really
23 haven't produced a lot at the end of the line.

24 Justice Gorsuch raised the due process
25 issue, and I think that's another reason why

1 the clear and unmistakable standard makes
2 sense. There's a serious risk that if the
3 standard applied below were allowed to -- to
4 prevail, then the class arbitration would
5 proceed.

6 Let's say the defendant won. Then
7 every class member would then argue in the
8 future, when the defendant sought to enforce
9 that judgment, I didn't agree to class
10 arbitration, so I'm not bound by that judgment.
11 A clear and unmistakable -- and certainly --

12 JUSTICE GINSBURG: Wouldn't they be
13 bound if they got notice and an opportunity to
14 opt out?

15 MR. PINCUS: I think there are serious
16 questions that were pointed out by Justice
17 Alito in -- in his Oxford Health dissent about
18 whether an arbitration to which they didn't
19 consent could bind them, especially if they
20 could prevail on an argument that the
21 arbitration agreement did not provide for class
22 arbitration.

23 That would be their argument. And,
24 ironically, the defendant would then be arguing
25 for class arbitration. The -- the class -- a

1 putative class member would say no, and the
2 putative class member would say you should
3 construe the ambiguous agreement against me by
4 saying there's no -- there's no arbitration.

5 So that's another reason why we think
6 the clear and unmistakable standard makes
7 sense.

8 Justice Gorsuch, you asked about
9 whether the arbitrator would be bound by the
10 district court's decision. The arbitrator's
11 bound under Rule 1(c) of the AAA rules by the
12 decision that the arbitration agreement
13 authorizes class arbitration.

14 Obviously, the arbitrator then would
15 have to go through the process to see whether
16 the rules for certifying a class were met, but
17 he couldn't or she couldn't contradict the
18 court's determination that class arbitration
19 was authorized.

20 And -- and then just -- my friend
21 relies -- places a lot of reliance on the "in
22 lieu of" sentence in the agreement, but what
23 that says is what arbitration is instead of.
24 It doesn't say what can be arbitrated.

25 And what can be arbitrated is covered

1 by the claims covered by the arbitration
2 provision, and that's the provision that has
3 the I's and the my's.

4 Unless the Court has any further
5 questions.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel. The case is submitted.

8 (Whereupon, at 12:09 p.m., the case
9 adjourned.)

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