10-3247

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LARYSSA JOCK, *et al.*, Plaintiffs-Counter-Defendants-Appellants,

JACQUELYN BOYLE, *et al.*, Plaintiffs-Counter-Defendants

v.

STERLING JEWELERS INC., Defendant-Counter-Claimant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
CASE NO.: 2:08-CV-02875

BRIEF FOR *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND RETAIL LITIGATION CENTER, INC. SUPPORTING THE DEFENDANT-APPELLEE IN REQUESTING AFFIRMANCE OF THE DECISION BELOW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure:

(1) *Amicus curiae* Chamber of Commerce of the United States of America certifies that it is a non-profit corporation that does not have any parent corporation and that no publicly held corporations own 10% or more of its stock.

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses and associations, representing approximately 300,000 direct members, with an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every relevant economic sector and geographical region of the United States.[1] An important function of the Chamber is the representation of its members' interests by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

The Chamber successfully participated as an *amicus curiae* both in support of the petition for a writ of *certiorari* and in support of petitioners on the merits in a case important to the resolution of this appeal, *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010).

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings which affect the retail industry. The RLC, whose members include some of the country's largest retailers, was formed to provide courts with retail industry perspectives on significant legal

[1] *Amici* filed for leave to submit this brief under Fed. R. App. P. 29(a) on December 8, 2010. No counsel for any party to these proceedings authored this brief, in whole or in part. No entity or person, aside from the *amici curiae*, their members, and their counsel, made any monetary contribution for the preparation or submission of this brief.

issues, and highlight the potential industry-wide consequences of legal principles that may be determined in pending cases.

RLC's members employ thousands of people in stores across the nation. They endeavor to honor and abide by the laws that govern their activities, including laws prohibiting discrimination based on gender and other protected grounds. They have and enforce policies forbidding discrimination. And they take pride in their talented and diverse workforces.

Many of the Chamber's and RLC's members routinely utilize arbitration agreements in their business contracts and employment relationships, which enable them to avoid costly and time-consuming litigation over disputes arising out of and relating to these contracts by submitting to a streamlined yet fair dispute resolution based upon the mutual consent of the parties. Unlike litigation, arbitration is a matter of consent, not coercion.

Compelling parties to resolve disputes through costly, time-consuming, and high-stakes class arbitration, where they have not expressly agreed to do so, frustrates the parties' intent, undermines their existing agreements, and erodes the benefits of arbitration as an alternative to litigation. Simply put, imposition of class arbitration absent a contractual basis that the parties agreed to authorize such proceedings is contrary to the central goal of the Federal Arbitration Act (FAA),

9 U.S.C. §1 *et seq.*: ensuring that written arbitration agreements are enforced according to their terms.

The Chamber, RLC, and their members thus have a vital interest in having this Court affirm the decision below, which held—in accordance with the Supreme Court's decision in *Stolt-Nielsen*—that parties must affirmatively authorize class arbitration.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Stolt-Nielsen*, the Supreme Court reiterated based on settled precedents that the first principle under the FAA is the mutual consent of the parties, obligating arbitrators and courts to ensure that arbitration agreements are enforced according to their terms. To that end, the Court ordered vacatur of an arbitral award that had imposed class arbitration on the basis that the parties' agreement had *not prohibited* such proceedings. The Court concluded that such an available-unless-prohibited ruling by the arbitrators was error—error sufficient to constitute exceeding the arbitrators' authority under Section 10(a)(4) of the FAA—because traditional and class arbitration are such fundamentally different proceedings that consent to traditional arbitration cannot be deemed consent to class arbitration. Rather, the Court held that the FAA requires that before class arbitration may be compelled, there must be a contractual basis that the parties agreed to authorize such a divergence from traditional arbitration.

The Chamber's and RLC's members depend on this law. Arbitration and litigation serve important but distinct purposes in our legal system. Arbitration is usually cheaper and faster than litigation, with a minimum of procedural hurdles. But as the Court noted in *Stolt-Nielsen*, arbitration does not have the procedural protections of litigation or the safeguard of appellate review. Conversely, class arbitration entails many of the costs and burdens of litigation without the protections of formal procedures and appellate review. Because of those special circumstances, *Stolt-Nielsen* held that imposing class arbitration absent the parties' mutual consent would violate the consensual basis of arbitration under the FAA, discouraging parties from entering into arbitration agreements altogether and undermining Congress's goal of encouraging arbitration.

Nothing in this case warrants departure from *Stolt-Nielsen*. The arbitrator here neither found nor purported to find a contractual basis that the parties agreed to authorize class arbitration. Instead, the arbitrator imposed class arbitration on the same fundamentally flawed basis as the arbitrators in *Stolt-Nielsen*: the parties had not agreed to prohibit class arbitration. But as *Stolt-Nielsen* held, the FAA requires that parties opt-in to class arbitration, not opt-out.

Appellants' *amicus* the EEOC argues that class arbitration must be imposed here despite the lack of mutual consent or Appellants will be unable to effectively vindicate their rights under Title VII. But in *Gilmer v. Interstate/Johnson Lane*

Corp., 500 U.S. 20, 33 (1991), the Court concluded that arbitration could effectively vindicate statutory employment-discrimination claims despite the unavailability of class proceedings in arbitration. Even in the highly unlikely event that such claims could not be effectively vindicated, under *Gilmer* and *Stolt-Nielsen* this Court could only hold the arbitration agreement unenforceable, *not* impose class arbitration without the requisite mutual consent.

The Chamber's and RLC's members depend on a legal system that enforces contracts—including arbitration agreements—according to their terms. Here, the arbitrator's *ultra vires* imposition of class arbitration is analytically indistinguishable from the arbitrators' award requiring vacatur in *Stolt-Nielsen*. A*mici* therefore respectfully recommend that the order of the district court vacating the arbitrator's award be affirmed.

ARGUMENT

I. THE FAA REQUIRES A CONTRACTUAL BASIS FOR CONCLUDING THAT THE PARTIES AGREED TO AUTHORIZE CLASS ARBITRATION.

In *Stolt-Nielsen*, the Supreme Court held that the FAA requires that before a party to an arbitration agreement may be compelled to participate in class-action arbitration, there must be "a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen*, 130 S. Ct. at 1775. The case arose because the underlying arbitration panel issued an award finding the parties' arbitration agreement susceptible to class arbitration despite the agreement's undisputed silence regarding class arbitration, both expressly and impliedly. *Id.* at 1766. In view of that silence, the arbitrators reasoned that class arbitration was permissible because there was no "inten[t] to preclude class arbitration." *Id.* (internal quotation marks omitted).

On three essential grounds, the Supreme Court wholly rejected the premise that class arbitration could be imposed simply because nothing in the parties' agreement said that it could not. First, the Court rejected the arbitrators' failure to ground their award on a rule of decision under the FAA or state law. *Id.* at 1768-69 ("Rather than inquiring whether the FAA . . . or [state] law contains a 'default rule' under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had the authority of a

common-law court to develop what it viewed as the best rule to be applied in such a situation."). Thus, because the arbitrators crafted their own rule that class arbitration is available unless prohibited, they exceeded their authority. *Id.* at 1770 ("instead of identifying and applying a rule of decision derived from the FAA or . . . [state] law, the arbitration panel imposed its own policy choice and thus exceeded its powers.").

Second, relying on settled precedents, the Court determined that the arbitrators' available-unless-prohibited rule for class arbitration violated the first principle of the FAA: mutual consent. "While the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion[.]'" *Id.* at 1773 (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). The Court emphasized that—as a matter of arbitral authority—arbitrators cannot act beyond the terms of the parties' agreement. "This is because an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution." *Id.* at 1774. Quoting one fifty-year-old precedent, the Court reasoned, "an arbitrator 'has no general charter to administer justice for a community which transcends the parties' but rather is 'part of a system

of self-government created by and confined to the parties.'" *Id.* (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960)).

Because the parties' mutual consent both constitutes and confines the authority of arbitrators, "It falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties." *Id.* at 1774-75 (citing *Volt*, 489 U.S. at 479). The Court concluded: "From these principles, it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775.

But the arbitrators had done exactly the opposite: they premised their award finding the parties' agreement amenable to class arbitration *not* on any consent evidenced between the parties, but on the absence of an agreement to prohibit class arbitration. "The critical point, in the view of the arbitration panel, was that petitioners did not 'establish that the parties to the charter agreements intended to *preclude* class arbitration.'" *Id.* Because "the panel regarded the agreement's silence on the question of class arbitration as dispositive[,] [t]he panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Id.*

Third, the Court held that for certain procedural aspects of arbitration (e.g., holding hearings), an available-unless-prohibited approach of implied consent is appropriate, but class arbitration is too different from traditional arbitration to justify presuming consent. "This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.*

The Court explained that parties to an arbitration agreement trade the procedural formality and appellate review provided by courts for the cost-saving and efficiency benefits of arbitration. *Id.* But the logic of that trade-off does not apply to class arbitration, which entails the complexities and risks of class-action litigation without the safeguard of judicial review. *Id.* at 1775-76 ("An arbitrator chosen according to an agreed-upon procedure no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. . . . And the commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited[.]") (citations omitted).

Thus, along with the Court's precedents dictating consent-based arbitration, these real-world considerations informed the Court's categorical rejection of the arbitrators' available-unless-prohibited rule: "We think that the differences

between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 1776. To be sure, the Court emphasized that the inquiry required under the FAA is one for affirmative authorization: "consistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties *agreed to authorize* class arbitration." *Id.*

Notably, in granting vacatur of the arbitrators' available-unless-prohibited class-arbitration award, the Court necessarily found that the petitioners had "clear[ed] a high hurdle[,]" *id.* at 1767, in establishing that the arbitrators had exceeded their authority under Section 10(a)(4) of the FAA. The Chamber's and RLC's members value the finality of arbitral decisions, but as the Court held in *Stolt-Nielsen*, finality cannot come at the expense of consent.

II. THE ARBITRATOR HERE NEITHER FOUND NOR PURPORTED TO FIND A CONTRACTUAL BASIS THAT THE PARTIES AGREED TO AUTHORIZE CLASS ARBITRATION.

The transcendence of authority by the arbitrator here is analytically indistinguishable from that in *Stolt-Nielsen*: imposing class arbitration without a contractual basis that the parties agreed to authorize it—instead relying on the

absence of a prohibition as the supposed authority for class arbitration. JA703 ("I find that the RESOLVE Arbitration Agreements do not prohibit class claims.").

The arbitrator found, and it is undisputed, that the parties' RESOLVE agreements here are expressly silent regarding class arbitration. JA702 ("no version of the Agreement expressly prohibits the pursuit of class claims; indeed, there is no mention of class claims in any version of the Agreement."). Faced with that express silence, the arbitrator framed the issue as: "The question of whether an arbitration agreement prohibits the pursuit of class claims[.]" JA703. For the answer, the arbitrator looked to controlling state law, but found that it had not addressed the issue. JA703 ("Although numerous courts and arbitrators have struggled with the question of whether class claims are permitted or prohibited by an agreement that does not expressly address the issue, the question has apparently not been addressed in any reported decision by an Ohio court.").

With no rule of decision under state law, the arbitrator proceeded to develop what the arbitrator viewed as the best rule to be applied in such a situation. The arbitrator cited state law to the effect that the parties' intent is evidenced by contractual language and that: "The law will not insert by construction for the benefit of one of the parties an exception or condition which the parties either by design or neglect have omitted from their own contract." JA703 (quoting Ohio law) (internal quotation marks omitted). Thus, rather than seeking any affirmative

authorization, the arbitrator viewed the absence of a prohibition on class arbitration as dispositive: "Applying these principles, I find the RESOLVE Arbitration Agreements do not prohibit class claims." JA703.

Significantly, the arbitrator rejected Sterling's argument that, despite express silence, the RESOLVE agreements contain implied contractual bases for concluding that the parties did *not* agree to authorize class arbitration. "Sterling argues that RESOLVE's unique contractual provisions for local venues, the application of local laws, and the selection of locally-licensed arbitrators establish that the parties never intended class arbitration of employee claims." JA703. Without pointing to any countervailing language of the agreement that would render ambiguous these local-resolution clauses, the arbitrator nonetheless purported to construe them against Sterling: "Because this 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." JA704. Thus, in rejecting—but not refuting—Sterling's invocation of implied contractual bases that the parties did *not* agree to authorize class arbitration, the arbitrator again found the absence of a "clearly expressed" prohibition dispositive.

The arbitrator added: "I further find that agreeing 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.'" JA704. Again, the arbitrator found class-action arbitration to be some sort of presumptive, default rule to be "waived," rather than a term requiring affirmative authorization. And the arbitrator's quotation of the RESOLVE language empowering the arbitrator to award "any types of legal or equitable relief" available in court did not even purport to establish a contractual basis, express or implied, that the parties had agreed to authorize class arbitration—but instead only that they had *not* agreed to *prohibit* it. Indeed, the arbitrator's footnote supporting the proposition relies on other arbitral awards empowering class arbitration on the basis that the parties did not *prohibit* it in their arbitration agreements: "Arbitrators faced with agreements containing similar provisions have found them insufficient to reflect any mutual intent to preclude arbitration of class claims." JA704 n.1.

From the outset of the arbitrator's analysis through the concluding footnote, the arbitrator engaged in an inquiry seeking contractual prohibitions against class arbitration rather than contractual bases that the parties had agreed to authorize it. The arbitrator never identified, nor purported to identify, any basis that the parties actually had agreed to authorize class arbitration. Instead, the arbitrator viewed the unavailability of class arbitration as "adverse to the employee," JA704, and applied

an unfounded rule that class arbitration should be available if it is not precluded by the parties. *Cf. Stolt-Nielsen*, 130 S. Ct. at 1769 n.7 ("the arbitrators need not have said they were relying on policy to make it so.").

That outcome, and assumption of arbitral authority with no showing of mutual consent, is analytically indistinguishable from that in *Stolt-Nielsen*. *Id.* at 1775 ("the panel regarded the agreement's silence on the question of class arbitration as dispositive. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent."). For the same reason, then, Sterling has "clear[ed] a high hurdle," *id.* at 1767, in meeting the exceeding-authority ground for vacatur under Section 10(a)(4) of the FAA.

III. NO FEATURE OF THIS CASE WARRANTS DEPARTURE FROM THE FAA'S REQUIREMENT FOR A CONTRACTUAL BASIS THAT THE PARTIES AGREED TO AUTHORIZE CLASS ARBITRATION.

A. No Contractual Distinction Between this Case and *Stolt-Nielsen* Warrants Departure from the FAA Requirement.

Appellants and their *amici* seek to distinguish *Stolt-Nielsen* by asserting contractual distinctions between *Stolt-Nielsen* and this case, principally: (i) the parties' stipulation in *Stolt-Nielsen*; (ii) the purportedly broader language of the RESOLVE agreements; (iii) the sophistication of the parties; and (iv) Sterling's

omission from the RESOLVE agreements of an express prohibition on class arbitration.

1. The Stipulation in *Stolt-Nielsen*

In *Stolt-Nielsen*, the parties stipulated that their agreement was silent regarding class arbitration, both expressly and impliedly. "[T]he only task that was left for the panel, in light of the parties' stipulation, was to identify the governing rule applicable in a case in which neither the language of the contract nor any other evidence established that the parties had reached any agreement on the question of class arbitration[.]" *Stolt-Nielsen*, 130 S. Ct. at 1770. Instead, "the panel regarded the agreement's silence on the question of class arbitration as dispositive." *Id.* at 1775. The arbitrators had asked fundamentally the wrong question in inquiring whether the parties had agreed to prohibit class arbitration—as opposed to whether the parties had agreed to authorize it—so the silence provided the wrong answer. *Compare id.* at 1775 ("The critical point, in the view of the arbitration panel, was that petitioners did not 'establish that the parties to the charter agreements intended to *preclude* class arbitration.'"), *with id.* at 1776 ("we see the question as being whether the parties *agreed to authorize* class arbitration.").

But the parties' stipulation was incidental to the holding in *Stolt-Nielsen*. Any suggestion otherwise by Appellants or their *amici* confuses sufficiency with necessity. The stipulation in *Stolt-Nielsen* certainly was sufficient to establish that

there was no contractual basis that the parties had agreed to authorize class arbitration, but nothing in *Stolt-Nielsen* even hints that such stipulated silence would be necessary before a court could rule that an arbitrator had imposed class arbitration without contractual authorization.

The arbitrator here committed the same fundamental error as the arbitrators in *Stolt-Nielsen* by asking the same wrong question. And the agreement, or lack thereof, between the parties in this case concerning the meaning of the RESOLVE agreements has no impact whatsoever on the arbitrator's error.

Here, the parties agreed that the RESOLVE agreements are expressly silent regarding class arbitration, as did the arbitrator. JA702 ("no version of the Agreement expressly prohibits the pursuit of class claims; indeed, there is no mention of class claims in any version of the Agreement."). As to implied terms regarding class arbitration, the parties disagreed. Plaintiffs argued that the broad language of the RESOLVE agreements constituted an implied contractual basis that the parties had agreed to authorize class arbitration. JA655 (Claimants' Clause Construction Opening Brief: "The description of the remedies that may be awarded pursuant to Sterling's Arbitration Clause demonstrates an intention to permit multi-party relief."). On the other hand, Sterling argued that the local-resolution clauses in the RESOLVE agreements (i.e., local venue, local law, local

arbitrator) were implied contractual bases that the parties had *not* agreed to authorize class arbitration. JA703.

The parties' disagreement was irrelevant, however, because the arbitrator ruled not based on any purported agreement by the parties to authorize class arbitration, but based on the arbitrator's finding that they had not agreed to prohibit it. Indeed, Appellants conceded this error at oral argument below:

> MR. SELLERS: I will concede that there's nothing explicit in the [arbitrator's] clause construction that provides for a finding of assent by the parties; and that the arbitrator, based on the legal standards that were applicable then, was focused on whether there was any intention to preclude it.

SA19. Thus, the stipulation in *Stolt-Nielsen* cannot distinguish the shared, fundamental error of the arbitrators in the two cases.

For the avoidance of doubt, we also address Appellants' confused argument that the stipulation in *Stolt-Nielsen* meant the arbitrators were *not* supposed to identify the correct rule of decision: "*Absent the parties' stipulation* in *Stolt-Nielsen* that no agreement was reached regarding class arbitration, *the Court would have endorsed* an inquiry by the panel 'whether the FAA, maritime law, or New York law contains a "default rule" under which an arbitration clause is construed as

allowing class arbitration in the absence of express consent.'" Appellants' Br. 20-21 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1768-69). Quite the opposite, the inquiry into a "default rule" was precisely what the Court said the arbitrators should have done: "Because the parties agreed their agreement was 'silent' in the sense that they had not reached any agreement on the issue of class arbitration, the arbitrators' proper task was to identify the rule of law that governs in that situation." *Stolt-Nielsen*, 130 S. Ct. at 1769.

Notably, the arbitrator here looked to governing state law for such a default rule and found none. JA703 ("the question has apparently not been addressed in any reported decision by an Ohio court."). Upon finding no default rule, the arbitrator proceeded to create the arbitrator's own rule based on the same erroneous premise as the arbitrators in *Stolt-Nielsen*: that the parties must have agreed to prohibit class arbitration or it presumptively would be available. It is that same "wrong question" here and in *Stolt-Nielsen* that led the arbitrator here to cite state law supportive of the inapposite premise that a prohibition on class arbitration could not be "inserted" if the parties had not agreed on such an "exception." JA703. For that reason, Appellants' statement that, "The Arbitrator below employed the very analysis that the Supreme Court would have supported absent the stipulation[,]" Appellants' Br. 21, is demonstrably false.

2. Broad Language in the RESOLVE Agreements

Appellants and their *amici* point to the broad language of the RESOLVE agreements as a purported contractual basis that the parties agreed to authorize class arbitration. *E.g.*, Appellants' Br. 20 ("The Arbitrator's conclusion that the RESOLVE Agreement provides for class arbitration flows from the essence of the contract, which includes broad language providing for arbitration of '*any* dispute, claim, or controversy' and grants the Arbitrator 'power to award *any* types of legal or equitable relief' that would be available in court.'"); EEOC Br. 18 ("Nothing in this broad language suggests that it applies only to claims and relief pursued in bilateral arbitrations.").

These arguments ignore the repeated point in *Stolt-Nielsen* that class arbitration is so different from traditional arbitration that to preserve the consent-based arbitration required by the FAA, authorization for class arbitration cannot be presumed from even broad agreements to arbitrate: "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to *submit their disputes* to an arbitrator." *Stolt-Nielsen*, 130 S. Ct. at 1775; *id.* at 1776 ("the differences between bilateral and class-action arbitration are too great for arbitrators to presume . . . consent to resolve *their disputes* in class proceedings.") (emphases added).

While broad submission of "any disputes or claims" and empowering an arbitrator broadly to grant "any relief or remedy" would, for example, enable an arbitrator to award punitive damages although not provided for by the parties, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60-61 (1995), class arbitration cannot be so presumed. *Cf. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1439 n.4 (2010) (statutory prohibition on class actions "addresses not the remedy, but the procedural right to maintain a class action."). That was the whole point of *Stolt-Nielsen*: class arbitration changes the very constitution of an arbitration and, therefore, can proceed only on the basis of mutual, affirmative authorization for such a fundamental divergence from traditional arbitration.

Here, the arbitrator did *not* find that RESOLVE's broad language was a contractual basis that the parties had agreed to authorize class arbitration (as Appellants concede, SA19) and for the reasons explained, that language could not support such a finding.

3. Sophistication of the Parties

Appellants and *amicus* EEOC attempt to distinguish *Stolt-Nielsen* based on the sophistication of the parties and their relative bargaining power. *E.g.*, Appellants' Br. 25 ("this doctrine [*contra proferentem*] applies when a party in a superior bargaining position drafts a form contract"); EEOC Br. 12 (referring to the

"parties' sophistication and equal bargaining power" in *Stolt-Nielsen*); EEOC Br. 19 ("the [RESOLVE] agreements are take-it-or-leave-it contracts drafted by the company. As a standardized agreement between parties with unequal bargaining power, any ambiguity should be interpreted strictly against the drafter . . . .") (internal quotation marks omitted).

The Court's mention of party sophistication in *Stolt-Nielsen* was in terms of incredulity that the arbitrators would nonetheless impose class arbitration with no showing of authorization by the parties. *Stolt-Nielsen*, 130 S. Ct. at 1775 ("Even though the parties are sophisticated business entities . . . the panel regarded the agreement's silence on the question of class arbitration as dispositive."). The Court never limited the FAA's affirmative-authorization requirement for class arbitration to agreements between sophisticated parties or parties with equal bargaining power. *E.g.*, *id.* at 1768; *id.* at 1782. Indeed, if the Court had imposed a sophistication/bargaining-power distinction, that would have been a significant departure from FAA precedent. *See Gilmer*, 500 U.S. at 33 (holding "[m]ere inequality in bargaining power" an insufficient basis for declining to enforce mandatory arbitration against employment-discrimination claims); *see also, e.g.*, *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 121 (2d Cir. 2010) ("As a general matter, even to the extent that the law recognizes that employers and individual employees do not possess equal bargaining power, the FAA certainly

does not preclude the enforcement of employment contracts which make employment conditional upon an employee's acceptance of mandatory arbitration.").

Even assuming the RESOLVE agreements were unconscionable, the result would be to hold them unenforceable, *e.g.*, *Ragone*, 595 F.3d at 121, not to impose class arbitration. Here, of course, Appellants and the EEOC concede that the RESOLVE agreements are not unconscionable. JA137-38 (Plaintiffs' Notice of Motion to Refer to Arbitration and Stay the Litigation); JA142 (Plaintiffs' Memorandum supporting same); EEOC Br. 12 (conceding RESOLVE agreements are not "adhesive or unconscionable" under Ohio law).

Likewise, as to *contra proferentem* and construing any purported ambiguity of the RESOLVE agreements against the drafter, Appellants conceded that the agreements are unambiguous. *E.g.*, JA654 (Claimants' Clause Construction Opening Brief: "When a contract is unambiguous, as is the case here . . . .").

4. The Omission of an Express Prohibition on Class Arbitration

Appellants and *amicus* EEOC attempt to exempt the RESOLVE agreements from the FAA's affirmative-authorization requirement for class arbitration based on "Sterling's conduct in deliberately declining to include language in the Agreement manifesting an intent to prohibit class arbitration despite its awareness that similar language in arbitration agreements had been construed to authorize

class arbitration." Appellants' Br. 12; EEOC Br. 21 ("this decision reflects an unsavory attempt by the company to lull employees into inadvertently waiving a procedural right that has proved to be important in the Title VII context.").

The arbitrator similarly viewed this point as particularly important, if not dispositive:

> Notably, Sterling acknowledges in its reply brief that it has deliberately not revised the RESOLVE Arbitration Agreement to include an express prohibition, despite numerous arbitral decisions that class claims are permitted in the absence of an express prohibition. Under these circumstances, construing the Agreement to contain a waiver of a significant procedural right would impermissibly insert a term for the benefit of one of the parties that it has chosen to omit from its own contract.

JA704.

The arbitrator's reliance on Sterling's decision not to include an express prohibition on class arbitration is a direct result of the arbitrator asking the wrong question throughout the award: whether the parties had agreed to prohibit class arbitration. But the FAA requires that class arbitration result from a contractual basis that the parties agreed to authorize such proceedings, so Sterling's omission

of an express prohibition cannot constitute affirmative authorization of class arbitration by the parties.

Stolt-Nielsen itself disposes of this issue, but a recent decision of this Court applying *Stolt-Nielsen* provides further support. In *Fensterstock v. Education Finance Partners*, 611 F.3d 124 (2d Cir. 2010), this Court considered the arbitration clause in a student loan agreement, which contained an express prohibition of class arbitration. The Court struck down the prohibition as unconscionable under California law, but the arbitration agreement remained due to a severability clause. *Id.* at 140. The Court held: "excising the Note's class action and class arbitration waiver clause leaves the Note silent as to the permissibility of class-based arbitration, and under *Stolt-Nielsen* we have no authority to order class-based arbitration." *Id.* at 141.

Of particular relevance here, *Fensterstock* aptly noted: "Our conclusion that a given agreement [i.e., the express prohibition of class arbitration] is invalid and unenforceable does not mean that the parties in fact reached the opposite agreement." *Id.* Similarly, Sterling's omission of an express prohibition on class arbitration does not mean the parties agreed to class arbitration.

B. The Employment-Discrimination Claims Here Do Not Warrant Departure from the FAA Requirement.

Relying primarily on *Gilmer*, *amicus* EEOC argues: "Unless the agreements here are read to permit class actions, the plaintiffs may be unable effectively to vindicate their Title VII rights through arbitration." EEOC Br. 23. The EEOC is incorrect for two reasons. First, *Gilmer* and its progeny hold that discrimination claims, including under Title VII, can be effectively vindicated through bilateral arbitration. Second, even assuming such claims could not be vindicated through traditional arbitration, the result would *not* be to compel class arbitration without the requisite contractual authorization, but instead to hold the arbitration agreement unenforceable against such claims.

In *Gilmer* itself, the Court found a mandatory arbitration clause enforceable against an age-discrimination claim under the Age Discrimination in Employment Act (ADEA), holding that arbitration would not prevent the employee from vindicating his statutory rights. *Gilmer*, 500 U.S. at 23, 35. Furthermore, the Court specifically rejected the employee's argument that arbitration could not effectively vindicate his statutory rights because arbitration did not provide for class actions and the ADEA explicitly provided for such proceedings. *Id.* at 32. The Court explained that "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the

[ADEA] provides for the possibility of bringing a collective action d[id] not mean that individual attempts at conciliation were intended to be barred." *Id.* (internal quotation marks and citation omitted). The Court also noted that arbitration would "not preclude the *EEOC* from bringing actions seeking class-wide and equitable relief," and pointed out that Gilmer had filed a charge with the EEOC. *Id.* Here, of course, the EEOC already is pursuing a parallel class action. Appellants' Br. 7.

Regarding pattern-or-practice claims, in particular, the EEOC argues that Title VII claimants may not be able to obtain statistical evidence to support their claims because it is "normally available only in class proceedings" and is "too costly" for individual plaintiffs to obtain. EEOC Br. 24-25. But in *Gilmer* the Court rejected the employee's complaint that the more limited discovery in arbitration would make it difficult to prove discrimination, noting that the employee had made "no showing" that the applicable discovery procedures would prove insufficient to allow ADEA claimants a fair opportunity to present their claims. *Gilmer*, 500 U.S. at 31.

The EEOC has likewise failed to support its assertion here that arbitrators "might well refuse to order the employer to produce the [] data" necessary to prove discrimination in a pattern-or-practice case. EEOC Br. 25. Indeed, this argument appears moot because Sterling already has produced such data. *See* Appellants' Br. 5 (referring to the EEOC's "Statistical analysis of pay and promotion data

provided by [Sterling]"). The EEOC's further claim that an arbitrator may refuse "to admit the evidence, finding it irrelevant," EEOC Br. 25, is wholly speculative and must be rejected as being "far out of step with [the Court's] [] strong endorsement of the federal statutes favoring arbitration" and reflecting a "suspicion of . . . the competence of arbitral tribunals." *Gilmer*, 500 U.S. at 30.

Furthermore, even if it would be more efficient to present statistical evidence in one consolidated proceeding, the FAA does not permit arbitrators or courts to consolidate arbitrations for sake of efficiency. Indeed, the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983), even when delay or duplication may result, *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

Similarly, the EEOC's argument that "even a sympathetic arbitrator might well refuse to issue the kind of broad injunctive and equitable relief that would be available in a class action," EEOC Br. 25, is unavailing. *Gilmer* rejected that argument, noting that the applicable rules did not restrict the relief an arbitrator could award. *Gilmer*, 500 U.S. at 32. Here, the RESOLVE agreements enable the arbitrator to award "any type of legal or equitable relief that would be available in a court of competent jurisdiction." JA600. And Sterling has stipulated that the arbitrator may award any relief. JA142.

Applying *Gilmer*, this Court, too, has consistently found mandatory arbitration agreements, like the RESOLVE agreements, to be sufficient to vindicate statutory rights, including under Title VII. *E.g.*, *Ragone*, 595 F.3d at 120 (Title VII); *Guyden v. Aetna, Inc.*, 544 F.3d 376, 379 (2d Cir. 2008) (Sarbanes-Oxley Act); *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 147 (2d Cir. 2004) (Title VII).

For all these reasons, the EEOC fails to establish any basis that plaintiffs cannot effectively vindicate their Title VII rights in traditional arbitration. And if plaintiffs could not, the answer under *Gilmer* would be to permit such claims to be litigated rather than arbitrated, *Gilmer*, 500 U.S. at 28, *not* to impose class arbitration without contractual authorization. Significantly, Appellants themselves never argue that they cannot vindicate their statutory rights through traditional arbitration, nor do they ever cite *Gilmer* or any of its progeny.[2]

The EEOC's arguments for class arbitration, which are plainly uncognizable under *Gilmer* and *Stolt-Nielsen*, boil down to a naked policy argument that traditional arbitration of employment-discrimination claims is a bad thing because,

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[2] Texts by professors supporting Appellants as *amici* confirm that Congress intended employment-discrimination claims to be subject to arbitration agreements. *See* LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 610 (4th ed. 2009) ("Congress endorsed arbitration and other alternative processes in the Civil Rights Act of 1991, and the Americans with Disabilities Act."); *see also* ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 799 (3d ed. 2002) ("at the time Congress passed the 1991 Act, *Gilmer* was the law. Congress must be presumed to have been aware of *Gilmer* . . . .").

"No one would be focusing on the big picture" and "there would be no effective judicial review of those decisions." EEOC Br. 26. But that is an argument to be made to Congress, not the courts.

C. Departure from the FAA Requirement Here Would Erode the Consensual Basis for, and Thereby Discourage, Arbitration.

The controlling principle of the FAA is that, "Arbitration under the Act is a matter of consent, not coercion." *Mastrobuono*, 514 U.S. at 57. In agreeing to bilateral arbitration, parties elect to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985). But class arbitration "changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 130 S. Ct. at 1775. Indeed, unexpected imposition of class arbitration so fundamentally alters the risk involved in the arbitration bargain that it can discourage arbitration altogether—a result that is both undesirable and directly contrary to the strong federal policy favoring arbitration.

The Supreme Court has long recognized and repeatedly underscored the benefits of traditional arbitration in the form of "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized

disputes." *Stolt-Nielsen*, 130 S. Ct. at 1775 (collecting cases). The Court has also made clear that these benefits do not "somehow disappear when transferred to the employment context." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). Indeed, such benefits may be "of particular importance" there. *Id.* Because employment litigation "often involves smaller sums of money than disputes concerning commercial contracts," *id.*, most employees simply cannot afford to pay the attorney's fees and other litigation costs for several years, RICHARD A. BALES, COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT 153-54 (1997). Even under a contingency-fee arrangement, the employee often must pay litigation expenses and put life on hold until the litigation is complete. *Id.* Contrary to the presumption of the arbitrator here that bilateral arbitration is "adverse to the employee," JA704, arbitrating employment disputes can be a beneficial, lower-cost alternative to litigation for both sides.

In addition, arbitration also offers employees a greater chance of a merits hearing and, thus, of having their grievances heard and resolved. "[N]o such guarantee exists in litigation where relatively few employees survive the procedural hurdles necessary to take a case to trial in the federal courts." *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1488 (D.C. Cir. 1997).

Imposition of class arbitration on an employer who has not consented to it transforms a process for resolving bilateral disputes into sprawling, high-stakes

quasi-litigation, thereby defeating the practical advantages of arbitration. The time- and cost-savings of traditional arbitration are certainly lost as the arbitrator "no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties." *Stolt-Nielsen*, 130 S. Ct. at 1776. Employment class actions, in particular, can involve thousands of class members and be extremely complex and time-consuming to defend. *E.g.*, *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 598 (9th Cir. 2010), *cert. granted*, No. 10-277 (U.S. Dec. 6, 2010).

Also, the commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited. *Stolt-Nielsen*, 130 S. Ct. at 1776. The significantly higher costs and exposure in class actions in turn create enormous pressure for defendants to settle rather than risk catastrophic loss. *See, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.") (citations and footnote omitted).

These increased costs and diminished benefits from class arbitration can deter employers from agreeing to arbitrate altogether. *See, e.g.*, *Shroyer* v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 986-87 (9th Cir. 2007) (giving effect

to severability provision under which entire arbitration clause became void when express waiver of class arbitration was found unenforceable); *cf. In re Am. Express Merchs.' Litig.*, 554 F.3d 300, 321 (2d Cir. 2009), *vacated sub nom. Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010) ("in light of the fact that Amex declared at oral argument that it would reconsider its intention to proceed to arbitration should this Court not enforce the class action waiver, we remand to the district court to allow Amex the opportunity to withdraw its motion to compel arbitration.").

The consequence of such deterrence would be that parties like those here and the members of the Chamber and RLC would lose the substantial benefits of arbitration and would be left without a cost- and time-efficient alternative to onerous litigation, undermining Congress's "liberal federal policy favoring arbitration agreements." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (internal quotation marks omitted). Indeed, the Supreme Court has explicitly cautioned courts not to "chip away at [the FAA] by indirection," *Circuit City*, 532 U.S. at 122, and that caution should be especially heightened where the Court has spoken so plainly against involuntary class arbitration.

CONCLUSION

For the foregoing reasons, *amici curiae* the Chamber and RLC respectfully recommend that the district court's order vacating the arbitrator's award be affirmed.

Respectfully submitted,

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This brief complies with the type-volume limitations of Rules 29(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 7,000 words, excluding parts exempted by Rule 32(a)(7)(B)(iii). It also complies with the typeface and style requirements of Rules 32(a)(5) and -(6) because it was typed in proportionally spaced typeface using Microsoft Word, 14-point Times New Roman type.

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