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Lamps Plus, Inc. v. Varela: Dark Times Ahead for Class Arbitrations

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NOTES

Lamps Plus, Inc. v. Varela: Dark Times Ahead for Class Arbitrations

JOANNA NIWOROWSKI*

The Federal Arbitration Act (“FAA”) was enacted in 1925 to combat judicial hostility towards arbitration. Over the years, the U.S. Supreme Court has interpreted this statute as evidencing a pro-arbitration policy and has upheld the use of arbitration clauses in a variety of contracts. Unfortunately, while the FAA was able to overcome the hostility towards arbitration, it was not able to stop the Court from finding a new target: class arbitrations.

This Comment analyzes the Supreme Court’s recent decision in Lamps Plus, Inc. v. Varela. In critiquing the Court’s continued erosion of the availability of class arbitrations, this Comment considers the negative effects of the pro-business decision on employees and consumers who are subject to arbitration clauses. This Comment concludes that congressional action is needed to reverse the years of flawed class arbitration jurisprudence.

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INTRODUCTION

Nearly a decade has passed since the Supreme Court decided in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*¹ that to compel class arbitration under the Federal Arbitration Act² (the “FAA” or the “Act”) there must be a “contractual basis for concluding that the part[ies] *agreed* to do so.”³ The Court in that case concluded that the silence of the agreement at issue was not enough to compel arbitration.⁴ The decision, however, left a few unanswered questions. The Court did not address what would happen if the agreement was not silent but merely ambiguous.⁵ Nor

¹ *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010).

² Federal Arbitration Act, 9 U.S.C. §§ 1–16.

³ *Stolt-Nielsen*, 559 U.S. at 684.

⁴ *Id.* at 687.

⁵ *See id.* at 687 n.10.

did the Court specify what it meant exactly by a “contractual basis” and what was necessary in an agreement to meet that threshold.⁶ These questions were left up in the air until the Supreme Court decided *Lamps Plus, Inc. v. Varela* in 2019.⁷

In *Lamps Plus*, the Court was once again faced with the question of whether to compel class arbitration.⁸ The Court had to come face to face with the questions it left unanswered in *Stolt-Nielsen*⁹—“whether, consistent with the FAA, an ambiguous agreement can provide the necessary ‘contractual basis’ for compelling class arbitration.”¹⁰ It held that ambiguity, like silence, cannot constitute a sufficient contractual basis for compelling class arbitration.¹¹

The *Lamps Plus* decision is a continuation of the Court’s flawed class arbitration jurisprudence. This Comment aims to analyze the reasoning of the *Lamps Plus* Court to point out that, while the decision is a natural progression of the Court’s recent arbitration jurisprudence, it rests on an unsound foundation. The *Lamps Plus* Court’s decision was predictable in its incorrect characterization of class arbitration as less efficient than individual arbitration and as inherently incompatible with the goals of the FAA.¹² Furthermore, this Comment argues that the Court should not have so hastily preempted the state contract rule known as *contra proferentem* (the “anti-drafter rule”), a widely used, neutral contract rule that dictates reading an ambiguous contract against the drafter.¹³

This Comment’s main goal is to point out the potential negative impact of this decision on employees and consumers—individuals with relatively little bargaining power.¹⁴ The use of

⁶ *See id.*

⁷ *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).

⁸ *See id.* at 1412.

⁹ *Stolt-Nielsen*, 559 U.S. at 662.

¹⁰ *Lamps Plus*, 139 S. Ct. at 1415 (quoting *Stolt-Nielsen*, 559 U.S. at 684).

¹¹ *Id.* at 1417.

¹² *See id.* at 1415–17.

¹³ 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 32:12 (4th ed. 2012).

¹⁴ *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L. J. 2804,

mandatory arbitration clauses in employment and consumer contracts has been on the rise in recent years.¹⁵ The Supreme Court has previously upheld the use of class action waivers in arbitration agreements, making it easier for employers and businesses to prevent class arbitrations from being brought.¹⁶ The effect of *Lamps Plus* will be to further reduce the availability of class arbitrations—even where there is no explicit class waiver—with little hope for employees or consumers to be able to negotiate for this procedural option.

Part I of this Comment lays out basic background information about the Federal Arbitration Act and discusses two significant Supreme Court cases that form the basis for the holding in *Lamps Plus*. Part II lays out the relevant background facts and procedural history of *Lamps Plus* as well as the reasoning of the majority, concurring, and dissenting opinions. Part III analyzes the majority's decision, discussing its basis in legislative history, the majority's view of arbitration, and the preemption of the *contra proferentem* rule. Part III concludes by discussing the decision's future implications on employees and consumers and calls for congressional action to address the issues surrounding the FAA and class arbitrations.

2863–74 (2015) (discussing expansion of FAA to parties with little bargaining power).

¹⁵ See CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS 9–10 (2015) (summarizing that “[t]ens of millions of consumers use consumer financial products or services” that are subject to mandatory arbitration and nearly all of which include class waivers); ALEXANDER J.S. COLVIN, ECON. POL’Y INST., THE GROWING USE OF MANDATORY ARBITRATION, 1–2 (2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/> (discussing results of a study that found that amount of workers subject to mandatory arbitration has more than doubled since early 2000s and now exceeds fifty-five percent).

¹⁶ See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346–48, 352 (2011) (preempting a state law that conditioned enforceability of consumer contract arbitration agreements on availability of class arbitration procedures).

I. BACKGROUND

A. *The Federal Arbitration Act and the Preemption Doctrine*

The Federal Arbitration Act¹⁷ was enacted in 1925 to make arbitration agreements “in any maritime transaction or . . . contract evidencing a transaction involving commerce” valid and enforceable.¹⁸ Section 2 of the FAA provides that:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.¹⁹

Through this Section, Congress intended to ensure arbitration agreements were generally valid and enforceable by placing them “upon the same footing as other contracts, where [they] belong”²⁰ The motivation behind the passage of the FAA was to combat judicial hostility towards arbitration that would often interfere with enforcement of contracts that contained arbitration clauses.²¹

¹⁷ 9 U.S.C. §§ 1–16.

¹⁸ *Id.* at § 2; JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RSCH. SERV., R44960, MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT 1 (2017).

¹⁹ 9 U.S.C. § 2; *see also* *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (stating that Section 2 of FAA is “primary substantive provision of the Act”).

²⁰ H.R. REP. NO. 68-96, at 1 (1924) (“The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be the subject of litigation in the Federal courts.”); *see also* S. REP. NO. 68-536, at 2 (1924) (“The purpose of the bill is clearly set forth in section 2”).

²¹ H.R. REP. NO. 68-96, at 1–2; SHIMABUKURO & STAMAN, *supra* note 18, at 2.

Over the years, the Supreme Court has interpreted this statute as evidencing “a national policy favoring arbitration” that “withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”²² The Court has also stated that a “fundamental principle” of the FAA is that “arbitration is a matter of contract”²³ and that the statute requires courts to “enforce arbitration agreements according to their terms.”²⁴

Generally, under the FAA, state contract rules govern arbitration clauses and their interpretation and enforcement.²⁵ However, the Court has, at times, preempted state contract law that interfered with arbitration contracts and was inconsistent with the goals and purposes of the FAA.²⁶ The “saving clause” in Section 2 of the FAA²⁷—“save upon such grounds as exist at law or in equity for the revocation of any contract”²⁸—has been interpreted by the Supreme Court to limit the possible grounds on which a court may deny the enforcement of an arbitration provision.²⁹ The Court has interpreted the saving clause to mean that “generally applicable

²² *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *see also* Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 97 (2012) (discussing how Court’s policy favoring arbitration turned arbitration agreements into “super contracts”).

²³ *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010).

²⁴ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018).

²⁵ *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019); SHIMABUKURO & STAMAN, *supra* note 18, at 5.

²⁶ SHIMABUKURO & STAMAN, *supra* note 18, at 5; *see also* *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) (“[S]tate law may nonetheless be pre-empted to the extent that it actually conflicts with federal law—that is, to the extent that it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941))); Maureen A. Weston, *The Accidental Preemption Statute: The Federal Arbitration Act and Displacement of Agency Regulation*, 5 Y.B. ARB. & MEDIATION 59, 64 (2013) [hereinafter Weston, *The Accidental Preemption Statute*] (“Lacking an express preemptive intent, FAA preemption is implied based on the broadest form of ‘conflict preemption,’ which generally warrants narrow construction.”).

²⁷ *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

²⁸ 9 U.S.C. § 2.

²⁹ SHIMABUKURO & STAMAN, *supra* note 18, at 5; *see also* Wilson, *supra* note 22, at 107.

contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2” of the FAA.³⁰ Thus, arbitration contracts may be held to be invalid and unenforceable under state law principles but only through such principles that are generally applicable to all contracts and are not otherwise hostile to arbitration agreements.³¹ The saving clause, the Court has stated, does not intend “to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives,” namely, the goal of ensuring the enforcement of arbitration agreements.³²

B. *Supreme Court Precedent Underlying Lamps Plus*

1. *STOLT-NIELSEN V. ANIMALFEEDS*

One of the key precedents underlying the *Lamps Plus* decision was *Stolt-Nielsen*, which involved a dispute between a shipping company, Stolt-Nielsen S.A., and its customers over alleged anti-trust violations.³³ AnimalFeeds International Corp., one of Stolt-Nielsen’s customers, shipped goods around the world pursuant to a standard maritime contract known as a “charter party,” which contained an arbitration clause.³⁴ After the Second Circuit held that the parties had to arbitrate their dispute, AnimalFeeds served Stolt-Nielsen with a demand for class arbitration, seeking to bring a

³⁰ *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

³¹ See *Concepcion*, 563 U.S. at 339 (“[The] saving clause permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” (quoting *Doctor’s Assocs.*, 517 U.S. at 687)); *Doctor’s Assocs.*, 517 U.S. at 687 (“Courts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.”).

³² See *Concepcion*, 563 U.S. at 343; see also Weston, *The Accidental Preemption Statute*, *supra* note 26, at 64 (“Since *Southland*, the preemption doctrine has become an oft-used mechanism for the Supreme Court to overturn state legislation that not only invalidate arbitration agreements or single out arbitration agreements for different treatment than other contracts, but increasingly to overturn state laws deemed as ‘hostile’ towards arbitration.”).

³³ *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 666–67 (2010).

³⁴ *Id.*

class action on behalf of all the customers that purchased transportation services from Stolt-Nielsen.³⁵ The parties stipulated that the “arbitration clause was ‘silent’ with respect to class arbitration” and entered into a supplemental agreement that provided that the question of whether class arbitration was permitted was to be submitted to a panel of arbitrators.³⁶ The panel concluded that the particular arbitration clause did allow class arbitration proceedings.³⁷

The Supreme Court was presented with the question of “whether imposing class arbitration on parties whose arbitration clauses are ‘silent’ on that issue is consistent with the” FAA.³⁸ The Court held that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”³⁹ Justice Alito, writing for the majority, reasoned that, because a foundational principle of the FAA is that “arbitration is a matter of consent,” an arbitrator may not infer an implicit agreement to permit class arbitration solely from the arbitration agreement.⁴⁰ The majority explained that class arbitration is drastically different from bilateral arbitration, which has the benefits of “lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”⁴¹ Thus, the parties’ silence on the issue of class proceedings is not enough to find consent to class arbitration.⁴²

In her dissent, Justice Ginsburg pointed out that, while “the Court apparently demands contractual language one can read as affirmatively authorizing class arbitration,” the Court’s decision was seemingly limited as it “d[id] not insist on express consent to class arbitration.”⁴³ In addition, she noted that the holding “apparently spare[d] from its affirmative-authorization requirement con-

³⁵ *Id.* at 667–68.

³⁶ *Id.* at 668.

³⁷ *Id.* at 669.

³⁸ *Id.* at 666.

³⁹ *Id.* at 684.

⁴⁰ *See id.* at 684–85; *see also* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) (“Arbitration under the Act is a matter of consent, not coercion . . .”).

⁴¹ *Stolt-Nielsen*, 559 U.S. at 685–87.

⁴² *See id.*

⁴³ *Id.* at 697–99 (Ginsburg, J., dissenting).

tracts of adhesion presented on a take-it-or-leave-it basis.”⁴⁴ These limitations seemed to be true, at least until the Court’s decision in *Lamps Plus* this year.

2. *AT&T MOBILITY V. CONCEPCION*

Another significant case underlying the *Lamps Plus* decision was *AT&T Mobility, LLC v. Concepcion*.⁴⁵ The Court in *Concepcion* held that the FAA preempted a California judicial rule that classified most class arbitration waivers in consumer contracts as unconscionable.⁴⁶ The dispute in the case arose between AT&T and a class of its customers, who alleged that AT&T had “engaged in false advertising and fraud by charging sales tax on phones it advertised as free.”⁴⁷ Vincent and Liza Concepcion, whose complaint was consolidated with the class, had entered into a contract with AT&T for the sale and service of cellphones, which included an arbitration clause and a class arbitration waiver.⁴⁸ When AT&T moved to compel arbitration of the Concepcions’ claim, the Concepcions opposed arbitration, arguing that “the arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed classwide procedures.”⁴⁹

The Supreme Court was faced with the question of “whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.”⁵⁰ Specifically, the Court was considering California’s “*Discover Bank* rule,” which deemed most class action waivers in consumer contracts unconscionable⁵¹ and which the courts below applied to deem the arbitration clause at issue unconscionable.⁵² The Court, considering the saving clause, reasoned that, “[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting

⁴⁴ *Id.* at 699.

⁴⁵ *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011).

⁴⁶ *Id.* at 340, 352.

⁴⁷ *Id.* at 337.

⁴⁸ *Id.* at 336–37.

⁴⁹ *Id.* at 337–38.

⁵⁰ *Id.* at 336.

⁵¹ *Id.* at 340.

⁵² *Id.* at 338.

rule is displaced by the FAA.”⁵³ But where a generally applicable doctrine, such as duress or unconscionability, “is alleged to have been applied in a fashion that disfavors arbitration,” the inquiry is “more complex.”⁵⁴ The Court stated that, even though “§ 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”⁵⁵ In the present case, because “the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA,” the state law rule interfered with the FAA and had to be preempted.⁵⁶

The majority saw California’s rule as interfering with arbitration for three reasons. First, the Court stated that switching from bilateral arbitration to class proceedings would not allow the parties to take advantage of the fundamental advantages of bilateral arbitration, namely its informality.⁵⁷ This would make the whole process “slower, more costly, and more likely to generate procedural morass than final judgment.”⁵⁸ The Court saw the point of arbitration as allowing the parties to have a specially designed process that allows for efficient dispute resolution and where informality, which translated into greater speed of resolution and a reduction in costs, was desirable.⁵⁹ Second, the Court found that class arbitration required procedural formality to ensure that absent class members were afforded their due process and would be

⁵³ See *id.* at 339–41 (citing *Preston v. Ferrer*, 552 U.S. 346, 353 (2008)).

⁵⁴ *Id.* at 341; see also *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (noting that FAA may preempt even grounds that were traditionally considered to exist “at law or in equity for the revocation of *any* contract” and that courts cannot “rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot”).

⁵⁵ *Concepcion*, 563 U.S. at 343.

⁵⁶ *Id.* at 344, 352.

⁵⁷ *Id.* at 348.

⁵⁸ *Id.*

⁵⁹ *Id.* at 344–45; see also *Preston v. Ferrer*, 552 U.S. 346, 357–59 (2008) (noting that main objective of an arbitral agreement is “streamlined proceedings and expeditious results,” and that preempting certain state law rules would “hinder speedy resolution of the controversy”).

bound by the judgment.⁶⁰ It was unlikely, the Court argued, that Congress intended to give arbitrators the responsibility of ensuring that absent members' due process rights were satisfied.⁶¹ Finally, the Court found that arbitration greatly increased the risks for defendants because class arbitration carried much higher stakes for defendants with little chance for effective judicial review of the arbitration decision.⁶² Thus, because it "st[ood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the California state law rule was preempted by the FAA.⁶³

The *Concepcion* decision invoked a notable dissent from Justice Breyer. Justice Breyer disagreed with the majority's assertion that the California law was inconsistent with the FAA and its primary objective.⁶⁴ He saw the rule as an application of the general principle of unconscionability that, by its terms, would have applied to any contract as required by the FAA.⁶⁵ He also saw the rule as being consistent with the purpose behind the Act, pointing out why he believed the majority's view of the FAA's purpose was skewed.⁶⁶ According to Justice Breyer, the purpose behind the FAA has been described by the Court as "one of 'ensur[ing] judicial enforcement' of arbitration agreements."⁶⁷ Justice Breyer points out that Congress's intent was to combat the judicial hostility towards arbitration that was prevalent before the Act's passage, a goal Congress sought to achieve by "placing agreements to arbitrate 'upon the same footing as other contracts.'"⁶⁸ Justice Breyer further argued that the California law was consistent with Section

⁶⁰ *Concepcion*, 563 U.S. at 349.

⁶¹ *Id.*

⁶² *Id.* at 350–51.

⁶³ *Id.* at 352 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁶⁴ *Id.* at 357 (Breyer, J., dissenting).

⁶⁵ *See id.* at 358–59.

⁶⁶ *See id.* at 359–62.

⁶⁷ *See id.* at 359 (alteration in original) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985)); *see also Dean Witter Reynolds*, 470 U.S. at 219 ("We . . . reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.").

⁶⁸ *Concepcion*, 563 U.S. at 360 (Breyer, J., dissenting); *see also S. REP. NO. 68-536*, at 2 (1924) (noting that purpose of FAA is "clearly set forth in section 2" of Act).

2, and thus the FAA's purpose, because it put all agreements on the same footing by placing the same limitation on both arbitration and litigation.⁶⁹ He also went on to question the majority's assertion that "individual, rather than class, arbitration is a 'fundamental attribut[e]' of arbitration."⁷⁰ He pointed out that class arbitration may have certain advantages, such as being more expeditious than class actions in court and more efficient than thousands of separate proceedings.⁷¹ Class arbitration may also preserve the claimants' right to pursue small-dollar claims where they would have to otherwise abandon them due to the high cost of individual arbitration.⁷² Justice Breyer concluded that there was little support or reason for the preemption of the state law.⁷³

II. LAMPS PLUS, INC. V. VARELA

A. *Background Facts and Procedural Posture*

Lamps Plus involved a dispute between the company Lamps Plus and its employees.⁷⁴ In 2016, one of the company's employees was tricked by a hacker, who had impersonated a company official, into disclosing the tax information of about 1,300 other Lamps Plus employees.⁷⁵ Soon after the incident, a fraudulent tax return was filed in the name of Frank Varela, one of the Lamps Plus employees whose information was hacked.⁷⁶

⁶⁹ See *Concepcion*, 563 U.S. at 362 (Breyer, J., dissenting).

⁷⁰ *Id.* (alteration in original).

⁷¹ *Id.* at 363.

⁷² *Id.* at 365–66. Justice Breyer's dissent also highlighted that the Court had previously authorized complex arbitration proceedings, such as antitrust claims in an international transaction in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and had upheld state laws that in effect slowed down arbitration, such as a California state law staying arbitration until the resolution of related litigation in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), further calling into doubt the majority's assertions that arbitration is not compatible with class proceedings. See *Concepcion*, 563 U.S. at 366 (Breyer, J., dissenting).

⁷³ See *Concepcion*, 563 U.S. at 367 (Breyer, J., dissenting).

⁷⁴ *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412–13 (2019).

⁷⁵ *Id.* at 1412.

⁷⁶ *Id.*

Many of the employees, including Frank Varela, had signed an arbitration agreement when beginning their employment at Lamps Plus.⁷⁷ The arbitration clause stated that “arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to [the employee’s] employment.”⁷⁸ Nevertheless, Varela brought a suit in the United States District Court for the Central District of California, raising both federal and state law claims on behalf of a putative class of other employees who had been affected by the data breach.⁷⁹ In response, Lamps Plus moved for an order to compel arbitration in accordance with the arbitration agreement to compel individual, rather than class, arbitration and to dismiss the pending lawsuit.⁸⁰ The Central District of California granted the motion to compel and dismissed the suit without prejudice but compelled class arbitration.⁸¹

Lamps Plus appealed the authorization of class arbitration, but the Ninth Circuit affirmed the district court’s ruling.⁸² The Ninth Circuit reasoned that, although the arbitration agreement at issue did not expressly mention class arbitration, the issue was not controlled by *Stolt-Nielsen*.⁸³ because there was no stipulation here as to the silence of the arbitration clause with respect to class arbitration.⁸⁴ In addition, the mere failure of the agreement to mention class proceedings was not the silence that *Stolt-Nielsen* found to be dispositive.⁸⁵ The Ninth Circuit, instead, found the arbitration agreement to be ambiguous in regard to class arbitration.⁸⁶ The Ninth Circuit applied California law, which dictated that, where a

⁷⁷ *Id.* at 1413.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010).

⁸⁴ *Lamps Plus*, 139 S. Ct. at 1413.

⁸⁵ *Id.*

⁸⁶ *See id.* The Ninth Circuit considered both parties’ arguments. *Id.* On one hand, Lamps Plus argued that the phrasing of the agreement contemplated “purely binary claims.” *Id.* On the other hand, Varela argued that other phrases were ambiguous enough to permit class arbitration, such as the phrase “arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment.” *Id.*

contract is ambiguous, the court should construe the ambiguity against the drafter of the contract.⁸⁷ Construing the contract in favor of Varela and against Lamps Plus, the drafter of the contract, the Court authorized class arbitration.⁸⁸ Thereafter, Lamps Plus petitioned for a writ of certiorari, arguing that the Ninth Circuit did not follow the controlling precedent of *Stolt-Nielsen*.⁸⁹

B. *The Majority Opinion*

After discussing the Court's jurisdiction and parties' standing to appeal, the majority, led by Chief Justice Roberts, focused its discussion on the arbitration agreement at issue.⁹⁰ The Court deferred to the Ninth Circuit's interpretation and application of state law and accepted that the agreement at issue was "ambiguous" on the issue of class arbitration.⁹¹ Thus, the Court saw the question at issue as "whether, consistent with the FAA, an ambiguous agreement can provide the necessary 'contractual basis' for compelling class arbitration."⁹² For the reasons discussed below, the Court held that, based on *Stolt-Nielsen*,⁹³ an ambiguous agreement could not provide sufficient contractual basis.⁹⁴

The Court's primary basis for its decision was that, because class arbitration is so different from individualized arbitration and undermines the benefits of individual arbitration, the FAA requires more than ambiguity to ensure the parties actually agreed to class arbitration.⁹⁵ The majority began by pointing out that the FAA requires the enforcement of arbitration agreements according to their

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See id.* at 1414–15.

⁹¹ *Id.* ("In California, an agreement is ambiguous 'when it is capable of two or more constructions, both of which are reasonable.'" (quoting *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670, 672 (9th Cir. 2017), *vacated*, 771 F. App'x 418 (9th Cir. 2019) (mem.)).

⁹² *Id.* at 1415 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010)).

⁹³ *See generally* 559 U.S. at 684 ("[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.").

⁹⁴ *Lamps Plus*, 139 S. Ct. at 1415.

⁹⁵ *Id.*

terms.⁹⁶ Usually, the Court stated, courts can accomplish this by relying on state contract law.⁹⁷ However, if the state law interferes or “‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives’ of the FAA,” then the state law is preempted by the Act.⁹⁸ The Court framed the present issue as the conflict between the California state contract law regarding ambiguity and a fundamental principle of the FAA, “namely, that arbitration ‘is a matter of consent, not coercion.’”⁹⁹ According to the Court, courts and arbitrators aspire to carry out parties’ intentions.¹⁰⁰ To do so, the majority remarked, the decision maker must recognize the “‘fundamental’ difference” between class arbitration and the traditional, individual arbitration “envisioned by the FAA.”¹⁰¹ The majority framed individual arbitration as a process that parties agree to in order to enjoy the benefits of private dispute resolution.¹⁰² These benefits, the Court said, are “lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”¹⁰³ In contrast, the majority saw class arbitration as lacking those benefits, “sacrific[ing] the principal advantage of arbitration—its informality—and mak[ing] the process slower, more costly, and more likely to generate procedural morass than final judgment.”¹⁰⁴ The Court, following its previous reasoning from *Stolt-Nielsen*, concluded that, “because of these ‘crucial differences’ between individual and class arbitration . . . there [wa]s ‘reason to doubt the parties’ mutual consent to

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011)).

⁹⁹ *Id.* (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 681 (2010)).

¹⁰⁰ *Id.* at 1416.

¹⁰¹ *Id.*

¹⁰² *See id.*

¹⁰³ *Id.* (quoting *Stolt-Nielsen*, 559 U.S. at 685).

¹⁰⁴ *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011)); *see also* *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018) (noting that, with class proceedings, “the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace”).

resolve disputes through classwide arbitration.”¹⁰⁵ Thus, like the silence that was found insufficient in *Stolt-Nielsen*, ambiguity did not provide a sufficient contractual basis for the Court to conclude that the parties agreed to give up the benefits of individual arbitration and to permit class arbitration proceedings.¹⁰⁶

The majority’s decision rests on the FAA’s preemption of the California contract law.¹⁰⁷ The California law at issue was based on the doctrine of *contra proferentem*.¹⁰⁸ The majority explained that the rule was one of “last resort,” applied only once other forms of interpretation were exhausted.¹⁰⁹ In addition, the rule resolves an ambiguity on the basis of public policy factors rather than the parties’ intentions.¹¹⁰ Because the rule is used when a court cannot determine the intentions of the parties, the Court reasoned that the use of this doctrine to permit class arbitration is “inconsistent with ‘the foundational FAA principle that arbitration is a matter of consent.’”¹¹¹ The Court also noted that it did not matter that the doctrine applied with equal force to all types of contracts as long as the doctrine interfered with the fundamental attributes of arbitration and the purpose of the FAA.¹¹² The FAA, the Court remarked, provides the default rule for resolving contractual ambiguities in arbitration agreements.¹¹³

Thus, the majority concluded that ambiguity in an arbitration agreement does not constitute a sufficient contractual basis to find consent to class arbitration and that the doctrine of *contra*

¹⁰⁵ *Lamps Plus*, 139 S. Ct. at 1416 (quoting *Stolt-Nielsen*, 559 U.S. at 685–867).

¹⁰⁶ *See id.* at 1416–17.

¹⁰⁷ *See id.* at 1417–19.

¹⁰⁸ *Id.* at 1417.

¹⁰⁹ *Id.* (quoting 3 A. CORBIN, CONTRACTS § 559 at 268–70 (1960)).

¹¹⁰ *Id.*

¹¹¹ *See id.* at 1418 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684 (2010)); *see also* *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018) (“[C]ourts may not allow a [state] contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties’ consent.”); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) (“[C]lass arbitration, to the extent it is manufactured by [a state law] rather than consen[t], is inconsistent with the FAA.”).

¹¹² *Lamps Plus*, 139 S. Ct. at 1418.

¹¹³ *Id.* at 1419.

proferentem could not be used as a substitute for an affirmative contractual basis showing that the parties agreed to class proceedings.¹¹⁴

C. *The Concurring Opinion*

In his concurrence, Justice Thomas agreed with the majority's application of FAA precedent, although he read the arbitration agreement as silent and only contemplating bilateral arbitration.¹¹⁵ He wrote separately, however, to note his continued skepticism of the Court's implied preemption of state law where, as here, the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA."¹¹⁶

D. *The Dissenting Opinions*

1. JUSTICE GINSBURG

Although she joined Justice Kagan's dissent in full, Justice Ginsburg wrote separately to emphasize the Court's divergence from the FAA's fundamental principle that "arbitration is a matter of consent, not coercion."¹¹⁷ Justice Ginsburg pointed out not only that the intention was for the Act to serve a limited purpose but also that it was not meant to be used for contracts where one party has limited bargaining power, such as in consumer and employment contracts.¹¹⁸ She pointed out that the effect of the Court ap-

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1419–20 (Thomas, J., concurring).

¹¹⁶ *Id.* at 1420 (quoting *id.* at 1415 (majority opinion)); see also *Wyeth v. Levine*, 555 U.S. 555, 587 (2009) (Thomas, J., concurring) ("My review of this Court's broad implied pre-emption precedents, particularly its 'purposes and objectives' pre-emption jurisprudence, has increased my concerns that implied pre-emption doctrines have not always been constitutionally applied. Under the vague and 'potentially boundless' doctrine of 'purposes and objectives' pre-emption . . . the Court has pre-empted state law based on its interpretation of broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not contained within the text of federal law." (citing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 907–08 (2000) (Stevens, J., dissenting))).

¹¹⁷ *Lamps Plus*, 139 S. Ct. at 1420 (Ginsburg, J., dissenting) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010)).

¹¹⁸ See *id.*

plying the FAA to these contracts has been to impose mandatory arbitration on employees and consumers with “no genuine choice in the matter.”¹¹⁹ It also precluded these individuals from being able to come together to seek remedies as a class.¹²⁰ As a consequence, she noted, employees and consumers are faced with obstacles in obtaining relief, especially in circumstances where the situation “cries out for collective treatment” precisely because individual claims would be costly to bring, like in the present case.¹²¹ Justice Ginsburg called out the “irony of invoking ‘the first principle’ that ‘arbitration is strictly a matter of consent’ to justify imposing individual arbitration on employees who surely would not choose to proceed solo,” and she concluded that immediate congressional action was necessary to correct the Court’s expansion of the FAA.¹²²

2. JUSTICE SOTOMAYOR

In her brief dissent, Justice Sotomayor asserted that the “Court went wrong years ago in concluding that a ‘shift from bilateral arbitration to class-action arbitration’ imposes such ‘fundamental changes’ that class-action arbitration ‘is not arbitration as envisioned by’” the FAA.¹²³ She also disagreed with the Court’s preemption of the state law and noted that the Court should not have acted so hastily to preempt a “neutral principle of state con-

¹¹⁹ *See id.* at 1420–21.

¹²⁰ *See id.* (“The Court has relied on the FAA . . . to deny to employees and consumers ‘effective relief against powerful economic entities.’ Arbitration clauses, the Court has decreed, may preclude judicial remedies even when submission to arbitration is made a take-it-or-leave-it condition of employment or is imposed on a consumer given no genuine choice in the matter.” (quoting *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 476 (2015) (Ginsburg, J., dissenting))).

¹²¹ *See id.* at 1421.

¹²² *Id.* at 1421–22 (citation omitted) (quoting *id.* at 1415–16 (majority opinion)).

¹²³ *Id.* at 1427 (Sotomayor, J., dissenting) (citations omitted) (first quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 686 (2010); and then quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011)).

tract law” without making sure that the preemption was truly necessary.¹²⁴

3. JUSTICE KAGAN

As one of the few Justices who viewed the agreement as clearly permitting class arbitration, Justice Kagan began her dissent by focusing on specific phrases of the arbitration agreement at issue.¹²⁵ In her view, the terms and phrases used in the agreement were broad enough to cover both individual and class arbitration.¹²⁶

However, Justice Kagan pointed out that, even if the Court was correct about the contract’s ambiguity, applying the “plain-vanilla rule of contract interpretation, applied in California as in every other State,” should have yielded the simple result of permitting class arbitration.¹²⁷ In Justice Kagan’s view, the “anti-drafter canon” is exactly the kind of state contract rule that the FAA contemplates will control interpretations of arbitration clauses.¹²⁸ She highlighted previous decisions where the Court itself had pointed out that the proper course was for the Court to apply state contract principles except where they discriminated against arbitration agreements.¹²⁹ Where a state contract law treated arbitration

¹²⁴ *Id.* at 1427–28 (Sotomayor, J., dissenting) (“This Court normally acts with great solicitude when it comes to the possible pre-emption of state law, but the majority today invades California contract law without pausing to address whether its incursion is necessary. Such haste is as ill advised as the new federal common law of arbitration contracts it has begotten.” (citation omitted)).

¹²⁵ *See id.* at 1428–29 (Kagan, J., dissenting).

¹²⁶ *See id.* For example, Justice Kagan construed the phrase “any and all disputes, claims, or controversies” as “encompass[ing] both their individual and their class variants.” *Id.* at 1428. The employee’s class arbitration was a “‘dispute, claim or controversy’ that belonged in arbitration.” *Id.* at 1429. Similarly, the agreement stated that arbitration “shall be in lieu of any and all lawsuits or other civil legal proceedings relating to [the employee’s] employment.” *Id.* Justice Kagan interpreted these phrases from the agreement as allowing arbitration of any kind of action that could have been brought in court. *See id.* at 1428–29.

¹²⁷ *Id.* at 1428.

¹²⁸ *See id.* at 1430–31.

¹²⁹ *See id.* (“[T]he construction of those contractual terms . . . is ‘a question of state law, which this Court does not sit to review . . .’ [e]xcept when state contract law discriminates against arbitration agreements.” (quoting Volt Info.

agreements worse off than other contracts, it would be preempted because it would stand as an obstacle to achieving the FAA's purpose of placing arbitration agreements on the same footing as all other contracts.¹³⁰ But in this case, Justice Kagan noted that the anti-drafter rule is neutral, does not attempt to subtly target arbitration agreements, and applies and treats all conceivable contracts the same.¹³¹

Justice Kagan concluded that the only basis for the majority's holding was its hostility towards class arbitration.¹³² It was only because this case involved class arbitration, she argued, that the majority ignored the parties' contract and neutral default rule and preempted the state law.¹³³ Justice Kagan concluded that the Court "should instead—as the FAA contemplates—have left the parties' agreement, as construed by state law, alone."¹³⁴

III. COMMENT ON THE *LAMPS PLUS* DECISION

A. *A Look at the Legislative History and the Court's Hostility Towards Class Arbitration*

The *Lamps Plus* decision is an unfortunate continuation of the Court's hostility towards class arbitration that has been the basis for many previous decisions.¹³⁵ A majority of the Court has criti-

Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989)); see also *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009) ("Neither [Section 2 nor Section 3 of the FAA] purports to alter background principles of state contract law regarding the scope of agreements . . .").

¹³⁰ *Lamps Plus*, 139 S. Ct. at 1431 (Kagan, J., dissenting); see also *Kindred Nursing Ctrs. Ltd. v. Clark*, 137 S. Ct. 1421, 1424 (2017) ("The Federal Arbitration Act . . . requires courts to place arbitration agreements 'on equal footing with all other contracts.'" (quoting *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015))).

¹³¹ *Lamps Plus*, 139 S. Ct. at 1431–32 (Kagan, J., dissenting) ("The anti-drafter rule . . . takes no side—favors no outcome—as between class and individualized dispute resolution.").

¹³² See *id.* at 1435.

¹³³ See *id.*

¹³⁴ *Id.*

¹³⁵ See *id.*; Imre S. Szalai, *The Supreme Court's Arbitration Docket*, 3 AM. CONST. SOC'Y SUP. CT. REV. 91, 111 (2019) [hereinafter Szalai, *Arbitration*].

cized class arbitration as fundamentally different from individualized arbitration¹³⁶ and has painted a picture of class arbitration that has allowed the Court to use the preemption doctrine wherever possible to not permit class proceedings. According to the majority, class arbitration stands in stark contrast to the cheap, fast, and personalized individual arbitration proceedings that the majority believes the FAA was designed for.¹³⁷ In the majority's view, informality is the biggest advantage of arbitration, and that advantage must be preserved at all costs.¹³⁸ To support these assertions, the majority has plucked from the sparse legislative history some indication that members of Congress were aware of the possible financial and efficiency advantages of arbitration.¹³⁹ This,

Docket] (“The *Lamps Plus* decision and the Court’s other class arbitration cases are not really about arbitration at all; instead, these cases are best understood as reflecting the desire of certain justices to dismantle class actions.”). For examples of this hostility toward class arbitration, see generally *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018), and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

¹³⁶ See *Lamps Plus*, 139 S. Ct. at 1416 (“[I]t is important to recognize the ‘fundamental’ difference between class arbitration and the individualized form of arbitration envisioned by the FAA.” (quoting *Epic Sys. Corp.*, 138 S. Ct. at 1622–23)).

¹³⁷ See *id.* (describing benefits of individualized arbitration as “lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes” (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 685 (2010))). Some commentators have also noted that this view of individual arbitration as efficient and less costly can also help explain the Court’s hostility towards litigation, which is described as slow and inefficient. See, e.g., Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1141 (2019). This view is consistent with the *Lamps Plus* Court’s portrayal of class arbitration as too litigation-like and the hostility of the Court towards the procedure. See *Lamps Plus*, 139 S. Ct. at 1416.

¹³⁸ See *Lamps Plus*, 139 S. Ct. at 1416.

¹³⁹ See H.R. REP. NO. 68-96, at 2 (“It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.”); see also Bookman, *supra* note 137, at 1147–48 (“Relying on the FAA’s legislative history, the Court often states that the FAA was intended ‘to allow parties to avoid ‘the costliness and delays of litigation’ because arbitration was supposed to ‘largely eliminate[]’ that cost and delay. The Court has now held in multiple contexts that this litigation-avoidance purpose prevails over Congress’s

however, appears to be the *only* support from the legislative history of the majority's restrictive view of what arbitration is meant to be.¹⁴⁰

First, the legislative record and many commentators suggest that Congress enacted the FAA for the limited purpose of pushing back against the judicial hostility towards arbitration existing at the time.¹⁴¹ The FAA was intended to fight against this hostility by making arbitration agreements valid and enforceable and by placing them on the same footing as all other contracts.¹⁴² This means that arbitration agreements were *not* meant to be *elevated above* other contracts—they were simply meant to be treated and enforced equally.¹⁴³ The Court, however, through decisions such as *Lamps Plus*, has elevated arbitration agreements above other contracts.¹⁴⁴ Through the use of the preemption doctrine, the Court has

intent in other statutes . . . to allow collective action and over many areas of state law.” (alteration in original) (footnotes omitted) (first quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510–11 (1974); and then quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985))).

¹⁴⁰ *But see* Imre S. Szalai, *Aggregate Dispute Resolution: Class and Labor Arbitration*, 13 HARV. NEGOT. L. REV. 399, 425–39 (2008) (discussing how there is nothing in legislative history indicating that Congress understood FAA as supporting a framework for class arbitration).

¹⁴¹ *See* H.R. REP. NO. 68-96, at 1–2; Szalai, *Arbitration Docket*, *supra* note 135, at 106–07 (“The FAA was originally designed to be narrow in scope and applicability . . . [T]he FAA was designed with a simple goal in mind: to reverse prior judicial hostility against the enforcement of pre-dispute arbitration clauses and to make such clauses as enforceable as other contract terms . . .”).

¹⁴² H.R. REP. NO. 68-96 at 1–2; Szalai, *Arbitration Docket*, *supra* note 135, at 107. Many commentators have also noted that the FAA was supposed to be limited to claims involving parties of equal bargaining power, further raising doubt as to the Court's expansion of the FAA. *See, e.g.*, Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531, 540 n.40 (2014) [hereinafter Frankel, *Super Contract*].

¹⁴³ *See* Szalai, *Arbitration Docket*, *supra* note 135, at 107 (noting that the drafters of the FAA did not want to make arbitration agreements more enforceable than other contracts); Wilson, *supra* note 22, at 100 (discussing that congressional intent behind FAA was to place arbitration agreements on same footing as other contracts).

¹⁴⁴ *See* Bookman, *supra* note 137, at 1146 (“The Court has described the FAA as embodying ‘a national policy favoring arbitration’ that does not just put arbitration contracts on equal footing with other kinds of contracts but seems to affirmatively favor arbitration over litigation.” (footnotes omitted) (quoting

singled out arbitration clauses for special treatment, setting them apart from other contracts.¹⁴⁵ For example, as a result of the *Lamps Plus* decision, ambiguous arbitration agreements are not subject to the *contra proferentem* rule like other contracts because of the Court's unwillingness to read the contract to permit class arbitration.¹⁴⁶ Through such decisions, the Court has advanced a policy favoring arbitration instead of treating it equally.¹⁴⁷

Furthermore, although the majority is correct that there is evidence that the Congress that considered the FAA was aware of the possible advantages of arbitration,¹⁴⁸ the majority draws the wrong conclusion from this evidence. The fact that Congress recognized the potential benefits of arbitration does not mean they meant to restrict parties to only those forms of arbitration that use those benefits to the fullest.¹⁴⁹ There is also little indication that the possible efficiency and cost advantages were intended to allow the Court to block the class arbitration procedure, or any other procedural form of arbitration for that matter.¹⁵⁰ The FAA itself is silent

Southland Corp. v. Keating, 465 U.S. 1, 10 (1984)); *see also* Szalai, *Arbitration Docket*, *supra* note 135, at 108 ("Today, arbitration agreements are more enforceable than other contracts and benefit from special preferences and rules written not by Congress, but by the Court.").

¹⁴⁵ *See* Wilson, *supra* note 22, at 132–33 (arguing that FAA's purpose of placing arbitration agreements on "equal footing as other contracts" was frustrated after *Concepcion* excluded arbitration agreements from "a generally applicable state law").

¹⁴⁶ *See* *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019); Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575, 598–99 (2020).

¹⁴⁷ *See* Wilson, *supra* note 22, at 124–29 (discussing how the Court's policy favoring arbitration is inconsistent with legislative intent to place arbitration agreements on equal footing with other contracts).

¹⁴⁸ *See* H.R. REP. NO. 68-96, at 2.

¹⁴⁹ *See* Wilson, *supra* note 22, at 134 n.209 (noting that while Congress recognized potential benefits stemming from arbitration, "the legislative history does not support the conclusion that Congress envisioned any particular proceedings").

¹⁵⁰ *See* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 360–61 (2011) (Breyer, J., dissenting); Wilson, *supra* note 22, at 133; *see also* S.I. STRONG, CLASS, MASS, AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW 109 (2013) (noting that it is unclear whether the traditional model of bilateral arbitration is or has ever been true).

on the particular procedural form that arbitration must take.¹⁵¹ This silence has allowed arbitration to take on many different disputes in many different procedural forms, not just the bilateral arbitration form that the majority paints as the ideal picture of arbitration.¹⁵² And even if class arbitrations may be more lengthy and expensive than individualized arbitration,¹⁵³ that should not be a reason to throw away a potentially useful procedural option. In his dissent in *AT&T Mobility*, Justice Breyer correctly pointed out that instead of comparing bilateral and class arbitration, we should be comparing class arbitration and regular class actions.¹⁵⁴ That argument is still valid here. Using this comparison, class arbitration *is* the more streamlined, efficient process as compared to class action litigation.¹⁵⁵ Class arbitrations provide the same, as well as unique, benefits to the parties.¹⁵⁶ The parties are still allowed to structure the proceeding in their agreement, pick and choose which procedural rules to follow, select a specialized arbitrator, and so on.¹⁵⁷ Just like individual arbitration, class arbitration can be made less formal

¹⁵¹ See 9 U.S.C. §§ 1–16; see also Resnik, *supra* note 14, at 2890 (“The FAA’s text . . . provided no descriptions of the form that arbitrations were to have. The Court imputed one through a purposive interpretation, inflected with assessments of the costs and benefits of class actions.”).

¹⁵² See Resnik, *supra* note 14, at 2892 (“The 1925 statute’s silence as to form reflects its historical context, authorizing enforcement when the practice was nascent and leaving ample room for arbitration’s evolution, in use today for a range of disputes from high stakes, heavily lawyered, expensive commercial conflicts to family dissolutions.”); Wilson, *supra* note 22, at 135–36 (discussing how modern arbitration practices do not necessarily fit Court’s description of inexpensive and streamlined arbitration). Some research also indicates that arbitration is not actually cheaper or more efficient than litigation. See Wilson, *supra* note 22, at 136 n.219.

¹⁵³ See Gregory M. Bentz & Phillip Zeeck, *Concerned About Class Arbitration? Check Your Agreement*, NAT. L. REV. (June 28, 2019), <https://www.natlawreview.com/article/concerned-about-class-arbitration-check-your-agreement>.

¹⁵⁴ See *AT&T Mobility LLC v. Concepcion*, 563 U.S. at 363 (Breyer, J., dissenting).

¹⁵⁵ See *id.*; see also Neal Troum, *The Problem with Class Arbitration*, 38 VT. L. REV. 419, 420 (2013).

¹⁵⁶ See Troum, *supra* note 155, at 420, 427–28.

¹⁵⁷ See *id.*

compared to litigating a class action.¹⁵⁸ Or, just like with individual arbitration, parties can choose to forgo all of the “benefits” and make their proceedings more formal.¹⁵⁹ Unfortunately, the majority of the Court continues to incorrectly restrict arbitration to the “efficient” bilateral form without much justification.¹⁶⁰

In addition, in some circumstances, class arbitration proceedings may even be *more* efficient and streamlined than individualized arbitration.¹⁶¹ These are usually circumstances where there are large numbers of potential claimants with a common injury.¹⁶² Companies and employers that seek to dismiss class actions usually hope and believe that most consumers or employees will abandon their claims—for example, because of financial reasons—thereby decreasing the number of arbitrations they have to defend.¹⁶³ Recently, however, there have been circumstances where potential class members and their attorneys have refused to abandon their claims and fought back against employers that demanded

¹⁵⁸ *See id.*

¹⁵⁹ *See id.* at 427–28 (“Parties can choose a specialist to be their arbitrator, but they need not; they may want privacy, but they may also seek celebrity [F]ormality may be desired in some arbitration contexts, or not; and it is not uncommon for litigants to make strategic decisions that will cause a case to move more quickly (or slowly) when it is in their interest.”).

¹⁶⁰ *See* Keren, *supra* note 146, at 594 (arguing that, in *Stolt-Nielsen*, Justice Alito failed to provide any supporting authority for his assertion that “class-action arbitration changes the nature of arbitration” and that there are great differences between the procedures (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 685–87 (2010))).

¹⁶¹ *See* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 363 (2011) (Breyer, J., dissenting) (“[A] single class proceeding is surely more efficient than thousands of separate proceedings for identical claims. Thus, if speedy resolution of disputes were all that mattered, then the [state] rule would reinforce, not obstruct, that objective of the Act.”); Bookman, *supra* note 137, at 1153 (“If efficiency is the goal, class arbitration can be more efficient than individualized arbitration in contexts that are likely to generate large numbers of claims.”).

¹⁶² *See* Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1726–27 (2006) [hereinafter Weston, *Universes Colliding*].

¹⁶³ *See* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 695 (2018).

individual arbitration.¹⁶⁴ For example, Uber and Lyft have recently found themselves overwhelmed with arbitration costs and fees when thousands of their employees filed individual arbitration petitions after their class actions were dismissed in court.¹⁶⁵ Now, these companies are facing thousands of potential individual arbitration claims instead of one consolidated claim, with the employees already seeking a court order to compel the companies to pay the arbitration fees so that the cases may proceed.¹⁶⁶ And this is not the first example of employees seeking to force their employer's hand or of employers realizing individual arbitration can prove to be a costly endeavor.¹⁶⁷ In such cases, the majority's argument that

¹⁶⁴ See, e.g., Jessica Goodheart, *Why 24 Hour Fitness Is Going to the Mat Against Its Own Employees*, FAST CO. (Mar. 13, 2018), <https://www.fastcompany.com/40543580/why-24-hour-fitness-is-going-to-the-mat-against-its-own-employees>; Alison Frankel, *'This Hypocrisy Will Not Be Blessed': Judge Orders DoorDash to Arbitrate 5,000 Couriers' Claims*, REUTERS: ON THE CASE (Feb. 11, 2020, 5:53 PM), <https://www.reuters.com/article/us-otc-doordash/this-hypocrisy-will-not-be-blessed-judge-orders-doordash-to-arbitrate-5000-couriers-claims-idUSKBN2052S1>.

¹⁶⁵ See Joel Rosenblatt, *Uber Gambled on Driver Arbitration and Might Have Come up the Loser*, L.A. TIMES (May 8, 2019, 10:22 AM), <https://www.latimes.com/business/la-fi-uber-ipo-arbitration-miscalculation-20190508-story.html> (discussing how more than 60,000 employee drivers have filed arbitration demands against Uber in the United States and estimating that it will cost Uber \$600 million to deal with these cases); Charlotte Garden, *Uber and Lyft Drivers Turn the Tables on Individual Arbitration*, ONLABOR (Jan. 8, 2019), <https://onlabor.org/uber-and-lyft-drivers-turn-the-tables-on-individual-arbitration/>.

¹⁶⁶ See Alison Frankel, *Forced into Arbitration, 12,500 Drivers Claim Uber Won't Pay Fees to Launch Cases*, REUTERS: ON THE CASE (Dec. 6, 2018, 2:58 PM), <https://www.reuters.com/article/legal-us-otc-uber/forced-into-arbitration-12500-drivers-claim-uber-wont-pay-fees-to-launch-cases-idUSKBN1O52C6>.

¹⁶⁷ See, e.g., Alison Frankel, *From the 11th Circuit, a Cautionary Tale for Employers Imposing Arbitration on Workers*, REUTERS: ON THE CASE (Aug. 9, 2018, 4:14 PM), <https://www.reuters.com/article/us-otc-epic/from-the-11th-circuit-a-cautionary-tale-for-employers-imposing-arbitration-on-workers-idUSKBN1KU2GF> (discussing *Hernandez v. Acosta Tractors Inc.*, 898 F. 3d 1301 (11th Cir. 2018), a case where an employer faced more than \$100,000 in arbitration fees after successfully dismissing a class action suit); Daniel Wiessner, *Arbitration Bid by 10,000 Postmates Drivers Not a 'De Facto Class Action' – Judge*, REUTERS LEGAL (Apr. 16, 2020), <https://www.reuters.com/article/employment-postmates/arbitration-bid-by-10000-postmates-drivers-not-a-de-facto-class-action-judge-idUSL1N2C41ZD>.

bilateral arbitration is more cost effective and streamlined falls apart. So why are class arbitrations not allowed to be part of the efficient and streamlined procedures that the FAA apparently envisioned? Why are 1,300 potential arbitration proceedings by the Lamps Plus's employees more "efficient" than one class action? Perhaps it is the Court's way of limiting all types of class proceedings¹⁶⁸ or is simply a result of the Court's pro-business approach.¹⁶⁹ Either way, these examples demonstrate the inconsistency of the Court's assertion that class arbitration is always the more inefficient option.¹⁷⁰ Unfortunately, the Court's decisions "cataloging . . . class arbitration's many sins"¹⁷¹ have led to a vision of class arbitration that is unmanageable and highly inefficient. This approach, however, ignores the potential usefulness of class proceedings for certain disputes where, as in *Lamps Plus*, the particular circumstances "cr[y] out for collective treatment."¹⁷²

The majority also argues that arbitration is not designed for class proceedings,¹⁷³ but this argument is questionable as well. Class arbitrations have, and hopefully will, continue to occur in the United States, demonstrating the ability and utilization of the procedure to solve certain disputes.¹⁷⁴ In addition, arbitral tribunals

¹⁶⁸ See *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1435 (2019) (Kagan, J., dissenting).

¹⁶⁹ See generally Keren, *supra* note 146 (discussing effect of neoliberalism and resulting pro-corporation arbitration jurisprudence).

¹⁷⁰ See David Horton, *Clause Construction: A Glimpse into Judicial and Arbitral Decision-Making*, 68 DUKE L. J. 1323, 1370–71 (2019) [hereinafter Horton, *Clause Construction*] ("[Some] judges have observed that class actions are a mere procedural device that leaves the 'parties' legal rights and duties intact and the rules of decision unchanged.' These courts have therefore held that 'the shift from multiple bilateral arbitrations to a single class arbitration does nothing to alter a defendant's potential aggregate liability.'" (footnote omitted) (first quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 408 (2010); and then quoting *Sandquist v. Lebo Auto., Inc.* 376 P.3d 506, 520 (Cal. 2016)).

¹⁷¹ *Lamps Plus*, 139 S. Ct. at 1435 (Kagan, J., dissenting).

¹⁷² See *id.* at 1421 (Ginsburg, J., dissenting); *infra* Section III.C.

¹⁷³ See *Lamps Plus*, 139 S. Ct. at 1416.

¹⁷⁴ See *Class Action Case Docket*, AM. ARB. ASS'N, https://apps.adr.org/CaseDocketApp/faces/CaseSearchPage.jspx;jsessionid=kspaG_Y5HGaleks5ZOtyNeJ90GrKppPQjAYV6DE7dR7lZrxFp3is!1032178906 (last visited Nov. 18, 2020).

have been utilized to deal with different forms of multiparty arbitration, showing that arbitration can adapt and handle different kinds of disputes.¹⁷⁵ Furthermore, many standard arbitration rules contain specific rules for class arbitration proceedings, which raise doubt as to the argument that arbitration cannot be designed and structured to support a class proceeding.¹⁷⁶ The majority does raise a valid point as to the due process concerns in regard to class arbitration and absent members.¹⁷⁷ Similarly, some commentators have argued that class actions are inherently incompatible with arbitration proceedings because they seem to have a “preclusive effect on absent . . . class members,” which is incompatible with the notion that arbitrators possess only the authority granted to them by the parties in the dispute.¹⁷⁸ However, these due process concerns may be better addressed through changes to the class arbitration procedure, not by placing more obstacles in the way of class arbitration in the first place. For example, greater notice requirements or changes to the institutional rules,¹⁷⁹ such as establishing uniform class arbitration rules or guidelines, may be better at addressing the

¹⁷⁵ See STRONG, *supra* note 150, at 110, 167–68 (noting that arbitration community has been conducting multiparty proceedings for some time and that large-scale proceedings resemble traditional multiparty actions). See also *id.* at 167 (“[C]laims that class, mass, and collective arbitration are in some way fundamentally different from other forms of arbitration are unfounded, factually and legally.”).

¹⁷⁶ See, e.g., AM. ARB. ASS’N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (2003), https://www.adr.org/sites/default/files/Supplementary_Rules_for_Class_Arbitrations.pdf.

¹⁷⁷ See *Lamps Plus*, 139 S. Ct. at 1416 (“[C]lass arbitration . . . raises serious due process concerns by adjudicating the rights of absent members of the plaintiff class . . . with only limited judicial review.”).

¹⁷⁸ See Troum, *supra* note 155, at 421.

¹⁷⁹ For example, after the Supreme Court decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), the American Arbitration Association established rules dictating that “clause construction” awards, which were issued by an arbitrator deciding whether a silent arbitration agreement permitted class proceedings, were to be published and contain a written reasoning of the decision. See *AAA Policy on Class Arbitrations*, AM. ARB. ASS’N, (July 14, 2005) https://www.adr.org/sites/default/files/document_repository/AAA-Policy-on-Class-Arbitrations.pdf; AM. ARB. ASS’N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS Rule 3 (2003), https://www.adr.org/sites/default/files/Supplementary_Rules_for_Class_Arbitrations.pdf.

due process concerns.¹⁸⁰ With equally valid concerns on both sides of this issue, congressional action is necessary to address this specific issue. Modifying the procedural requirements may be the only way to both protect absent class members and preserve the class arbitration procedure, which is something that Congress could accomplish with an FAA amendment or a separate statute.

The consequences of the *Lamps Plus* decision, however, are not limited to just denying class proceedings to this group of employees or just continuing the Court's flawed class arbitration jurisprudence. As the next Section discusses, the majority, without any real consideration about the necessity of such preemption,¹⁸¹ preempted a neutral state law for the sole purpose of not backing down on class arbitration.

B. Preemption of *contra proferentem*

Lamps Plus could have been a very straightforward decision. The Court could have agreed with the concurrence's reading of the agreement and held that the agreement only permitted individual arbitration.¹⁸² Or the Court could have read the arbitration clause as unambiguously permitting class arbitration, as the dissent did.¹⁸³ Under either reading, the result would have then been clear under the reasoning of *Stolt-Nielsen*.¹⁸⁴ The Court, instead, chose to

¹⁸⁰ See generally Weston, *Universes Colliding*, *supra* note 162, at 1732–42 (discussing different approaches used in class arbitration in the United States).

¹⁸¹ In her dissent, Justice Sotomayor points out the Court reaches its conclusion without actually deciding for itself that the agreement is ambiguous. *Lamps Plus*, 139 S. Ct. at 1427 (Sotomayor, J., dissenting). The majority could have avoided preemption by reading the contract as unambiguous like the concurrence did. See *id.* at 1419 (Thomas, J., concurring). Nevertheless, even while deferring to the lower court's reading, the Court should have paused before preempting a state law and encroaching on the state law domain. *Id.* at 1428 (Sotomayor, J., dissenting); see also Kristopher Kleiner, Comment, AT&T Mobility L.L.C. v. Concepcion: *The Disappearance of the Presumption Against Preemption in the Context of the FAA*, 89 DENV. U. L. REV. 747, 769 (2012) (arguing that FAA preemption doctrine “deviates from the fundamental principles of federalism”).

¹⁸² See *Lamps Plus*, 139 S. Ct. at 1419 (Thomas, J., concurring).

¹⁸³ See *id.* at 1428–29 (Kagan, J., dissenting).

¹⁸⁴ See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 687 (2010).

adopt the lower court's interpretation of the agreement as ambiguous.¹⁸⁵ As Justice Kagan argued, the conclusion still should have been straightforward—apply the state contract law principle of *contra proferentem*.¹⁸⁶ Doing so would certainly have been consistent with the general presumption against preemption of state laws.¹⁸⁷ It would also have been consistent with *Stolt-Nielsen*, where the Court did not explicitly say that express authorization was required to permit class arbitration.¹⁸⁸ Had the Court followed the state rule and adopted the reading of the employee, class arbitration would have been permitted.¹⁸⁹ The majority, however, chose to go down a much different route and once again invoked the preemption doctrine.¹⁹⁰

The *Lamps Plus* majority's preemption of the neutral state contract principle of *contra proferentem*¹⁹¹ is perhaps the most concerning part of this decision. The anti-drafter rule is applied to an ambiguous contract as a "last resort," where other rules of interpretation have failed to extract the meaning of the contract.¹⁹² It is only applied where an ambiguity exists and only "[a]fter the court has examined all of the other factors that affect the search for the parties' intended meaning, including general, local, technical and trade usages and custom, and including the evidence of relevant circumstances which must be admitted and weighed."¹⁹³ This rule

¹⁸⁵ *Lamps Plus*, 139 S. Ct. at 1415.

¹⁸⁶ *See id.* at 1430 (Kagan, J., dissenting).

¹⁸⁷ Some commentators have argued that Court's FAA preemption doctrine interferes with state laws and is inconsistent with general presumption against preemption. *See, e.g.*, Kleiner, *supra* note 181, at 760–66.

¹⁸⁸ *See Stolt-Nielsen*, 559 U.S. at 687 n.10.

¹⁸⁹ *See Lamps Plus*, 139 S. Ct. at 1430 (Kagan, J., dissenting).

¹⁹⁰ *See id.* at 1417–19 (majority opinion).

¹⁹¹ *See id.*

¹⁹² 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.27 (Joseph M. Perillo, ed. 1998) [hereinafter CORBIN]. *But see* David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 436 (2009) [hereinafter Horton, *Flipping the Script*] ("Historically, *contra proferentem* had been a last resort However, the version that governed standard-form contracts was markedly different. Rather than being the last step of the interpretive process, it was the first. Rather than being a tie-breaker, it was dispositive." (footnote omitted)).

¹⁹³ CORBIN, *supra* note 192, § 24.27.

dictates that a court *reasonably* interpret the ambiguous terms against the party who supplied or drafted them.¹⁹⁴ The language is interpreted against the drafter because the drafter, more so than other parties, knows of any ambiguities and usually benefits from the ambiguous language.¹⁹⁵

The Court's preemption of this doctrine is both intriguing and worrying. There is arguably good reason and basis to preempt state contract rules that explicitly or subtly discriminate or single out arbitration contracts.¹⁹⁶ These rules, as the Court asserts, undermine the purpose of the FAA and legislative intent to ensure that arbitration agreements are enforceable and placed on the same footing as all other contracts.¹⁹⁷ However, based on section 2 of the FAA, there is also a good basis for the Court to leave alone state

¹⁹⁴ *See id.*; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. L. INST. 1981) ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.").

¹⁹⁵ RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a. The Supreme Court itself has recognized the *contra proferentem* rule in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), which also involved an arbitration agreement. *See also id.* at 62–63 ("Moreover, respondents cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it. Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result. That rationale is well suited to the facts of this case. As a practical matter, it seems unlikely that petitioners were actually aware of New York's bifurcated approach to punitive damages, or that they had any idea that by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right. In the face of such doubt, we are unwilling to impute this intent to petitioners." (footnote omitted) (citations omitted)).

¹⁹⁶ *See* Weston, *The Accidental Preemption Statute*, *supra* note 26, at 64 (discussing FAA's preemptive power based on the Commerce Clause); Shane Blank, Note, *Concerning Preemption: Upholding Consent Under the Federal Arbitration Act*, 2012 J. DISP. RESOL. 281, 284–85 (2012).

¹⁹⁷ *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011); *see also* Kleiner, *supra* note 181, at 748–52 (discussing preemption doctrine and FAA).

law rules that apply equally to all contracts and do not favor or disfavor arbitration agreements.¹⁹⁸

Contra proferentem is one such state contract principle. The principle applies equally and uniformly to all sorts of contracts where an ambiguity exists in the language and the court cannot ascertain the intent of the parties any other way.¹⁹⁹ The rule also does not in any way discriminate against or target, expressly or subtly, arbitration agreements as compared to other contracts.²⁰⁰ For example, unlike in *Concepcion*, where a class action waiver ban would have applied more broadly to arbitration agreements as opposed to other contracts,²⁰¹ the anti-drafter rule does not lean one way or the other.²⁰² Additionally, the anti-drafter rule does not presuppose any single outcome—certainly not the outcome that class arbitration will always be allowed.²⁰³ As noted by Justice Kagan in her dissent, had the employee drafted the contract, the rule would have directed the Court to interpret the agreement against the employee, thus preventing class arbitration.²⁰⁴ Al-

¹⁹⁸ See *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019) (“The FAA requires courts to ‘enforce arbitration agreements according to their terms.’ Although courts may ordinarily accomplish that end by relying on state contract principles, state law is preempted to the extent it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives’ of the FAA.” (citations omitted) (first quoting *Epic Sys. Corp. v. Lewis* 138 S. Ct. 1612, 1621 (2018); and then quoting *Concepcion*, 563 U.S. at 352)); see also *id.* at 1431 (Kagan, J., dissenting) (“Nothing in the FAA . . . ‘purports to alter background principles of state contract law regarding’ the scope or content of agreements.” (quoting *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009))).

¹⁹⁹ See CORBIN, *supra* note 192 § 24.27; see also Jeffrey Gordon & Paul Sullivan, *Contra Proferentem Doesn’t Always Mean ‘Against the Insurer’*, JD SUPRA (July 21, 2016), <https://www.jdsupra.com/legalnews/contra-proferentem-doesn-t-always-mean-89102/>.

²⁰⁰ See *Lamps Plus*, 139 S. Ct. at 1431–32 (Kagan, J., dissenting); *Sandquist v. Lebo Auto., Inc.*, 376 P.3d 506, 514 (Cal. 2016).

²⁰¹ See 563 U.S. at 341. *But see* Wilson, *supra* note 22, at 137 (arguing that *Discover Bank* rule was a “generally applicable state law” and that it did not “target arbitration”).

²⁰² See *Lamps Plus*, 139 S. Ct. at 1432 (Kagan, J., dissenting).

²⁰³ *Id.*

²⁰⁴ *Id.*; *cf. id.* at 1432 n.5 (“Similarly, if *Lamps Plus*, as the agreement’s author, had wanted class arbitration (perhaps because that would resolve many related cases at once) and *Varela* had resisted it (perhaps because he thought his

though that would be an unlikely scenario, it nevertheless shows that the rule neither discriminates nor favors arbitration.²⁰⁵ It is curious, then, that the Court so hastily preempted such a neutral and widely used state contract rule that seems to agree with both section 2 of the FAA and the Court's previous precedent.²⁰⁶ One of the dissenters offers perhaps the only good reason for the majority's preemption—namely, that this case involved class arbitration and that the Court is willing to preempt even a neutral state law to prevent a class proceeding.²⁰⁷ The majority justifies its preemption by pointing out that the rule uses public policy factors to resolve ambiguities in contracts, instead of focusing on the parties' intent.²⁰⁸ Even so, the rule is potentially useful in interpreting some agreements where the court can draw a reasonable interpretation of the agreement and where an actual ambiguity exists.²⁰⁹ By side-

case better than the others), the anti-drafter rule would have prevented, rather than permitted, class arbitration.”).

²⁰⁵ See *id.*

²⁰⁶ See *id.* at 1432 (“[The] Court has itself used the anti-drafter canon to interpret an arbitration agreement. In that case . . . the rule’s through-and-through neutrality made preemption unthinkable.”); Weston, *The Accidental Preemption Statute*, *supra* note 26, at 60 (discussing how FAA explicitly contemplates laws of general applicability that include state contract law defenses).

²⁰⁷ *Lamps Plus*, 139 S. Ct. at 1428 (Kagan, J., dissenting) (“The majority can reach the opposite conclusion only by insisting that the FAA trumps that neutral state rule whenever its application would result in class arbitration.”); see also Weston, *The Accidental Preemption Statute*, *supra* note 26, at 63 (noting that “significant judicial vacatur” of arbitration awards occurs in the form of preemption of state laws that are “deemed rarely in direct conflict with arbitration, but merely ‘anti-arbitration’”).

²⁰⁸ *Lamps Plus*, 139 S. Ct. at 1417; see also CORBIN, *supra* note 192, § 24.27 (“The rule is not actually one of interpretation, because its application does not assist in determining the meaning that the two parties gave to the words, or even the meaning that a reasonable person would have assigned to the language used. It is chiefly a rule of policy, generally favoring the underdog. It directs the court to choose between two or more possible reasonable meanings on the basis of their legal operation, i.e., whether they favor the drafter or the other party. As . . . Restatement (Second) of Contracts comment [a] on [Section 206] entitled ‘Interpretation Against the Draftsman’ explains, ‘It is in strictness a rule of legal effect, sometimes called construction, as well as interpretation; its operation depends on the position of the parties as they appear in litigation . . .’”).

²⁰⁹ See Frankel, *Super Contract*, *supra* note 142, at 555 (“Although some authorities have said that the doctrine should be used as a ‘last resort’ when

stepping the rule, the Court merely ignores the parties' agreement for its own policy preference against class arbitrations.²¹⁰

It is unfortunate that the majority would so readily substitute its policy judgment for a long-standing contract principle. As noted by Justice Kagan in her dissent, “[f]rom an *ex ante* perspective, the [*contra proferentem*] rule encourages the drafter to set out its intent in clear contractual language, for the other party then to see and agree to.”²¹¹ In other words, maintaining the applicability of the anti-drafter rule to arbitration agreements would encourage employers and businesses to be clear in their drafting.²¹² This would likely result in drafters inserting explicit class arbitration waivers to prevent being forced to submit to class proceedings.²¹³ And while this would, of course, conclusively prohibit employees and consumers from initiating class proceedings, at the very least, these parties would be better informed about what rights they have prior to signing the contracts.²¹⁴ There is no good reason for imposing on these parties the burden of having to realize that, even in the absence of an explicit class action waiver, they are nevertheless prohibited from pursuing class arbitration.²¹⁵ The explicit class waivers would place employees and consumers on notice that they are in fact waiving these rights, instead of leaving parties uncertain about their options or how a court will later interpret the contract.²¹⁶ In fact, this knowledge may indeed impact their decision to

extrinsic evidence fails to resolve the ambiguity, extrinsic evidence is often unavailable in arbitration disputes, and the doctrine has been frequently applied to standard-form contracts of all types.” (footnotes omitted)).

²¹⁰ See *Lamps Plus*, 139 S. Ct. at 1435 (Kagan, J., dissenting).

²¹¹ *Id.* at 1434.

²¹² See Frankel, *Super Contract*, *supra* note 142, at 555 (discussing how one of the main justifications of *contra proferentem* is that it “encourages greater clarity in contracts through better drafting”).

²¹³ See Horton, *Flipping the Script*, *supra* note 192, at 437 (noting that *contra proferentem* rule encourages “information flow by making the drafter spell out the parties’ rights and duties or suffer dire consequences”).

²¹⁴ See Frankel, *Super Contract*, *supra* note 142, at 560.

²¹⁵ See *id.* at 560–61.

²¹⁶ See *id.* (“There appears to be some evidence, particularly in the consumer context, that companies intentionally make their arbitration clauses difficult to understand so that consumers will not fully realize what rights they are giving up.”).

enter into the contract in the first place.²¹⁷ The Court's holding, however, allows employers and businesses to leave their contracts ambiguous with no fear of being dragged into a class proceeding.²¹⁸ Even with no explicit class waiver, the mere absence of express authorization of class arbitration is enough to block employees and consumers from engaging in class proceedings.²¹⁹ The *Lamps Plus* decision places the burden on the employees and consumers to realize that the ambiguous contract will preclude them from seeking relief in a class proceeding, something that employees and consumers should not be expected to do.²²⁰

Furthermore, as Justice Kagan points out, "from an *ex post* perspective, the rule enables an interpreter to resolve any remaining uncertainty in line with the parties' likely expectations."²²¹ As mentioned, an employee signing the contract, seeing no class action waiver, likely does not expect that he would be barred from participating in a class proceeding.²²² The employer, on the other hand, likely knew of the possibility of inserting a class action waiver, and still chose to proceed without one.²²³ A simple application of the *contra proferentem* rule would warrant protecting the employee from the employer's omission of the waiver, as the em-

²¹⁷ *See id.*

²¹⁸ *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1419 (2019).

²¹⁹ *See id.*

²²⁰ *See id.* at 1427 (Sotomayor, J., dissenting) ("Where, as here, an employment agreement provides for arbitration as a forum for all disputes relating to a person's employment and the rules of that forum allow for class actions, an employee who signs an arbitration agreement should not be expected to realize that she is giving up access to that procedural device.").

²²¹ *Id.* at 1434 (Kagan, J., dissenting). *But see* CORBIN, *supra* note 192, § 24.27 ("The rule is not actually one of interpretation, because its application does not assist in determining the meaning that the two parties gave to the words, or even the meaning that a reasonable person would have assigned to the language used.").

²²² *See* Frankel, *Super Contract*, *supra* note 142, at 560–61.

²²³ *See* Horton, *Flipping the Script*, *supra* note 192, at 437–38 (explaining that firms can use ambiguity in contracts strategically and how *contra proferentem* helps combat these "opportunistic incentives").

ployee likely had no power or opportunity to negotiate to change the agreement.²²⁴

The *Lamps Plus* Court took yet another step towards expanding the FAA's preemptive powers. The question that remains is what state rules will the Court preempt next? One commentator has suggested that the Court might seek to preempt procedural devices such as punitive damages or discovery.²²⁵ These procedural devices, however, were likely already in danger of being undermined even before the *Lamps Plus* decision under the reasoning of *Concepcion*.²²⁶ Consider, for example, a state law mandating discovery procedures similar to the ones used in federal district courts. They will likely be seen as too litigation-like for the Court, imposing procedural requirements on the arbitrators and the parties that are inconsistent with streamlined arbitration procedures—much like the class arbitration the Court was trying to prevent in *Lamps Plus*.²²⁷ The Court could also, although unlikely, see such discovery as entirely consistent with private dispute resolution, reasoning that the parties likely intended to submit themselves to discovery in order to fully arbitrate their claims. It will be interesting to see how

²²⁴ See CORBIN, *supra* note 192 § 24.27 (“The ‘contra proferentem’ device is intended to aid a party whose bargaining power was less than that of the drafts-person.”); see also Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 854 (1964) (“[The *contra proferentem* rule] favors the party of lesser bargaining power, who has little or no opportunity to choose the terms of the contract, and perforce accepts one drawn by the stronger party.”).

²²⁵ See Bookman, *supra* note 137, at 1184 (“*Lamps Plus* leaves [an] open question[] about . . . what other ‘fundamental attributes’ of arbitration will next be held to trump ‘plain vanilla’ state contract law. Punitive damages and discovery seem like potential contenders for features which, if used in arbitration, might be challenged as undermining the ‘essential virtues’ of arbitration.” (footnotes omitted) (quoting *Lamps Plus*, 139 S. Ct. at 1428–35 (Kagan, J., dissenting))).

²²⁶ See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341–42 (2011) (discussing examples of state laws that would be preempted because they would disfavor arbitration, such as, for example, one finding agreements unconscionable that failed to provide for “judicially monitored discovery”).

²²⁷ See *Lamps Plus*, 139 S. Ct. at 1416.

courts will apply the *Lamps Plus* decision to such procedures in the future.²²⁸

As mentioned, however, state laws involving things such as discovery procedures and punitive damages were probably already at risk before *Lamps Plus* under the reasoning of *Concepcion* and other related cases.²²⁹ More of a concern are other neutral contract principles, like *contra proferentem*, which previously seemed to be applicable to all arbitration agreements under the saving clause of section 2.²³⁰ These rules are unlike those addressed in, for example, *Concepcion*, where the state law at issue would have more broadly impacted arbitration agreements.²³¹ They were not designed with an ulterior motive or policy aimed at limiting or controlling arbitration agreements.²³² Instead, neutral state contract rules are applied by courts to help interpret disputed contracts.²³³ The *Lamps Plus* decision shows that the Court is willing to reason its way around these state rules to accomplish its policy goal of cutting back on class proceedings. If the Court can preempt the anti-drafter rule, what other basic rules of interpretation will see

²²⁸ See Weston, *The Accidental Preemption Statute*, *supra* note 26, at 64 n.29 (discussing examples of laws of general applicability that were preempted because they affected arbitration).

²²⁹ See Christopher R. Drahozal, *FAA Preemption After Concepcion*, 35 BERKELEY J. EMP. & LAB. L. 153, 165 (2014) (discussing how, after *Concepcion*, “any state contract law defense that conditions enforcement of an arbitration clause on some procedure that makes arbitration ‘more formal, costlier, or less efficient’ is preempted,” such as, for example, court-monitored discovery (quoting Arpan A. Sura & Robert A. DeRise, *Conceptualizing Concepcion: The Continuing Viability of Arbitration Regulations*, 62 U. KAN. L. REV. 403, 449 (2013))).

²³⁰ See Wilson, *supra* note 22, at 107 (“The savings clause of section 2 promotes the congressional purpose behind the FAA . . . because the savings clause ensures that, like other contracts, arbitration agreements are subject to all generally applicable contract defenses.”).

²³¹ See *supra* note 201.

²³² See *Lamps Plus*, 139 S. Ct. at 1415 (“[S]tate law is preempted to the extent it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives’ of the FAA.” (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011))).

²³³ See, e.g., CORBIN, *supra* note 192, § 24.27 (explaining how courts will use neutral state contract rule of *contra proferentem* to decide what meaning to give to a contract’s words).

themselves thrown out whenever class proceedings are at issue? Taking the FAA preemption doctrine to its extreme, could the Court not preempt basic rules, such as construing undefined terms according to industry custom or their common, ordinary meaning if such a rule would result in the authorization of class arbitration?²³⁴ The only limit that can be extracted from the majority's opinion is that the majority considered *contra proferentem* to be applying public policy factors and not actually interpreting the parties' intent.²³⁵ Perhaps this is one way that other neutral rules will be upheld as applicable—if they are seen as actual rules of interpretation. The extent to which the Court is willing to go to prevent class arbitration is yet to be seen. In the meantime, the Court's decision leaves all contracting parties in an uneasy limbo by making it less predictable as to which contract principles will apply to their agreements and which will be preempted.²³⁶ At the very least, businesses and employers can rest easy knowing that the Court will continue to expand the FAA to protect them from class arbitrations.²³⁷

C. *Future Impact of Lamps Plus*

Lamps Plus expands the *Stolt-Nielsen* decision by placing further requirements and restrictions on arbitration agreements and the parties that enter into them. Arbitration agreements will now require *explicit* authorization of class arbitration for a court to find that a party to the contract may pursue a claim through class proceedings.²³⁸ Nothing short of actual consent will allow parties to pursue class arbitration.

²³⁴ See *id.* § 24.13.

²³⁵ See *Lamps Plus*, 139 S. Ct. at 1417 (“[C]ontra proferentem resolves the ambiguity against the drafter based on public policy factors, primarily equitable consideration about the parties’ relative bargaining strength.”).

²³⁶ See Bookman, *supra* note 137, at 1160 (“*Lamps Plus* undermines parties’ expectations that general contract principles apply to arbitration contracts and replaces those principles with a federal common law of arbitration contracts.”). *But see* Kleiner, *supra* note 181, at 759–60 (explaining how a consistent line of “FAA preemption jurisprudence” provides businesses with more predictability and allows for easier drafting of agreements for multiple states).

²³⁷ See generally Keren, *supra* note 146.

²³⁸ See *Lamps Plus*, 139 S. Ct. at 1417.

While this result is in line with the Court's various holdings,²³⁹ it will nonetheless have drastic consequences for the rights of employees and consumers.²⁴⁰ Some commentators have previously accused the Court of taking a pro-business stance on this issue, blocking class arbitration to protect the expectations of businesses and employers.²⁴¹ The *Lamps Plus* decision is simply a continuation of this stance. Because of this decision, many employees and consumers will not have access to class proceedings to vindicate small claims against employers and businesses, even where there is no explicit class arbitration waiver in the agreement.²⁴² This is troublesome because class proceedings are often the only realistic way for individuals with small claims to seek relief.²⁴³ Class actions are useful procedural devices where a large group of claim-

²³⁹ See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 687 (2010).

²⁴⁰ Some commentators have asserted that the FAA was not supposed to apply to employment or consumer contracts, marking yet another area of expansion of the statute beyond what Congress intended. See Szalai, *Arbitration Docket*, *supra* note 135, at 108–09; Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 117–18 (2016) (“The history of the FAA’s enactment helps demonstrate that the FAA was originally intended to provide a framework for federal courts to support a limited, modest system of private dispute resolution for commercial disputes, not the expansive system that exists today involving both state and federal courts and covering virtually all types of non-criminal disputes Through my historical research, I learned the statute was enacted to cover privately-negotiated arbitration agreements between merchants in order to facilitate the resolution of contractual disputes However, through decades of flawed interpretations, the Supreme Court has expanded the statute to force both state courts and federal courts to acknowledge and compel arbitration of a wide variety of disputes, including complex statutory disputes of a public nature, consumer disputes, and employment disputes. Based on the history of the FAA’s enactment, it is clear that the statute was never intended to apply in state courts or cover employment disputes.”).

²⁴¹ See, e.g., Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 KAN. L. REV. 767, 780–81 n.99 (2012) [hereinafter Weston, *Death of Class Arbitration*] (noting that businesses praised *Concepcion* decision).

²⁴² See generally Keren, *supra* note 146 (discussing how *Lamps Plus* decision will further isolate employees by restricting their ability to proceed collectively).

²⁴³ See Estlund, *supra* note 163, at 695.

ants has suffered some common injury.²⁴⁴ Through a class proceeding, these claimants can aggregate their claims and split the expenses of seeking relief.²⁴⁵ Without this procedural option, many individuals are simply unable to bring their claims due to the expenses associated with individual arbitration.²⁴⁶ This results in the loss of these individuals' ability to seek relief and thus effectively takes away their right to seek justice.²⁴⁷ In addition, class arbitration has more potential to fix the behavior that is harming the employees and consumers than a few individual claims, especially where most individuals with small claims have no financial incentive or ability to bring them.²⁴⁸ Where employers and businesses can insert class arbitration waivers—or, after *Lamps Plus*, simply rely on ambiguous arbitration agreements—these arbitration clauses begin to look like exculpatory clauses, limiting the businesses' liability.²⁴⁹

²⁴⁴ See Weston, *Universes Colliding*, *supra* note 162, at 1726–27.

²⁴⁵ See *id.*; Estlund, *supra* note 163, at 695.

²⁴⁶ Estlund, *supra* note 163, at 695 (“The problem for employees is that some legal claims cannot practicably be adjudicated on an individual basis. In particular, many FLSA wage and house claims involve incremental pay disparities over a few years; the cost of litigating them as an individual often exceeds the expected returns. But if many individuals are subject to the same challenged practice, as is often true, employees can practicably pursue their claims through a class or collective action.” (footnote omitted)).

²⁴⁷ See *id.* (“If employers have their way in the Supreme Court, they will be free to block . . . [class] actions, and to virtually nullify a large category of employee claims that are not viable on an individual basis, simply by requiring individual arbitration.”); Keren, *supra* note 146, at 584 (noting that prohibiting class arbitration “insulate[s] corporations from legal liability by preventing claimants from coming together—which is by and large their only viable path to redress”).

²⁴⁸ See Keren, *supra* note 146, at 586 (discussing effect of class waivers is to prevent individuals from addressing “corporate wrongdoing”); see also *id.* at 592 (discussing Supreme Court’s jurisprudence as creating “a world in which as long as [corporations] cause smaller harms to numerous victims, no one will be able to hold them accountable”).

²⁴⁹ See Szalai, *Arbitration Docket*, *supra* note 135, at 92 (“With this expansive system of arbitration currently in place and the willingness of courts to compel arbitration where meaningful consent is lacking, corporate America and parties with disproportionate bargaining power can unilaterally and easily remove themselves from the traditional justice system through the use of arbitration clauses. The average person in America has lost access to the courthouse,

Furthermore, while class arbitration survives where it is expressly authorized by an arbitration agreement, there is little hope that employees or consumers will have access to this procedural option unless the employer or business drafting the contract permits class arbitration.²⁵⁰ Employees and consumers will now have to negotiate for the inclusion of an *explicit* class arbitration *authorization* in the arbitration agreement. This, of course, is very unlikely to happen in either the employment or consumer context, where arbitration clauses in contracts are usually of a take-it-or-leave-it nature.²⁵¹ Employees, especially, are placed in a tough spot where the decision is between employment (with a binding arbitration clause that may preclude them from seeking relief in a class proceeding) and unemployment.²⁵² And while employees may be in a better position than consumers to negotiate the contract terms, most employees likely lack the necessary bargaining power or leverage to convince their employer to change the agreement to include a class arbitration procedure.²⁵³ Therefore, few employees, if

and in its place, a virtually unregulated, unreviewable, expansive system of privatized justice now exists.”); Estlund, *supra* note 163, at 703 (“[T]he imposition of mandatory arbitration means that the employer faces only a miniscule chance of ever confronting a formal legal claim in any forum regarding future legal misconduct against its employees . . . [S]uch a provision virtually amounts to an ex ante exculpatory clause, and an ex ante waiver of substantive rights that the law declares non-waivable.”).

²⁵⁰ See Keren, *supra* note 146, at 598 (arguing that there is “zero probability” that corporations will ever explicitly agree to class arbitration).

²⁵¹ See Horton, *Clause Construction*, *supra* note 170, at 1370 (“Class actions invariably arise from adhesive consumer and employment contracts. In this milieu, there is no course of dealing . . . to analyze, and few plaintiffs will have even read or understood the disputed term. Therefore, as one arbitrator put it, the idea that the parties shared a common understanding of whether the agreement authorized class arbitration ‘is actually a fiction.’”). There has also been a bit of discussion about whether the FAA was intended to apply to such take-it-or-leave-it contracts, further undermining the Court’s assertion that the parties to such contracts consent to waive their rights to class proceedings. See *supra* note 240.

²⁵² See *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1421 (2019) (Ginsburg, J., dissenting) (discussing employee’s “Hobson’s choice” in deciding whether to accept an employment contract with an arbitration clause).

²⁵³ See Resnik, *supra* note 14, at 2863–70.

any, will be able to secure the explicit class arbitration authorization required by the Court in *Lamps Plus*.

Fortunately, some hope remains for class arbitrations as some federal courts have distinguished *Lamps Plus* and permitted class proceedings. For example, in *Jock v. Sterling Jewelers Inc.*, the Second Circuit upheld an arbitrator's determination that the agreement at issue permitted class proceedings and that absent class members were bound by this determination.²⁵⁴ In its decision, the Second Circuit distinguished *Lamps Plus* by pointing out that, in that case, the question of class arbitration was submitted to the court, not to the arbitrator as in *Jock*.²⁵⁵ The *Jock* Court also pointed out that its decision was consistent with the Supreme Court's previous ruling in *Oxford Health Plans LLC v. Sutter*, which also upheld an arbitrator's determination that the contract permitted class arbitration.²⁵⁶ Therefore, at least where the parties agree to send the interpretation of the agreement to an arbitrator, there is some chance that a court will uphold the arbitrator's authorization of class proceedings.²⁵⁷

Nevertheless, just as Congress responded to judicial hostility towards arbitration when passing the FAA, it is now time for the legislature to respond to the modern Court's hostility towards class arbitration. Many commentators, including some Justices, have called for congressional action to fix the confusion surrounding the FAA.²⁵⁸ Congressional action is certainly necessary to scale back the Court's expansion of the FAA, as there is little prospect of the Court doing so on its own. There is also little hope for states being able to protect their residents due to the ever-expanding FAA preemption doctrine, which has now been used to invalidate all sorts of state legislation.²⁵⁹ Amending the FAA to expressly permit class arbitration is likely necessary to overcome the years of the

²⁵⁴ *Jock v. Sterling Jewelers Inc.*, 942 F.3d 617, 620 (2d Cir. 2019).

²⁵⁵ *See id.* at 626.

²⁵⁶ *See Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 573 (2013).

²⁵⁷ *See id.*; *see also Ala. Psychiatric Servs., P.C. v. Lazenby*, 292 So. 3d 295, 307–08 (Ala. 2019) (holding that an arbitrator did not exceed his power by finding that class arbitration was available).

²⁵⁸ *See, e.g., Szalai, Arbitration Docket, supra* note 135, at 124; *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1422 (2019) (Ginsburg, J., dissenting).

²⁵⁹ *See Weston, The Accidental Preemption Statute, supra* note 26, at 64.

Court's hostility towards class proceedings. Doing so would be a significant step for employees who may be relying on the availability of class proceedings to vindicate their rights. On the other hand, an amendment expressly banning or disfavoring class arbitration would also resolve the confusion surrounding class proceedings and would actually constitute the clear congressional intent that the Court has been grabbing at for years. Alternatively, the Court could simply scale back the FAA to its intended purpose of governing arbitration agreements between sophisticated parties and address arbitration in other sectors separately.²⁶⁰ This would allow the Court to be more precise as to its intent with regard to arbitration in specific circumstances, including the arbitration of employment disputes.

Over the years, both Congress and federal agencies have made attempts at changing certain aspects of the FAA.²⁶¹ However, these single pieces of legislation do not address the bigger issue created by FAA preemption, and more precise action is required specifically in regard to class arbitration.²⁶² Further, if Congress intends to

²⁶⁰ Cf. Wilson, *supra* note 22, at 139 n.232 (giving examples of attempts of industry-specific amendments to FAA). In September 2019, the House of Representatives passed the Forced Arbitration Injustice Repeal Act, which would “prohibit predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes.” See Forced Arbitration Injustice Repeal Act H.R. 1423, 116 Cong. § 2 (as passed by House, Sept. 20, 2019). This bill would pull back on the use of arbitration in sectors where the other party to the agreement has little bargaining power. See *id.* However, as of the date of this Comment, the Senate has not yet voted on the bill. See *S.610 - Forced Arbitration Injustice Repeal Act*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/610/actions> (last visited Nov. 18, 2020).

²⁶¹ See SHIMABUKURO & STAMAN, *supra* note 18, at 16 (discussing several bills introduced in the 115th Congress regarding mandatory arbitration agreements); JON O. SHIMABUKURO, CONG. RSCH. SERV., RL30934, THE FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS 7 (2003) (discussing some legislative bills aimed at mandatory arbitration such as one proposing an amendment to FAA to address arbitration of employment disputes); Weston, *Death of Class Arbitration*, *supra* note 241, at 792–94 (discussing federal legislative action regarding mandatory arbitration).

²⁶² See Weston, *The Accidental Preemption Statute*, *supra* note 26, at 72 (“Congress has enacted piecemeal legislation to address specific consumer protection and policy concerns.”). See also *id.* (“A clear statement by Congress

keep class arbitration alive, uniform class arbitration rules could benefit all parties by setting standards and preventing due process violations of parties' rights, further mitigating any concerns the Court may have.²⁶³

CONCLUSION

Through its decision in *Lamps Plus*,²⁶⁴ the Court once again found a way to cut back on the availability of class arbitrations as a procedural option for parties seeking to vindicate their rights. Through its demeaning characterization of class arbitration as less efficient and unmanageable, the Court further solidified its view that class arbitration is incompatible with the goals of the FAA. In doing so, it unnecessarily expanded on the FAA's preemptive powers, holding that the FAA preempted the state contract rule of *contra proferentem*. The Court's view, however, has little basis in law or logic when one considers the potential benefits class proceedings offer and the potential for class arbitration to be just as efficient as individual arbitration, if not more in some circumstances.

As a result of this decision, countless employees and consumers subject to mandatory arbitration clauses will find themselves unable to seek relief through class arbitration proceedings, even if they are not subject to an explicit class action waiver. With the use of mandatory arbitration on the rise,²⁶⁵ more and more employees and consumers may potentially be unable to hold employers and businesses accountable for their wrongdoings. Therefore, immediate congressional action is necessary to address this judicial hostility towards class arbitration.

reinforcing the FAA's original purpose to enforce voluntary arbitration agreements, within the bounds of state and federal law, is warranted.”).

²⁶³ See Weston, *Universes Colliding*, *supra* note 162, at 1732–42 (discussing three procedural approaches used for class arbitrations absent uniform rules).

²⁶⁴ See *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1419 (2019).

²⁶⁵ See *supra* note 15.