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No. 08-1198

IN THE

Supreme Court of the United States

STOLT-NIELSEN S.A., *et al.*,
Petitioners,
v.
ANIMALFEEDS INTERNATIONAL CORP.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

RAE T. VANN
Counsel of Record
JUDITH A. LAMPLEY
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
(202) 629-5600

Attorneys for *Amicus Curiae* Equal Employment Advisory Council

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*.[1] The brief supports the position of Petitioners before this Court in favor of reversal.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes approximately 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the legal and practical considerations relevant to interpreting and complying with workforce nondiscrimination requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e *et seq.*, the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. §§ 621 *et seq.*, the Americans with Disabilities Act of 1990 (ADA), as amended, 42 U.S.C. §§ 12101 *et seq.*, and other employment-related statutes and regulations. Many of EEAC's members have contracts with their employees governing some or all terms and conditions of employment. Some of these contracts include agreements to arbitrate disputes arising out of the employment relationship.

EEAC's members have an ongoing interest in preserving the enforceability of agreements calling for arbitration of employment-related disputes. Arbitration is a flexible, efficient, and effective alternative means of resolving discrimination claims and other employment-related issues. Agreements to arbitrate, like other privately negotiated contracts, afford parties the ability to establish procedures under which

any future disputes will be governed. It follows, then, that such agreements must be enforced according to their express terms so as to give meaning to the parties' intent.

Thus, the issue presented in this matter regarding whether the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.,* permits the imposition of class action procedures on a private commercial arbitration agreement even where the parties' agreement is silent regarding class arbitration is extremely important to the nationwide constituency that EEAC represents. Although the instant case involves arbitration of commercial disputes, the Court's decision likely will be construed as applying to arbitration of employment disputes as well.

Because of its interest in this subject, EEAC has filed *amicus curiae* briefs in numerous cases before this Court and the federal courts of appeals endorsing the strong public policy supporting private arbitration of individual disputes.[2] EEAC thus is familiar with the legal and public policy issues presented to the Court in this case. Because of its significant experience in these matters, EEAC is well situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioners Stolt-Nielsen S.A., Stolt-Nielsen Transportation Group Ltd., Odfjell ASA, Odfjell Seachem

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[2] *E.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. __, 129 S. Ct. 1456 (2009); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

AS, Odfjell USA, Inc., Jo Tankers B.V., Jo Tankers, Inc., and Tokyo Marine Co., Ltd., (collectively "Stolt-Nielsen") are owners of parcel tankers used to ship chemicals. Pet. App. 2a. Respondent AnimalFeeds International Corp. is a direct purchaser of parcel tanker transportation services. *Id.*

AnimalFeeds initially filed suit on September 4, 2003 in the U.S. District Court for the Eastern District of Pennsylvania against Stolt-Nielsen alleging that Stolt-Nielsen had caused AnimalFeeds to overpay for the shipment of goods, thereby engaging in a "global conspiracy to restrain competition in the world market for parcel tanker shipping services in violation of federal antitrust laws." *Id.* at 2a-3a.

During 2003 and 2004, similar suits were filed against Stolt-Nielsen by other claimants in the U.S. District Courts of Connecticut, Pennsylvania, and Texas. *Id.* at 46a. The combined cases subsequently were transferred to the District of Connecticut, where Stolt-Nielsen moved to compel arbitration pursuant to the arbitration clauses contained in its shipping agreements. *Id.* at 3a, 46a. The district court denied the motion, but the Second Circuit reversed, holding that the parties' contracts contained enforceable arbitration provisions and thus the antitrust claims were arbitrable. *Id.* at 3a. On May 19, 2005, AnimalFeeds and several other co-plaintiffs filed a demand for class arbitration. *Id.* at 36a. Stolt-Nielsen objected and an arbitration panel was appointed to decide the dispute. *Id.*

The arbitration panel reviewed the relevant contracts between the parties and determined that the arbitration clauses in each were silent as to class arbitration. *Id.* at 37a. The question before the panel, then, was whether that silence permitted or

precluded class arbitration. *Id.* at 48a. AnimalFeeds argued that because the arbitration clauses were silent as to class arbitration, class arbitration was permissible. *Id.* at 6a. It contended that other arbitrators had construed similar clauses as allowing for class arbitration and argued that depriving them of the class procedure contravened public policy. *Id.*

Stolt-Nielsen, relying on several federal cases and arbitration rulings in which such silence was deemed to bar class arbitration, argued that because the arbitration clauses were silent, the parties did not assent to class arbitration and thus it could not be imposed by the arbitration panel. *Id.* Stolt-Nielsen also noted that the cases cited by AnimalFeeds were inapposite, as they were not decided in the context of international maritime agreements, in which the parties generally have no expectation of class arbitration. *Id.*

On December 20, 2005, the panel issued a Clause Construction Award concluding that Stolt-Nielsen had not established conclusively that the parties intended to preclude class arbitration, and therefore the arbitration could proceed on a class-wide basis. *Id.* at 7a. Stolt-Nielsen petitioned the U.S. District Court for the Southern District of New York to vacate the panel's decision, which it did, concluding that the arbitration panel's ruling was in "manifest disregard of the law." *Id.* at 8a. The district court found that the panel had not accounted for federal maritime law, which "requires that the interpretation of charter policies be dictated by custom and usage." *Id.* Because Stolt-Nielsen had demonstrated that maritime arbitration clauses are never subject to class arbitration, the court concluded the arbitration panel should not have found such procedures applicable to this case. *Id.*

On appeal, the U.S. Court of Appeals for the Second Circuit reversed, concluding that the "manifest disregard" standard was not met in this case. Pet. App. 32a. The appeals court acknowledged the case law prohibiting class arbitration where not expressly provided for in the parties' agreement, but nevertheless determined that those cases do not "establish law that is so clearly and plainly applicable that we are compelled to conclude that the arbitration panel willfully ignored it, thereby manifestly disregarding the law." Pet. App. 28a. In doing so, it misconstrued this Court's holding in *Bazzle* as standing for the proposition that class procedures may be imposed in arbitration where the argument is silent. Stolt-Nielsen petitioned for a writ of certiorari, which this Court granted on June 15, 2009. *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l, Inc.*, *cert. granted*, 129 S. Ct. 2793 (2009) (No. 08-1198).

SUMMARY OF ARGUMENT

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et seq.*, requires judicial enforcement of a valid agreement to arbitrate in accordance with its terms. Thus, where the parties to an arbitration agreement have not expressly provided for the right to pursue class action procedures, the FAA prohibits a court from ordering class-wide arbitration. As this Court has observed, "the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Boyd*, 470 U.S. 213, 218 (1985) (emphasis in original).

Most federal courts to address the issue have ruled that the FAA precludes class-wide arbitration where the arbitration agreement is silent as to the availability of class action procedures. *See, e.g., Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.,* 246 F.3d 219 (2d Cir. 2001); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001); *Randolph v. Green Tree Fin. Corp.,* 244 F.3d 814 (11th Cir. 2001); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000); *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995). Drawing support from a line of federal circuit court decisions that have refused to order *consolidated* arbitration where the arbitration agreement does not expressly provide for it, these courts have applied the same reasoning to preclude *class-wide* arbitration absent express contractual language providing for class action procedures.

In *Gilmer v. Interstate/Johnson Lane Corp.*, this Court observed that by agreeing to submit their disputes to arbitration, parties voluntarily exchange "the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." 500 U.S. 20, 31 (1991) (citation and internal quotation omitted). Indeed, parties to arbitration agreements routinely waive procedural mechanisms that otherwise would be available in litigation in favor of having their disputes heard quickly and less expensively in an arbitral forum. The class action is simply one of many courtroom procedures that is waived when a party agrees to submit its disputes to arbitration.

Allowing individuals subject to private arbitration agreements to pursue claims on a class-wide basis would defeat most, if not all, of the practical advan-

tages and mutual benefits of arbitration, particularly in the employment context. As this Court has observed, "the relative informality of arbitration is one of the chief reasons that parties select arbitration." *14 Penn Plaza LLC v. Pyett*, 556 U.S. __, 129 S. Ct. 1456, 1471 (2009).

Disputes are resolved far more quickly in an arbitral forum; the average length of an arbitration from filing to award is five months. Michael J. Schroeder, *Take the Lawyers Out of the Loop—Help Yourself and Your Patients*, Acupuncture Today (Apr. 2001).[3] As this Court noted in *Circuit City Stores, Inc. v. Adams*, arbitration agreements also "allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation . . . ." 532 U.S. 105, 123 (2001). Indeed, parties "generally prefer arbitration precisely because of the economics of dispute resolution." *14 Penn Plaza*, 129 S. Ct. at 1464.

These benefits would be significantly diminished, if not lost altogether, if complex class action procedures were imposed in arbitration in the absence of the parties' mutual assent. Such a result would significantly discourage the use of agreements to arbitrate in the employment setting and would run counter to the strong federal public policy, endorsed time and again by this Court, favoring private arbitration.

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[3] *available at* http://www.adrforum.com/main.aspx?itemID=565&hideBar=False&navID=230&news=3

ARGUMENT

I. A RULE THAT ALLOWS CLASS ARBITRATION TO BE INCORPORATED INTO AN AGREEMENT THAT IS SILENT AS TO THE AVAILABILITY OF CLASS-WIDE ARBITRATION RUNS COUNTER TO THE PLAIN LANGUAGE OF THE FEDERAL ARBITRATION ACT

A. The FAA Requires That A Valid Arbitration Agreement Be Enforced As The Parties Wrote It

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, provides that an arbitration agreement "shall be valid, irrevocable, and enforceable save upon such grounds as exist in law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has observed:

> Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

The FAA was enacted, in part, "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements on the same footing as other contracts." *Gilmer v. Interstate /Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted); *Green Tree Fin. Corp. v. Randolph,* 531 U.S. 79, 89 (2000); *EEOC v. Waffle House, Inc.,* 534 U.S.

279, 289 (2002). Thus, "'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration,'" *Gilmer,* 500 U.S. at 26 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24), a policy which this Court has reaffirmed repeatedly in the years since *Gilmer* was first decided.

As a general rule, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 26 (citation and internal quotation omitted). Consequently, when presented with a valid arbitration agreement, "the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Boyd*, 470 U.S. 213, 218 (1985) (emphasis in original); *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. __, 129 S. Ct. 1456, 1465 (2009).

Section 4 of the FAA provides, in relevant part that:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4. Once it is determined that the agreement to arbitrate is valid and addresses the disputed claim, "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.*

This Court repeatedly has recognized the FAA's emphasis on construing arbitration agreements in

accordance with the parties' desires and expectations. "The FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 57 (1995). As this Court observed in *Green Tree Financial Corp. v. Bazzle,* "we rigorously enforce agreements to arbitrate . . . in order to give effect to the contractual rights and expectations of the parties." 539 U.S. 444, 458 (2003) (citations and internal quotations omitted). *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("as with any other contract, the parties' intentions control").

Furthermore:

> Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, . . . so too may they specify by contract the rules under which that arbitration will be conducted.

Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 479 (1989).

B. The Predominant View Of The Circuit Courts Of Appeals Is That The FAA Plainly Bars The Merging Of Individual Claims In Arbitration Where The Parties' Agreement Is Silent On The Availability Of Class Action Procedures

Eight of the thirteen circuit courts of appeals now have concluded that Section 4 of the FAA prohibits imposing class action procedures or consolidating individual arbitrations when the arbitration agree-

ment is silent as to the availability of such procedures. *Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.,* 246 F.3d 219 (2d Cir. 2001); *see also Gov't of the United Kingdom v. Boeing,* 998 F.2d 68 (2d Cir. 1993); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000); *Del E. Webb Constr. v. Richardson Hosp. Auth.,* 823 F.2d 145 (5th Cir. 1987); *American Centennial Ins. Co. v. National Cas. Co.,* 951 F.2d 107 (6th Cir. 1991); *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984); *Randolph v. Green Tree Fin. Corp.,* 244 F.3d 814 (11th Cir. 2001). As the Second Circuit observed, "[T]he FAA mandates enforcement of the bargains struck by the parties and nothing more. Furthermore, our sister circuits have arrived at the same conclusion." *Hartford*, 246 F.3d at 229.

Citing to its earlier ruling in *United Kingdom*, the Second Circuit in *Hartford* pointed out that while:

> [I]nefficiencies and possible inconsistent determinations . . . may result absent consolidation . . . such concerns, though valid, do not provide us with the authority to reform the private contracts and that if contracting parties wish to have all disputes that arise from the same factual situation arbitrated in a single proceeding, they can simply provide for consolidated arbitration in the arbitration clauses to which they are a party.

246 F.3d at 229 (quoting *Gov't of U.K. v. Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993) (internal quotations omitted)). Applying the Second Circuit's rationale, the Seventh Circuit in *Champ v. Siegel Trading Co.*

similarly ruled that Section 4 of the FAA prohibits a court from ordering class-wide arbitration "absent a provision in the parties' arbitration agreement providing for class treatment of disputes . . . ." *Champ,* 55 F.3d at 271.

Noting that the Second, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits all have refused to order *consolidation* where the arbitration agreement does not expressly provide for it, the court in *Champ* determined that the same reasoning applies to preclude *class-wide* arbitration absent express contractual language providing for class action procedures.[4] *Id.* at 274 (citations omitted). Observing that "the overriding goal of the FAA was to place private arbitration agreements on the same footing as other contracts negotiated between private parties," *id.* at 275, the Seventh Circuit concluded that since the arbitration agreement at issue was silent as to class arbitration, "[f]or a federal court to read such a term into the parties' agreement would 'disrupt[] the negotiated risk/benefit allocation and direct[] [the parties] to proceed with a different sort of arbitration.'" *Id.* (citation omitted).

In this case, the Second Circuit incorrectly determined that this Court's decision in *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444 (2003), "abrogated [earlier circuit court] decisions to the extent that they read the FAA to prohibit such proceedings." Pet. App. 29a. In fact, the question whether class procedures may be imposed where the applicable arbitration agreement is completely silent as to the

[4] Subsequent to the court's holding in *Champ,* the Third Circuit adopted a similar rationale in *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000).

availability of such procedures was left unresolved by this Court, which held only that the threshold determination as to whether or not an agreement, in fact, is silent as to class arbitration is for the arbitrator, not a court, to decide. *Id.* The Second Circuit's misapplication of *Bazzle* resulted in its erroneous reversal of the district court's ruling below.

II. THIS COURT'S RULING IN *GILMER* RECOGNIZES THE RIGHT OF PRIVATE PARTIES TO WAIVE JUDICIAL PROCEDURES IN FAVOR OF ARBITRATION OF INDIVIDUAL DISPUTES

This Court in *Gilmer* put to rest any lingering questions regarding whether arbitration procedures, as a general principle, are adequate to resolve statutory claims, concluding that "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" 500 U.S. at 31 (citation omitted). The Court reiterated that view last term in *14 Penn Plaza v. Pyett,* in which it observed, "[t]he decision to resolve . . . claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace . . . discrimination; it waives only the right to seek relief from a court in the first instance." 129 S. Ct. at 1469.

By contrast, the "right" to bring a class action "is merely a procedural one, arising under Fed. R. Civ. P. 23, that may be waived by agreeing to an arbitration clause." *Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000). As the Seventh Circuit noted in *Champ*:

> When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish

> the right to certain procedural niceties which are normally associated with a formal trial. One of those "procedural niceties" is the possibility of pursuing a class action under Rule 23.

55 F.3d at 276 (citations omitted).

Parties to arbitration agreements often agree to streamlined procedural mechanisms that do not allow for claims to be brought on a class-wide basis. "[S]imply because judicial remedies are a part of a law does not mean that Congress meant to preclude parties from bargaining around their availability." *Johnson*, 225 F.3d at 377. In fact, "[a]rbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (citations and internal quotations omitted).

As this Court observed in *Volt Information Sciences, Inc. v. Board of Trustees*, "[j]ust as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which the arbitration will be conducted." 489 U.S. 468, 476 (1989). A rule that allows courts to read into a valid arbitration agreement the availability of class-wide arbitration where the parties have not expressly assented to it would ignore these well-established principles of contract law and would undermine the strong federal public policy, as articulated time and again by this Court, favoring arbitration.

Furthermore, when an individual party waives class action procedures, the ability of other private parties not subject to arbitration agreements to pursue class-wide relief in court is not affected. More-

over, as this Court made clear in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), public enforcement agencies not privy to arbitration agreements and where specifically authorized by statute may continue to seek victim-specific relief in court, whether on behalf of an individual or an entire class. Accordingly, to the extent that the threat of class action litigation may serve as a strong deterrent against violations of the law, the prohibition of class-wide arbitration will have little, if any, effect on the availability of such procedures to those not subject to an arbitration agreement.

III. PERMITTING INDIVIDUALS SUBJECT TO PRIVATE ARBITRATION AGREEMENTS TO PURSUE CLAIMS ON A CLASS-WIDE BASIS DEFEATS MOST, IF NOT ALL, OF THE PRACTICAL ADVANTAGES AND MUTUAL BENEFITS OF ARBITRATING EMPLOYMENT DISPUTES

In most cases, arbitration enables parties to resolve disputes more quickly and more efficiently than in litigation. Chief Justice Burger once observed:

> The reasons for favoring arbitration are as wise as they are obvious: litigation is costly and time consuming, and, more to the point in this case, judges are less adapted to the nuances of the disputes that typically arise in shops and factories than shop stewards, business agents, managerial supervisors, and the traditional ad hoc panels of factfinders. By bringing together persons actually involved in the workplace, often assisted by a neutral arbitrator experienced in such matters, disputes are resolved more swiftly and cheaply. This mechanism promotes industrial harmony

> and avoids strikes and conflicts; it provides a swift, fair and inexpensive remedy.

Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 747-48 (1981) (Burger, C.J., dissenting) (citation omitted).

Indeed, the speed with which most disputes are resolved through arbitration far outpaces the judicial system. The federal district courts take an average of 25.3 months to complete a civil case through jury trial. Admin. Office of the U.S. Courts, Fed. Judicial Caseload Statistics, Table C-5 (Apr. 1, 2007—Mar. 31, 2008)[5]. And, according to a study by the Federal Judicial Center, "the median time from filing to disposition for *class actions* tends to be *two to three times* that of other civil cases." (emphasis added). Admin. Office of the U.S. Courts, *The Third Branch,* Vol. 34, No. 5 (Apr. 2002).[6] In contrast, according to the National Arbitration Forum, the "average length of [an arbitration] from filing to award was 4.35 months for claims brought by consumers against businesses and 5.6 months for claims brought by businesses against consumers." Nat'l Arbitration Forum, *The Benefits of Arbitration* (Sept. 2007 & Supp. Apr. 2009).[7]

In addition to reducing the amount of time within which their disputes are likely to be heard, arbitration provides employees with a better chance of having their "day in court" than does a judicial proceed-

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[5] *available at* http://www.uscourts.gov/caseload2008/tables/C05Mar08.pdf

[6] *available at* http://www.uscourt.gov/ttb/apr02ttb/actionbill.html

[7] *available at* http://www.adrforum.com/main.aspx?itemID=1293&hideBar=False&navID=6&news=3#Time

ing. "Arbitration also offers employees a guarantee that there will be a hearing on the merits of their claims; no such guarantee exists in litigation where relatively few employees survive the procedural hurdles necessary to take a case to trial in the federal courts." *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1488 (D.C. Cir. 1997).

Procedural rights, such as class action procedures, the right to a jury trial, and extensive (and often excessive) discovery, mean little to an employee who is unable to find an attorney to take his or her case. Such an employee likely will feel that the doors to justice are closed to them. Arbitration gives these employees a timely opportunity to have their claims heard. Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* (Cornell Univ. Press, 1997), at 159.

Also, as this Court noted in *Circuit City Stores, Inc. v. Adams*, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation . . . ." 532 U.S. 105, 123 (2001). Indeed:

> Most employees simply cannot afford to pay the attorney's fees and costs that it takes to litigate a case for several years. Even when an employee is able to engage an attorney on a contingency fee basis . . . the employee nonetheless often must pay for litigation expenses, and put working and personal life on hold until the litigation is complete.

Bales at 153-54. As a practical matter, "[a]rbitration thus provides access to a forum for adjudicating employment disputes for employees whom the litigation system has failed." Bales at 159 (footnote omitted).

Unlike the typical arbitration, employment class actions can involve thousands of class members and can be extremely complex and time-consuming to defend. For defendants, the significantly higher costs and exposure posed by class actions creates enormous pressure to settle rather than run any risk of catastrophic loss. "Once one understands that the issues involved in the instant case are predominantly case-specific in nature, it becomes clear that there is nothing to be gained by certifying this case as a class action; nothing, that is, except the *blackmail value* of a class certification that can aid the plaintiffs in coercing the defendant into a settlement." *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) (emphasis added). As the Fifth Circuit has recognized:

> In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.

Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (citations and footnote omitted).

This immense pressure to settle exists largely independently of the merits of the underlying statutory claim:

> Once plaintiffs obtain class certification, the defendant's exposure, plus projected costs of defending hundreds or thousands of individual claims, places almost overwhelming and irresistible pressure on the defendant to settle, regardless of the merits of the claims. Even if individ-

> ual plaintiffs' odds of prevailing in their specific cases are low, the risk to defendants remains extremely high. In the face of these numbers, companies often perceive that they have little choice but to cut their losses through settlement.

Gary Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-The-Board Employment Discrimination Cases*, 15 The Labor Lawyer [ABA Sec. Lab. & Emp. L.] 415, 416 (2000) (footnotes omitted); *see also Castano*, 84 F.3d at 746 ("[c]lass certification magnifies and strengthens the number of unmeritorious claims" and "[a]ggregation . . . makes it more likely that a defendant will be found liable and results in significantly higher damage awards") (citations omitted). This predicament is evident particularly in the employment context, where several employers have settled large class action discrimination suits for hundreds of millions of dollars to avoid larger litigation costs. *See* Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 B.Y.U. L. Rev. 305, 344 (2001).

These astronomical numbers often give a defendant little choice but to cut its losses through settlement, regardless of the merits. Judge Posner observed in *In re Rhone-Poulenc Rorer, Inc.* that faced with billions of dollars in potential liability and possible bankruptcy as a result of a class action, employers "may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." 51 F.3d 1293, 1298 (7th Cir. 1995) (citation omitted). *See also In re Hydrogen Peroxide Antitrust Litig.,* 552 F.3d 305, 310 (3d Cir. 2008); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 259 F.3d 154, 168 n.8 (3d Cir. 2001).

Even under the best of circumstances, there is some question as to whether class actions effectuate the purpose of the laws under which they are brought. Considering the incentives built into the class action format:

> [Class action attorneys] may be too willing to bring nonmeritorious suits if these suits produce generous financial rewards for them.
>
> * * *
>
> For society, however, there are substantial costs: lost opportunities for deterrence (if class counsel settled too quickly and too cheaply), wasted resources (if defendants settled simply to get rid of the lawsuit at an attractive price, rather than because the case was meritorious), and—over the long run—increasing amounts of frivolous litigation as the attraction of such lawsuits becomes apparent to an ever-increasing number of plaintiff lawyers.

Deborah R. Hensler, *et al.*, *Class Action Dilemmas: Pursuing Public Goals For Private Gain*, *Executive Summary*, RAND Institute for Civil Justice 9-10 (2000)[8].

Judge Posner warned in *Culver v. City of Milwaukee* that improperly certifying large class actions seeking substantial monetary relief would mean that "[r]ealistically, functionally, practically [plaintiffs' counsel] is the class representative, not [the named plaintiff]." 277 F.3d 908, 913 (7th Cir. 2002). In addition, plaintiffs' lawyers may have different goals from the class they represent. *Id.* at 910. Plaintiffs'

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[8] *available at* http://www.rand.org/pubs/monograph_reports/2005/MR969.1.pdf

lawyers even have reportedly boasted publicly about their own power, stating that "their goal is to bankrupt the defendant or, more colorfully, to 'blow them off the New York Stock Exchange.' This approach has been recognized in class cases as the principle of 'judicial blackmail.'" Piar, 2001 B.Y.U. L. Rev. at 343 (footnote omitted).

These class action problems are even more acute in the context of private arbitration, which by its very nature is designed to promote, rather than discourage, speedy, cost-effective resolution of individual claims in as non-adversarial a manner as possible. As this Court has observed, "the relative informality of arbitration is one of the chief reasons that parties select arbitration." *14 Penn Plaza*, 129 S. Ct. at 1471. Many employers view arbitration and other forms of alternative dispute resolution as an opportunity not only to resolve a specific dispute but also to preserve relationships with their employees, particularly those who will continue to work for them well after their claims are addressed.

Permitting class-wide arbitration where the parties have not explicitly agreed to pursue such procedures fundamentally undermines the benefits and advantages, and therefore would significantly discourage the use, of agreements to arbitrate in the employment setting. Many employers have adopted mandatory arbitration programs primarily to reduce litigation costs. If parties to private arbitration agreements were permitted to pursue disputes on a class basis, employers would be faced with the very burdens they sought to avoid by introducing mandatory arbitration programs.

To be sure, if employers wished to be subject to class-wide arbitration, they would express as much in

the terms of their arbitration agreements. As such, class-wide procedures should not be read into an arbitration agreement in the absence of express language providing for such procedures.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

RAE T. VANN
Counsel of Record
JUDITH A. LAMPLEY
NORRIS, TYSSE, LAMPLEY &
LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
(202) 629-5600

Attorneys for *Amicus Curiae*
Equal Employment Advisory
Council

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