

No. 08-1198

In The
Supreme Court of the United States

—◆—
STOLT-NIELSEN S.A.; STOLT-NIELSEN
TRANSPORTATION GROUP LTD.; ODFJELL ASA;
ODFJELL SEACHEM AS; ODFJELL USA, INC.;
JO TANKERS B.V.; JO TANKERS, INC.;
TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit**

—◆—
**BRIEF OF PUBLIC JUSTICE AND
PUBLIC GOOD AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT**

—◆—
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INTEREST OF *AMICI CURIAE*¹

Public Justice, P.C. (“Public Justice”) is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuse. Public Justice prosecutes cases designed to advance consumers’ and victims’ rights, civil rights and civil liberties, occupational health and employees’ rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

To further its goal of defending access to justice for consumers, employees, and other persons harmed by corporate misconduct, Public Justice has initiated special projects devoted to fighting abuses of mandatory arbitration, opposing expansive assertions of federal preemption, and preserving the availability and integrity of class action proceedings. Public Justice also regularly represents consumers and employees in class actions, and our experience is that the class action device, properly used, often represents the only meaningful way that individuals can vindicate important legal rights.

¹ Letters granting blanket consent to the filing of *amicus curiae* briefs have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

Public Good is a public interest organization dedicated to the proposition that all are equal before the law. Through *amicus curiae* participation in cases of particular significance for consumer protection, civil rights, and civil liberties, Public Good seeks to ensure that the protections of the law remain available to everyone. Access to class action procedures for claims that would not otherwise be adjudicated or arbitrated exemplifies the rights that Public Good seeks to defend.

This case presents a convergence of mandatory arbitration, federal preemption, class action preservation, and access to justice issues that has potentially enormous implications for the rights of consumers and workers. The Petitioners urge the Court to hold that the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1 *et seq.*, which is silent about class action proceedings, compels the interpretation of an arbitration agreement that likewise is silent about class actions to *prohibit* their availability to plaintiffs in *any* forum, arbitral or judicial. Public Justice and Public Good are gravely concerned that, if this position is adopted as law, there could be no limit to the ability of companies to eliminate class actions simply by having an arbitration clause. This is because the companies would invoke not just the unwritten interpretive rule urged by Petitioners, but also implied preemption rules would arguably flow from it. If Petitioners’ principal argument were adopted, preemption arguments soon would follow that state laws preserving class actions when they are essential to

vindicate claims – which many states have – constitute an “obstacle” to the FAA’s alleged “purpose and objective” to ban class actions whenever an arbitration clause does not explicitly authorize them.

Public Justice and Public Good thus submit this brief in support of Respondent urging the Court to reject the Petitioners’ proposed interpretive rule and the far-reaching preemption consequences that could flow from it. Instead, the Court should affirm the decision below holding that the arbitration panel did not manifestly disregard applicable state and/or federal maritime law in holding that the parties’ arbitration agreement does not, by virtue of its silence on the subject, prohibit class-wide arbitration.²



SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the Second Circuit correctly held below that the arbitration panel did not exceed its authority in applying New York or federal maritime law to construe the parties’ arbitration agreement not to prohibit class-wide proceedings. In urging reversal of this ruling, Petitioners ask the Court to hold that a statute that is silent about class

² We agree with Respondent and *amicus* Public Citizen that this case is not ripe or appropriate for consideration by this Court at this time. We submit this brief to explain why, if the Court nevertheless reaches the merits of Petitioners’ arguments, it should reject them.

actions requires interpretation of a contract that likewise is silent about class actions to prohibit them from taking place in any forum.

This argument finds no support whatsoever in the text or purposes of the FAA, but would threaten to radically transform arbitration and litigation practice by stripping the plaintiffs in this and many other cases of an essential vehicle for vindicating their claims. This Court and many others long have recognized that class actions are essential for plaintiffs to vindicate important rights whose economic value could be dwarfed if those plaintiffs were required to pursue those rights on an individual basis. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). The parties do not dispute this. *See* Brief for Petitioners at 14. But the argument that the FAA prohibits class actions except where an arbitration clause expressly permits them would allow the companies that draft these provisions to eliminate class actions in any consumer or employment case involving a contract. Because Congress nowhere in the FAA even discusses class actions, let alone calls for their abolition, the Court should reject Petitioners' arguments to read into the Act a freshly minted rule to allow this result.

First, the FAA says nothing prohibiting, disfavoring, or even mentioning class actions or other multi-party disputes. *Cf. Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 n.5 (1989) ("As indicated, the FAA itself contains no provision designed to deal with the special

practical problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate.”). There is thus no basis for finding that Congress meant to reach the sweeping result sought here of prohibiting class actions except where company contracts expressly allow them. Moreover, in applying the FAA, this Court has held repeatedly that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983); see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (ambiguity resolved in favor of finding that claims for punitive damages should be resolved in arbitration). Petitioners, however, are asking this Court to create a special, unauthorized and unprincipled class-action-only rule of interpretation that when class actions are involved, any doubts (indeed, lack of utter certainty) concerning the scope of arbitrable issues must be resolved *against* arbitration. The interpretation proposed by Petitioners, aimed at preventing arbitration of many disputes, stands a quarter-century of jurisprudence applying the FAA on its head. Thus, neither the FAA’s express provisions nor its purposes long recognized by this Court support the result of preventing arbitration of class actions that is sought here.

Second, the Court also should reject this argument for inferring in the FAA a rule prohibiting class actions because adopting this unwritten rule could lead to significant preemption of state laws that do directly address this issue. A number of states have

fashioned rules to preserve the availability of class actions where they are shown to be necessary to vindicate claims. *See, e.g., Feeney v. Dell, Inc.*, 908 N.E.2d 753, 762 (Mass. 2009) (“Here, expressions of three branches of Massachusetts government indicate that the public policy of the Commonwealth strongly favors G.L. c. 93A class actions.”). But if the FAA were held to authorize or favor a prohibition of class actions, there would then arise the argument that this unwritten rule of substantive contract law preempts any state law aimed at preserving class actions when applied to cases subject to arbitration.

Again, although Congress chose not to expressly preempt any state laws under the FAA, the Act has been held to impliedly preempt state law that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Volt Info. Sciences*, 489 U.S. at 477 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Thus, by recognizing an unwritten purpose to prohibit class actions absent their explicit authorization, the ruling urged by Petitioners would open the door to free-wheeling and potentially far-reaching preemption of state law, notwithstanding the Court’s repeated admonitions that “the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.” *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (internal citation omitted).

In light of the foregoing, the Court should reject the Petitioners' invitation to create an unwritten rule under the FAA disfavoring class actions in arbitration and thereby potentially preempting state laws aimed directly at *preserving* this critical device for consumers and employees to vindicate their legal rights.



ARGUMENT

I. The FAA Does Not Prohibit, Disfavor, or Even Mention Class Actions.

During the 80+ years since the FAA was enacted, Congress has never disapproved or even addressed the availability of class actions in arbitration. This Court long has recognized as much, noting for example that the FAA “contains no provision designed to deal with the special problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate.” *Volt Info. Sciences*, 489 U.S. at 476 n.5. The Court thus has found that a state arbitration statute giving courts “authority to consolidate or stay arbitration proceedings in these situations in order to minimize the potential for contradictory arguments” would “foster the federal policy favoring arbitration.” *Id.*

Similarly, in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), the Court found that the issue of whether an arbitration clause prohibited class action proceedings was governed by “state law, not federal

law.” *Id.* at 450 (plur. op.); *see also id.* at 455 (Stevens J., concurring in the judgment and dissenting in part) (FAA did not preclude determination based on state law that class action arbitration was permissible).

The FAA’s silence on the availability of class actions in arbitration should be fatal to Petitioners’ argument that the Act only permits class actions where a company’s contract expressly allows them. First, the Act’s silence on this issue deprives the Court of any basis for finding that Congress ever intended to enact such a rule of substantive contract law requiring express contractual authorization of class actions. *Cf. Engine Manuf.’s Ass’n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”) (quoting *Park ’N Fly, Inc. v. Dollar Park ’N Fly, Inc.*, 469 U.S. 189, 194 (1985)). Absent any statutory support whatsoever for this proposed anti-class-action rule of contract law, the Petitioners’ arguments for reversal of the decision below should be rejected.

Second, the proposed interpretive rule disfavoring class actions in arbitration flies in the face of the ordinary presumption in *favor* of arbitrating claims that the Court long has found to apply under the FAA. As discussed, the Court repeatedly has held that the FAA’s primary substantive provision making arbitration agreements enforceable, 9 U.S.C. § 2, establishes that, “as a matter of federal law, any doubts

concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone, supra*, 460 U.S. at 24-25. The gist of this rule is that the Federal *Arbitration Act*, by its express terms, was meant to encourage the enforcement of agreements for *arbitration* of disputes.

In the quarter-century since, the *Moses H. Cone* principle has been cited in over 1,500 court opinions. Moreover, this Court repeatedly has invoked it as a basis for holding that different types of claims were arbitrable whether or not they were specifically named in an arbitration clause. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (“There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights.”); *Mastrobuono, supra*, 514 U.S. at 62 (citing *Moses H. Cone* as basis for finding punitive damages claims subject to arbitration under otherwise ambiguous agreement). Indeed, this Court has never held that any kind of underlying claim could only be arbitrated under the FAA if it was expressly identified in an arbitration clause.

Adoption of Petitioners’ argument for a presumption *against* arbitration (or litigation) of class actions absent express contractual authorization thus would mark a sea-change in the Court’s application of the FAA that finds no support in either the text or the heretofore observed purposes of the Act to facilitate arbitration of claims. Unlike the *Moses H. Cone* rule, Petitioners’ proposed interpretive rule would read the

Federal Arbitration Act to *prohibit* arbitration of a significant body of disputes – making class actions the only disputes for which any doubts (or lack of utter certainty) concerning the scope of arbitrable issues would be resolved against arbitration.

Finding no answer in the FAA itself for reversing the ordinary presumption in favor of permitting arbitration of claims, Petitioners rely instead on what amount to naked policy arguments about arbitration and class actions. Petitioners contend that “[i]mposing class arbitration fundamentally transforms the nature and scope of the proceeding, turning it into something to which the parties never agreed” and that “[a]rbitrators are not authorized to order such a transformation.” Brief for Petitioners at 27. But they cite no language in their actual contracts showing that class arbitration somehow “*transforms*” anything, or any language in the FAA suggesting that allowing class arbitration of a dispute would somehow “*transform*” the terms of the agreement to arbitrate.

Absent any contractual or express statutory support, Petitioners’ arguments against arbitration of a class action are no different from the generalized arguments against arbitration of statutory claims that this Court has repeatedly rejected in applying the FAA. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (“Such generalized attacks on arbitration ‘rest on suspicion of arbitration as a method of weakening the protections afforded in substantive law to would-be complainants,’ and as

such, they are ‘far out of step with our current strong endorsements of the federal statutes favoring this method of resolving disputes.’”) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)).

Since the FAA provides no support whatsoever for a presumption against arbitration of class actions and instead has repeatedly been held to presumptively *favor* arbitration of claims, the Court should reject Petitioners’ arguments and affirm the decision below holding that class-wide arbitration is not prohibited under applicable New York and/or federal maritime law that governs the claims in this case.

II. Adoption of Petitioners’ Arguments Could Have Far-Reaching Preemptive Effects.

The absence of statutory support by itself should be fatal to Petitioners’ proposed interpretive rule prohibiting or disfavoring arbitration of class actions under the FAA. An additional reason for not reading this interpretive rule into the statute arises from its potentially far-reaching preemptive effects.

A. A Number of States Have Developed Laws that Directly Address and Bar Contract Terms Prohibiting Class Actions Where Class Procedures are Necessary to Vindicate Claims Important to Those States.

Unlike Congress in the FAA, a number of states have developed law that directly addresses the effect of contract provisions expressly prohibiting class actions. For example, Massachusetts has a consumer protection statute giving consumers a specific right to bring a class action, Mass. Gen. Laws ch. 93A, § 9(2), and prohibits waivers of consumers' rights under the statute. *See Canal Elec. Co. v. Westinghouse Elec. Corp.*, 548 N.E.2d 182, 187 (Mass. 1989). Based on this established law, the Massachusetts Supreme Judicial Court found in addressing the validity of an arbitration clause's express prohibition of class actions that the "expressions of three branches of Massachusetts government indicate that the public policy of the Commonwealth strongly favors G.L. c. 93A class actions." *Feeney v. Dell, Inc.*, 908 N.E.2d 753, 762 (Mass. 2009). In light of this legislatively-based public policy, the court held that a provision expressly barring class actions was unenforceable as applied to claims challenging fraudulently labeled "sales tax" charges of \$13.65 on the purchase of a personal computer because, "in the circumstances of a case such as this (small value claims sought under our consumer protection statute, G.L. c. 93A), a clause effectively prohibiting class proceedings in any forum violates the public policy of the Commonwealth." *Id.* at 766.

Other states have reached similar conclusions about contracts with class action bans that effectively prevent consumers from vindicating their claims in arbitral or judicial proceedings alike. In Washington, the State Supreme Court has found that the state's consumer protection statute, Wash. Rev. Code ch. 19.86, and state class action rule created public policy making class actions "vital where the damage to any individual consumer is nominal." *Scott v. Cingular Wireless*, 161 P.3d 1000, 1006 (Wash. 2007).³ Applying this legislatively-based public policy to consumer claims found too small to vindicate individually, the court held that a contract provision barring class action treatment of these claims in arbitration was unenforceable. *Id.* at 1008. On the same day, the court reached exactly the same conclusion with regard to a *judicial* forum selection clause (*i.e.*, a clause that did not involve arbitration) that likewise barred class action proceedings. *See Dix v. ICT Group, Inc.*, 161 P.3d 1016, 1024-25 (Wash. 2007).

In New Jersey, the State Supreme Court similarly held that a provision expressly barring class actions for small-value, but factually complex, claims under the state's consumer protection statutes in

³ The court in *Scott* traced the rich factual record set forth in the trial court establishing as a matter of admissible evidence that the class action ban at issue in that case would bar the plaintiffs and others similarly situated from effectively vindicating their statutory causes of action. *Scott*, 161 P.3d at 1003-04.

arbitration was unenforceable. *See Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 100-101 (N.J. 2006). The court also held on the same day that an identical provision barring class actions in arbitration was valid and fully enforceable as applied to larger value consumer claims that were filed on an individual basis. *See Delta Funding Corp. v. Harris*, 912 A.2d 104, 115 (N.J. 2006).

Other states have taken different views of contract provisions prohibiting class actions. The State of Utah, for example, has enacted a statute expressly declaring that class-action bans in open-ended consumer credit contracts are valid. *See Utah Code Ann. § 70C-4-105*. In the District of Columbia, the District's Court of Appeals held that a judicial forum selection clause effectively prohibiting class actions was valid and enforceable. *Forrest v. Verizon Comm.'s, Inc.*, 805 A.2d 1007, 1013 (D.C. 2002).

In sum, all of these states and numerous others have done what Congress nowhere in the FAA ever did, *i.e.*, look directly at the issue of whether contracts can expressly or implicitly prohibit class actions. These states have resolved this issue in a variety of ways involving consideration of both freedom of contract and the ability of parties to effectively vindicate their statutory rights under applicable state law.

B. Petitioners’ Proposed Interpretation of the FAA to Ban Class Actions When an Arbitration Clause Does Not Expressly Provide for Them Would Arguably Impliedly Preempt Many State Laws Based on the Alleged Frustration of Congress’s “Purposes and Objectives.”

Petitioners, though not their *amici*, disavow any preemption consequences of their proposed interpretive rule, contending that “if true contractual silence results in the unavailability of class arbitration, traditional principles such as fraud, duress, or unconscionability could lead a court to void an arbitration provision entirely under Section 2 of the FAA.” Brief for Petitioners at 14. This assessment is correct as a statement of *current* law. *See, e.g., Homa v. American Express Co.*, 558 F.3d 225, 230 (3d Cir. 2009) (“In other words, the defense [New Jersey law] provides is a general contract defense, one that applies to all waivers of class-wide actions, not simply those that also compel arbitration. Therefore, there are no grounds for FAA preemption.”) (citing *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1221 (9th Cir. 2008)).

But whether this still would be the law upon adoption of Petitioners’ proposed interpretive rule prohibiting class actions where a company contract does not expressly allow them is far from clear. *See, e.g.*, Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioners at 19 (“Significantly, the FAA mandates

displacement not only of [state law] rules that keep parties out of arbitration altogether, but also of arbitration-specific rules that allow arbitration to proceed, but recast the arbitration in ways contrary to the parties' intent."). This uncertainty arises not just from the fact that the proposed rule itself is nowhere to be found in the FAA, but also from the fact that the preemption argument that Petitioners' *amici* would invoke also is nowhere to be found in the FAA's text.

This Court long has recognized that "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sciences*, 489 U.S. at 477. Instead, preemption under the FAA arises through the doctrine of implied conflict preemption, where state law may be preempted "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.'" *Id.* (quoting *Hines v. Davidowitz*, *supra*, 312 U.S. at 67). The relevant preemption inquiry thus would be whether a state law that invalidates a contract provision prohibiting class actions where they are necessary to vindicate claims would be deemed to "undermine the goals and policies of the FAA." *Volt Info. Sciences*, 489 U.S. at 478.

The Petitioners' professed certainty as to how this preemption issue would be resolved is misplaced. As often has been noted, the doctrine of implied conflict preemption based on alleged frustration of

statutory purposes and objectives defies precise application. Indeed, it has been deemed “problematic” precisely because it “encourages an overly expansive reading of statutory text,” in which a court’s “desire to divine the broader purposes of the statute before it inevitably leads it to assume that Congress wanted to pursue those policies ‘at all costs’ – even when the text reflects a different balance.” *Wyeth v. Levine*, 129 S. Ct. 1187, 1215 (2009) (Thomas, J., concurring in the judgment) (quoting *Geier v. American Honda Motor Co.*, 529 U.S. 861, 904 (2000) (Stevens, J., dissenting)). Moreover, a “freewheeling judicial inquiry into whether a state statute is in tension with federal objectives” has been recognized to “undercut the principle that it is Congress rather than the courts that pre-empts state law.” *Gade v. National Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

These concerns are particularly resonant here because the unwritten Congressional purpose to disfavor class actions would not even be based on any textual provision of the FAA, but rather on the likewise unwritten interpretive rule that Petitioners urge upon the Court here. If this rule prohibiting class actions except where a company’s arbitration clause expressly allows one were adopted as federal law, then a state-law rule of the type discussed above – requiring the availability of class actions where proven necessary to vindicate claims – would at least

arguably conflict with the FAA's unwritten purpose to allow their prohibition.

Creation of a rule under the FAA limiting the availability of class actions also could greatly expand the already considerable range of state laws held to be impliedly preempted. Although the FAA says nothing about preemption, the Court has found implied preemption based on the Act's express command that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In light of this provision, the Court has held that state laws prohibiting, restricting, or delaying access to arbitration are preempted as applied to cases covered by arbitration clauses. *See Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (state law barring arbitration of franchise disputes); *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987) (state law barring arbitration of wage and hour claims); *Allied-Bruce Terminix Co.'s, Inc. v. Dobson*, 513 U.S. 265, 269-70 (1995) (state law barring enforcement of pre-dispute arbitration agreements); *Doctor's Assoc.'s, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (state law imposing unique disclosure requirements for arbitration clauses); *Preston v. Ferrer*, 552 U.S. 346, 128 S. Ct. 978, 987 (2008) (state law requiring administrative proceeding before claims can be arbitrated). In each case, the state law at issue restricted access to the arbitral forum, and thereby was deemed to conflict with the FAA's express provision making arbitration clauses enforceable. *See, e.g., Preston*, 128

S. Ct. at 987 (“[I]t bears repeating that Preston’s petition presents precisely and only a question concerning the forum in which the parties’ dispute will be heard.”).

The Petitioners here, by contrast, seek to expand the FAA’s reach, beyond the express language of the statute, to make the arbitral forum *unavailable*. Indeed, Petitioners are seeking to *prevent* Respondent from arbitrating or litigating a class action in the absence of any statutory or contractual prohibition from doing so. The Court should not allow Petitioners to succeed in this gambit. Once an unwritten purpose to disfavor class actions is recognized under the FAA, then arguments for recognizing a likewise unwritten intent to preempt state law will quickly follow. Since Congress nowhere in the FAA even addresses the availability of class actions, the Court should reject this invitation to open the door to the implied preemption of state laws aimed at preserving the class action device where it is deemed essential to vindicating the rights of consumers and employees.



CONCLUSION

For the reasons set forth herein, the United States Court of Appeals for the Second Circuit's decision should be affirmed.

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