

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 AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF PETITIONERS**

DEBORAH J. LA FETRA
TIMOTHY SANDEFUR
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTION PRESENTED

Whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
IDENTITY AND INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE RIGHT TO FREEDOM OF CONTRACT—INCLUDING CONTRACTS TO ARBITRATE—IS A MATTER OF INDIVIDUAL FREEDOM, NOT DISCRETIONARY SOCIAL POLICY	3
II. CONSIDERATIONS OF ECONOMIC EFFICIENCY DO NOT WARRANT IMPOSING ARBITRATION ON PARTIES AGAINST THEIR WILL	7
III. IMPOSING CLASS ARBITRATION ON PARTIES WITHOUT THEIR CONSENT WOULD HAVE TROUBLING POLICY CONSEQUENCES	16
CONCLUSION	20

TABLE OF AUTHORITIES

	Page
Cases	
<i>Advance-Rumely Thresher Co., Inc. v. Jackson</i> , 287 U.S. 283 (1932)	6
<i>Aetna Ins. Co. v. Kennedy to Use of Bogash</i> , 301 U.S. 389 (1937)	19
<i>Andrews-Clarke v. Travelers Ins. Co.</i> , 984 F. Supp. 49 (D. Mass. 1997)	7
<i>Bowers v. Hardwick</i> , 478 U.S. 186 (1986)	6
<i>Cingular Wireless, LLC v. Mendoza</i> , 547 U.S. 1188 (2006)	1
<i>City of Erie v. Pap's A.M.</i> , 529 U.S. 277 (2000)	5
<i>Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.</i> , 527 U.S. 666 (1999)	19
<i>Commodity Futures Trading Comm'n v. R.J. Fitzgerald & Co., Inc.</i> , 310 F.3d 1321 (11th Cir. 2002)	6
<i>Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.</i> , 527 F.2d 966 (2d Cir. 1975)	8, 14-15
<i>Davis v. Prudential Sec., Inc.</i> , 59 F.3d 1186 (11th Cir. 1995)	19
<i>Dean Witter Reynolds, Inc. v. Byrd</i> , 470 U.S. 213 (1985)	8, 14-15
<i>DHL Express (USA), Inc. v. Ontiveros</i> , 129 S. Ct. 1048 (2009)	1

TABLE OF AUTHORITIES—Continued

	Page
<i>DiFelice v. Aetna U.S. Healthcare</i> , 346 F.3d 442 (3d Cir. 2003)	6
<i>East San Bernardino County Water Dist.</i> <i>v. City of San Bernardino</i> , 33 Cal. App. 3d 942 (1973)	18
<i>Elmora Hebrew Ctr., Inc. v. Fishman</i> , 570 A.2d 1297 (N.J. Super. Ct. App. Div. 1990), <i>aff'd</i> , 593 A.2d 725 (N.J. 1991)	7
<i>Faretta v. California</i> , 422 U.S. 806 (1975)	4-6
<i>Green Tree Fin. Corp. v. Bazzle</i> , 539 U.S. 444 (2003)	18
<i>Hall Street Assocs., L.L.C. v. Mattel, Inc.</i> , 128 S. Ct. 1396 (2008)	1
<i>Illinois v. Allen</i> , 397 U.S. 337 (1970)	6
<i>Izzi v. Mesquite Country Club</i> , 186 Cal. App. 3d 1309 (1986)	18
<i>Jabri v. Qaddura</i> , 108 S.W.3d 404 (Tex. App. 2003)	7
<i>Lefkowitz v. Wagner</i> , 395 F.3d 773 (7th Cir. 2005)	17
<i>Livingston v. Assocs. Fin., Inc.</i> , 339 F.3d 553 (7th Cir. 2003)	17
<i>Mastrobuono v. Shearson Lehman</i> <i>Hutton, Inc.</i> , 514 U.S. 52 (1995)	15
<i>Preston v. Ferrer</i> , 128 S. Ct. 978 (2008)	1

TABLE OF AUTHORITIES—Continued

	Page
<i>Robert Lawrence Co., Inc. v. Devonshire Fabrics, Inc.</i> , 271 F.2d 402 (2d Cir. 1959), <i>cert. dismissed</i> , 364 U.S. 801 (1960)	14
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989)	5
<i>The Monrosa v. Carbon Black Export, Inc.</i> , 359 U.S. 180 (1959)	3
<i>Twin City Pipe Line Co. v. Harding Glass Co.</i> , 283 U.S. 353 (1931)	6
<i>United Kingdom v. Boeing Co.</i> , 998 F.2d 68 (2d Cir. 1993)	8, 14-15
<i>Volt Info. Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Junior Univ.</i> , 489 U.S. 468 (1989)	15
United States Constitution	
Declaration of Independence, 1 Stat. 1 (1776)	4
Rules of Court	
Fed. R. Civ. P. 23	17-18
Sup. Ct. R. 37.3(a)	1
Sup. Ct. R. 37.6	1
Miscellaneous	
Boudreaux, Donald, et al., <i>Talk Is Cheap: The Existence Value Fallacy</i> , 29 <i>Env'tl. L.</i> 765 (1999)	10-11
Brunet, Edward, <i>Arbitration and Constitutional Rights</i> , 71 <i>N.C. L. Rev.</i> 81 (1992)	4

TABLE OF AUTHORITIES—Continued

	Page
Buchanan, James M., <i>Rights, Efficiency, and Exchange: The Irrelevance of Transaction Cost</i> (1984), <i>reprinted in</i> THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY (1999)	10
Buckner, Carole J., <i>Due Process in Class Arbitration</i> , 58 Fla. L. Rev. 185 (2006)	18
Burnham, Scott J., <i>The War Against Arbitration in Montana</i> , 66 Mont. L. Rev. 139 (2005)	11
Carter, Roger L., <i>Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations</i> , 2002 J. Disp. Resol. 367	14
De Alessi, Louis, <i>Efficiency Criteria for Optimal Laws: Objective Standards or Value Judgments?</i> , 3 Const. Pol. Econ. 321 (1992)	13
Hayek, Friedrich, <i>The Pretense of Knowledge</i> (1974), <i>reprinted in</i> NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS, AND THE HISTORY OF IDEAS (1977)	10
Jefferson, Thomas, Letter to Isaac H. Tiffany, April 4, 1819, <i>in</i> <i>Jefferson: Political Writings</i> (Joyce Appleby ed., 1999)	4
Kirzner, Israel, <i>Market Theory and the Price System</i> (1963)	9

TABLE OF AUTHORITIES—Continued

	Page
Knight, Frank, <i>The Ethics of Competition</i> (Transaction Books 1997) (1923)	9
Locke, John, <i>Second Treatise of Civil Government</i> (Peter Laslett ed., rev. ed. 1963) (1690)	3
Meriwether, Thomas S., <i>Limiting Judicial</i> <i>Review of Arbitral Awards Under the Federal</i> <i>Arbitration Act: Striking the Right Balance,</i> 44 Hous. L. Rev. 739 (2007)	8
Posner, Richard, <i>Economic Analysis</i> <i>of the Law</i> (4th ed. 1992)	4, 12
Rothbard, Murray, <i>Man, Economy, and</i> <i>State</i> (Nash Publishing 1970) (1962)	12
<i>The Federalist</i> (Clinton Rossiter ed., 1961)	9
Vanberg, Viktor, <i>Individual Choice</i> <i>and Institutional Constraints: The</i> <i>Normative Element in Classical and</i> <i>Contractarian Liberalism, in RULES</i> AND CHOICE IN ECONOMICS (1994)	11-12
Weston, Maureen A., <i>Universes Colliding: The Constitutional</i> <i>Implications of Arbitral Class Actions,</i> 47 Wm. & Mary L. Rev. 1711 (2006)	16-17

**IDENTITY AND
INTEREST OF AMICUS CURIAE**

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Petitioners.¹

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving the Federal Arbitration Act and contractual arbitration in general, including *DHL Express (USA), Inc. v. Ontiveros*, 129 S. Ct. 1048 (2009); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008); *Preston v. Ferrer*, 128 S. Ct. 978 (2008); and *Cingular Wireless, LLC v. Mendoza*, 547 U.S. 1188 (2006). PLF believes its public policy experience will assist this Court in its consideration of the merits of this case.

¹ Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any 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.

SUMMARY OF ARGUMENT

The purpose behind the Federal Arbitration Act is to preserve and promote the right to contractual choice. It is not to impose on contracting parties a means of dispute resolution unrelated to, or possibly contrary to, their actual preferences. While arbitration is generally thought to be more “economically efficient”—meaning that it costs less time and money than litigation—this is not why arbitration contracts ought to be enforced; rather, like all mutually agreed-upon contracts, arbitration agreements should be enforced because they represent the bargained-for meeting of the minds between the parties. Such contracts are the product of the parties’ own assessments of their costs and benefits, and as no third party is in a better position to decide whether the benefits outweigh the costs, the parties’ own judgment deserves respect.

Given the FAA’s overriding purpose of protecting freedom of choice, courts should not construe arbitration agreements in a broad manner that subjects parties to *class* arbitration when no such meeting of the minds is evident in their agreement. To do so would be to impose a dispute resolution mechanism by coercion rather than choice, which would contradict the basic principles of arbitration itself.

Moreover, imposing class arbitration would also threaten the security of other important constitutional rights. A knowing and voluntary agreement to arbitrate waives certain constitutional rights that would apply in litigation. Thus, for a court to infer an intent to arbitrate from equivocal evidence would risk imposing a waiver of constitutional rights where the party did not so intend. This Court should not

presume a waiver of constitutional rights in the absence of an unmistakable attempt to waive them. The judiciary should “not stretch the language” of an arbitration agreement when the parties have “not included a provision [they] easily might have [included].” *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959).

ARGUMENT

I

THE RIGHT TO FREEDOM OF CONTRACT—INCLUDING CONTRACTS TO ARBITRATE—IS A MATTER OF INDIVIDUAL FREEDOM, NOT DISCRETIONARY SOCIAL POLICY

The liberty explicitly guaranteed by the Constitution includes the freedom of individuals or groups to decide how to use their property, labor, capital, and other rights commonly subject to exchange. The right of people, either individually or in concert, to dispose of their time, energy, liberty, or possessions is a fundamental element of freedom. *See, e.g., John Locke, Second Treatise of Civil Government* § 57 (Peter Laslett ed., rev. ed. 1963) (1690) (freedom means a person’s “liberty to dispose and order freely as he lists his person, actions, possessions, and his whole property within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own.”). This means that people must be free to formulate agreements and exchanges, including agreements that third parties might regard as unwise or undesirable.

Freedom of exchange has many beneficial economic and social consequences. In particular, it

allows people to apply resources to the most efficient uses. Richard Posner, *Economic Analysis of the Law* 10 (4th ed. 1992). Individuals and firms can exchange their possessions or efforts for things that they value more, thereby maximizing the utility each individual enjoys. *Id.* at 11 (“By a process of voluntary exchange, resources, are shifted to those uses in which the value to consumers, as measured by their willingness to pay, is highest.”). Free exchange therefore leads to greater economic efficiency. *See also* Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. Rev. 81, 104-05 (1992) (“Efficiency is furthered by agreements to exchange items because each party will receive a more useful item than it surrenders.”).

But the Constitution and laws—including the FAA—protect liberty not merely in pursuit of economic efficiency, but because those choices are inherently worthy of respect. As this Court observed in a different context, “whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice.” *Faretta v. California*, 422 U.S. 806, 833-44 (1975). The exercise of rightful freedom—which in Thomas Jefferson’s words means “unobstructed action according to our will within limits drawn around us by the equal rights of others,” Letter to Isaac H. Tiffany, April 4, 1819, in *Jefferson: Political Writings* 224 (Joyce Appleby ed., 1999)—represents the individual’s decision of how to employ her faculties in pursuit of her own ends. The founders referred to such decision-making as “the pursuit of happiness.” Declaration of Independence, 1 Stat. 1, 1 (1776).

The right of each person peacefully to pursue her own happiness is justified both by the worthiness of

the goal itself and by the fact that outside observers are virtually never in a position to know what ends another person ought to pursue. Outsiders have very limited knowledge of a person's circumstances, desires, and abilities; they are also subject to different incentives and desires than the contracting parties themselves. Given the power to control or limit the freedom of contracting parties, outsiders will typically make erroneous assessments of the parties' priorities or of the appropriateness of a particular means to the ends that the parties seek. Also, outsiders will often exploit such power to serve their own interests at the expense of the contracting parties. Thus outsiders cannot be trusted with the authority to control the choices that contracting parties might make, even where doing so might appear to lead to more "efficient" results, or results that outsiders consider more desirable.

In short, the right to make economic choices, like other rights, is protected not because it leads to broader policy goals like wealth maximization or "economic efficiency," but because that right preserves individual autonomy and restricts the improper interference of outsiders. This Court has often recognized that liberty is protected even where its social benefits are minimal or its consequences undesirable. For example, the First Amendment protects free speech even though some expression might be offensive to others. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 420 (1989) (flag burning); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (erotic dancing). This Court has also protected other aspects of individual freedom because they are central to individual autonomy, and not because they serve some broader scheme of social welfare. *See, e.g., Faretta*,

422 U.S. at 834 (“although [a criminal defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of ‘that respect for the individual which is the lifeblood of the law.’” (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring))). As Justice Blackmun wrote (in a dissenting opinion that was later vindicated) the Constitution protects individual rights “not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual’s life.” *Bowers v. Hardwick*, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting).

This Court has recognized that the freedom to make and enforce contracts is a fundamental element of free choice and ought to be protected for that reason. *See, e.g., Advance-Rumely Thresher Co., Inc. v. Jackson*, 287 U.S. 283, 288 (1932) (“[F]reedom of contract is the general rule and . . . [t]he exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.”); *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931) (“The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.”). Other courts have agreed. *See, e.g., Commodity Futures Trading Comm’n v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d 1321, 1333 (11th Cir. 2002) (“The law vigorously protects the right of private individuals to exercise free choice in the marketplace.”); *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 460 (3d Cir. 2003) (“This cause of action—that contractual promises can be enforced in the courts—pre-dates Magna Carta. It is the very bedrock of our notion of

individual autonomy and property rights.’” (quoting *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49 (D. Mass. 1997))). The freedom to formulate economic agreements and exchanges is not a discretionary social policy imposed by government to serve the state’s purposes, but an element of that freedom of choice to which every individual is entitled by right.

The right to choose how to resolve disputes is also an aspect of this freedom of choice, and often one that implicates extremely important personal values. For example, many people choose to have disputes arbitrated by religious leaders, *see, e.g., Jabri v. Qaddura*, 108 S.W.3d 404 (Tex. App. 2003) (compelling arbitration by Islamic authorities); *Elmora Hebrew Ctr., Inc. v. Fishman*, 570 A.2d 1297 (N.J. Super. Ct. App. Div. 1990), *aff’d*, 593 A.2d 725 (N.J. 1991) (enforcing decision of Jewish arbitrators). While some might see commercial arbitration contracts between sophisticated businesses as impersonal, routine affairs, the reality is that decisions regarding arbitration are often fraught with judgments about essential individual values. Courts should respect contractual choices, including arbitration agreements, not simply to serve public policy goals involving speedy dispute resolution, but because contractual freedom of choice is worthy of protection and enforcement.

II

CONSIDERATIONS OF ECONOMIC EFFICIENCY DO NOT WARRANT IMPOSING ARBITRATION ON PARTIES AGAINST THEIR WILL

Participants in arbitration generally consider the procedure more economically efficient than litigation

because it costs less time and money. *See, e.g.*, Thomas S. Meriwether, *Limiting Judicial Review of Arbitral Awards Under the Federal Arbitration Act: Striking the Right Balance*, 44 *Hous. L. Rev.* 739, 758 (2007) (“Parties opt for arbitration in lieu of traditional litigation in large part because arbitration offers a quicker and less expensive avenue for dispute resolution.”). This has led some courts to conclude that judges should presume in favor of arbitration, even where the parties may not have sought it. *See, e.g.*, *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966, 975 (2d Cir. 1975), *overruled by United Kingdom v. Boeing Co.*, 998 F.2d 68, 71 (2d Cir. 1993). But this Court has observed that freedom of choice, and not efficiency concerns, animates the Federal Arbitration Act. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985) (FAA was designed “first and foremost . . . to enforce agreements into which parties had entered, and we must not . . . allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation.”).

It is illusory to regard a case like *Byrd* or the present case as a clash between efficiency and free choice. That distinction rests on an incorrect understanding of the term “economic efficiency.” That term “efficiency” is meaningless when abstracted from the choices that parties freely make when weighing their options. There is no such thing as efficiency *per se*; there can only be an efficient means to accomplish some particular end with minimal waste. Yet ends are only pursued by individuals or business firms, not by society as a whole. As economist Israel Kirzner wrote,

[s]ociety has no single mind where the goals of different individuals can be ranked on a single scale. . . . We are not invoking the notion of a society having *its* goals in any sense apart from the goals of the individuals making up the society. Efficiency for a social system means the efficiency with which it permits its individual members to achieve their several goals.

Market Theory and the Price System 35 (1963). Since “society” does not pursue any particular end, it is impossible to say whether a policy advances that end with minimal waste.² Thus there can be no such thing as a policy that is “socially” efficient. *See also* Frank Knight, *The Ethics of Competition* 34 (Transaction Books 1997) (1923) (“It is impossible to form any concept of ‘social efficiency’ in the absence of some general measure of value.”).

Moreover, it is rarely if ever possible for outsiders to determine what actions are most efficient for contracting parties to take than to observe the transactions to which those parties actually agree. To second-guess their decisions would require a degree of knowledge that is almost never available to an outside observer. As economist Friedrich Hayek observed in his Nobel prize lecture:

² It might be argued that there is one policy that is, in fact, “efficient” for society as a whole, as it serves the interests of all concerned: that is, the protection of individual rights. *See The Federalist No. 10*, at 80-81 (James Madison) (Clinton Rossiter ed., 1961) (“[T]he great desideratum by which [representative] government can be rescued from . . . opprobrium” is “[t]o secure the public good and private rights against the danger of such a faction” as might “sacrifice the weaker party or an obnoxious individual.”)

Into the determination of [the terms of an exchange] . . . there will enter the effects of particular information possessed by every one of the participants in the market process—a sum of facts which in their totality cannot be known to the scientific observer, or to any other single brain. . . . [B]ecause we, the observing scientists, can thus never know all the determinants of such an order . . . we also cannot measure the deviations from that order; nor can we statistically test our theory that it is the deviations from that “equilibrium” system of prices and wages which make it impossible to sell some of the products and services at the prices at which they are offered.

The Pretense of Knowledge (1974), reprinted in *NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS, AND THE HISTORY OF IDEAS* 23, 27 (1977).

Thus there can be no such thing as “efficiency in general” or “collective” or “social” efficiency. Rather, as Nobel laureate James Buchanan writes, “voluntary exchanges among persons, within a competitive constraints structure, generate efficient resource usage, *which is determined only as the exchanges are made.*” James M. Buchanan, *Rights, Efficiency, and Exchange: The Irrelevance of Transaction Cost* (1984), reprinted in *THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY* 260, 273-74 (1999) (emphasis added). Outsiders cannot gather the information necessary to know whether an economic exchange is efficient except to observe that the parties, who know their own priorities best, voluntarily adopted it. See Donald J. Boudreaux et al., *Talk Is Cheap: The*

Existence Value Fallacy, 29 *Envtl. L.* 765, 785 (1999) (“In market transactions, we can assume that all individual trades increase individual utility, because the occurrence of the trade itself suggests that the individual values the good received more highly than the good surrendered.”). This is as true of arbitration as of any other contract. “For the system to work, government has to trust people, even to the extent of letting them enter ‘bad’ contracts. . . . The government does its best work when it sticks to furthering the competitive aspects of the system and leaves the deal-making to the parties.” Scott J. Burnham, *The War Against Arbitration in Montana*, 66 *Mont. L. Rev.* 139, 204 (2005).

Thus the term “economic efficiency” is misused when it is applied in a way that disregards the actual decisions individuals make in pursuit of their own ends. Collective economic efficiency cannot be an end which social policy pursues; an activity is economically efficient only to individuals and only in light of their individual pursuits. Nor can economic efficiency serve as a normative guideline for shaping social policy. As economist Viktor Vanberg writes:

In saying that market outcomes are efficient, one claims, in effect, that the processes by which they are generated are ‘good,’ in the sense that through their market choices the constituent individuals reveal what they consider ‘good’ in their own judgement. . . . There is no reference to any standard that would allow one to judge the outcome independently of the transaction itself.

Individual Choice and Institutional Constraints: The Normative Element in Classical and Contractarian

Liberalism, in RULES AND CHOICE IN ECONOMICS 210 (1994).

Since goals are inherently individualized and particular, assessments of true economic efficiency are also inherently personal. Some economists have tried to devise different definitions of economic efficiency, arguing for example that a policy is economically efficient if it aims at maximizing society's wealth. *See, e.g.,* Posner, *supra*, at 14-15. But this disregards the fact that not all economic actors seek to maximize wealth. Rather, they seek to maximize *utility*, which may or may not include considerations of monetary wealth. As economist Murray Rothbard noted, an economic actor "always chooses a bundle of *money income plus other psychic factors* and . . . will maximize his money income only if psychic factors are neutral with respect to his choices." *Man, Economy, and State* 186 (Nash Publishing 1970) (1962). Any government policy which coerces individuals against their will to do what outside observers think will maximize society's wealth will in fact deprive those individuals of utility—thus diminishing their ability to pursue their ends in the ways they consider most efficient. Such a policy would by definition be economically *inefficient*. While it may be *politically* efficient to force individuals to pursue goals that political representatives consider worthy, it is not *economically* efficient to force people to surrender their own desires.

To the degree that a policy substitutes political efficiency for economic efficiency—substitutes the goals of political leaders for the goals of those citizens who seek to pursue happiness through mutually satisfactory exchanges—that policy also substitutes other normative goals in place of allegedly neutral

economic analysis. As economist Louis De Alessi explained, “[t]he maximization of aggregate wealth implies that sources of utility not reflected in the aggregate do not matter and that changes in the wealth of individuals that do not result in a reduction of aggregate wealth also do not matter.” *Efficiency Criteria for Optimal Laws: Objective Standards or Value Judgments?*, 3 Const. Pol. Econ. 321, 334-337 (1992). But prioritizing the desires of third parties above the desires of the contracting parties renders *economic* concerns superfluous. At that point, the state is simply confiscating individual freedom for its own ends, and its doing so is subject to political, rather than to economic analysis.

In short, it makes no sense to speak of a coercive policy as economically efficient. Coercive policies deprive the contracting parties of their judgment, to benefit outsiders, whose goals are thereby deemed more worthy. But if the desires of the contracting parties are to be disregarded, then the determination of whether a decision is efficient for those parties is unnecessary and senseless.

What attorney Roger L. Carter writes of coercion in mediation is equally true of any form of coercive arbitration:

If a party is not free to make a small offer—or no offer at all—in mediation, that party has lost, rather than gained, autonomy. . . . Judges must recognize that the parties—not the court—own the dispute. . . . Any contrivance that works against this right deserves condemnation. . . . [W]e err if we see docket clearing as a primary goal of any form of

ADR. Mediation processes should be designed to improve the quality of settlements. Any attendant increase in the quantity of settlements ought to be seen as a secondary benefit.

Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations, 2002 J. Disp. Resol. 367, 395. Prioritizing the political goal of increased *quantity* of dispute resolutions over the litigants' own interest in the *quality* of those resolutions jettisons the desires of the litigants themselves, and thus cannot qualify as *economically* efficient.

The Second Circuit's resolution of *Boeing*, 998 F.2d 68, was therefore correct and instructive here. In that case, the court overruled *Nereus*, 527 F.2d 966, which had allowed arbitration cases to be consolidated despite the failure of the parties to agree to such a procedure. The *Nereus* court held that this was justified by "the liberal purposes of the Federal Arbitration Act," which "require that [it] be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings." *Id.* at 975.

The *Nereus* court relied on the earlier decision of *Robert Lawrence Co., Inc. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 410 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960), which held that the FAA required courts to "promot[e] arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars." But in *Byrd*, 470 U.S. at 220, decided in 1985, this Court rejected the proposition that the FAA's overriding goal is to promote speedy resolutions of disputes; rather, *Byrd*

made clear that the goal of the FAA is “to enforce agreements into which the parties had entered,” whether or not those agreements promote speedy resolution. Thus, in *Boeing*, the Second Circuit overruled *Nereus*, noting that “the FAA was intended merely to assure the enforcement of privately negotiated arbitration agreements, *despite* possible inefficiencies created by such enforcement.” 998 F.2d at 72. While the Second Circuit may consider this outcome inefficient, that outcome is in reality efficient, if it enforces the actual desires of the parties. And it is the desires of the parties, not concerns over economic efficiency, that dictate the policy of the Federal Arbitration Act—and of enforcing any other kind of contract.³

This Court has repeatedly observed that the FAA’s policy favoring arbitration does not operate without regard to the wishes of contracting parties. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *accord, Volt Info. Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (“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.”). This is correct, but it should not be seen as a choice between competing values of autonomy or economic efficiency. In fact, those values necessarily harmonize; both are best pursued by respecting the right of individuals and

³ In *Byrd*, this Court held that parties to an arbitration agreement could not force other parties to arbitrate issues not contemplated by the agreement even if those issues were pendent. 470 U.S. at 217. The same principle bars coercing pendent *parties* into an arbitration against their will, or consolidating potential or existing disputes against the parties’ will. *Boeing*, 998 F.2d at 74.

firms to make transactions as they see fit, and holding them to the contracts that they sign.

III

IMPOSING CLASS ARBITRATION ON PARTIES WITHOUT THEIR CONSENT WOULD HAVE TROUBLING POLICY CONSEQUENCES

Class arbitration is a relatively new innovation, the rules for which remain vague; imposing it on parties without their actual consent would raise serious public policy objections. For example, many commentators have questioned the due process implications of binding non-disputants to judgments in class arbitrations. *See, e.g.*, Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 Wm. & Mary L. Rev. 1711, 1722 (2006) (“An arbitral award generally cannot bind a nonparty to the arbitration contract; however, the question of whether nonparticipatory class members’ rights may be foreclosed in a private class arbitration is not entirely clear.”).

The central conflict here is the contrast between *individualized* determinations of the rights of parties who have signed an arbitration agreement and the mass resolution of collective injuries by courts. Parties to an arbitration contract have agreed to a process that is inherently individualistic; under the plain language of the arbitration agreement in this case, for instance, each party has a right to an individualized review of the disputes that arise. *See* Brief of the Ass’n of Ship Brokers & Agents (U.S.A.), Inc. as Amicus Curiae in Support of Petitioners at 6, *Stolt-Nielsen S.A., et al. v. AnimalFeeds Int’l Corp.*, No. 08-1198, 2009

WL 1133152 (U.S. filed Apr. 23, 2009) (the agreement speaks of “*the owner*” and “*the charterer*”). But class-based resolutions are not individualized; they resolve mass conflicts which are deemed similar enough to warrant treatment all as one. The parties therefore do not litigate the particular merits of their different circumstances.

In addition, each party to an arbitration has a right to participate in choosing the arbitrator—a right the Seventh Circuit calls “the cornerstone of the arbitral process.” *Lefkovitz v. Wagner*, 395 F.3d 773, 780 (7th Cir. 2005). Also, in some cases, parties to an arbitration agreement are legally entitled to invalidate that agreement, based on “individualized evidence that [the party] likely will face prohibitive costs in the arbitration at issue and that it is financially incapable of meeting those costs.” *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003). These factors reveal that arbitration is an essentially individualized format, in which each party has reserved an opportunity for individual determination of his or her particular injury. Class treatment would deprive the parties of this individualized treatment.⁴

Indeed, class arbitrations could deprive even non-disputants of this right, since such arbitrations are resolved through judgments that could preclude later

⁴ Even the propriety of class arbitration where the class does not meet the standards for class treatment set in Federal Rule of Civil Procedure 23 is questionable. The American Arbitration Association has formulated rules for certifying classes that parallel federal rules for class certification, but there is no legal reason that these two must be identical. If a class satisfies the Association’s rules for class treatment but not federal rules, it would seem to violate due process for a court to refer the case to arbitration for class treatment. *Weston, supra*, at 1737-42.

litigation by another injured party over an injury similar to the one redressed in arbitration. A person who signs an arbitration agreement with a business, but has no dispute with the firm at the time that a class arbitration is brought against it by another signer, could find herself barred from suing later if a dispute does arise which is similar to the dispute resolved in arbitration. This would deprive her entirely of the opportunity for individualized resolution to which she has a contractual right. Procedural rules applicable in class *litigation* typically require the parties to take steps to notify all potential class members of the proceedings and allow them to participate. Fed. R. Civ. P. 23. But what sort of notice requirements apply to class *arbitration* is unresolved. California courts require judges to supervise class arbitrations to “safeguard the rights of absent class members to adequate representation and in the event of dismissal or settlement.” *Izzi v. Mesquite Country Club*, 186 Cal. App. 3d 1309, 1321 (1986) (quoting *East San Bernardino County Water Dist. v. City of San Bernardino*, 33 Cal. App. 3d 942, 950 (1973)). But in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453-54 (2003), this Court limited the judge’s role solely to determining arbitrability, not supervising the arbitration to ensure that it complies with due process rules. Thus it is unclear whether non-disputants who have signed arbitration agreements are entitled to the same protections with respect to class arbitrations that they receive vis-à-vis class litigation. *See further* Carole J. Buckner, *Due Process in Class Arbitration*, 58 Fla. L. Rev. 185, 251-52 (2006) (“[A]rbitration providers’ rules also fail to require explicitly the arbitrator to protect or safeguard the rights of absent

parties throughout the class action proceeding as explicitly required in class action litigation.”).

Perhaps the most troubling problem with inferring consent from a silent arbitration agreement is that such an inference might deprive parties of constitutional rights by presumption. This Court has repeatedly held that it will not lightly presume in favor of a waiver of constitutional rights. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (“[C]ourts indulge every reasonable presumption against waiver’ of fundamental constitutional rights.” (quoting *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393 (1937))). Yet arbitration agreements do waive certain constitutional protections. *See, e.g., Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995) (due process did not apply because arbitration is not state action). Thus, inferring that a party is willing to participate in class arbitration when the arbitration agreement is silent on that matter might operate to waive constitutional procedural rights, both of the defendant and those nondisputants who have also signed the arbitration agreement. This Court should resist adopting a rule that could lead to such dangerous consequences.

The Federal Arbitration Act was designed to expand and enforce freedom of choice. Adopting a rule which might imply the waiver of important constitutional rights would undermine the purpose of the Act by replacing informed consent with implication and coercion. It would replace a regime of free decisionmaking with a rule that enforces “consent” where none actually exists. To defend freedom of choice and to put into effect the actual decisions of

contracting parties, this Court should refuse to infer a willingness to participate in class arbitration from a silent arbitration agreement.

◆

CONCLUSION

The authority of federal courts to compel arbitration is justified by the FAA's overriding policy of protecting the freedom of choice of contracting parties, not by concerns with "efficiency." Indeed, to compel a party to submit to arbitration against his or her will would distort the actual meaning of economic efficiency. This Court should avoid adopting a rule which might lead to the implied waiver of constitutional rights to fair dispute resolution procedures. The decision of the court of appeals should be *affirmed*.

DATED: September, 2009.

Respectfully submitted,

DEBORAH J. LA FETRA
TIMOTHY SANDEFUR
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae Pacific Legal Foundation