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 US, 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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

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

Many of the Chamber's members and affiliates routinely utilize agreements to arbitrate in their business contracts. By agreeing to arbitrate, they are able to avoid costly and time-consuming litigation over disputes arising out of and relating to these contracts by submitting to a streamlined, yet fair process based upon the mutual consent of the parties.

Unlike litigation, private arbitration is a matter of consent, not coercion. Compelling parties to resolve disputes through costly, time-consuming and high-stakes class arbitration, where the parties have not expressly agreed to do so, frustrates the parties' intent, undermines their existing agreements, and erodes the benefits offered by arbitration as an

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[1] Pursuant to Rule 37.6, no counsel for any party to these proceedings authored this brief, in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person, aside from the *amicus curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Petitioners and respondent have submitted letters reflecting blanket consent to the filing of *amicus* briefs and such letters have been filed with the Clerk.

alternative to litigation. Imposition of class arbitration on a "silent" agreement is contrary to the central goal of the Federal Arbitration Act: To ensure that written agreements to arbitrate are enforced in accordance with the terms adopted by the parties.

Parties agree to arbitrate because it offers them an alternative to the dispute resolution processes already available in courts. The FAA ensures not only that private agreements to arbitrate are enforceable, but also that hostility to arbitration is not permitted to remake agreements to arbitrate to replicate the most expensive and formal aspects of court litigation when the parties have not agreed to follow such procedures. The Chamber and its members thus have a vital interest in having this Court reverse the decision below, which held that class arbitration may be imposed by an arbitrator in a proceeding involving a "silent" arbitration agreement.

INTRODUCTION AND SUMMARY

In the wake of *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003) (plurality opinion), arbitrators increasingly have been asked to determine whether to impose class arbitration in cases where the parties' agreement contains no language addressing the availability of class arbitration. Under the FAA, private agreements to arbitrate must be "enforced according to their terms." *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 479 (1989). Parties are entitled not only to choose arbitration over litigation, but "also the procedure to be used in resolving the dispute." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). The command that agreements to arbitrate "shall be valid, irrevocable, and enforceable" is binding both on

courts, 9 U.S.C. § 2, and also on arbitrators who are "bound to effectuate the intentions of the parties." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636 (1985).

Under generally applicable contract law, a contract may not be rewritten to add terms that fundamentally transform the agreement into something the parties have not agreed to do. Instead, an additional term may be supplied only when "essential to a determination of [the parties'] rights and duties" and "reasonable in the circumstances." *Restatement (Second) of Contracts* § 204 (1981); see also 11 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 31:7 (4th ed. 1999) (terms may be added in the face of silence only where "the parties must have intended them and must have failed to express them only because of sheer inadvertence or because they are too obvious to need expression."). It is neither essential nor reasonable under the circumstances to assume – in the face of silence – that the parties to an arbitration agreement intended to authorize class arbitration.

First, as a general matter, class arbitration, and the extensive, formal procedures that it necessarily entails, is not "essential to a determination of [the parties'] rights." *Restatement (Second) of Contracts* § 204. A principal advantage of traditional arbitration is that it allows parties to avoid "'the delay and expense of litigation,'" and it thus "appeal[s] 'to big business and little businessalike, . . . corporate interests [and] individuals.'" *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995) (quoting S. Rep. No. 68-536, at 3 (1924)). As this Court has explained, arbitration "often would seem helpful to individuals . . . who need a less expensive alternative to litigation." *Id.* (noting that arbitration "'is usually

cheaper and faster than litigation; it can have simpler procedural and evidentiary rules'"). Imposition of class arbitration – which is the antithesis of the informality and expeditious nature of traditional arbitration – is thus in no sense "essential" to an agreement to arbitrate.

Second, imposition of class arbitration in the face of a "silent" agreement is not "reasonable in the circumstances." Arbitration provides an alternative to litigation precisely because it allows the parties to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors*, 473 U.S. at 628. In contrast, class arbitration is a "hybrid" proceeding that entails substantially more "external supervision" by courts than traditional arbitration. *Keating* v. *Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd on other grounds sub nom.* 465 U.S. 1, 16 (1984); see also *Discover Bank* v. *Superior Court*, 113 P.3d 1100, 1106 (Cal. 2005) (class arbitration is a "hybrid procedure"). Class arbitration is thus in fundamental respects a stark break from traditional notions of private arbitration.

Under generally applicable contract law, it is not reasonable to conclude that the parties, by agreeing to arbitrate, intended through their silence to transform fundamentally the nature and the scope of traditional arbitration. Class arbitration (i) raises due process issues that require the arbitrator to follow complex and time-consuming procedures (procedures already available in litigation), (ii) exponentially raises the stakes of a single arbitral decision, and (iii) at the same time largely insulates that high-stakes decision from judicial review that would occur as a matter of course in class-action litigation. Neither defendants nor absent class

members reasonably expect to bind themselves to proceed in such a cumbersome fashion by signing an agreement to arbitrate that says nothing about class arbitration.

Finally, the FAA prohibits courts and arbitrators from applying different, arbitration-specific rules of contract law to impose class arbitration on "silent" agreements to arbitrate. See *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 686-87 (1996); *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987).

ARGUMENT

I. THE FAA MANDATES THAT AGREEMENTS TO ARBITRATE BE ENFORCED, UNDER GENERALLY APPLICABLE CONTRACT PRINCIPLES, IN ACCORDANCE WITH THEIR TERMS.

Section 2 of the FAA provides that agreements to arbitrate "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. This broad provision – the "centerpiece" of the FAA – is "at bottom a policy guaranteeing the enforcement of private contractual arrangements." *Mitsubishi Motors*, 473 U.S. at 625. Section 2 likewise reflects that Congress's "primary purpose" is not only requiring that agreements to arbitrate be enforced, but also "ensuring that private agreements to arbitrate are enforced *according to their terms*." *Volt*, 489 U.S. at 479 (emphasis added).

Congress enacted the FAA against a backdrop of hostility by the judiciary to agreements to arbitrate. It sought "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate" by placing them "'upon the same footing as other contracts.'"

Dean Witter Reynolds, Inc. v. *Byrd*, 470 U.S. 213, 219-20 (1985) (quoting H.R. Rep. No. 68-96, at 1 (1924)). As this Court has explained, the FAA requires that arbitration agreements must be enforced and interpreted under the same principles of contract law applicable generally to any other contract. See, *e.g.*, *Doctor's Assocs.*, 517 U.S. at 686-87; *Perry*, 482 U.S. at 492 n.9. That core obligation applies both to courts as well as to arbitrators, who are "bound to effectuate the intentions of the parties." *Mitsubishi Motors*, 473 U.S. at 636; *accord 14 Penn Plaza LLC* v. *Pyett*, 129 S. Ct. 1456, 1467 (2009) ("'the arbitrator's task is to effectuate the intent of the parties'") (quoting *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 53 (1974)).

As with any contract, "parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. Parties may choose to limit the types of claims subject to arbitration, see *Mitsubishi Motors*, 473 U.S. at 628, or they may select particular rules and procedures that will govern the manner in which their arbitration proceeds, see *Volt*, 489 U.S. at 479; *Scherk*, 417 U.S. at 519. In this respect, arbitration differs markedly from litigation because an agreement to arbitrate is "a matter of consent, not coercion." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 294 (internal quotation marks omitted). As a result, an arbitrator "'has no general charter to administer justice for a community which transcends the parties,'" but is instead "'part of a system of self-government created by and confined to the parties.'" *United Steelworkers of Am.* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960). Put simply, "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration."

AT&T Techs., Inc. v. *Communications Workers of Am.*, 475 U.S. 643, 648-49 (1986).

Application of these bedrock principles confirms that class arbitration cannot be imposed upon a "silent" agreement to arbitrate.

II. GENERALLY APPLICABLE CONTRACT LAW DOES NOT PERMIT IMPOSITION OF CLASS ARBITRATION UPON A SILENT ARBITRATION AGREEMENT.

Under generally applicable contract law, parties are bound by the terms of their agreement, and those agreements may not be rewritten by courts or arbitrators to add provisions that the parties could have, but did not, include.

When the terms of an agreement are "silent" on a matter, an additional term may be supplied only if (i) "essential to a determination of [the parties'] rights and duties," *and* (ii) "reasonable in the circumstances." See *Restatement (Second) of Contracts* § 204; see, *e.g.*, *Vermont Teddy Bear Co.* v. *538 Madison Realty Co.*, 807 N.E.2d 876, 879 (N.Y. 2004) ("[C]ourts may not by construction add or excise terms . . . and thereby make a new contract for the parties under the guise of interpreting the writing") (internal quotation marks omitted); 11 Williston & Lord, *supra*, § 31:7 (terms may be added to a "silent" agreement only where "the parties must have intended them and must have failed to express them only because of sheer inadvertence or because they are too obvious to need expression").

For example, under the FAA, courts have repeatedly rejected claims that an arbitration agreement cannot be enforced because it fails expressly to state that, by agreeing to arbitrate, the parties are waiving their right to a jury trial. *E.g.*,

Pierson v. *Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984) ("loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate").[2] In such cases, an agreement to arbitrate necessarily, reasonably and obviously implies a waiver of a jury trial. The parties' "silence" on this issue is of no moment; it is "too obvious to need expression." 11 Williston & Lord, *supra*, § 31:7. As shown below, the parties' consent to class arbitration is neither essential to an agreement to arbitrate nor reasonable under the circumstances.

A. Class Arbitration Is Not An Essential Aspect Of An Agreement To Arbitrate.

Class arbitration is not an "essential" part of an agreement to arbitrate. To the contrary, class arbitration reflects a stark break from traditional arbitration, whereby a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors*, 473 U.S. at 628.

1. Class arbitration is fundamentally different than traditional arbitration. The earliest decisions addressing class arbitration recognized this fact, explaining that class arbitration necessarily "entail[s] a greater degree of judicial involvement than is normally associated with arbitration," which is

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[2] *See also Snowden* v. *Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (jury trial waiver, though not expressly provided, was implicit as a "'necessary'" and "'obvious'" consequence of the arbitration agreement); *Robert Bosch Corp.* v. *ASC Inc.*, 195 F. App'x 503, 507 (6th Cir. 2006) ("the loss of the right to a civil jury trial is a fairly obvious consequence of failing to object to an arbitration clause and, therefore, does not require an express waiver") (internal quotation marks omitted).

"ideally a complete proceeding, without resort to court facilities." *Keating*, 645 P.2d at 1209 (internal quotation marks omitted). Following California's lead, Pennsylvania courts recognized that "[c]lass-wide arbitration is a different animal" than traditional arbitration because of the required resort to judicial remedies. *Dickler* v. *Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 & n.5 (Pa. Super. Ct. 1991).[3] These courts viewed class arbitration as a "hybrid" method of dispute resolution that requires judicial intervention concerning "certification and notice to the class" and "external [court] supervision . . . to safeguard the rights of absent class members to adequate representation and in the event of dismissal or settlement." *Discover Bank*, 113 P.3d at 1106. See also *Keating*, 645 P.2d at 1209; *Dickler*, 596 A.2d at 866 & n.5.

To be sure, this Court has recognized that, in court litigation, class actions may allow some cases to move forward collectively "which would be uneconomical to litigate individually." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 809 (1985). Traditional individual arbitration, however, serves the same

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[3] Both *Keating* and *Dickler* held that arbitrators cannot, without judicial oversight, certify classes, administer notice, or conduct related proceedings. *Keating*, 645 P.2d at 1209 ("The court would have to make initial determinations regarding certification and notice to the class, and if classwide arbitration proceeds it may be called upon to exercise a measure of external supervision in order to safeguard the rights of absent class members to adequate representation and in the event of dismissal or settlement."); *Dickler*, 596 A.2d at 866 & n.5 (court would need to "certify the class," "to insure that notice is provided for," and "to have final review in order to insure that class representatives adequately provide for absent class members"). None of this, of course, is provided in any contractual agreement to arbitrate.

function. It offers "streamlined proceedings and expeditious results [that] will best serve [the parties'] needs" and will "keep the effort and expense required to resolve a dispute within manageable bounds." *Mitsubishi Motors*, 473 U.S. at 633. As explained earlier this year, "'[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance [in cases that] involve[] smaller sums of money than disputes concerning commercial contracts." *14 Penn Plaza*, 129 S. Ct. at 1464 (quoting *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 123 (2001)). Indeed, arbitration is favored because it allows claims that might have been uneconomical if pursued in court to proceed given the favorable "economics of dispute resolution." *Id.*

In all events, the FAA does not permit agreements to be rewritten merely because different procedures than the ones agreed to by the parties might be more efficient. See *Dean Witter*, 470 U.S. at 221 (FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement") (internal quotation marks omitted).

2. The Supplementary Rules for Class Arbitration adopted by the American Arbitration Association (AAA) confirm that class arbitration is markedly different from traditional arbitration.

First, consistent with the views expressed in *Keating* and *Dickler*, the AAA's rules reflect significant court interaction throughout the arbitral proceeding. Under those rules, the arbitrator (i) makes an assessment "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class," and (ii) then "stay[s] all proceedings following the issuance of [that award] for a period of at least 30 days to permit any party to

move a court of competent jurisdiction to confirm or to vacate [that award]." AAA, Supplementary Rules for Class Arbitrations, Rule 3 (effective date Oct. 8, 2003), *available at* http://www.adr.org/sp.asp?id=21936.

Second, the arbitrator must then assess whether an arbitration should proceed as a class by analyzing the factors such as numerosity, commonality, typicality and adequacy of representation. *Id.* Rule 4. Following that decision, the arbitrator again must "stay all proceedings following the issuance of [that decision] for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate [that award]." *Id.* Rule 5(d).

Third, to satisfy the minimum due process requirements necessary to bind absent class members, class arbitration necessarily must incorporate the same complex procedures that have been deemed essential in class action litigation. For example, in *Hansberry* v. *Lee*, 311 U.S. 32 (1940), the Court held that, under the Due Process Clause, non-parties may not be bound by a judgment unless there has been a determination that they were "adequately represented by parties who are present." *Id.* at 42-43. In *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), the Court explained that Rule 23 "incorporat[es] . . . due process standards" and requires that "notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort." *Id.* at 173. And, in *Phillips Petroleum*, 472 U.S. at 808, the Court explained that "absent parties" may be bound by a judgment only if "the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest." *Id.*

Consistent with these principles, the AAA's Class Arbitration Rules adopt detailed procedures in an effort to satisfy due process. Specifically, the arbitrator must make findings that track the procedural requirements of Rule 23 of the Federal Rule of Civil Procedure, including the question of adequacy of representation and typicality of claims. AAA, *supra*, Rule 4. Further, in contrast to traditional litigation, where the parties' dispute is kept confidential, the AAA's rules require that in a class arbitration there be notice to potential class members, *id.* Rule 6(a), and that potential class members be permitted to request exclusion from the class, *id.* Rule 6(b)(5).

In short, class arbitration is in no sense an "essential" aspect of an agreement to arbitrate, but instead reflects a sharp break from the traditional understanding of arbitration as an informal and confidential means of resolving disputes quickly and efficiently.

B. It Is Not "Reasonable" To Conclude That The Parties Agreed To Proceed Via Class Arbitration Without Saying So In Their Agreement.

The parties cannot be deemed to have reasonably consented to class arbitration by remaining silent on the issue. To be sure, parties to an arbitration agreement can, subject to due process constraints, agree to arbitrate their disputes on a classwide basis. See *Volt*, 489 U.S. at 479. The question here, however, is whether a term compelling class arbitration can be added to a "silent" agreement on the assumption that class arbitration is something the parties actually intended or is "too obvious to need expression." Quite simply, it is unreasonable to make such an assumption about the parties' intent.

First, the very concept of class arbitration is a relatively recent development. Although the FAA was enacted in 1925, the first serious analysis of class arbitration occurred more than 50 years later, when the California Court of Appeal addressed the question whether class arbitration was even possible and, if so, what sort of extraordinary protections courts would need to provide. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 38 (2000) (citing *Keating* v. *Superior Court*, 167 Cal. Rptr. 481 (Cal. Ct. App. 1980), *vacated*, 645 P.2d 1192 (Cal. 1982), *rev'd on other grounds sub nom.* 465 U.S. 1, 16 (1984)). In light of this limited commercial history of class arbitration, including, until very recently, the lack of any guidance regarding how such an arbitration should actually proceed, it is purely fanciful to believe that the parties to a "silent" arbitration agreement consented to class arbitration.[4]

Here, it is implausible that the parties assumed that they could be compelled to submit to class arbitration absent an *express* agreement to do so because, before 2003, the overwhelming majority of courts to consider the issue had ruled that class arbitration could not be compelled in the face of a "silent" agreement. As the Seventh and Fourth

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[4] The American Arbitration Association ("AAA") did not publish rules addressing class arbitrations until 2003, after this Court's ruling in *Bazzle*. *See* AAA, *supra*. The arbitration agreement at issue in this case, and the dispute that transpired under it, all predate the adoption of these rules. *See Stolt-Nielsen SA* v. *AnimalFeeds Int'l Corp.*, 548 F.3d 85, 87-88 (2d. Cir. 2008). After the district court held the dispute arbitrable, the parties agreed to follow AAA Supplementary Rules 3-7, for purposes of determining whether the parties agreed to permit class arbitration.

Circuits have explained: "'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.'" *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 276 (7th Cir. 1995) (quoting *Burton* v. *Bush*, 614 F.2d 389, 390 (4th Cir. 1980)). And, "[o]ne of those 'procedural niceties' is the possibility of pursuing a class action under Rule 23." *Id.* It would be unreasonable to presume that the parties sought an alternative to court litigation but nevertheless agreed, *sub silentio*, to resolve disputes in a classwide proceeding before an arbitrator in a manner that mirrors the procedures available in court litigation.

Second, it would be even more unreasonable to conclude that a prospective defendant would have agreed to class arbitration by being "silent" on the subject. Even in litigation, class actions under Federal Rule of Civil Procedure 23 are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamasaki*, 442 U.S. 682, 700-01 (1979). By enabling a class representative to prosecute an action on behalf of absent class members, judicial class actions enable a court to issue an order that is binding on all members of the class. See *Hansberry*, 311 U.S. at 40-41 (class actions are a "recognized exception" to the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process"). In so doing, judicial class actions protect defendants from the inconsistent obligations that might result from individual successive suits by each class member.

See *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 402-03 (1980).

The defendant in a class arbitration brought by a single claimant under a "silent" arbitration agreement may not be afforded this same protection. Regardless of the procedures adopted by an arbitrator, absent class members might attempt to avoid the consequences of an adverse class-wide determination by arguing that the arbitration process did not provide them with sufficient due process protections to bind them to the results, especially given that they had not agreed to allow another party to enforce their contractual rights. *Cf. Phillips Petroleum*, 472 U.S. at 811-12.

Due process requires that the court supervise class representation to ensure that "the named plaintiff at all times adequately represent[s] the interests of the absent class members." *Id.* at 812 (citing *Hansberry*, 311 U.S. at 42-43, 45). In a class arbitration, however, the arbitrators are selected by the named parties, and the absent class members may legitimately object that the arbitrators were selected without any input from them. See Sternlight, *supra*, at 113 ("it is difficult to see how such an arbitrator would play the role of the court in checking possible self-dealing").

Third, it would be unreasonable to conclude, in the face of silence, that a party to a contract has agreed to allow a non-party to that contract the right to enforce the party's contractual rights. Arbitration is a matter of contract, and "[i]t goes without saying that a contract cannot bind a nonparty." *Waffle House*, 534 U.S. at 294. Where each class member's contract expressly provides for class arbitration, each may be obligated to submit to binding class arbitration under the representation of another. But,

where each contract is "silent" on the issue of class arbitration, the absent class members have a compelling argument that they did not consent to having their claims prosecuted by a class representative before arbitrators who were not selected in accordance with their individual contracts. *Cf. Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) ("the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties").

As this Court explained long ago, "'Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement to which he is not a party, he must, at least, show that it was intended for his direct benefit.'" *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303, 307 (1927) (Holmes, J.) (quoting *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U.S. 220, 230 (1912)). Thus, the general rule is that a non-party to a contract "may enforce the duty" created by a contract only if the contract was intentionally made for the benefit of that non-party. See *Restatement (Second) of Contracts* §§ 302, 304.

Here, imposition of class arbitration in the face of a silent agreement violates these principles because it permits a non-party to a contract for which the non-party is not an intended beneficiary, to sue for the breach of that contract. To be sure, parties can authorize such a result by providing that class arbitration is an intended and available method of resolving disputes, but nothing of the sort is reflected in the parties' agreement.

Finally, these concerns are compounded by the heightened stakes associated with the aggregation of hundreds or thousands of individual claims in a single proceeding. Class arbitration has the effect of

concentrating all of the risk of substantial damages awards in a single arbitration. As such, the outcome of a single arbitration could have dramatic consequences for a defendant. In a judicial class action, the potential for enormous liability is tempered by a more liberal provision for interlocutory appeals that enables a party to seek review not just of the final judgment, but also specifically of the class certification decision. See Fed. R. Civ. P. 23(f).

Notwithstanding the greater stakes at issue, review of the arbitrator's substantive rulings is not as broad as that available in an appeal from a trial court decision and cannot be expanded by agreement. See *Hall St. Associates, L.L.C.* v. *Mattel,* 128 S. Ct. 1396, 1403 (2008); *cf. Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987) ("[A]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure arbitrators comply with the requirements of the statute"). Although a trade-off between efficiency and procedural protections may be reasonable where the parties expect to deal with a single claim, the trade-off becomes unthinkable when the outcome of a single arbitration has classwide consequences.

The same holds true for absent class members, who could be left in a situation in which the courts may be unable to correct substantive errors in a decision by arbitrators they did not select and before whom their representation may not have been adequate. There is little reason to assume that absent class members would have consented to such treatment of their claims without saying so expressly in their agreement to arbitrate.[5]

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[5] Although the binding effect of class arbitration on absent class members is not settled, to be effective, class arbitration

C. The FAA Precludes The Application of Arbitration Specific Rules That Would Permit Imposition Of Class Arbitration On A Silent Agreement.

As shown above, imposition of class arbitration on a "silent" agreement to arbitrate violates generally applicable principles of contract law. If, however, a State's law imposes different standards on agreements to arbitrate – thereby allowing class arbitration to be superimposed on a "silent" agreement – the FAA would then require that agreements to arbitrate nevertheless be enforced in accordance with generally applicable contract principles. See *Perry*, 482 U.S. at 492 n.9 ("[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally") (emphasis in original); *Allied-Bruce Terminix*, 513 U.S. at 272 (FAA's displacement of conflicting state law is "well-established").[6]

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proceedings nonetheless must operate under the premise that their results will resolve issues on a class-wide basis. See, e.g., AAA supra, Rule 8(a)(3) ("The arbitrator may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.").

[6] *Cf.* Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 62 (2005) ("California has created a new brand of unconscionability. It is far more demanding – and it is unique to arbitration."); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buff. L. Rev. 185, 186 (2004) ("[J]udges find unconscionable specific features of arbitration agreements, such as forum selection clauses and confidentiality requirements, which are routinely enforced as unobjectionable

1. This Court has invalidated state laws that frustrated the parties' agreement to arbitrate. See, *e.g.*, *Preston* v. *Ferrer*, 128 S. Ct. 978, 981 (2008) (FAA supersedes state law requiring parties to a valid arbitration agreement instead to submit disputes under that statute to an administrative agency); *Doctor's Assocs.*, 517 U.S. at 683 (FAA supersedes state law invalidating arbitration agreements that are not noticed on the first page of a contract); *Perry*, 482 U.S. at 491-92 (FAA supersedes state law providing that state law actions for the collection of wages may be maintained without regard to any arbitration agreement); *Southland Corp.* v. *Keating*, 465 U.S. 1, 16 (1984) (FAA supersedes state law requiring judicial consideration of claims brought pursuant to that statute regardless of parties' agreements to arbitrate). There can thus be no dispute that the FAA invalidates the application of state contract law to the extent that it singles out arbitration for different or less favorable treatment.

Significantly, the FAA mandates displacement not only of 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. See *Southland*, 465 U.S. at 13-14. Indeed, one of the problems that Congress sought to address in enacting the FAA was that courts often would permit arbitration, but only pursuant to procedures supplied by state statute that did not accord with the parties'

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in nonarbitration agreements."); Stephen J. Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 Wake Forest L. Rev. 1001, 1034 (1996) ("Judicial decisions apply unconscionability, and other common law doctrines, more aggressively to arbitration agreements than to other contracts.").

private agreements. See *id.* (citing *Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 8 (1923)); see also *Scherk*, 417 U.S. at 519 (parties entitled to choose "the procedure to be used in resolving the dispute").

Because generally applicable rules of contract law apply, the FAA does not permit "silence" to be treated as a license fundamentally to transform the parties' agreement into a class arbitration – whether that transformation is effected by a court or an arbitrator.

2. Prior to this Court's decision in *Bazzle*, the Second Circuit (in addition to others) had held that the FAA prohibits a compelled class arbitration when the agreement is silent, and thus a district court is without power to compel class arbitration under such an agreement. *Government of U.K.* v. *Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993); see also *Glencore, Ltd.* v. *Schnitzer Steel Prods. Co.*, F.3d 264, 268 (2d Cir. 1999). In the post-*Bazzle* decision below, however, the Second Circuit permitted a panel of arbitrators to do precisely what it held a district court could not do. *Stolt-Nielsen SA* v. *AnimalFeeds Int'l Corp.*, 548 F.3d 85, 99 (2d Cir. 2008).

The decision in *Bazzle* does not give arbitrators a license to rewrite arbitration agreements. The *Bazzle* plurality did not purport to establish the rule of decision to be applied where there is a dispute over whether the parties agreed to permit class arbitration. 539 U.S. at 452-53 (plurality opinion). Changing the initial decision-maker from a court to the arbitrator should not affect the substantive rules to be applied. See *McMahon*, 482 U.S. at 232 (arbitrators must "follow the law"); *Mitsubishi Motors*, 473 U.S. at 628 (a party to an arbitration "does not forgo the substantive rights afforded by the statute"). That essential point is critical because, as

noted, the FAA limits the grounds on which a court may overturn an arbitral decision. See *Hall Street*, 128 S. Ct. at 1403-05.

3. This case offers a perfect illustration. The Second Circuit misinterpreted *Bazzle*. It held that *Bazzle* "abrogated" *Boeing* and *Glencore* "to the extent that they read the FAA to prohibit" class arbitration on "silent" agreements. *Stolt-Nielsen*, 548 F.3d at 100. Having made this error, the court below ruled that it was obligated to defer to the arbitrators' determination. *Id*. at 99. Under this misreading of *Bazzle*, parties to arbitration agreements are faced with the prospect that arbitrators will impose class arbitrations to which the parties never agreed, and that courts will default on their obligation to police the limits of the authority conferred on the arbitrators by the parties' agreement. That result would substitute coercion for consent, in violation of the core requirements of the FAA.

* * * *

Under the FAA, imposition of class arbitration in the face of a "silent" agreement is contrary to generally applicable contract standards, which prohibit agreements from being rewritten to add terms that the parties could have included, but did not. It is patently unreasonable to conclude that parties to an arbitration contract agreed to alter fundamentally the nature, the stakes, and the costs and benefits associated with traditional arbitration without saying so in their contracts.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

Respectfully submitted,

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