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No. 08-1198

IN THE

Supreme Court of the United States

STOLT-NIELSEN S.A., *et al.*
Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.
Respondent.

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

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, ALLIANCE FOR JUSTICE, ASIAN AMERICAN JUSTICE CENTER, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, AND NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether an arbitration panel's decision interpreting the parties' silence in its arbitration agreement as allowing class arbitration is entitled to great deference, given that the class-action device serves important public policy objectives.

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STATEMENT OF INTEREST

The following *amici* submit this brief, with the consent of the parties,[1] in support of Respondent's argument that the arbitration panel's decision that the parties' arbitration clause permits class arbitration should be upheld.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee, through its Employment Discrimination Project, has been involved in cases before the Court involving the interplay of arbitration clauses and the exercise of rights guaranteed by civil rights laws prohibiting employment discrimination.

Alliance for Justice is a national association of over 80 organizations dedicated to advancing justice and democracy. We believe all Americans have the right to secure justice in the

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[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with Clerk of the Court pursuant to Supreme Court Rule 37.3.

courts, including full and fair compensation to redress harms suffered. Many of our member organizations may be negatively affected by the Court's decision in this case. These organizations provide legal representation to a wide variety of clients, including employees subject to mandatory arbitration clauses.

The Asian American Justice Center is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education. AAJC and its affiliates have a long-standing interest in employment discrimination issues that have an impact on the Asian American community, and this interest has resulted in AAJC's participation in a number of amicus briefs before the courts.

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA provides assistance and support to lawyers in protecting the rights of employees against the greater resources of their employers and the defense bar. NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys

committed to working for those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. As part of its advocacy efforts, NELA has filed dozens of *amicus curiae* briefs before this Court and the federal appellate courts regarding the proper interpretation and application of Title VII and other anti-discrimination statutes to ensure that the goals of those statutes are fully realized. We have endorsed the use of class actions as an important tool for vindicating civil rights, whether in a court or through arbitration, so long as arbitration is knowingly and voluntarily agreed to between the parties after disputes arise.

The National Partnership for Women & Families is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, access to quality health care, and policies that help women and men meet the dual demands of work and family. The National Partnership has devoted significant resources to combating sex, race, age, and other forms of invidious workplace discrimination and has filed numerous briefs amicus curiae in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of protected individuals in employment.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex

discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace by supporting the full enforcement of anti-discrimination laws, including Title VII of the Civil Rights Act of 1964 and other laws that protect employees. NWLC has prepared or participated in numerous amicus briefs filed with the Supreme Court and the Courts of Appeals in employment discrimination cases.

SUMMARY OF ARGUMENT

The arbitration panel's decision that the parties' arbitration clause permits class arbitration should be upheld. The parties, who are both companies in an equal bargaining position, expressly agreed that the panel would decide the procedural issue of whether the parties' agreements permit class arbitration. In carrying out that mandate, the Second Circuit appropriately found that the arbitration panel did not act in manifest disregard of the law and did not exceed its authority.

Petitioners' argument that the Federal Arbitration Act ("FAA") forbids arbitration of class claims where the arbitration agreement is silent has no basis in the text or legislative intent of the statute. The Second Circuit applied the deference required by the FAA and upheld the arbitration panel's decision. The decision below therefore comports with the intent of the FAA and should be upheld.

The Supreme Court has previously determined that employees can be bound to mandatory arbitration clauses as a condition of employment. *Circuit City v. Adams*, 532 U.S. 105 (2001). Given this precedent, a rule prohibiting class arbitration based on contractual silence would have a detrimental impact on the ability of victims of civil rights violations to have their substantive rights vindicated. If employees who suffer discrimination are required to arbitrate their claims, they should not be deprived of the tool of class arbitration to seek appropriate relief for widespread discrimination.

Without the ability to bring class cases in arbitration, some employees could not prove a pattern of discrimination that could well be critical to their ability to prevail. Additionally, in the absence of class treatment, broad injunctive relief necessary to eradicate discrimination would not be available to employees. For both reasons, a ruling that prevents class arbitration when arbitration is required would frustrate the goal of ending discrimination in the workplace—a goal made clear by Congress when it enacted Title VII of the 1964 Civil Rights Act and other laws intended to eliminate discrimination.

ARGUMENT

I. The Second Circuit Correctly Held that the Arbitrators Neither Acted in Manifest Disregard of the Law Nor Exceeded Their Authority.

This case involves a straightforward application of the Federal Arbitration Act (FAA). 9 U.S.C. § 1 *et seq.* Under the FAA, the decision of an arbitrator is given great deference. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509-510 (2001) (per curiam). This deference is detailed in Section 10 of the FAA, which lists a limited number of circumstances in which an arbitrator's decision may be vacated by a federal court. 9 U.S.C. § 10. In this case, the arbitration panel's decision that class arbitration is available is entitled to the deference afforded by the FAA.

Here, both parties agreed that an arbitration panel would decide whether class arbitration was available under their contract, which remained silent on the matter. Pet. Br. at 7-8. This question of whether class arbitration is available is a procedural matter properly decided by an arbitrator. *Green Tree Fin. v. Bazzle*, 539 U.S. 444, 451-53 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002). Thus, the Second Circuit reviewed the arbitration panel's finding under the deferential standard of Section 10 of the FAA. *Stolt-Nielsen v. Animalfeeds*, 548 F.3d 85, 97-101 (2d Cir. 2008). Under that standard, the court correctly held that the panel's decision was not in "manifest disregard" of the law. *Id.* The court also correctly found that the arbitration panel did not violate Section 10 of the FAA by exceeding its authority. *Id.* at 101.

Petitioners ask the Court to create a new, preemptive rule of contract construction, barring class arbitration unless explicitly commanded by the written instrument. Pet. Br. at 15-19. This rule lacks any basis in the FAA or the Court's jurisprudence and should be rejected. It also reverses a basic contract-interpretation rule that waivers must be knowing and voluntary.[2]

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[2] "Waiver" may be defined as "the voluntary relinquishment of a known right." Restatement (Second) of Contracts § 84 cmt. b (1981); "The party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it." Black's Law Dictionary 1611 (8th ed. 2004).

Petitioners argue that they never agreed to class arbitration. Pet. Br. at 15-19. However, Petitioners are sophisticated corporations well-versed in arbitration contracts. Pet. Br. at 14. Both parties agreed to have an arbitration panel decide whether class arbitration is available under their prior contract. *Id.* at 7. Under Section 10 of the FAA, both parties must be held to the arbitration panel's decision.

Petitioners cite to Section 4 of the FAA, which states that federal courts "shall make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement*" if one party refuses to submit to arbitration. *Id.* at 15; 9 U.S.C. § 4 (emphasis added). Here, the agreement is silent. *Id.* at 21. However, the parties expressly agreed that the panel would decide the procedural issue of whether the parties' agreements permit class arbitration. The FAA merely states that federal courts shall compel arbitration "in accordance with the terms of the agreement." 9 U.S.C. § 4. The FAA does not dictate a rule for filling in missing terms about the scope or process of arbitration.

The FAA does determine the outcome of this case, however. Here, after the Second Circuit compelled arbitration at the request of the Petitioners, the parties entered into another agreement. Pet. Br. at 6-7. This later agreement stated, among other things, that the arbitrators "shall follow and be bound by Rules 3 through 7 of the American Arbitration Association's Supplementary Rules for Class Arbitrations (as

effective Oct. 8, 2003)." *Stolt-Nielsen*, 548 F.3d at 88. Rule 3 provides that an arbitrator shall "determine as a threshold matter, . . . whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." Pet. Br. at 7. Thus, although the original arbitration clause is silent on whether class arbitration is available, the subsequent agreement reached by the parties submitted that very question to an arbitration panel. *Id.* The panel's decision on the matter must be granted deference under Section 10 of the FAA and thus, the Second Circuit's decision must be upheld.

Petitioners attempt to argue that class arbitration is being imposed upon them, but the Petitioners agreed to submit to class arbitration if the arbitration panel found that it was available. *Id.* at 7, 15-19. Petitioners must not be allowed to avoid the decision of the arbitration panel simply because they lost. The FAA does not contemplate that outcome. *See* 9 U.S.C. § 10. Section 10 of the FAA lists a limited number of circumstances when an arbitrator's decision may be vacated by a federal court. *Id.* As the Second Circuit correctly found, none of these circumstances apply here and the arbitration panel's decision must be upheld.

II. Class Arbitration is Consistent with the Text of the Federal Arbitration Act and Advances the Legislative Intent.

The FAA contains no language prohibiting class arbitration when the parties' agreement is

silent regarding the availability of class arbitration.[3] In fact, class arbitration is consistent with the statutory language and legislative intent of the FAA. An arbitration panel, acting pursuant to an undisputed agreement between the parties, found that class arbitration is available. Pet. Br. at 8-9. Under Section 10 of the FAA, that decision is due deference by the courts. Because none of the enumerated circumstances in Section 10 of the FAA apply here, the Court should affirm the Second Circuit's decision.

The Supreme Court has not used silence as a basis upon which to incorporate additional terms into an existing agreement.[4] Therefore, the silence

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[3] Congress wrote no exclusion of class treatment into the FAA, even though class actions existed at the time the FAA was enacted. Chafee, Some Problems of Equity (1950) at 220–42; 1 Street, Federal Equity Practice (1909) § 552; Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 Mich. L. Rev. 878 (1932); Blume, *Jurisdictional Amount in Representative Suits*, 15 Minn. L. Rev. 501 (1931); Yeazell, *From Group Litigation to Class Action: Part II: Interest, Class, and Representation*, 27 UCLA L. Rev. 1067 (1980); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 874, 928–41 (1958); Note, *Action Under the Codes Against Representative Defendants*, 36 Harv. L. Rev. 89 (1922); Wheaton, *Representative Suits Involving Numerous Litigants*, 19 Cornell L.Q. 339 (1934); Gordon, *The Common Question Class Suit Under the Federal Rules and in Illinois*, 42 Ill. L. Rev. 518 (1947). There is no basis for any contention that Congress was unaware of the possibility of class treatment, or intended sub silentio to establish any special rule of the type for which petitioner advocates.

[4] The Court has particularly been cautious when an arbitration agreement is silent on a key term. *See, e.g., EEOC v. Waffle House, Inc.,* 534 U.S. 279, 294 (2002) (refusing to read into

in this agreement between the parties should not be construed by this Court to include an additional term barring class arbitration. The parties did not bargain on this issue and the Respondent did not waive the right to proceed as part of a class. This result is also consonant with basic contract law requiring a knowing and voluntary waiver of rights.

Petitioners claim that they would not have agreed to arbitration if they had known that "more than $6.5 billion" could be at stake in a single arbitration. Pet. Br. at 28-29. Petitioners' concern about the potential magnitude of the remedy to rectify a violation of the law cannot provide a legitimate basis to deny class treatment. Furthermore, large businesses of this size can face considerable liability even outside of the context of a class claim.

The fact that Petitioners' violation of the law could result in a large award to the class cannot justify a rule against class treatment. In some cases, especially where the parties have equal bargaining power, class treatment can benefit both parties. Class treatment can save attorneys' fees and resources that would otherwise be squandered in prosecuting and defending numerous individual arbitrations over the same issue. Further, resolution of a class action in a defendant's favor brings global closure to a disputed issue. *See Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993)

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silent agreement a term precluding administrative relief of civil rights claim); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90–91 (2000) (declining to read into silence a term on the division of forum fees).

("Findings in a common issues trial on even a few of the eight identified questions may eventually save considerable time and judicial resources. Significant economies may be achieved by relieving [defendants] of the need to prove [their case] over and over…."); *Jenkins v. Raymark Indus.*, 782 F.2d 468, 473 (5th Cir. 1986) ("To the extent defendants win, the elimination of issues and docket will mean a far greater saving of judicial resources.").

III. The Retention of Class Treatment Is Necessary to Preserve Certain Statutorily-Protected Civil Rights.

The Supreme Court has held that employees can be bound to pre-dispute mandatory arbitration clauses. *Circuit City v. Adams*, 532 U.S. 105 (2001). Because employees may be forced into arbitration, as a matter of important public policy, it is critical to allow employees in the arbitral forum to bring these claims collectively as a class in order to further the legislative intent of eradicating systemic discrimination.

A. In Pattern-and-Practice Cases, Class Litigation Is Essential to the Enforcement of Civil Rights Laws.

Challenging systemic workplace discrimination often requires the class-action vehicle. In fact, the origins of Federal Rule of Civil Procedure 23 are steeped in a civil rights tradition. The provision of the rule that allows for broad injunctive relief to an entire class was designed by the Rules Committee to assist the efforts to eradicate systemic

discrimination. *See* Fed. R. Civ. P. 23 Advisory Comm. Notes, 1966 Amends., Subdiv. (b)(2) (stating that the primary cases that fall within this Rule are "various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration"). Since the passage of Title VII of the Civil Rights Act of 1964, the class action vehicle has been recognized as an important tool to implement the Congressional commitment to ensuring equal opportunity in the workplace.[5] The Equal Employment Opportunity Act of 1972 included provisions allowing charges to the EEOC to be filed "by or on behalf of a person claiming to be aggrieved."[6] The Senate Committee explicitly endorsed this provision by stating:

> This section is not intended in any way to restrict the filing of class complaints. The committee agrees with the courts that Title VII actions are by their very nature class complaints, and that any restriction on such actions would greatly undermine the

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[5] *See East Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) ("We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs."). *See also* George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV 688, 688, 692 (1979-80); Nantiya Ruan, *Bringing Sense to Incentives: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions,* 10 EMP. RTS. & EMP. POL'Y J. 395, 400-01 (2006).

[6] S. Rep. No. 92-2525 § 5 (1971), *pertinent portion reprinted in* SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 377 (1972).

effectiveness of Title VII.[7]

As a matter of important public policy, if employees are not permitted to bring their claims before a court, they should be able to access a class remedy in the arbitration forum, so as to further the legislative intent of eradicating systemic discrimination. Class treatment enables plaintiffs to obtain the evidence necessary to establish or rebut a prima facie case of adverse impact discrimination or intentional "pattern and practice" disparate treatment going beyond the isolated facts particular to an individual claim.[8] Class evidence enables plaintiffs to use the types and scale of proof necessary to show such patterns and to establish a structure by which victims can be identified and obtain relief.

The discovery necessary to prove a company-wide disparate impact or pattern of discrimination is not generally available to individual litigants.[9]

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[7] S. Rep. No. 92-415 § 5, at 27 (1971), *reprinted in* SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 414 (1972).

[8] *See Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 339-40 n. 20 (1977); *Hazelwood Sch. Dist. v. United States,* 433 U.S. 299, 307-08, (1977) (noting that "statistics can be an important source of proof in employment discrimination cases"); *E.E.O.C. v. Chi. Miniature Lamp Works*, 947 F.2d 292, 299 (7th Cir. 1991) ("Statistical evidence of disparities between minority representation in an employer's work force and minority representation in the community from which employees are hired can prove disparate treatment in a pattern and practice case.").

[9] *See, e.g., Adreani v. First Colonial Bankshares Corp.*, 154 F.3d 389, 400 (7th Cir. 1998) (statistical evidence concerning discharged employees generally not relevant in analysis of

Increased discovery is generally allowed in class arbitration because of the claims and complexity of such cases. This additional discovery is often necessary for plaintiffs to make the statistical and other showings that are critical to proving broad patterns and company-wide policies that impact groups of employees and cause unlawful discrimination.[10]

Obtaining a just outcome can depend entirely on proof of a discriminatory pattern. For this reason, the Court has identified pattern-and-practice cases as having unique methods of proof affecting all persons subject to the challenged practice. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 n. 20 (1977) ("Since the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation . . . . In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved."). Thus, statistical and other evidence is available to prove such patterns of discrimination.

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reasons for firing particular plaintiff); *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 792 (8th Cir. 1997) (trial court did not abuse discretion in limiting employee's request for information because companywide statistics are usually not helpful in establishing pretext).

[10] *E.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (complaining party makes out a prima facie case of adverse impact by showing significant racial disparities between selected applicants and applicant pool); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. at 339 ("[s]tatistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue.") (internal quotation omitted) (citing *Mayor of Phil. v. Educ. Equal. League*, 415 U.S. 605, 620 (1974)).

Once such a pattern is established, it creates a rebuttable presumption that each class member was victimized by the discrimination, shifting to defendants the burden of persuasion to establish the contrary.[11]

Lastly, the injunctive relief necessary to eradicate a pattern or practice of discrimination is often unavailable without class treatment. This Court has recognized that district courts have "not merely the power but the duty to render a decree which will so far as possible eliminate the discrimination effects of the past as well as bar like discrimination in the future." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)).

Moreover, even if individual plaintiffs prove pervasive discrimination, the absence of class certification jeopardizes the availability of systemic injunctions that prevent future wrongs. In individual actions, many courts have held that broad injunctive relief is prohibited when it is deemed to exceed what is needed to give individual relief to the named plaintiffs.[12]

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[11] *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 875-76 (1984); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. at 361-62; *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772-73 (1976); *Robinson v. Metro-North Commuter R.R. Co.,* 267 F.3d 147, 168 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002); *Thiessen v. Gen. Elec. Capital Corp*., 267 F.3d 1095, 1106 (10th Cir. 2001) ("significant advantage" in ADEA collective action), *cert. denied*, 536 U.S. 934 (2002).

[12] *E.g., Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 766-67 (4th Cir. 1998), *vacated*

If arbitration clauses that are silent on the subject of class arbitration are construed to prohibit class arbitration, then countless employees will be rendered powerless to challenge pattern-and-practice discrimination. This result would contravene public policy and Congress's intent to provide relief for such discrimination. Therefore, class arbitration must remain available when the arbitration clause is silent on the matter, and plaintiffs are precluded by an arbitration clause from proceeding on a class basis in court.

B. Some Claims Are Too Small For Counsel to Litigate Economically.

Because the amount of damages at issue often precludes employees from undertaking individual litigation, some individuals would be forced to forgo redress for the violation of their rights if class treatment is unavailable. The Court has recognized the crucial function that class actions play in

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and remanded on other grounds, 527 U.S. 1031 (1999), *reaff'd, Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 437 (4th Cir.), *cert. denied*, 531 U.S. 822 (2000); *Paige v. California*, 102 F.3d 1035, 1039 (9th Cir. 1996); *Butler v. Dowd*, 979 F.2d 661, 674 (8th Cir. 1992), *cert. denied*, 508 U.S. 930 (1993); *Brown v. Trustees of Boston University*, 891 F.2d 337, 361 (1st Cir. 1989), *cert. denied*, 496 U.S. 937 (1990); *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987); *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 888 (3d Cir. 1986), *approved on rehearing*, 809 F.2d 979, 982 n.1 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1998); *Nat'l Ctr. for Immigrant Rights v. INS*, 743 F.2d 1365, 1371-72 (9th Cir. 1984), *vacated on other grounds*, 481 U.S. 1009 (1987); *Zepeda v. INS*, 753 F.2d 719, 727-29 (9th Cir. 1983); *Hollon v. Mathis Indep. Sch. Dist.*, 491 F.2d 92, 93 (5th Cir. 1974) (per curiam).

protecting individual rights, noting that "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Indeed,

> the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (citations omitted).

Injured parties are not often able to bear the significant expenses involved in challenging well-heeled defendants such as large corporations on an individual basis.[13] Without the availability of class or other collective action devices, such potential defendants would have a distinct advantage over plaintiffs.[14] Many state courts, in recognition of this

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[13] 7B WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1782 at 59 (1986).

[14] *See Amchem Prods., Inc.*, 521 U.S. at 617 (noting that "the Advisory Committee [in enacting Rule 23] had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'"). *See also* Jean Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the*

problem, have sanctioned class actions as the solution.[15]

Class Action Survive?, 42 Wm. & Mary L. Rev. 1, 9 (2000) ("The potential defendants know that because many claims are not viable if brought individually, plaintiffs will often drop or fail to initiate claims once it is clear that class relief is unavailable" (footnote omitted).

[15] *See, e.g.*, *Leonard v. Terminix Int'l Co., L.P.*, 854 So.2d 529, 539 (Ala. 2002) ("This arbitration agreement is unconscionable because it is a contract of adhesion that restricts the Leonards to a forum where the expense of pursuing their claim far exceeds the amount in controversy. The arbitration agreement achieves this result by foreclosing the Leonards from an attempt to seek practical redress through a class action and restricting them to a disproportionately expensive individual arbitration."); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 278-79 (W. Va 2002) ("Thus, in the contracts of adhesion that are so commonly involved in consumer and employment transactions, permitting the proponent of such a contract to include a provision that prevents an aggrieved party from pursuing class action relief would go a long way toward allowing those who commit illegal activity to go unpunished, undeterred, and unaccountable."), *cert. denied sub nom. Friedman's Inc. v. West Virginia*, 123 S. Ct. 695; *McDonald v. Washington*, 862 P.2d 1150, 1158 (Mont. 1993) ("The Green court also put into perspective the need for class actions and the type of case which is best litigated as a class action: Equity has long recognized that there is need for a course which would redress wrongs otherwise unremediable because the individual claims involved were too small, or the claimants too widely dispersed . . . In the instant case, the claims involved would be unremediable without class action status because most are minor in and of themselves.") (citation omitted); *In re Cadillac V8-6-4 Class Action*, 461 A.2d 736, 748 (N.J. 1983) ("Individual actions or a test case may be an inferior alternative to the class action when the economics of the situation make it impossible for the aggrieved members to vindicate their rights by separate actions.") (citation omitted); *Vasquez v. Superior Court*, 484 P.2d 964, 968 (Cal. 1971) ("Individual actions by each of the defrauded consumers is often impracticable because the

In all areas of the law, including civil rights cases, it is difficult for persons with small monetary claims to find capable counsel.[16] Employment discrimination claims are particularly at risk of going unanswered because of the difficult legal proof frameworks and the contingent nature of the litigation.[17] Even with fee-shifting statutes, individual cases remain economically less desirable

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amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct."); *Daar v. Yellow Cab Co.*, 433 P.2d 732, 746 (Cal. 1967) ("It is more likely that, absent a class suit, defendant will retain the benefits from its alleged wrongs.").

[16] *See, e.g.*, *USA Check Cashers of Little Rock, Inc. v. Island*, 76 S.W.3d 243, 248-49 (Ark. 2002)(class action superior when "potential recovery to each member of class expected to be relatively small and would not justify contingency fee cases nor cases in which attorneys charge on an hourly basis"). *See also* Julia Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 Hastings L.J. 197, 236 (1997) (noting that "[d]espite the existence of individual attorneys whose choice of cases is driven more by ideological commitment than money, the plaintiffs' damages were a factor many survey participants viewed as extremely important in determining what cases they wanted to accept") (footnote omitted).

[17] *See* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEG. STUD. 429, 429 (2004) (noting based on empirical study that in employment discrimination cases, "relatively often, the numerous plaintiffs must pursue their claims all the way through trial . . . ; at both pretrial and trial these plaintiffs lose disproportionately often, in all the various types of employment discrimination cases; and employment discrimination litigants appeal more often than other litigants, with the defendants doing far better on those appeals than the plaintiffs"); Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813 (2004).

for attorneys than cases in which substantial recoveries or broad injunctive relief are at stake. Courts, moreover, routinely consider the complexity of a case when deciding attorneys' fees petitions and will reduce fee awards for cases they consider to be simple or straightforward,[18] supporting the paradigm by which attorneys are discouraged from representing small individual claims, making the availability of class treatment all the more important.

[18] *See, e.g.*, *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 184 (2d Cir. 2007) (in determining the "reasonable hourly rate" used to calculated the "lodestar," a district court should consider, among other factors, "the complexity and difficulty of the case" and "whether an attorney might have initially acted *pro bono* (such that a client might be aware that the attorney expected low or non-existent remuneration)"); *Montcalm Publ'g Corp. v. Commonwealth of Virginia*, 199 F.3d 168, 174 (4th Cir. 1999) (upholding district court's reduction of attorneys' fees for appeal of a "novel but uncomplicated issue" that had been briefed and researched during the lower court phase); *Pizzolato v. Safeco Ins. Co. of America*, No. 08 Civ. 353, 2008 U.S. Dist. LEXIS 88603, at *6 (M.D. La. Nov. 3, 2008) (reducing attorney's hourly rate "to be more indicative of this uncomplicated matter"); *Stone v. Deagle*, No. 05 Civ. 1438, 2007 U.S. Dist. LEXIS 88235, at *7 (D. Colo. Nov. 19, 2007) (reducing attorney's hourly rate despite extensive experience because of matter's "uncomplicated" nature); *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. 5*, No. 8:04-1866, 2007 U.S. Dist. LEXIS 32495, at **8-9 (D.S.C. May 2, 2007) (reducing hours in First Amendment case because the uncomplicated nature of the law and discovery in case did not warrant high number of hours spent).

C. Employers Should Not Be Permitted to Draft Vague Arbitration Clauses that Permit Civil Rights Violations to Go Unremedied.

Accordingly, class treatment can be critical to the vindication of civil rights. When class treatment is important to the vindication of a claim, a company-drafted arbitration clause should not trump Congress's clear intent in authorizing class actions. The arbitral framework must preserve the opportunity for consideration of class certification under the standards used by the courts.

Job applicants and employees rarely, if ever, negotiate over the terms of pre-dispute arbitration clauses.[19] Arbitration clauses are often buried in the boilerplate of job applications or in employee handbooks,[20] and job applicants and employees are

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[19] Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISPUTE RESOLUTION JOURNAL (May/July 2003), at 2, *available at* http://www.adr.org/si.asp?id=2532 ("Signing a mandatory arbitration clause is a job requirement – generally included among the papers given to an employee to sign when he or she starts a new job").

[20] *See Id.*; Bonnie Barnish, *Signing an Arbitration Agreement With Your Employer,* http://employment.findlaw.com/employment/employment-employee-hiring/signing-arbitration-agreement.html (last visited Oct. 24, 2009) ("Employees often sign arbitration agreements unintentionally. How can this happen? Some employers bog down new employees with tons of paperwork to fill out on their first day, and some employees, in turn, sign documents without reading them. Although many employers are straightforward and present the arbitration agreement to employees openly in a separate contract, others bury arbitration agreements in other documents, such as an employment contract, a hiring letter, or an employee

generally required to sign the documents containing employer-drafted arbitration clauses as a condition of employment.[21] One recent study found that, despite the prevalence of binding arbitration clauses in employment and consumer agreements, most Americans fail to take note of such clauses.[22] Further, approximately seventy-five percent of Americans mistakenly believe that they can sue their employers if they are seriously harmed or have a major dispute, even if they are subject to a binding arbitration clause.[23] If the Court holds that employers can bind employees to the arbitral forum while eliminating, *sub silentio,* the potential for class arbitration, the rights of many employees to pursue pattern-and-practice claims of discrimination would be eroded even further.

To be sure, the EEOC cannot fill the void if class arbitration is prohibited whenever arbitration

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handbook.").

[21] *See* Barnish, *supra* note 20 ("If your employer asks you to sign an arbitration agreement, you can refuse, but you may be putting your job in jeopardy if you do so. Usually, an employer can rescind an employment offer if a prospective employee refuses to sign the arbitration agreement. And an employer can fire an at-will employee who refuses to sign one. Therefore, declining to sign the agreement could jeopardize your job"); Jennifer Brown Shaw, Shawvalenza.com, *A Checklist for Preventing Human Resources Problems*, http://shaw valenza.com/publications.php?=36 (last visited Oct. 24, 2009) ("many employers require all employees, as a condition of hire or continued employment, to sign mandatory arbitration agreements.").

[22] Memo on 2009 Study of Public Attitudes on Forced Arbitration,http://www.justice.org/resources/Forced_ Arbitration_ Study_Memo_0409.pdf (last visited Oct. 24, 2009).

[23] *Id.*

agreements are silent. As the Court recognized in *Waffle House*, the EEOC has never been able to bring more than a small fraction of the enforcement cases filed annually,[24] and the primary burden of enforcing Title VII has always rested on private plaintiffs.[25]

CONCLUSION

For the above reasons, the *amici* respectfully suggest that the judgment of the Second Circuit should be AFFIRMED.

Respectfully submitted,

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[24] *EEOC v. Waffle House*, 534 U.S. at 290.

[25] See Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives From an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 358 (1988).

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