No. 02-634

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.,
Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

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

ANN ELIZABETH REESMAN
RAE T. VANN
Counsel of Record
MCGUINESS, NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for *Amicus Curiae*
Equal Employment Advisory Council

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

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* in support of Petitioner Green Tree Financial Corporation.[1] The written consent of all parties has been filed with the Clerk of this Court.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over 340 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e *et seq.*, the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 *et seq.*, Titles I and V of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117, 12201-12213, and other employment-related statutes and regulations. Many of EEAC's members have contracts with their employees governing some or all terms and conditions of employment. Some of these contracts include agreements to arbitrate disputes arising out of the employment relationship.

EEAC's members have an ongoing interest in preserving the enforceability of agreements calling for arbitration of employment-related disputes. Arbitration is a flexible, efficient, and effective alternative means of resolving discrimination claims and other employment-related issues. Agreements to arbitrate, like other privately negotiated contracts, afford parties the ability to establish procedures under which any future disputes will be governed. It follows, then, that such agreements must be enforced according to their express terms so as to give meaning to the parties' intent.

Thus, the issues presented in this appeal are extremely important to the nationwide constituency that EEAC represents. Contrary to the universal guiding principles of common contract, as well as federal statutory law, the court below improperly permitted two cases to proceed in arbitration using class-type proceedings, culminating in class-wide relief, where the parties' agreement to arbitrate was silent on the availability of class action procedures. In so doing, the court inexcusably failed to give effect to the terms of the arbitration agreement as written. Although the instant case involves arbitration of commercial disputes, the Court's decision is likely to be construed as applying to arbitration of employment disputes as well.

Because of its interest in this subject, EEAC has filed *amicus curiae* briefs in numerous cases before this Court and others supporting the enforceability of private agreements to arbitrate.[2] EEAC thus is familiar with the legal and public policy issues presented to the Court in this case. Because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner Green Tree Financial Corporation n/k/a Conseco Finance Corporation (Green Tree) is a consumer finance company in the business of providing, among other things, retail home equity mortgages, home improvement loans and consumer loans for manufactured housing. *www.conseco.com*. Respondents Lynn and Burt Bazzle (the Bazzles) executed a home improvement financing agreement with Green Tree, which contained a contractual provision

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[2] *E.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *EEOC v. Waffle House*, 534 U.S. 279 (2002).

requiring any claims or disputes relating to the contract be resolved by binding arbitration. *Bazzle v. Green Tree Fin. Corp.*, 569 S.E. 2d 349, 352 (S.C. 2002). Respondent Daniel Lackey (Lackey) entered into a consumer finance agreement with Green Tree for the purchase of a mobile home. *Id.* at 353. His agreement also contained a provision requiring the use of binding arbitration to resolve all disputes arising out of the financing agreement. *Id.*

The Bazzle Plaintiffs

On March 25, 1997, the Bazzles filed an action against Green Tree in South Carolina state court, alleging violations of the South Carolina Consumer Protection Code. *Id.* at 352. They later amended their complaint to include class allegations, and moved the state trial court for class certification. *Id*

Green Tree filed a Motion for Stay and to Compel Arbitration pursuant to the binding arbitration provision contained in the Bazzles' consumer financing agreement. *Id.* On December 5, 1997, the trial court granted the Bazzles' motion for class certification. *Id.* At the same time, the court granted Green Tree's motion to compel arbitration, ordering the Bazzles, as well as "all members of their class who elected to be part of the action," to arbitrate their claims. *Id.* In a supplemental ruling, the trial court ordered that the class-wide arbitration "proceed on an opt-out basis." *Id.*

An arbitrator was appointed and hearings subsequently were held in the matter. *Id.* On July 24, 2000, the arbitrator ruled against Green Tree on the state law claims and awarded the class in excess of $14.5 million in damages, attorney's fees and costs. Green Tree appealed. *Id.* at 352-53.

The Lackey Plaintiffs

On May 28, 1996, Lackey, joined by George and Florine Briggs, commenced a class action against Green Tree in state

court, alleging violations of the South Carolina Consumer Protection Code. 569 S.E. 2d at 353. Green Tree moved to compel arbitration, which the trial court denied, ruling that the contract was unconscionable and therefore unenforceable. *Id.* The trial court's ruling subsequently was reversed and remanded on appeal. *Id.*

On remand, the parties agreed on an arbitrator, who *sua sponte* "raised the issue of class action arbitration and held a hearing to determine whether a class action could proceed under Green Tree's arbitration clause." *Id.* (footnote omitted) Over Green Tree's vigorous objections, the arbitrator issued an order permitting the arbitration to proceed on a class wide basis. *Id.* (footnote omitted). After a hearing on the merits, the arbitrator ruled against Green Tree and awarded $9.2 million in damages and over $3 million in attorney's fees. The trial court confirmed the award and Green Tree appealed. *Id.* at 354.

Green Tree's Appeal

On appeal, Green Tree argued in both cases that because the arbitration provision contained in its consumer financing agreement was silent on the availability of class action procedures, neither the court in *Bazzle* nor the arbitrator in *Lackey* had the authority under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, to order class-wide arbitration. *Id.* at 356-57. The South Carolina Supreme Court assumed jurisdiction and consolidated both the *Bazzle* and *Lackey* appeals. *Id.* at 351.

While conceding that "[s]everal federal circuits have precluded class-wide arbitration when the arbitration agreement is silent based on their interpretation of section 4 of the FAA," *id.* at 356, the South Carolina Supreme Court nonetheless ruled that class-wide arbitration was permissible in both the *Bazzle* and the *Lackey* actions. In so doing, it ignored federal precedent and instead adopted the California

Supreme Court's minority view "that class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice." *Id.* at 360. This Court now has agreed to hear the case. *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 817 (2003) (*cert. granted*).

SUMMARY OF ARGUMENT

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

Most federal courts to address the issue have ruled that the FAA precludes class-wide arbitration where the arbitration agreement is silent as to the availability of class action procedures. *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *Randolph v. Green Tree Fin. Corp.,* 244 F.3d 814 (11th Cir. 2001); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001). Drawing support from a line of federal circuit court decisions that have refused to order consolidated arbitration where the arbitration agreement does not expressly provide for it, these courts have applied the same reasoning to preclude class-wide arbitration absent express contractual language providing for class action procedures.

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

Allowing individuals subject to private arbitration agreements to pursue claims on a class wide basis would defeat most, if not all, of the practical advantages and mutual benefits of arbitration, particularly in the employment context. Not only are disputes resolved far more quickly in an arbitral forum, arbitration awards "usually [are] issued within nine months after the time an arbitrator is selected." Toby Brink, *Alternative Dispute Resolution: Pros and Cons*, Connecticut Employment Law Letter (Mar. 2000) *available in* WESTLAW FIND 8 NO. 3 SMCTEMPLL 3. As this Court noted in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), arbitration agreements also "allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation . . . ." *Id*. at 123.

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

ARGUMENT

I. A RULE THAT ALLOWS COURTS TO INCORPORATE CLASS ACTION PROCEDURES INTO AN AGREEMENT THAT IS SILENT AS TO THE AVAILABILITY OF CLASS-WIDE ARBITRATION CONTRAVENES THE PLAIN LANGUAGE OF THE FEDERAL ARBITRATION ACT

A. The FAA Requires That a Valid Arbitration Agreement Be Enforced as the Parties Wrote It

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

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

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

This Court repeatedly has affirmed the strong federal policy favoring arbitration, noting that the purpose of the FAA "was to reverse longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements on the same footing as other contracts." *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted); *Green Tree Fin. Corp. v. Randolph,* 531 U.S. 79, 89 (2000); *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 289 (2002). Thus, "'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring

arbitration.'" *Gilmer,* 500 U.S. 20, 25-26 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24).

Section 4 of the FAA provides, in relevant part:

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

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

In *Gilmer*, this Court made clear that as a general rule, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 26 (citation omitted). Thus, when presented with a valid arbitration agreement, "the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Boyd*, 470 U.S. 213, 218 (1985).

B. The Predominant View of the Federal Courts of Appeals Is That the FAA Bars Merger of Individual Claims in Arbitration Where the Parties' Agreement Is Silent on the Availability of Class Action Procedures

As the court below acknowledged, "[s]everal federal circuits have precluded class-wide arbitration when the arbitration agreement is silent based on their interpretation of section 4 of the FAA." *Bazzle*, 569 S.E. 2d at 356; *see also Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995);

Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *Randolph v. Green Tree Fin. Corp.,* 244 F.3d 814 (11th Cir. 2001); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001). In *Champ v. Siegel Trading Co.*, for instance, the Seventh Circuit ruled that Section 4 of the FAA prohibits a court from ordering class-wide arbitration "absent a provision in the parties' arbitration agreement providing for class treatment of disputes." 55 F.3d at 271.

The court in *Champ* relied heavily on a line of federal circuit court decisions involving the consolidation of individual arbitrations, which, like class-wide arbitration, would permit several claims subject to individual agreements to arbitrate to be heard collectively in a single arbitration proceeding. Noting that the Second, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits all have refused to order consolidation where the arbitration agreement does not expressly provide for it, the court in *Champ* concluded that the same reasoning applies to preclude class-wide arbitration absent express contractual language providing for class action procedures. *Champ*, 55 F.3d at 274 (citations omitted).

The Seventh Circuit reasoned, as did its sister circuits, that the FAA mandates enforcement of arbitration agreements as they are written and thus prohibits a court from reading terms into the agreements that simply are nonexistent. *Id.* It thus concluded that since the arbitration agreement at issue was silent as to class arbitration, "[f]or a federal court to read such a term into the parties' agreement would 'disrupt[] the negotiated risk/benefit allocation and direct[] [the parties] to proceed with a different sort of arbitration.'" *Id.* at 275 (citation omitted).

Similarly, both the Eleventh and the Third Circuits, citing *Gilmer,* have ruled in cases involving the federal Truth in Lending Act (TILA) that the right to pursue class action procedures may be waived by signing a valid arbitration

agreement, even where the underlying statute on which the claim is based provides for class actions. *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814 (11th Cir. 2001); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001). As the Third Circuit pointed out in *Johnson*, "whatever the benefits of class actions, the FAA *requires* piecemeal resolution when necessary to give effect to an arbitration agreement,'" 225 F.3d at 375 (quoting *Moses H. Cone Mem'l Hosp.*).

While acknowledging that the FAA applies to both the *Bazzle* and *Lackey* arbitration agreements, the lower court nonetheless refused to follow the weight of federal authority barring merger of individual claims in arbitration – whether by class action procedure or by consolidation – in favor of the minority view of the California state courts that "class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice." 569 S.E. 2d at 360-61 (citing *Keating v. Superior Court*, 183 Cal. Rptr. 360 (Cal. 1982); *Blue Cross v. Superior Court*, 78 Cal. Rptr. 2d 779 (Cal. Ct. App. 1998)).

Apparently concerned with the purported unequal bargaining power of parties to "adhesive arbitration clause[s]," the court below concluded that to prohibit class action procedures where the agreement is silent would allow the drafting party to "effectively prevent class actions against it without having to say it was doing so in the agreement." *Id.* at 360. The lower court's conclusion ignores, however, the now well-established principle that a party's unequal bargaining power will not, in and of itself, invalidate an agreement to arbitrate. *Gilmer,* 500 U.S. at 33 ("Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context"). Thus, the fact that a party may have drafted an agreement differently if given a chance will not

allow him to ignore the agreement to which he ultimately agreed to be bound.

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

In *Gilmer*, this Court observed, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" 500 U.S. at 31 (citation omitted). In so doing, "a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (quoted in *Gilmer*, 500 U.S. at 26). *Gilmer* thus put to rest any further contest over whether arbitration procedures are, as a general principle, adequate to resolve statutory claims. 500 U.S. at 26.

The "right" to bring a class action "is merely a procedural one, arising under Fed.R.Civ.P. 23, that may be waived by agreeing to an arbitration clause." *Johnson*, 225 F.3d at 369. As the Seventh Circuit noted in *Champ*:

> When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. One of those "procedural niceties" is the possibility of pursuing a class action under Rule 23.

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

Parties to valid arbitration agreements are free to—and routinely do—contractually waive their right to access the Rule 23 class action procedure. "[S]imply because judicial remedies are a part of a law does not mean that Congress

meant to preclude parties from bargaining around their availability." *Johnson*, 225 F.3d at 377. Indeed, "[a]rbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995).

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

Moreover, an individual's waiver of class action procedures will not affect the ability of other private parties not subject to arbitration agreements to pursue class-wide relief. In addition, as this Court made clear in *EEOC v. Waffle House*, 534 U.S. 279 (2002), public enforcement agencies not privy to an arbitration agreement also may continue to seek victim-specific relief in court—whether on behalf of an individual or an entire class—where specifically authorized by statute to do so. Thus, to the extent that the threat of class action litigation may serve as a deterrent against violations of the law, the prohibition of class-wide arbitration will have little, if any, effect on the availability of such procedures to those not subject to an arbitration agreement.

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

A. Arbitration Enables Parties To Resolve Disputes More Quickly and More Efficiently Than Litigation

As this Court observed in *Circuit City Stores, Inc. v. Adams*,

> Arbitration agreements allow parties to avoid the cost of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts. These litigation costs to parties (and the accompanying burden to the courts) would be compounded by the difficult choice-of-law questions that are often presented in disputes arising from the employment relationship.

532 U.S. 105, 123 (2001) (citation omitted). In addition, private arbitration gives parties the ability to resolve their disputes relatively quickly and more efficiently than in state or federal court litigation.

Indeed, the speed with which most disputes are resolved through arbitration far outpaces the judicial system. The federal courts take an average of 20.1 months to complete a civil case through jury trial, with at least three districts taking more than 30 months. Table C-5, Federal Judicial Caseload Statistics, Administrative Office of the United States Courts (July 1, 2001 - June 30, 2002). According to a study by the Federal Judicial Center, "the median time from filing to disposition for class actions tends to be two to three times that of other civil cases." Administrative Office of the United

States Courts, *The Third Branch,* Vol. 34, No. 5 (Apr. 2002). In contrast, "[a]n arbitration award usually is issued within nine months after the time an arbitrator is selected." Toby Brink, *Alternative Dispute Resolution: Pros and Cons*, Connecticut Employment Law Letter (Mar. 2000) *available in* WESTLAW FIND 8 NO. 3 SMCTEMPLL 3. In the employment context, the alacrity benefits both sides, but particularly employees, who typically can less afford a lengthy battle.

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

Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* (Cornell Univ. Press, 1997), at 153-54.

In addition to the relative speed with which their disputes are likely to be heard, employees are more likely to get their "day in court" in arbitration than they are in the judicial system. "Arbitration also offers employees a guarantee that there will be a hearing on the merits of their claims; no such guarantee exists in litigation where relatively few employees survive the procedural hurdles necessary to take a case to trial in the federal courts." *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1488 (D.C. Cir. 1997).

As a practical matter, "[a]rbitration thus provides access to a forum for adjudicating employment disputes for employees whom the litigation system has failed." Bales at 159 (footnote omitted). Procedural rights, such as class action procedures, the right to a jury trial, and extensive (and often

excessive) discovery, mean little to employees who cannot find an attorney to take their case, and who, therefore, feel that the doors to justice are closed to them. Arbitration gives these employees a ready opportunity to have their claims heard. *Id.*

B. Class Action Procedures Impose a Level of Complexity and Acrimony That Is Antithetical to the Unique Nature of Employment Arbitration

Unlike the typical arbitration, employment class actions involving hundreds, if not thousands, of class members can be extremely complex and time-consuming to defend. The significantly higher costs and exposure posed by class actions creates enormous pressure to settle rather than run even a small risk of catastrophic loss. "Once one understands that the issues involved in the instant case are predominantly case-specific in nature, it becomes clear that there is nothing to be gained by certifying this case as a class action; nothing, that is, except the *blackmail value* of a class certification that can aid the plaintiffs in coercing the defendant into a settlement." *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) (emphasis added), *cert. denied,* 532 U.S. 919 (2001). Similarly, the Fifth Circuit has recognized:

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

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

Moreover, the pressure to settle exists largely independently of the merits of the underlying statutory claims.

> Once plaintiffs obtain class certification, the defendant's exposure, plus projected costs of defending hundreds or thousands of individual claims, places almost overwhelming and irresistible pressure on the defendant to settle, regardless of the merits of the claims. Even if individual plaintiffs' odds of prevailing in their specific cases are low, the risk to defendants remains extremely high. In the face of these numbers, companies often perceive that they have little choice but to cut their losses through settlement.

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

These numbers give employers little choice but to cut their losses through settlement. Judge Posner observed in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), that when companies face billions of dollars in potential liability and possible bankruptcy as a result of a class action, "[t]hey may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." 51 F.3d at 1298 (citation omitted).

Judge Posner further warned in *Culver v. City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002), that improperly certifying large class actions for enormous aggregate liability would mean that "[r]ealistically, functionally, practically [the plaintiffs' lawyer in this case] is the class representative, not [the named plaintiff]." 277 F.3d at 913. The plaintiffs' lawyers, however, may have different goals from the class. *Id.* at 910'. Plaintiffs' lawyers have boasted privately about their own power that "their goal is to bankrupt the defendant or, more colorfully, to 'blow them off the New York Stock Exchange.' This approach has been recognized in class cases as the principle of 'judicial blackmail.'" Piar, 2001 B.Y.U. L. Rev. at 343 (footnote omitted).

These class action problems are even more acute in the context of private arbitration, which by its very nature is designed to promote, rather than discourage, speedy, cost-effective resolution of individual claims in as non-adversarial a manner as possible. Many employers view arbitration and other forms of alternative dispute resolution as an opportunity not only to resolve a specific dispute but also to preserve relationships with their employees, particularly those who will continue to work for them well after their claims are addressed. Thus, the informal nature of arbitration is, from an employee relations viewpoint, of tremendous benefit to both employers and employees.

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

To be sure, if employers wished to be subject to class-wide arbitration, they would express as much in the terms of their arbitration agreements. As such, courts should not be permitted to read into an arbitration agreement the availability of class-wide procedures in the absence of express language providing for them.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

ANN ELIZABETH REESMAN
RAE T. VANN
Counsel of Record
MCGUINESS, NORRIS & WILLIAMS, LLP
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for *Amicus Curiae*
Equal Employment Advisory Council