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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LAWRENCE HILL, et al.,

Petitioners,

v.

GARDA CL NORTHWEST, INC.,

Respondents.

**BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
IDENTITY AND INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. ELECTING CLASS ARBITRATION INVOLVES WAIVING THE DUE PROCESS PROTECTIONS APPLICABLE IN COURTS	4
A. The Due Process Requirement of Notice Conflicts with the Presumption of Confidentiality in Bilateral Arbitration	7
B. Class Arbitration Is Incompatible with the Requirements of Class Certification, Which Due Process Demands	9
C. Arbitrators May Be Unable To Protect the Due Process Rights of Absent Class Members	13
D. Judicial Intervention in Arbitration Is Inconsistent with the Nature of Arbitration	14
II. FUNDAMENTAL RIGHTS CANNOT BE WAIVED BY SILENCE	17
CONCLUSION	19
DECLARATION OF SERVICE	

TABLE OF AUTHORITIES

	Page
Cases	
<i>Aetna Ins. Co. v. Kennedy to Use of Bogash</i> , 301 U.S. 389, 57 S. Ct. 809, 81 L. Ed. 1177 (1937)	17-18
<i>AT&T Mobility LLC v. Concepcion</i> , ___ U.S. ___, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)	1-2, 12-13
<i>Balfour, Guthrie, & Co., Ltd. v. Commercial Metals Co.</i> , 93 Wn.2d 199, 607 P.2d 856 (1980)	4
<i>Barnett v. Hicks</i> , 119 Wn.2d 151, 829 P.2d 1087 (1992)	6, 15-16
<i>Bellevue v. Acrey</i> , 103 Wn.2d 203, 691 P.2d 957 (1984)	3, 18
<i>Berger v. Compaq Computer Corp.</i> , 257 F.3d 475 (5th Cir. 2001)	10, 13
<i>Coast Plaza Doctors Hosp. v. Blue Cross of Cal.</i> , 83 Cal. App. 4th 677, 99 Cal. Rptr. 2d 809 (2000)	12
<i>Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.</i> , 527 U.S. 666, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999)	17
<i>Davidson v. Hensen</i> , 135 Wn.2d 112, 954 P.2d 1327 (1998)	3, 17
<i>Fuentes v. Shevin</i> , 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972)	3, 18-19
<i>Green Tree Fin. Corp. v. Bazzle</i> , 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003)	15
<i>Hall Street Assocs., L.L.C. v. Mattel, Inc.</i> , 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008)	1
<i>Hansberry v. Lee</i> , 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940)	4

	Page
<i>In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.</i> , 55 F.3d 768 (3d Cir. 1995)	13-14
<i>In re Rhone-Poulenc Rorer, Inc.</i> , 51 F.3d 1293 (7th Cir. 1995)	11
<i>Johnson v. Moore</i> , 80 Wn.2d 531, 496 P.2d 334 (1972)	5
<i>Johnson Controls, Inc. v. Edman Controls, Inc.</i> , Nos. 12-2308, 12-2623, 2013 WL 1098411 (7th Cir. Mar. 18, 2013)	15
<i>Lefkowitz v. Wagner</i> , 395 F.3d 773 (7th Cir. 2005), <i>cert. denied</i> , 546 U.S. 812 (2005)	14
<i>Lents, Inc. v. Santa Fe Engineers, Inc.</i> , 29 Wn. App. 257, 628 P.2d 488 (1981)	6
<i>Martin v. Wilks</i> , 490 U.S. 755, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989)	4
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)	2-3
<i>Mullane v. Cent. Hanover Bank & Trust Co.</i> , 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950)	5, 7-8
<i>Munsey v. Walla Walla Coll.</i> , 80 Wn. App. 92, 906 P.2d 988 (1995)	11-12, 15
<i>Nat'l Equip. Rental, Ltd. v. Szukhent</i> , 375 U.S. 311, 84 S. Ct. 411, 11 L. Ed. 2d 354 (1964)	18
<i>Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> , 259 F.3d 154 (3d Cir. 2001)	5
<i>Nobl Park, L.L.C. of Vancouver v. Shell Oil Co.</i> , 122 Wn. App. 838, 95 P.3d 1265 (2004)	5

	Page
<i>Ohio Bell Tel. Co. v. Public Utils. Comm'n of Ohio</i> , 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 (1937)	17
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)	4-5, 7-8
<i>Preston v. Ferrer</i> , 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008)	1
<i>Rent-A-Center, W., Inc. v. Jackson</i> , ___ U.S. ___, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010)	1
<i>Richardson v. Byrd</i> , 709 F.2d 1016 (5th Cir. 1983)	10
<i>Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> , 170 F.3d 1 (1st Cir. 1999)	8
<i>State v. Ashue</i> , 145 Wn. App. 492, 188 P.3d 522 (2008)	18
<i>Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.</i> , 559 U.S. 662, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010)	1-2, 11, 19-20
<i>Tombs v. Northwest Airlines, Inc.</i> , 83 Wn.2d 157, 516 P.2d 1028 (1973)	5
<i>United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.</i> , 484 U.S. 29, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987)	16
<i>United Steelworkers of Am. v. Am. Mfg. Co.</i> , 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960)	6
<i>Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.</i> , 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)	3-4, 19
<i>Watson v. Wash. Preferred Life Ins. Co.</i> , 81 Wn.2d 403, 502 P.2d 1016 (1972)	7

	Page
<i>Weston v. Emerald City Pizza LLC</i> , 137 Wn. App. 164, 151 P.3d 1090 (2007)	11

Statutes

9 U.S.C. § 10	15
RCW 7.04A	6
RCW 7.04A.150(1)	15
RCW 7.04A.170(3)	12
RCW 7.04A.230(1)	15

Rules

Fed. R. Civ. P. 23(a)(1)-(4)	9
Fed. R. Civ. P. 23(c)(2)(A)	8
Fed. R. Civ. P. 23(c)(2)(B)	8
CR 23(a)	9
CR 23(c)(2)	8
CR 23(c)(3)	8
RAP 10.6	1

Miscellaneous

Alderman, Richard M., <i>Consumer Arbitration: The Destruction of the Common Law</i> , 2 J. Am. Arb. 1 (2006)	16
Blankley, Kristen M., <i>Class Actions Behind Closed Doors? How Consumer Claims Can (and Should) Be Resolved by Class-Action Arbitration</i> , 20 Ohio St. J. on Disp. Resol. 451 (2005)	6
H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924)	16-17
Manual for Complex Litigation, Third Ed. (1995)	10-11
Reuben, Richard C., <i>Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice</i> , 47 UCLA L. Rev. 949 (2000)	8-9
Sternlight, Jean R., <i>As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?</i> , 42 Wm. & Mary L. Rev. 1 (2000)	10
Ware, Stephen J., <i>Default Rules from Mandatory Rules: Privatizing Law Through Arbitration</i> , 83 Minn. L. Rev. 703 (1999)	16

**IDENTITY AND
INTEREST OF AMICUS CURIAE**

Pacific Legal Foundation (PLF) respectfully submits this brief in support of the Respondents pursuant to Washington Rule of Appellate Procedure 10.6.

PLF was founded 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated in many important cases involving the Federal Arbitration Act and contractual arbitration in general, including *AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011); *Rent-A-Center, W., Inc. v. Jackson*, ___ U.S. ___, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008); and *Preston v. Ferrer*, 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008). PLF believes its public policy experience will assist this Court in its consideration of the merits of this case.

SUMMARY OF THE ARGUMENT

In *Stolt-Nielsen v. AnimalFeeds International Corp.*, the U.S. Supreme Court held that where a contract is silent on the issue of class arbitration, a court cannot impose class arbitration on the parties unless there is a contractual basis for doing so. 130 S. Ct. at 1782. In that case, both parties agreed that their silence meant there had been no meeting of the minds with regard to class arbitration. Thus there was “no occasion to ‘ascertain the parties’ intention,’” because the parties were in “complete agreement” about what their silence meant. *Id.* at 1770. While the Court did not indicate how silence should be interpreted where the parties do not so stipulate, due process considerations suggest courts should not infer consent to class arbitration from mere silence.

There are many reasons why individuals may choose arbitration. Because of its informality and the parties’ ability to tailor it to their needs, arbitration “reduc[es] the cost and increas[es] the speed of dispute resolution.” *Concepcion*, 131 S. Ct. at 1749; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) (“[I]t is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes.”). For these reasons, Washington

policy favors arbitration. *See Davidson v. Hensen*, 135 Wn.2d 112, 117-18, 954 P.2d 1327 (1998). In contrast to arbitration, judicial resolution of disputes is not a creature of contractual choice. Therefore it includes more rigorous procedural and substantive rules to safeguard important due process rights of the parties to the litigation. Where parties consent to arbitration, they elect to exchange these rules for procedures of their own choosing. *Mitsubishi Motors Corp.*, 473 U.S. at 628 (Parties to an arbitration “trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”). Because the parties’ consent to arbitration essentially waives the courtroom’s due process protections, *Stolt-Nielsen* implies that only express consent to arbitration provides clear and unmistakable evidence of an intent to waive such protections. *See Fuentes v. Shevin*, 407 U.S. 67, 95, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) (waivers of constitutional rights must be clear on their face); *see also Bellevue v. Acrey*, 103 Wn.2d 203, 208, 691 P.2d 957 (1984) (implied waivers of constitutional rights are inadequate).

Inferring consent from silence risks imposing a less formal, potentially less safe procedure on individuals who did not consent to them, in violation of the bedrock rule that arbitration “is a matter of consent, not coercion.” *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*,

489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989); *see also* *Balfour, Guthrie, & Co., Ltd. v. Commercial Metals Co.*, 93 Wn.2d 199, 202, 607 P.2d 856 (1980) (“[A]rbitration stems from a contractual, consensual relationship.”). In order to protect the due process rights of both parties, and especially absent class members, courts must presume that where a contract is silent on class arbitration, the parties did not consent to that process.

ARGUMENT

I

ELECTING CLASS ARBITRATION INVOLVES WAIVING THE DUE PROCESS PROTECTIONS APPLICABLE IN COURTS

Generally, due process dictates that one cannot be bound to a judgment if he did not participate in the litigation. *See Hansberry v. Lee*, 311 U.S. 32, 40, 61 S. Ct. 115, 85 L. Ed. 22 (1940). Given the legal tradition that “‘everyone should have his own day in court,’” it is unfair to bind someone to a judgment who has had no opportunity to be heard. *Martin v. Wilks*, 490 U.S. 755, 762, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989) (citations omitted). Class-actions, however, are an exception, as the outcome binds similarly situated individuals who do not directly litigate their claims. In order to fairly bind absent class members to an outcome of a proceeding in which they did not participate, due process thus demands that their interests must be protected throughout that adjudication. *See Phillips Petroleum Co. v. Shutts*,

472 U.S. 797, 812, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985) (“[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.”).

Due process requires at a minimum adequate notice, opportunity to appear, and adequate representation. *See, e.g., Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (“[T]he Due Process Clause . . . at a minimum . . . require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”); *Tombs v. Northwest Airlines, Inc.*, 83 Wn.2d 157, 161, 516 P.2d 1028 (1973) (“An award made without notice and hearing, in absence of a waiver by the parties agreed, is a nullity.”); *Nobl Park, L.L.C. of Vancouver v. Shell Oil Co.*, 122 Wn. App. 838, 845, 95 P.3d 1265 (2004). Federal Rule of Civil Procedure 23 was grounded in the due process concern for the rights of absent class members; it provides for class certification, notice to class members, judicial approval of settlements, and appointment of adequate counsel. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 182 n.27 (3d Cir. 2001) (explaining Rule 23 as a “multipart attempt to safeguard the due process rights of absentees”). Washington Civil Rule 23 “is an exact counterpart” of Federal Rule 23, and is similarly rooted in due process considerations. *Johnson v. Moore*, 80 Wn.2d 531, 531, 496 P.2d 334 (1972).

No such procedural rules govern class arbitration. While Washington has enacted a Uniform Arbitration Act, the specific procedural rules that govern arbitration are largely left to the parties's choice. *See* RCW 7.04A. Indeed, parties may waive provisions of the Act. *Lents, Inc. v. Santa Fe Engineers, Inc.*, 29 Wn. App. 257, 262, 628 P.2d 488 (1981). Arbitration is “consensual and contractual in nature,” *id.* at 261, and much of its appeal lies in the parties' ability to tailor the governing rules and procedures to their specific needs. *See Barnett v. Hicks*, 119 Wn.2d 151, 160, 829 P.2d 1087 (1992) (The purpose of arbitration is “to avoid . . . the formalities, the delay, the expense and the vexation of ordinary litigation.”). The arbitrator is “part of a system of self-government created by and confined to the parties.” *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960) (citation omitted). Arbitration organizations often craft their own rules, which parties can elect to use in their arbitration agreements. *See* Kristen M. Blankley, *Class Actions Behind Closed Doors? How Consumer Claims Can (and Should) Be Resolved by Class-Action Arbitration*, 20 Ohio St. J. on Disp. Resol. 451, 452 (2005) (Arbitral organizations “have begun to create rules and standards” for parties to choose from.). Or, parties can design their own rules. In exchange for giving up the uniform due process guarantees provided in court, the parties choose a system they can design for their own purposes.

This presents no constitutional problem so long as that choice is voluntary. But imposing arbitration in the absence of clear and unequivocal consent risks denying individuals their due process rights. This is especially dangerous in the case of class arbitration, where absent class members are deprived of the opportunity to litigate their individual claims, potentially even without their knowledge. Arbitration should only be imposed on these individuals where they have expressly elected to trade the courtroom's procedural guarantees for the advantages of arbitration.

**A. The Due Process Requirement of
Notice Conflicts with the Presumption of
Confidentiality in Bilateral Arbitration**

Without notice and an opportunity to participate, absent class members cannot be bound to a judgment. *See, e.g., Shutts*, 472 U.S. at 811-12 (“If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide . . . notice plus an opportunity to be heard and participate in the litigation” (footnote omitted)); *Watson v. Wash. Preferred Life Ins. Co.*, 81 Wn.2d 403, 408, 502 P.2d 1016 (1972) (“The essence of procedural due process is notice and the right to be heard.”). Notice of an action to which one will be bound is an “elementary” requirement of due process, as without it, the fundamental right to be heard can be rendered irrelevant. *See Mullane*, 339 U.S. at 313.

In order to satisfy due process, the form of notice to class members must be “the best practicable, ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” *Shutts*, 472 U.S. at 812 (quoting *Mullane*, 339 U.S. at 314-15). Under Federal Rule of Civil Procedure 23 and Washington Court Rule 23, courts must ensure that the notice is adequate. *See* Fed. R. Civ. P. 23(c)(2)(A) & (B) (mandating court oversight of notice in Rule 23(b)(3) class actions, and providing for discretionary oversight for classes certified under Rule 23(b)(1) and (b)(2)); *see also* CR 23(c)(2) & (3).

One common method of providing notice in class actions—where not all interested parties are ascertainable—is mass publication. *See Mullane*, 339 U.S. at 318 (upholding the constitutionality of mass publication as means of satisfying notice requirements where the parties’ “interests or addresses are unknown”). But such notice by publication conflicts with the confidentiality that parties traditionally enjoy in arbitration. Confidentiality is one of arbitration’s principal attractions. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 8 n.4 (1st Cir. 1999) (“Each side may also prefer arbitration because of the confidentiality and finality that comes with arbitration.”); *see also* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA

L. Rev. 949, 1086 (2000) (“Privacy can be an important consideration in the decision to waive full-blown trial rights in favor of the arbitral forum.”). The confidentiality of arbitration proceedings has good justification. It bolsters parties’ candor by allowing them to share information without fear that it will later be used against them, and shields trade secrets and business strategies. To this end, parties may include an express confidentiality provision, or incorporate specific arbitral rules into their agreements.

The notice requirement that due process rightly imposes on class action lawsuits inherently conflicts with this confidentiality. The notice necessary to satisfy due process would frustrate the arbitral parties’ expectations of privacy in electing arbitration. Class arbitration, therefore, may not accommodate the due process requirement of notice.

B. Class Arbitration Is Incompatible with the Requirements of Class Certification, Which Due Process Demands

In class action litigation, class certification serves an important gatekeeping role that protects the due process rights of absent class members. Under Federal Rule 23 and its Washington counterpart, a class may be certified only if the named plaintiff demonstrates the numerosity, commonality, and typicality of the class, and adequacy of the class representatives. *See* Fed. R. Civ. P. 23(a)(1)-(4); CR 23(a). By ensuring that

the class is sufficiently similar, and that the named plaintiff is representative of the class, these requirements guarantee that the named plaintiff's interests are aligned with absent class members', and ensure that class members' rights are adequately protected. *See Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 (5th Cir. 2001) (The adequacy requirement has "constitutional dimensions," and "implicates the due process rights of all members who will be bound by the judgment.").

Adherence to Rule 23's standards is also important "because it determines not only whether a representative suit may be brought, but also how it must be structured to ensure that all class members' interests are adequately represented." Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 112 (2000). Even after class certification, "[t]he district judge must define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts." *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir. 1983). These steps ensure that the trial is sufficiently individualized to protect the due process rights of both plaintiffs and defendants.

Because it is expensive for the party that loses a class certification decision to continue the litigation, class certification determinations are often outcome-determinative. *See Manual for Complex Litigation*, Third Ed.,

§ 30.1 at 212 (1995). This is especially true for defendants, who are under tremendous pressure to settle after a class is certified due to the increased amount of potential damages. *See, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (defendants facing large damage awards against certified classes “will be under intense pressure to settle”). By ensuring that classes are only certified in appropriate circumstances, the class certification stage acts as a bulwark against frivolous litigation intended to secure settlements. Because of class certification’s importance, “a court should order class certification only after conducting a ‘rigorous analysis’ to ensure that the plaintiff seeking class certification has satisfied CR 23’s prerequisites.” *Weston v. Emerald City Pizza LLC*, 137 Wn. App. 164, 168, 151 P.3d 1090 (2007).

But this rigor, required by class certification rules and the principles of due process, is at odds with the very reason parties choose arbitration: quick and efficient dispute resolution. *See, e.g., Stolt-Nielsen*, 130 S. Ct. at 1775 (“In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize . . . lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”); *Munsey v. Walla Walla Coll.*, 80 Wn. App. 92, 95, 906 P.2d 988 (1995) (“[A]rbitration eases court congestion, provides an expeditious method of resolving disputes and is generally less expensive than

litigation.”). While class certification often entitles the parties to discovery and complex evidentiary hearings, limitations on discovery are among “the hallmark[s] of arbitration.” *Coast Plaza Doctors Hosp. v. Blue Cross of Cal.*, 83 Cal. App. 4th 677, 689, 99 Cal. Rptr. 2d 809 (2000). Under the Uniform Arbitration Act, an arbitrator “may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account . . . the desirability of making the proceeding fair, expeditious, and cost-effective.” RCW 7.04A.170(3). Thus the safeguards that protect parties to a litigation cannot be imported to arbitration without undermining the very rationale for arbitration; yet disposing of those safeguards would run the risk of allowing certification where it is not justified. Parties’ consent reconciles this conflict between class arbitration and the due process protection normally afforded by class certification.

In addition, arbitrators may not be able to determine when a group of potential plaintiffs should be treated as a class, because arbitrators are often neither lawyers nor judges. The Supreme Court has recognized the potential due process deficiencies that could result from allowing arbitrators to handle such complex tasks as class certification, writing that “while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of

absent parties.” *Concepcion*, 131 S. Ct. at 1750. In order for arbitration to maintain its attractive traits without infringing the due process rights of absent class members, courts must ensure that before class arbitration is imposed, all class members have consented to it.

C. Arbitrators May Be Unable To Protect the Due Process Rights of Absent Class Members

Even beyond the initial analysis of whether to certify a class, arbitrators may be unable to provide the same due process protections in class arbitration that courts normally afford. Through various uniform and mandatory rules of procedure, courts play an important role in protecting the due process rights of absent class members throughout class action litigation. *Berger*, 257 F.3d at 480 (“[T]he court must be especially vigilant to ensure that the due process rights of all class members are safeguarded through adequate representation at all times.”). They are responsible for enforcing the parameters of Federal Rule 23 and Court Rule 23, which, in addition to requiring notice and class certification procedures, requires judicial scrutiny over settlements, and determinations of “manageability” and “superiority.” These rules are essential to ensuring the fundamental fairness of binding absent class members to the ultimate judgment of class litigation. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) (Rule 23 was designed “so that the court can assure, to the

greatest extent possible, that the actions are prosecuted on behalf of the actual class members in a way that makes it fair to bind their interests.”).

Unlike judges, arbitrators may not be familiar with matters of constitutional law; they are generally chosen for their knowledge on discrete areas of the law or commerce. In many ways, this is a benefit; parties to an arbitration

trade the formalities of the judicial process for the expertise and expedition associated with arbitration, a less formal process of dispute resolution by an umpire who is neither a generalist judge nor a juror but instead brings to the assignment knowledge of the commercial setting in which the dispute arose.

See Lefkowitz v. Wagner, 395 F.3d 773, 780 (7th Cir. 2005), *cert. denied*, 546 U.S. 812 (2005). Unless absent class members consented to make that trade, subjecting them to class arbitration violates their rights that the rules of civil procedure were designed to safeguard.

D. Judicial Intervention in Arbitration Is Inconsistent with the Nature of Arbitration

One way to preserve the rights of absentees in class arbitration would be for courts to intervene. But such intervention is inconsistent with the principles of arbitration, and cannot compensate for class arbitration’s due process deficit.

First, both the U.S. and Washington Supreme Courts have limited the judiciary's role in arbitration to determining whether a valid arbitration agreement exists and deciding other "gateway matters," not monitoring the process to ensure it conforms with due process. *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003); *Munsey*, 80 Wn. App. at 95-96 (superior and appellate courts' authority over arbitration is limited). Arbitration decisions are subject to very limited judicial review, and vacated in a narrow set of circumstances, including corruption, fraud, partiality, or misconduct. *See* 9 U.S.C. § 10; RCW 7.04A.230(1).

Second, judicial intervention would present logistical difficulties. Arbitration is meant to "avoid the courts insofar as the resolution of the dispute is concerned." *Barnett*, 119 Wn.2d at 160 (emphasis added). Arbitrators have therefore traditionally been afforded latitude in facilitating expeditious dispute resolution. *See* RCW 7.04A.150(1) ("The arbitrator may conduct the arbitration in such manner as the arbitrator considers appropriate so as to aid in the fair and expeditious disposition of the proceeding."). Judicial intervention may result in delay and increased costs, or "undermine the integrity of the arbitral process." *Johnson Controls, Inc. v. Edman Controls, Inc.*, Nos. 12-2308, 12-2623, 2013 WL 1098411, at *7 (7th Cir. Mar. 18, 2013) (court imposed high risk of sanctions for challenges to

arbitration decisions). By requiring two trials of every claim, judicial review of arbitrators' decisions would impair the central purpose of arbitration—efficiency. *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987) (“If the courts were free to intervene . . . the speedy resolution of grievances by private mechanisms would be greatly undermined.”).

Third, even if judicial review were available, arbitration decisions do not lend themselves to such review. Arbitrators are not bound by precedent like courts are. See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 Minn. L. Rev. 703, 719-20 (1999) (up to 90 percent of arbitrators would disregard the law to reach an equitable result in a case). Further, their decisions do not act as precedent for future courts, or other arbitrators and arbitration panels. See Richard M. Alderman, *Consumer Arbitration: The Destruction of the Common Law*, 2 J. Am. Arb. 1, 11-12 (2006). Accordingly, arbitrators are not required to explain the rationale behind their decisions. See *Barnett*, 119 Wn.2d at 156. This makes sense, as the arbitration process is a product of the parties' design, and meant to resolve the immediate dispute alone. The result is that arbitration decisions are not amenable to judicial review. And subjecting arbitration decisions to judicial review would undermine many of the policy reasons for Congress' and this state's declared preference for arbitration. See H.R. Rep.

No. 96, 68th Cong., 1st Sess., 1-2 (1924) (“It is practically appropriate that the [FAA should be enacted] at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.”); *see also Davidson*, 135 Wn.2d at 117-18 (recognizing that Washington’s policy favoring arbitration promotes efficiency, and state policy therefore also favors the finality of arbitration awards). In order for class arbitration to retain the benefits that alternative dispute mechanisms provide, arbitration should retain its private nature.

II

FUNDAMENTAL RIGHTS CANNOT BE WAIVED BY SILENCE

In class arbitration, parties exchange the due process protections of courts for the gains in efficiency and specificity that arbitration provides. But this means that the election of class arbitration entails waiving certain fundamental rights. The U.S. Supreme Court has repeatedly held that it will not infer waivers of fundamental rights lightly. *See, e.g., Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999); *Ohio Bell Tel. Co. v. Public Utils. Comm’n of Ohio*, 301 U.S. 292, 307, 57 S. Ct. 724, 81 L. Ed. 1093 (1937) (“We do not presume acquiescence in the loss of fundamental rights.”). Indeed, “courts indulge every reasonable presumption against waiver.” *Aetna*

Ins. Co. v. Kennedy to Use of Bogash, 301 U.S. 389, 393, 57 S. Ct. 809, 81 L. Ed. 1177 (1937); *State v. Ashue*, 145 Wn. App. 492, 503, 188 P.3d 522 (2008). A contract's silence cannot constitute a valid waiver of due process rights.

Even where contracts have included language purporting to waive fundamental rights, courts have found some such waivers constitutionally insufficient. Thus in *Fuentes v. Shevin*, 407 U.S. 67, the Court held that a conditional sales contract permitting the seller to repossess merchandise upon the buyer's default did not constitute a waiver of the buyer's right to prior notice and a hearing. In rejecting the waiver, the Court emphasized the importance of clarity, stating, "a waiver of constitutional rights in any context must, at the very *least*, be clear. We need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver." *Id.* at 95 (emphasis added); *see also Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 332, 84 S. Ct. 411, 11 L. Ed. 2d 354 (1964) ("Waivers of constitutional rights to be effective, this Court has said, must be deliberately and understandingly made and can be established only by clear, unequivocal, and unambiguous language."); *Acrey*, 103 Wn.2d at 207 (waiver of constitutional rights must be express).

There is even less reason to presume an individual has waived his or her constitutional rights where the contract does not even include ambiguous language on the subject to be waived. In *Fuentes*, the language was not clear enough; while it contained language permitting the seller to retake any property the buyer defaulted on, it “included nothing about the waiver of a prior hearing.” 407 U.S. at 96. In the present case, there is no language relating to class arbitration at all. Parties cannot be aware of the significance of their waiver if they did not include language constituting such a waiver. Accordingly, silence cannot constitute a valid waiver.

CONCLUSION

Federal law favors arbitration not only because of its efficiency gains, but also because such a policy bolsters individuals’ freedom of contract by effectuating their intent when they enter into arbitration agreements. *See Stolt-Nielsen*, 130 S. Ct. at 1773 (“[T]he ‘central’ or ‘primary’ purpose of the FAA is to ensure that ‘private agreements to arbitrate are enforced according to their terms.’” (quoting *Volt*, 489 U.S. at 479)). Without evidence that the parties contemplated class arbitration, a court cannot glean consent to class arbitration from the mere agreement to arbitrate. *Id.* at 1775. The parties’ consent is paramount, and the differences between bilateral and class arbitration are such that the benefits that parties enjoy in the former are “much less assured” in the latter, making it doubtful that parties would have

consented to such a process. *Id.* But most importantly, consent to class arbitration involves the waiver of constitutional rights. A waiver inferred from silence threatens the constitutional rights of absent class members and undermines the purpose of the federal and state level policy favoring arbitration, which is to uphold arbitration in those cases where the parties have *agreed* to such a procedure. Courts should presume that where parties are silent as to the issue of class arbitration, the parties did not consent to class arbitration. Instead, courts should require express consent, manifested by unequivocal terms electing class arbitration. Such a policy would best respect the parties' intent, and bolster individuals' freedom to contract.

For the reasons stated above, the decision below should be affirmed.

DATED: April 18 2013.

Respectfully submitted,

TIMOTHY SANDEFUR
BRIAN T. HODGES
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By



BRIAN T. HODGES
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DECLARATION OF SERVICE

BRIAN T. HODGES declares as follows:

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I am a resident of the State of Washington, employed at 10940 NE 33rd Place, Suite 210, Bellevue, Washington 98004. I am over the age of 18 years and am not a party to this action. On the below date, true copies of the BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS were served to the following as indicated:

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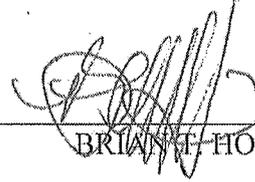
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I declare under penalty of perjury that the foregoing is true and correct
and that this declaration was executed this 18th day of April, 2013, at
Bellevue, Washington.



BRIAN F. HODGES

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Dear Clerk:

Attached for filing in *Hill v. Garda CL Northwest*, Supreme Court Case No. 87877-3 are the following pleadings:

1. Motion for Leave to File Brief as Amicus Curiae by the Pacific Legal Foundation with attached Declaration of Service; and
2. Brief Amicus Curiae of Pacific Legal Foundation in Support of Respondents with attached Declaration of Service.

If you have any problems opening the attachments, or have any questions, please do not hesitate to contact this office.

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