NO. 12-133

In the
Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,
Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,
Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

This Court has repeatedly recognized that federal statutory claims may be appropriately resolved through arbitration only "so long as the prospective litigant effectively may vindicate [its] statutory cause of action in the arbitral forum." *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 90 (2000). The question presented is whether an arbitration clause should be enforced when there is no dispute that a litigant has shown that it would be unable effectively to vindicate its federal statutory rights in the arbitral forum.

RULE 29.6 STATEMENT

Respondents are Italian Colors Restaurant, 429 Supermarkets Corp., Bunda Starr Corp. d/b/a Buy-Rite, Chez Noelle Restaurant Corp., Cohen Rese Gallery, Inc., DRF Jewelers Corp., Il Forno, Inc., Mai Jasmine Corp., Mascari Enterprises d/b/a Sound Stations, Mims Enterprises, Inc. d/b/a Mims Restaurant, National Supermarkets Association, Inc., and Phuong Corp. None of the Respondents has a parent company. No publicly held company owns 10% or more of any one Respondent's stock.

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INTRODUCTION

For more than a quarter century, this Court has recognized that federal statutory claims may be appropriately resolved through arbitration under the Federal Arbitration Act ("FAA") only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 637 (1985). This requirement reflects the uniquely federal need to harmonize the FAA's general pro-arbitration policy with competing federal statutes that enjoy equal constitutional footing. It ensures the FAA serves its purpose of actually resolving claims in a streamlined forum, without exterminating those claims in circumstances where the particulars of a specific arbitration agreement foreclose the possibility of effectively resolving the dispute in arbitration. The effective-vindication rule is thus fully consonant with the policies underlying the FAA, which is pro-arbitration in the sense that it actually wants federal statutory claims settled through arbitration, not precluded altogether.

Accordingly, this Court has squarely held that the effective-vindication rule applies where, as here, enforcing an arbitration clause would impose "prohibitive costs" that prevent a claimant from effectively vindicating her federal statutory rights. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91–92 (2000). The required showing is daunting. A party invoking the rule "bears the burden" of demonstrating that the costs would truly be "prohibitive," *i.e.*, would actually prohibit vindication

of federal rights, not just make doing so more difficult. *Id.* But the possibility of carrying the burden through a fact-bound showing has never been doubted and indeed has always been thought vital to harmonizing the pro-arbitration policy of the FAA with the policies underlying the federal statute at issue in a given case.

This is the rare case in which the plaintiffs have carried that burden. Respondents have proven through uncontested expert evidence that they cannot effectively vindicate their federal statutory rights through bilateral arbitration under Petitioners' arbitration clause. The necessary, non-recoupable costs of proving the elements of Respondents' antitrust claims through expert economic analysis far exceed the value of any individual recovery. Petitioners' arbitration clause neither allows a prevailing party to shift those costs nor permits any other cost-sharing mechanism that would render bilateral arbitration a feasible means of vindicating Respondents' antitrust rights. And Petitioners have never offered to shift those costs, stipulate to market power or other similar issues, or make any other accommodation that would make bilateral arbitration feasible. This is thus truly a case in which the alternative to litigation is not arbitration, but nothing. "Compelling arbitration" here would not actually lead to arbitration of Respondents' important federal antitrust claims, but rather would grant Petitioners *de facto* immunity from federal antitrust law.

The application of the effective-vindication rule under these narrow circumstances is fully consistent

with this Court's decisions. Because the decision below does not order class arbitration when the parties have not agreed to it, this case does not conflict with this Court's decisions in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). Nor does *Concepcion* implicitly undermine the effective-vindication rule. Nothing in *Concepcion* purported to overrule or limit *Randolph*. Indeed, *Concepcion* neither cites nor discusses *Randolph*, which is hardly surprising because the federal-law rule of *Randolph* was irrelevant to the preemption question in *Concepcion*. When state law conflicts with the FAA as in *Concepcion*, the Supremacy Clause itself provides the rule of decision for resolving the conflict. But when the FAA is in tension with another federal statute, like the antitrust laws, the Supremacy Clause (and therefore *Concepcion*) is irrelevant and *Randolph* provides the basis for harmonizing the two federal statutes.

Petitioners and their *amici* cannot refute any of this. Instead, they mistake this Court's narrow but vital effective-vindication doctrine for *dicta*, misconstrue Respondents' arguments, and falsely warn of future doom. But the effective-vindication rule is not *dicta*. This Court, in *Randolph*, both clarified the applicable test and squarely applied it, but concluded that the claimant failed to meet her heavy evidentiary burden. Nor has this Court ever limited the effective-vindication rule to choice-of-law provisions or some subset of costs imposed by an arbitration clause—limitations that would be neither logical nor administrable. Petitioners also mistakenly complain that Respondents demand class

arbitration, or even class litigation. All that Respondents desire is the ability to effectively vindicate their federal antitrust rights in some forum. If Petitioners want to adopt a better arbitration agreement that allows cost-shifting for prevailing parties, such as the one employed by AT&T in *Concepcion* or by a number of other large companies, Respondents stand ready to vindicate their federal antitrust claims through bilateral arbitration. Indeed, such agreements, which guarantee *both* the efficiencies of the arbitral process and the effective vindication of rights, are becoming more common. But nothing in the FAA—which favors arbitration, not *de facto* immunity—or common sense permits Petitioners to demand enforcement of an arbitration clause with respect to claims that simply cannot be addressed under the terms of that clause. Petitioners nominally sought to compel arbitration, but in light of the uncontested showing of prohibitive costs, what they really seek to compel is the non-arbitration and non-vindication of important federal claims. Permitting such immunity is antithetical to the policies of both the FAA and the federal antitrust laws. The effective-vindication doctrine wisely prevents that perverse result.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Relevant provisions of the Federal Arbitration Act, the Sherman Act, and Article VI of the United States Constitution are reproduced in the Statutory Appendix.

STATEMENT OF THE CASE

A. Respondents' Federal Antitrust Claims

Respondents are merchants who sued American Express (Amex) for violations of the federal antitrust laws. The crux of their complaint is that Amex compels merchants to accept Amex-branded mass-market credit cards, including bank-issued cards, as a condition of accepting Amex corporate and premium charge cards. Respondents assert that Amex has monopoly power in the markets for corporate and premium cards, and that it uses that power to force merchants to accept ordinary credit cards at rates approximately 30% higher than the fees for identical bank-issued cards in competing networks (*e.g.*, Visa and MasterCard). This monopoly power also contributed to Respondents' acceptance of the arbitration clause in dispute. *See* JA 77–78 (Amended Complaint) ("In order to maintain its ability to exercise monopoly power, American Express imposes upon merchants in its standard form merchant services agreements a provision designed to insulate itself from any class-wide liability for antitrust violations.").

Amex's tying arrangement, which Respondents attack as unlawful under the Sherman Act, has had specific and provable anticompetitive effects in the market for ordinary credit-card acceptance.[1]

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[1] "A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461–62 (1992) (citation and internal quotation marks omitted). A tying arrangement violates § 1 of the Sherman Act, under Second Circuit

Specifically, the tying arrangement has allowed Amex to offer banks vastly higher "interchange" fees than Visa and MasterCard.[2] That, in turn, has driven those companies to raise their own interchange fees to avoid losing bank issuers to Amex. The result has been an upward spiral in interchange fees without the downward price competition that normally exists in competitive markets. This breakdown of normal competitive forces in the credit-card-acceptance market has prompted, in addition to this case, merchant class actions against Visa and MasterCard that have produced settlements providing for reformative network rules changes and billions of dollars in compensation to merchant businesses and their customers.[3] In addition, the Department of Justice

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precedent, only if the seller has appreciable economic power in a properly defined tying product market and if plaintiffs demonstrate a substantial likelihood of harm to competition in a defined tied-product market. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc. (In re Visa Check/MasterMoney Antitrust Litig.)*, 280 F.3d 124, 133 n.5 (2d Cir. 2001); *see also Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997). Respondents here propose to satisfy their burden by proving actual harm to competition.

[2] "Interchange fees" are fees that the "card-issuing bank" receives "each time it provides funds … as payment to a merchant for the cardholder's purchase." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc. (In re Visa Check)*, 396 F.3d 96, 102 (2d Cir. 2005).

[3] *See, e.g.*, *In re Visa Check*, 396 F.3d at 101 (approving settlement of tying claims similar to those challenged here for $3.1 billion and rules reforms); *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110 (S.D.N.Y. 2009) (approving settlement of claims regarding fixing of foreign exchange fees

brought enforcement actions against Visa, MasterCard, and Amex seeking relief that complements the injunctive relief sought in the merchant class cases against all three networks.[4]

Prosecuting Respondents' tying case is no small task. In the courts below, Respondents presented expert analysis demonstrating the high costs of proving their claims. Based on this evidence, it was uncontested below that Respondents cannot prosecute their claim without at least one detailed antitrust market study. Pet. App. 25a–27a. It was also uncontested that the study in this case will be "necessarily complex and costly" because it will require specific determinations concerning:

- the relevant "tying" and "tied" product markets and whether they are distinct from one another;
- whether Amex has monopoly market power in the "tying" product market;

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for $336 million and reform of rules). More recently, in *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, No. 05-md-1720 (E.D.N.Y), Doc. No. 1588, merchants challenged, among other things, "anti-steering rules" that are identical to rules imposed by Amex, *see infra* note 4.

[4] *See United States v. Am. Express Co.*, No. 10-cv-4496 (E.D.N.Y.). The United States entered into consent decrees with Visa and MasterCard, *id.* Doc. No. 4, and continues to litigate against American Express. The United States is seeking certain targeted injunctive relief, whereas private plaintiffs in coordinated proceedings are seeking broader, market-wide injunctive relief as well as monetary damages. *See In re Am. Express Anti-Steering Rules Antitrust Litigation*, No. 11:MD-2221 (E.D.N.Y.).

- whether Amex has exercised its monopoly market power to enforce the tying arrangement;
- whether the tying arrangement has had discernible anticompetitive effects in the "tied" product market;
- what the merchant fees would have been but for the anticompetitive tying arrangement; and
- the dollar amount of the damages to the individual claimant as a consequence of the tying arrangement.

Pet. App. 87a–88a.

Given these complex, contested, and time-consuming inquiries, Respondents' uncontested evidence shows that the cost of conducting the market study—which is not recoverable even if Respondents prevail—is "at least several hundred thousand dollars" and could "easily exceed $1 million." Pet. App. 87a. This total dwarfs, many times over, the recovery that any named plaintiff could hope to obtain—approximately $5,252 for the "median volume" merchant plaintiff and $38,549 for the largest-volume merchant plaintiff. Pet. App. 89a.

B. District Court Proceedings

Based on this evidentiary showing, which Petitioners did not dispute, Respondents opposed the motion to compel arbitration on the ground that they would, in fact, be unable to arbitrate their federal statutory rights under the specific arbitration agreement here.

The arbitration agreement in this case is eight years old and bears none of the attractive features of the agreement at issue in *Concepcion* or the pro-vindication agreements employed by many other companies. It provides no mechanism for either sharing or reimbursing the costs of the requisite market study. It precludes the spreading of costs among claimants even in separate bilateral arbitrations by prohibiting the sharing of "any information relating to … the arbitration proceedings." Pet. App. 92a. In addition, the arbitration agreement prevents claimants from seeking relief "on behalf of … other [merchants]," Pet. App. 67a—meaning that it precludes the possibility of obtaining the kind of market-wide injunctive relief that is often necessary to remedy systemic anticompetitive conduct.

Respondents argued that directing them to the arbitral forum would not result in the actual arbitration of their Sherman Act claims because, under the particular circumstances of this case, such an order would "impose such punishing costs" on each claimant "as to preclude vindication" of their rights under the federal antitrust laws. Pet. App. 108a. The district court nonetheless granted Petitioners' motion to compel arbitration. Pet. App. 123a.

C. Court of Appeals Decisions

The Second Circuit reversed. It determined that the effective-vindication question was "plainly" a question for the court, not the arbitrator, to decide, Pet. App. 75a (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006)), and then

analyzed that question under the effective-vindication framework set forth by this Court in *Randolph*.

Applying that framework to the specific facts of the case, the Second Circuit held that Respondents met their heavy burden. The court found that the "uncontested" record evidence before it—like the "similar" evidence in another court of appeals case where plaintiffs successfully showed that "prohibitive costs" would prevent the vindication of similarly complex federal antitrust claims, *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006)—established that Respondents "would incur prohibitive costs if compelled to arbitrate" because the non-recoverable, per-claimant costs of bringing their claims in arbitration (as opposed to class proceedings in court) would exceed their expected individual recoveries many times over. Pet. App. 86a–91a (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987) (reimbursement of expert witness fees capped by federal statute at $30 per witness per day)). The court therefore held that the arbitration clause could not "be enforced in this case because to do so would grant Amex de facto immunity from antitrust liability." Pet. App. 95a.

At the same time, the Second Circuit emphasized the limited scope of its opinion. It explained that it was not holding that arbitration clauses "are *per se* unenforceable in the context of antitrust actions," but only that—consistent with this Court's approach in *Randolph*—"*each* case" presenting the question "must be considered on its own merits, governed with a healthy regard for the fact that the FAA 'is a

congressional declaration of a liberal federal policy favoring arbitration agreements.'" Pet. App. 97a (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

This Court granted *certiorari*, vacated the Second Circuit's opinion, and remanded for further consideration in light of *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). *Stolt-Nielsen* characterized the differences between bilateral arbitration and class arbitration as "fundamental," and therefore held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775–76.

On remand, the Second Circuit agreed with Petitioners that *Stolt-Nielsen* would "plainly preclude[] [the court] from ordering class-wide arbitration." Pet. App. 55a. But the Second Circuit explained that it "did not do so" in its previous opinion. Pet. App. 55a. Class proceedings, if any, would take place in the district court, not in arbitration—unless the parties agreed otherwise. The Second Circuit thus concluded that *Stolt-Nielsen* did not alter the outcome of its prior decision. Pet. App. 55a.[5]

After this Court decided *Concepcion*, the Second Circuit again reconsidered its decision, this time on

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[5] Justice Sotomayor was a member of the panel when the Second Circuit first decided the case. *See* Pet. App. 57a. By the time the panel reconsidered its opinion in light of *Stolt-Nielsen*, she had been elevated to this Court. *See* Pet. App. 31a, n.1.

its own initiative. Pet. App. 125a–26a. The Second Circuit read *Concepcion* and *Stolt-Nielsen* as "stand[ing] squarely for the principle that parties cannot be forced to arbitrate disputes in a class-action arbitration"—whether by state law or by the FAA—"unless the parties agree to class action arbitration." Pet. App. 16a. The court observed that neither case mentioned *Randolph* or addressed whether an arbitration clause "is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights." Pet. App. 15a, 24a. Thus, the court concluded that neither decision undermined the effective-vindication rule.

Recognizing that *Randolph*—not *Stolt-Neilsen* or *Concepcion*—provided the relevant inquiry, the Second Circuit reiterated its earlier conclusion. "The evidence presented by plaintiffs here establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." Pet. App. 25a. The court therefore held that, based on the specific record in this case, it would decline to "strip the plaintiffs of rights accorded them by statute" by compelling an arbitration that would never occur. Pet. App. 30a.

At the same time, the Second Circuit stressed the uphill battle facing other plaintiffs who seek to invalidate arbitration clauses based on the effective-vindication principle. Pointing to several cases in which plaintiffs tried but failed to meet the exacting

standard of *Randolph*, the Second Circuit made clear that these "failures speak to the quality of the evidence presented, not the viability of the legal theory." Pet. App. 24a–25a. That "plaintiffs so often fail" in these attempts, the Second Circuit explained, "demonstrates that the [necessary] evidentiary record … is not easily assembled, and that the courts are capable of the scrutiny such arguments require." Pet. App. 25a. And again the court stressed that it was not ordering a specific course of proceedings, only that Respondents must be afforded the ability to vindicate their federal antitrust claims. *See* Pet. App. 25a.

SUMMARY OF ARGUMENT

I. The effective-vindication rule is a narrow, but essential safety valve that ensures the FAA's broad policy in favor of arbitration does not eviscerate more specific federal statutory rights. This Court has always maintained that federal statutory claims are subject to arbitration only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi*, 473 U.S. at 637; *see also Randolph*, 531 U.S. at 91–92. And this Court has repeatedly reaffirmed that it "would have little hesitation in condemning" an arbitration agreement that prevented the effective vindication of statutory rights. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (quoting *Mitsubishi*, 473 U.S. at 637 n.19).

The effective-vindication rule harmonizes the FAA with other federal statutes by giving effect to both statutory regimes to the fullest extent possible. The rule ensures that by agreeing to arbitrate their

federal claims, claimants do not sacrifice their federal rights but instead secure an alternative forum in which to vindicate those rights. In this sense, the effective-vindication rule is like this Court's other doctrines for reconciling competing federal statutory regimes—such as implied antitrust immunity—which eliminate clear repugnancy between two statutes of equal constitutional stature. But in an important way the effective-vindication rule is different. When the minimal requirements for proving a particular federal statutory claim and the mandates of a specific arbitration agreement interact so that the federal claims cannot be vindicated in an arbitral forum, compelling arbitration is contrary to the policies of *both* the FAA and the underlying federal statute. The FAA reflects a federal policy favoring actual arbitration—not a policy favoring *de facto* immunity or a policy of hostility to litigation when the alternative is not arbitration, but nothing at all.

The effective vindication rule is narrow. It applies when an arbitration agreement would impose "prohibitive costs" that would prevent a claimant from effectively vindicating her federal statutory rights in the arbitral forum. And "prohibitive costs" means just that. It is not enough that the costs make vindication of federal rights more difficult, or lower the incentives for proceeding in arbitration. Rather, the claimant bears the burden of proving that the arbitral agreement actually prohibits the effective vindication of federal rights, such that being consigned to the arbitral forum will not result in the arbitration of the federal statutory claims but will

instead serve as the functional equivalent of a grant of immunity.

II. The decision below is consistent with this Court's recent decisions concerning class arbitration. Respondents unequivocally do not request class arbitration, and the court of appeals did not order class arbitration. Thus, this case does not conflict with this Court's decisions in *Concepcion* and *Stolt-Nielsen*. Moreover, nothing in *Concepcion* implicitly undermined the effective-vindication rule. *Concepcion* does not even cite the Court's longstanding effective-vindication precedents, which is hardly surprising given that *Concepcion* was a preemption case concerning conflicts between the FAA and competing *state* law. The effective-vindication rule, in contrast, is a uniquely federal doctrine that reconciles conflicts between the FAA and competing *federal* statutory rights.

Nor does the effective-vindication rule lead to widespread invalidation of arbitration agreements, as Petitioners suggest. The rule is exceedingly narrow and thus very rarely satisfied. Over the past two decades, the courts have demonstrated the ability to distinguish between unsupported speculation and the truly rare case where record evidence proves that prohibitive costs will preclude the effective vindication of a federal claim in arbitration. Indeed, in the only other court of appeals case involving similarly complex antitrust claims and a similarly uncontested factual record, the plaintiffs were similarly found to have satisfied the rule's stringent requirements. In other cases involving mere speculation, where the costs merely

diminished the incentive to pursue arbitration, or where the costs were substantial but not "prohibitive," neither this Court nor the lower courts have hesitated to enforce arbitration agreements according to their terms.

Furthermore, companies are increasingly drafting arbitration clauses that ensure the effective vindication of federal rights in the arbitral forum. The agreement at issue in *Concepcion* is an example. Among other things, AT&T agreed to pay double attorney's fees and all costs of pursuing the claims if an arbitration award exceeded the company's last written settlement offer. Other companies have adopted similar terms providing for the shifting of necessary costs, including expert fees. These clauses would allow Respondents to vindicate their claims. Amex's very different agreement does not. Any party drafting an arbitration agreement can readily ensure that the agreement will permit the vindication of federal statutory claims and make any judicial resort to the effective-vindication doctrine unnecessary. Thus, continued application of the effective-vindication doctrine implicates no floodgates concerns but does create healthy incentives for parties to draft truly pro-arbitration agreements. Those incentives undoubtedly will promote the FAA's core purpose by spurring private arbitration agreements that can be enforced according to their terms without foreclosing the vindication of federal rights.

Petitioners' position would do the opposite, ending both the effective-vindication rule and this beneficial trend. Companies would instead have

every incentive to impose highly restrictive arbitration terms that, like Petitioners', insulate them from federal liability.

III. The effective-vindication rule clearly applies here. It is undisputed that, unlike the agreement in *Concepcion*, Petitioners' arbitration clause prohibits Respondents from shifting, or even sharing, non-recoupable costs that are necessary to establish their federal antitrust claims. Thus, each individual Respondent will be forced to bear those costs on its own. And those costs—if they can be neither recouped nor shared—are plainly prohibitive. Respondents presented expert evidence that it would cost several hundreds of thousands (if not millions) of dollars to provide the expert market analysis necessary to prove their antitrust claims. But while the claims here are substantial, with some of the larger merchants seeking to recover nearly $40,000, the recoveries are still dwarfed by the necessary expert costs. Thus, in this case, the alternative to litigation (where costs can be shared) is not arbitration, but the complete inability to vindicate federal rights in any forum.

Petitioners suggest that the effective-vindication rule is just a mechanism to permit class actions by businesses like Respondents that have agreed to arbitrate. But that is simply incorrect. Respondents do not seek to avoid arbitration *per se*, nor do they insist on proceeding as a class. All they desire is the ability to vindicate their federal antitrust claims in some forum. The cost-sharing available in class-action litigation provides one mechanism to address the high expert costs associated with Respondents'

tying claim, but it is far from the only mechanism. If Petitioners prefer non-class arbitration, they could offer to shift Respondents' costs, or they could permit Respondents to share those costs through mechanisms other than class proceedings. Or they could even stipulate to market power and the other disputed issues addressed by Respondents' expert. The choice is theirs. But what they cannot do is continue to foreclose legitimate federal antitrust claims.

ARGUMENT

I. This Court Has Long Recognized That Arbitration Agreements Should Not Be Enforced When Prohibitive Costs Prevent The Effective Vindication Of Federal Statutory Rights In The Arbitral Forum.

This Court's application of the FAA to federal statutory rights rests critically on the existence and continued vitality of the effective-vindication rule. Courts, including this one, were initially reluctant to compel the arbitration of federal statutory claims at all, and ultimately did so only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi*, 473 U.S. at 637. That narrow rule is not some hangover from the days of judicial hostility to arbitration but a guarantee that the arbitral forum will actually be available to vindicate statutory rights. It is a necessary rule to harmonize the FAA with the policies underlying other federal statutes. Indeed, the rule furthers the policy of the FAA itself, which is pro-arbitration in the sense of wanting arbitration actually to occur, not simply anti-

litigation or pro-immunity from other important federal laws. Consistent with its role in vindicating the FAA and harmonizing it with other federal statutes, the effective-vindication rule is narrow. It requires costs to be prohibitive, not just substantial or daunting. But when the costs are prohibitive and the alternative to litigation is not arbitration, but nothing, the effective-vindication rule ensures that private parties are not needlessly precluded from vindicating important federal statutes.

A. This Court's Application of the FAA to Federal Statutory Claims Rests Critically on the Effective-Vindication Rule.

This Court has recognized the effective-vindication rule for as long as it has applied the FAA to federal statutory claims. For much of the twentieth century, this Court took the view that federal statutory claims could not be arbitrated at all. *See, e.g.*, *Wilko v. Swan*, 346 U.S. 427 (1953). In a series of cases beginning in 1985 with *Mitsubishi*, however, this Court changed its view and recognized that the FAA appropriately governs federal statutory claims. *Mitsubishi* explained that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute," but "submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S. at 628; *see also Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (same) (overruling *Wilko*). Thus, this Court rejected the *Mitsubishi* plaintiffs' suggestion that the FAA does not reach federal statutory claims generally, *see id.* at 624–25, or

federal antitrust claims in particular, *see id.* at 628–29.

The effective-vindication rule was critical to this Court's holding. The availability of the arbitral forum to vindicate "the substantive rights afforded by the statute," *id.* at 628, and to ensure that the Sherman Act "will continue to serve both its remedial and deterrent function," *id.* at 637, was central to the Court's reasoning. Indeed, the Court expressly cautioned that the FAA applies only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Id.* It thus harmonized the FAA's general pro-arbitration policy with the specific federal statutory rights in any given case. In doing so, the Court bolstered the congressional policy in favor of arbitration while safeguarding public confidence in the arbitral process. The FAA applies to federal statutory claims and mandates arbitration according to contractual terms except in the very rare instance when an arbitration clause will foreclose the effective vindication of a federal right.

Since *Mitsubishi*, this Court has repeatedly reaffirmed the effective-vindication rule as an essential safety valve to preserve federal rights and to reconcile the FAA with the balance of the federal code. In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court found no "inherent inconsistency" between arbitration and the "important social policies" furthered by the Age Discrimination in Employment Act because "the statute will continue to serve both its remedial and deterrent function"—but, again, only "'so long as the prospective litigant effectively

may vindicate his or her statutory cause of action in the arbitral forum.'" 500 U.S. 20, 27–28 (1991) (brackets omitted) (quoting *Mitsubishi*, 473 U.S. at 637). In *Vimar Seguros*, the Court reiterated that it "would have little hesitation in condemning" an arbitration agreement that prevented the effective vindication of statutory rights. 515 U.S. at 540 (quoting *Mitsubishi*, 473 U.S. at 637 n.19). And most recently, in *14 Penn Plaza LLC v. Pyett*, this Court recognized that arbitration agreements may not prevent claimants "from 'effectively vindicating' their 'federal statutory rights in the arbitral forum.'" 556 U.S. 247, 273–74 (2009) (quoting *Randolph*, 531 U.S. at 90).

In *Green Tree Financial Corp.-Alabama v. Randolph*, this Court held that the effective-vindication rule is satisfied when arbitration would entail prohibitive costs that prevent effective vindication of a federal statutory right. 531 U.S. at 90–91. Specifically, the Court envisioned a claimant making a particularized showing that the costs of arbitrating under the agreement would be "prohibitive," *i.e.*, exceed the maximum potential recovery. *Randolph* reiterated that the FAA was never intended to—and properly applied, does not—eviscerate other federal statutory protections: "[E]ven claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute serves its functions." 531 U.S. at 90 (brackets and internal quotation marks omitted). The Court then addressed the plaintiff's suggestion that she might "be required to

bear prohibitive arbitration costs if she pursues her claims in an arbitral forum" and thus that "she is unable to vindicate her statutory rights in arbitration." *Id.* The Court explained that when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." Then the Court applied that test to the facts before it, noting that "the record does not show that Randolph will bear such costs if she goes to arbitration." *Id.* And "[t]he 'risk' that Randolph will be saddled with prohibitive costs," this Court held, "is too speculative to justify the invalidation of an arbitration agreement." *Id.* at 91.

The effective-vindication rule is similar to other efforts by this Court to reconcile competing statutory regimes, like the implied antitrust immunity doctrine. Both doctrines apply only to the intersection of federal statutes. *See, e.g.*, *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 271 (2007) ("Where regulatory statutes are silent in respect to antitrust, … courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws."). Both doctrines are designedly difficult to satisfy. *See, e.g.*, *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 682 (1975) ("Repeal of the antitrust laws by implication is not favored and not casually to be allowed."). As with the effective-vindication rule, this Court refrains from enforcing the antitrust laws only where there is a "clear repugnancy" between those laws and another federal statute. *See, e.g.*, *Credit Suisse*, 551 U.S. at 275 ("[W]hen a court decides whether securities law

precludes antitrust law, it is deciding whether, given context and likely consequences, there is a 'clear repugnancy' between the securities law and the antitrust complaint—or … whether the two are 'clearly incompatible.'"). And the courts have had little difficulty policing the two doctrines' narrow bounds. *Compare Credit Suisse*, 551 U.S. at 271 (collecting implied antitrust immunity cases), *with infra* pp. 29–32 (collecting effective-vindication cases).

There is, however, one important difference between the effective-vindication rule and other doctrines designed to eliminate conflict between two federal statutes. In the narrow circumstances in which the effective-vindication rule is satisfied, it does not vindicate the policies of the underlying federal statute at the expense of the FAA's policies. To the contrary, it vindicates the FAA's policy as well as that of the underlying statute. The FAA reflects a decidedly pro-arbitration policy, but what it favors is the resolution of claims in arbitration, not the complete elimination of claims resulting from the terms of an arbitration agreement. *See* 9 U.S.C. § 2 (providing for enforcement of agreements "to *settle by arbitration* a controversy" (emphasis added)); *cf. Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 941 (4th Cir. 1999) (Wilkinson, J.) ("By promulgating this system of warped rules, Hooters so skewed the process in its favor that Phillips has been denied arbitration in any meaningful sense of the word. To uphold the promulgation of this aberrational scheme under the heading of arbitration would undermine, not advance, the federal policy favoring alternative dispute resolution."). In other words, when the

choice is arbitration or litigation, the FAA prefers arbitration. But if the choice is between litigation and nothing, the FAA does not prefer "nothing," and there is every reason to vindicate the underlying federal statute. Moreover, because continued application of the effective-vindication doctrine encourages parties to form truly pro-arbitration agreements that facilitate the effective vindication of federal statutory rights, *see infra* § II.C, the rule affirmatively promotes the FAA's pro-arbitration policy, and engenders confidence in the arbitral forum.

Petitioners cannot dismiss this Court's holding in *Randolph* as *dicta*. The Court in *Randolph* confronted the plaintiff's argument under the effective-vindication rule—while repeating, rather than questioning, the rule's importance—and squarely applied the rule to the facts of the case. *See* 531 U.S. at 90–92. It rightly placed "the burden of showing the likelihood of incurring [prohibitive] costs" on the plaintiff and correctly held that she "did not meet that burden." *Id.* at 92. The Court's opinion did not delineate "[h]ow detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence," because in *Randolph* there was no "timely showing at all on the point." *Id.* But this Court, having held that the plaintiff's showing was inadequate, left no doubt that the effective-vindication doctrine is settled law and that such a significant, fact-bound showing is possible.

Nor is the effective-vindication rule limited to "arbitration-specific" costs or choice-of-law

provisions, as Petitioners also suggest (at 41–48). This Court's reasoning in *Randolph* was in no way limited to "filing fees, arbitrator's fees, and other administrative fees imposed by the arbitral forum." Br. for Pet'rs at 41. Rather, the Court categorically held that the effective-vindication rule applies when "arbitration would be prohibitively expensive." *Randolph*, 531 U.S. at 92. To be sure, the plaintiff's argument in *Randolph* concerned filing fees, arbitrator's fees, and other administrative costs. *See id.* at 90–91 n.6. But the specific characteristics of the fees had no bearing on the Court's articulation of the effective-vindication rule in *Randolph* or any other case. Indeed, this Court's statement in *Mitsubishi* and later cases that federal statutory rights are subject to arbitration only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum," 473 U.S. at 637, does not turn on the precise way in which the arbitration agreement or the costs of arbitrating prevent the vindication of substantive rights. What matters is whether, not precisely why, the federal statutory claims can be resolved in the arbitral forum.

Randolph itself proves this. While prior cases expressed concerns about the substantive preclusion of federal statutory claims, *Randolph* demonstrates that the Court is equally concerned about the possibility that procedural costs would foreclose consideration of federal claims. And having declined to distinguish between substantive and procedural bases for foreclosing federal statutory claims, it would make no sense to slice the doctrine even thinner by having it turn on whether the "prohibitive

costs" are imposed by filing fees or by some other provision of the arbitration agreement (such as the prohibition on cost-sharing in the Amex agreement).

Indeed, Petitioners' arguments are doctrinally illogical. Once it is accepted that the effective-vindication doctrine applies when federal statutory rights cannot be vindicated in the arbitral forum, the precise manner in which the arbitration clause prevents effective vindication can hardly be determinative. A flat ban on litigating antitrust claims, a choice-of-law provision with the same effect, a filing fee with the same effect, or rules against cost-shifting or cost-sharing with the same effect, all preclude the effective vindication of antitrust claims in the arbitral forum. In each case, the consequences of enforcing the arbitration agreement will not be to compel actual arbitration of the claims but to foreclose any determination and to frustrate the "remedial and deterrent function" of the Sherman Act. *Mitsubishi*, 473 U.S. at 637. In each case, the choice will not be between arbitration and litigation, but between litigation and nothing. There is simply no basis in doctrine or common sense to distinguish among the various ways in which an arbitration agreement can preclude the effective vindication of federal statutory rights.

Petitioners are similarly off base to suggest (at 22–24) that the effective-vindication rule cannot apply here because Congress did not contemplate class arbitration when it enacted the FAA and the Sherman Act. First and most critically, Respondents do not insist on class arbitration, and the decision below expressly did not order class arbitration, *see*

infra § II.A. Petitioners' continued suggestion otherwise is mystifying. Moreover, it is irrelevant whether, in 1890, decades before Rule 23 of the Federal Rules of Civil Procedure was promulgated, "Congress rejected a proposal to adopt a class-action mechanism to address the problem of small-damages antitrust claims." Br. for Pet'rs at 24. Under current law, Rule 23 permits class actions for federal claims, and Petitioners surely do not mean to suggest that the Sherman Act's legislative history *prohibits* antitrust class actions under Rule 23. *See, e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979). The reality is that Congress was happy for Sherman Act claims to be litigated against the backdrop of existing procedural rules, which have always included cost-sharing mechanisms like joinder, and it was equally happy to have those claims litigated exclusively in federal court—and not in arbitration—for decades after the passage of the FAA and before *Mitsubishi*. Congress was equally happy to have antitrust claims actually resolved in arbitration with the express assurance from this Court that the effective-vindication rule would ensure that Sherman Act claims would not go wholly unresolved. But there is no indication—and certainly none in the 1890 legislative history—that Congress would be indifferent to having serious antitrust violations go completely unremedied because an arbitration agreement foreclosed the possibility of either litigating or arbitrating the claims.

For the past quarter century, this Court has always maintained the effective-vindication rule as a narrow means for harmonizing the FAA's liberal policy in favor of arbitration with other federal

statutory protections. The rule does not disrupt "the central or 'primary' purpose of the FAA … to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen*, 130 S. Ct. at 1773. It merely recognizes that "no legislation pursues its purpose at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam), and that the FAA's general policy in favor of arbitration was not intended to eliminate more specific federal rights found in statutes of equal constitutional footing. Thus, parties remain "generally free to structure their arbitration agreements as they see fit," *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (internal quotation marks omitted), while the effective-vindication rule ensures that federal judicial enforcement of arbitration agreements will not result in the unwitting foreclosure of federal statutory rights.

B. The Effective-Vindication Rule Requires a Demanding Evidentiary Showing.

The effective-vindication rule is rightly very narrow. "[W]here, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Randolph*, 531 U.S. at 92 (citing *Gilmer*, 500 U.S. at 26; *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987)). Costs must truly be prohibitive; substantial or daunting costs are not enough. The "risk" of prohibitive costs does not suffice. *Randolph*, 531 U.S. at 90. Nor does mere "speculation" that a party

will not be able to vindicate her rights through arbitration. *14 Penn Plaza*, 556 U.S. at 273–74. Instead, to satisfy the rule, there must be proof that vindication of the federal right in the arbitral forum is simply not feasible.

The courts are capable of holding claimants to this burden. This Court has set the evidentiary bar very high. The costs must truly be prohibitive. It is not enough if the costs merely lower incentives. And when a claimant argues that prohibitive costs prevent the effective vindication of rights, "the record [must] show that [the claimant] will bear such costs if she goes to arbitration." *Randolph*, 531 U.S. at 90. In every case to come to this Court before this one, such hard record evidence has been lacking and the Court enforced the challenged arbitration clause. But it is every bit as important to apply the effective-vindication rule in the rare case where such a showing is made as it is to enforce the agreement when the showing is absent.

Likewise, lower courts have long recognized the effective-vindication rule as a vital component of this Court's FAA jurisprudence and yet have applied it strictly, with a healthy regard for the strong federal policy in favor of arbitration, when arbitration will actually occur. Every regional circuit has recognized and applied the effective-vindication rule.[6] But the

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[6] *See, e.g.*, *Kristian*, 446 F.3d at 54–59 (1st Cir. 2006); Pet. App. 22a-25a; *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 216–17 (3d Cir. 2003); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556–57 (4th Cir. 2001); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 300 (5th Cir. 2004); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 658–60 (6th Cir. 2003)

test has been found satisfied only rarely. And it is no coincidence that one of those rare cases involved the same kind of complex antitrust claims and uncontested evidence as involved here. In *Kristian v. Comcast Corp.*, the plaintiffs submitted the same type of uncontested expert testimony as Respondents have to establish the impossibility of pursuing their antitrust claims in arbitration. *See* 446 F.3d at 58. Specifically, the plaintiffs submitted uncontested expert affidavits showing that "to prosecute their antitrust claims successfully, Plaintiffs will have to undertake an elaborate factual inquiry"; "expert witness fees alone will cost a minimum of $300,000, which could exceed in excess of $600,000"; and "an individual recovery … will range from a few hundred dollars to a few thousand dollars at most." *Id.* The First Circuit, like the Second Circuit here, held that on these undisputed facts "Plaintiffs will be unable to vindicate their statutory rights." *Id.* at 61.

In other cases, the lower courts have readily rejected effective-vindication arguments lacking adequate factual support. *See, e.g.*, *Coneff*, 673 F.3d at 1158 n.2 ("Plaintiff's federal claim fails under *Green Tree*"); *Atl. Textiles v. Avondale Inc. (In re Cotton Yarn Antitrust Litig.)*, 505 F.3d 274, 285 (4th

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(en banc); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003); *EEOC v. Woodmen of World Life Ins. Soc'y*, 479 F.3d 561, 566–67 (8th Cir. 2007); *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158 & n.2 (9th Cir. 2012); *Hill v. Ricoh Ams. Corp.*, 603 F.3d 766, 780 (10th Cir. 2010); *Musnik v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1259–60 (11th Cir. 2003); *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 708 (D.C. Cir. 2001). The Federal Circuit has not considered the issue.

Cir. 2007) (Plaintiffs "developed no evidentiary record … establishing how much it would cost to proceed individually against each defendant or how those increased costs would affect their ability to proceed in arbitration."); *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 82 (D.C. Cir. 2005) (Roberts, J.) ("Under the approach set forth in … *Green Tree*, and *Vimar*, such speculation about what *might* happen in the arbitral forum is plainly insufficient to render the agreement to arbitrate unenforceable."). These cases—not those satisfying the effective-vindication rule—are the norm. In fact, the vast majority of disputes subject to an arbitration agreement proceed to arbitration with no suggestion of the effective-vindication rule and thus produce no decision on the matter.

Within the Second Circuit, moreover, the decision below has hardly opened the floodgates that Petitioners ominously predict. There have been only a small handful of prohibitive-costs cases in the four years since *Amex I*. In one of those cases, *Sutherland v. Ernst & Young LLP*, the district court set forth a narrow conception of the effective-vindication rule and found the rule satisfied based on a clear record that the arbitration clause "would operate as a waiver of Sutherland's right to pursue her statutory remedies pursuant to FLSA." 847 F. Supp. 2d 528, 538 (S.D.N.Y. 2012). In another, by contrast, the district court rejected a prohibitive-costs argument because the plaintiffs "failed to meet their burden of demonstrating that they would be unable to vindicate their statutory rights in the arbitral forum." *Cohen v. UBS Financial Services, Inc.*, 2012 WL 6041634 at *5 (S.D.N.Y. Dec. 4, 2012). Thus, following the

decision below, the lower courts have continued to enforce the high evidentiary bar for proving an effective-vindication argument, with a healthy regard for the FAA's policy in favor of arbitration.

Petitioners' related assertion (at 44 n.16) that continued application of the effective-vindication rule will add "another complex, fact-intensive inquiry to the threshold arbitrability test" is wrong for similar reasons. As demonstrated above, the universe of cases that even implicate the effective-vindication rule is very small. And even in that narrow band of cases, the prohibitive-costs analysis is a straightforward question of whether the non-recoupable costs that must be incurred in arbitration, but could be avoided or spread in litigation, exceed the plaintiff's potential recovery. That is the inquiry this Court sanctioned in *Randolph*, and it ultimately requires a comparison of only two variables. The inquiry has not led to time-consuming "mini-trials" in the decades in which lower courts have viewed the effective-vindication doctrine as an important, if rarely invoked, safety valve to ensure that a policy favoring the settling of claims in arbitration does not inadvertently render some federal claims incapable of vindication in any forum. And, of course, parties who want to avoid any such additional inquiry can adopt arbitration terms that ensure the effective vindication of rights. *See infra* § II.C.

Finally, plaintiffs will invoke the effective-vindication rule only when litigation (or some other alternative) is likely to enable the vindication of their rights. There are some statutory claims that will not be pursued in any forum. But when costs uniquely

associated with a particular arbitration agreement—whether filing fees or other costs that the agreement precludes from being shared or spread—exceed the maximum recovery, the inquiry is not difficult, and there is no reason not to allow the plaintiffs to make the required showing and pursue their claims in the only forum in which they can possibly vindicate their rights.

The heavy and rarely satisfied evidentiary burden for effective-vindication claims is consistent with the rule's place in this Court's broader FAA jurisprudence. Because the effective-vindication rule exists to reconcile the FAA with other federal rights—and to give each the fullest effect possible—the rule is satisfied only when, and to the extent that, enforcement of an arbitration clause will *actually* prevent the effective vindication of a federal statutory right. In those narrow circumstances, an order to compel arbitration will not actually result in arbitration, but instead will compel only the abandonment of a federal statutory right, which is a result favored by neither the FAA, nor the Sherman Act, nor any other underlying federal statute. Twenty years of lower court decisions demonstrate that the doctrine is both vital and rarely satisfied. Petitioners' floodgates argument is thus doubly problematic. The effective-vindication doctrine has been the law of the land for over twenty years, and still the conjured flood is just a trickle. Yet eliminating the doctrine entirely would create results wholly incompatible with both the FAA and an array of other federal statutes.

II. The Effective-Vindication Rule Is Consistent With This Court's Arbitration Decisions.

The effective-vindication rule does not require class arbitration or otherwise conflict with this Court's recent decisions in *Concepcion* and *Stolt-Neilsen*. Despite Petitioners' persistent suggestions otherwise, Respondents do not seek class arbitration, and the decision below expressly did not order class arbitration. All that is at issue here is whether Respondents can vindicate their federal statutory rights in some forum. Their ability to do so does not necessarily turn on the availability of class proceedings, in arbitration or otherwise. Although the cost-sharing permitted in class-action litigation in federal court would permit Respondents to vindicate their Sherman Act damages claims, so too would effective cost-shifting or cost-sharing provisions in the arbitration agreement. Nor does anything in *Concepcion* undermine the effective-vindication rule. *Concepcion* does not mention the rule or any of the cases that invoke it. That is because *Concepcion* is a preemption case concerning conflicts between the FAA and state contract laws. The effective-vindication rule, by contrast, is uniquely federal. Simply put, the effective-vindication doctrine remains just as vital and just as narrow after *Stolt-Neilsen* and *Concepcion* as it was before those decisions.

A. Respondents Do Not Seek Class Arbitration, and the Decision Below Did Not Order Class Arbitration.

Plain and simple, Respondents do not seek class arbitration, and the decision below does not order class arbitration. *See* Pet. App. 129 ("At issue here is not the right to proceed as a class, but the ability to vindicate a federal statutory right …."). Petitioners' attempt to suggest otherwise (*e.g.*, at 23, 27–31) is a red herring. Respondents do not seek to compel class arbitration, but only to vindicate their federal antitrust rights. Indeed, what Respondents specifically requested in the courts below was not an order compelling class arbitration, but an order denying the enforcement of arbitration altogether. That is because, under the circumstances of this case, an order nominally compelling arbitration would in fact compel Respondents to abandon their claims altogether, as they cannot be vindicated in the arbitral forum consistent with the binding terms of the arbitration agreement. Those claims can be vindicated in federal court because the class-action device allows the costs of an economic expert report to be shared. But even such collective litigation is neither what Respondents seek in itself nor what the effective-vindication doctrine entitles them to in all instances. For example, if Petitioners offered to shift the prohibitive costs in this case, Respondents could effectively vindicate their federal statutory rights to seek damages under the antitrust laws through bilateral arbitration. And they would gladly do so.

Recognizing all this, the Second Circuit did not order class arbitration. The court below rightly

understood Respondents' argument to be simply that they could not effectively vindicate their federal antitrust rights under the arbitration clause because it prohibits any mechanism to shift or effectively share costs. And the court correctly agreed with Respondents that bilateral arbitration, under these terms, would impose prohibitive, non-recoupable costs on each individual claimant "as to preclude vindication" of their rights under the Sherman Act. Pet. App. 108a. The court left Petitioners to determine the proper means for enabling Respondents to vindicate their federal antitrust rights: The court "refrained from ordering the parties to submit to class arbitration, instead permitting Amex the choice between arbitration and litigation." Pet. App. 29a.

Therefore, application of the effective-vindication rule here does not conflict with this Court's class-arbitration decisions in *Concepcion*, 131 S. Ct. at 1750, and *Stolt-Nielsen*, 130 S. Ct. at 1776. It makes no difference to Respondents or to the effective-vindication doctrine whether Respondents are ultimately able to vindicate their federal claims through class litigation, class arbitration, bilateral arbitration with effective cost-shifting or cost-sharing, bilateral litigation with effective cost-shifting or cost-sharing, by Petitioners stipulating to their market power, or through some other alternative mechanism. All that matters is that Respondents have the opportunity to vindicate their federal antitrust rights. But given that the FAA generally favors enforcement of "private arbitration agreements … according to their terms," *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford*

Jr. Univ., 489 U.S. 468, 478 (1989), absent a willingness by Petitioners to change those terms to allow for the vindication of rights in the arbitral forum, the only available course to share costs and vindicate the Sherman Act is class litigation in federal court.

Indeed, at all times, it is *Petitioners* who control whether the effective-vindication rule will affect their arbitration agreement. Petitioners could render the effective-vindication doctrine inapplicable to their agreements by ensuring some mechanism to share or shift costs.[7] And the choice is not between class litigation and class arbitration. Bilateral arbitration remains feasible if costs can be shared or shifted. For instance, the arbitration clause at issue in *Concepcion* provided that "[i]f the arbitrator awards the customer more than [AT&T's] last written settlement offer, then [AT&T] will pay the customer's attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, that the attorney reasonably accrues for investigating, preparing, and pursuing the claim in arbitration." Br. for Pet'r at 7, *Concepcion*, 131 S. Ct. 1740 (2011), 2010 WL 3017755 (Aug. 2, 2010). Had Petitioners offered similar terms—either in the arbitration clause, or later during this lawsuit—Respondents undoubtedly could

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[7] In those cases where effective relief requires a market-wide injunction (such as the coordinated proceedings referred to in note 4, *supra*) the effective-vindication rule would further require the rescission of the provision in Amex's arbitration agreement that prohibits merchants from seeking in the arbitral forum any relief "on behalf of … other [merchants]." Pet. App. 67a.

have pursued their treble damage actions effectively through bilateral arbitration, and we would not be here. At bottom, this case is not at all about class arbitration and therefore cannot possibly conflict with *Concepcion* and *Stolt-Nielsen*.

B. *Concepcion* Did Not Undermine the Effective-Vindication Rule.

Moreover, *Concepcion*'s reasoning does not implicitly undermine the effective-vindication rule. *Concepcion* held that "the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." 131 S. Ct. at 1744; *see also id.* at 1751–53. Again, the effective-vindication rule does not condition the enforcement of arbitration agreements on the availability of class procedures. More fundamentally, though, *Concepcion* concerned a conflict between the FAA and a competing *state* law, while the effective-vindication rule reconciles the FAA with competing *federal* laws. The difference is fundamental.

Concepcion unambiguously was a case about preemption. The issue in *Concepcion* was whether a California state-law doctrine conditioning the enforceability of arbitration on the availability of class arbitration was consistent with the FAA. This Court explained that "nothing in [the FAA] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives," 131 S. Ct. at 1748. Because California's rule stood "'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" the Court held that California's rule "is

preempted by the FAA." *Id.* at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

That conclusion has no impact on the well-established effective-vindication doctrine. In a situation, like *Concepcion*, where federal and state laws conflict, the Supremacy Clause supplies the rule of decision for reconciling the conflict. And the rule is simple; federal law controls. *See* U.S. Cons. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."). But when two federal statutes are in tension, the Supremacy Clause (and, thus, *Concepcion*) is wholly irrelevant. Courts instead must develop rules to harmonize the two federal statutes, which stand on equal constitutional footing.

The effective-vindication doctrine is such a uniquely federal rule. It was first recognized when this Court first applied the FAA to federal statutory claims. *See supra* § I.A. That is no accident. Once the Court decided that federal statutory claims were not wholly outside the reach of the FAA, it became necessary to harmonize the FAA with the rest of federal law. *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."); *cf.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal*

Texts 180 (2012) (Harmonious-Reading Canon) ("[T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.").[8] Thus, consistent with the Court's approach in other areas of the law, this Court concluded in *Mitsubishi* that the FAA's general policy in favor of arbitration cannot be applied so woodenly as to eviscerate the specific antitrust protections of the Sherman Act. The Supremacy Clause has no bearing on that doctrine and thus *Concepcion* has no bearing on this case.

Indeed, Respondents do not contend that the FAA should yield to the effective vindication of competing state laws. *See Moses H. Cone Mem. Hosp*, 460 U.S. at 24 ("[The FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any *state* substantive or procedural policies to the contrary." (emphasis added)). But this Court should make clear that the uniquely federal effective-vindication doctrine continues to play a vital, if narrow, role.

C. The Effective-Vindication Rule Promotes Arbitration.

This Court's arbitration decisions confirm its "strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de*

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[8] Though the "harmonious-reading canon" is most often applied when interpreting provisions within a single statute, it is always this Court's "role to make sense rather than nonsense out of the *corpus juris*." *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 101 (1991). Thus, it is equally imperative that competing statutory regimes likewise be read to harmoniously co-exist.

Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989). The effective-vindication doctrine furthers the FAA's purpose by encouraging agreements that will actually result in parties "resolving disputes" in arbitration. It gives parties an incentive to negotiate agreements that allow for arbitration of federal statutory claims, as opposed to agreements that foreclose parties' ability to vindicate federal rights in arbitration. Petitioners' rule, by contrast, would provide companies (and particularly those with market power) clear incentives to employ contractual terms that ensure that federal statutory claims (and particularly antitrust claims) are never actually arbitrated.

While Petitioners invoke concerns about the widespread application of the effective-vindication doctrine, in fact, the rule only rarely applies. *See supra* § I.B. And the very existence of the doctrine may be part of the explanation for why it is so sparingly invoked to excuse compliance with an arbitration agreement. The rule itself creates incentives for parties to negotiate agreements that actually facilitate the vindication of federal rights in the arbitral forum. And agreements that provide mechanisms like cost-sharing, cost-shifting, or fee-shifting will almost certainly be immune from challenge under the effective-vindication doctrine.

In fact, the current trend appears to be in favor of better arbitration agreements with correspondingly less scope for the doctrine to apply. A recent empirical study of "37 current arbitration clauses" "confirm[s] that many large and well-known consumer-oriented companies have indeed added

'friendly' provisions to their arbitration clauses, such as offering to pay filing fees, providing for attorney and expert fee-shifting, and promising 'bounty' or premium payments to claimants who achieve a better outcome in arbitration than the company's last-best offer." Myriam E. Gilles, *Killing Them With Kindness: Examining "Consumer-Friendly" Arbitration Clauses After* AT&T Mobility v. Concepcion 4 (Jacob Burns Inst. For Advanced Legal Studies, Faculty Research Paper No. 372, Aug. 2012) (forthcoming 88 Notre Dame L. Rev. 825 (2013)).[9] These provisions protect the effective vindication of rights by ensuring that prohibitive costs will not foreclose meritorious claims.

The agreement at issue in *Concepcion* provides an example of such state-of-the-art, truly pro-arbitration agreements. As the Court noted, AT&T's arbitration clause in that case ensured that the Concepcions' claim "was most unlikely to go unresolved." 131 S. Ct. at 1753. Among other things, it "specifie[d] that ATT&T must pay all costs for nonfrivolous claims; … and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages." *Id.* at 1744. And the agreement obligated the company to "pay the customer's attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, that the attorney reasonably accrues for investigating, preparing, and pursuing the claim in arbitration," if the customer prevailed and the award

[9] Professor Gilles's study is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132604.

was "more than [AT&T's] last written settlement offer." Br. for Pet'r at 7, *Concepcion*, 2010 WL 3017755. Given these provisions, it was likely that "the Concepcions were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action." 131 S. Ct. at 1753. "Because [AT&T] has committed to pay all arbitration costs and makes special premiums available in arbitration," the company explained in its brief to this Court, its arbitration agreement "'prompts [AT&T] to *accept liability*'—and to offer to settle for many times the customer's actual damages—'during the *informal claims process*' that precedes arbitration, 'even for claims of questionable merit.'" Br. for Pet'r at 10, *Concepcion*, 2010 WL 3017755 (quoting the district court's opinion) (emphasis in original).

Other companies have adopted similar provisions. For instance, Microsoft very recently added an arbitration clause to its services agreement that includes many of the pro-vindication provisions found in AT&T's agreement, including the promise to "reimburse any expenses (including expert witness fees and costs)" incurred in pursuing a claim that results in an award that is greater than Microsoft's last written offer.[10] Sovereign Bank has added a similar provision to its arbitration agreement for personal deposit account holders that agrees to "pay [claimants'] reasonable attorneys' and experts' fees if

[10] Microsoft's agreement is available at http://windows.microsoft.com/en-US/windows-live/microsoft-services-agreement.

and to the extent [they] prevail."[11] And T-Mobile's arbitration agreement has evolved four times in less than a decade to include increasingly more pro-vindication terms. Under the company's current agreement, for all claims under $75,000, T-Mobile advances "administration and arbitrator fees" and entitles prevailing parties to "recovery of reasonable attorneys' fees and costs."[12]

If Petitioners' arbitration clause contained such pro-vindication clauses, Respondents would not be here. Most obviously, under the terms of Sovereign Bank's agreement, this case would not exist and the cost of this "effective-vindication" litigation would have never been expended. Similarly, Microsoft, AT&T, and T-Mobile's agreements would enable Respondents to vindicate their rights with the assurance that successful claims will not result in even greater economic losses. In all these scenarios, the FAA would function as intended. Arbitration would proceed according to the terms of a private agreement, without the foreclosure of any federal statutory claims.

Any company worried about the effective-vindication doctrine can avoid the doctrine by structuring their arbitration agreements as have AT&T, Sovereign Bank, the other companies

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[11] Sovereign Bank's agreement is available at http://www.sovereignbank.com/personal/docs/deposit-account-agreement-MA.pdf.

[12] T-Mobile's agreement is available at http://www.t-mobile.com/Templates/Popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions&print=true.

referenced above, and no doubt scores of other businesses. Thus, the effective-vindication rule creates incentives for a virtuous cycle in which pro-vindication clauses become more prevalent, and the actual application of the effective-vindication rule by courts becomes even rarer. *See, e.g.*, Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 Notre Dame L. Rev. 1069, 1115–16 (2011) (describing the AT&T arbitration agreement as a "third-generation" arbitration clause that was aimed at compelling arbitration (like "first-generation" clauses), and prohibiting class-actions (like "second-generation" clauses), but also aimed at ensuring compliance with the effective-vindication doctrine). This virtuous cycle fully serves the purposes of the FAA, which favor the actual arbitration of claims according to the terms of private agreements, while in no way favoring the complete foreclosure of claims. In fact, some have suggested that, because of this trend toward arbitration clauses including "alternative incentives," the "specific facts" presented by this case are "unlikely to be repeated." Jacob Spencer, *Arbitration, Class Waivers, and Statutory Rights*, 35 Harv. J.L. & Pub. Pol'y 991, 1013 (2012).

While the effective-vindication rule gets the incentives right by encouraging these pro-vindication provisions, Petitioners' proposed rule would have the opposite effect. Under Petitioner's view, there would be no incentive for companies to protect the vindication of rights through private agreements. While the effective-vindication rule is very rarely satisfied as it is, Petitioners would do away with it altogether, or at least limit it substantially. *See* Br.

for Pet'rs at 40–48 (characterizing the effective-vindication rule as *dicta*). Not only would Petitioners eliminate incentives for pro-vindication clauses, they would also create substantial incentives for companies to adopt less favorable agreements like the one at issue here. After all, the ability to enforce a clause that has the effect of providing *de facto* immunity for Sherman Act claims from direct purchaser businesses—the only plaintiffs with antitrust standing in most cases, *see Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745–46 (1977)—is a powerful incentive indeed.

The choice between those competing incentives seems clear. The effective-vindication rule promotes a race to the top that ensures that the policies of both the FAA and the underlying federal statute are vindicated in the arbitral forum. Petitioners' rule would prompt a race in the opposite direction, encouraging arbitration agreements that frustrate the policies of the FAA and the underlying federal statutes by effectively exempting suspected antitrust violators from ever actually facing arbitration, and thus thwarting the "remedial and deterrent function" of the Sherman Act. *Mitsubishi*, 473 U.S. at 637.

III. The Effective-Vindication Rule Clearly Applies Here.

The undisputed facts of this case establish that Respondents cannot effectively vindicate their federal antitrust claims under the arbitration agreement. Uncontested expert analysis shows that it will cost each of these businesses several hundred thousand (if not millions) of dollars to prove their claims. But each individual Respondent's likely recovery is

several hundred thousand dollars less than the likely cost of pursuing their claims. That dynamic would not be fatal if the agreement allowed some mechanism to share or shift the expert's costs. But Petitioners' arbitration clause forecloses any effective means for sharing or shifting those prohibitive costs. Thus, under the arbitration clause in this case, for Respondents to recover the economic losses caused by Petitioners' anticompetitive behavior, they would be forced to incur far greater economic losses. While there are federal claims that could be vindicated under this agreement, and agreements (like AT&T's) that would permit bilateral arbitration of Respondents' claims, the combination of these claims, this agreement, and Respondents' uncontested showing of costs make this the rare case in which the effective-vindication doctrine's heavy burden is met.

A. Respondents Face Prohibitive Costs that Prevent Them from Effectively Vindicating Their Antitrust Claims in the Arbitral Forum.

It is uncontested that Petitioners' arbitration clause prevents the sharing or shifting of expert fees and other costs necessary to prove Respondents' antitrust claims. With respect to cost-sharing through collective action, the clause provides that claimants "will not have the right to participate in a representative capacity or as a member of any class of claimants pertaining to any claim subject to arbitration." Pet. App. 35a–36a (all caps omitted). The agreement similarly dictates that there is "no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving Claims

brought in a purported representative capacity on behalf of the general public, other establishments which accept the Card (Service Establishments), or other persons or entities similarly situated." Pet. App. 36a. The agreement also prohibits the joinder or consolidation of claims in arbitration. *See* Pet. App. 36a.

Nor can claimants pool their resources outside of arbitration to prepare expert testimony for use in their respective one-on-one proceedings as Petitioners suggest (50–51). Any such expert report or testimony would be based on information produced in one or more of the bilateral arbitration proceedings. And as the Second Circuit held in rejecting the same suggestion by Petitioners below, the arbitration agreements expressly prohibit sharing that information with other claimants. Pet. App. 92a (each bilateral "arbitration proceeding and all testimony, filings, documents and any information relating to or presented during the arbitration proceedings shall be deemed to be confidential information not to be disclosed to any other party"); *id.* ("[A]ny proposal that the plaintiffs share the services of expert witnesses employed in the *Marcus* action runs aground on the fact that the individual plaintiffs have contracted with Amex not to share such information with *anyone*.").

Even absent confidentiality concerns, Petitioners raised this speculative possibility too late and with no factual support. Confronted in the district court with Respondents' factual showing of prohibitive costs, Petitioners never suggested that costs could be pooled outside class proceedings. And even now, they

fail to sketch any plausible scenario under which far-flung claimants might pool resources to engage a single circuit-riding expert who would retail a single report in a series of independent arbitrations. Much less did they respond, in the district court, to Respondents' evidentiary showing with any evidence of their own that the merchant plaintiffs could in fact vindicate their rights in such a fashion. They offer no more than mere speculation, which is not enough to rebut Respondents' concrete facts. *See Randolph*, 531 U.S. at 92 (holding that, once a plaintiff meets her evidentiary burden under the effective-vindication rule, "the party seeking arbitration must come forward with contrary evidence").[13]

The agreement also precludes any shifting of expert costs to Amex. Unlike the agreement in *Concepcion*, Petitioners' arbitration agreement does not offer to shift "any expenses[] that [Respondents'] attorney reasonably accrues for investigating, preparing, and pursuing [the] claim in arbitration." Br. for Pet'r at 7, *Concepcion*, 2010 WL 3017755. The rules of the arbitral bodies designated in the agreement do not award costs unless they are

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[13] Moreover, Petitioners are wrong to suggest (at 50) that this case involves "small-value claims." This is a serious dispute between commercial parties, with some of the largest named plaintiff retailers pursuing claims worth nearly $40,000. Those claims are small only in comparison to the very substantial costs of an economic expert. In reality, especially considering the sheer number of businesses subject to Petitioners' anticompetitive conduct, this is precisely the sort of "dispute[] concerning commercial contracts" that Petitioners seek to distinguish. Br. for Pet'rs at 50 (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001)).

authorized by the applicable fee-shifting statute, COA App. at 720, which is not the case here. *See W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 94 (1991) (explaining that antitrust statutes do not "permit a shift of expert witness fees"); *Crawford Fitting Co.*, 482 U.S. at 439 (holding, in an antitrust case, that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of [28 U.S.C.] § 1821(b), absent contract or explicit statutory authority to the contrary"). Nor have Petitioners offered, during the course of this litigation, to bear Respondents' necessary costs or enter stipulations that would obviate the need for an expert. *Cf. Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298–300 (5th Cir. 2004) (effective-vindication argument "mooted by Countrywide's representation to the district court that it would pay all arbitration costs").

It is also uncontested that, without the ability to share or shift those costs, individual Respondents cannot pursue their federal antitrust claims. At trial, Respondents submitted an extensive expert affidavit by Dr. Gary L. French "concerning the likely costs and complexity of an expert economic study concerning the liability and damages" sought in Respondents' federal tying claims compared to individual Respondents' "potential recovery of damages." *See* JA 88; Pet. App. 86a–87a. Crucial to this analysis is that to prove their tying claim Respondents must commission an antitrust study by a reputable economic expert. *See supra* pp. 7–8 (listing the components of this required antitrust study). "Due to the complexity and analytical intensity of an antitrust study, total expert fees and

expenses usually are substantial, even in a non-class action involving an individual plaintiff." JA 88; Pet. App. 87a. In Dr. French's experience, "even a relatively small economic antitrust study will cost at least several hundred thousand dollars, while a larger study can easily exceed $1 million." JA 88; Pet. App. 87a. Based on the allegations in Respondents' complaint and preliminary research, Dr. French estimated that the cost of an economic antitrust study for Respondents' claims would fall in the middle range between $300,000 and $2 million. *See* JA 88–89; Pet. App. 87a–89a. Petitioners did not contest this expert analysis.

Dr. French then calculated individual Respondents' likely recoveries. He "estimated that a small merchant with $10 million of annual sales, on average, might calculate and expect $754 of economic damages for the year 2001, which is roughly the midpoint of the damage period covered by this litigation." JA 92; Pet. App. 88a; *see also* JA 94 t.1. "Multiplying the $754 damage figure by four, gives a rough estimate of $3,015 total damages for the whole four-year damage period, or $9,046 when trebled, assuming that the merchant's sales remain constant at $10 million for the four-year period." JA 92; Pet. App. 88a. The "median volume merchant" named in this case, "having reported $230,343 American Express Card volume in 2003, might expect four-year damages of $1,751, or $5,252 when trebled." JA 92; Pet. App. 89a. "The largest volume named plaintiff merchant, with reported American Express Card volume of $1,690,749 in 2003, might expect four-year damages of $12,850, or $38,549 when trebled."

JA 92; Pet. App. 89a. Again, Petitioners did not contest any of these conclusions.

Dr. French's expert analysis proves that Respondents cannot vindicate their antitrust rights under the arbitration agreement. *See* JA 93. Because the agreement forecloses every practicable avenue for cost-sharing or cost-shifting, each individual Respondent will be forced to expend hundreds of thousands (if not millions) of dollars to establish the essential elements of a roughly ten-thousand-dollar claim (including trebled damages). Even the highest volume named plaintiff, paying the lowest possible cost for an antitrust report, will lose over a quarter million dollars pursuing its claim under the Amex agreement. That means each named plaintiff *will* be a net loser—to the tune of hundreds of thousands of dollars—under the arbitration agreement and therefore cannot vindicate its rights under the agreement. Enforcing the arbitration agreement in the face of these uncontested facts will not compel arbitration, but will compel Respondents to drop their claims and grant Petitioners *de facto* immunity from many millions of dollars in federal antitrust liability.

B. The Prohibitive Costs Respondents Face Are Real, Not Speculative.

Unlike the claimant in *Randolph*, Respondents have shown much more than the mere "risk" that they would each bear the prohibitive, non-recoverable costs required to prove their antitrust claims. Dr. French's expert affidavit establishes with certainty that Respondents must incur prohibitive costs to prove their federal statutory claims and that, without

a cost-sharing mechanism, those costs will dwarf any possible recovery. Petitioners did not dispute the content of the affidavit. And the court below found it to be credible and to provide concrete facts that prove Respondents will not be able to vindicate their rights in the arbitral forum. *See* Pet. App. 27a ("We again find Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions …. The enforcement of the [arbitration agreement] flatly ensures that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws." (internal quotation and alteration marks omitted)).

Petitioners' suggestion (at 50) that an economic antitrust study might not be required in this case is wrong for many reasons. Most fundamentally, Petitioners never pressed this below and thus forfeited the argument. Nor could they credibly argue that no study is required. Under settled law, to prove their tying claims, Respondents must define the relevant market, prove market power, prove that Petitioners used market power in furtherance of its tying scheme, prove anticompetitive effects, and calculate damages. *See, e.g.*, *Illinois Tool Works v. Independent Ink*, 547 U.S. 28, 46 (2006) ("[I]n all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product."). Petitioners have never stated a willingness to stipulate to any of these critical facts, and it is incredible to suggest they could be established without an extensive expert report. In fact, Petitioners are careful not to say anything of the sort. Rather, in a mirror image of the speculation

rejected in *Randolph*, Petitioners suggest only that "[w]hether each claimant would have to submit a complex and costly economics expert report is a decision for the arbitrator." Br. for Pet'rs at 50.

But whether a formal report is required is not the point. Arbitration may be more informal than litigation, but that does not translate into allowing cut-rate economic analysis to go unchallenged or dispensing with necessary elements of Respondents' statutory claims. Petitioners have steadfastly retained the right to contest critical elements of Respondents' claims. Respondents therefore must establish them through extensive, costly economic analysis, whether embodied in a report or not. And the cost of that expert evidence is prohibitive in light of the nature of the claims and the foreclosure of any means to share or shift the cost.

To be clear, this is not a matter of mere lowered incentives. Respondents brought their claims to recover economic losses that result from Petitioners' ongoing anticompetitive behavior. But under Petitioners' arbitration agreement, each individual Respondent can recover their losses only by incurring significantly greater economic losses. No rational business would engage in such self-destructive behavior. And Respondents would not do so here.

This result would be particularly troubling in the antitrust context, where effective private enforcement serves important public functions. *See, e.g.*, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 198 n.2 (1997) (Scalia, J., concurring in part and dissenting in part) (The federal antitrust laws are "designed to … bring to bear the pressure of 'private attorneys

general' on a serious national problem for which public prosecutorial resources are deemed inadequate."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) ("[P]rivate suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."). Indeed, in most antitrust contexts, evidence that the defendant successfully insisted on inserting clauses that preclude any enforcement of the antitrust laws would itself be evidence of market power and anticompetitive conduct. *Cf. Redel's Inc. v. General Elec. Co.*, 498 F.2d 95, 99 (5th Cir. 1974) ("Such a release, if recognized as having any validity of that nature, could therefore itself operatively serve as a contract 'in restraint of trade.'"). To read such clauses to foreclose any antitrust inquiry whatsoever would truly put the FAA and the Sherman Act on an unnecessary collision course. *Cf. Lawlor v. Nat'l Screen Service Corp.*, 349 U.S. 322, 329 (1955) ("[A] partial immunity from civil liability for future violations" is inconsistent with "the antitrust laws.").

This is not to say, of course, that antitrust claims should never be subject to arbitration. *See Mitsubishi*, 473 U.S. at 637; Pet. App. 29a ("We do not hold today that class action waivers in arbitration agreements are per se unenforceable, or even that they are per se unenforceable in the context of antitrust actions."). For most antitrust claims, under most arbitration agreements, the effective-vindication rule will be irrelevant; mine-run federal antitrust claims can be enforced through arbitration. *See Mitsubishi*, 473 U.S. at 633 ("[T]he vertical restraints which most frequently give birth

to antitrust claims covered by an arbitration agreement will not often occasion the monstrous proceedings that have given antitrust litigation an image of intractability.").[14] But in the rare case where an arbitration clause forecloses complex, costly antitrust claims—especially where, as here, those claims involve industry-wide distortions—the effective-vindication rule ensures that federal antitrust statutes "will continue to serve both [their] remedial and deterrent function[s]." *Mitsubishi*, 473 U.S. at 637.

* * *

In the final analysis, the narrow issue presented here, based on an uncontested evidentiary record about a particular antitrust claim under a specific arbitration agreement, should not be difficult to resolve. From the very first case in which this Court held that federal statutory claims are within the reach of the FAA, it has emphasized as a necessary precondition that the federal claims must be capable of vindication in the arbitral forum. The rule is not only longstanding, but necessary to harmonizing the FAA with other federal statutes and to vindicating the policies of the FAA itself, which is pro-arbitration in the sense of wanting arbitration to occur.

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[14] Indeed, Respondents are *not* arguing, like the plaintiffs in *Gilmer*, that "the fact that [a federal statute] provides for the possibility of bringing a collective action … mean[s] that individual attempts at conciliation were intended to be barred." 500 U.S. at 32. Rather, Respondents have shown that, on the specific facts of this case, Petitioners' specific arbitration agreement would prevent the effective vindication of Respondents federal statutory claims.

Recognizing that the narrow effective-vindication rule applies here is faithful to the entirety of this Court's FAA jurisprudence involving federal statutes and maintains healthy incentives for parties to agree to arbitration agreements that allow federal claims to be vindicated. The alternative is to remove the linchpin that has allowed this Court to reverse the rule of *Wilko* and to enforce the policies of the FAA in the vast majority of federal statutory cases. But the reasons for the caveat that the FAA commands arbitration if, but only if, the federal claims can be effectively vindicated in the arbitral forum are as sound as ever. And applying that doctrine to the uncontested record here, Respondents have clearly met their burden and thus should not be foreclosed from vindicating their Sherman Act claims.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 22, 2013

STATUTORY APPENDIX

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

The Sherman Antitrust Act

Section 1, 15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The Sherman Antitrust Act

Section 2, 15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The Federal Arbitration Act

Section 2, 9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The Federal Arbitration Act

Section 3, 9 U.S.C. § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

The Federal Arbitration Act

Section 4, 9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

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 which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear

and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.