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 OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

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

BRIEF OF PUBLIC JUSTICE, P.C., AARP, AND THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE

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STATEMENT OF INTEREST OF *AMICI*[1]

Public Justice, P.C. ("Public Justice") is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate, governmental, and individual wrongdoing. Public Justice prosecutes cases designed to advance consumers' and victims' rights, civil rights and civil liberties, employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. To further its goal of defending access to justice for employees, consumers, and other persons harmed by corporate misconduct, Public Justice has long conducted a special project devoted to fighting abuses of mandatory arbitration.

Public Justice regularly represents workers and consumers in both individual and class actions, and its experience is that aggregate litigation often affords the only way to redress corporate wrongdoing where individuals by themselves lack the knowledge, incentive, or effective means to pursue their claims. Public Justice has challenged class and collective action bans throughout the country where they would effectively immunize the corporate drafter from lia-

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Letters reflecting the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk's office.

bility or prevent individuals from vindicating important rights.

AARP is a non-partisan, non-profit organization with a membership that helps people 50 and older have independence, choice, and control in ways that are beneficial and affordable to them and society as a whole. As the leading organization representing the interests of people aged 50 and older, AARP advocates to protect the health, safety, and financial security of older people.

AARP is greatly concerned about fraudulent, deceptive, unfair, and discriminatory corporate practices, many of which have a disproportionate impact on older people. AARP thus supports laws and public policies designed to protect people and to preserve the legal means for people to seek redress when they are injured by such practices. Among these activities, AARP advocates for improved access to the civil justice system and supports the availability of the full range of enforcement tools.

While many older people lose large amounts of money to such practices, many others lose relatively small amounts or are subjected to practices which violate statutes that provide low monetary remedies. These losses nevertheless are significant. Moreover, even small losses may accumulate into huge ill-gotten gains for corporations which may have thousands or even millions of customers, each subject to the same harmful practices. Meaningful protection in the marketplace requires access to effective redress through private litigation. Class action waivers in arbitration clauses can, in some cases, prevent the

effective enforcement of statutory remedies. Ineffective enforcement removes important incentives a business may have to avoid engaging in fraudulent, unfair, or deceptive practices. AARP is interested in the Court's ruling in this case because of the impact it will have if people are forced to forego the only effective remedies they have.

The American Association for Justice ("AAJ") is a voluntary national bar association whose members primarily represent individual plaintiffs in civil actions. AAJ is committed to the First Amendment value of providing access to courts for the redress of grievances and the Seventh Amendment value of dispute resolution through trials by juries. It is concerned that when people waive those rights in favor of arbitration they enter a system that resolves disputes, not one that precludes resolution.

INTRODUCTION AND SUMMARY OF ARGUMENT

The legitimacy of arbitration as an institution depends upon one vital premise: that it provides a means for parties with valid legal claims to effectively vindicate their substantive rights. As the enforceability of arbitration clauses has expanded to encompass claims by weaker parties against parties drafting the clauses, this Court, lower courts, and pro-arbitration advocates have steadfastly maintained that arbitration is an acceptable substitute for court because it offers parties a meaningful opportunity to obtain relief. As this brief will establish, the premise that parties may "effectively vindicate" their rights

in arbitration encompasses an assurance that the process offers a meaningful, genuine opportunity for parties to obtain the relief provided in statutes.

Petitioners argue that the FAA requires enforcement of its individual arbitration clause despite the undisputed fact that, in this case, enforcement will result not in the individual arbitration of Respondents' federal antitrust claims, but in their elimination. While it is cloaked in innocuous and obfuscatory language, Petitioners' proposition will have radical consequences if it is adopted by the Court.

First, if the Court embraces Petitioners' position and severs the link between arbitration and effective vindication of rights, statutes intended by Congress to protect weaker parties against stronger parties will essentially be gutted. Small businesses might as well move to a different country where they no longer enjoy the protection of the antitrust laws. At the whim of an employer, workers could be required to prospectively waive their Title VII rights. Consumer protection laws such as the Truth in Lending Act could be silently, but inescapably, repealed by corporations with the stroke of a pen.

Second, if Petitioners' position prevails and arbitration clauses are held enforceable even where they eliminate parties' ability to effectively vindicate their rights, incalculable harm will be done to the institution of arbitration. The concept of arbitration as a forum where claims may be heard – as opposed to buried and disposed of without resolution – pervades every aspect of our legal system. Scholars characterize and justify arbitration as a forum where disputes

may be heard, fairly considered, and resolved. Academics, many of whom strongly favor arbitration and other forms of alternative dispute resolution, do not equate arbitration with exculpation or the sub-rosa repeal of statutes, but consistently describe it as a forum in which claimants with valid claims have a chance of prevailing that is at least as good as the one they would have in court.

If the Court abandons the historic requirement that arbitration must provide for effective vindication of rights, these longstanding intellectual and ethical justifications for arbitration will no longer be valid. Arbitration will transform from a consensual choice to move disputes to a different but equally fair forum into a mere exercise in power. Arbitration will be nothing more than a convenient way for stronger parties to immunize themselves from laws intended to protect weaker parties.

If the Court agrees to the use of arbitration as a means of indirectly, but inevitably, gutting statutes, the case for arbitration in the realm of public and political discourse will also erode. In the Halls of Congress and before regulatory agencies such as the Consumer Financial Protection Bureau, the defenders of arbitration repeatedly stress that it offers claimants a fair means of pursuing claims. Congressional witnesses testifying on behalf of the business community do not argue that the value of arbitration lies in its power to wipe away antitrust claims that would otherwise impair businesses' freedom to do whatever they want. To the contrary, pro-arbitration advocates stress that the system offers an efficient way for claims to actually be *heard* on their merits. If

the Court holds, as Petitioners ask, that an arbitration clause is enforceable even in the exceptional situation where the evidence establishes that enforcement would make it economically irrational and realistically impossible for the plaintiffs to vindicate their statutory rights, proponents of arbitration will no longer be able to justify it as a fair system.

Similarly, since the 1920's, courts assessing the validity of arbitration clauses have consistently acknowledged that the legitimacy of arbitration depends upon it offering parties a realistic means of pursuing their rights. This Court should not embrace Petitioners' suggestion that the effective vindication doctrine must be read as a formalistic notion that permits enforcement of thinly veiled exculpatory contract terms that undermine statutes. Instead, if the doctrine is to mean anything, it must be that arbitration is acceptable because of the promise that it offers meaningful, practical avenues for actually obtaining the substantive remedies made available in statutes. *Black's Law Dictionary* (9th ed. 2009) defines "effective" as "productive; achieving a result." If an arbitration clause is proven in a particular case to make it economically infeasible for parties to pursue their claims, that bars them from "achieving a result," and therefore prohibits them from effectively vindicating their rights as the Court has required.

Petitioners and their *amici* say many fine words about the policy favoring arbitration. But if they get their way here, their victory in this case will be short-lived. Transformed into an absolute bar to potentially valid claims, arbitration will be a wounded and weakened institution. If arbitration is detached

from the promise of a chance at effective vindication of rights, it will lose its legitimacy – and will need to be put to rest.

STATEMENT OF THE CASE

Amici adopt Respondents' Statement of the Facts, but will succinctly highlight a few specific facts to make their argument more clear.

The evidence showing that Respondents would not be able to effectively vindicate their rights under Petitioners' arbitration clause was undisputed before the district court. In the trial court, where parties must raise or risk waiving their factual arguments, Petitioners never bothered to controvert facts and testimony offered by Respondents establishing that it is not possible to prosecute their tying claim under the Sherman Act without at least one detailed market study. Petitioners neither deposed Respondents' expert witness nor introduced their own. Because the testimony was uncontroverted, the Second Circuit specifically held in its first opinion in this case that "Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursed as individual actions, whether in federal court or in arbitration . . . ." *In re Am. Express Merchants Litigation (Amex I)*, 554 F.3d 300, 319 (2d Cir. 2009).

It is only before this Court that Petitioners have begun to quibble with Respondents' factual showing, suggesting that it is exaggerated. *E.g.*, Petitioners' Brief at 32-33. But the only sworn testimony in this

case shows that the median plaintiff's claim is worth a maximum of $5,252 and that the minimum costs of proceeding – in an individual case – are several hundred thousand dollars. To put Petitioners' quarrels about the evidence in context, even if one makes the unwarranted and extraordinarily conservative assumption that the minimum costs testified to by the *only expert* before the district court were exaggerated by a factor of three, the evidence would *still* show that the plaintiffs would have to advance costs of more than 20 times the amount they could conceivably hope to recover if they won their case.

ARGUMENT

Enforcement of Arbitration Clauses that Prevent Parties From Effectively Vindicating Their Substantive Statutory Rights Would Strip Arbitration of Any Legitimacy.

I. The Scholarly and Historic Understanding is that Arbitration Provides a Meaningful Forum for Pursuing and Vindicating Claims.

Scholars have consistently justified arbitration as a forum for adjudication – an alternative to courts in which claims can be heard and decided by neutral decisionmakers. In one of the leading treatises on arbitration, Thomas Carbonneau explains that, "arbitration gives meaningful effect to the constitutional guarantee of due process and equal protection. It guarantees that the parties will be heard and have an equal opportunity to make their case." Thomas E.

Carbonneau, *The Law and Practice of Arbitration* 38 (3d ed. 2009). Each of the three leading treatises on domestic arbitration describes arbitration as a viable alternative to trial adjudication, an idea that has been uncontroversial for decades but which Petitioners' theory would undermine. *See id.* (arbitration is an "informal procedure for the adjudication of disputes" that "functions as an alternative to conventional litigation"); 1 Larry E. Edmonson, *Domke on Commercial Arbitration* § 1:1 (3d ed. 2011) (hereinafter "Domke") ("Arbitration . . . involves a final determination of disputes [and] has elements of the judicial process. . . . [It] coexists with court procedure as an adjunct and part of the American system of administering justice."); 1 Ian R. Macneil, Richard E. Speidel & Thomas J. Stipanowich, *Federal Arbitration Law* § 2.6.1 (1994) ("Arbitration is a form of adjudication because the parties participate in the decisional process by presenting evidence and reasoned arguments to an arbitrator whose final decision should be responsive to the dispute as presented."). "Adjudication" necessarily means that the process permits parties with valid claims to actually have those claims heard by a decisionmaker. The "adjudication" envisioned by these arbitration scholars is incompatible with the regime advocated by Petitioners, in which statutory claims may be practically erased so long as certain formalities are followed.

A number of scholarly articles on the topic of arbitration likewise stress the "adjudicatory" nature of arbitration. *See*, *e.g.*, Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 Ohio St. J. on Disp. Resol. 157, 158 (1989) ("[A]rbitration is a private ad-

judicatory process invoked as an alternative to filing a lawsuit."); William M. Landes & Richard A. Posner, *Adjudication As a Private Good*, 8 J. Legal Stud. 235, 235 (1979) ("[E]ven today much adjudication is private (commercial arbitration being an important example)."); Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DePaul L. Rev. 431, 431 (2010) ("[A]n agreement to arbitrate transfers disputes whose natural venue is a court to an arbitral tribunal, which does the work of courts . . . [and] retains adjudication's judgment rendering function."); Paul R. Verkuil, *Privatizing Due Process*, 57 Admin. L. Rev. 963, 983 (2005) (describing arbitration as "an alternative to judicial decisionmaking").

Although arbitration occurs in a private forum, its legitimacy rests in its promise that parties' claims will be fairly heard and resolved on their merits, just as if they had been adjudicated in a court. Domke, *supra*, at § 1:1 ("Despite differences between court litigation and arbitration proceedings, certain common principles of justice must be maintained."). Carbonneau explains that arbitration upholds due process concerns because it "provide[s] access, legal representation, hearings, equal and fair treatment of the parties, and a final and enforceable opinion." Carbonneau, *supra*, at 38. *See also* Domke, *supra*, at § 29:1 ("the parties to an arbitration . . . have the absolute right to be heard and to present evidence"); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 365 (1978) (arbitration participants must have "an opportunity to present proofs and reasoned arguments").

Central to this concept of arbitration serving as an alternative to court that upholds participants' rights is the assurance that the arbitrator will ultimately issue a decision on the merits. Domke emphasizes that arbitration "involves a final *determination* of disputes" using "elements of the judicial process." Domke, *supra*, at § 1:1 (emphasis added). The notion that parties are entitled to a "determination" of their disputes in arbitration runs counter to Petitioners' argument that an arbitration clause should be enforced even where parties would never be able to actually go through the arbitral process. *See also* Fuller, *supra*, at 387 ("We tend to think of the judge or arbitrator as one who decides and who gives reasons for his decision.").

One theme underlies these scholars' work: they all emphasize the idea that arbitration entails a neutral decisionmaker who will reach a decision on the merits based on evidence and arguments presented by the parties. There is not even a whiff of suggestion that arbitration is a roadblock that prevents parties from moving forward with their claims. In other words, the ability to vindicate one's rights is one of the hallmarks of arbitration.

II. Advocates for Arbitration Have Consistently Argued that It Offers an Opportunity to Vindicate Rights.

Proponents of arbitration – from members of Congress to members of the business community – have unswervingly touted arbitration as a perfectly adequate (and often superior) alternative forum for the vindication of substantive claims. Their argu-

ments, like those of the academics, assume that parties can actually pursue their substantive statutory rights in this alternative forum – not that arbitration clauses require parties to forfeit the right to bring their claims in any forum *at all*. As one vocal advocate whose firm specializes in drafting consumer contracts for banks put it, arbitration is a "valuable and significant way of making sure that everyone has access to justice." *Mandatory Binding Arbitration Agreements: Are They Fair for Consumers?: Hearing Before the Subcomm. on Commercial & Admin. Law, House Comm. on the Judiciary*, 110th Cong. 111 (2007) ("2007 House Judiciary hearing") (statement of Mark Levin, partner, Ballard Spahr Andrews & Ingersol).

U.S. Senators and Representatives assessing whether Congress should take action on arbitration have likewise emphasized that the central requirement of private arbitration is that parties have the opportunity to bring their claims, be heard, and effectively vindicate their rights. For example, in a recent hearing before the Senate Judiciary Committee, Senator Cornyn said, "I think we would all agree that not only must a process for dispute resolution be fair in fact but that there has to be an appearance of fairness, too, for people to have confidence in the outcome." *Arbitration: Is It Fair When Forced?: Hearing Before the Senate Comm. on the Judiciary*, 112th Cong. 18 (2011) ("2011 Senate Judiciary hearing") (statement of Sen. John Cornyn, Member, Sen. Comm. on the Judiciary). The Senator extolled the "positive societal good" of arbitration, emphasizing that, "[w]e need to provide an opportunity for people to have a forum that is fair and involves efficient

resolution of disputes." *Id.* at 20-21. Arbitration, he said, is just that forum. Senator Cornyn did not speak of avoiding or eliminating disputes, but instead of a forum where disputes may be heard and fairly resolved. Representative Cannon characterized the arbitration system as a "classic" means for "those wishing not to bring their dispute before Federal or State courts," noting that it can "afford justice" and beneficially resolve disputes. 2007 House Judiciary hearing, *supra*, at 2 (statement of Rep. Chris Cannon, Member, Subcomm. on Commercial & Admin. Law, House Comm. on the Judiciary).

Pro-business advocates, likewise, have defended arbitration on the ground that, "when you go to arbitration, you are not losing your substantive claims." *Id.* at 43 (statement of Mark Levin). Appearing on behalf of the U.S. Chamber of Commerce, Victor Schwartz testified that arbitration "allow[s] individuals to make their case"; that "[i]n many instances, [arbitration] agreements provide parties with the only realistic opportunity to obtain relief"; and that when parties "in the real world weigh the costs and benefits of pursuing a claim, . . . the ability to get resolution" through arbitration "can make a difference." 2011 Senate Judiciary hearing, *supra*, at 46. A prominent pro-arbitration law professor similarly emphasized that arbitration is about parties "actually being able to present their claim to a neutral decision maker." *Id.* at 97 (statement of Chris Drahozal, John M. Rounds Professor of Law, Univ. of Kansas School of Law).

"[A]rbitration agreements are fair," advocates have underscored, "because there is a dynamic pres-

ently in place that ensures fairness . . . .” 2007 House Judiciary hearing, *supra*, at 43 (statement of Mark Levin). The reason we can all trust arbitration’s fairness, according to pro-arbitration witnesses, is that arbitration clauses are policed by the courts. As one advocate testified, “If a court rejects an arbitration agreement, that . . . shows that due process is working . . . .” *Id.* at 112. *See also* 2011 Senate Judiciary hearing, *supra*, at 161 (statement of Victor Schwartz) (“[E]xisting law prevents businesses from drafting arbitration agreements that tilt the playing field in their direction.”); *id.* at 47 (Arbitration has “rigorous standards to help ensure fair results.”).

The Chamber of Commerce itself, appearing before this Court, has embraced the core premise that arbitration is supposed to *ensure* that parties can proceed with their claims. Arbitration, the Chamber maintained, “offers a virtual guarantee that there will be a hearing on the merits.” Brief of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Petitioner at 14, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (No. 02-634), 2003 WL 721691, at *14 (quotation and citation omitted).

The Chamber also extolled the important role of courts in assessing the circumstances of each case to determine whether a particular clause would prohibit a party from going forward. Urging the Court to hold that a class action was “not necessary” for the consumer plaintiff in *Bazzle* to vindicate her rights, *id.* at 6, the Chamber argued:

> *[W]hether individual arbitration is prohibitively costly is a case-by-case question.* The answer to that question will vary depending on the claimant's circumstances, the institutional rules governing the arbitration, and the provisions of the applicable agreement. . . . [T]he courts of appeals have been fleshing out the precise contours of the claimant's burden to prove that arbitration would be prohibitively expensive.

Id. at 7 (emphasis added, citations omitted).[2]

In sum, even the most adamantly pro-arbitration lobbyists, legislators, and business groups acknowledge that a rule requiring the enforcement of arbitration clauses that prevent parties from pursuing valid claims would go too far.

III. FAA Jurisprudence Is Rooted in the Core Premise that Arbitration Must Provide a Realistic Possibility of Vindicating Rights.

In keeping with the above, and most important, courts – including this Court – have consistently justified arbitration as a procedural forum where claims

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[2] Notably, the Chamber now opposes the "case-by-case" approach it endorsed in *Bazzle*. In the present case, the Chamber argues instead that the FAA does *not* "authorize courts to condition enforcement of arbitration provisions on a case-by-case assessment of whether class-wide procedures may be necessary to enable plaintiffs to vindicate their statutory claims." Brief of the Chamber of Commerce of the United States of America and Business Roundtable as *Amici Curiae* in Support of Petitioners at 6, *Am. Express Co. v. Italian Colors Rest.*, No. 12-133 (U.S. Dec. 28, 2012).

may be heard on their merits, not a mechanism for barring claims altogether. As then-Judge Cardozo explained about New York's arbitration statute of 1920, from which the FAA was derived, "Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow." *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288, 290 (N.Y. 1921).[3] In other words, Justice Cardozo's point was that arbitration is not supposed to change the underlying substantive law – the definition of what is right and wrong – or to legalize previously illegal conduct, but instead is a forum for applying (not evading) the law. This Court invoked the core premise that arbitration is only acceptable where the parties have a meaningful opportunity to prevail on valid statutory claims in *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (agreements to arbitrate are enforceable under the FAA only "so long as the prospective litigant effectively may vindicate its

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[3] One of the primary drafters of both the New York Act and the FAA was Julius Henry Cohen. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 589 n. 7 (2008). In his seminal law review article explaining the Act, Cohen noted, "When the agreement to arbitrate *is* made, it is not left outside the law. Proceedings under the new arbitration law are as much a part of our legal system as any other special proceeding or form of remedy." Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 279 (1926). Cohen's point is plainly that arbitration is supposed to offer a different forum, but *not* strip parties of the protections of substantive law, and leave parties "outside the law." Cohen's article has been repeatedly cited by members of this Court as key to understanding the FAA's legislative history. *E.g.*, *Southland v. Keating*, 465 U.S. 1, 26 n.10 (1984) (O'Connor, dissenting).

statutory cause of action in the arbitral forum"). While the parties have already debated the meaning of *Mitsubishi Motors* at some length, and these *amici* do not intend to retread that ground, there is one crucial point to be made here. The Court in *Mitsubishi Motors* did not articulate a formalistic test under which arbitration clauses that preclude claimants from pursuing their claims are enforceable as long as they sound fine on paper. Instead, the Court stressed that arbitration clauses must provide a way for parties to "effectively" vindicate their statutory rights, not as an abstraction, but in a manner where nothing of substance is lost – so that "the statute will continue to serve both its remedial and deterrent function." *Id.* at 637. In other words, for arbitration to have legitimacy, it must "ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed." *Id.* at 638.

Outside the arbitration context, the Court has recognized that if parties are restricted to a single forum for conflict resolution, they cannot then be barred – either expressly or in effect – from accessing that forum. In *Boddie v. Connecticut* the plaintiffs could not afford to pay the state-imposed court fees and costs required to bring an action for divorce. 401 U.S. 371, 372 (1970). The evidence in the record – which, as here, was undisputed – established that the practical effect of enforcing the law would be to "effectively bar" the litigants from relief by denying them access to *any forum* in which they could bring their claims. *Id.* at 372-73. The Court held that the law was unconstitutional: "Just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a

cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." *Id.* at 380.

Admittedly, neither Petitioners nor Respondents have raised constitutional issues in this case. However, the principle at stake here is identical to that in *Boddie*. The uncontroverted evidence shows that enforcement of Petitioners' individual arbitration clause will effectively bar small businesses with valid federal antitrust claims from pursuing their claims in the only forum provided to them. If the Court adopts Petitioners' position, a private arbitration clause that operates to bar parties from access to all forums for dispute resolution will be perfectly enforceable, while the same action by a governmental body would be unconstitutional. This result would sharply conflict with the Court's arbitration jurisprudence, which has steadfastly upheld arbitration as an equal (if not superior) forum to court – not as a bar to bringing claims. *E.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (in arbitration, "a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum"). If Petitioners' rationale is accepted, it will no longer be possible to view arbitration as equal to court with respect to providing parties with a meaningful opportunity to vindicate their substantive rights.

Petitioners' position, if adopted by the Court, would also entail discarding the robust body of law that has developed as lower courts applied the Court's teachings that arbitration must provide for

the vindication of substantive rights. In *Morrison v. Circuit City Stores, Inc.*, the Sixth Circuit explained that the purpose of an arbitration contract "was to provide [the claimant] with an arbitral forum that would allow him to pursue his statutory rights." 317 F.3d 646, 680 (6th Cir. 2003). The appeals court rightly declared that if that purpose was impaired by some operation of the contract, it "would undermine confidence in the integrity of arbitration as a legitimate forum for the vindication of public claims." *Id.*

Courts have consistently applied the effective vindication principle to cases like this one, striking down clauses where the costs that a party would have to advance to pursue its claims under the terms of a particular arbitration clause were proven to actually exceed the amount the party stood to recover. *E.g.*, *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 571, 574 (N.Y. App. Div. 1998) (striking term that would require consumer to advance non-refundable $4,000 arbitration fee, where fee exceeded value of most Gateway products and would "surely serve[] to deter the individual consumer" from pursuing his claim); *Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 605 (Wash. Ct. App. 2002) (invalidating clause that would require purchaser of used mobile home to pay over $2,000 in arbitration fees to arbitrate $1,500 claim); *cf. Phillips v. Assocs. Home Equity Servs.*, 179 F. Supp. 2d 840, 846-47 (N.D. Ill. 2001) (refusing to enforce arbitration clause that would require consumer to pay a $4,000 filing fee, half of the arbitrators' fees, travel expenses, hearing room rental, and costs, to arbitrate her Truth in Lending Act claim, which was "likely to be at least twelve times what it currently costs to file a case in federal

court"). The reasoning behind each of these cases is that the arbitration clauses in them barred claimants from actually being able to pursue their claims. *See*, *e.g.*, *Jones v. Fujitso Network Commc'ns, Inc.*, 81 F. Supp. 2d 688, 693 (N.D. Tex. 1999) (refusing to enforce term that would have required employee fired for requesting medical leave to pay up to $7,000 to pursue his claim in arbitration because it would "substantially limit[] the use of the arbitral forum.").

If the Court adopts Petitioners' proposed new rule that arbitration clauses need only offer parties the chance to *hypothetically* vindicate their substantive statutory rights while in reality requiring claimants simply to forfeit those rights, arbitration will lose its legitimacy as an institution. To see how corrosive it would be for the Court to sanction such a degradation of the standards for enforcing arbitration clauses, one need only recall the cases in which courts held that forums *labeled* "arbitration," but which were rigged in a way that claimants would not be able to pursue their disputes in a fair system, do not even qualify as "arbitration" at all. *E.g.*, *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) ("The parties agreed to submit their claims to arbitration – a system whereby disputes are fairly resolved . . . . By creating a sham system unworthy . . . of the name of arbitration, Hooters completely failed in performing its contractual duty."). While Petitioners' arbitration clause lacks the more flamboyantly unfair aspects of the clause at issue in the *Hooters* case (such as allowing a party to the dispute to be the arbitrator), a dispute resolution process requiring a small business to expend costs 20 times greater

than the amount in dispute is every bit as exculpatory as the one at issue in *Hooters*.

In short, courts (including this Court) and the authorities often relied upon by courts have routinely and consistently endorsed the notion that arbitration is only legitimate and acceptable where it offers parties a meaningful opportunity to effectively vindicate substantive statutory rights. Petitioners seek to eliminate that opportunity and, in so doing, the legitimacy of arbitration.

CONCLUSION

This is an extraordinarily important case. Petitioners ask the Court to do something radical – to hold that the FAA mandates enforcement of arbitration clauses even in those limited circumstances where the clauses are proven through the admissible evidence to prevent parties from effectively vindicating substantive statutory rights. Petitioners' proposal would change the underlying statute from the Federal Arbitration Act to the Federal Corporate Immunity Act, and would rob it of its legitimacy. If the Court endorses the idea of arbitration as a means of immunity from the law, as a means of gutting substantive statutes, then the Court will do incalculable damage to the institution of arbitration itself.

Respectfully submitted,

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