No. 12-133

IN THE

Supreme Court of the United States

AMERICAN EXPRESS COMPANY, *et al.*,

Petitioners,

v.

ITALIAN COLORS RESTAURANT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* THE NATIONAL COMMUNITY PHARMACISTS ASSOCIATION, NATIONAL ASSOCIATION OF CONVENIENCE STORES, AND NATIONAL GROCERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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The National Community Pharmacists Association, National Association of Convenience Stores, and National Grocers Association respectfully submit this brief, as *amici curiae* and on behalf of themselves and their members, in support of respondents.[1]

INTERESTS OF *AMICI CURIAE*

Amici curiae represent thousands of small businesses that have been and will be forced, via contracts-of-adhesion, to effectively waive their rights to challenge anticompetitive conduct engaged in by dominant suppliers. Most of *amici*'s small business members have no choice but to enter into arrangements with payment networks, health insurance companies and other suppliers of goods and services that wield substantial market power in order to continue their operations. In many of these current and prospective arrangements, these suppliers are insisting that our small business members waive their ability to privately enforce antitrust law via a class action — a procedure that has necessarily been and must often be utilized by our small business members to remediate losses caused by suppliers' anticompetitive conduct and to enjoin such illegal conduct from continuing. If these class action waivers that have been forced upon our members are held to always be enforceable, even where our members would be deprived of effectively vindicating

1. No counsel for any party authored this brief in whole or in part. No party or counsel for any party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici* and their members made any such monetary contribution. Counsel to the parties have provided blanket consent to this and all other *amici curiae* submissions.

their rights under antitrust law, our members will suffer substantial harm. They will likely be forced to suffer price increases, output reductions and inferior product quality.

The National Community Pharmacists Association (NCPA), founded in 1898, represents the interests of America's community pharmacists, including the owners, managers, and employees of more than 60,000 retail pharmacies, and 23,000 smaller, independent community pharmacies across the United States. Together, independent pharmacies represent an $88.5 billion health care marketplace, dispense nearly 40 percent of all retail prescriptions, and employ more than 315,000 people, including 62,400 pharmacists.

The National Association of Convenience Stores (NACS), founded in 1961, is the international association for convenience and fuel retailing. The U.S. convenience store industry, with more than 149,000 stores across the country, posted $681 billion in total sales in 2011, of which $486 billion were motor fuels sales. NACS has 2,200 retail and 1,600 supplier member companies that do business in the United States and nearly 50 other countries. The majority of these members are small, independent operators. More than 70 percent operate ten stores or less; more than 60 percent operate five stores or less; and nearly 40 percent of NACS' membership — and 62.7 percent of the convenience retailing industry as a whole — operate only a single store.

The National Grocers Association (NGA), founded in 1982, represents the interests of the retail and wholesale grocers that comprise the independent sector of the food distribution industry in the United States. Independents

are the true entrepreneurs of the grocery industry and are highly dedicated to their customers, associates, and communities. NGA's approximately 1,300 members include retail and wholesale grocers, state grocers associations, and manufacturers and service suppliers.

Consistent with the Congressional intent that motivated the adoption of Clayton Act Sections 4 and 16, *amici* and their member businesses have historically vindicated their rights and the public interest under the antitrust laws through private litigation. However, the high cost of antitrust litigation, particularly fees for necessary economic expert services, often has prevented *amici* and their members from remediating anticompetitive actions without spreading the costs of antitrust prosecution amongst multiple businesses via a class action.

Many of our member businesses, particularly the thousands of small business owners that *amici* collectively represent, have recently been forced by powerful suppliers and other entities to accept class action waivers in adhesion contracts. These waivers prevent *amici* and our members from effectively vindicating their antitrust rights, as it renders the cost of doing so prohibitive. These waivers further prevent other businesses and the public from enjoying the benefits of our members' private enforcement efforts, such as lower prices and increased output.

The Second Circuit's decision prevents this injustice by following settled law that requires class action waivers to be reviewed, case by case, and stricken if they preclude effective private antitrust enforcement. As our small business members will be effectively deprived of the substantial ability to constrain anticompetitive conduct

by dominant suppliers if the Second Circuit's decision is reversed, *amici* — on behalf of our members and ourselves — have a strong interest in seeing that decision affirmed.

SUMMARY OF ARGUMENT

This case is not about "class action lawyers" that "drive" class actions. Pet'rs' Br. at 54. Rather, it is about our members — business entities that participate in several different industries. It is these businesses who will have their antitrust rights compromised if class action waivers that are forced upon them by dominant suppliers and effectively eviscerate their private rights of action are nonetheless deemed enforceable.

The businesses we represent have often taken up the mantle of private antitrust enforcer to correct conspiratorial or monopolistic behavior that harms our economy. Consistent with the Congressional intent behind Sections 4 and 16 of the Clayton Act, they have challenged conduct in, for example, the payments and health insurance industries, that has resulted in supra-competitive prices or sub-competitive product output or quality. These actions have benefitted the U.S. economy and all of its constituents.

To enforce U.S. antitrust proscriptions and, in particular, to remedy actions that have caused artificial price increases or output restrictions, these businesses have launched class proceedings. They have done so in light of the large costs and associated risks inherent in vindicating their statutory antitrust rights, which render individual proceedings infeasible. Without the class procedures set forth in Fed. R. Civ. P. 23 that

enable plaintiffs to efficiently share these costs with class members, these businesses would have foregone, on multiple occasions, enforcement actions that have resulted in substantial public interest benefits.

Our member businesses deal with dominant, "must have" suppliers in a host of industries, including health care, financial services and others. To immunize themselves from antitrust prosecution, these suppliers have already forced class action waivers upon our members via contracts-of-adhesion. They have been able to require our much smaller members to enter these contracts by exerting the overwhelming bargaining leverage that they enjoy by being the providers of goods and services that are necessary to our members' continued operations.

Should the Court reverse the Second Circuit's well-reasoned opinion and hold that class action waivers are *always* valid, we expect even more dominant suppliers to insist upon class action waiver clauses as a prerequisite to contract. This is especially troubling, as the Second Circuit's decision readily follows this Court's precedents that prevent arbitration clauses from depriving businesses, like our members, from effectively enforcing their antitrust rights.

To the extent these waiver clauses will preclude our members from being able to finance antitrust enforcement actions, reversing the Second Circuit will erode their ability to fulfill the Congressional desire to supplement public antitrust enforcement, which relies on limited governmental resources, with actions brought by aggrieved private businesses. Should this occur, the deterrent and remedial impact of this critical statutory

regime will be severely gutted, likely leading to greater amounts of anticompetitive behavior that will distort the U.S. economy.

The Court should not let this happen.

ARGUMENT

I. CONGRESS HAS ENCOURAGED PRIVATE ANTITRUST ENFORCEMENT BY BUSINESSES, SUCH AS OUR MEMBERS, TO PROTECT THE PUBLIC INTEREST FROM ANTICOMPETITIVE BEHAVIOR.

Contrary to petitioners' claim, the Second Circuit did not impose its "own policy views" in this case. Pet'rs' Br. at 46. Rather, well-settled precedent recounts the strong Congressional interest in ensuring effective, private antitrust enforcement. *See, e.g., Exxon Shipping Co. v. Baker*, 554 U.S. 471, 494-95 (2008) (antitrust regulatory scheme is designed "to induce private litigation to supplement official enforcement that might fall short if unaided"); *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) ("Private enforcement [is] an integral part of the congressional plan for protecting competition."); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977) (noting the "longstanding policy of encouraging vigorous private enforcement of the antitrust laws"); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263 (1975) (Section 4 of the Clayton Act is a "prime example" of Congress "rely[ing] heavily on private enforcement to implement public policy . . . [and] encourag[ing] private litigation").

Congress sought to deputize actors as private Attorneys General to vindicate the public interest by correcting economic distortions resulting from anticompetitive behavior. *See Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955) (noting "the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action"); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130-31 (1969) ("the purpose of giving private parties . . . injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws"). Indeed, for this reason, Congress structured the Clayton Act differently from other federal statutes, providing certain incentives to businesses to encourage them to bring private antitrust litigation when confronting anticompetitive behavior. For example, unlike employment discrimination statutes, Section 4 of the Clayton Act provides for treble damages to encourage private antitrust prosecution. *See, e.g., Exxon*, 554 U.S. at 494-95; *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979). Moreover, while Section 4 does not recompense a prevailing plaintiff for a substantial amount of the costs that it necessarily incurs in prosecuting an antitrust case, including the vast amount of its economic expert costs (*see infra* Part II.B), Section 4 does, unlike other federal statutory regimes, mandate that prevailing plaintiffs be awarded certain costs. *See, e.g., Alyeska*, 421 U.S. at 263.

A primary reason that Congress offered these incentives to private parties is that governmental prosecutorial resources are limited, making it difficult for public prosecutors to detect and correct all anticompetitive conduct. *See Exxon*, 554 U.S. at 494-95 ("official enforcement [of the antitrust laws] might fall short if

unaided"); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987) (Clayton Act was designed to bring to "bear the pressure of 'private attorneys general' on a serious [] problem for which public prosecutorial resources are deemed inadequate."). Supplementing those resources is particularly important in times, like now, of budget crises, when public enforcement resources are particularly constrained.[2]

Petitioners do not even acknowledge this Congressional intent, which can often only be effectuated by businesses

2. Petitioners also erroneously argue that "instead of promoting consumer class actions, the Congress relied on the ability of competitors and the federal government to enforce federal law." Pet'rs' Br. at 7. For this claim, petitioners cite an article by Herbert Hovenkamp and *Reiter v. Sonotone*. But neither Professor Hovenkamp nor *Reiter* indicate any Congressional preference for enforcement by competitors or government over consumers. *See* Herbert Hovenkamp, Antitrust's Protected Classes, 88 Mich. L. Rev. 1, 27 (1989) ("the debate surrounding passage of the Clayton Act . . . contains virtually no discussion of the respective merits of consumer or competitor lawsuits"); *Reiter*, 442 U.S. at 343 ("Congress designed the Sherman Act as a consumer welfare prescription . . . . At no time . . . was the *right* of a consumer to bring an action for damages questioned.") (emphasis in original, quotation omitted). Both of those sources do, however, note the infeasibility of individual consumer actions for small recoveries. *See* Hovenkamp, 88 Mich. L. Rev. at 23 ("Nearly every member of Congress who spoke on the issue suggested that [individual] consumer [antitrust] lawsuits would be ineffectual because consumer injuries were too small"); *Reiter*, 442 U.S. at 343 (during the Sherman Act debates, "some legislators questioned whether individual consumers would be willing to bring actions for relatively small amounts"). Thus, they reinforce the need for class proceedings as a means for plaintiffs with small damages amounts – whether merchants or consumers – to effectively vindicate their antitrust rights.

that, as consumers of other providers' services, have suffered losses as a result of anticompetitive conduct. Rather, petitioners argue that "[t]he Sherman Act [] reflects a judgment that the inability of some consumers to bring small-damages claims would not undermine the effective vindication of the Sherman Act's policies, in light of other enforcement mechanisms such as competitor suits and government enforcement." Pet'rs' Br. at 24. This is meritless. First, as stated, Congress purposely designed the Clayton Act to ensure that private suits are brought to supplement public enforcement, which is constrained by limited resources. Second, competitors often cannot challenge anticompetitive conduct that results in higher prices. They do not have standing to challenge horizontal agreements to fix price, for instance, because they can compete against the conspirators by offering lower prices. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 582-83 (1986) (while supracompetitive pricing may "indeed violate the Sherman Act, . . . it could not injure competitors"); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-489 (1977).

II. CLASS ACTION WAIVERS, IF GIVEN BLANKET IMMUNITY FROM CHALLENGE, WILL ERADICATE NECESSARY AND BENEFICIAL ANTITRUST ENFORCEMENT BY BUSINESS ENTITIES.

A. Meritorious Antitrust Class Litigation Brought On Behalf of Businesses Has Benefitted Our Member Businesses And The Public.

Business entities have successfully brought antitrust class actions that have remedied anticompetitive conduct

and led to public benefits.[3] *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 122 (2d Cir. 2005) (noting "significant and lasting benefits for America's merchants and consumers" from settlement of merchant class action against Visa and MasterCard) (quotation omitted); *see also Am. Med. Ass'n v. United Healthcare Corp.*, 2009 WL 1437819, at *2 (S.D.N.Y. May 19, 2009) (settlement of antitrust class action brought by physician practices ended use of database that under-reimbursed practices and subscribers, enabled subscribers to easily determine charges for services, and established $350 million settlement fund); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 7575004, at *3 (N.D. Cal. Dec. 27, 2011) (settlement of antitrust class action brought by businesses that purchased LCD panels "achieved . . . excellent result" of $388 million settlement fund).

For example, market-wide fixing of supply prices and other anticompetitive conduct can have a significant detrimental impact on prices charged by U.S. businesses. Class actions brought by businesses challenging such conduct often results in ensuring competitive prices ultimately charged to consumers. In light of this substantial public benefit, petitioners' claim that "the lower costs of bilateral arbitration" render it superior to class litigation is hollow. Pet'rs' Br. at 51.[4]

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3. Businesses have standing to pursue antitrust actions under Section 4 of the Clayton Act (for damages) and Section 16 of the Clayton Act (for injunctive relief). 15 U.S.C. §§ 12(a), 15(a), 26.

4. To the extent the Court believes that we, as trade associations, can bring class claims against suppliers that bar our members from bringing class suits, we cannot. Under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S.

B. Our Members Often Can Only Effectively Vindicate Their Statutory Antitrust Rights By Class Proceedings.

The costs of antitrust litigation often make it difficult for our members to engage in private enforcement outside of a class action, particularly because of the high cost of experts. As the leading antitrust authority has noted, expert evidence "is both ubiquitous and essential in antitrust cases[.]" *See* 2 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 309 (3d ed. 2007). The need for such expert evidence in antitrust cases has become even greater over the past few decades, as this Court has increasingly limited Section 1 *per se* analysis in favor of the Rule of Reason. *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, In*c., 551 U.S. 877 (2007) (applying Rule of Reason to minimum resale price maintenance claims); *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997) (applying Rule of Reason to maximum resale price maintenance claims); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20 (1979) (applying Rule of Reason to horizontal price-fixing challenge); *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977) (applying Rule of Reason to vertical restriction claims).

Rule of Reason treatment generally requires a plaintiff to demonstrate harm to competition by the practice in question, as petitioners note. Pet'rs' Br. at 53 (in "antitrust law, [] it may be hard to distinguish conduct

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333, 343 (1977), an association only "has standing to bring suit on behalf of its members when [] its members would otherwise have standing to sue in their own right[.]" If such waivers always bar our members from pursuing class suits, we would also be barred from pursuing such class litigation.

that harms competition and consumers from conduct that is aggressively competitive"). To prove harm to competition, the plaintiff must prove that the challenged conduct caused higher prices, reduced output, or harmed innovation on a market wide basis. *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 113 (1984) ("rais[ing] prices and reduc[ing] output" are the "hallmarks of anticompetitive behavior" that violates Section 1). To prove a violation of Sherman Act Section 2, harm to competition also must be proven. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (monopolistic conduct "is of no moment to the antitrust laws if competition is not injured"). Economic expert analysis is necessary to prove such harm. *See Nilavar v. Mercy Health Sys.-W. Ohio*, 244 Fed. Appx. 690, 695 (6th Cir. 2007) ("anticompetitive effects . . . [are] usually shown through the use of expert testimony"); The Sedona Conference Commentary on the Role of Economics in Antitrust Law, 7 Sedona Conf. J. 69, 78 (2006) ("The plaintiff challenging [anticompetitive] behavior must demonstrate (through economic evidence) that it adversely affects competition . . . .").

Economic expert analysis in antitrust cases is generally very costly. *See, e.g.*, Maurice E. Stucke, Does the Rule of Reason Violate the Rule of Law?, 42 U.C. Davis L. Rev. 1375, 1467 (2009) (noting "antitrust litigation's significant costs for economic experts"). Indeed, petitioners do not dispute respondents' evidence that antitrust experts can cost hundreds of thousands to millions of dollars. *See In re Am. Express Merchants' Litig.*, 667 F.3d 209, 218 (2d Cir. 2012) (*Amex III*) (citing respondents' evidence of "substantial expert witness costs"). Nor do they dispute that the formal and informal discovery needed to support

necessary economic analysis in an antitrust case carries massive costs.

Most of these expert costs are non-recoverable, notwithstanding the fact that Sections 4 and 16 of the Clayton Act allow some cost shifting. Prevailing antitrust plaintiffs are entitled to reimbursement of expert costs only at the statutory rate of *$40 per day*. *See* 28 U.S.C. § 1821(b); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987) ("when a prevailing party [in an antitrust case] 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)" of $40 per day) (alteration omitted). Forty dollars a day does not even begin to approach the cost of an antitrust expert. To illustrate, even respondents' low estimate of $300,000, at the statutory rate, reflects 7,500 days of expert work — every day for more than 20 years.

C. The Blanket Protection for Class Action Waivers That Petitioners Seek Will Immunize Entities From Antitrust Prosecution.

If, as petitioners request, class action waivers are enforced under *all* circumstances, suppliers and other entities with which our members deal will be effectively immunized from antitrust prosecution. This is because, as this Court has recognized, where plaintiffs have small individual damages claims, "[e]conomic reality dictates that [their] suit proceed as a class action or not at all." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974).

For example, following is a standard arbitration clause that is being widely forced upon a number of our

small business members that provide health-care related services by a substantial pharmaceutical benefits manager. It contains a class action waiver that explicitly notes its application to antitrust claims, while also requiring each side to pay their own costs — confirming that suppliers and others that insist on such waivers will, if the waivers are enforced under all circumstances, use them as a shield against antitrust scrutiny. It provides (emphases added):

> . . . The parties agree that any dispute arising from or relating to this Agreement or their business relationship which cannot be settled by mutual agreement shall be submitted to final and binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association ("AAA") . . . . The parties agree that this Arbitration Agreement is subject to, and shall be interpreted in accordance with, the Federal Arbitration Act, 9 U.S.C. §§ 1-14. No claim or allegation shall be excepted from this Arbitration Agreement, including alleged breach of the Agreement, alleged violations of state or federal statutes or regulations, tort or other common law claims, and claims of any kind that a party to the Agreement has conspired or coordinated with, or aided and abetted, one or more third parties in violation of law. Without limiting the foregoing, **this Arbitration Agreement requires arbitration of disputes involving antitrust, racketeering and similar claims. . . .**
>
> . . . **Each party shall be responsible for its own attorneys' fees and such other costs and**

> **expenses incurred related to the proceedings**, except to the extent the applicable substantive law specifically provides otherwise.
>
> . . . Any arbitration under this Arbitration Agreement shall be solely between [member] and Provider, shall not be joined with another lawsuit, claim, dispute or arbitration commenced by any other person, and may not be maintained on behalf of any purported class. **Both parties waive the right to participate in any class action against the other**, and the arbitrator has no authority to adjudicate any class claims or class arbitration.

Blanket protection for class action waivers, such as the one referenced above, is particularly disconcerting for businesses that, like our members, are beholden to dominant suppliers that have insisted or will insist on such waivers. *See, e.g., United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 239 (2d Cir. 2003) (holding that Visa and MasterCard have economic power over merchants); Am. Med. Ass'n, Competition in health insurance: A comprehensive study of U.S. Markets 5 (2009) (noting market power of health insurers, with whom pharmacists are required to negotiate).[5]

Petitioners argue that dispute resolution costs, including expert costs, are also incurred in bilateral

5. Contrary to petitioners' suggestion, it is generally not our members' choice to accept class action waiver clauses. Pet'rs' Br. at 20. Many times, these clauses are forced upon our members by essential suppliers who have disproportionate bargaining power.

arbitration processes. Pet'rs' Br. at 40-45. However, as petitioners acknowledge, one "feature of the aggregation brought about by class actions [is] its capacity to facilitate the pursuit of small claims by spreading the costs of litigation across the class." *Id.* at 53. This "fee-spreading incentive" is a "central concept of Rule 23" and a "significant benefit to [class] claimants," particularly those with small individual recoveries (that could lead to a large recovery for the class). *See Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 338 n.9 (1980). *See also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("A class action . . . aggregat[es] the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.") (quotation omitted).

Equally unavailing is the Chamber of Commerce's argument that "pursuing serial individual arbitrations (or small claims actions) can be an economically viable business model." COC Br. at 28-30. Courts have recognized that class proceedings are a particularly effective means of remediating small businesses' claims. *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 146 (2d Cir. 2001) (noting "the powerful policy considerations that favor certification" of merchant class suing credit card networks under the antitrust laws, including that "[w]ithout certification, ... millions of small merchants will lose any practical means of obtaining damages for defendants' allegedly illegal conduct") (quotation omitted); *see also Klay v. Humana, Inc.*, 382 F.3d 1241, 1270-71 (11th Cir. 2004) ("consideration" that "class actions often . . . make it economical to bring suit" supported certifying class of doctors asserting RICO claims against insurers, "especially . . . when the defendants are corporate

behemoths with a demonstrated willingness and proclivity for drawing out legal proceedings for as long as humanly possible and burying their opponents in paperwork and filings") (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985)).

The sources cited by the Chamber are not apposite. None of them involve antitrust claims, thus they do not implicate the Congressional policy favoring private enforcement or the expert costs at issue here. *See supra* Parts I (Congressional policy), II.B (necessity of experts in antitrust cases).[6] And the cases addressed in the news articles did not involve class action waivers at all — rather, they were brought by individuals who chose to opt out of *class settlements*.

Finally, the American Bankers Association's argument that "published studies show . . . high levels of satisfaction for parties who participate in arbitration" also fails. ABA Br. at 10. None of the "studies" the ABA cites address complex antitrust claims that will costs millions of dollars to litigate, nor do they offer any indication of the complexity of the claims they do address — thus how expensive they might be. *Id.* at 10-13 (citing studies). Rather, the studies either address claims that generally are far less complex than antitrust claims to litigate (e.g., employment, lending, personal injury), or they do not

6. *Hendricks v. AT&T Mobility LLC* involved a class action waiver that — unlike the waiver here — provided individual claimants with recovery of their expert costs if they were awarded more than AT&T's last settlement offer. 823 F. Supp. 2d 1015, 1022 (N.D. Cal. 2011) (for this reason, the court found that "[t]he costs of pursuing Plaintiff's case are therefore not a basis for invalidating the agreements").

identify the nature of the claims at all. Casting further doubt on the studies' reliability is that fact that one of them was financed by the American Bankers Association and at least two others were financed by organizations that advocate for arbitration over litigation.

III. PETITIONERS' POSITION SHOULD BE REJECTED BECAUSE IT WOULD UPHOLD CLASS ACTION WAIVERS EVEN WHEN THEY EFFECTIVELY DEPRIVE ENTITIES OF THEIR RIGHTS TO PRIVATE ANTITRUST ENFORCEMENT.

A. The Case-By-Case Approach to Judging These Waivers Advocated by Respondents and the Second Circuit Is Correct.

Class action waivers should not be enforced if they would preclude "prospective litigant[s] [from] effectively . . . vindicat[ing their] statutory cause of action in the arbitral forum." *Green Tree Fin. Corp.- Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (Rehnquist, C.J.) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 637 (1985)). *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (same); *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273-74 (2009) (quoting *Randolph*, 531 U.S. at 90). That is precisely the effect of the class action waiver at issue here: By prohibiting businesses from proceeding on a class basis, it strips them of the ability to seek redress from petitioners for anticompetitive conduct.

Determining at the outset whether a case would be so expensive to prosecute that a class action waiver

effectively nullifies the private right of action would not unduly burden courts. Indeed, courts regularly make threshold findings that involve at least as much, if not far more, evidentiary review as what would be required here. *See, e.g., Zappia Middle E. Constr. Co. Ltd. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir. 2000) (in considering motion to dismiss for lack of subject matter jurisdiction filed "promptly" after complaint, court reviewed evidentiary record "amassed over two years . . . of discovery solely on the jurisdictional issue").

In any event, any burden such a review might impose cannot trump the Congressional intent to encourage private antitrust enforcement. *See Reiter*, 442 U.S. at 344 (rejecting argument that class actions "will add a significant burden to the already crowded dockets of the federal courts" because "Congress created . . . § 4 precisely for the purpose of encouraging private challenges to antitrust violations . . . [thus it must] provide the judicial resources necessary to execute its mandates").

B. *Concepcion* Is Not Applicable.

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), does not affect this result. First, it was not an antitrust case. *See id.* at 1744 (noting case involved alleged false advertising and fraud in cell phone service sales). Thus, it did not implicate the Congressional intent to encourage private enforcement or other policy objectives at issue here. Second, it turned on a preemption analysis, namely "whether [the FAA] preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable." *Id.* at 1746. *See also id.* at 1753 (reversing the Ninth Circuit because the California

rule "is preempted by the FAA"). This case, on the other hand, turns on the plaintiffs' ability to vindicate federal statutory rights, and whether that ability is precluded by petitioners' arbitration clause. *See* Resp'ts' Br. at i; Pet'rs' Br. at i.

Third, the arbitration clause in *Concepcion* was very different from the one at issue here. The *Concepcion* clause provided cost-shifting for non-frivolous claims; permitted arbitrators to award equitable relief; and guaranteed a substantial minimum recovery and twice claimants' attorneys' fees if their arbitration award exceeded AT&T's last settlement offer. 131 S. Ct. at 1744, 1753. The clause here provides none of these things. *See Amex III*, 667 F.3d at 209-10. Therefore, this Court can find none of the comfort in *Concepcion* that individual merchants are "*better off* under their arbitration agreement . . . than they would have been as participants in a class action[.]" 131 S. Ct. at 1753 (emphasis in original).

C. *Stolt-Nielsen* Is Not Applicable.

Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758 (2010), also does not apply. Like *Concepcion*, *Stolt-Nielsen* had nothing to do with the enforceability of a class action waiver. Rather, it addressed "whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with" the FAA. *Id.* at 1764. Moreover, significant to this Court was that the plaintiffs in that case (consumers of the shipping services at issue) *chose* to enter a contract that was silent on class arbitration. *See id.* at 1764 (customers "typically select the particular [contract] that governs the shipments"). Thus, as Justice Ginsburg noted in dissent,

Stolt-Nielsen's holding does not apply to "contracts of adhesion presented on a take-it-or-leave-it basis" such as the contract at issue here. *See id.* at 1783; *see also supra* Part II.C (class action waivers are often forced upon merchants by essential suppliers).

In addition, petitioners misrepresent the basis of this Court's decision in *Stolt-Nielsen*. Petitioners claim that this Court "expressly rejected the arbitral panel's justification that class proceedings were necessary given the plaintiff's 'negative value claims' . . . as an impermissible effort by the panel 'to impose its own view of sound policy regarding class arbitration.'" Pet'rs' Br. at 12 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1767-68, 1770 & n.7). However, the "policy view" this Court rejected was the panel's conclusion, based on a series of decisions, "that class arbitration is beneficial in a wide variety of settings" thus it should be allowed absent "good reason not to" allow it. *Stolt-Nielsen*, 130 S. Ct. at 1769 (quotation omitted). This Court only referenced "negative value claims" once, in a footnote recounting proceedings before the arbitration panel. *Id.* at 1769 n.7. It pointed out that the presence of "negative value claims" was a common factor between the decisions cited by the panel and the cases of many of the claimants before it. *Id.* However, the Court gave no indication that the presence of negative value claims played a role either in the arbitration panel's or this Court's conclusions.

CONCLUSION

For the reasons stated here and in respondents' brief, *amici* NCPA, NACS and NGA respectfully request that the Court affirm the Second Circuit's decision.

Respectfully submitted,

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