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 PETITIONERS

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QUESTION PRESENTED

Whether the Federal Arbitration Act permits courts, invoking the "federal substantive law of arbitrability," to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners American Express Company and American Express Travel Related Services Company, Inc. were defendants in the district court proceedings and appellees in the court of appeals proceedings.

Respondents 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 Phoung Corp. were plaintiffs in cases consolidated before the district court and appellants in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners American Express Company and American Express Travel Related Services Company, Inc. state the following:

American Express Company is a publicly traded company. It has no parent company; however, Berkshire Hathaway, Inc. owns more than 10 percent of its outstanding common shares. American Express Travel Related Services Company, Inc. has not issued shares to the public and is a wholly owned subsidiary of American Express Company.

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The Second Circuit's opinion on rehearing in light of *Concepcion* (App. 1a-30a) is reported at 667 F.3d 204 ("*Amex III*").[1] The court's prior opinion after further consideration in light of *Stolt-Nielsen* (App. 31a-56a) is reported at 634 F.3d 187 ("*Amex II*"). The court's initial opinion (App. 57a-99a), which was vacated and remanded by this Court, is reported at 554 F.3d 300 ("*Amex I*"). The memorandum opinion and order of the district court (App. 100a-124a) is not reported (but is available at 2006 WL 662341).

JURISDICTION

The Second Circuit entered its judgment on March 8, 2011. On May 9, 2011, the panel *sua sponte* ordered supplemental briefing on the impact of *Concepcion*. On August 1, 2011, prior to the deadline for American Express's petition for certiorari,[2] the Second Circuit issued a statement that the panel was "*sua sponte* considering rehearing" in light of *Concepcion*. App. 125a-126a. As a result, under this Court's Rule 13.3, the time for American Express's petition for certiorari did not start to run until the panel's decision on rehearing. The panel issued that decision on February 1, 2012. American Express filed a timely petition for rehearing *en banc* on February 10, 2012, which was denied on May 29, 2012. App. 127a-149a. The petition for a writ of certiorari was

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[1] Chief Judge Jacobs wrote a dissenting opinion from denial of rehearing *in banc* in which Judge Cabranes and Judge Livingston joined. Judge Cabranes also wrote a separate dissenting opinion. Judge Raggi wrote a dissenting opinion in which Judge Wesley joined. These opinions are reported at 681 F.3d 139 (reproduced at App. 127a-149a).

[2] On May 24, 2011, Justice Ginsburg had extended the time for filing a certiorari petition to August 5, 2011. App. 153a.

filed on July 30, 2012, and granted on November 9, 2012 (JA100). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Arbitration Act and the Sherman Act are reproduced in the Addendum to this brief.

STATEMENT

The Federal Arbitration Act's ("FAA") core mandate is to require enforcement of arbitration agreements "in accordance with the terms of the agreement." 9 U.S.C. § 4. Twice in its last three Terms, this Court has made clear that that mandate requires courts to enforce arbitration agreements even when they call for bilateral rather than classwide proceedings. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), this Court held that the FAA prohibits arbitrators from imposing class arbitration on parties that have not agreed to such procedures. Then, in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), this Court held that the FAA precludes courts from "conditioning the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures." *Id.* at 1744, 1748.

The decision below conflicts with this Court's repeated holdings. In the Second Circuit, bilateral arbitration agreements will not be enforced if the court concludes that the predicted costs of pursuing a federal statutory claim, including costs that would be incurred in litigation as well as arbitration, would exceed the plaintiff's expected recovery. *See* App. 27a-29a. In creating this sweeping, unwritten exception to the FAA's statutory command, the panel: (1) departed from this Court's well-settled

and longstanding FAA precedents; (2) misconstrued this Court's holding in *Concepcion*, which rejected a materially indistinguishable California state-law rule that prohibited enforcement of arbitration agreements that did not permit classwide arbitration; and (3) engrafted onto the FAA a pro-class-action public policy that has no basis in that Act.

The panel reasoned that its approach was justified in order to ensure the "vindication of [federal] statutory rights." *E.g.*, App. 16a (internal quotations omitted). This Court has never endorsed any such rationale for limiting the FAA's plain command, and it should not do so now. Allowing courts to refuse to enforce arbitration agreements based on vague and manipulable concerns about the effectiveness of the arbitral forum in particular cases would be inconsistent with this Court's previous teachings. The Court should instead reaffirm that, absent express limitation by Congress on the arbitration of a federal statutory claim, there is no basis for courts to refuse to enforce the FAA's command that arbitration agreements be enforced according to their terms.

A. Statutory Background

1. The Federal Arbitration Act

Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The FAA embodies a "liberal federal policy favoring arbitration agreements," *id.* at 25 (internal quotations omitted), and requiring state and federal courts to enforce arbitration agreements "in accordance with the terms of the agreement," 9 U.S.C. § 4; *see Volt Info. Sciences, Inc. v. Board of Trustees,* 489 U.S. 468, 478 (1989).

FAA § 2, the "primary substantive provision of the Act," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "That provision creates substantive federal law regarding the enforceability of arbitration agreements," requiring courts "to place such agreements upon the same footing as other contracts." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009) (internal quotations omitted); *see also Preston v. Ferrer*, 552 U.S. 346, 349 (2008). The last clause of § 2 preserves the ability of States to apply "'generally applicable contract defenses, such as fraud, duress, or unconscionability,'" to the enforcement of arbitration agreements, but it precludes application of any state-law "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

FAA §§ 3 and 4 implement § 2's substantive pro-arbitration policy. Section 3 requires courts to stay litigation of arbitrable claims so that arbitration may proceed "in accordance with the terms of the [arbitration] agreement." 9 U.S.C. § 3. Section 4 provides that "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement" unless "the making of the agreement for arbitration or the failure to comply therewith" are called into question. *Id.* § 4.

Congress enacted the FAA based on findings that bilateral arbitration between a single claimant and a single defendant would benefit individuals and busi-

nesses alike by reducing the expense, delay, and uncertainties associated with court litigation. *See*, *e.g.*, S. Rep. No. 68-536, at 3 (1924) (noting that avoiding burdensome litigation would benefit "big business and little business alike," as well as "corporate interests" and "individuals"); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (Congress "had the needs of consumers, as well as others, in mind").

"[C]lass arbitration was not . . . envisioned by Congress when it passed the FAA in 1925." *Concepcion*, 131 S. Ct. at 1751. Indeed, Congress passed the FAA before the enactment of the Federal Rules of Civil Procedure in 1938, at a time when class actions were permitted only in suits in equity, not in suits at law for monetary relief. *See* 1 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 1:9, at 32 (4th ed. 2002); 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1751, at 13-16 & n.14 (3d ed. 2005). Classwide arbitration did not emerge until the 1980s, when California state courts began an experimental program of engrafting onto arbitration agreements classwide procedures analogous to the 1966 revisions to Rule 23.[3]

The FAA's pro-arbitration policy applies with full force to federal statutory claims, unless "Congress itself has evinced an intention to preclude" arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-*

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[3] *See Keating v. Superior Court*, 167 Cal. Rptr. 481 (Cal. Ct. App. 1980), *vacated*, 645 P.2d 1192 (Cal. 1982), *rev'd in part on other grounds*, *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984); Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 Denv. U. L. Rev. 301, 309 (2004) (stating that *Keating* launched an "experimental state program regarding the combination of class actions and arbitration").

Plymouth, Inc., 473 U.S. 614, 628 (1985) (holding that claims under the Sherman Act are arbitrable). Although this Court's earlier precedents held arbitration incompatible with federal substantive statutes, *see Wilko v. Swan*, 346 U.S. 427, 434-38 (1953), this Court has long overruled those cases as reflecting the very "judicial hostility to arbitration" the FAA was intended to eliminate. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480 (1989) (overruling *Wilko*) (internal quotations omitted).

2. The Sherman and Clayton Acts

Congress enacted the Sherman Act in 1890 to protect competition essential to a properly functioning free market. *See*, *e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997). Congress recognized that competition benefits consumers through lower prices, and it created a private right of action, which authorized treble damages and attorneys' fees, by which consumers could enforce the Act. *See* Act of July 2, 1890, ch. 647, § 7, 26 Stat. 209, 210. But Congress declined to create a class-action mechanism for private antitrust claims, at a time when class actions otherwise were unavailable in damages actions.

Specifically, Senator James Z. George of Mississippi proposed "an amendment that would have permitted a type of plaintiff class action in which liability would be determined as to a large group of plaintiffs but damages would be assessed to each individually." Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 Mich. L. Rev. 1, 25 (1989). In support of the amendment, Senator George argued that individual lawsuits would be ineffectual in vindicating small claims:

> It is manifest that in nearly every instance the damage by the advanced price of each article

> affected by these combinations would be – though in the aggregate large, indeed – so small as not to justify the expense and trouble of a suit in a distant court.

Id. at 24-25. Other such comments abounded. *See id.* at 25-26 & n.78, 47-48 & nn.185-86.

Congress ultimately rejected Senator George's amendment and declined to adopt a class-action mechanism to address the problem of small claims. *See id.* at 25; *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (noting that the Congress "rejected a proposal to allow a group of consumers to bring a collective action as a class").

Instead of promoting consumer class actions, the Congress relied on the ability of competitors and the federal government to enforce federal law. "[N]o one doubted that competitor lawsuits would work." Hovenkamp, 88 Mich. L. Rev. at 26. Moreover, Congress emphasized "the power of the United States government to bring suit" under § 4 of the Sherman Act. *See id.* at 26 & n.81; 15 U.S.C. § 4 (authorizing the government to bring suits for injunctive relief).

Likewise, when Congress enacted the Clayton Act in 1914, it extended the Sherman Act's private right of action to all of the antitrust laws, but it did not adopt any private class-action enforcement mechanism. *See* Hovenkamp, 88 Mich. L. Rev. at 27; 15 U.S.C. § 15.

B. Proceedings Below

1. Plaintiffs' Complaint

The named plaintiffs in these consolidated cases are retail businesses that, unlike many businesses in the United States, voluntarily chose to accept American Express cards for purchases. Most of these

businesses have annual revenues between $5 million and $40 million. *See* Pet'rs C.A. Br. 5 n.1 (Nov. 1, 2006).

Each named plaintiff entered into a written Card Acceptance Agreement (the "Agreement") with American Express that contains a provision requiring bilateral rather than class arbitration (sometimes referred to as a "class-arbitration waiver"). C.A. App. A156; *see* App. 8a-9a. The arbitration provision is "governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16, as it may be amended (*the FAA*)." C.A. App. A156; *see* App. 67a.

The gravamen of plaintiffs' complaint is that American Express's "Honor All Cards" policy, which requires merchants that wish to accept American Express cards to accept American Express's charge cards as well as its credit cards, constitutes an unlawful tying arrangement under § 1 of the Sherman Act.[4] The named plaintiffs seek to bring suit on behalf of "all merchants that have accepted American Express charge cards." App. 4a.

2. Proceedings in the District Court

American Express moved to compel arbitration. Plaintiffs did not dispute that the arbitration clause in the Agreement covers their antitrust claims. Plaintiffs argued, however, that under *Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000), the arbitration agreement's class-action waiver precluded them from "'effectively vindicating

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[4] A charge card generally "requires its holder to pay the full outstanding balance at the end of a standard billing cycle," while a credit card, though it can be paid in full at the end of each billing cycle, also "allows the cardholder to pay a portion of the amount owing at the close of a billing cycle, subject to interest charges." App. 102a n.6.

[their] federal statutory rights in the arbitral forum'" because each plaintiff would face "costs amounting to hundreds of thousands of dollars, despite seeking average damages of only $5,000." App. 111a (quoting *Randolph*, 531 U.S. at 90).

The district court granted the motion to compel arbitration and dismissed plaintiffs' lawsuits. The court rejected plaintiffs' "prohibitive costs" argument, holding that *Randolph* related only to "*costs which would not be incurred in a judicial forum*." *Id.* Because the costs plaintiffs identified – expert and attorneys' fees – would be incurred whether in court or in arbitration, the court held that they provided no basis to avoid arbitration.

3. *Amex I*

In *Amex I*, the Second Circuit reversed. The panel concluded that the class-action waiver provision in the parties' arbitration agreement was invalid under the "federal substantive law of arbitrability" – i.e., the body of judicial decisions interpreting FAA § 2. App. 77a-78a (internal quotations omitted).[5]

The Second Circuit panel dismissed as inapplicable this Court's holdings that arbitration clauses are enforceable under the FAA "'"unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."'" App. 81a (quoting *Gilmer*, 500 U.S. at 26, quoting in turn *Mitsubishi*, 473 U.S. at 628). *Gilmer*, in particular, had rejected the plaintiff's argument that "'arbitration procedures cannot adequately further

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[5] All parties agreed for purposes of this litigation that the enforceability of the arbitration agreement, including the provision requiring individual arbitration, could be appropriately decided by the court, not the arbitrator. *See* App. 75a-77a.

the purposes of the [Age Discrimination in Employment Act of 1967 ("ADEA")] because they do not provide for broad equitable relief *and class actions*.'" *Id.* (quoting *Gilmer*, 500 U.S. at 32) (emphasis added).

Instead of following this Court's longstanding FAA holdings, the panel invoked *dicta* from two cases that it claimed were "somewhat closer to th[e] issue" presented. App. 84a. First, the panel construed language in *Randolph* that "'the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum'" to license federal courts to strike down class-action waivers anytime an individual claimant can show that the anticipated costs of pursuing its claim would exceed the amount of its expected recovery, regardless of the fact that such costs would be incurred whether the claim proceeded in litigation or arbitration. App. 84a, 86a (quoting *Randolph*, 531 U.S. at 90).

The panel then concluded, based on an affidavit by plaintiffs' paid litigation-costs expert, that expert witness fees would be "at least several hundred thousand dollars, and might exceed $1 million" – far higher than the average plaintiff's anticipated recovery ($5,000). App. 89a. Moreover, the panel said, "[e]ven with respect to reasonable attorney's fees, which are shifted under Section 4 of the Clayton Act, the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs." App. 91a. The panel thus concluded that *Randolph*'s "prohibitive costs" *dicta* governed because plaintiffs' "claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration." App. 93a.

Second, the panel invoked *dicta* from this Court's opinion in *Mitsubishi* suggesting that a "choice-of-law" clause that functioned as a "prospective waiver of a party's right to pursue statutory remedies for antitrust violations" might be void "against public policy." 473 U.S. at 637 n.19. The panel reasoned that provisions prohibiting class arbitration constitute such a "prospective waiver" anytime the costs of pursuing an individual claim, "whether in federal court or in arbitration," exceed the anticipated recovery for each plaintiff. App. 93a-94a. After invalidating the class-action waiver, the panel remanded the matter to allow American Express the opportunity to withdraw its motion to compel arbitration. App. 98a-99a.

4. This Court's GVR

This Court granted certiorari, vacated *Amex I*, and remanded for further consideration in light of *Stolt-Nielsen*. In *Stolt-Nielsen*, as in this case, the plaintiff sought to bring a class action alleging violations of the Sherman Act. 130 S. Ct. at 1765. The defendants sought to compel arbitration on the basis of the parties' contract, which the parties stipulated was "silent" on the availability of class arbitration. *Id.* at 1766. The arbitral panel permitted class-arbitration proceedings, accepting the plaintiff's argument that class arbitration was beneficial as a policy matter because the "vast majority" of plaintiffs had "negative value claims" that cost more to litigate than the claimant could expect to recover. *Id.* at 1770 n.7 (internal quotations omitted); *see also id.* at 1777 n.3 (Ginsburg, J., dissenting) (describing plaintiff's argument to the arbitrators that "[a]n antitrust case, particularly involving an international cartel[,] . . . is extraordinarily difficult and expensive to litigate")

(internal quotations omitted; second and third alterations in original).

This Court held that the arbitral panel had "exceeded its powers" and vacated the arbitral award under FAA § 10(a)(4). *Id.* at 1770. It held that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* at 1775. Thus, "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 1773, 1775. This Court also expressly rejected the arbitral panel's justification that class proceedings were necessary given the plaintiff's "negative value claims," describing it as an impermissible effort by the panel "to impose its own view of sound policy regarding class arbitration." *Id.* at 1767-68, 1770 & n.7 (internal quotations omitted).

5. *Amex II*

On remand, American Express argued that *Stolt-Nielsen* required enforcement of the parties' arbitration agreement *a fortiori* because it was not simply "silent" on the availability of arbitration, but expressly refused to authorize it. American Express also argued that the Court's rejection of the arbitral panel's "negative value claims" justification for imposing class arbitration foreclosed the very same rationale advanced by plaintiffs here and adopted by the panel below.

Nonetheless, the remaining panel members (Judges Pooler and Sack)[6] again refused to enforce

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[6] Justice Sotomayor was a member of the panel before her elevation to this Court.

the parties' arbitration agreement. The panel construed *Stolt-Nielsen* as a "narrow ruling on contractual construction" that only barred courts from using public policy to engraft a class-arbitration provision onto an otherwise "silent" arbitration agreement. App. 55a (internal quotations omitted). According to the panel, "nothing in *Stolt-Nielsen* bars a court from using public policy to find contractual language [in an arbitration agreement] void." *Id.* The panel concluded that, in light of *Stolt-Nielsen*'s holding that courts may not impose class arbitration on unwilling parties, *Amex I* had to be *broadened* to invalidate the parties' arbitration agreement in its entirety, not just the class-arbitration waiver provision. App. 54a.

On April 11, 2011, the court stayed its mandate pending American Express's filing of a petition for certiorari.

6. *Amex III*

On April 27, 2011, this Court held in *Concepcion* that the FAA preempts California's *Discover Bank* rule,[7] which California courts had "frequently applied . . . to find arbitration agreements unconscionable" where they did not permit class arbitration. 131 S. Ct. at 1746. The *Discover Bank* rule provided that class-action waivers in arbitration agreements are invalid if (1) "the waiver is found in a consumer contract of adhesion"; (2) "disputes between the contracting parties predictably involve small amounts of damages"; and (3) the plaintiff alleges "a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." 113 P.3d at 1110. This Court held the *Discover Bank* rule was preempted, notwithstanding the "saving clause" in

[7] *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

FAA § 2, because "conditioning the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures" "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1744, 1748.

Concepcion also specifically rejected the argument that the "prohibitive costs" facing plaintiffs with small claims could justify requiring the availability of classwide arbitration procedures as a condition for enforcing an arbitration agreement. *See id*. at 1753. Specifically, the dissenting opinion argued that California courts were entitled to decide whether to enforce prohibitions on class arbitration because "agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate." *Id.* at 1760 (Breyer, J., dissenting); *see id.* at 1753 (noting dissent's argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system"). But the majority squarely rejected the dissent's argument as a justification for the *Discover Bank* rule. *See id.*

The Second Circuit *sua sponte* granted rehearing to consider the impact of *Concepcion*. American Express argued that *Concepcion* unequivocally addressed the question the Second Circuit panel had thought left open by *Stolt-Nielsen*, by holding that courts cannot condition the enforcement of arbitration agreements on the availability of class-arbitration proceedings and, moreover, by rejecting the Second Circuit's "prohibitive costs" justification for imposing such a condition.

On February 1, 2012, the panel held that "*Concepcion* does not alter [its] analysis." App. 3a. It

narrowly construed *Concepcion* as merely "offer[ing] a path for analyzing whether a state contract law is preempted by the FAA," whereas its decision rested on "'a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability.'" App. 16a (quoting *Amex I*, App. 96a). According to the panel, *Concepcion* and *Stolt-Nielsen* merely stand "for the principle that parties cannot be forced to arbitrate disputes in a class-action arbitration"; they do not foreclose courts from invalidating arbitration agreements due to the absence of class-arbitration provisions. App. 16a-17a.

Thus, for the third time, the panel held that arbitration agreements providing for bilateral but not class arbitration are "unenforceable" if the claimant can demonstrate that "the cost of . . . individually arbitrating their dispute . . . would be prohibitive," even though the costs at issue would be incurred whether the claim was brought in litigation or arbitration. App. 25a, 28a (internal quotations omitted). The panel reversed the district court and remanded with instructions to deny American Express's motion to compel arbitration. App. 30a.

On May 29, 2012, the Second Circuit denied rehearing *en banc* over the dissenting votes of five circuit judges. *See supra* note 1.

SUMMARY OF ARGUMENT

I.A. The decision below violates this Court's long-standing holding that arbitration agreements must be enforced as written "unless Congress itself has evinced an intention to preclude" the agreement. *Mitsubishi*, 473 U.S. at 628. That principle applies both to parties' decision to arbitrate, as well as to the procedures the parties choose to govern their arbitration. In the context of plaintiffs' antitrust claims, the Second Circuit was not authorized to override the parties' choice of bilateral rather than class arbitration in "the absence of any explicit support for such an exception in either the Sherman Act or the [FAA]." *Id.* at 628-29.

The decision below should be reversed because it is undisputed that nothing in either statute evinces any intention by Congress to preclude agreements to arbitrate on a bilateral basis. Nothing in either statute's text demands class proceedings under any circumstances. Moreover, the history of both statutes forecloses any conclusion that Congress insisted on class procedures, even for modest-value claims. Indeed, when Congress passed the Sherman Act in 1890, at a time when class actions were not available in lawsuits for damages, it specifically rejected a proposed amendment to create a class-action device to facilitate small antitrust claims. Likewise, the concept of class arbitration did not exist when Congress enacted the FAA in 1925.

B. This Court's decision in *Concepcion* confirms that reversal is warranted. *Concepcion* categorically held that "conditioning the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures" – which is precisely what the Second Circuit did here – is "inconsistent with the FAA." 131 S. Ct. at 1744, 1748. Just like the *Discover*

Bank rule held preempted in *Concepcion*, the decision below frustrates the FAA because it requires defendants to accept class arbitration, which lacks the benefits of bilateral arbitration, or else abandon arbitration altogether. Indeed, the decision below undermines bilateral arbitration in even more cases than California's *Discover Bank* rule.

Concepcion also forecloses the "prohibitive costs" or "vindication of statutory rights" rationale adopted by the Second Circuit. That rationale is materially indistinguishable from the one adopted by *Discover Bank* and advocated by the *Concepcion* dissent. But this Court squarely rejected it, holding the *Discover Bank* rule inconsistent with the FAA "even if" "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." *Id.* at 1753. *Concepcion*'s holding is consistent with *Stolt-Nielsen*, which rejected the arbitrators' adoption of that same public policy argument in the context of federal antitrust claims. *See* 130 S. Ct. at 1770 n.7.

The Second Circuit's "labored" efforts to "evad[e]" *Concepcion* are meritless. App. 143a (Jacobs, J.). *Concepcion* did not merely hold that courts are prohibited from literally imposing class arbitration on unwilling parties. It explicitly held that conditioning the enforcement of arbitration agreements on the availability of class actions frustrates the FAA no less than actually requiring it. *See* 131 S. Ct. at 1751. Moreover, *Concepcion* held the *Discover Bank* rule preempted in all cases, and it thus cannot be read to be limited to cases involving state-law claims.

II. The Second Circuit panel's "selective quotation from Supreme Court dicta" in *Randolph* and *Mitsubishi* provides no basis for its disregard of *Concepcion*. App. 141a (Jacobs, J.).

A. The argument pressed in *Randolph* was that costs associated with access to the arbitral forum that would not be required to sue in court – e.g., filing fees, arbitrator's fees, and other administrative fees – warranted invalidating the arbitration agreement. *Randolph* found it unnecessary to address that question, given the absence of any record evidence of such costs. Whether or not *Randolph*'s *dicta* would ever suggest the crafting of a judicial exception to enforcement of the FAA, it certainly did not authorize lower courts to invalidate arbitration agreements on the ground that litigation costs generally, as opposed to costs of the arbitral forum, would make it uneconomical to bring a claim. Nor can *Randolph*'s *dicta* be read to authorize courts to invalidate arbitration agreements based on the absence of class procedures, given that the Court expressly declined to address that issue.

B. This Court's "effective vindication" *dicta* in *Mitsubishi* also have no applicability here. The concern addressed in *Mitsubishi* was that arbitrators might refuse to apply substantive American antitrust law to the parties' dispute. That concern is wholly absent here, because it is undisputed that the Sherman Act will govern the parties' arbitration. Moreover, *Mitsubishi*'s *dicta* did not authorize courts to demand class-arbitration procedures on grounds of federal policy. Rather, as this Court's subsequent decisions make clear, as long as the arbitrators will apply federal substantive law, bilateral arbitration of federal claims "satisfies the statutory prescription of civil liability in court." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 671 (2012).

III. The Second Circuit panel erred in imposing its own pro-class-action policy judgments rather than adhering to Congress's mandate to enforce the

parties' agreement. Respondents' policy concerns are properly addressed to Congress, not the courts. Moreover, the Second Circuit's policy judgment was inappropriately one-sided and therefore betrayed the same judicial hostility toward arbitration that the FAA was designed to eliminate.

A. The Second Circuit ignored the demonstrated benefits of bilateral arbitration in facilitating resolution of claims. Empirical studies bear out Congress's judgment that bilateral arbitration reduces the costs of dispute resolution and thus is particularly beneficial to claimants seeking modest damages. Moreover, arbitration's cost savings benefit consumers and employees in the form of lower prices and higher wages. The Second Circuit erred by assuming, contrary to Congress's judgment, that bilateral arbitration lacked the flexibility to vindicate federal statutory claims in a cost-effective way.

B. At the same time, the Second Circuit focused exclusively on the perceived policy benefits of class proceedings, while ignoring its serious policy disadvantages. Aggregation of claims does not merely allow plaintiffs to share costs. As Congress and this Court have repeatedly stated, aggregation also can distort the underlying substantive law by creating hydraulic pressure to settle even meritless claims. *See infra* pp. 30-31, 53-55. It is Congress's prerogative to weigh these policy considerations and limit bilateral arbitration where it deems appropriate. It indisputably has not done so here. The Second Circuit exceeded its proper role under the FAA by invalidating the parties' arbitration agreement on the basis of its own one-sided policy preferences.

ARGUMENT

I. THE DECISION BELOW VIOLATES THE FAA'S CORE MANDATE THAT ARBITRATION AGREEMENTS BE ENFORCED IN ACCORDANCE WITH THEIR TERMS

A. The Second Circuit Ignored the FAA's Requirement That the Parties' Choice of Arbitration Procedures Be Enforced Unless Congress Has Precluded Them

1. This Court should reverse the decision below because it is "incompatible with the longstanding principle of federal law, embodied in the FAA and numerous Supreme Court precedents, favoring the validity and enforceability of arbitration agreements." App. 141a (Jacobs, J.). The Second Circuit's invalidation of the parties' arbitration agreement on the basis of their decision to forgo class proceedings violates what this Court has repeatedly described as "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 (quoting *Volt*, 489 U.S. at 479).

Under the FAA, "parties are generally free to structure their arbitration agreements as they see fit." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (internal quotations omitted). "[T]he FAA lets parties tailor . . . many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law." *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008).

Parties that choose an arbitral forum do so principally to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informal-

ity, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628. Thus, the parties' freedom to fashion their own arbitration agreements includes not only the ability to define "by contract the issues which they will arbitrate," but also the right to delineate the procedural "rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479. For example, the parties are free to waive their right to a jury trial, or to the application of the Federal Rules of Evidence, in exchange for the "relative informality of arbitration." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009) (holding that such informality is "not a basis for finding the forum somehow inadequate"); *see Concepcion*, 131 S. Ct. at 1747 (stating that courts may not override parties' choice to waive jury trial or the Federal Rules of Evidence).

The parties' choice to pursue bilateral rather than class arbitration is precisely the type of procedural decision that the FAA leaves in the hands of the parties. That choice does not affect the scope of the parties' substantive remedies; it "affect[s] only the procedural means by which the remedy may be pursued." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1439 (2010); *accord id.* at 1443 (plurality) (calling it "obvious" that class procedures "neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed"). Accordingly, when parties specify "*with whom* they choose to arbitrate their disputes" – in this case, by providing for arbitration solely on a bilateral basis – the FAA requires that courts enforce the parties' choice in accordance with the terms of the agreement. *Stolt-Nielsen*, 130 S. Ct. at 1774-75; *see also Concepcion*, 131 S. Ct. at 1749; *EEOC v. Waffle House, Inc.*, 534

U.S. 279, 289 (2002) ("[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, *or by any parties*, that are not already covered in the agreement.") (emphasis added). Indeed, as this Court observed in *Concepcion*, the choice between bilateral and class arbitration is a "'fundamental'" one due to the stark differences between those two procedures for dispute resolution. 131 S. Ct. at 1750 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1776); *see infra* pp. 29-31.

The FAA forbids courts or arbitrators from overriding the parties' choice of bilateral rather than class procedures based merely on "judicial policy concern" about the effectiveness of arbitration. *Pyett*, 556 U.S. at 270; *see also Stolt-Nielsen*, 130 S. Ct. at 1769 (holding that arbitrators also may not impose their "own conception of sound policy"). Rather, arbitration agreements must be enforced by their terms "*unless Congress itself* has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi*, 473 U.S. at 628 (emphasis added); *accord Randolph*, 531 U.S. at 90; *Gilmer*, 500 U.S. at 26; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987) (FAA "mandates enforcement of agreements to arbitrate statutory claims," unless the mandate is "overridden by a contrary congressional command"). Thus, here, the FAA required that parties' procedural choice to pursue bilateral rather than class arbitration be enforced absent evidence in either the FAA or the Sherman Act that Congress intended to preclude that choice.

2. The Second Circuit panel disregarded these basic principles. It erred in invalidating the parties' agreement because nothing in either the FAA or the Sherman Act evinces any intent by Congress to

preclude parties from agreeing not to pursue class proceedings. Congress's core purpose in enacting the FAA was to promote *bilateral* arbitration, not class arbitration, as a means to facilitate cost-effective resolution of individual claims – including, specifically, claims asserting modest damages. *See*, *e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (emphasizing the importance of bilateral arbitration to employment disputes, which "often involve[] smaller sums of money"); *see also supra* pp. 4-5 (discussing FAA's purposes).

Congress did not even contemplate class arbitration when it enacted the FAA in 1925. *See Concepcion*, 131 S. Ct. at 1751. Class arbitration was a judicial innovation of the California state courts in the early 1980s – more than half a century later. *See supra* note 3. Moreover, Congress enacted the FAA against the backdrop of a pre-Federal Rules regime in which class actions for damages were not permitted in suits at law. Given that class-arbitration procedures were not even envisioned by Congress when it enacted the FAA, the Act cannot reasonably be interpreted to preclude parties from forgoing class-arbitration proceedings. *See supra* p. 5.

Nor does the Sherman Act reflect any congressional intent to preclude agreements to arbitrate antitrust claims on a bilateral basis. Like the FAA, nothing in the Sherman Act's text precludes parties from forgoing class arbitration. *See CompuCredit*, 132 S. Ct. at 673 (holding that "the FAA requires the arbitration agreement to be enforced according to its terms" if the federal statute is "silent on whether claims under the Act can proceed in an arbitrable forum"); *cf. Gilmer*, 500 U.S. at 32 ("*[E]ven if the arbitration could not go forward as a class action*

or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.") (internal quotations omitted; emphasis added; second alteration in original).

The Sherman Act's history, moreover, belies any intent to insist on class arbitration. Like the FAA, the Sherman Act was passed before the Federal Rules made class actions available in damages suits. As discussed above, moreover, Congress rejected a proposal to adopt a class-action mechanism to address the problem of small-damages antitrust claims. *See supra* pp. 6-7. The Sherman Act thus 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 lawsuits and government enforcement. Given that Congress rejected class proceedings, even in the context of claims involving small damages, it certainly could not have intended to preclude parties from agreeing contractually to forgo class proceedings.

The Second Circuit viewed the parties' bilateral arbitration agreement as incompatible with the Sherman Act because it equated bilateral arbitration with the waiver of *substantive* relief under the Act. App. 27a. As discussed below, that premise itself discriminates against arbitration, because it assumes, contrary to Congress's judgment and this Court's decisions, that bilateral arbitration is incapable of "properly handl[ing] an antitrust matter" and "keep[ing] the effort and expense required to resolve a dispute

within manageable bounds." *Mitsubishi*, 473 U.S. at 633-34; *see infra* pp. 49-53.

Moreover, in equating the choice of bilateral arbitration with the waiver of substantive antitrust remedies, the Second Circuit panel ignored what this Court has recognized as the fundamental difference between eliminating liability and changing the procedures by which liability is enforced. The Court's opinion in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,* 515 U.S. 528 (1995), is instructive. There, the arbitration clause in a maritime contract between the parties (a shipper and the owner of cargo damaged on the ship) provided for arbitration to occur in Japan. The Carriage of Goods by Sea Act ("COGSA"), which governs the rights and duties of shippers and cargo owners, provides that "[a]ny clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage . . . or lessening such liability . . . shall be null and void and of no effect." 46 U.S.C. app. § 1303(8) (1994). The cargo owner in *Vimar Seguros* resisted enforcement of the arbitration agreement under the FAA on the ground that the "inconvenience and costs of proceeding in Japan would 'lesse[n] . . . liability' as those terms are used in COGSA." 515 U.S. at 532 (alterations in original); *see id.* at 533 ("The first [argument] is that a foreign arbitration clause lessens COGSA liability by increasing the transaction costs of obtaining relief.").

This Court rejected that argument. It held that COGSA did not preclude selection of a foreign arbitral forum and that there was therefore no conflict between COGSA and the FAA. COGSA, the Court held, "addresses the lessening of the specific liability imposed by the Act, without addressing the separate

question of the means and costs of enforcing that liability." *Id.* at 534. "The difference," the Court said, "is that between explicit statutory guarantees and the procedure for enforcing them, between applicable liability principles and the forum in which they are to be vindicated." *Id.* Thus, it held enforcement of the arbitration agreement under the FAA fully consistent with COGSA. *See id.* at 541 ("[T]he FAA and COGSA may be given full effect."); *see also CompuCredit*, 132 S. Ct. at 671 (distinguishing between procedural choices and substantive guarantees – "*the guarantee of the legal power to impose liability*"); *Pyett*, 556 U.S. at 265-66 (distinguishing "a prospective waiver of the substantive right" from a waiver of the procedural right to proceed in court).

The distinction between procedural choices and substantive remedies is critical to the FAA's mandate that parties be "free to structure their arbitration agreements as they see fit." *Mastrobuono*, 514 U.S. at 57 (internal quotations omitted). "Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants." *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 445 (1946); *accord Shady Grove*, 130 S. Ct. at 1442 (plurality) (noting that "most procedural rules" "affect[] a litigant's substantive rights" in the sense that they change "the manner and the means by which the litigants' rights are enforced") (internal quotations omitted). But "[i]t would be unwieldy and unsupported by the terms or policy of the statute to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the [party]." *Vimar Seguros*, 515 U.S. at 536.

The distinction between substantive liability and procedures for dispute resolution is dispositive of this case: the parties' arbitration agreement here did not purport to lessen American Express's liability under the Sherman Act or any substantive laws. It merely changed "the procedure for enforcing them." *Id.* at 534; *see also Shady Grove*, 130 S. Ct. at 1439 (holding that class actions do not affect a party's remedies, but only "the procedural means by which the remedy may be pursued"). And nothing in the FAA or the Sherman Act "suggests that the statute prevents the parties from agreeing to enforce [its] obligations in a particular forum" or that it requires particular "mechanisms for their enforcement." *Vimar Seguros*, 515 U.S. at 535. Thus, under this Court's settled precedents, the Second Circuit was required to enforce the parties' arbitration agreement, including its provision for bilateral rather than classwide procedures, "in accordance with the terms of the agreement." 9 U.S.C. § 4.

B. The Second Circuit's Decision Contravenes *Concepcion*

Concepcion dictates reversal here because, consistent with this Court's FAA jurisprudence, it forbade courts from doing exactly what the Second Circuit panel did here – refuse to enforce an arbitration agreement on the ground that it precluded classwide arbitration procedures. *See Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158 (9th Cir. 2012) (recognizing that *Concepcion* "is broadly written" to preclude courts from "'conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures'") (quoting 131 S. Ct. at 1744). The Second Circuit's efforts to distinguish *Concepcion* were, as Chief Judge Jacobs stated in his dissent from

denial of rehearing *in banc*, legal contortions designed to "evad[e] the broad language and clear import" of this Court's decision. App. 143a.

1. The decision below is incompatible with *Concepcion*. The question in *Concepcion* was whether the FAA allows state courts to "condition[] the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." 131 S. Ct. at 1744. The Court unambiguously held that it does not: such a condition "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748. As a result, it held that California's *Discover Bank* rule, which California courts had "frequently applied . . . to find arbitration agreements unconscionable" where such agreements precluded class arbitration, conflicted with, and was therefore preempted by, the FAA. *Id.* at 1746. In doing so, it held that the *Discover Bank* rule was not spared from preemption by § 2's "saving clause" because that clause did not "preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 1748.

This Court's holding in *Concepcion* requires reversal of the decision below. That holding was rooted in conflict preemption – the conclusion that the *Discover Bank* rule, by "conditioning the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures," "[stood] as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 1744, 1748. The Court's conflict preemption holding leads inescapably to the conclusion that the FAA also precludes *federal* courts from crafting a judge-made rule that interferes with the Act's objectives in the same way. Because the decision below, just like the *Discover Bank* rule, "condition[s] the enforce-

ability of certain arbitration agreements on the availability of classwide arbitration procedures," it is "inconsistent with the FAA" and thus cannot be a proper interpretation of its pro-arbitration provisions. *Id.*

The Second Circuit panel asserted that its rule was authorized by the "federal substantive law of arbitrability" as a means of assuring that the plaintiff in a particular case could "vindicat[e] [its] statutory rights." App. 16a (internal quotations omitted). But the "federal substantive law of arbitrability" is simply the "body of federal substantive law" interpreting and effectuating FAA § 2, the statute's "primary substantive provision"; and nothing in that body of law suggests that it is appropriate for courts to create *exceptions* to the FAA based on their view of the policy of other federal laws. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24; *see also* App. 77a-78a. The "federal substantive law of arbitrability" does not allow courts to promulgate judge-made rules that *frustrate* the FAA's purposes, on the theory that doing so might advance the purpose of some other federal law. *See Concepcion*, 131 S. Ct. at 1748 (FAA cannot be interpreted so as "to destroy itself") (internal quotations omitted). On the contrary, just as *Concepcion* held that the FAA preempts state-law rules that insist on class arbitration as a condition of enforcement, any judicially crafted parallel federal rule likewise is contrary to the "federal substantive law of arbitrability."

The holding of the court below interferes with the FAA's policies in the same way as the *Discover Bank* rule held preempted in *Concepcion*. As this Court observed in *Concepcion*, the choice between bilateral and class arbitration is a "'fundamental'" one due to

the stark differences between those two procedures for dispute resolution. 131 S. Ct. at 1750 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1776). "[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1751. "[B]efore an arbitrator may decide the merits of a claim in classwide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted." *Id.* "And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties." *Id.* at 1750.

Further, "[c]lasswide arbitration includes absent parties, necessitating additional and different procedures." *Id.* "Confidentiality becomes more difficult" because of the need for notice to absent class members. *Id.* Due process also requires that absent class members be given "an opportunity to be heard, and a right to opt out of the class." *Id.* at 1751.

Class arbitration also "greatly increases risks to defendants" because the absence of judicial review "makes it more likely that errors will go uncorrected." *Id.* at 1752. While parties may agree to accept that risk in exchange for the lower costs and increased efficiency of arbitration in the context of an individual dispute, that risk of error "will often become unacceptable" to the parties when "damages allegedly owed to tens of thousands of potential

claimants are aggregated and decided at once." *Id.* "Faced with even a small chance of a devastating loss, defendants will be pressured into . . . 'in terrorem' settlements" of even meritless claims. *Id.*; *see also Stolt-Nielsen*, 130 S. Ct. at 1775-76; *Shady Grove*, 130 S. Ct. at 1465 n.3 (Ginsburg, J., dissenting) ("A court's decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims."); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

As a result of these fundamental differences, insistence on class arbitration as a condition to enforcing the parties' arbitration agreement interferes with the FAA because it "will have a substantial deterrent effect on incentives to arbitrate." *Concepcion*, 131 S. Ct. at 1752 n.8. Indeed, faced with the unbargained-for choice between accepting class procedures in arbitration and defending class-action litigation in court, defendants predictably will abandon arbitration altogether. Real-world experience proves that this deterrent effect is severe.[8]

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[8] For example, in light of *Discover Bank*, certain corporations abandoned arbitration for California residents altogether. *See* Br. for Pet'rs 55-56, *Concepcion*, No. 09-893 (U.S. filed Aug. 2, 2010), 2010 WL 3017755 (citing Comcast residential services agreement); Verizon Wireless Customer Agreement, *at* http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp (**"If for some reason the prohibition on class arbitrations . . . cannot be enforced, then the agreement to arbitrate will not apply."**). After *Concepcion*, Comcast resumed agreeing to arbitrate with California residents. *See* http://www.comcast.com/Corporate/Customers/Policies/SubscriberAgreement.html.

In fact, the Second Circuit's rule interferes with the FAA even more than the *Discover Bank* rule held preempted in *Concepcion*, because it would lead to the invalidation of far more arbitration agreements. The *Discover Bank* rule was limited to circumstances: (1) where "'the waiver is found in a consumer contract of adhesion'"; (2) "'in a setting in which disputes between the contracting parties predictably involve small amounts of damages'"; and (3) "'when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.'" *Id.* at 1746 (quoting *Discover Bank*, 113 P.3d at 1110).

As to the second factor, this Court noted – with evident skepticism – that courts had deemed individual claims as large as $4,000 sufficiently "small" to satisfy *Discover Bank*. *Id.* at 1750 (calling the small-damages limitation "toothless" and "malleable"). By contrast, the Second Circuit here found that respondents' claims were prohibitively expensive because the cost of an expert economist's antitrust study would be "at least several hundred thousand dollars," and maybe even more than $1 million. App. 89a. The Second Circuit apparently would deem any individual claim asserting damages less than that amount uneconomical, thus effectively precluding bilateral arbitration of all but the most massive individual antitrust claims.

Beyond antitrust cases, litigation of all kinds often is costly, and it is all too easy for plaintiffs' lawyers to "avoid arbitration by hiring a consultant (of which there is no shortage) to opine that expert costs would outweigh a plaintiff's individual loss." App. 137a (Jacobs, J.). Indeed, at least one plaintiffs' organi-

zation has posted a model expert affidavit on its website, to be used as a boilerplate for claimants trying to evade bilateral arbitration agreements. *See* Public Justice, *Helpful Post-Concepcion court rulings*, *at* http://publicjustice.net/case-documents/concepcion (visited Dec. 3, 2012).

Moreover, the Second Circuit did not require a showing that "the waiver [was] found in a consumer contract of adhesion" or that American Express had "superior bargaining power" and "carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Discover Bank*, 113 P.3d at 1110. Rather, the Second Circuit's rule allows any plaintiff, no matter how sophisticated or well-funded, to invalidate bilateral arbitration agreements in any contract, no matter how even-handed its terms. The Second Circuit's reasoning thus will enable the invalidation of bilateral arbitration for a vast number of claims.

The decision below also undermines the key benefits of *all* arbitration agreements – even those that withstand challenge – by turning the threshold arbitrability question into a detailed inquiry into the merits. Under the decision below, any arbitration in which plaintiffs seek class treatment will be subject to protracted proceedings in district court and "be litigated there on the merits in many critical respects." App. 139a (Jacobs, J.). As Chief Judge Jacobs recognized, the "economic feasib[ility]" of an individual claim cannot be assessed "[w]ithout a close inquiry into the merits" of the claim. App. 138a-139a (internal quotations omitted). For example, "[w]hether a dispute may require expert testimony is a question inseparable from the merits (and raises *Daubert* and other vexed questions)." App. 139a. Nor can the

feasibility of a claim be assessed without delving into "such prior questions as the statute of limitations and laches, controlling law, [and] res judicata, . . . not to mention . . . whether the putative class is duly constituted and properly represented, without which there is no class claim." *Id.* Thus,

> [e]ven if arbitration is given a green light at the end of the judicial proceeding, the party seeking to arbitrate may have already spent many times the cost of an arbitral proceeding just enforcing the arbitration clause. . . . The predictable upshot is that *Amex III* will render arbitration too expensive and too slow to serve any of its purposes.

App. 139a-140a; *accord Vimar Seguros*, 515 U.S. at 533.

In sum, "*Amex III* is a broad ruling that, in the hands of class action lawyers, can be used to challenge virtually every consumer arbitration agreement that contains a class-action waiver – and other arbitration agreements with such a clause." App. 137a (Jacobs, J.). Given that the Second Circuit's rule would frustrate the FAA's core purposes in a broader range of cases than the *Discover Bank* rule, the decision below cannot be a proper interpretation of the FAA in light of *Concepcion*.

2. *Concepcion* also squarely rejected the Second Circuit panel's "prohibitive costs" or "vindication of rights" justification for conditioning enforcement of arbitration agreements on the availability of class-wide arbitration procedures. As noted above, the dissenting opinion in *Concepcion* made the same argument urged by respondents and accepted by the panel below: that the *Discover Bank* rule was justified because "class proceedings are necessary to prosecute small-dollar claims that might otherwise

slip through the legal system." 131 S. Ct. at 1753.[9] The dissent's argument echoed the California Supreme Court's decision in *Discover Bank*, which reasoned that class actions are "inextricably linked to the vindication of substantive rights," and thus class-arbitration waivers are unconscionable "to the extent they operate to insulate a party from liability." 113 P.3d at 1109. But this Court specifically rejected the dissent's argument, because "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 131 S. Ct. at 1753. This Court also rejected the argument that California's "policy against exculpation" justified the *Discover Bank* rule. *Id.* at 1746.

The Court in *Concepcion* also noted that the plaintiffs' claims in that case were "most unlikely to go unresolved" because of particular provisions of AT&T's arbitration clause. *Id.* at 1753. But that observation did not limit the Court's unequivocal holding. The previous sentence of the Court's opinion is clear: the FAA precludes conditioning enforcement of arbitration provisions on the availability of class proceedings, "*even if* [class arbitration] is desirable for unrelated reasons." *Id.* (emphasis added). Moreover, that unequivocal reading is the only sensible one given the Court's categorical declaration in the ensuing paragraph that the *Discover Bank* rule is "preempted by the FAA" in *all* of its applications. *Id.* If the Court had agreed with the dissent's policy argument – that bilateral arbitration is *consistent* with the FAA only in cases where it is "unlikely" that claims will "slip through the legal

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[9] *See Concepcion*, 131 S. Ct. at 1760-61 (Breyer, J., dissenting).

system" – it would necessarily have held the *Discover Bank* rule preempted only in those cases. It did not.

Concepcion's unqualified rejection of the dissent's policy arguments is bolstered by *Stolt-Nielsen*, which also rejected the same policy arguments – significantly, in the context of Sherman Act claims. There, the arbitral panel permitted class arbitration despite the absence of any agreement by the parties, in part because it viewed class proceedings as necessary given that AnimalFeeds itself and "the 'vast majority' of the claimants against [Stolt-Nielsen] 'ha[d] negative value claims meaning it costs more to litigate than you would get if you won.'" 130 S. Ct. at 1770 n.7 (ellipsis omitted). This Court rejected that argument, holding that the arbitral panel "exceeded its powers" under FAA § 10(a)(4) by "impos[ing] its own policy choice" rather than enforcing the terms of the parties' agreement. *Id.* at 1770; *see also id.* at 1767 (noting that vacatur of an arbitral award under § 10(a)(4) is appropriate "only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice") (internal quotations and alterations omitted).

Concepcion and *Stolt-Nielsen* thus make clear that, whatever the policy arguments in favor of class arbitration in reducing the transaction costs of claims (whether based on state law, as in *Concepcion*, or federal law, as in *Stolt-Nielsen*), the FAA precludes courts from using those policy considerations to condition the enforceability of arbitration agreements on the availability of a fundamentally different procedure to which the parties never agreed.

3. The Second Circuit panel gave two reasons for refusing to apply *Concepcion* as controlling precedent in this case. Neither has merit.

First, the panel construed *Concepcion* as standing only "for the principle that parties cannot be *forced* to arbitrate disputes in a class-action arbitration." App. 16a-18a (emphasis added). In the panel's view, the invalidation of the parties' arbitration clause did not run afoul of *Concepcion* because it did not "order[] the parties to participate in class arbitration." App. 17a.

That interpretation of *Concepcion* is at odds with the plain language of this Court's decision. *See* App. 143a (Jacobs, J.) (stating that the panel "evad[ed] the broad language and clear import" of *Concepcion*). This *Concepcion* Court stated in no uncertain terms that the *Discover Bank* rule was preempted even though it "does not *require* classwide arbitration." 131 S. Ct. at 1750. As this Court explained, conditioning the enforceability of arbitration agreements on the availability of class arbitration frustrates the FAA's core purposes no less than actually requiring class arbitration, because it allows plaintiffs to insist on class arbitration *ex post*. *See id.* Any such *ex post* demand predictably will lead defendants to forgo arbitration altogether because of the "fundamental" "changes brought about by the shift from bilateral arbitration to class-action arbitration." *Id.* (internal quotations omitted). Plainly, *Concepcion* not only precludes rules that literally compel parties to engage in class arbitration but also forecloses the outcome the panel reached here – refusing to enforce an arbitration agreement because it does not permit classwide arbitration. *See id.* at 1744. Either way,

the courts are improperly refusing to enforce the parties' own agreement.

Second, the panel said that *Concepcion* addressed solely "whether a state contract law is preempted by the FAA" and did not affect the panel's "'vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability.'" App. 16a (quoting *Amex I*, App. 96a). As Chief Judge Jacobs noted, that "labored analysis does not rise to a distinction, and treats the reasoning of *Concepcion* as an obstacle to be surmounted or evaded." App. 143a. While *Concepcion* addressed preemption because it dealt with a state-law rule, its holding – that conditioning the enforceability of arbitration agreements on the availability of arbitration is "inconsistent with the FAA," 131 S. Ct. at 1748 – rested on an interpretation of FAA § 2. That same interpretation governs the "federal substantive law of arbitrability," which is just the body of law implementing § 2.[10] Thus, *Concepcion*'s holding that the FAA preempts California's *Discover Bank* rule forecloses lower courts from interpreting the "federal substantive law of arbitrability" to achieve a result that is equally "inconsistent with the FAA." *Id.*; *see supra* pp. 28-29.

The panel appeared to conclude that *Concepcion* simply does not apply where a plaintiff asserts federal-law rather than state-law claims. App. 16a. But that distinction finds no basis in *Concepcion*. Nowhere did this Court suggest that its holding was

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[10] *See also* App. 55a (recognizing, prior to *Concepcion*, that *Amex II* was just a "different iteration" of the Second Circuit's state-law unconscionability holding in *Fensterstock v. Education Finance Partners*, 611 F.3d 124 (2d Cir. 2010), which *Concepcion* abrogated in *Affiliated Computer Services, Inc. v. Fensterstock*, 131 S. Ct. 2989 (2011)).

contingent on the state-law nature of the Concepcions' claims. 131 S. Ct. at 1748. Indeed, the *Discover Bank* rule had been applied to invalidate bilateral arbitration of federal statutory claims, including Sherman Act claims. *See*, *e.g.*, *In re Apple & AT&TM Antitrust Litig.*, 596 F. Supp. 2d 1288 (N.D. Cal. 2008). *Concepcion* was categorical in holding that the *Discover Bank* rule – without limitation – was "inconsistent with the FAA." 131 S. Ct. at 1748; *see also In re Apple & AT&TM Antitrust Litig.*, No. C 07-05152 JW, 2011 WL 6018401, at *4 (N.D. Cal. Dec. 1, 2011) (rejecting plaintiffs' argument that *Concepcion* did not apply to federal antitrust claims and reversing its prior decision not to compel arbitration).

The panel's effort to limit *Concepcion* to state-law claims also contradicts this Court's repeated holdings that the FAA applies with full force to federal statutory claims. This Court reiterated that principle just last Term, holding that "contractually required arbitration of claims satisfies the statutory prescription of civil liability in court." *CompuCredit*, 132 S. Ct. at 671. Accordingly, the FAA "requires courts to enforce agreements to arbitrate according to their terms . . . *even when the claims at issue are federal statutory claims*, unless the FAA's mandate has been overridden by a contrary congressional command." *Id.* at 669 (internal quotations omitted; emphasis added).[11] As discussed above, not only does the Sherman Act lack any such directive, but Congress specifically

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[11] The panel's view that it was at liberty to refuse to enforce an arbitration agreement where it thought that doing so would lead to better "vindication of [federal] statutory rights" (App. 16a (internal quotations omitted)) thus reflects just the same sort of "judicial hostility to arbitration" that this Court sought to eliminate when it overruled *Wilko*. *See supra* p. 6.

rejected a class-action-type mechanism when it enacted the Sherman Act in 1890. The federal nature of respondents' antitrust claims thus provides no justification for the panel's disregard of *Concepcion*.

Finally, the Second Circuit's effort to limit *Concepcion* to state-law claims would lead to absurd and unworkable results. Plaintiffs often bring claims under parallel state and federal statutes, and virtually any complaint can be artfully pled to include at least one federal-law claim. The decision below would lead to enormous inefficiency, by requiring duplicative proceedings in separate forums of state-law and federal-law claims arising out of the same facts. It would be particularly absurd, for example, to refuse to enforce an agreement for bilateral arbitration of a federal antitrust claim while a substantively identical Cartwright Act claim, Cal. Bus. & Prof. Code § 16700 *et seq.*, is subject to bilateral arbitration. The Second Circuit's distinction is not only legally untenable but also practically unworkable.

II. THE SECOND CIRCUIT PANEL DISTORTED THIS COURT'S DECISIONS IN *RANDOLPH* AND *MITSUBISHI*

Rather than follow the plain language of the FAA and this Court's precedents, the panel below relied on "selective quotation from Supreme Court dicta" in *Randolph* and *Mitsubishi*. App. 141a (Jacobs, J.). None of those *dicta* supports the Second Circuit's sweeping new exception to the FAA.

A. This Court's "Prohibitive Costs" *Dicta* in *Randolph* Related Only to the Costs of Access to the Arbitral Forum

First, the panel relied on "distortion of dicta from [*Randolph*]." App. 143a (Jacobs, J.). In *Randolph*, the plaintiff (Randolph) alleged that Green Tree

violated the federal Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, by failing to disclose a $15 charge for "vendor's single interest" insurance on her Truth in Lending statement. 531 U.S. at 83. In resisting arbitration, the plaintiff argued that the agreement's failure to specify which party would bear the costs of arbitration created a "risk" that she would "be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum." *Id.* at 89-90. Reversing the Eleventh Circuit, which had accepted Randolph's argument, this Court held that "the arbitration agreement's silence on the subject [of arbitration costs] . . . is plainly insufficient to render it unenforceable." *Id.* at 91.

In *dicta*, *Randolph* commented that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." *Id.* at 90. But *Randolph*'s reference to "large *arbitration* costs" does not support the Second Circuit's decision in this case because it was not a reference to any and all costs, whether in arbitration or litigation. It referred to filing fees, arbitrator's fees, and other administrative fees imposed by the arbitral forum that would not be required to sue in court. *See id.* at 89 (referring to "the costs *of arbitration*") (emphasis added); *id.* at 90 & n.6 (referring to the "filing fee," "arbitrator's fee," and "administrative fees") (internal quotations omitted). The dissenting opinion also shared this understanding of the issue. *See id.* at 93 (Ginsburg, J., concurring in part and dissenting in part) (describing the question raised by plaintiff's challenge as one of "access[]" – i.e., "who pays for the arbitral forum"). So did the court of appeals. *See Randolph v. Green Tree Fin. Corp. – Alabama*, 178

F.3d 1149, 1158 (11th Cir. 1999) (invalidating arbitration agreement based on "filing fees, arbitrators' costs and other arbitration expenses that may curtail or bar a plaintiff's access to the arbitral forum").

In other words, *Randolph*'s *dicta* related to the extra "price of admission" that a plaintiff has to pay a private arbitrator that would not be required to sue in court. App. 144a (Jacobs, J.). It did not authorize lower courts to invalidate arbitration agreements, on the ground that litigation costs generally, as distinguished from the specific costs of accessing an arbitral forum, would make it uneconomical to bring an individual claim.[12]

Virtually every other federal circuit has adopted this limited reading of *Randolph*'s "prohibitive costs" *dicta*. Except for the court below, and possibly *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006),[13] every circuit to apply *Randolph* has done so exclusively in analyzing the enforceability of "cost-splitting," "fee-sharing," and other arbitration provisions requiring the plaintiff to pay all or part of the

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[12] Plaintiffs here have never contended – much less demonstrated – they would bear prohibitive filing fees, arbitrators' fees, or other costs to access the arbitral forum that they would not have to bear in court. *See Randolph*, 531 U.S. at 90 & n.6 (dismissing challenge because "record d[id] not show" plaintiff would bear excessive arbitration costs).

[13] *Kristian* referred to *Randolph* in holding that a class-arbitration waiver was unenforceable. In contrast, however, the First Circuit in *Awuah v. Coverall North America, Inc.*, 554 F.3d 7, 12, 13 (1st Cir. 2009) (Boudin, J.), described the relevant test as "whether the arbitration regime . . . is structured so as to *prevent* a litigant from having access to the arbitrator to resolve claims."

costs *of the arbitral forum*.[14] Likewise, the cases cited by the panel involved exclusively arbitration-specific costs that restrict access to the arbitral forum. *See* App. 146a n.2 (Jacobs, J.) (discussing *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007); *Livingston*, 339 F.3d at 558-59; and *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002)).

The Second Circuit's broad reading of *Randolph* also cannot be correct because it would discriminate against arbitration, in violation of the FAA. *See Preston*, 552 U.S. at 356. Even in federal litigation, a plaintiff will often be required to bear costs that exceed its expected recovery. *See Fox v. Vice*, 131 S. Ct. 2205, 2213 (2011) ("Our legal system generally requires each party to bear his own litigation expenses, including attorney's fees, regardless whether he wins or loses."). Even in such situations, a plaintiff's ability to proceed as part of a class action may be denied under Rule 23.

For example, under Rule 23(b)(3), the need to prove individualized issues frequently precludes claims that involve small damages from proceeding as a

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[14] *See Spinetti v. Service Corp. Int'l*, 324 F.3d 212, 216-17 (3d Cir. 2003); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 553-54 (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, 657-59 (6th Cir. 2003) (en banc); *Livingston v. Associates Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003); *EEOC v. Woodmen of the World Life Ins. Soc'y*, 479 F.3d 561, 566-67 (8th Cir. 2007); *Hill v. Ricoh Ams. Corp.*, 603 F.3d 766, 779-80 (10th Cir. 2010); *Musnick v. King Motor Co.*, 325 F.3d 1255, 1258-59 (11th Cir. 2003); *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 708 (D.C. Cir. 2001).

class action.[15] A plaintiff cannot avoid Rule 23's requirements by claiming he needs it to defray otherwise "prohibitive costs." Yet the Second Circuit never assessed whether respondents' claims here would satisfy Rule 23.[16] Instead, it categorically ruled that arbitration agreements must provide for class proceedings whenever they are necessary to make it economical for a plaintiff to pursue a claim. Because that rule places a unique burden on arbitration that would not obtain in court, it contravenes the FAA.

The procedural history of *Randolph* confirms that the Second Circuit misinterpreted this Court's opinion. As an alternative ground for affirming the Eleventh Circuit's invalidation of the arbitration agreement, Randolph argued that the agreement was unenforceable because it "preclude[d] respondent from bringing her claims under the TILA as a class action." 531 U.S. at 92 n.7. But this Court expressly "decline[d] to reach" that argument because the Eleventh Circuit "did not pass on this question." *Id.*

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[15] *See*, *e.g.*, *In re IPO Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006) (reversing class certification because "market for IPO shares is not efficient" and fraud-on-the-market presumption therefore did not apply); *Vallies v. Sky Bank*, 591 F.3d 152, 158 (3d Cir. 2009) (stating that TILA's "detrimental reliance" requirement "may create obstacles for class certification because of the individualized fact-specific nature of the reliance inquiry").

[16] If respondents' claims cannot be certified as a class action under Rule 23, the parties' waiver of class procedures would provide no basis to deny enforcement of the arbitration agreement. This further demonstrates that the Second Circuit's test is untenable: having to ascertain whether there is a basis for class certification would undermine the advantages of bilateral arbitration by adding another complex, fact-intensive inquiry to the threshold arbitrability test.

Thus, *Randolph* cannot reasonably be read to endorse some lower courts' invalidation of arbitration agreements on the ground that they do not authorize class proceedings.[17]

Moreover, any such reading of *Randolph*'s *dicta* is now squarely foreclosed by *Concepcion*, "which more directly and more recently addresses the issue on appeal in this case." *Coneff*, 673 F.3d at 1159; *see* App. 145a (Jacobs, J.) (*Concepcion* "is more clear and more recent – and authoritative"). In response to the dissent's "prohibitive costs" argument – "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," 131 S. Ct. at 1753 – the majority squarely held that courts "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.*; *accord Stolt-Nielsen*, 130 S. Ct. at 1770 n.7 (rejecting the same policy justification for imposing class arbitration on non-consenting parties). That holding is directly on point here, and it precludes the Second Circuit's tortured reading of *Randolph* to reach the opposite result.

B. This Court's "Effective Vindication" *Dicta* in *Mitsubishi* Related Only to Arbitration Provisions That Threaten To Override U.S. Substantive Law

"Similarly misleading is the panel's quotation of *Mitsubishi*." App. 145a (Jacobs, J.). *Mitsubishi*'s "effective-vindication" comment addressed concerns that the arbitrators would refuse to apply substantive American antitrust law to the parties' dispute.

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[17] *See also Randolph v. Green Tree Fin. Corp. – Alabama*, 244 F.3d 814, 819 (11th Cir. 2001) (rejecting plaintiff's argument on remand).

473 U.S. at 636-37 & n.19. The Second Circuit's effort to stretch that language into a roving license to impose courts' own policy views regarding the "effectiveness" of the parties' chosen procedures for vindicating federal statutory rights violates the FAA and lacks any support in this Court's precedents.

Mitsubishi involved a sales agreement between Mitsubishi and one of its dealers located in Puerto Rico. *Id.* at 616-17. The sales agreement contained an arbitration provision that broadly called for the parties' disputes to be arbitrated before the Japanese Commercial Arbitration Association ("JCAA"). *Id.* at 617. The dealer brought certain counterclaims against Mitsubishi, including (as relevant to this Court's decision) a claim alleging that Mitsubishi had conspired to divide markets in violation of the Sherman Act. *Id.* at 620. Mitsubishi sought to compel arbitration and the dealer resisted. This Court held that the dealer's antitrust claims were arbitrable, and it rejected the dealer's claim that arbitration was incompatible with the federal policies underlying the Sherman Act. *Id.* at 632-40.

In doing so, this Court indicated it believed that the JCAA "should be bound to decide [the parties'] dispute in accord with the national law giving rise to the claim" (i.e., under the Sherman Act). *Id.* at 636-37. In a footnote, the Court noted that the parties' sales agreement contained a choice-of-law clause calling for its provisions to be "governed and construed in all respects according to the laws of the Swiss Confederation." *Id.* at 637 n.19. Certain *amici* raised a concern that the JCAA might interpret this choice-of-law provision to mean that Swiss law, not the Sherman Act, governed the dealer's antitrust claim. *Id.*

In response, this Court said it had "no occasion to speculate on th[e] matter," because Mitsubishi sought only "to enforce the agreement to arbitrate, not to enforce an award." *Id.* The Court "merely note[d]" that if, at the award-enforcement stage, the arbitration clause and the "choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations," it would refuse to enforce the agreement based on "public policy." *Id.*

The *Mitsubishi* footnote expresses, at most, concern about a contract that prospectively waives the application of federal *substantive* law to disputes "where it otherwise would apply." *Id.* That concern is nonexistent here, however, because American Express's arbitration agreement with its merchants contains no similar choice-of-law provision that purports to alter the substantive law applicable to the parties' dispute.

Rather, the parties' agreement merely reflects a *procedural* decision to resolve their disputes through bilateral rather than class arbitration. Nothing in *Mitsubishi* remotely suggested that the FAA permits courts to invalidate arbitration agreements based on that kind of procedural choice. Nor did *Mitsubishi* address class arbitration, much less suggest it was necessary to the enforcement of the federal antitrust laws. To the contrary, *Mitsubishi* held that bilateral arbitration of antitrust claims is fully consistent with the policies underlying the federal antitrust laws because of arbitration's "adaptability and access to expertise" as well as the benefits of "streamlined proceedings and expeditious results." *Id.* at 633.

This Court's decision in *Vimar Seguros* confirms that the *Mitsubishi* footnote is properly read as

addressing prospective waivers of federal *substantive* law, not procedural rules such as class procedures. As discussed above, this Court held that the parties' choice of a Japanese forum was a procedural choice that did not lessen COGSA's substantive guarantees. *See supra* pp. 25-26. *Vimar Seguros* also addressed a second argument made by the cargo owners: that "there is no guarantee foreign arbitrators will apply COGSA." 515 U.S. at 539. That objection, this Court said, "raises a concern of substance." *Id.* It was only in connection with that separate argument that the Court invoked footnote 19 of *Mitsubishi*, describing "[t]he relevant question" under that footnote as "whether the *substantive law* to be applied will reduce the carrier's obligations to the cargo owner below what COGSA guarantees." *Id.* (emphasis added); *see also Pyett*, 556 U.S. at 273-74 (addressing *Mitsubishi* in context of "substantive waiver of federally protected civil rights").[18]

In sum, the *Mitsubishi* footnote addresses concerns about arbitration agreements that supplant federal law as the substantive rule of liability. It was "misleading" for the Second Circuit panel to read into *Mitsubishi* a license for courts to invalidate arbitration agreements whenever they perceive the parties' agreed-upon arbitration *procedures* as ineffective in vindicating federal statutory claims. App. 145a (Jacobs, J.). That unwarranted expansion is flatly contrary to Congress's core policy in the FAA that bilateral arbitration *is* effective to vindicate federal statutory rights.

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[18] *See also Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005) (Roberts, J.) (invalidating arbitration agreement under *Mitsubishi* because it eliminated a *substantive* federal remedy – namely, punitive damages).

III. THE SECOND CIRCUIT'S POLICY ARGUMENTS PROVIDE NO BASIS TO OVERRIDE THE FAA AND THIS COURT'S PRECEDENTS

The Second Circuit panel rooted its decision in a policy view that class proceedings were necessary to allow respondents to vindicate their asserted rights under the federal antitrust laws in the particular circumstances of this case. As a threshold matter, any such concerns are properly directed to Congress, which has the sole prerogative to make exceptions to the FAA. *See supra* pp. 22-24. Congress knows how to limit arbitration when it wants to do so. *See*, *e.g.*, 15 U.S.C. § 1639c(e) (TILA); 12 U.S.C. § 5518 (directing the Bureau of Consumer Financial Protection to conduct a study concerning pre-dispute arbitration agreements between "consumers" and providers of "consumer financial products or services" and to "prohibit or impose conditions or limitations on the use" of such agreements if such regulations are "in the public interest and for the protection of consumers").

In any event, the panel's policy justifications lack merit, because they ignore both the proven benefits of bilateral arbitration and the serious drawbacks that class actions pose for the vindication of federal statutory objectives.

A. The Second Circuit concluded "that the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action." App. 27a. It came to that conclusion because it credited the opinion of a consultant hired by plaintiffs that the cost of an antitrust economist's expert report – whether in "arbitration or litigation" – would be up to $1 million, which exceeded the value of each plaintiff's alleged damages. App. 18a, 26a; *see also* App.

92a n.20 (assuming that "expert fees" "would need to be expended in either action").

That reasoning strikes at the heart of the FAA because it assumes – without empirical support and contrary to Congress's considered policy judgment – that arbitration lacks the flexibility to serve as a cost-effective means for resolving respondents' antitrust disputes. Whether each claimant would have to submit a complex and costly economics expert report is a decision for the arbitrator. But it certainly was error for the panel to *assume* that arbitrators would insist on the same complexity that federal courts would require under the Federal Rules. By doing so, the panel effectively overrode Congress's judgment, repeatedly reflected in this Court's precedents, that the "adaptability" of bilateral arbitration *reduces* the costs of dispute resolution and thus facilitates the effective vindication of federal statutory claims, including Sherman Act claims. *Mitsubishi*, 473 U.S. at 633.

Indeed, as this Court has recognized, the benefits of arbitration are especially pronounced for small-value claims, including those brought by consumers. *See Allied-Bruce Terminix*, 513 U.S. at 280 ("[A]rbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation."). Avoiding the high costs of litigation is "of particular importance" in disputes that "involve[] smaller sums of money than disputes concerning commercial contracts." *Circuit City*, 532 U.S. at 123. Moreover, arbitration's informality creates the possibility of non-class procedural mechanisms, consistent with the parties' agreement, for reducing these costs even further through informal cost-sharing arrangements

among plaintiffs. For example, claimants could hire the same attorneys, or hire the same expert witness, even outside the context of class proceedings.

The lower costs of arbitration also reduce businesses' costs, thus permitting lower prices for consumers and higher wages for employees. *See* Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration*, 2001 J. Disp. Resol. 89, 91 ("Assuming that consumer arbitration agreements lower the dispute-resolution costs of businesses that use them, competition will (over time) force these businesses to pass their cost-savings to consumers."); Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. Ill. L. Rev. 695, 741 (noting the cost savings that are "passed on to consumers through reductions in the price of goods and services, [or] to employees through higher wages"). Thus, bilateral arbitration offers not only increased cost efficiency once disputes arise, but also economic benefits at the time of contracting.[19]

The Second Circuit's assumption that bilateral arbitration would be ineffectual in reducing costs is contrary to the available evidence. Leading arbitration providers, including the American Arbitration Association ("AAA") and JAMS, apply expedited procedures in administering disputes under a certain dollar threshold and adhere to additional, consumer-protective rules in administering consumer disputes. These policies limit the portion of arbitrator fees the

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[19] The panel disclaimed any finding of unconscionability, App. 96a, and respondents have no viable claim that the agreement here was oppressive, given that they are merchants, many with substantial revenues, that could have chosen not to accept American Express cards. *See Concepcion*, 131 S. Ct. at 1750 n.6.

consumer is required to pay for arbitration.[20] Moreover, these rules have proven effective in obtaining compliance from businesses and lowering consumer outlays in arbitration.[21] Empirical evidence thus bears out Congress's policy judgment that bilateral arbitration is fully consistent with the effective vindication of federal statutory rights. *See* Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. Rev. 105, 105-06 (2003) (finding that "employees who arbitrate their complaints fare at least as well as those who take their disputes to court," and "many more employees are able to obtain justice through arbitration than through litigation"). The Second Circuit's contrary judgment impermissibly revives the old "judicial hostility to arbitration agreements" that the FAA was designed to eradicate. *Gilmer*, 500 U.S. at 24.

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[20] *See* JAMS, *Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness* (eff. July 15, 2009) (capping consumer's responsibility for arbitrator fees at $250); AAA, *Consumer Due Process Protocol*, Principle 6 (Feb. 14, 2012) ("reasonable cost" principle, in "some cases, . . . may require the [business] to subsidize the [alternative dispute resolution] process"); AAA, *Consumer-Related Disputes Supplementary Procedures* 8 (eff. Jan. 1, 2010) (consumers bringing a claim for less than $10,000 are not required to pay more than $125 in arbitrator fees).

[21] *See* Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 Tenn. L. Rev. 289, 292 (2012) (empirical study of AAA's Consumer Due Process Protocol finding that Protocol is effective); Searle Civil Justice Inst., *Consumer Arbitration Before the American Arbitration Association: Preliminary Report* 109 (Mar. 2009) (based on review of 301 consumer arbitrations closed by award in 2007, concluding that the upfront cost of arbitration for consumer claimants is low – $96 on average for sub-$10,000 claims – and consumers win some relief more than half the time).

B. While improperly discounting the demonstrated benefits of bilateral arbitration, contrary to Congress's intent, the Second Circuit also took a one-sided view of the consequences of class proceedings for the effective vindication of federal statutory policies. The Second Circuit panel focused exclusively on one feature of the aggregation brought about by class actions: its capacity to facilitate the pursuit of small claims by spreading the costs of litigation across the class. App. 18a-19a.

But aggregation also creates incentives that tend to increase litigation over questionable or frivolous claims, increasing costs and deterring socially beneficial conduct. Aggregation risks "giv[ing] a class attorney unbounded leverage," which can "essentially force corporate defendants to pay ransom to class attorneys by settling – rather than litigating – frivolous lawsuits." S. Rep. No. 109-14, at 20 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3 ("CAFA Report"). This Court, and numerous lower courts, have accordingly recognized the serious risk of "in terrorem" settlements created by class-action proceedings. *See supra* pp. 30-31; *see also*, *e.g.*, *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (Posner, J.) (noting that aggregation can create irresistible settlement pressures despite "the demonstrated great likelihood that the plaintiffs' claims . . . lack legal merit").

Settlements that are out of line with the merits of the plaintiffs' underlying claim undermine, rather than promote, the "effective vindication" of federal substantive policies. Particularly in an area like antitrust law, where it may be hard to distinguish conduct that harms competition and consumers from conduct that is aggressively competitive and thus

beneficial to consumers, the threat of settlements creates significant societal costs by deterring socially beneficial conduct. *See* Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 Sup. Ct. Econ. Rev. 39, 46-47 (2008) ("Faced with the risk of being held liable whether or not he complies with the law, a potential defendant may choose to avoid the activity that might give rise to liability. . . . To the extent such litigation-induced decisions deprive society of the benefits of productive activity, low merit litigation is costly to society."). And, of course, the cost of litigation of a meritless claim – whether a settlement is paid or not – represents a cost that must be recovered in higher prices charged to consumers.

These problems are exacerbated by the fact that class actions are frequently driven by lawyers specializing in class actions whose incentives – despite procedural safeguards – may not align perfectly with those of class members, still less with those of the legal system and society more generally. As Congress found in enacting the Class Action Fairness Act of 2005 ("CAFA"), the incentives for class-action lawyers in small-value cases "create inequitable outcomes . . . and – over the long run – increasing amounts of frivolous litigation as the attraction of such lawsuits becomes apparent to an ever-increasing number of plaintiff lawyers." CAFA Report 33 (internal quotations omitted).

Given these incentives, it is realistic to acknowledge that private lawyers may bring claims that public enforcement officials would not pursue because of their limited merit. As Judge Posner has commented in the antitrust context: "Students of the antitrust laws have been appalled by the wild and woolly anti-

trust suits that the private bar has brought – and won. It is felt that many of these would not have been brought by a public agency and that, in short, the influence of the private action on the development of antitrust doctrine has been on the whole a pernicious one." Richard A. Posner, *Antitrust Law* 275 (2d ed. 2001). "[W]hile the small claimant class action may add something in the way of enforcement of efficient substantive laws, any resulting marginal deterrence comes at a great cost in terms of the incentives created for litigation of questionable claims, overenforcement of inefficient substantive laws, and higher prices to consumers." Samuel M. Hill, *Small Claimant Class Actions: Deterrence and Due Process Examined*, 19 Am. J. Trial Advoc. 147, 154-55 (1995); Posner, *Antitrust Law* 275 ("The class action is the law's standard answer to the problem of aggregating a multitude of small claims, but it has serious drawbacks.").[22]

Because of these drawbacks, Congress would have no reason to interfere with private parties' decision to prioritize other mechanisms to ensure the effective enforcement of federal statutory rights. Virtually all federal statutes conferring a private right of action also provide for public enforcement by democratically accountable government officials.[23] Federal as well

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[22] As Congress found in enacting CAFA, class actions aggregating small-value claims create serious unfairness to plaintiffs, whose interests are subordinated to those of their lawyers. *See* CAFA Report 33.

[23] *See*, *e.g.*, Credit Repair Organizations Act ("CROA"), 15 U.S.C. § 1679h (authorizing Federal Trade Commission ("FTC") and state attorneys general to enforce CROA); Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681s (authorizing state attorneys general, FTC, and other federal agencies to enforce FCRA); Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C.

as state enforcement of the antitrust laws is particularly robust, consistent with Congress's intent in enacting the Sherman Act.[24] And, as discussed above, bilateral arbitration promotes cost-effective vindication of individual claims without the costs and disadvantages of class proceedings. Any business – or consumer – might agree *ex ante* to opt for a less costly dispute-resolution regime, especially because arbitration will predictably provide an efficient forum for the vindication of substantial claims.

Given that class actions entail real drawbacks for the effective vindication of federal policies, the decision whether to override private agreements to forgo participation in class litigation for any particular federal statutory claim is Congress's, not the courts', to make. The FAA evinces Congress's policy to enforce arbitration agreements, including those that call for exclusively bilateral arbitration, unless Con-

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§ 1692*l* (authorizing FTC and other federal agencies to enforce FDCPA); Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (authorizing state attorneys general and U.S. Attorney General to sue); TILA, 15 U.S.C. §§ 1607, 1611, 1640(e) (authorizing state attorneys general, FTC, and other federal agencies to enforce TILA).

[24] *See*, *e.g.*, Act of July 7, 1955, ch. 283, § 1, 69 Stat. 282, 282-83 (adding § 4A to the Clayton Act, *see* 15 U.S.C. § 15a, to permit federal government to sue for damages); Antitrust Amendments Act of 1990, Pub. L. No. 101-588, § 5, 104 Stat. 2879, 2880 (amending § 4A to permit the government to recover treble damages); Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708 (1974) (codified as amended at 15 U.S.C. §§ 1-3) (increasing criminal penalties for Sherman Act violations); Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 301, 90 Stat. 1383, 1394-96 (adding §§ 4C-4H to the Clayton Act, *see* 15 U.S.C. §§ 15c-15h) (giving states the right to bring antitrust suits for treble damages on behalf of state residents).

gress specifies otherwise. By improperly substituting its own one-sided policy judgments for those of Congress, the panel below exceeded its proper role under the FAA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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ADDENDUM

TABLE OF CONTENTS

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

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 $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

2. Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

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 $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

3. Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

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.

4. Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, provides:

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.

5. Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, provides:

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.