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 Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## REPLY BRIEF FOR PETITIONERS


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October 24, 2012

## CORPORATE DISCLOSURE STATEMENT

Petitioners American Express Company's and American Express Travel Related Services Company, Inc.'s Rule 29.6 Statement was set forth at p. iii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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The panel below invalidated the parties' arbitration agreement solely because of its class-action waiver provision: "[A]s the class action waiver in this case precludes plaintiffs from enforcing their statutory rights, we find the arbitration provision unenforceable." App. 28a. As the Ninth Circuit recognized in *Coneff*, the panel's holding is foreclosed by *Concepcion*, which held that "conditioning the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures" violates the FAA. 131 S. Ct. at 1744, 1748. Certiorari is warranted to prevent a two-judge Second Circuit panel from effectively gutting *Concepcion* in cases involving federal claims and to resolve this circuit split.

Respondents contend (at 2) that the decision below merely constitutes "fact-bound application" of an "effective-vindication doctrine" supposedly long established by this Court. Respondents' arguments bolster the case for certiorari, because they demonstrate the urgent need for this Court to clarify its "effective-vindication" *dictum* in light of "misleading" lower court efforts to "distort[]" it into a broad license to evade the FAA's mandate that arbitration agreements be enforced according to their terms. App. 141a, 143a, 145a (Jacobs, C.J., dissenting from denial of reh'g in banc).

This Court should not postpone review. The decision below is not limited to "truly rare" cases. Opp. 2. It provides an easy-to-follow roadmap for plaintiff's lawyers to invalidate literally millions of arbitration agreements nationwide. Nor will further percolation assist the Court in deciding whether that result is faithful to its own precedents. The issues presented are "indisputably important" and call for this Court's prompt review. App. 148a (Cabranes, J., dissenting from denial of reh'g in banc).

## ARGUMENT

### I. CERTIORARI IS WARRANTED TO VINDICATE THIS COURT'S FAA PRECEDENTS

#### A. The Decision Below Threatens To Negate *Concepcion* in a Broad Swath of Cases

*Concepcion* held that "conditioning the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures" is impermissible under the FAA. 131 S. Ct. at 1744. Astonishingly, respondents deny that the panel imposed such a condition, asserting that its holding is not "about class arbitration" at all. Opp. 17-18. That is a brazen mischaracterization.

*Amex III* found the parties' arbitration agreement "unenforceable" solely because "the class action waiver in this case precludes plaintiffs from enforcing their statutory rights." App. 28a. It did not merely insist on "*some* means of vindicating their federal statutory rights," including "the pro-claimant features provided in more recently drafted arbitration agreements." Opp. 18. All three panel opinions focused exclusively on the class-action waiver; none even mentions other "pro-claimant" cost-shifting features. Indeed, respondents did not challenge any other provision of the agreement. *See* App. 3a (stating that "the only issue before us is the narrow question of whether the class action waiver provision contained in the contract between the parties should be enforced"); *see also* App. 8a-9a; App. 111a.

Had the parties' arbitration agreement provided for class arbitration, the panel would have enforced it. The panel made that clear in *Amex I* and then

reaffirmed it in *Amex II* and *Amex III*.[1] That condition is exactly what *Concepcion* forbids. Class arbitration is "not arbitration as envisioned by the FAA." 131 S. Ct. at 1753. Conditioning the enforcement of arbitration agreements on the availability of class arbitration violates the FAA because it allows parties "to demand it *ex post*." *Id*. at 1750.

Respondents also defend the panel's effort to limit *Concepcion* to state-law claims. Opp. 17. But, like the panel, respondents cannot point to anything in *Concepcion* supporting such a limitation. That is unsurprising, given this Court's longstanding holding that the FAA applies equally to federal statutory claims. *See Mitsubishi*, 473 U.S. at 627-28; *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481, 485 (1989) (overruling *Wilko v. Swan*, 346 U.S. 427 (1953)). Federal- and state-law claims differ only in that Congress can, if it chooses, override the FAA's mandate for particular federal claims. *See* Pet. 16-17. But Congress indisputably has not done so for federal antitrust claims. *See* Pet. 17.

Under *Amex III*, a plaintiff need only manufacture a federal statutory claim to evade *Concepcion*. That is not a difficult task for any plaintiff's lawyer, and it is already happening. *See* Chamber of Commerce *et al. Amicus* Br. 8 n.6 ("Chamber Br."). Certiorari is

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[1] In an effort to obscure the panel's insistence on class arbitration, respondents mischaracterize *Amex I* as having "held that *the arbitration clause* could not 'be enforced in this case.'" Opp. 7 (quoting *Amex I*) (emphasis added). In fact, *Amex I* "h[e]ld that the *class action waiver in the Card Acceptance Agreement* cannot be enforced in this case." App. 95a (emphasis added). *Amex II* and *Amex III* also invalidated the class-action waiver and then concluded that *Stolt-Nielsen* required nullification of the *entire* arbitration agreement as the remedy. App. 28a-30a, 54a-56a.

warranted to prevent the decision below from nullifying *Concepcion* in a broad swath of cases.

### B. This Court Should Grant Certiorari To Prevent Its "Effective-Vindication" *Dicta* from Being Distorted To Evade *Concepcion*

Respondents contend (at 11-16) that the "effective-vindication principle" supposedly endorsed by this Court in *Mitsubishi* and *Randolph* authorizes federal courts to condition enforcement of arbitration agreements on class arbitration. If that interpretation of *Mitsubishi* and *Randolph* were correct, it would put those cases at odds with *Concepcion*, which rejected the very same "effective-vindication" argument. *See* 131 S. Ct. at 1753 (rejecting dissent's contention that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system"). Indeed, *Amex III* acknowledged the need for this Court's clarification of its own precedents, saying it was "leaving to this Court the prerogative of overruling its own decisions." App. 25a (internal quotations omitted). While no overruling is required, this Court should certainly act to eliminate the confusion that has arisen in the lower courts by clarifying that its prior *dicta* do not override *Concepcion* for federal-law claims.

Certiorari is warranted, moreover, because the panel's interpretation of *Mitsubishi* and *Randolph* is untenable and impermissibly imposes special burdens on arbitration. *Mitsubishi*'s "effective-vindication" comment addressed concerns that the arbitrators would refuse to apply *substantive* American antitrust law. 473 U.S. at 636-37 & n.19; *see* Pet. 21. The same is true of *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-41 (1995) (discussing substantive choice-of-law provisions), and

*14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273-74 (2009) (discussing a "substantive waiver of federally protected civil rights").[2] It is thus "misleading" to read into these decisions 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. 143a (Jacobs, C.J.).

*Mitsubishi* also provides a full response to respondents' policy arguments. Unless Congress prescribes special rules, enforcement of the parties' agreement "harmonizes the FAA's general policy in favor of arbitration with the specific federal statutory protections." Opp. 12. The FAA protects the "integrity" of the arbitral process by giving effect to the parties' agreement and prohibiting courts from substituting their views of what procedures are "effective." Opp. 16.

Respondents likewise misconstrue *Randolph*. They do not dispute, nor did the panel, that *Randolph*, by its terms, referred only to "large *arbitration* costs" that would not be required to litigate in court. 531 U.S. at 90 (emphasis added); *see* Pet. 18-19; App. 22a.[3] Yet respondents assert (at 15) that *Randolph* guarantees every plaintiff in arbitration will be spared *any* costs (including those they would equally incur in litigation) that exceed their likely recovery. That cannot be correct, given that plaintiffs in court have no similar guarantee. Indeed, Rule 23's strictures

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[2] *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).

[3] Respondents (at 13) deny that *Randolph*'s statement was *dicta*, but even the panel acknowledged as much. App. 22a.

are not excused even if applying them will prevent a plaintiff from spreading "prohibitive" litigation costs. *Amex III*'s "distortion" of *Randolph* (App. 143a (Jacobs, C.J.)) impermissibly imposes a special burden on arbitration, which is precisely what the FAA forbids. *See Concepcion*, 131 S. Ct. at 1747-48.

Contrary to respondents' mischaracterization (at 9), "[e]very circuit court" has not followed respondents' reading of *Randolph*. Except for the First Circuit in *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006), all of respondents' cases (at 13 n.6) applied *Randolph* to "cost-splitting," "fee-sharing," and other provisions requiring the plaintiff to pay all or part of the costs *of the arbitral forum*.[4] Likewise, *Awuah v. Coverall North America, Inc.*, 554 F.3d 7, 12-13 (1st Cir. 2009), addressed the possibility that the "costs of arbitration itself" would "*prevent* a litigant from having access to the arbitrator."[5]

Finally, respondents assert that the parties' arbitration agreement imposes costs that "*are* unique

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[4] *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. Assocs. 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). *Coneff* is inapposite for the reasons given below. *See infra* pp. 7-8.

[5] Although *Awuah* said arbitrators' fees were "not necessarily the only" type of arbitration-specific costs, it nowhere endorsed considering costs that would be incurred in litigation. 554 F.3d at 12.

to arbitration." Opp. 14. That is just wordplay. Respondents faced the same antitrust expert costs whether in "arbitration or litigation." App. 26a. Their complaint is that class arbitration is unavailable to spread those costs. Opp. 14, 19. But clearly *Randolph* never addressed that issue: it declined to consider plaintiffs' challenge to the bar on class arbitration. 531 U.S. at 92 n.7. *Concepcion*, by contrast, squarely rejected the possibility of "prohibitive costs" as a justification for insisting on class arbitration. *See Concepcion*, 131 S. Ct. at 1753 (rejecting the same justification offered by the dissent); *Coneff*, 673 F.3d at 1159 (*Concepcion* "more directly and more recently addresses the issue . . . in this case"). This Court's intervention is necessary to prevent its "effective-vindication" *dicta* from being distorted to nullify *Concepcion* in cases asserting federal claims.

## II. THE DECISION BELOW CREATES A CIRCUIT SPLIT DESERVING THIS COURT'S PROMPT REVIEW

Respondents' denial of a circuit split strains credibility. According to respondents: "Far from disagreeing with the decision below, *Coneff* distinguished it on its facts." Opp. 2. Respondents even say that *Coneff* "agreed with the Second Circuit's reasoning" in *Amex III*. Opp. 20. But *Coneff* was clear: "To the extent that the Second Circuit's opinion is not distinguishable, *we disagree with it*." 673 F.3d at 1159 n.3 (emphasis added). *Coneff* creates a square split with *Amex III* because it rejected an "effective-vindication" challenge to a class-action waiver in the context of a federal claim. *See id.* at 1157-58 & n.2.

All three opinions dissenting from denial of rehearing en banc recognized a conflict between the two cases. *See* Pet. 22. Moreover, district courts in the

Ninth Circuit have refused to follow the Second Circuit's "effective-vindication" rule because *Coneff* rejected it. *See* Pet. 23-24. By contrast, district courts in the Second Circuit have repeatedly held that they are bound to follow *Amex III*.[6] This Court's review thus is warranted because the decision below creates disuniformity between two of the most prominent and populous federal circuits on an important question of federal arbitration law.

Respondents' effort to distinguish *Coneff* rests on the same type of "labored" analysis the panel used in trying to distinguish *Concepcion*. App. 143a (Jacobs, C.J.). *Amex III* itself undermines respondents' proffered distinction (Opp. 20) between "means" and "incentives," because the panel held it inadequate under *Randolph* for the arbitration agreement merely to make plaintiffs whole; it must also give them incentives to sue by compensating them for the "risk of losing." App. 27a (internal quotations omitted); *see* Pet. 24 n.15.

Respondents also deny that the decision below conflicts with the Third Circuit's decision in *Johnson* or the Fifth Circuit's decision in *Carter*, even though the panel expressly disagreed with those cases, *see* App. 46a-47a. Respondents distort *Johnson* and *Carter*, just as they do *Mitsubishi* and *Randolph*. *Johnson* did not merely find the plaintiffs' evidence insufficient under *Randolph*. *Johnson* categorically "rejected the premise that . . . a class-action waiver is unenforceable because it effectively prevents plaintiffs from

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[6] *See Orman v. Citigroup, Inc.*, No. 11-cv-7086, 2012 WL 4039850, at *3 (S.D.N.Y. Sept. 12, 2012); *Fromer v. Comcast Corp.*, No. 09-cv-2076, 2012 WL 3600298, at *4 (D. Conn. Aug. 21, 2012); *In re Electronic Books Antitrust Litig.*, No. 11-MD-2293, 2012 WL 2478462, at *2-*3 (S.D.N.Y. June 27, 2012).

bringing a federal statutory claim at all." *Brokers' Servs. Mktg. Group v. Cellco P'ship*, Civil Action No. 10-3973 (JAP), 2012 WL 1048423, at *4-*5 (D.N.J. Mar. 28, 2012) (citing *Johnson*, 225 F.3d at 369).

Likewise, *Carter* did not find that plaintiffs lacked adequate proof of "prohibitive costs" under *Randolph*. Opp. 21. *Carter* never embraced *Randolph*'s "prohibitive costs" *dicta* as a basis to invalidate a class-action waiver. Rather, it held based on *Gilmer* that, "[s]o long as a plaintiff can pursue the substantive statutory rights through *individual* arbitration, a plaintiff's inability to proceed collectively or on behalf of a class is legally irrelevant." *Veliz v. Cintas Corp.*, No. 03-01180, 2005 WL 1048699, at *3 (N.D. Cal. May 4, 2005) (citing *Carter*, 362 F.3d at 298). That is why the panel here explicitly "rejected the reasoning relied on in" *Carter*. *Raniere v. Citigroup, Inc.*, 827 F. Supp. 2d 294, 311 (S.D.N.Y. 2011); *see* App. 47a.

Notwithstanding respondents' claims to the contrary, the Third, Fifth, and Ninth Circuits would have enforced the parties' arbitration agreement here. Every other circuit except the First Circuit likely would have done so too. *See supra* note 4. *Amex III* clearly creates a circuit split warranting this Court's review.

## III. THIS COURT SHOULD NOT DELAY REVIEW

This Court's immediate review is needed because *Amex III* will lead to the invalidation of innumerable arbitration agreements nationwide. Respondents' assertion (at 2) that *Amex III* is limited to "truly rare" cases is not credible. The panel's reasoning abrogates arbitration for all but the largest individual antitrust claims with damages greater than $1

million. These sweeping effects will not be limited to complex antitrust cases, because many federal claims are costly to litigate. And the decision below will become a *de facto* nationwide rule, given the ease with which companies can be sued in the Second Circuit. *See* Pet. 30-31. As a matter of common sense, *Amex III* will undermine arbitration agreements – and require class actions to proceed in court – for a large number of consumer and other relatively modest-value claims. *See* App. 137a (Jacobs, C.J.).

Respondents (at 23) tout *Amex III*'s supposedly stringent evidentiary standard, but this case shows it has no teeth. All it took was a single affidavit by a paid consultant, "uncritically" adopted by the panel, to invalidate the parties' agreement. App. 137a (Jacobs, C.J.). This is no tall order, and plaintiff groups are already preparing "model" affidavits that can be used to surmount this low bar. Chamber Br. 11.

The fact that only two circuit cases have actually invalidated a class-action waiver under the "effective-vindication" principle does not indicate that the decision below is narrow. Opp. 23. To the contrary, those two cases are the only ones to have interpreted *Randolph* to permit class-arbitration waivers to be invalidated based on "prohibitive costs." Pre-*Concepcion* experience confirms that, once this erroneous principle is adopted, class-action waivers will be routinely invalidated. *See Concepcion*, 131 S. Ct. at 1746 (noting that California courts "frequently applied" the analogous, but narrower, *Discover Bank* rule to invalidate arbitration agreements).

Moreover, even a searching "prohibitive" costs inquiry would jeopardize arbitration's core purpose, by subjecting parties to costly, protracted litigation just to determine arbitrability. As a result, parties

likely would be forced to "spen[d] many times the cost of an arbitral proceeding just enforcing the arbitration clause." App. 139a (Jacobs, C.J.). Respondents provide no answer to this important reason for this Court's review.

Further percolation will not assist the Court in interpreting its own FAA decisions. The opposing arguments have been thoroughly vetted by the appellate courts, including in three panel opinions and three separate dissents from *en banc* review in this case alone. There is no reason to await the Second Circuit's decision in *Sutherland v. Ernst & Young LLP*, No. 12-304 (2d Cir.). The full Second Circuit has already passed up the opportunity "to flesh out the contours of the decision below," Opp. 24, instead indicating that the issue should be resolved by this Court. *See* App. 148a (Cabranes, J.) ("This is one of those unusual cases where one can infer that the denial of *in banc* review can only be explained as a signal that the matter can and should be resolved by the Supreme Court.").

Respondents' suggestion (at 22) that certiorari would be imprudent because of Justice Sotomayor's recusal is inconsistent with this Court's established practice. *See*, *e.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) (Sotomayor, J., recused); *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010) (same).

Finally, any trend toward "consumer-friendly" cost-shifting provisions (Opp. 24) is irrelevant to the issues here. The panel did not mention such provisions, much less consider them pertinent. *See supra* p. 2. It focused exclusively on the agreement's class-action waiver – a provision that is "common[]" in commercial arbitration agreements. App. 135a

(Jacobs, C.J.). Because *Amex III* authorizes routine invalidation of such agreements – in contravention of the FAA and *Concepcion* – this Court should accept the Second Circuit dissenters' call for prompt review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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