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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

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

CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

For a quarter century, this Court has recognized that federal statutory claims may be resolved through arbitration under the Federal Arbitration Act (FAA) only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 637 (1985). That requirement harmonizes the FAA's general pro-arbitration policy with the specific federal statutory protections at stake in a given case. And it ensures that the FAA serves its purpose of resolving claims in an alternative forum, not exterminating them. In this way, the requirement safeguards arbitration's legitimacy and the public's confidence in it.

Accordingly, this Court has held that "where, as here, a party [contends] that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000). The possibility of carrying that burden through a fact-bound showing has never been doubted. Every regional circuit has recognized this possibility while imposing a very high bar.

The decision below is no different. It held that respondents satisfied their heavy burden under *Randolph* because they proved they could not vindicate their federal antitrust claims under the arbitration clause without incurring non-recoverable costs that would dwarf each claimant's possible recovery many times over. Only one other circuit has addressed similar facts, and it reached the same conclusion. *See Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006). Under these limited circumstances, the decision below correctly concluded that enforcing the arbitration clause would grant petitioners "de facto immunity" from federal antitrust law. Pet. App. 12.

That fact-bound application of settled law does not conflict with any of this Court's cases. The preemption principles applied in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), govern the relationship between *state* contract law and *federal* arbitration law, not the FAA and the Sherman Act. Nothing in *Concepcion* purported to overrule or limit the effective-vindication doctrine. And no circuit has concluded otherwise.

Manufactured conflicts aside, the thrust of both the petition and Judge Jacobs's dissent is their speculation that the decision below will be successfully invoked by plaintiffs in other cases to circumvent *Concepcion*. But support for that speculation is nonexistent, and the evidence against it is mounting. Indeed, the very case petitioners portray as creating a split, *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012), shows otherwise. Far from disagreeing with the decision below, *Coneff* distinguished it on its facts, explaining that *Randolph*'s burden cannot be met in the mine run of cases in which consumers and employees can possibly vindicate their claims in arbitration. But that possibility, as *Coneff* recognized, does not exist in this case. There is no reason to believe lower courts are incapable of distinguishing run-of-the-mill class actions—in which plaintiffs contend merely that their *incentives* to arbitrate are insufficient—from the truly rare case in which the evidence satisfies *Randolph*'s heavy burden.

That burden is even less likely to be satisfied in future cases because of the ongoing evolution of arbitration agreements, which increasingly include pro-claimant features designed to facilitate the effective vindication of complex statutory claims. This Court should allow that evolution to run its course rather than rush in to fix a problem that does not, and may never, exist.

STATEMENT

1. Respondents are merchants who sued American Express (Amex) for violations of federal antitrust law. The crux of their complaint is that Amex compels merchants to accept Amex-branded mass-market credit cards, including bank-issued cards, as a condition of accepting Amex corporate and premium charge cards. Respondents assert that Amex has monopoly power in the markets for corporate and premium cards, and that it uses that power to force merchants to accept ordinary credit cards at rates that are 30% higher than the fees for identical bank-issued cards in competing networks (*e.g.*, Visa and MasterCard).

This practice, which respondents attack as an unlawful tying arrangement under the Sherman Act,[1] has had specific and provable anticompetitive effects in the market for ordinary credit-card acceptance. Specifically, it has allowed Amex to offer banks vastly higher "interchange" fees than Visa and MasterCard. That, in turn, has driven those companies to raise their own interchange fees to avoid losing bank issuers to Amex. The

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[1] "A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product …. Such an arrangement violates § 1 of the Sherman Act if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461-62 (1992) (citation and internal quotation marks omitted). For an arrangement to be unlawful under Second Circuit precedent, plaintiffs must additionally demonstrate a substantial likelihood of harm to competition in the tied product market, *see In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 133 n.5 (2d Cir. 2001), which respondents here seek to show by proving actual harm to competition.

result has been an upward spiral in interchange fees without the downward price competition that normally exists in competitive markets. This breakdown of normal competitive forces in the credit-card-acceptance market has prompted, in addition to this case, a merchant class action against Visa and MasterCard that recently settled for significant injunctive and monetary relief.[2] In addition, the Department of Justice brought enforcement actions against Visa, MasterCard, and Amex that complement the injunctive relief sought in the merchant class cases.[3]

Prosecuting respondents' tying case is no small task. It is uncontested that respondents cannot prosecute their claim without at least one detailed antitrust market study. Pet. App. 25-27. It is also uncontested that the study in this case will be "necessarily complex and costly" because it will require specific determinations concerning:

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

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[2] *See In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, No. 05-md-1720 (E.D.N.Y), Doc. No. 1588; *see also* Christie Smythe and Dakin Campbell, *Visa, MasterCard Settle Merchants' Swipe-Fee Lawsuit*, Bloomberg News (July 14, 2012), *available at* http://www.bloomberg.com/news/2012-07-13/visa-mastercard-settle-merchants-antitrust-swipe-fee-suit.html.

[3] *See United States v. Am. Express Co.*, No. 10-cv-4496 (E.D.N.Y.). The United States entered into consent decrees with Visa and MasterCard, *id.* Doc. No. 4, and continues to litigate against American Express.

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

Id. at 87-88. Given these complex and time-consuming inquiries, respondents' evidence shows that the cost of conducting the market study—which is not recoverable even if respondents prevail—is "at least several hundred thousand dollars" and could "easily exceed $1 million." *Id.* at 87. This total dwarfs, many times over, the recovery that any individual plaintiff could hope to obtain—approximately $5,252 for the "median volume" claimant and $38,549 for the largest volume claimant. *Id.* at 89.

2. Based on this evidentiary showing, which petitioners did not contest, respondents opposed arbitration in the district court on the ground that they would be unable to effectively vindicate their federal statutory rights under the specific arbitration agreement here.

The arbitration agreement in this case is eight years old. It provides no mechanism for either sharing or reimbursing the costs of the market study. It precludes the spreading of costs among claimants even in separate arbitrations by prohibiting the sharing of "any information relating to … the arbitration proceedings." *Id.* at 92. And it contains no other provisions—like the consumer-friendly provisions examined by this Court in *Concepcion*—that might allow respondents to effectively vindi-

cate their claims. In addition, the arbitration agreement prevents claimants from seeking relief "on behalf of … other [merchants]," *id.* at 67—meaning that it precludes the possibility of obtaining the kind of market-wide injunctive relief that is often necessary to remedy systemic anticompetitive conduct.

Respondents argued that forcing them to pursue their claims in arbitration would, under the particular circumstances of this case, "impose such punishing costs" on each claimant—much of them non-recoupable—"as to preclude vindication" of their rights under the Sherman Act. *Id.* at 108. The district court held that this question should be resolved by the arbitrator, not the court, and granted petitioners' motion to compel arbitration. *Id.* at 123.

3. The Second Circuit reversed. After determining that the enforceability of the arbitration clause was "plainly" a question for the court to decide, *id.* at 75, the Second Circuit analyzed that question under the framework set forth by this Court in *Randolph*, which held that "where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." 531 U.S. at 92.

Applying that test to the specific facts of the case, the Second Circuit held that respondents met their heavy burden. The court found that the "uncontested" record evidence before it—like the "similar" evidentiary showing made by the plaintiffs in *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006)—established that respondents "would incur prohibitive costs if compelled to arbitrate" because the non-recoverable per-claimant costs of bringing their claims in arbitration (as opposed to ag-

gregate proceedings in court) would exceed their expected individual recoveries many times over. Pet. App. 86-91 (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987) (reimbursement of expert witness fees capped by federal statute at $30 per witness per day)). The court therefore held that the arbitration clause could not "be enforced in this case because to do so would grant Amex de facto immunity from antitrust liability by removing [respondents'] only reasonably feasible means of recovery"—"the aggregation of individual claims." *Id.* at 89, 95.

At the same time, the Second Circuit emphasized the limited scope of its opinion. It explained that it was not holding that arbitration clauses "are *per se* unenforceable in the context of antitrust actions," but only that—consistent with this Court's approach in *Randolph*—"*each* case" presenting the question "must be considered on its own merits, governed with a healthy regard for the fact that the FAA 'is a congressional declaration of a liberal policy favoring arbitration agreements.'" *Id.* at 97 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

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

On remand, the Second Circuit agreed with petitioners that *Stolt-Nielsen* would "plainly preclude[] [the

court] from ordering class-wide arbitration." Pet. App. 55. But the Second Circuit explained that it "did not do so" in its previous opinion. *Id.* Any class proceedings would take place in the district court, not in arbitration. The Second Circuit thus concluded that *Stolt-Nielsen* did not alter the outcome of its prior decision. *Id.*[4]

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

Tackling that question, the Second Circuit again applied *Randolph* and reached the same conclusion: "The evidence presented by plaintiffs here establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." *Id.* at 25. The court therefore concluded that, based on the specific record before it, the "arbitration clause is unenforceable." *Id.* at 30. Were the

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

clause enforced, the court held, "it would strip the plaintiffs of rights accorded them by statute." *Id.*

At the same time, the Second Circuit stressed the uphill battle facing plaintiffs who seek to invalidate arbitration clauses based on the effective-vindication principle. Pointing to several cases in which plaintiffs' arguments under *Randolph* were rejected, the Second Circuit made clear that these "failures speak to the quality of the evidence presented, not the viability of the legal theory." *Id.* at 24-25. That "plaintiffs so often fail" in these attempts "demonstrates that the [necessary] evidentiary record … is not easily assembled, and that the courts are capable of the scrutiny such arguments require." *Id.* at 25.

REASONS FOR DENYING THE PETITION

The decision below is consistent with this Court's cases, creates no circuit split, and does not warrant review. This Court has repeatedly recognized that a litigant's ability to effectively vindicate its rights is a precondition to the arbitration of federal statutory claims. The decision below is an application of that well-established principle. It is based on respondents' specific, unrebutted submissions demonstrating the impossibility of prosecuting their antitrust claims in arbitration.

Nothing in *Concepcion*—which considered FAA preemption of contrary state-law principles—calls into question this Court's longstanding effective-vindication rule. To the extent that plaintiffs in future cases may be more inclined to test the limits of the effective-vindication rule as a consequence of *Concepcion*, that concern is not raised by this case, which was brought years before *Concepcion*.

Every circuit court to address the issue—both before and after *Concepcion*—has followed the same approach

as the decision below. Those courts have recognized the effective-vindication rule and have required litigants to meet the heavy burden set forth in *Randolph*. *See, e.g.*, *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 81 (D.C. Cir. 2005) (Roberts, J.) (under *Randolph*, a party may "resist[] arbitration on the ground that the terms of an arbitration agreement interfere with the effective vindication of statutory rights," but that party "bears the burden of showing the likelihood of such interference"); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502-03 (4th Cir. 2002) (Wilkinson, J.) (plaintiff did not "come close" to satisfying burden under *Randolph*).

Not surprisingly, that burden is almost never met. The rare instance presented here—where it is undisputed that respondents have successfully shown that the prohibitive costs of proving an unlawful tying arrangement in arbitration would foreclose the vindication of their federal antitrust rights—does not indicate a split. Quite the contrary. One other decision has applied the same rule to reach the same conclusion on similar facts, *see Kristian*, 446 F.3d at 54-59, while other decisions have applied the same rule to reach different conclusions on materially different facts.

Indeed, *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012), the case on which petitioners premise their supposed split, expressly recognized the effective-vindication rule, held that the rule survives *Concepcion*, and concluded that the plaintiffs there (unlike respondents here) failed to satisfy their burden. There is no circuit split for this Court to resolve.

This case neither evades nor disrupts settled doctrine. The decisions in the courts of appeals illustrate that the effective-vindication rule is well settled but infrequently met. And the decision below has not lowered that high bar. If the circuits begin to depart from the

narrow path they have charted under *Randolph*, there will be time enough to review those cases.

I. The Decision Below Does Not Conflict With This Court's Cases.

1. For much of the twentieth century, this Court took the view that federal statutory claims could never be appropriately channeled into arbitration. *See Wilko v. Swan*, 346 U.S. 427 (1953). In a series of cases beginning in 1985 with *Mitsubishi*, however, the Court recognized that federal statutory claims are appropriately subject to arbitration under the FAA because, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute," but "submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S. at 628; *see also Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (same) (overruling *Wilko*). Arbitration's ability to resolve federal statutory claims thus rests critically on the assumption that "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi*, 473 U.S. at 637.

Since *Mitsubishi*'s recognition of this rule in a case under the Sherman Act, the Court has repeatedly reaffirmed the fundamental importance of the effective-vindication principle to the arbitrability of various federal statutory claims. In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court found no "inherent inconsistency" between arbitration and the "important social policies" furthered by the Age Discrimination in Employment Act; "the statute will continue to serve both its remedial and deterrent function," the Court held, "'[s]o long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum.'" 500 U.S. 20, 27-28 (1991) (brackets omitted) (quoting *Mitsubishi*,

473 U.S. at 637). And in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, Justice Kennedy's majority opinion reiterated that the Court "would have little hesitation in condemning" an arbitration agreement that prevented the effective vindication of statutory rights. 515 U.S. 528, 533 (1995) (quoting *Mitsubishi*, 473 U.S. at 637 n.19).[5]

The Court made the same point again in *Randolph*, in upholding an agreement to arbitrate a claim under the Truth in Lending Act (TILA). Like *Gilmer*, *Randolph* explained that the FAA does not eviscerate other federal statutory protections: "[E]ven claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute serves its functions." 531 U.S. at 90 (brackets and internal quotation marks omitted). That narrow rule harmonizes the FAA's general policy in favor of arbitration with the specific federal statutory protections asserted in a given case.

Most recently, in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), this Court reinforced the vitality of the effective-vindication doctrine. *Pyett* recognized that arbitration agreements may not prevent claimants "'from effectively vindicating' their 'federal statutory rights in the arbitral forum,'" but the Court compelled arbitration

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[5] Petitioners contend that *Vimar Seguros* supports *their* view because the Court in that case found that federal statutory rights could potentially be vindicated in arbitration and thus deferred review until the award-enforcement stage. *See* Pet. 21 n.13. But there is no dispute that respondents here will be unable to vindicate their federal statutory rights in arbitration. Award-enforcement review would be meaningless here, and petitioners tellingly do not contend otherwise.

because the concern there was unduly speculative. *Id.* at 273 (quoting *Randolph*, 531 U.S. at 90).

Petitioners repeatedly dismiss this Court's effective-vindication rule as dictum, but *Randolph* applied the rule to the particular facts at hand. 531 U.S. at 90-92. The plaintiff there argued that potentially high arbitration costs rendered her TILA claim incapable of being effectively vindicated in arbitration. Recognizing that "large arbitration costs could preclude a litigant … from effectively vindicating her federal statutory rights in the arbitral forum," the Court adopted a framework to address that possibility: "[W]here, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id.* at 92. Under that framework, the Court found that Randolph failed to meet her burden because her agreement was silent on costs and she made no showing as to whether (and to what extent) she would in fact be required to pay arbitration costs, making her argument "too speculative to justify the invalidation of an arbitration agreement." *Id.* at 91-92.

In the 12 years since *Randolph*, every regional circuit has recognized and applied this rigorous inquiry.[6] The

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[6] *See, e.g.*, *Kristian*, 446 F.3d at 54-59 (1st Cir. 2006); Pet. App. 22-25; *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 216-17 (3d Cir. 2003); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556-57 (4th Cir. 2001); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 300 (5th Cir. 2004); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 658-60 (6th Cir. 2003) (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); *Coneff*, 673 F.3d at 1158 & n.2 (9th Cir. 2012); *Hill v. Ricoh Ams. Corp.*, 603 F.3d 766, 780 (10th Cir. 2010); *Musnik v. King Mo-*
(continued …)

Second Circuit below did so as well. It held that respondents cleared *Randolph*'s high bar because they had made a successful and uncontested evidentiary showing that the non-recoverable expenses each claimant would incur in arbitration would be so high, and would so outstrip their individual recovery amounts, that compelling arbitration would effectively deprive them of their federal antitrust rights. *See* Pet. App. 25-27.

Petitioners do not deny any of this. They do not deny that respondents made a successful showing that the arbitration agreement here, by precluding the sharing of non-recoverable costs among claimants, strips them of any "economically feasible means for … enforcing their statutory rights." *Id.* at 27. Rather, petitioners argue that this is beside the point. Advancing a theory that not a single court has accepted, petitioners contend that the effective-vindication doctrine should apply only to a subset of cases in which the cost of arbitration would be prohibitive: namely, those in which "costs unique to arbitration—such as filing fees, the arbitrator's fees, and other administrative fees imposed by the arbitral forum— … might be so high as to preclude access to the arbitral forum." Pet. 18-19. But the prohibitively expensive per-claimant costs necessary to prosecute respondents' claims in this case *are* unique to arbitration because each claimant would be forced to pay those costs under Amex's arbitration agreement (which precludes any cost-sharing) but would not be forced to do so in aggregate proceedings outside of arbitration.

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tor Co. of Fort Lauderdale, 325 F.3d 1255, 1259-60 (11th Cir. 2003); *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702, 708 (D.C. Cir. 2001). The Federal Circuit has not considered the issue.

In any event, petitioners' novel argument misconstrues *Randolph*, finds no support in this Court's cases, and stands the effective-vindication doctrine on its head. By its plain terms, *Randolph* applies whenever "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive." 531 U.S. at 92. Although respondents squarely fit that description, petitioners urge this Court to resist that conclusion. Selectively quoting language from *Randolph* in which the Court was addressing the particular set of facts before it, petitioners assert that because the plaintiff there was challenging arbitration *fees* (*e.g.*, the "filing fee," "arbitrator's fee," and "administrative fees," *see id.* at 90 & n.6), *Randolph* governs only challenges to arbitration clauses that are based on fees. But nothing in *Randolph* warrants this crabbed reading. The analysis in *Randolph* was driven by the recognition that the costs of arbitration could be prohibitively expensive in the context of a particular case and thus foreclose the vindication of federal rights, not by the precise nature of the expenses.

Notably, not a single circuit has adopted petitioners' proposed limitation on *Randolph*. As the Fourth and Sixth Circuits have held in applying the effective-vindication rule, "[t]he proper inquiry … is not where the money goes"—whether to an arbitrator or to an expert witness—"but rather the amount of money that ultimately will be paid by the claimant" under the arbitration agreement. *Bradford*, 238 F.3d at 556; *Morrison*, 317 F.3d at 660. The case petitioners cite to support their view, *Awuah v. Coverall North America, Inc.*, 554 F.3d 7 (1st Cir. 2009) (Boudin, J.), in fact says just the opposite. The First Circuit there stressed that the "concern about fees is … *not necessarily the only basis* for [the plaintiffs'] claim that *in practical effect* they have no real op-

portunity to get issues … resolved in arbitration," and then remanded the case to the district court to decide whether "excessive arbitration costs deprive the plaintiff of an arbitral forum." *Id.* at 12-13 (emphasis added). Indeed, *Awuah* expressly reaffirmed the First Circuit's holding in *Kristian* that "[i]f arbitration prevents plaintiffs from vindicating their rights, it is no longer a 'valid alternative to traditional litigation.'" *Id.* at 12 (quoting *Kristian*, 446 F.3d at 37).

Petitioners' proposed limitation on *Randolph*, moreover, would eliminate any safety valve for the rare case in which a plaintiff is truly unable to vindicate its federal statutory rights in arbitration because of a structural barrier such as the inability to share costs. This outcome would have a destabilizing effect on the integrity of, and public confidence in, the alternative dispute resolution process as a whole. The "arbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. This supposition falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights." *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999) (citation omitted).

The decision below is consistent with this Court's long line of effective-vindication cases. Petitioners' desire to alter that case law is no reason to grant the petition.

2. This Court's decision in *Concepcion* did not undermine the effective-vindication rule. That decision neither implicated nor mentioned the rule. *Concepcion* addressed whether and to what extent the FAA preempts contrary state contract law. The Court held that "nothing in [the FAA] suggests an intent to preserve state-law

rules that stand as an obstacle to the accomplishment of the FAA's objectives." 131 S. Ct. at 1748. Those objectives, the Court explained, are to ensure that private arbitration agreements are enforced according to their terms and to allow for efficient, streamlined procedures tailored to the type of dispute. *Id.* at 1748-49. The Court held that California's contract law obstructed those objectives because it allowed a party to demand nonconsensual class arbitration, thereby making arbitration less efficient, while greatly increasing risks to defendants. *Id.* at 1750-52.

Concepcion is thus not "controlling precedent in this case." Pet. 13. This case concerns the harmonization, in the context of a particular factual setting, of two federal statutes—the FAA, which embodies a federal policy favoring the resolution of claims through arbitration, and the Sherman Act, in which "the private cause of action plays a central role," *Mitsubishi*, 473 U.S. at 635. As to that question, this Court's effective-vindication cases—not *Concepcion*—supply the answer. *Concepcion* did not discuss and does not impact those longstanding precedents. Moreover, the plaintiffs in *Concepcion* were pursuing only *state-law* claims. And the Court stressed that the plaintiffs *would* be able to vindicate those claims. Under the distinctive pro-consumer features of AT&T Mobility's arbitration clause, "aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole," making the claims at issue "most unlikely to go unresolved." 131 S. Ct. at 1753 (citation omitted).

Petitioners' attempt to cast this case as one about class arbitration is a fluorescent red herring. As the Second Circuit observed, "*Concepcion* and *Stolt-Nielsen*, taken together, stand squarely for the principle that parties cannot be forced to arbitrate disputes in a class-

action arbitration unless the parties agree to class action arbitration." Pet. App. 16. The Second Circuit did not compel class arbitration—to the contrary, it recognized that it had no authority to do so—and the effective-vindication doctrine does not require that parties submit to such a proceeding. Nor did the Second Circuit condition the enforceability of the arbitration agreement on the availability of class arbitration. What it *did* insist upon is that, taking into account the circumstances of the particular case, the claimants have *some* means of vindicating their federal statutory rights—whether through the cost-sharing that attends aggregate proceedings, or through the pro-claimant features provided in more recently drafted arbitration agreements, or by any other means. "At issue here is not the right to proceed as a class, but the ability to effectively vindicate a federal statutory right that predates the FAA." Pet. App. 129 (opinion of Pooler, J.).

II. There Is No Circuit Split.

Lacking a conflict with this Court's cases, petitioners attempt to create one in the circuits. But as discussed above, every circuit that has addressed a prohibitive-costs argument, both before and after *Concepcion*, has applied the same framework as the decision below. And they have done so strictly, with a healthy regard for the strong federal policy in favor of arbitration, thereby ensuring that the test has been satisfied very rarely. That this case presents one of those rare occasions is not evidence of a circuit split; to the contrary, it demonstrates that the circuits' development of the *Randolph* test has been carefully calibrated. Indeed, *Coneff*, which petitioners hold up as creating their alleged split, actually signals agreement, not conflict, among the circuits. That case recognized the effective-vindication doctrine, held

that the doctrine survives *Concepcion*, and expressly distinguished the decision below on the facts.

The decision below is also consistent with the circuits that have considered a challenge to an arbitration clause based on the particular argument made by respondents here—namely, that the per-claimant costs of arbitration, as opposed to the cost-spreading possible in aggregate litigation, would be so high as to preclude the effective vindication of federal statutory rights. *See, e.g.*, *Kristian*, 446 F.3d at 54-59; *Coneff*, 673 F.3d at 1158 & n.2; *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007). Those cases, like this one, applied the *Randolph* framework.

Kristian and *Cotton Yarn* were decided prior to *Concepcion*, and both involved federal antitrust claims. The *Kristian* plaintiffs submitted uncontested expert affidavits demonstrating that they would each have to spend "a minimum of $300,000" on an antitrust market study to prevail in arbitration. 446 F.3d at 58. Because there was "no doubt" that "these large arbitration costs" would preclude the effective vindication of federal rights, the First Circuit held that the plaintiffs had satisfied their heavy burden under *Randolph*. *Id.* at 54-59. By contrast, the *Cotton Yarn* plaintiffs "developed no evidentiary record … establishing how much it would cost to proceed individually against each defendant or how those increased costs would affect their ability to proceed in arbitration." 505 F.3d at 285. "This kind of uninformed speculation about cost," the Fourth Circuit held, "falls far short of satisfying the plaintiffs' burden" under *Randolph*. *Id.* These outcomes, although different on their facts, are identical on the law. They reveal the consistency with which *Randolph* has been applied.

This consistency has continued since *Concepcion*. In *Coneff*, the Ninth Circuit agreed with the decision below that *Concepcion* is not "inconsistent with *Green Tree* [*v. Randolph*] and similar cases." *Id.* at 1158. But it rejected the plaintiffs' arguments on the merits because (1) they "assert[ed] primarily state statutory rights" and (2) their "federal claim fail[ed] under [*Randolph*]." *Id.* at 1158 n.2. On this second point, the *Coneff* plaintiffs could not show that they had "no effective *means* to vindicate their rights" in arbitration, but only that arbitration diminished their "*incentive* to do so." *Id.* at 1159. "It is on this reasoning" that the Ninth Circuit expressly "distinguish[ed]" the decision below. *Id.* at 1159 n.3. Thus, the Ninth Circuit agreed with the Second Circuit's reasoning, but reached the opposite result because the plaintiffs there failed to satisfy the necessary elements of the *Randolph* test.[7]

The *Coneff* plaintiffs could not argue that they had no effective *means* to vindicate their rights in arbitration because of the particular features of AT&T's consumer-friendly arbitration clause, the same one considered by this Court in *Concepcion*. Under that clause, those who file a claim are "essentially guaranteed to be made whole." *Concepcion*, 131 S. Ct. at 1753 (brackets and internal quotation marks omitted). The eight-year-old ar-

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[7] Petitioners' attempt to concoct a circuit split ignores *Coneff*'s core reasoning and relies instead on a misreading of a single sentence of dictum. In a footnote, after agreeing that *Randolph* survives *Concepcion* and then distinguishing the decision below on its facts, the Ninth Circuit unremarkably went on to state: "To the extent that the Second Circuit's opinion is not distinguishable, we disagree with it." *Id.* But the decision below, of course, *is* distinguishable—and for the very reasons the Ninth Circuit identified in the body of its opinion.

bitration clause at issue in this case, on the other hand, contains no such guarantee. Just the opposite: Given the high non-recoverable costs of conducting a market study, and the lack of any cost-shifting or cost-spreading mechanism, the clause guarantees that respondents will *not* be made whole.

Nor does the decision below conflict with *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000). Like the Ninth Circuit in *Coneff*, the Third Circuit in *Johnson* held that the plaintiffs failed to meet their heavy burden of proving that their federal statutory rights could not be effectively vindicated in arbitration. 225 F.3d at 369 ("That burden has not been met here."). The *Johnson* plaintiff never argued, however, that arbitration would "eliminate" the only economically feasible means of vindicating his statutory rights, but instead generally asserted only that arbitration is "less attractive than pursuing a class action in the courts." *Id.* at 374. That is not nearly enough, and it would not be nearly enough under the Second Circuit's rigorous application of *Randolph* below.

The Fifth Circuit's decision in *Carter v. Countrywide Credit Industry, Inc.*, also poses no conflict because there too the plaintiffs failed to meet their burden of proof and their only properly argued effective-vindication claim was moot. 362 F.3d 294, 298-300 (5th Cir. 2004). *Carter* first rejected the plaintiffs' unsupported arguments that arbitration would "interfere with their right under the [Fair Labor Standards Act] to proceed collectively." *Id.* at 298-99. Then, the court held that the defendants had mooted the plaintiffs' prohibitive-

costs argument under *Randolph* by agreeing to "pay all arbitration costs." *Id.* at 300.[8]

Far from creating a circuit split, the decision below in fact avoids one. It applies the same test as every other decision in every other regional circuit, before and after *Concepcion*. And it reaches the same holding as the most closely analogous case, in which the plaintiffs conclusively demonstrated that they could not vindicate their federal statutory rights in the arbitral forum. *See Kristian*, 446 F.3d at 54-59. There is no conflict for this Court to resolve.

III. Petitioners' Speculation Is Unfounded and Review Now Is Unwarranted.

As explained, the decision below is a case-specific application of this Court's settled doctrine and is fully consistent with other circuits' similarly fact-bound decisions. It is no sinister evasion of *Concepcion*. Nor is there any reason to believe it will be applied as such. If later applications prove otherwise, those future cases can be reviewed at that future time, with the benefit of a full Court. *See Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010) (reflecting Justice Sotomayor's recusal); *see also Laird v. Tatum*, 409 U.S. 824, 837-38 (1972) (memorandum of Rehnquist, J.) (discussing the "undesirability" of "the disqualification of one Justice of this Court" resulting in "an affirmance of the judgment

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[8] Looking further afield, the Chamber (at 14) cites two other cases in an effort to conjure a split. But *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1215 (11th Cir. 2011), involved only *state-law* claims and reaffirmed the effective-vindication doctrine's application to *federal* claims. And *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1234-35 (11th Cir. 2012), likewise involved only *state-law* claims.

below by an equally divided Court"). For now, the prudent course is to refrain from premature review.

The decision below does not affect the mine run of federal statutory cases where consumers and employees can effectively prosecute their claims through arbitration. The Second Circuit made clear that the evidentiary record necessary to invalidate an arbitration clause under *Randolph* "is not easily assembled," and that "courts are capable of the scrutiny such arguments require." Pet. App. 25. In fact, in the 12 years since *Randolph*, only two appellate decisions, including the decision below, have held that arbitration does not allow for the effective vindication of federal statutory rights because of the inability of claimants to share costs in aggregated proceedings. And both cases involved complex and hugely expensive antitrust actions, where the amount of non-recoupable costs dwarfed the expected individual recoveries. *See Kristian*, 446 F.3d 25; Pet. App. 25. If *Randolph* continues to be applied as faithfully and narrowly as it has been thus far, there will be no need for this Court's intervention.

If the well-established *Randolph* rule were likely to open the floodgates to class actions, one would expect to see some evidence of this from before *Concepcion*, particularly in states that did not adopt unconscionability rules like California's. Yet the petition offers no such evidence, and there is none. *Kristian* (decided in 2006) and the decision below are the only cases of their kind. Where petitioners fear a flood, the empirical evidence shows barely a trickle.

Petitioners point to a single district court case as proof that the decision below will lead to widespread arbitration avoidance. That case, *Sutherland v. Ernst & Young LLP*, 847 F. Supp. 2d 528 (S.D.N.Y. 2012), is fully

briefed on appeal in the Second Circuit and has generated amicus briefs on both sides, including one filed by the United States. *Sutherland v. Ernst & Young LLP*, 2d Cir. Case No. 12-304. *Compare* Appellants' Br. 2-3 (arguing that the decision below is "not a per se rule," but requires "a detailed showing of prohibitive costs that 'is not easily assembled'" and is not met when the costs are recoupable), *with* U.S. Dep't of Labor Br. 8 (supporting the appellee and arguing that the decision below should apply when the plaintiff can show prohibitive costs, even if recoupable, because "plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of the suit's potential costs"). *Sutherland* provides the Second Circuit with an excellent opportunity to flesh out the contours of the decision below. Whatever the outcome, that percolation would be beneficial.[9]

Developments in the drafting and enforcement of arbitration clauses further counsel against premature intervention by this Court. "Consumer-friendly" arbitration clauses—like the AT&T clause at issue in *Concepcion* and *Coneff*—are becoming increasingly widespread. A recent empirical study of "37 current arbitration clauses" "confirm[s] that many large and well-known consumer-oriented companies have indeed added 'friendly' provisions to their arbitration clauses, such as offering to pay filing fees, providing for attorney and expert fee-shifting, and promising 'bounty' or premium pay-

[9] The Chamber (at 9 n.7) also points to another case, which is also now pending before the Second Circuit. That case concerns a different issue: whether Title VII pattern-or-practice claims—which cannot be prosecuted individually—may be sent to arbitration. *See Chen-Oster v. Goldman, Sachs & Co.*, 2011 WL 2671813 (S.D.N.Y. July 7, 2011), 2d Cir. Case No. 11-5229.

ments to claimants who achieve a better outcome in arbitration than the company's last-best offer." Myriam E. Gilles, *Killing Them With Kindness: Examining "Consumer-Friendly" Arbitration Clauses After* AT&T Mobility v. Concepcion, Notre Dame L. Rev. (forthcoming 2013).[10]

For example, Microsoft very recently added an arbitration clause to its services agreement that includes many of the pro-consumer provisions included in AT&T's clause, but with an additional promise to "reimburse any expenses (including expert witness fees and costs)" incurred in pursuing a claim that results in an award that is greater than Microsoft's last written offer.[11] And Groupon's clause was amended in late 2011 to provide that "in the event that [the claimant is] able to demonstrate that the costs of arbitration will be prohibitive as compared to the costs of litigation, Groupon will pay as much of your filing and hearing fees in connection with the arbitration as the arbitrator deems necessary to *prevent the arbitration from being cost-prohibitive*." (Emphasis added.)[12] This case, by contrast, includes an eight-year-old arbitration agreement that is completely lacking in such features. In light of the ongoing trend toward arbitration clauses including "alternative incentives," the "specific facts" presented by this case are "unlikely to be repeated." Jacob Spencer, *Arbitration, Class Waivers,*

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[10] The study is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132604.

[11] The agreement is available at http://windows.microsoft.com/en-US/windows-live/microsoft-services-agreement.

[12] The agreement is available at http://www.groupon.com/terms#arbitration.

and Statutory Rights, 35 Harv. J.L. & Pub. Pol'y 991, 1013 (2012).

The Court should allow this evolutionary process to continue, just as it did prior to *Concepcion*.[13] By refraining from premature intervention—as AT&T's amicus brief pointed out before *Concepcion*—this Court allowed for "the continued evolution of both arbitration clauses" in the marketplace and "the law governing their enforceability." Amicus Br. of AT&T Moblility, 2008 WL 534808, at *5 (filed Feb. 25, 2008), in *T-Mobile USA, Inc. v. Laster*, 128 S. Ct. 2500 (2008) (No. 07-976) (urging the denial of certiorari to allow for percolation and development of consumer-friendly clauses such as AT&T's). Given the absence of any conflict on the question presented, the Court should do the same here.

If lower courts continue applying the *Randolph* framework narrowly and companies continue adopting claimant-friendly arbitration clauses, no action by this Court will be needed. If a different course of events unfolds, this Court will have ample opportunity to address the question, with the benefit of those future developments. *See Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950) (Frankfurter, J., respecting the denial of certiorari) ("Wise adjudication has its own time

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[13] Before *Concepcion*, the Court repeatedly denied certiorari in cases involving earlier, less-claimant-friendly clauses. *See, e.g. Athens Disposal Co. v. Franco*, 130 S. Ct. 1050 (2010); *T-Mobile USA v. Laster*, 128 S. Ct. 2500 (2008); *T-Mobile USA v. Janda*, 129 S. Ct. 45 (2008); *T-Mobile USA v. Lowden*, 129 S. Ct. 45 (2008); *T-Mobile USA v. Ford*, 128 S. Ct. 2503 (2008); *T-Mobile USA v. Gatton*, 128 S. Ct. 2501 (2008); *Circuit City Stores, Inc. v. Gentry*, 128 S. Ct. 1743 (2008); and *Cnty. Bank v. Muhammad*, 127 S. Ct. 2032 (2007).

for ripening."). Intervention now is both unnecessary and unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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