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,

Respondents.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AMERICAN BANKERS ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
KATE COMERFORD TODD
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

MARIA GHAZAL
Business Roundtable
300 New Jersey Ave., NW, Suite 800
Washington, DC 20001
(202) 872-1260

ANDREW J. PINCUS
Counsel of Record
EVAN M. TAGER
ARCHIS A. PARASHARAMI
KEVIN RANLETT
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

[Additional Counsel listed on signature page]

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES AND RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

Page(s)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AMERICAN BANKERS ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.[1]

Business Roundtable ("BRT") is an association of chief executive officers of leading U.S. companies with over $6 trillion in annual revenues and more than 14 million employees. BRT member companies comprise nearly a third of the total value of the U.S. stock market and pay $163 billion in dividends to shareholders.

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. ABA members hold an overwhelming majority—approximately 95

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief, and their letters consenting to the filing of the brief have been filed with the Clerk.

percent—of the domestic assets of the U.S. banking industry.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

Relying on the Federal Arbitration Act's policies promoting arbitration and this Court's consistent vindication of those policies over the past half-century, many of *amici*'s members use arbitration agreements in millions of their contractual relationships. By eliminating the huge litigation costs associated with resolving disputes in court, those agreements create cost savings that result in lower prices for consumers, higher wages for employees, and benefits for the entire national economy.

Most arbitration agreements require that disputes be resolved on an individual, rather than class-wide, basis. As this Court explained in *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011), and *Stolt–Nielsen S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), class procedures interfere with the simplicity, informality, and expedition that are characteristic of arbitration.

The Second Circuit in this case refused to enforce the parties' agreements to arbitrate on an individual basis, instead holding that plaintiffs' federal anti-

trust claims must proceed as a putative class action. Because the advantages of arbitration would be lost if the Second Circuit's ruling stands, *amici* have an extremely strong interest in this case.

SUMMARY OF ARGUMENT

A two-judge panel of the Second Circuit refused to enforce the parties' agreements to arbitrate their disputes on an individual basis because the court determined—on the basis of a single affidavit from an expert witness retained by plaintiffs' counsel—that "the practical effect of enforcement would be to preclude [plaintiffs'] ability to vindicate their federal statutory rights." Pet. App. 15a.

The panel did not dispute that if the plaintiffs here had asserted state-law claims, this Court's decision in *Concepcion* would control—and the arbitration agreements would be enforced. It nonetheless determined that when a plaintiff's claim arises under federal law, a court must refuse to enforce the arbitration agreement if the court concludes, based on a case-by-case factual assessment, that it would be "economically [in]feasible" for the plaintiff to vindicate his federal rights in an individual arbitration.

This Court's review is urgently needed for two fundamental reasons.

First, the decision below is the product of an intense effort by the plaintiffs' bar to undermine this Court's decision in *Concepcion* and, if permitted to stand, it threatens to do just that. Virtually any class-action complaint can be framed to include at least one federal claim. And plaintiffs' lawyers can readily retain an expert to assert that the costs of proving a plaintiff's claim would outweigh the potential recovery—thereby providing the factual predi-

cate needed to avoid arbitration on an individual basis under the Second Circuit's approach.

As a result, the vast majority of businesses sued in a putative class action in the Second Circuit will either be deprived of their arbitration rights altogether or permitted to invoke them only after costly and time-consuming litigation regarding projected costs of proving the claim in arbitration. Because forum-shopping plaintiffs can bring virtually any class action in the Second Circuit—and almost every business of any significant size is susceptible to suit in New York—the decision below will effectively apply nationwide, calling into question literally millions of arbitration agreements.

Second, the Second Circuit panel patently misread *Concepcion*. This Court's preemption holding rested on its construction of the FAA—the conclusion that the statute protects the right to arbitrate on an individual basis—and that construction applies equally to claims arising under federal law. Nothing in the FAA indicates that the statute subjects arbitrable state-law claims to a standard different than arbitrable federal-law claims.

To be sure, Congress may exclude federal claims from the otherwise-applicable arbitrability principle embodied in the FAA. But the standard for demonstrating exclusion of a claim from the FAA is demanding, and this Court has already held that antitrust claims are not subject to such an exclusion.

And, although this Court has indicated that an arbitration agreement may not be enforced when *costs unique to the arbitration process* effectively preclude the plaintiff from initiating arbitration, that principle does not grant courts a roving commission

to invalidate arbitration clauses based on the supposed costs of proving the plaintiff's claim. It applies only to the costs of accessing the arbitral forum.

Finally, although policy concerns are irrelevant to the legal question presented here, the policy rationale underlying the Second Circuit's decision is wrong as well. The panel assumed that individual arbitration would proceed in exactly the same way as a class action in court, ignoring this Court's repeated recognition that arbitration is simpler, quicker, and less formal than litigation in court. And the panel's case-specific assessment ignores the fact that arbitration clauses apply to a range of disputes—and, because of arbitration's greater efficiency, provide aggrieved parties with the ability to pursue claims that could not be pursued economically in court. Determining that an arbitration clause is impermissible based on how it applies to one type of claim simply makes no sense.

ARGUMENT

I. THE IMPORTANCE OF THE ISSUE PRESENTED NECESSITATES THIS COURT'S IMMEDIATE REVIEW.

The decision below provides plaintiffs with a forum and roadmap for judicial invalidation of millions of arbitration agreements in direct contravention of this Court's decision in *Concepcion*—a result that will undermine substantially the strong federal policy favoring arbitration.

A. The Plaintiffs' Bar Has Aggressively Promoted Contrived Limitations On This Court's Ruling In *Concepcion*.

This Court held in *Concepcion* that "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures" is inconsistent with "arbitration as envisioned by the FAA." 131 S. Ct. at 1744, 1753. It therefore determined that California's state-law rule requiring class procedures was preempted by the FAA.

Concepcion vindicates the "federal policy favoring arbitration" embodied in the FAA, *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and the benefits that parties to arbitration agreements receive from less costly and more efficient dispute resolution.[2]

But the Court's holding threatens the one group that benefits from the high transaction costs of litigation—class-action lawyers. It therefore is not surprising that the Court's decision triggered an intensive effort by the plaintiffs' bar to promote contrived limitations on *Concepcion*.

Immediately following the Court's ruling, many plaintiffs argued that *Concepcion* is limited to its facts—either arbitration clauses with the exact same language and features or the specific California un-

---

[2] The lower cost of dispute resolution also reduces the costs of doing business, allowing for lower prices for consumers and higher wages for employees. See, *e.g.*, Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 91; Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 5-7 (1995).

conscionability rule addressed in that decision. Lower courts rejected those arguments.[3]

Plaintiffs' lawyers around the country also argued that courts remained free to refuse to enforce arbitration agreements when the lack of class procedures allegedly prevents them from "effectively vindicating" their state-law claims. Again, those arguments were rejected by virtually every lower court.[4]

Unable to convince the lower courts to adopt unjustified limitations on *Concepcion* when claims arise under state law, those seeking to invalidate arbitration agreements suggested arguing that courts must conduct a case-specific factual inquiry to assess whether plaintiffs need class procedures to "effectively vindicate" their *federal* statutory rights, and invalidate agreements to arbitrate solely because they preclude class arbitration—the precise result that *Concepcion* forbids.[5]

---

[3] See, *e.g.*, *Morvant* v. *P.F. Chang's China Bistro, Inc.,* 2012 WL 1604851, at *7-*8 (N.D. Cal. May 7, 2012); *Lewis* v. *UBS Fin. Servs. Inc.,* 818 F. Supp. 2d 1161, 1167 (N.D. Cal. 2011).

[4] See, *e.g.*, *Homa* v. *Am. Express Co.*, 2012 WL 3594231 (3d Cir. Aug. 22, 2012); *Pendergast* v. *Sprint Nextel Corp.*, 2012 WL 3553466 (11th Cir. Aug. 20, 2012); *Coneff* v. *AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012); *Cruz* v. *Cingular Wireless LLC*, 648 F.3d 1205 (11th Cir. 2011); *Kaltwasser* v. *AT&T Mobility LLC*, 812 F. Supp. 2d 1042 (N.D. Cal. 2011).

[5] See, *e.g.*, Leslie Bailey & Paul Bland, *How courts can and should limit AT&T Mobility LLC* v. *Concepcion*, Public Justice, http://publicjustice.net/ConcepcionMemo (visited Aug. 27, 2012); Myriam Gilles, AT&T Mobility vs. Concepcion*: From Unconscionability to Vindication of Rights*, Scotusblog (Sept. 15, 2011), http://www.scotusblog.com/2011/09/att-mobility-vs-concepcion-from-unconscionability-to-vindication-of-rights/.

This argument has been advanced in numerous courts around the country.[6] Although virtually all courts outside the Second Circuit have rejected it, the Second Circuit's acceptance of this theory threatens to open a vast loophole for plaintiffs seeking to avoid enforcement of agreements to arbitrate on an individual basis.

B. The Second Circuit's "Vindication-Of-Federal-Statutory-Rights" Test Threatens To Limit *Concepcion* Drastically.

The Second Circuit panel held that an agreement to arbitrate on an individual basis is invalid whenever "the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights." Pet. App. 15a. According to the panel, this factual showing is case-specific—the enforceability of an arbitration agreement "must be considered on its

---

[6] See, *e.g.*, *Fromer* v. *Comcast Corp.*, 2012 WL 3600298, at *6 (D. Conn. Aug. 21, 2012); *Rame, LLC* v. *Popovich*, 2012 WL 2719159, at *12 (S.D.N.Y. July 9, 2012); *In re Elec. Books Antitrust Litig.*, 2012 WL 2478462, at *2 (S.D.N.Y. June 27, 2012); *Knutson* v. *Sirius XM Radio Inc.*, 2012 WL 1965337, at *5 (S.D. Cal. May 31, 2012); *Coleman* v. *Jenny Craig, Inc.*, 2012 WL 3140299, at *4 (S.D. Cal. May 15, 2012); *Karp* v. *CIGNA Healthcare, Inc.*, 2012 WL 1358652, at *5-*10 (D. Mass. Apr. 18, 2012); *Emilio* v. *Sprint Spectrum L.P.*, 2012 WL 917535, at *4 (S.D.N.Y. Mar. 16, 2012); *LaVoice* v. *UBS Fin. Servs., Inc.*, 2012 WL 124590, at *7-*8 (S.D.N.Y. Jan. 13, 2012); *Sutherland* v. *Ernst & Young LLP*, 847 F. Supp. 2d 528, 535-538 (S.D.N.Y. 2012); *In re Apple & AT&TM iPhone Antitrust Litig.*, 826 F. Supp. 2d 1168, 1175 (N.D. Cal. Dec. 1, 2011); *Raniere* v. *Citigroup Inc.*, 827 F. Supp. 2d 294, 314 (S.D.N.Y. 2011); *Adams* v. *AT&T Mobility LLC*, 816 F. Supp. 2d 1077, 1091-1092 (W.D. Wash. 2011); *Chen-Oster* v. *Goldman, Sachs & Co.*, 2011 WL 2671813, at *4 (S.D.N.Y. July 7, 2011).

own merits, based on its own record." *Id.* at 29a. Here, relying on the affidavit of a single paid expert witness, the panel concluded that "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action." *Id.* at 27a.[7]

This "vindication-of-statutory-rights" theory is, of course, the precise argument that the Court expressly rejected in *Concepcion*—holding irrelevant (because "States cannot require a procedure that is inconsistent with the FAA") the dissent's "claim[] that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." 131 S. Ct. at 1753.

The practical effect of the Second Circuit's ruling is to enable the vast majority of class-action plaintiffs to avoid *Concepcion* by bringing suit there, filing an affidavit from a paid expert stating that it is impractical to litigate the claim in an individual arbitration, and obtaining the invalidation of the arbitration agreement based on the "case-by-case" test endorsed by the panel below. Even when the party seeking to enforce an arbitration agreement prevails, it will have been forced to undergo burdensome satellite litigation regarding the plaintiffs' alleged ability to vindicate their claims in arbitration. Both of these results directly contravene the FAA.

---

[7] Although the panel issued its ruling in an antitrust case, the decision is already being applied to claims under other federal statutes. See, *e.g., Sutherland, supra* (Fair Labor Standards Act); *Chen-Oster*, *supra* (Title VII of the Civil Rights Act).

1. The "vindication" test will allow the vast majority of class-action plaintiffs to improperly resist a motion to compel arbitration.

The panel below held that a single expert witness's assertion that it would cost "'from about $300 thousand to more than $2 million'" to arbitrate each class member's claim—consisting in large measure of that expert's own witness fees—"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." Pet. App. 14a, 26a.

Chief Judge Jacobs recognized in his dissent from the denial of rehearing en banc that the panel's "broad ruling" could "be used to challenge virtually every consumer arbitration agreement that contains a class-action waiver." *Id.* at 137a. Plaintiffs' lawyers need only include a federal claim in the complaint and retain a paid expert to testify that the cost of pursing an individual claim would be prohibitive. As Chief Judge Jacobs observed, "there is no shortage" of "consultant[s]" willing "to opine that expert costs would outweigh a plaintiff's individual loss." *Ibid.*[8]

That is precisely what is occurring in federal courtrooms across the country. Plaintiffs routinely submit affidavits from experts or other plaintiffs' lawyers who testify that even the simplest of individual claims—such as disputes over whether a cellphone customer authorized charges for a roadside-assistance program—will cost hundreds of thousands

[8] Indeed, the paid expert witness in this case performed precisely the same role in *Kaltwasser*, *supra*.

or millions of dollars to arbitrate. *E.g.*, *Cruz* v. *Cingular Wireless LLC*, 648 F.3d 1205, 1214 (11th Cir. 2011); see also cases cited in note 6, *supra*; Br. of Chamber of Commerce of the United States at 10-13, *McKenzie Check Advance of Fla., LLC* v. *Betts*, No. SC-11-514 (Fla. July 1, 2011), *at* 2011 WL 4442948.

Indeed, one plaintiffs'-lawyer organization has posted model affidavits on its website. Public Justice, *Helpful Post-Concepcion court rulings*, http://publicjustice.net/case-documents/concepcion (visited Aug. 27, 2012).

2. Plaintiffs' ability to compel collateral judicial litigation conflicts with the FAA's policy favoring efficient and expeditious vindication of arbitration rights.

This "vindication-of-federal-statutory-rights" argument not only places a cloud of uncertainty around the enforceability of vast numbers of arbitration clauses, but also imposes drastically increased burdens and costs on the enforcement of arbitration agreements.

The Second Circuit's approach calls for an analysis in each case "based on its own record" (Pet. App. 29a), and—as noted above—it is becoming standard practice for parties resisting arbitration to retain experts to testify that arbitration is not feasible. Accordingly, the party seeking to enforce the arbitration agreement must be prepared with facts and its own expert testimony showing that individual arbitration is an "economically feasible means for enforcing [the plaintiffs'] statutory rights." *Id.* at 53a. Indeed, given the Second Circuit's repeated emphasis on petitioners' failure to provide facts disputing the expert's affidavit here (*id.* at 11a, 27a), parties seeking to en-

force arbitration agreements would be foolhardy to base their case solely on the irrelevance and inadequacy of a plaintiff's factual showing.

This evidentiary showdown over the feasibility of arbitration inevitably will devolve into a collateral litigation of the merits, with requests for plenary discovery, briefing, and argument over what types of evidence and analysis are needed to arbitrate the case and how expensive discovery and the arbitral hearing would be. The parties also can be expected to challenge the qualifications and methodology of each other's experts.

In light of these burdens, some parties to arbitration agreements inevitably will conclude that the fight to enforce them is not worth the bother: "Even 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," and the "predictable upshot is that" arbitration will be "too expensive and too slow to serve any of its purposes." *Id.* at 139a-140a (Jacobs, C.J., dissenting from denial of rehearing en banc).

The burdens, and the resulting uncertainty, may lead some companies to abandon arbitration altogether. Businesses typically pay all or almost all of the consumer's or employee's share of arbitration costs.[9] But when there is no assurance that all claims will be arbitrated (or can be compelled into arbitration inexpensively), and a company must

---

[9] *E.g.*, Am. Arbitration Ass'n, Consumer-Related Disputes Supplementary Procedures § C-8, http://www.adr.org/aaa/faces/aoe/gc/gc_search/gc_rule/gc_rule_detail?doc=ADRSTG_015806.

shoulder the additional costs of class-action litigation, subsidizing the costs of individual arbitration may no longer be a rational business option.

Moreover, the judicial resources that would be devoted to presiding over this satellite litigation would be enormous. That is why this approach "is unworkable as a practical matter of judicial administration." *Kaltwasser*, 812 F. Supp. 2d at 1049.[10]

C. This Court Should Not Delay Consideration Of The Question Presented.

The dramatic consequences of the Second Circuit's decision warrant immediate review by this Court. And nothing would be gained by waiting to grant review of this issue in a future case.

To begin with, because the issue turns entirely on the meaning of this Court's prior arbitration decisions—chiefly *Concepcion* and *Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79 (2000)—further percolation in the lower courts would provide little useful information. This Court is best situated to explain the meaning of its own decisions.

In any event, there already is a diverse array of judicial thinking on the issue. The Second Circuit in this case alone has produced three panel opinions, a

---

[10] The "vindication of federal statutory rights" argument has not met with success when the challenged arbitration clause provides extra incentives to plaintiffs who successfully pursue small claims (and thereby undercuts any contention that individual arbitrations would be economically infeasible). *E.g.*, *Coneff*, 673 F.3d at 1159. But few arbitration clauses include such provisions. And even in many of those cases, the party invoking arbitration has been forced to undergo costly, time-consuming satellite litigation regarding the potential costs of pursuing the claim in arbitration and the plaintiff's potential recovery.

concurrence in the denial of en banc review, and three dissents from that denial. And as the petitioners point out, the Third, Fifth, and Ninth Circuits have issued decisions reflecting reasoning and results that diverge significantly from the Second Circuit's approach. Pet. 22-27. The Eleventh Circuit has done so as well. *Cruz*, 648 F.3d at 1214; *Pendergast* v. *Sprint Nextel Corp.*, 2012 WL 3553466, at *10-*11 (11th Cir. Aug. 20, 2012).

Nor is this the type of issue as to which this Court should await additional decisions by the courts of appeals. The Chief Judge of the Second Circuit dissented from the denial of rehearing en banc, stating that the panel's decision is squarely inconsistent with two of this Court's rulings.

And the practical effect of the panel's ruling is extremely far-reaching. That is because virtually every significant company that does business nationwide is subject to personal jurisdiction in New York—especially when federal claims are involved—and plaintiffs' lawyers accordingly will bring their nationwide class actions in New York to ensure application of the Second Circuit's "vindication" standard and avoid a possible loss on the issue in another court. Through this entirely predictable forum-shopping, the Second Circuit's standard effectively will become the national rule.

In the meantime, the FAA and this Court's decision in *Concepcion* would be short-circuited in numerous cases, with many businesses—as well as consumers and the market generally—deprived of the benefit of arbitration. Intervention by this Court now is essential to avoid that result.

II. THE DECISION BELOW FUNDAMENTALLY MISINTERPRETS *CONCEPCION* TO CREATE A DISTINCTION BETWEEN FEDERAL AND STATE CLAIMS NOT AUTHORIZED BY CONGRESS.

This Court's review also is warranted because the decision below flagrantly disregards this Court's reasoning in *Concepcion*, manufactures a distinction between federal and state claims not authorized by Congress in the FAA or any other federal statute, and arrogates to courts new authority to invalidate arbitration agreements.

A. The FAA Bars Courts From Conditioning Enforcement Of Arbitration Agreements On The Availability Of Class Procedures.

1. Concepcion*'s interpretation of the FAA governs the arbitrability of all claims, including federal statutory claims, unless Congress expressly commands otherwise.*

Concepcion's holding rested entirely on this Court's conclusion that "class arbitration" is "not arbitration as envisioned by the FAA," because it lacks the speed and efficiency of individual arbitration, requires the burdens and "formality" of class-action litigation, and "greatly increases risks to defendants" given the magnified stakes and absence of meaningful judicial review. 131 S. Ct. at 1751-1753. Requiring parties to arbitration agreements to subject themselves to class proceedings as the price of admission to the arbitral forum, the Court held, would "interfere[]" with the FAA's objective of "promot[ing] arbitration." *Id.* at 1749-1750.

To be sure, *Concepcion* was a preemption decision because the anti-arbitration rule before the Court was embodied in state law. But this Court's holding rested squarely on its interpretation of the FAA—that "[r]equiring the availability of class wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748.

The interference with the FAA is no less pronounced when a plaintiff contends that the inability to "vindicate" a federal claim (as opposed to "vindicate" a claim under state law) mandates the availability of class proceedings. In that situation, as well, requiring class procedures "creates a scheme inconsistent with the FAA."

Concepcion's interpretation of the FAA could be inapplicable here only if the FAA embodied a different, and more restrictive, standard for arbitration of federal claims than the test applicable to state claims. That might justify refusing to enforce an agreement for individual arbitration of federal claims in circumstances in which the same agreement would be enforced with respect to state claims.

But this Court reiterated just this year that the FAA's mandate to "enforce arbitration agreements according to their terms" applies "*even when* the claims at issue are federal statutory claims." *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 667, 669 (2012) (emphasis added). The FAA does not specify separate procedures—or standards—for determining the enforceability of arbitration agreements depending on whether state or federal claims are at issue. See 9 U.S.C. § 2.

2. Congress has not excluded federal antitrust claims from the FAA's coverage.

Federal and state claims stand on a different footing under the FAA in one respect: Congress, unlike a state legislature, may exclude from the FAA's pro-arbitration mandate a statutory right that Congress creates. But the Court has repeatedly held that "Congress itself" must "evince[] an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

Neither respondents nor the Second Circuit rely on such a congressional determination. Pet. App. 17a n.5 ("[p]laintiffs here do not allege that the Sherman Act expressly precludes arbitration or that it expressly provides a right to bring collective or class actions").

Nor could they, because this Court has repeatedly held that federal antitrust claims may be arbitrated. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("[i]t is by now clear that statutory claims"—including "claims arising under the Sherman Act"—"may be the subject of an arbitration agreement, enforceable pursuant to the terms of the FAA"); *Mitsubishi Motors*, 473 U.S. at 636.

Moreover, Congress has not evinced any intent to require class procedures for antitrust claims. The Sherman and Clayton Acts were enacted more than a half-century before the creation of the modern class action. Just as "class arbitration was not even envisioned by Congress when it passed the FAA in 1925" (*Concepcion*, 131 S. Ct. at 1752), class arbitration and class-action litigation did not exist when Congress passed the Sherman Act in 1890 and the Clay-

ton Act in 1924. Congress's enactment of those statutes could hardly have mandated a procedure not yet in existence.

Indeed, as this Court has noted, in enacting the Sherman Act, Congress specifically "rejected a proposal to allow a group of consumers to bring a collective action as a class." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979). And in subsequently enacting the Clayton Act, Congress did not discuss class proceedings at all. Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 27 (1989).

The court below nonetheless concluded that individual arbitration of the plaintiffs' antitrust claims would "conflict with congressional purposes manifested in the provision of a private right of action in the [Sherman Act]." Pet. App. 17a n.5. But this Court rejected that contention in *Mitsubishi Motors*, explaining that "the fundamental importance … of the antitrust laws" does not preclude these claims from being brought in arbitration. 473 U.S. at 634; see *id.* at 634-640. There is no "inherent conflict" (*Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220, 227 (1987)) between individual arbitration and the purpose of the antitrust laws; claimants can recover the same individual remedies (such as treble damages and attorneys' fees) in arbitration as in court. Moreover, in *CompuCredit* the Court rejected the notion that "the mere formulation of the cause of action" in a statute is "sufficient to establish the contrary congressional command overriding the FAA." 132 S. Ct. at 670 (internal quotation marks omitted).

3. Courts are not authorized to undertake case-by-case assessments of whether class procedures are "necessary" to "vindicate" a federal claim.

The Second Circuit pointed to this Court's statement in *Green Tree Financial Corp.-Alabama* v. *Randolph* that it would invalidate an arbitration clause if "the existence of large arbitration costs [were to] preclude a litigant … from effectively vindicating her federal statutory rights." 531 U.S. at 90. But *Randolph* is wholly inapplicable here.

That case involved a plaintiff's contention that an arbitration clause was unenforceable because it did not "affirmatively protect [her] from potentially steep arbitration costs," such as "filing fees, arbitrators' costs, and other arbitration expenses." 531 U.S. at 82, 84. While rejecting that challenge as speculative, this Court indicated that courts could "invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive" in order to ensure that the plaintiff "'effectively may vindicate'" her statutory rights in arbitration. *Id.* at 90, 92 (quoting *Gilmer*, 500 U.S. at 28) (quoting in turn *Mitsubishi Motors*, 473 U.S. at 637)).

Contrary to the Second Circuit's view, this "vindication" principle applies only when an arbitration agreement imposes on the claimant excessive costs *unique to arbitration—i.e.*, costs that would not be incurred if the claim were instead brought in a judicial forum. Thus, *Randolph* refers to "*arbitration* costs" (531 U.S. at 90 (emphasis added)) and "*arbitration* expenses" (*id.* at 84 (emphasis added)), and the two examples it offers—"filing fees" and "arbitrators' costs" (*ibid.*)—both are costs imposed as a consequence of the arbitral forum.

Indeed, this Court in *Gilmer rejected* the argument that the unavailability of class procedures is a valid basis for refusing to compel arbitration of a federal claim. As this Court explained, "the fact that the [federal statute at issue] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." 500 U.S. at 32 (internal quotation marks omitted).

Moreover, the Second Circuit did not conclude—and plaintiffs did not contend—that the cost of accessing the arbitral forum is "prohibitively expensive" when compared to the costs of filing a case in court. Instead, the Second Circuit simply assumed, erroneously, that the "vindication" principle identified in *Randolph* extends to cases in which the cost of proving the claim—whether in court or in arbitration—is high in relation to its value.[11]

The Second Circuit's interpretation of *Randolph* also directly conflicts with *Concepcion*'s rejection of the dissent's argument that class procedures must remain available because some claims are too small to be worth pursuing on an individual basis. 131 S. Ct at 1753; see also *Coneff* v. *AT&T Corp.*, 673 F.3d 1155, 1158 (9th Cir. 2012).

For this reason, the Kentucky Supreme Court recently explained that, under *Randolph* and *Concep-*

---

[11] The argument for requiring class procedures was stronger in *Gilmer* than it is here, because the ADEA—unlike the antitrust laws—expressly provides for collective actions (see 29 U.S.C. § 626(b)). Nevertheless, this Court stated that ADEA claims may be arbitrated "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." 500 U.S. at 32 (internal quotation marks omitted).

cion, "arbitration clauses certainly may continue to be struck down as unconscionable if their terms strip claimants of a statutory right, which cannot be vindicated by arbitration, because, for example, the arbitration costs on the plaintiff are prohibitively high [compared to court filing costs]; or the location of the arbitration is designated as a remote location. But again, simply the impracticality of pursuing a single, small dollar claim is not regarded as an impediment to vindicating one's rights." *Schnuerle* v. *Insight Commc'ns, Co.*, 2012 WL 3631378, at *8 (Ky. Aug. 23, 2012); see also *Kaltwasser*, 812 F. Supp. 2d at 1049 ("it is incorrect to read *Concepcion* as allowing plaintiffs to avoid arbitration agreements on a case-by-case basis simply by providing individualized evidence about the costs and benefits at stake").

Finally, the Second Circuit's overbroad interpretation of *Randolph* must be rejected for an additional reason. It would create a significant limitation on the enforceability of arbitration agreements not grounded in any recognized legal authority in this area. Nothing in the FAA, the antitrust laws, any other federal statute,[12] or federal common law permits a court to undertake its own case-specific factual investigation of whether a federal claim can feasibly be pursued only in a class action.[13]

---

[12] Federal Rule of Civil Procedure 23 cannot justify the "vindication of rights" standard, because it may not "enlarge, or modify any substantive right." 28 U.S.C. § 2072(b).

[13] Indeed, the FAA was specifically enacted to end "judicial hostility to arbitration agreements," which manifested in a "great variety of devices and formulas declaring arbitration against public policy." *Concepcion*, 131 S. Ct. at 1745. The Second Circuit's malleable "vindication of statutory rights" approach is akin to those anti-arbitration "devices and formulas."

B. The Policy Arguments Underlying The Second Circuit's Ruling Provide No Basis For Overriding Congress's Determinations In The FAA.

At bottom, the Second Circuit's misguided application of the "vindication-of-federal-statutory-rights" test rests on the very policy argument rejected by the Court in *Concepcion*. The dissent argued that "nonclass arbitration over [small] sums will also sometimes have the effect of depriving claimants of their claims (say, for example, where claiming the $30.22 were to involve filling out many forms that require technical legal knowledge or waiting at great length while a call is placed on hold)." 131 S. Ct. at 1761 (Breyer, J., dissenting). The Court responded that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id*. at 1753.

The panel's policy concern is not only irrelevant for the same reasons, but also is wrong on its own terms.

First, the Second Circuit's case-specific standard ignores that arbitration agreements apply to a wide range of potential disputes. A large number of those disputes could be characterized as "economically infeasible" to bring in court because they involve individualized claims involving amounts too small to justify invocation of complex judicial procedures that typically require the retention of counsel.[14] The simple procedures that are the hallmark of arbitration,

---

[14] Survey data indicate that a potential recovery must exceed $60,000 to attract contingent fee counsel, for example. See Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 DISP. RESOL. J. May-Jul. 2003, at 9, 10-11.

by contrast, make it possible for the parties to vindicate rights that would not be redressable in court. *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 281 (1995).

The panel's analysis also ignores the savings that arbitration produces in connection with the resolution of all disputes because of procedures that are quicker, less burdensome, and more efficient than the judicial process. See note 2, *supra*.

By ignoring the range of claims subject to the arbitration clause—and the resulting benefits in terms of significantly reduced overall costs as well as the ability to vindicate claims that cannot practically be pursued in court—the Second Circuit's standard produces an incomplete and fundamentally skewed analysis. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (unconscionability of contract assessed as of the time of contracting, not based on facts that ultimately develop).

Second, the court erroneously assumed that a plaintiff who arbitrates an individual antitrust claim will inevitably face the same hurdles and obstacles as a plaintiff who pursues a class action in court. In fact, arbitration is much more informal than litigation, and spares litigants from the rigors of the federal rules of evidence and civil procedure. In addition, in individual arbitration there is no need for the plaintiff to spend months or years litigating whether there are common questions of fact or law that predominate over individualized issues or whether the plaintiff can adequately represent the interests of the putative class.

Litigating these class-certification issues—which Federal Rule of Civil Procedure 23 and due process

necessitate and which may involve millions of dollars in costs—all come before the parties confront the merits of their dispute. Individual arbitration, by contrast, gets immediately to the heart of the merits, securing faster and more affordable resolution of claims for all parties involved.

Third, the court of appeals incorrectly assumed that each individual claimant must reinvent the wheel in each proceeding. In fact, however, nothing prevents claimants (or their attorneys) from sharing the expenses of expert witnesses, fact investigation, and attorney preparation. In this case, the plaintiffs are businesses that belong to a trade association that could facilitate the organization process. Although petitioner's arbitration agreement includes a provision requiring that arbitration proceedings be kept confidential (Pet. App. 92a), that requirement would not prevent plaintiffs from collectively preparing their arbitration demands and assembling the evidence for their *prima facie* cases before arbitration begins.

In sum, even if policy analysis were the relevant standard—which it is not—the Second Circuit's "vindication-of-federal-statutory-rights" test could not be justified on that basis. Rather, enforcing parties' arbitration agreements will produce greater access to fair and efficient dispute resolution procedures—for businesses and their customers and employees alike.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBIN S. CONRAD
KATE COMERFORD TODD
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

MARIA GHAZAL
Business Roundtable
300 New Jersey Ave., NW, Suite 800
Washington, DC 20001
(202) 872-1260

QUENTIN RIEGEL
National Association of Manufacturers
733 10th Street, NW, Suite 700
Washington, DC 20001
(202) 637-3000

ANDREW J. PINCUS
Counsel of Record
EVAN M. TAGER
ARCHIS A. PARASHARAMI
KEVIN RANLETT
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

AUGUST 2012