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

BRIEF *AMICI CURIAE* OF ANTITRUST SCHOLARS IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

Amici (Professors William S. Comanor, Einer R. Elhauge, Eleanor M. Fox, Herbert Hovenkamp, John B. Kirkwood, and Mark A. Lemley) have spent many years researching antitrust law and the economics of markets, and teaching law and graduate school courses on those subjects. *See* Appendix. Since 1890, federal antitrust law has both prohibited certain anticompetitive conduct and authorized parties injured by that conduct to obtain compensation. The private civil enforcement mechanisms in the Sherman Act and strengthened in the Clayton Act implement those important public policies of antitrust prohibition and compensation. *Amici* submit this brief to apprise the Court of the harmful consequences for antitrust enforcement of allowing private parties to insulate themselves from future antitrust liability through contractual arbitration provisions such as one preventing parties with individual claims too small to rationally justify the costs of pursuing them from pooling resources, even where the aggregate harm is large.[1]

[1] Letters from the parties consenting to the submission of this brief have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Amici urge the Court to affirm the Second Circuit's holding that arbitration provisions cannot be enforced when, in a particular case, doing so would preclude the effective vindication of the private right of action specified in the Clayton Act. "[T]he principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively while yet permitting them to take advantage of every available economy that comes from internal or jointly created production efficiencies or from innovation producing new processes or new or improved products." 1 Philip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 100a (3d ed. 2006). Achieving that objective is vital to our economy.

It has long been the law that contracts cannot abrogate the protection of federal statutes affecting the public interest, as the antitrust laws do. In harmonizing the administration of the antitrust laws with the FAA, the Court should not require enforcement of arbitration provisions that amount to prospective waivers of antitrust liability, consistent with the Court's many decisions conditioning arbitration on the "effective vindication" of statutory rights and with background rules of contract law.

The threat to antitrust enforcement is real. Antitrust claims depend heavily on economic analyses that simply cost too much for individual parties with small claims to prove liability and damages in individual proceedings. Unless those parties can pool their resources, their claims are effectively extinguished. Competitor suits involve distinct antitrust injuries and different damages; they cannot substitute for actions by direct purchasers like the merchants here. Moreover, if the Court were to abandon the "effective vindication" standard, it would be easy for firms to develop and to impose through adhesion contracts other arbitration provisions that would also have devastating effects on antitrust claims. The result would be a severe deficit in antitrust deterrence and compensation.

ARGUMENT

At this stage, this case is not about whether the merchants have stated antitrust claims under the Sherman Act, or whether they can prove their claims. Rather, the issue is whether their claims cannot proceed—regardless of the merits—because an arbitration provision in the contracts (Card Acceptance Agreements) between American Express and the merchants prevents the merchants from pooling their resources to pay for the necessary costs of litigating the case under modern antitrust law.

In order to establish liability and damages, any merchant plaintiff would have to present an economic study to show that American Express has market power and the impact of its restrictive rule on the merchant's revenues. Plaintiffs submitted a declaration by an experienced economist estimating that the cost of the kind of expert economic analysis that would nowadays be required—whether in an arbitration proceeding involving a single merchant or in a class action in a federal district court—is likely to be greater than $300,000 but less than $2 million. (JA 86-90). The economist also estimated the maximum damages sustained by an average merchant ($3,015) and by the named plaintiff with the largest volume of disputed American Express fees ($12,850). (JA 92). *See* Pet. App. 26a. Even after trebling, the maximum amount of damages that an individual merchant could recover would be only a small fraction of even the low-end estimate of the cost of the economic study that would be required.[2]

The arbitration provision in the form Card Acceptance Agreement for merchants with an annual sales volume of less than $10 million, (Pet. App. 7a; JA 88), precludes class arbitration, (Pet. App. 9a). That provision also appears to prevent any of the merchants from acting as a representative party for the others, (*id.*), thwarting a privately-negotiated arrangement whereby merchants pool their resources to fund a single bilateral arbitration presenting a representative antitrust claim applicable to all of them.

The Court of Appeals found that "Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration." (Pet. App. 27a (quoting *Amex I*, 554 F.3d at 319)). Because "the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws"

[2] The Second Circuit correctly deemed the prospect that the merchants could recover costs "inadequate to alleviate [its] concerns," Pet. App. 27a, in light of the Court's decision in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) (limiting recovery for expert witnesses to the statutory attendance fee). *See* 28 U.S.C. § 1821.

(Pet. App. 25a), the Second Circuit ruled that the arbitration provision ran afoul of the "firm principle of antitrust law that an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy." (*Id.* at 19a; *see also id.* at 50a). While careful to state that it was not holding class action waivers invalid in all cases or even in all antitrust cases (*id.* at 29a), the Second Circuit held that the plaintiffs had met their burden of proving the arbitration provision unenforceable as applied to their particular antitrust claim. (*Id.*).

I. FEDERAL ANTITRUST LAW AND ITS EFFECTIVE PRIVATE ENFORCEMENT ARE FUNDAMENTALLY IMPORTANT PUBLIC POLICIES.

A. The Protection of Free Markets Through the Federal Antitrust Laws Is An Important Public Policy.

"The preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom. A national policy of such a pervasive and fundamental character is an essential part of the economic and legal system. . . ." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992) (citation omitted). The Sherman and Clayton Acts play a vital role in upholding that national policy. The Court has referred to the "[a]ntitrust laws in general, and the Sherman Act in particular," as "the Magna Carta of free enterprise." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 611 (1972). The federal antitrust laws "are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *Id.*; *see also Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218 (1966) ("[T]he antitrust laws represent a fundamental national economic policy"); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348 (1963) (describing "role of antitrust policy in the maintenance of a free economy" as "indispensable"). Indeed, those policies are so embedded in our law that even before the Sherman Act, restraint of trade was an exception to the general reluctance of English and American courts to limit the enforcement of contracts on the basis of public policy. Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1024 & n.32 (1989).[3]

Antitrust policy is important not only to our economy, but also to our way of life. "It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social

[3] *See generally* Restatement (Second) of Contracts § 186(1) (1981) ("A promise is unenforceable on grounds of public policy if it is unreasonably in restraint of trade."); Restatement of Contracts § 514 (1932). ("A bargain in restraint of trade is illegal if the restraint is unreasonable."); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279-81 (6th Cir. 1898) (Taft, J.) (surveying common law antecedents of the Sherman Act), *aff'd as modified*, 175 U.S. 211 (1899).

institutions." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). The free market for goods and services has thus been seen by this Court as helping to promote and sustain a free marketplace of ideas.

B. Federal Antitrust Law Depends Upon Private Enforcement Actions.

Private enforcement has been a fundamental component of federal antitrust law from the very beginning. In 1890, when it passed section 7 of the Sherman Act, Congress not only authorized private parties to sue, but also gave them a then-novel incentive to do so by authorizing the award of treble damages to the successful plaintiff, and the recovery of costs and attorney fees. 26 Stat. 209, 210 § 7 (July 2, 1890), *superseded by* 38 Stat. 730, 731 § 4 (Oct. 15, 1914), *codified at* 15 U.S.C. § 15. In 1914, the Clayton Act enhanced the Sherman Act remedies by adding provisions allowing private plaintiffs to rely on government judgments to establish liability and to obtain injunctive relief as well as to recover costs and attorney fees in such cases. 38 Stat. 730, 731, 737 §§ 5, 16 (Oct. 15, 1914), *codified at* 15 U.S.C. §§ 16, 26. The private right of action has been "a bulwark of anti-trust enforcement," *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968), and "an integral part of the congressional plan for protecting competition." *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990). The Court recognized that "the private cause of action plays a central role in enforcing this regime" in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) (permitting arbitration of certain antitrust claims).

The purpose of the private right of action is both to deter violators by stripping them of the "fruits of their illegality" and "to compensate victims of antitrust violations for their injuries." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) (The purpose of private actions "was not merely to provide private relief, but was to serve the high purpose of enforcing the antitrust laws."); *Radovich v. NFL*, 352 U.S. 445, 453-54 (1957) ("These laws protect the victims of forbidden practices as well as the public."). To preserve the robust private enforcement scheme that Congress enacted, the Court has declined, "in the face of [the congressional antitrust policy]" to "add requirements to burden the private litigant beyond what is specifically set forth by Congress." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 473 n.9 (1982) (quoting *Radovich*, 352 U.S. at 454).

Congress did not rely solely on the federal government to enforce federal antitrust law. "[T]he U.S. antitrust system depends overwhelmingly upon private plaintiffs to police compliance." Douglas H. Ginsburg, *Costs and benefits of private and public antitrust enforcement: an American perspective*, *in* COMPETITION LAW AND ECONOMICS: ADVANCES IN COMPETITION POLICY ENFORCEMENT IN THE EU AND NORTH AMERICA 39, 42 (Abel M. Mateus & Teresa Moreira, eds. 2010). "Congress created the treble-damages remedy . . . precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572 n.10 (1982) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979)); *see also* 2A Areeda & Hovenkamp, ¶ 330b ("Private enforcement thus increases the likelihood that a violator will be found out, and greatly enlarges the penalties and thereby helps discourage illegal conduct. The statutory scheme thus supplements public enforcement, which is inevitably selective and not always likely to concern itself with local, episodic, or less than flagrant violations.").[4] Private enforcement frees the government to focus its resources "against more systemic violations for which no private plaintiff is likely to sue or for which criminal sanctions are desirable." William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 690-91 (1982).

[4] Private parties have recovered for antitrust violations as to which the federal government took no action. *See generally* Robert H. Landes & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879 (2008). The federal government has also filed antitrust litigation as a result of information brought to light in private litigation. *See, e.g., In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 503, 524 n.31 (E.D.N.Y. 2003) (citing *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003)).

C. Arbitration Agreements That Preclude Effective Vindication of Federal Antitrust Claims Conflict With Public Policy.

American Express contends that there is no room in the Court's recent Federal Arbitration Act (FAA) jurisprudence for an exception to enforcement when an arbitration provision would preclude a party from effectively vindicating the substantive right to sue for damages under federal antitrust law. (Pet'r's Br. 35). Petitioners discount the resulting gap in antitrust enforcement because "no one doubted that competitor lawsuits would work," (*id.* at 7) (quoting Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH L. REV. 1, 26 (1989)), and Congress "relied on the ability of competitors and the federal government to enforce federal law." (Pet'r's Br. 7).

Direct purchasers, like the merchants in this case, not competitors, are often the most appropriate parties to pursue antitrust deterrence and compensation. Reliance on suits by others would result in less deterrence and compensation than Congress intended. "The Act is comprehensive in its terms and coverage, protecting all who may be made victims of the forbidden practices by whomever they may be perpetrated." *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 312 (1978) (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)) (foreign government can sue). "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers." *Mandeville Island Farms*, 334 U.S. at 236. Only the merchants, as "direct purchasers" of the card payment processing services offered by American

Express, can sue to recover damages for alleged overcharges in the American Express discount fee, regardless of whether they are able to pass on some or all of the overcharge to consumers through higher prices. *Illinois Brick*, 431 U.S. at 745. Consumers, as indirect purchasers of the services, cannot sue in their own right. *Id.*[5]

Petitioners' suggestion (at 7) that competitors can adequately enforce antitrust laws in the merchants' stead, overlooks the public interest in providing compensation for antitrust injuries and naively supposes that the interests of competitors are always congruent with the interests of customers even for purposes of deterrence. The Court has stated that the antitrust laws protect "competition, not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

Many important restraints of trade will not motivate litigation by a competitor. An obvious example is a horizontal price-fixing cartel. None of

[5] That does not mean Congress did not intend to prevent and compensate harm to consumers. As the Court noted in *Reiter*, 442 U.S. at 343, Congress declined to include in the Sherman Act a special provision to facilitate suits by individual consumers who may have suffered small and indirect injuries from antitrust violations—perhaps anticipating the difficulty in tracing the harm to the conduct that this Court later recognized in *Illinois Brick*. However, Congress did not limit enforcement to competitors to the exclusion of enforcement by other injured parties. Indeed, consumers can sue for damages when they have sustained cognizable antitrust injury. *Reiter*, 442 U.S. at 343 ("At no time, however, was the right of a consumer to bring an action for damages questioned.").

the members of the cartel can or will sue, and any competitors who are not members of the cartel will lack antitrust standing to challenge the cartel pricing. *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 & n.8 (1986). Thus, members of the cartel would need only to include an arbitration provision preventing effective vindication of antitrust claims (like the one in this case) in their sales contracts to immunize their conduct from the private enforcement remedy in federal antitrust law. Petitioners' argument would leave the cartel's smaller customers without any recourse except the hope that the federal government will commit its limited enforcement resources to terminating the cartel. The deficit in deterrence is not limited to cartels—the same problem would arise if oligopolists use exclusionary agreements such as ties, which can "aid oligopolistic coordination by effectively allocating the market among oligopolists, making it difficult to increase market share by decreasing prices." Einer Elhauge, U.S. Antitrust Law & Economics 327 (2d ed. 2011).

Competitor-only enforcement would be inadequate for two additional reasons. *First*, the damages that excluded rivals can seek based on profits earned in a "but for" competive market scenario may be much smaller than the gains reaped from successful anticompetitive conduct, leading to insufficient deterrence. *Second*, the deterrent impact of a competitor suit will be diminished because the relief will not include damages for harm to customers. If the restraint tends to exclude competitors from the supply market, the competitor may sue for the injury that *it* suffers from the exclusion, but such actions are relatively rare and do nothing to compensate injured customers. 8 Areeda & Hovenkamp ¶ 1767 ("[T]he foreclosed rival's injury is entirely independent of the amount or existence of any injury to buyers."). To the extent the anticompetitive conduct exploits customers, the competitor lacks antitrust standing to sue, because it is presumed to benefit from the defendant's wrongdoing. *See Atl. Richfield, Co. v. USA Petroleum Co.*, 495 U.S. 328, 337 (1990) (defining antitrust injury). Indeed, American Express's principal competitors (Visa and MasterCard) employed "honor all cards" rules (for debit cards) similar to the policy being challenged by the plaintiff merchants.

Nor is it normally possible for smaller customers to rely on enforcement of the antitrust laws by large customers. To begin with, the conduct at issue may only be directed at smaller customers (as appears to be the case here, as the form Card Acceptance Agreement was for smaller merchants). *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 458, 476 (1982) (challenged restraint was not applied to customers large enough to have in-house servicing organization). Further, even if one assumes—contrary to the situation here—that there are large customers injured in the same way as the too-small-to-sue-individually victims, the larger customer-competitor has no reason to try to help its smaller rivals by obtaining broad injunctive relief that would benefit them in a suit the larger firm alone filed and funded. Successful damages litigation by the larger customer alone provides no compensation to the smaller victims. And the restraints in the Card Acceptance Agreements would preclude the smaller merchants from joining in an action along with the larger customer-competitor, even if invited to do so.

In such circumstances, the most likely result of the large-victim suit is a discriminatory settlement that mostly benefits the larger customer. If Wal-Mart had sued Visa and MasterCard (for tying debit cards to credit cards) only on its own behalf rather than as the lead representative of a class, it is likely that instead of reaching a broad industry-wide settlement, *see Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005), Wal-Mart would have sought an agreement that gave Wal-Mart alone the right to refuse high cost debit cards, thereby enhancing its cost advantages vis-a-vis its smaller competitors. In sum, relying on bigger customers to sue in such situations would produce less prevention of antitrust violations and less compensation of victims than Congress intended.

II. THIS COURT HAS HARMONIZED FEDERAL STATUTES CONFERRING IMPORTANT SUBSTANTIVE RIGHTS, INCLUDING THE FEDERAL ANTITRUST LAWS, WITH THE FAA BY LIMITING ENFORCEMENT OF ARBITRATION AGREEMENTS WHEN NECESSARY TO EFFECTIVELY VINDICATE THE FEDERAL RIGHTS.

Unlike *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), this case involves a conflict in the administration of two federal statutes, not between a federal statute and a judge-made state law rule subject to federal preemption. When federal statutes intersect, as they do here, the Court's task is to effectuate the intent of Congress. The Court generally does so by harmonizing the statutory schemes to the extent possible and giving precedence to one statute or the other only in the face of an irreconcilable conflict. As the Court explained in addressing the intersection of the Carriage of Goods by Sea Act and the FAA, "'[w]hen two statutes are capable of co-existence,' however, 'it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). "[T]he proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another, rather than holding one completely ousted," *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross*, 452 U.S. 378, 392 (1981) (quoting *Silver v. NYSE*, 373 U.S. 341, 357 (1963)), as American Express urges the Court to do.

Repeals by implication are disfavored, and petitioners point to nothing in the text or history of the FAA that suggests that Congress, by requiring the enforcement of a particular type of contract—arbitration agreements—in the same manner as other contracts intended any repeal or limitation of federal antitrust law. The "preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements into which parties had entered." *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 221 (1985). Congress would not have expected that parties could shield themselves from prospective antitrust liability by contract, and so would not have expected them to do so by arbitration agreements.

"[A] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704 (1945) (holding right to recover liquidated damages under Fair Labor Standards Act nonwaivable).[6] That prohibition not only prevents contracts from nullifying statutes, but also in the antitrust context protects third parties, for example indirect purchasers, who are harmed but cannot sue.[7] Even putting aside the absence of actual

[6] The antitrust law protection against market-wide harm is the paradigm of such a *public* rather than purely individual interest. *Newton v. Rumery*, 480 U.S. 386 (1987), involved a *retrospective* release of the right to sue under 42 U.S.C. § 1983, not a prospective waiver immunizing future violations of federal law. The Court has not analyzed the acceptance of restrictions on certain constitutional rights as a condition of receiving government benefits as a form of contractual waiver.

[7] Courts have long refused to allow parties to contract away statutory protections affecting public interests. *See, e.g., Narramore v. Cleveland, C., C., & St. L. Ry. Co.*, 96 F. 298, 302 (6th Cir. 1899) (Taft, J.). The rule is further justified in economic terms by a collective action problem that coerces individual parties to accede to terms offered by an entity with market power that produce market-wide harm, such that the terms cannot be said to be the product of a voluntary choice. *See* Einer Elhauge, *Defining Better Monopolization Standards*, 56 STANFORD L. REV. 253, 284-88 (2003) (explaining the collective action problem). Contract law also restricts agreements granting immunity from fault-based tort liability. "At one time, as we know, the law did not permit a person to exculpate himself by contract from the legal consequences of his negligence." *Maiatico v. Hot Shoppes, Inc.*, 287 F.2d 349, 350 (D.C. Cir. 1961) (Burger, J.); *see also R. R. Co. v. Lockwood*, 84 U.S. 357 (1873). Waivers of statutory and intentional violations are forbidden even under more permissive modern contract law.

negotiation over contracts like the form Card Acceptance Agreements, nullification of future antitrust liability cannot be considered a "benefit" for which American Express could have bargained. *See* Fin. Servs. Roundtable Br. at 8.

Further, the strong federal policy reflected in the antitrust laws has made this Court especially reluctant to read even federal statutes establishing an alternative regulatory regime as requiring an exemption from antitrust liability. *Carnation Co.*, 383 U.S. at 217-18 (citing *Philadelphia Nat'l Bank*, 374 U.S. at 350-51). *See* Resp't Br. 32-33 (discussing implied immunity cases). Because of the many ways arbitration provisions can be drafted to neutralize antitrust claims, see *infra*, pp. 34-35, petitioners' approach would allow *private parties* to extend themselves prospective antitrust immunity, even in adhesion contracts, thereby carving out a broad (and unregulated) exception to private antitrust enforcement. The effective vindication standard, by contrast, preserves both arbitration agreements and antitrust enforcement save in the few instances in which they irreconcilably conflict. Consistent with the background rule of contract law, in such a conflict, precedence must go to the substantive statutory right.

See Maiatico, 287 F.2d at 350-51 (discussing modern rule); Restatement of Contracts §§ 574-575 (1932); Restatement (Second) of Contracts § 1915(1) (1981); 8 Richard Lord, Williston on Contracts § 19:24 (4th ed. 2012).

A. The Court Recognized in *Mitsubishi* That An Arbitration Agreement Should Not Be Enforced If It Would Nullify Prospective Antitrust Liability.

The FAA "simply 'creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.'" *Mitsubishi*, 473 U.S. at 625 (citation omitted). Nothing in the FAA suggests that Congress intended to allow private parties to use arbitration agreements to create contractual antitrust-free zones.

The Court in *Mitsubishi* rejected categorical arguments against the arbitration of antitrust disputes, *id.* at 630-36, before deciding whether the particular international arbitration proceeding to which the parties had agreed "will not provide an adequate mechanism" to resolve the particular federal antitrust claims asserted. *Id.* at 636. In a frequently-cited footnote, the Court took up the argument that "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations" because the arbitrators would apply Swiss law to the exclusion of United States antitrust law. *Id.* at 637 n.19 (citations omitted). The Court said it "would have little hesitation in condemning the agreement as against public policy," in the event that the effect of the agreement was prospectively to block federal antitrust claims. *Id.* The decision pointed to the Convention governing the enforcement of international arbitral decisions as a safeguard against an arbitration that failed to take "cognizance of the antitrust claims and actually decide[] them." *Id.* at 638.

Mitsubishi does not support petitioners' view that the determination that federal antitrust claims are arbitrable in general is dispositive in every case. Before deciding that the agreement could be enforced, the Court in *Mitsubishi* considered *both* the categorical question and the particular question whether the specific agreement would operate "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations." *Id.* at 637 n.19 (citations omitted). The arbitration agreement governs only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, [and] the [antitrust] statute will continue to serve both its remedial and deterrent function." *Id.* at 637.

B. This Court Has Repeatedly Conditioned the Enforcement of Arbitration Agreements on the Effective Vindication of Federal Statutory Rights.

This Court's decisions distinguish between contractual agreements to *resolve* disputes concerning statutory rights in a particular forum—including arbitration—and contractual agreements prospectively to *waive* substantive federal statutory rights. The former are permissible; the latter are not. As the Court recently explained in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 672 (2011), a "right to sue" under a federal statute does not necessarily mean a right to a judicial forum. But a right to sue is a "guarantee of the legal power to impose liability" for violating the law. *Id.* at 671; *see* *also* Pet'r's Br. 26-27 (recognizing that distinction). Here, the Second Circuit found that the provisions of the arbitration agreement precluding class and representative actions work to extinguish a substantive right: "the legal power to impose liability" under Clayton Act section 4.[8]

Contracts prospectively waiving the right to enforce federal law, including antitrust law, are invalid. Most recently, the Court cited footnote 19 of *Mitsubishi* for the proposition that "a substantive waiver of federally protected civil rights will not be upheld." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009). The Court concluded that the record was not sufficiently developed "to resolve in the first instance whether the CBA allows the Union to prevent respondents from 'effectively vindicating' their 'federal statutory rights in the arbitral forum.'" *Id.* at 273-74 (quoting *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000)). As the citation to *Green Tree* suggests, the principle at issue is not limited to "costs associated with access to the arbitral forum" as petitioners contend (Pet'r's Br. at 18), but extends to any obstacle to the effective vindication of federal statutory rights in arbitration, whether the obstacle is cost (as in *Green Tree*) or union control (as in *Pyett*). The same principle applies to the prohibition of class or representative actions in the

[8] By contrast, the Court in *Concepcion* had little fear that the arbitration agreement would prevent consumers from vindicating their rights because of several features of the arbitration agreement as amended after the class action suit was filed. 131 S. Ct. at 1753 (claims "most unlikely to go unresolved").

merchants' Card Acceptance Agreements with American Express. The record here showing that the agreements would prevent the merchants from effectively vindicating their federal statutory rights is sufficiently developed and seemingly uncontested.

Likewise, in *Vimar Seguros*, the Court considered whether a contractual forum selection clause could be enforced. The Court first concluded that nothing in the Carriage of Goods by Sea Act (COGSA) precluded the parties from agreeing to resolve their disputes in the foreign arbitral forum, and then took up the question whether the characteristics of the particular forum would preclude effective vindication of substantive rights under COGSA. Quoting *Mitsubishi*, 473 U.S. at 638, the Court noted that the district court had retained jurisdiction, and "will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the . . . laws has been addressed," making it unnecessary to speculate about whether the arbitrators would apply COGSA or another standard that would afford equivalent relief. *Vimar Seguros*, at 540. The existence of an *ex post* safeguard was critical: "Were there no subsequent opportunity for review and were we persuaded that 'the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . ., we would have little hesitation in condemning the agreement as against public policy.'" *Id.* (quoting *Mitsubishi*, 473 U.S. at 637 n.19).[9]

[9] Petitioners focus exclusively on the Court's discussion of increased costs associated with the foreign arbitral forum.

The same conclusion follows from the Court's discussion of *Wilko v. Swan*, 346 U.S. 427 (1953), in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), stating that "*Wilko* must be understood, therefore, as holding that the plaintiff's waiver of the 'right to select the judicial forum,' was unenforceable only because arbitration was judged inadequate to enforce the statutory rights created by § 12(2)." *Id.* at 228-29 (citing *Wilko*, 346 U.S. at 345). In other words, the Court described *Wilko* as consistent with the principle that an agreement to arbitrate that is "inadequate to enforce" federal statutory rights will not be enforced. *Id.*[10] Nothing in the Court's subsequent decision in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (explicitly overruling *Wilko*), is inconsistent with the narrower rule the Court

(Pet'r's Br. 25-26). But, in contrast to *Green Tree* and this case, the plaintiffs in *Vimar Seguros* did not argue that the increased costs associated with the foreign forum would prevent them from pursuing their claim at all, but rather that those costs would lessen the carrier's liability, contrary to COGSA. The Court harmonized COGSA with the FAA by reading COGSA "to exclude increases in the transaction costs of litigation." *Vimar Seguros*, 515 U.S. at 536. The language quoted in petitioners' brief (p. 26) concerns whether COGSA mandated a case-by-case tally of litigation costs, not whether courts must decide if costs would wholly frustrate the enforcement of federal statutory rights, as opposed to lessening the net recovery.

[10] There is nothing to the contrary in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). The arbitrators did not base their decision that the arbitration agreement permitted class arbitration on any determination that the plaintiffs otherwise would be unable to enforce rights under the Sherman Act. Nor did their decision address the contention that the agreement was unenforceable. *Id.* at 1768.

deemed acceptable in *McMahon*. *See Rodriguez de Quijas*, 490 U.S. at 480 (noting that *Wilko* could have limited the prohibition of waiver of statutory rights to substantive provisions); *id.* at 481-82 (distinguishing the merely procedural features of the Securities Act which can be waived from the burden of disproving scienter, which implicitly cannot be waived).

III. THE COST, COMPLEXITY, AND NEED FOR EXPERT ECONOMIC ANALYSIS IN ANTITRUST CASES, INCLUDING THIS ONE, HAS INCREASED AS THE COURT HAS SUBSTANTIALLY MOVED AWAY FROM IMPOSING *PER SE* LIABILITY FOR MANY TYPES OF CONDUCT.

No "close inquiry" into the merits is needed to see that plaintiffs are required to produce *some* qualified expert economist's detailed analysis of the markets involved in order to vindicate their federal antitrust claims in this case. *See* Pet'r's Br. at 33. The need for an economic analysis of the relevant markets, and the considerable expense of obtaining one from a properly qualified economist, is a consequence of this Court's movement away from *per se* prohibitions in antitrust law and towards a more nuanced understanding of markets and competition. *See* John E. Lopatka & William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 CORNELL L. REV. 618-19 (2005) (the "narrowing or elimination of per se illegality has led to an expansion of factual inquires requiring expert testimony by professional economists.") (footnote omitted). Contrary to petitioners' assertions (Pet'r's Br. 50), an arbitrator would not be free to dispense with a "complex and costly economics expert report" unless petitioners are willing to forego the arguments and defenses to liability under antitrust law that require the merchants to adduce such proof.

A. The Court Has Generally (and Properly) Moved Away From Per Se Liability Towards Rules Based on an Understanding of Markets Grounded in Economics.

Beginning with its landmark decision in *Continental T.V. Inc. v. GTE Sylvania Inc.,* 433 U.S. 36 (1977), this Court has gradually retreated from broad categories of *per se* liability, by insisting that "departure from the rule-of-reason standard must be based upon *demonstrable economic effect* rather than . . . upon formalistic line drawing." *Id.* at 58-59 (emphasis added). Thus, the Court explicitly struck down a *per se* rule against territorial divisions in vertical distribution agreements. Two years later, in *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979), the Court rejected a *per se* challenge to a horizontal pricing agreement, warning that "easy labels do not always supply ready answers" and that a literal approach to applying per se rules can result in rules that are "overly simplistic and often overbroad." *Id.* at 8-9. Rather, the Court's inquiry focuses on "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Id.* at 19-20. The most recent and perhaps most dramatic illustration of this broad trend was *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877 (2007), where the Court struck down a 90 year old *per se* prohibition against vertical price fixing, saying: "Resort to *per se* rules is confined to restraints . . . 'that would always or almost always tend to restrict competition and decrease output.' To justify a *per se* prohibition a restraint must have 'manifestly anticompetitive' effects, and 'lack . . . any redeeming virtue.'" *Id.* at 886 (citations omitted).

The net result of this broad shift in Section 1 jurisprudence is to impose on most antitrust plaintiffs a much higher burden of proving market power and anticompetitive market effects than they would have faced prior to 1977. While *amici* believe that it has been largely desirable to build more rigorous economic analysis into the judicial resolution of antitrust disputes, this broad change has substantially increased the cost to the litigants of presenting and defending their cases. The ability of those harmed by the same alleged restraint of trade to share the necessary costs of expert evidence and discovery is even more central to the enforcement of the federal antitrust laws by parties with small individual injuries today than it was at the time of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974).

B. Plaintiffs Will Be Required To Present Expert Evidence on Market Power and Other Liability and Damages Issues.

The complaint in this case alleges that American Express tied acceptance of its corporate charge cards (said to be used by especially desirable customers) to its credit cards used by individuals. (JA 72a-75a). To sustain antitrust liability for that conduct, plaintiffs will have to show by expert testimony based on analyses of market data, that the corporate charge cards are a distinct market in which American Express has "appreciable economic power." *Eastman Kodak*, 504 U.S. at 462 (citations and internal quotations omitted).

As the Court explained in *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 35 (2006), "[o]ver the years, . . . this Court's strong disapproval of tying arrangements has substantially diminished."[11] The Court repudiated its longstanding assumption that tying is inherently anticompetitive in *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977). *Ill. Tool Works*, 547 U.S. at 35-36. Underlying the Court's shift was a much more sophisticated understanding of markets explicitly grounded in economic analyses by academics. *Id.* at 45-46; *see, e.g., Eastman Kodak*, 504 U.S. at 472-79.

The merchants will also need expert economic testimony to prove damages. Unlike many other commercial disputes in which damages—say for the difference between the market and contract price in a breach of contract suit—may be computed from information in a market that is presumed to be functioning properly, antitrust cases do not presume a functioning market from which price information reliably can be derived. Rather, damages must be based on an economist's model of the "but for" market that would have existed if the defendant had not

[11] For example, in *Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949), the Court stated that "[t]ying agreements serve hardly any purpose beyond the suppression of competition."

violated the antitrust law. *See* Lopatka & Page, 90 CORNELL L. REV. at 686.

The upshot of the Court's increasingly nuanced analysis of antitrust issues is that it is not enough for a merchant to show an explicit tie in the agreements with American Express and point generally to American Express's dominant position in the charge card market. Those facts might once have sufficed to establish liability under some of the Court's now-repudiated tying precedents. No longer. Today, extensive analysis by an economist is required. *See* Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academics Consensus in the Battle of the Experts*, 106 N.W. U. L. REV. 1261, 1271-77 (2012); *accord* 2 Areeda & Hovenkamp ¶ 309a (noting that "economic testimony is both ubiquitous and essential in antitrust cases").

The need for a rigorous economic analysis of liability and damages issues (as described in the declaration submitted in this case) is illustrated by the reliance on such analyses in the Second Circuit's decision affirming class certification in *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001) (involving claim that Visa and Master Card had tied acceptance of their credit cards to acceptance of debit cards under an "honor all cards" policy similar to the one imposed by American Express on the merchants in this case).[12]

[12] To complicate the picture further, economists and law professors disagree about the effects of certain business arrangements in what are known as "two sided markets," which include the markets for payments services. *E.g.* Timothy J. Muris, *Payment Card Regulation and the (Mis)Application of the*

C. The Cost of the Required Economic Analysis in This Case Would Preclude Any Rational Merchant From Pursuing An Antitrust Action On Its Own.

The effect of the substantive legal requirements for proof of liability and the contractual prohibition against class or representative actions is that no rational merchant can pursue a claim in an individual arbitration. An arbitrator must apply the same substantive law to determine liability and damages as a court. Each merchant would therefore have to bear the cost of proving liability (through a market analysis) and its own damages (through a model of the "but for" market). The contractual prohibition against representative actions would not only prevent sharing the cost among a formal class, but also prevent the merchants from agreeing privately to fund a single case through which to establish liability. Free rider problems and a confidentiality provision in the arbitration agreement

Economics of Two-Sided Markets, 2005 COLUM. BUS. L. REV. 515; Lloyd Constantine, *et al.*, *In re Visa Check/Mastermoney Antitrust Litigation: A Study of Market Failure in a Two-Sided Market*, 2005 COLUM. BUS. L. REV. 599; Adam J. Levitin, *Priceless? The Social Economic Costs of Credit Card Merchant Restraints*, 45 HARV. J. LEGIS. 1 (2008); Steven Semeraro, *The Economic Benefits of Credit Card Merchant Restraints: A Response to Adam Levitin*, 56 UCLA L. REV. DISC. 25 (2009). *Amici* take no position on any of these merits issues; the point is that under current law, expert analysis is required to establish liability and damages. The need to address questions specific to two-sided markets will increase the complexity and cost of the required analysis.

precluding the exchange of information among the merchants (*see* Pet. App. 92a) would impede private arrangements to share the costs of hiring the same expert to be used in a series of individual arbitrations (as *amicus* Chamber of Commerce suggests, Br. at 29-30). Moreover, it is hard to see how repeating the same expensive and complex expert presentation in a series of hundreds or thousands of individual arbitrations would promote any goal of the FAA—certainly it would not reduce dispute resolution costs.

While it is not possible to estimate the costs of the required expert analyses with precision, it is possible to state that the cost of reliable expert evidence would vastly exceed the damages that any individual merchant could recover. Nearly twenty years ago, experienced antitrust lawyers advised clients not to bother "bringing even the most routine (and soundest) of antitrust cases" unless they could spend $250,000 on economist expert fees. Charles Mueller, *Restoring the* Private *Antitrust Cases*: *Contingent Fees for Economic Experts*, 1994 L. & ECON. REV. 1, 2. The range estimated in the declaration submitted to the district court in this case is consistent with the experience of those *amici* who have been involved in antitrust litigation, and with the amounts approved by district judges in *pretrial* settlements of antitrust cases.[13]

[13] *See e.g.*, *In re Lorazepam Antitrust Litig.*, 205 F.R.D. 369, 385 (D.D.C. 2002) (Hogan, C. J.) (approving $779,148 in expert fees and associated document costs); 2003 WL 22037741 at *10 (D.D.C. 2003); *Molecular Diagnostics Labs v. Hoffman-La Roche, Inc.*, No. 04-CV-1649, Decl. of William Isaacson, Apr. 25, 2008,

IV. FOREGOING ARBITRATION IN PARTICULAR CASES WHEN IT PREVENTS THE EFFECTIVE VINDICATION OF FEDERAL RIGHTS BETTER PRESERVES CONGRESSIONAL INTENT THAN ALLOWING PRIVATE PARTIES TO IMMUNIZE THEMSELVES FROM FEDERAL ANTITRUST LAW THROUGH OVERLY RESTRICTIVE ARBITRATION AGREEMENTS.

Petitioners and their *amici* have much less to say about the correctness of the Second Circuit's holding on the actual facts before the Court than they do about the perceived danger that courts would misapply the rule in other cases and frustrate implementation of the Court's recent decision in *Concepcion*. Those professions of fear that courts will limit arbitration by finding obstacles to "effective vindication" of federal rights everywhere are exaggerated. The greater danger is that parties will attempt to opt-out of antitrust liability through arbitration provisions.

A. Federal Courts Can Administer a Case-By-Case "Effective Vindication" Rule.

There is nothing about the Second Circuit's application of an "effective vindication" standard that lends itself to indiscriminate extension or abuse.

ECF No. 103-2, p. 32 ($2.074 million in professional fees, primarily experts), approved Dec. 29, 2008, ECF 111, p.6.

This is not a borderline case. Petitioners have never really disputed that the costs of hiring an economist to perform the kind of analysis required to establish liability and damages far exceeds what a rational merchant with damages of $12,000 or less and the possibility of recovering $38,000 or so would spend. Unlike the situation in *Concepcion*, where AT&T Mobility's amended arbitration agreement virtually guaranteed recovery in an individual arbitration, an individual merchant cannot go it alone here. Without an unaffordable expert economic analysis, the claims will fail.

Nor is there anything about the circumstances of this case that suggest that the merchants seek to proceed as a class to "force [American Express] to pay ransom" (Defense Resource Inst. Br. 16) through sheer force of numbers. The merchants' claim is that American Express has injured all of them through an illegal requirement imposed in identical form agreements. It is particularly appropriate for those injured by the same market-wide harm to cooperate in seeking redress, regardless of whether that is in a judicial or arbitral forum. Allocating the cost of obtaining relief among those who would benefit from it is consistent with settled principles of unjust enrichment. *See Trustees v. Greenough*, 105 U.S. 527 (1881) (awarding fees for recovering a common fund).

Petitioners and their *amici* express an unfounded systemic distrust of the federal judiciary (*see, e.g.*, Pet'r's Br. 52); the days of entrenched judicial hostility to arbitration are long past, and lower courts will read a decision affirming the Second Circuit in this case in the context of the Court's entire corpus of recent decisions, including *Stolt-Nielsen* and

Concepcion. The Second Circuit's decision made clear that the party seeking to avoid arbitration on the ground that it would prevent effective vindication of federal statutory rights has the burden of proof, Pet. App. 25a, and the requisite evidence is "not easily assembled." *Id.*; *see also* Resp't Br. 30-32. The judge-made rule at issue in *Concepcion* was much broader than the holding in this case, because it invalidated arbitration clauses even in circumstances when arbitration imposed no practical impediment to the vindication of an individual consumer's claim. There is no reason to fear that federal courts will undo *Concepcion* in the name of "effective vindication" of federal statutory rights.

B. Arbitration Agreements Can Be Designed, or Amended, to Effectively Vindicate Federal Statutory Rights.

Declining to enforce arbitration agreements that prevent vindication of federal statutory rights will not lead to abandonment of arbitration. Businesses can negotiate arbitration procedures that allow for the effective vindication of federal statutory rights, or adapt them as needed, to particular cases. Indeed, businesses that can amend their contracts unilaterally can enforce arbitration procedures suited to the vindication of federal statutory rights even after litigation begins, as AT&T Mobility did in *Concepcion*, 131 S. Ct. at 1744. American Express has thus far chosen not to propose an arbitration process that would allow the merchants to pool their resources to pursue their antitrust claims, but there is no reason to believe that American Express or other firms would be so unyielding once the Court clarifies that arbitration agreements cannot be used to immunize against prospective antitrust liability.

On the other hand, firms seeking protection from federal antitrust (or other federal statutory) liability will have an incentive to craft provisions that prevent effective vindication of such claims, if permitted to do so. Typically, arbitration agreements are comprehensive and drafted to resolve with efficiency the mine run of disputes anticipated to arise from a particular contractual relationship. In choosing arbitration as the forum in which to resolve their disputes, parties to such agreements do not intend to waive substantive federal statutory rights. *Mitsubishi*, 473 U.S. at 628. The "effective vindication" standard facilitates the use of arbitration by preventing inadvertent prospective waivers of federal statutory protections, thereby ensuring the use of arbitration as a dispute resolution rather than dispute disposal process.

Petitioners' view that arbitration agreements should be enforced even when they do not permit the effective vindication of certain federal statutory rights would increase needlessly the transaction costs of reaching arbitration agreements with parties that have sufficient economic strength to negotiate them. That could well lead to narrower arbitration clauses and less arbitration. Some parties (even to adhesion contracts) may also resist accepting blanket arbitration clauses that produce a risk of waiving substantive rights under the antitrust laws, even when they would otherwise readily agree to arbitrate commercial disputes. And for arbitration agreements in contracts of adhesion, it is hard to defend implicit prospective waivers of statutory rights in the name of the free contract principles underlying the FAA.

C. Petitioners' Arguments Present A Grave and Immediate Danger to the Enforcement of Federal Antitrust Law and Other Important Federal Statutes.

If arbitration agreements could block the effective vindication of federal rights, parties with market power could use such agreements to nullify the work of Congress across a broad swath of economic regulation. It would be short work for firms to devise arbitration provisions other than restrictions on class and representative actions that will have the effect of dooming many federal antitrust claims. For example, a general arbitration agreement might forbid outright the presentation of expert testimony, in the interests of reducing time and expense, or because the arbitrators will be drawn from a pool already possessing expertise in a particular field or industry. However sensible such an agreement might be in resolving technical disputes over, say the quality of textiles or construction, it would be ill-adapted to resolving an antitrust claim that requires the plaintiff to prove market power through an economic analysis. An arbitration provision that bars experts as an *evidentiary* matter would have the same effect in an antitrust tying case as the arbitration provision here, which bars experts as an *economic* matter. The evidentiary rule would apply much more broadly, however, and would block claims even by single parties that could pay for expert reports.

The same would be true of a contract that chose a shorter limitations period than applicable federal antitrust law, or that cut off the right to recover attorney fees, or costs, or that designates a standard of liability less favorable than under an applicable federal statute, imposes a limitations period shorter than provided in an applicable federal statute, or restricts the statutorily-authorized award of treble damages.[14] Yet petitioners' arguments would require courts to enforce such limitations, regardless of their impact on the vindication of substantive federal statutory rights.

Petitioners' position that any provision of an arbitration agreement must be enforced even when it prevents the effective vindication of a "legal power to impose liability" thus poses a much greater threat of contractual nullification of a wide range of federal statutory rights, including rights under the federal antitrust laws, than the Second Circuit's narrow holding poses to administration of the FAA.

[14] *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003), required the enforcement of an arbitration agreement notwithstanding a prohibition against the award of "extracontractual" damages, finding the term ambiguous as applied to treble damages authorized by the Racketeer Influenced and Corrupt Organizations Act, so that it was premature to determine whether statutory rights under RICO could be effectively vindicated under the arbitration agreement.

CONCLUSION

The judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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