No. 12-133

IN THE
Supreme Court of the United States

AMERICAN EXPRESS COMPANY, *et al.*,
Petitioners,
v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, *et al.*,
Respondents.

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

BRIEF *AMICUS CURIAE* OF COSAL—THE COMMITTEE TO SUPPORT THE ANTITRUST LAWS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

The Committee to Support the Antitrust Laws (COSAL) was established in 1986 to promote and support the enactment, preservation, and enforcement of a strong body of antitrust laws in the United States. It is headquartered in Washington, D.C. and is dedicated to advocating strong antitrust laws and effective private enforcement.[1]

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[1] This brief was not authored in whole or in part by counsel for any party. No counsel for any parties made a monetary contribution intended to fund the preparation or submission of the brief. No person other than the *amicus curiae*, its members, or its counsel, made such a monetary contribution. Written consent to the filing of this brief has been received from all parties and filed with the Clerk of the Court.

STATEMENT OF FACTS

The salient facts are that the cases are brought by twelve plaintiffs--eleven merchants and the National Supermarkets Association (Respondents or Plaintiffs)--seeking certification under Fed. R. Civ. P. 23(b) to represent a class of all merchants using the cards of Petitioners American Express Company and American Express Travel Related Services (AMEX or Petitioners) and alleging a tying arrangement that they say coerces them into accepting AMEX cards they do not want in order to obtain the ability to accept AMEX's commercially desirable charge cards. The complaint invokes Sherman Act Section 1, seeking injunctive relief under Clayton Act Section 16 and damages under Clayton Act Section 4. Plaintiffs contend that the AMEX "Honor All Cards" rule damaged all merchants in the same way.

AMEX will not provide merchants with an opportunity to accept any of its cards unless they sign what this Court has referred to in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54 (1995), as a "standard-form" agreement pledging to arbitrate all claims against AMEX through the American Arbitration Association ("AAA"), the National Arbitration Forum ("NAF"), JAMS or another arbitration forum and agreeing not to seek class relief in arbitration or in court. If a merchant enters into arbitration with AMEX, AMEX demands that "all testimony, filings, documents and any

information relating to or presented during the arbitration proceedings shall be deemed to be confidential information not to be disclosed to any other party." Pet. App. 92a.

SUMMARY OF ARGUMENT

This appeal turns on only two questions: One, is there a Supreme Court-created doctrine that plaintiffs may not be required to arbitrate when the arbitration would not allow full vindication of federally-created rights? Two, did the court below apply the doctrine correctly?

The doctrine that arbitration clauses precluding effective vindication of federal rights are unenforceable, having been restated on numerous occasions by this Court, certainly does exist, and has had a robust existence in the lower federal courts' evaluations of antitrust, labor and civil rights matters, to necessary effect. The Petitioners do not deny any of this. The court below correctly applied the doctrine, based on credible evidence of record that was never refuted.

Public information clearly demonstrates that arbitration for firms seeking to adjudicate long, complex cases like antitrust damage actions is always too expensive for all but a few litigants.

Vindication of litigants' federal statutory rights, in cases where there are numerous putative class members, cannot be achieved in arbitration, due to a multitude of obstacles, aside from prohibitive cost, including lack of tolling and notification.

The twin goals of the antitrust laws—compensation and deterrence—can be achieved only

in a forum where all victims of widespread antitrust violations can be made whole.

ARGUMENT

I. This Court Created and Affirmed the Vindication of Statutory Rights Test in Multiple Opinions, and Made Clear that It Applied to any Constraints on a Litigant's Ability to Vindicate Its Rights

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985), this Court listed circumstances under which an arbitration requirement would be unenforceable, including "a showing . . . that the agreement was '[a]ffected by fraud, undue influence, or overweening bargaining power'; that 'enforcement would be unreasonable and unjust'; or that proceedings 'in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court.'" *Id.* at 633 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972)).

For an arbitration clause to be enforceable "the prospective litigant [must be able to] effectively [] vindicate its statutory cause of action in the arbitral forum, [such that] the statute will continue to serve both its remedial and deterrent function." *Mitsubishi*, 473 U.S. at 637. This rule was not limited to certain types of constraints, such as choice-of-law constraints, but instead, as demonstrated by its applications in later opinions of this Court, was meant to apply to any arbitral constraint that prevented any litigants entitled to recovery under a

statute from attaining that recovery. "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (quoting *Mitsubishi*, 473 U.S., at 637).

Finally, in *Randolph v. Green Tree Fin. Corp.-Alabama*, 531 U.S. 79 (2000), this Court confirmed that the vindication of statutory rights doctrine applied when there were practical constraints on the litigant's ability to vindicate his or her statutory rights. This Court stated that "the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum." *Id* at 90.

II. Numerous Lower Courts Have Applied the Vindication Doctrine as the Second Circuit Did Below and Have not Limited Its Application to Costs Unique to Arbitration

The *Green Tree* court identified the costs that should be considered in the vindication analysis as costs the plaintiff "will bear" "if she goes to arbitration." *Id.* at 90. This Court then stated that "where, as here, a party seeks to invalidate an arbitration agreement on the ground *that arbitration would be prohibitively expensive*, that party bears the burden of showing the likelihood of incurring

such costs." *Id.* at 92. (emphasis added). The *Green Tree* court mandated that a party asserting that it cannot vindicate its statutory rights must demonstrate that the case would be too costly to arbitrate. That is how this edict has been applied by lower courts.

For example, in *Kristian v. Comcast Corp.*, 446 F.3d 25, 54 (1st Cir. 2006), the court stated that:

> The class mechanism ban—"particularly its implicit ban on spreading across multiple plaintiffs the costs of experts, depositions, neutrals' fees, and other disbursements"—forces the putative class member "to assume financial burdens so prohibitive as to deter the bringing of claims.... And these costs ... will exceed the value of the recovery she is seeking."

Kristian, 446 F.3d at 54-55 (quoting Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near–Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 407 (2005)). The court acknowledged that all of the above expenses, such as expert fees and deposition fees, which each class member would have to bear, were "arbitration costs." *Id.* at 55. The court also recognized that the vindication doctrine can be applied to procedural obstacles to enforcement of substantive rights: "[w]hile Comcast is correct when it categorizes the class action (and class arbitration) as a procedure for redressing claims—and not a

substantive or statutory right in and of itself—we cannot ignore the substantive implications of this procedural mechanism." The *Kristian* court thus determined "[i]f the class mechanism prohibition here is enforced, Comcast will be essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law." *Id.* at 61.

A number of other lower courts have applied the vindication of statutory rights doctrine to determine whether the costs that putative plaintiffs would have to bear in the event that their cases were channeled to arbitration would prohibit them from effectively pursuing the statutory remedies to which they were entitled.

In *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 556 (4th Cir. 2001), the court stated that in a vindication analysis a court should look at " . . . the expected cost differential between arbitration and litigation in court . . ." and "whether that cost differential is so substantial as to deter the bringing of claims," among other factors.

The court in *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 660 (6th Cir. 2003) repeated the test set forth in *Bradford,* and added that: "[t]he issue is not only whether an individual claimant would be precluded from effectively vindicating his or her rights in an arbitral forum by the risk of incurring substantial costs, but also *whether other similarly*

situated individuals would be deterred by those risks as well." (emphasis added).

It explained that:

> In many, if not most, cases, employees (and former employees) bringing discrimination claims will be represented by attorneys on a contingency-fee basis. Thus, many litigants will face minimal costs in the judicial forum, as the attorney will cover most of the fees of litigation and advance the expenses incurred in discovery.

Morrison, 317 F.3d at 660. The court thus concluded that "[t]he issue is not the fact that the fees would be paid to the arbitrator, but rather whether the overall cost of arbitration, from the perspective of the potential litigant, is greater than the cost of litigation in court." *Id.* at 664 (internal citations omitted); *See also In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007) ("[I]f a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement.")

III. The Vindication Test Was Properly Applied By The Second Circuit to Invalidate the AMEX Arbitration Requirement Given that Bilateral Arbitration Could not Provide a Way for All Class Members to Vindicate their Statutory Rights

The Second Circuit took note of *Green Tree*'s assertion "that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." Pet. App. 22a (quoting *Green Tree*, 531 U.S. at 90). The court below then applied this Court's rule, also set forth in *Green Tree*, that when a "party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." (quoting *In Re American Express Merchants' Litigation*, 634 F.3d 187, 197 (2d Cir. 2011)) Pet. App. 49a (quoting *Green Tree*, 531 U.S. at 92)).

Applying this test to the evidence submitted by Plaintiffs, the court evaluated a declaration by Plaintiffs' economic expert who stated that his prices charged for expert assistance in antitrust cases ranged from $300,000 to $2,000,000 and that the cost of his work in this case would likely fall somewhere in the middle of that range. Pet. App. 26a. The court also took into account Plaintiffs' expert's statement that the median recovery of a medium volume merchant, trebled, would be $5,252, and that it would

not be worthwhile for an individual plaintiff to pursue an action for such damages, when the out-of-pocket costs, just for economist fees, would be at least several hundred thousand dollars or as much as $1 million. *Id*

The court also took into account "Supreme Court precedent [that] recognizes that the class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action." It stated that "[t]he Court made the point forcefully more than thirty years ago in the context of an antitrust action," and quoted this Court's statement in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974):

> A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would under-take this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.

Eisen, 417 U.S. at 161.

The court below also looked to this Court's opinion in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997), stating: "As the Court later opined, '[t]he policy at the very core of the class action

mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" (quoting *Amchem Prods.*, 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

In light of Plaintiffs' showing, the court below held that the AMEX arbitration agreement precluded the Plaintiffs from vindicating their federal statutory rights under the antitrust laws. Pet. App. 29a.

Just like the other courts applying the vindication rule, the court below measured the cost of arbitration, which would be the cost of each plaintiff proceeding separately and each bearing the expert costs of $300,000 to $2,000,000, in comparison to the cost of litigation, which would allow all plaintiffs to share the costs. The court then compared the cost of arbitration to the likely amount each plaintiff could recover in such a proceeding to determine that the cost of arbitration precluded the plaintiffs from vindicating their statutory rights due to the cost of arbitration being prohibitively high and the plaintiffs' lack of economic motivation to pursue their cases on an individual basis.

IV. Public Information Shows That Arbitration Costs Would Be Prohibitive For The Putative Class Members

The AMEX brief speaks of arbitration as being simple and economical for plaintiffs with small claims. Pet. Br., at 50-51. It recites some JAMS and AAA prices for consumers. However, this case is brought by retailers, not consumers. The largest claim asserted by any of the Plaintiffs is approximately $40,000. Retailers such as the Respondents would normally engage in arbitration governed by the rules of *commercial* arbitration.

AAA's Standard Administrative filing fees for commercial matters are over $1,000.[2] The majority of these fees has to be paid up front, when a party first files its claim. *Id.* There are also "deficient filing fees" assessed on "[p]arties that file demands for arbitration that are incomplete or otherwise do not meet the filing requirements" and "[t]he AAA may assess additional fees where procedures or services outside the Rules sections are required." *Id.* Also, if the case requires three or more arbitrators, the minimum filing fees total over $4,000. *Id.*

If arbitrating with AAA, each plaintiff would likely have to pay $500 to $800 per hour for the

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[2] See *http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004102*

services of the arbitrator. *See In re A2P SMS Antitrust Litig.*, Master File 12-cv-2656 (AJN), Declaration of George A. Bermann Regarding Arbitration Issues, ¶28 (Dec. 10, 2012). An antitrust arbitration can last up to 640 hours, if three arbitrators are used and up to 204 hours, if one arbitrator is used. *Id.* at ¶39. Absent Rule 23 procedures, each victim of AMEX's violation would have to file its own arbitration claim, and pay the above fees, without ever having the possibility of sharing expenses.

A piece in the New York Bar Journal made the following statement, in regard to an arrangement such as the one at issue here:

> When a commercial agreement containing an arbitration clause is negotiated, often it is by non-litigators unfamiliar with the arbitration process. Parties who agree to arbitrate before a panel of arbitrators of the AAA, JAMS Resolution Centers (JAMS), The American Health Lawyers Association (AHLA), the International Chamber of Commerce (ICC) or a myriad of others, are unlikely to contemplate that the out-of-pocket outlay can, within a short period of time, easily *reach six figures and be subject to reallocation to impose payment of the entire fee on the losing party.*

Ronald J. Offenkrantz, *Arbitrating Commercial Issues, Do You Really Know the Out-of-Pocket Cost?*, 18 N.Y.ST.B.J. 30, 31 (2009) (emphasis added).

The piece offers some examples of prices for commercial arbitration:

> Would counsel or a client anticipate, before agreeing to arbitrate or filing an arbitration demand, that arbitral fees of three arbitrators for a shareholders' dispute calling for seven days of hearings under the AAA Rules would total $80,000? What of a joint venture/licensing dispute resulting in arbitrators' fees of $468,000, or a trademark license dispute requiring seven days of hearings totaling $124,000 in arbitrator fees, or an employer/employee dispute in which the three arbitrators awarded fees, sanctions and costs of over $300,000? And what of the disputes where arbitrator fees alone can total $500,000 or more?

Id.

Like the administrative fees, a portion of the arbitrator fees also have to be paid in advance and must be replenished if they run low. *Id.* A party's inability to pay its share of fees can result in it being prejudiced in the arbitration. *Id.* at 32 (citing *Coty Inc. v. Anchor Constr. Inc.*, 7 A.D.3d 438, 776 N.Y.S.2d 795 (1st Dep't 2004), *aff'g* No. 601499-02,

2003 WL 139551 (Sup. Ct., N.Y. Co. Jan. 8, 2003) (party excluded from two days of hearing due to inability to advance arbitrator fees)). Unlike in most litigation, costs, as well as fees, are often imposed on the losing party in an arbitration. *In re A2P SMS Antitrust Litig.*, Master File 12-cv-2656 (AJN), Declaration of George A. Bermann Regarding Arbitration Issues, ¶41. Such relief for a winning defendant could expose some antitrust plaintiffs, especially small businesses such as the Respondents, to bankruptcy or "bet the company" risks.

The above fees for arbitration are added to the expert fees needed for a damage calculation, to determine the entire cost of arbitration. Petitioners appear, at 10, to question the reliability of Plaintiffs' expert estimate. There is ample evidence available from public sources showing that the expert's estimate here is similar to fees quoted by other experts. *Kristian*, 446 F.3d at 58 (plaintiffs' economist submitted an affidavit declaring that his expert fees would be "a minimum of $300,000, which could exceed in excess of $600,000 depending on the implementation of the factual inquiry").

The brief of the New England Legal Foundation, at 21, suggests that Plaintiffs could organize to share expert witness costs. But this hardly works for

millions of plaintiffs[3] who do not know each others' wishes or even addresses and have to maintain confidentiality of all information obtained in arbitration.

V. In an Antitrust Suit with a Large Number of Putative Plaintiffs, A Number of Factors Aside from High Costs Preclude Vindication from Being Achieved without a Class Mechanism

In *Mitsubishi*, this Court held that arbitration can be enforced "so long as the litigant effectively may vindicate the statutory cause of action in the arbitral forum." When a Rule 23(b) antitrust damage class action is filed, the putative litigant is the class, not any one member of it.

In one-on-one cases, the issue is whether the plaintiff can vindicate his right adequately in an arbitral forum. In cases like this, an antitrust class action on behalf of millions of purchasers, the question is whether arbitral fora can allow for vindication of the rights of all or most of them, as described in *Morrison*, where the Sixth Circuit stated that what matters is whether a provision in an

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[3] As stated in the complaint filed by the Department of Justice against American Express, concerning the same conduct at issue here, "[i]n 2009, American Express was accepted at 4.9 million merchant locations within the U.S. . . ." *United States v. Am. Express Co.*, No. 10-cv-4496 (E.D.N.Y.), Complaint, ¶64.

arbitration agreement "would deter a substantial number of similarly situated potential litigants." *Morrison*, 317 F.3d at 663. Even if the answer to the first question is "maybe," the answer to the second question is always "no!" Only class actions can remedy nationwide antitrust cartels and monopolies.

The First Circuit has recognized that a litigant's ability to vindicate its federal rights is not limited to having the ability to pay the costs of the adjudication, but also includes other considerations. In *Kristian*, the court held that, if a ban on treble damages were enforceable, it would prevent the plaintiffs from vindicating their federal rights under the federal antitrust laws. *Kristian*, 446 F.3d at 48.

Here, there are myriad reasons why *seriatim* or even concurrent arbitrations are utterly impractical for handling antitrust cases with numerous plaintiffs. To start with, the average antitrust case lasts about six years, even without trial.[4] Once the first plaintiff begins arbitration, all the others may have to wait six years before they can benefit from the outcome of that arbitration and take advantage of

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[4] Daniel Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 692 (2010) ("[T]he average private antitrust lawsuit today takes over six years to disposition" and "[t]he Georgetown study of private antitrust litigation conducted in the early 1980s found that antitrust cases take, on average, about three times longer than other federal cases from initiation of the lawsuit to disposition.")

any preclusive effects it may have. However, even waiting for the completion of one arbitration will not aid future plaintiffs in pursuing a subsequent arbitration, as arbitration settlements and rulings can be confidential, as required by AMEX's arbitration rules. Even if the arbitrators' rulings were able to be used by subsequent plaintiffs and constituted grounds for collateral estoppel, the other victims would still have to initiate their own arbitrations, and pay their own filing and arbitrator fees, as well as potential expert fees, before they could take advantage of any collateral estoppel. Furthermore, the first arbitration will likely not toll the statute of limitations for subsequent plaintiffs, as a class action litigation would do for putative class members. Under the four-year statute of limitations dictated by the Clayton Act, many may lose their claims, while awaiting the outcome of the first arbitration or simply due to not finding out that they have been injured.

If numerous cases go forward at once, then numerous sets of plaintiffs' lawyers and experts have to separately, repetitively and wastefully perform work that could be done by one team in a class action. And, as set forth above, arbitrators, unlike judges, do not work for free. They must be paid for equally by each single plaintiff.

Furthermore, none of the arbitral forums specifically referred to in AMEX's arbitration

clause—AAA, JAMS or NAF—can allow an individual plaintiff to obtain, or order the defendant to produce, the names and addresses of class members, notify them of settlements or outcomes, create claim forums, distribute money under a formula or conduct any of the other procedures available in class antitrust damage litigation for the compensation of the parties injured by illegal anticompetitive conduct.

In an antitrust case like this one with millions of victims all injured in the same way, district court class action litigation allows one recovery at one time for all victims wishing to join the action or accept its consequences, efficiently distributed by one administrator. This achieves judicial economy and deterrence based on the full effect of the violation. In contrast, if there is an antitrust violation with a hundred similarly-affected victims and single plaintiff arbitration is imposed due to take-it-or-leave-it form agreements (all true in this case), the victims who do not arbitrate individually would be left, at best, with questionable alternatives, and most likely with no recovery at all. And victims who do not even know that they have a claim against a defendant will never be notified of said claim as they would be in a class action. Thus, the named plaintiffs in any given class action may be the only plaintiffs who benefit from arbitration. Nor can a defendant engaging in arbitration obtain global peace from one settlement, but must instead engage in separate

proceedings with each plaintiff whose claim it wishes to resolve.

One of the opinions dissenting from the denial of rehearing *en banc* concentrates on whether the antitrust laws provide sufficient incentives to induce a plaintiff to arbitrate and for an attorney to take his case. Pet App. 137a-138a. The evidence was that they do not and it is not the purpose of Supreme Court review to second guess such weighing of facts.

VI. Prohibiting Class Actions in Situations Where Numerous Plaintiffs Have been Injured by a Widespread Antitrust Violation Will Preclude Achievement of the Antitrust Laws' Goals of Compensation and Deterrence

The question presented here could not be clearer: It is whether firms that commit antitrust violations (including felonies) against millions of victims should be able to insulate themselves from most damage liability by selling their goods only on the condition that any antitrust damage case against them must be conducted in bilateral, one-by-one arbitration. Unless this Court intends to eviscerate the entire compensation and deterrence system provided by antitrust damage actions, the answer must be no. That is what the Second Circuit held here, enforcing a rule restated by this Court in a number of cases and embraced in almost all circuits.

So long as this Court will enforce class action waivers in arbitration clauses and deny class

treatment under all arbitration clauses not expressly providing for it, the damage purposes of the antitrust laws can never be vindicated if arbitration is ordered against every plaintiff seeking to represent a putative class of victims meeting the numerosity requirements and common impact standards of Rule 23(b).

"Congress created the treble-damages remedy of § 4 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." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979). "[T]he private cause of action plays a central role in enforcing this regime." *Mitsubishi*, 473 U.S. 635 (citing *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262, 92 S.Ct. 885, 891, 31 L.Ed.2d 184 (1972)). "'A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.'" *Mitsubishi*, 473 U.S. at 635 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155, 168 (1st Cir 1983) (quoting *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826 (2d Cir. 1968)). "The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial

deterrent to potential violators." *Mitsubishi*, 473 U.S. at 635 (citing *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138-139 (1968)).

The purposes of the antitrust laws are "to deter[] violators and depriv[e][] them of 'the fruits of their illegality,'" *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977) (quoting *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968)), as well as "to compensate victims of antitrust violations for their injuries." *Illinois Brick*, 431 U.S. at 746 (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-486 (1977)).

Unlike claims brought under certain other statutes, federal antitrust claims can only be brought in federal court, to be decided by the jurists most competent to analyze them, and federal antitrust class actions can only be initiated in private actions.

Here, the named plaintiffs are seeking to bring a class action on behalf of millions of putative class members who have been injured by the same anticompetitive practices. These practices are so pernicious that they are being prosecuted by the Department of Justice. A ruling depriving the plaintiffs of their ability to proceed with this class action and obtain recovery for the millions of merchants injured by AMEX's conduct would also deprive future plaintiffs of the ability to recover damages from admitted conspirators who have

pleaded guilty to engaging in felonies, in violation of the antitrust laws, such as the perpetuators of the TFT-LCD conspiracy.[5]

Compensation of all victims of such widespread conspiracies is necessary to achieve the deterrence objective of the antitrust laws. As a recently-published law review note states:

> [t]he dominant law-and-economics model of crime posits that rational choices drive corporate decisions (including the decisions of the individuals involved) to commit crimes--a "cost/benefit analysis" of the decision. Consequently, there exists a bundle of sanctions that the legal system can (at least in theory) calculate that optimally will deter the crime.

John M. Connor and Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 438 (2012). Such sanctions include government fines and private damages, among other fines. "The standard optimal deterrence formula

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[5] *See In re TFT-LCD (Flat Panel) Antitrust Litig., Direct Purchaser Litigation*, Case no. 3:07-md-01827-SI (N.D. Cal), Order (May 9, 2011) (certain defendants who pleaded guilty to engaging in price-fixing on TFT-LCD products successfully invoked an arbitration clause against non-named plaintiff direct purchasers).

shows that the total amount of cartel sanctions should equal the cartel's "net harm to others" divided by the probability of detection and proof of the violation." *Id.* at 455. Being precluded from having to pay full compensation to its victims will encourage a cartelist to strike again.

Even under the current system, violators of the antitrust laws are under-deterred. The above study found that, out of the 75 cartels evaluated, only two were optimally deterred. *Id.* at 474. Thus, 73 cartels would have economic motivation for recidivism. As demonstrated above, permitting cartel members to avoid paying damages through use of an arbitration clause would promote recidivism of large cartels victimizing individuals and small businesses such as the Respondents.

This Court should not ignore a harsh reality: If price-fixers who overcharged hundreds of buyers are sued in a federal class action, and succeed in getting the federal case dismissed in favor of bilateral arbitrations, the game is over. The price-fixers win, pay almost nothing, and the victims lose, as does the antitrust enforcement system. A ruling like that sought by Petitioners here would not be a change of form or forum, but a death knell for the victims and a triumph for the antitrust violators, guaranteeing that their scheme will be profitable, and making certain that the antitrust statutes will be prevented from serving their "remedial and deterrent function[s]."

See Mitsubishi, 473 U.S. at 637. This is exactly the type of situation in which the *Mitsubishi* court contemplated arbitration clauses being inapplicable.

Just as this Court has been unwilling to transmogrify FAA bilateral arbitration, it should be unwilling to transmogrify a properly certifiable numerous-victim antitrust case into a disconnected short series of bilateral arbitrations of actions belonging to a few of the millions of injured putative class members. The bilateral arbitration contemplated by the FAA was not intended to be, nor can it provide, an effective remedy for numerous victims of a federal antitrust violation.

Arbitration is an excellent path in many non-antitrust fields, and perhaps in one-on-one antitrust disputes between parties operating under a negotiated contract. But the FAA assumes that arbitration is there to be used, not to be set up as an insurmountable obstacle protecting antitrust violators from multiple victims, all of whom had to accede to arbitration as a condition of dealing with the defendant.

VII. Neither AMEX's References to *Concepcion* and *Stolt-Nielsen*, nor its Policy Arguments Militate in Favor of a Different Conclusion

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.,* 130 S. Ct. 1758 (2010) and *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), this Court's rulings were justified partly by misgivings over the effectiveness or appropriateness of class arbitration. But a potential defendant may provide for one-on-one arbitration as the only form of arbitration in which it will agree to engage, so long as its arbitration agreement provides an exception for federal antitrust or other qualifying federal statute-based suits filed as putative class actions.

Petitioners argue that this Court's ruling in *Concepcion* mandates reversal, at 27. But AMEX misstates that ruling and sets up a straw man. It infers, at 29-31, that the Second Circuit's ruling requires class arbitration. But the court below ordered no such thing. It simply remanded for litigation in district court of a normal antitrust class action complaint.

Concepcion is not controlling in this matter, for three reasons: First, it was a preemption case, and thus says nothing about how to reconcile the goals of two federal statutes. *Concepcion*, 131 S. Ct. at 1753. Second, *Concepcion* found unreasonable a flat prohibition on the denial of class arbitration for cases concerning a vast majority of consumer contracts,

while the Second Circuit in this case found class treatment necessary based on the likely costs of the federal antitrust case in question. *Compare Concepcion*, 131 S. Ct. at 1750 *with* Pet App. 29a. *Concepcion* emphasized the quick and easy arbitration (even by telephone call) offered by AT&T, while no antitrust damage case is ever resolved so quickly or economically. *See Concepcion*, 131 S. Ct. at 1744; 1751. Third, *Concepcion*, involved several consumer claims, such as false advertising, while this matter involves a federal antitrust violation for which AMEX is being prosecuted by the Department of Justice.[6] Further, a finding here that victims of widespread antitrust violations could not proceed in a Fed. R. Civ. P. 23 action against violators would protect defendants guilty of major federal felonies, such as price-fixing, a result that could not have been intended by the drafters of the FAA.

AMEX's "policy" arguments are also ill-founded. It stresses the circumstances that led to the Class Action Fairness Act (CAFA) legislation. That law relates only to cases filed in state courts, and moves them to federal courts, on the ground that federal judges are better trained to determine class certification issues. But all cases under the federal antitrust laws have always been filed in federal court, including this case. The CAFA Report also

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[6] *United States v. Am. Express Co.*, No. 10-cv-4496, *supra*.

points to cases that were believed to have led to excessive or blackmail settlements. S. Rep. No. 14, at 21-22 (2005). Such examples are unavailing here, as they were not antitrust cases.

This court has already taken measures and announced rules regarding pleading standards, summary judgment standards, standing and class actions, to control antitrust and class actions that may lack a sufficient basis or are too burdensome to litigate. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983); *Illinois Brick Co.*, 431 U.S. 720.

Ironically, direct purchasers, who the Supreme Court has stated have standing to challenge antitrust violations under the federal antitrust laws, would be the ones deterred from vindicating their rights under a ruling upholding arbitration clauses in situations such as this one.

What the AMEX policy argument avoids discussing is the effect that its proposed prohibition on access to the federal court system will have on major, well-founded antitrust cases, such as cases seeking restitution for victims of international price-fixing cartels. There, as often happens, the Justice

Department learns of a major cartel due to a leniency applicant. It files indictments, secures guilty pleas and sends executives to prison. Federal class actions follow, pursuant to which thousands of victims receive compensation. There is no way for AMEX to describe such cases as blackmail. But there is no way for this Court to reverse the holding below and not create a rule allowing international price-fixers to protect themselves from many damage claims simply by inserting an AMEX-type clause in their sales contracts.

CONCLUSION

This Court should fashion a rule that preserves the deterrence and compensation functions of the antitrust laws by permitting numerous plaintiffs injured by antitrust violations to recover their damages, and affirm the ruling below.

Respectfully submitted,

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