No. 12-133

IN THE
Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,

Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,

Respondents.

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

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI – The Voice of the Defense Bar ("DRI") is an international organization of more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Consistent with this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient.

To promote these objectives, DRI participates as *amicus curiae* in cases, such as this one, that raise issues of import to its membership and to the judicial system. *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 130 S.Ct. 1758 (2010). Based on its members' extensive practical experience, DRI is uniquely well suited to explain why this Court should grant review and reverse the Second Circuit's opinion. If allowed to stand, the decision below will adversely affect the judicial system and the rule of law by subjecting parties to expensive, protracted proceedings to which they never agreed when contracting for arbitration.

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[1] Letters of consent have been filed with the Clerk. Counsel of record received notice more than 10 days prior to the due date that *amicus* intended to file this brief. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

The petition presents a recurring issue of singular importance under the Federal Arbitration Act ("FAA"): in what circumstances, if any, may courts invalidate arbitration agreements that prohibit class-wide arbitration of federal claims. The enforceability of literally millions of arbitration agreements turns on the answer to this question. As the petition explains, the Second Circuit's ruling conflicts with the FAA in fundamental respects: by allowing parties to evade a clear and unambiguous class action waiver in an arbitration agreement on a showing that an individual federal claim is not economically feasible, the ruling undermines arbitration's recognized advantages, creates powerful disincentives to arbitration, and conflicts with the FAA's strong federal policy favoring arbitration agreements.

This *amicus* brief addresses reasons that the Court should resolve the question presented by the petition. The decision below makes the enforceability of arbitration agreements highly unpredictable for businesses with operations, vendors or customers dispersed regionally and nationally. This uncertainty substantially undermines the federal right to enforce arbitration agreements and conflicts with the FAA's purpose of making such agreements predictably enforceable in accordance with contractual terms. Moreover, by refusing to enforce the agreement at issue in this case, the court of appeals made clear that it has adopted a rule that contracts providing for arbitration on an individual basis are unenforceable whenever a plaintiff can produce evidence that its case depends on expert testimony.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW MISREADS THIS COURT'S PRECEDENTS

Commentators have already criticized the panel decision here and accurately opined that "the correctness of the Second Circuit's decision is very doubtful" in light of this Court's precedents. Blackman, Rozenberg & Sidhu, *Tackling Class Action Waivers in Arbitration Clauses,* N.Y.L.J. (June 11, 2012). Both *Stolt-Nielsen* and *Concepcion* clearly held that class claims are not appropriate subjects for arbitration unless the parties expressly agree otherwise, and *Concepcion* held that the FAA preempts state laws invalidating commercial arbitration agreements on the ground that they forbid class arbitration.

Despite the governing authority of *Stolt-Nielsen* and *Concepcion* the court of appeals felt bound by, in the panel's words, "dicta" (Pet. App. 19a, 22a) in *Green Tree Fin. Corp. v. Randolph,* 531 U.S. 79 (2000) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). In *Randolph,* this Court suggested that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights." 531 U.S. 79, 90 (2000).[2]

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[2] Other courts have also characterized this passage of *Randolph* as "dicta." *See, e.g., James v. Conceptus, Inc.*, – F. Supp.2d –, 2012 WL 845122, at *10 (S.D. Tex. 2012); *D'Antuono v. Service Road Corp.,* 789 F. Supp.2d 308, 334 (D. Conn. 2011); *Little v. Auto Stiegler, Inc.* 63 P.3d 979, 992 (Cal. 2003). Commentators have done likewise. *See, e.g.,* Drahozal & Wittrock, *Is There a Flight From Arbitration?,* 37 Hofstra L. Rev. 71, 110 n.181 (2008) (*Green Tree*'s "costs" language was

Treating that dicta as "controlling," the panel reaffirmed its prior conclusion that the arbitration agreement here is "unenforceable" because "the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive." Pet App. 24a, 25a (internal quotations omitted).

Certiorari is warranted to correct this erroneous holding. First, dictum is not binding, especially when more recent opinions counsel a different result. *See, e.g., Parents Involved in Comm. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 737 (2007) (plurality opinion); *Jama v. ICE*, 543 U.S. 335, 351 n.12 (2005) ("Dictum settles nothing, even in the court that utters it"); *Cohens v. Va.,* 6 Wheat. 264, 399-400 (1821) (Marshall, C.J.).

Second, *Randolph* expressly declined to address whether the arbitration agreement was unenforceable because of a class action waiver in the agreement. *See* 531 U.S. at 92 n.7. That issue is now squarely presented in this petition.

Third, even if the relevant language of *Randolph* were not dicta, the Second Circuit read too much into the decision. As explained fully by the petition, *Randolph* dealt only with costs unique to arbitration that could effectively foreclose access to the arbitral forum. *See* Pet. 18-19; *accord Kaltwasser*

"dictum"); Noyes, *If You (Re)Build It, They Will Come: Contracts To Remake The Rules of Litigation in Arbitration's Image*, 30 Harv. J. L & Pub. Pol., 579, 588 n.28 (2007) (same); Jackson, *Green Tree v. Randolph*: *Will the Court's Decision Lessen The Effect of the FAA in Consumer Arbitration?,* 6 T.G. Jones L. Rev. 57, 60 (2002) (same); *see also* Pet. App. 143a-45a (dissenting opinions).

v. AT&T Mobility LLC, 812 F. Supp.2d 1042, 1049 (N.D. Cal. 2011)("[i]f *Green Tree* [*v. Randolph*] has any continuing applicability, it must be confined to circumstances in which a plaintiff argues that costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent her from vindicating her claims. *Concepcion* forecloses plaintiffs from objecting to class-action waivers in arbitration agreements on the basis that the potential cost of proving a claim exceed potential individual damages."). In this case, the only supposedly excessive costs are for *experts,* not for the *arbitrators.* No decision from this Court extends *Randolph* to situations where such costs would be the same in both arbitration *and* litigation.

Fourth, even if the lower court read *Randolph* correctly, the panel's decision cannot be reconciled with *Concepcion,* which effectively rejected the "prohibitive costs" justification for conditioning enforcement of arbitration agreements on the availability of classwide arbitration procedures. The *Concepcion* dissent contended that "agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate." *See* 131 S.Ct. at 1760 (Breyer, J., dissenting); *see also id.* at 1761 ("nonclass arbitration over such [small] sums will also sometimes have the effect of depriving claimants of their claims" and "insulate an agreement's author from liability for its own frauds"). But, the *Concepcion* majority made clear that courts "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1753 (majority opinion); *see also Stolt-Nielsen,* 130 S.Ct. at 1770 n.7 (essentially same).

Accordingly, the Second Circuit was wrong to rely on an argument posited by the dissent that the majority in *Concepcion* rejected. *See, e.g., Coneff v. AT&T Corp.,* 673 F.3d 1155, 1158 (9th Cir. 2012) (noting that *Concepcion* "majority expressly rejected the dissent's argument regarding the possible exculpatory effect of class-action waivers"). The respondent in *Concepcion* repeatedly cited "costs" as a justification for invalidating the class waiver. *See* Brief for Respondent in No. 09-893, at 29, 41, 43-44, 51-52; *see also Hendricks v. AT & T Mobility, LLC,* 823 F. Supp.2d 1015, 1021 (N.D. Cal. 2011) (making same point). But the majority expressly rejected the argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." 131 S.Ct. at 1753. Had the view of the *Concepcion* respondent – espoused by the dissent – prevailed, the Court's judgment would have been different. *Cf. Carroll v. Carroll's Lessee,* 57 U.S. 275, 287 (1853); *see also Sumner v. Mata,* 455 U.S. 591, 596-97 (1982) (*per curiam*) (granting certiorari and vacating where the court of appeals on remand "reinstated" its prior conclusion, followed the "dissenting opinion" in the prior case before this Court, and "apparently misunderstood the terms of [this Court's] remand").

Even if *Concepcion* were incompatible with *Randolph,* then the court of appeals erred in not following the more recent of the two decisions. As this Court explained, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

v. Shearson/AMEX, Inc., 490 U.S. 477, 484 (1989); *see also Coneff,* 673 F.3d at 1158 (following *Concepcion* for similar reasons). This Court should grant certiorari to quell the existing disagreement whether *Concepcion* or *Randolph* controls the question presented in the petition.

The court of appeals' reliance on dicta from a footnote in *Mitsubishi,* 473 U.S. at 637 n.19, is even less supportable. *See* Pet. App. 19a, 50a, 94a, 128a.[3] This Court has never invalidated an arbitration agreement under the "prospective waiver" dicta from *Mitsubishi.* Further, as explained by the petition, this Court has clarified that the *Mitsubishi* footnote is relevant – if at all – only at the arbitral award-enforcement stage. *See* Pet. 21-22 n.13 (citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,* 515 U.S. 528, 540-41 (1995)); *see also Lindo,* 652 F.3d at 1267 (same point). Yet the court of appeals here treated *Mitsubishi* as controlling at the pre-award stage. This misapplication of *Mitsubishi* should be corrected.

Nor does it matter (*see* Pet. App. 16a, 129a), that this case involves federal statutory rights rather than state contractual rights. *See* Blackman, Rozenberg & Sidhu, *supra* (predicting that "[t]he Supreme Court may find this to be a distinction without a difference, and reject the Second Circuit's

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[3] Again, there is no dispute that this language from *Mitsubishi* was dicta. *See, e.g., Lindo v. NCL (Bahamas), Ltd.* 652 F.3d 1257, 1266-67 (11th Cir. 2011); *Richards v. Lloyd's of London*, 135 F.3d 1289, 1295-96 (9th Cir. 1998) (en banc); *D'Antuono v. Service Road Corp.,* 789 F. Supp.2d 308, 332-33 (D. Conn. 2011); *Grynberg v. BP P.L.C.,* 596 F. Supp.2d 74, 78-79 (D.D.C. 2009).

view"); *accord* Pet. App. 143a ("This labored analysis does not rise to a distinction, and treats the reasoning of *Concepcion* as an obstacle to be surmounted or evaded"). *Concepcion* rested on the language of the FAA. Since that language governs to preempt conflicting state law under the Supremacy Clause, then *a fortiori* the same language governs federal law. Indeed, this Court has specifically held that the duty to enforce an arbitration agreement "is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/AMEX, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *accord CompuCredit Corp. v. Greenwood,* 132 S.Ct. 665, 669 (2012); *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247, 257 (2009) (Age Discrimination in Employment Act does not preclude arbitration of claims brought under that statute); *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 122-24 (2001) (arbitration not inherently inconsistent with enforcement of federal statutory rights). Surely nothing in the FAA or the federal antitrust statutes exempts antitrust claims from arbitration agreements. *See Mitsubishi*, 473 U.S. at 628, 632 (non-dicta direct holding in antitrust case).

Finally, it bears emphasis that, as the petition explains (Pet. 2, 10), the court of appeals has already been subjected to a grant, vacate, remand ("GVR") order from this Court for an earlier opinion invalidating the class arbitration waiver at issue. Although GVR orders *per se* do not constitute a "final determination on the merits" (*Henry v. Rock Hill,* 376 U.S. 776, 777 (1964)), at a minimum, they signal a "reasonable probability" that the lower court decision was in error. *See Lords Landing Village*

Condominium Council of Unit Owners, 520 U.S. 893, 896 (1997) (per curiam).

Indeed, this Court has granted certiorari and reversed numerous lower court opinions that re-affirmed or reinstated an earlier disposition following a GVR order.[4] Given the numerous precedents that the Second Circuit effectively ignored or nullified in the opinion below, this Court should do so again here.

II. THE DECISION BELOW IS IN DIRECT CONFLICT WITH MULTIPLE CIRCUITS

Even if the court of appeals had not misread and misapplied this Court's precedents, certiorari is equally warranted to resolve an irreconcilable circuit split. *See* Pet. App. 148a. While the petition correctly notes that the decision below directly conflicts with three other circuits (*see* Pet. 22-27), the split is more acute. Even in the post-*Concepcion* period alone, at least three circuits have correctly interpreted *Concepcion* as repudiating "excessive costs" defenses to class waivers in arbitration agreements – all contrary to the Second Circuit holding.

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[4] *See, e.g., Smith v. Spisak,* 130 S.Ct. 676, 681 (2010); *Ayers v. Belmontes,* 549 U.S. 7, 10-11 (2006); *Lujan v. G & G Fire Sprinklers, Inc.,* 532 U.S. 189, 195-99 (2001); *Powell v. Texas,* 492 U.S. 680, 681 (1989) (per curiam); *Rhodes v. Stewart,* 488 U.S. 1, 3 (1988) (per curiam); *United States v. Sharpe,* 470 U.S. 675, 681 (1985); *INS v. Miranda,* 459 U.S. 14, 19 (1982) (per curiam); *Hutto v. Davis,* 454 U.S. 370, 374-75 (1982) (per curiam); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 47 (1970) (per curiam); *Henry*, 376 U.S. at 777; *Fields v. South Carolina,* 375 U.S. 44 (1963) (per curiam); *see also Youngblood v. W. Va.*, 547 U.S. 867, 873 (2006) (Scalia, J., dissenting) (noting that GVR orders may sometimes be interpreted as "polite directives" that lower courts "reverse themselves").

In *Quilloin v. Tenet HealthSystem Philadelphia, Inc.,* the Third Circuit upheld class waivers in arbitration agreements despite arguments that "class action litigation is the only effective remedy such as when the high cost of arbitration compared with the minimal potential value of individual damages denies every plaintiff a meaningful remedy." 673 F.3d 221, 232 (3d Cir. 2012) (citing *Concepcion*). As noted by the dissenting judges here (Pet. App. 138a, 141a, 148a-49a), the Ninth Circuit reached the same conclusion. *See Coneff,* 673 F.3d at 1159 ("Although Plaintiffs argue that the claims at issue in this case cannot be vindicated effectively because they are worth much less than the cost of litigating them, the *Concepcion* majority rejected that"). In so holding, the Ninth Circuit in *Coneff* followed the Eleventh Circuit, which likewise interpreted *Concepcion* as foreclosing "excessive costs" rationales to invalidate class arbitration waivers. *See Cruz v. Cingular Wireless, LLC,* 648 F.3d 1205, 1214 (11th Cir. 2011) (noting that plaintiffs produced evidence that it would be economically impractical to bring individual claims in arbitration, and agreeing that most of these small-value claims will go undetected and unprosecuted, yet nonetheless holding that "faithful adherence to *Concepcion* requires the rejection of the Plaintiffs' argument").[5]

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[5] Post-*Concepcion,* district courts are likewise questioning earlier decisions invalidating class arbitration waivers on the same grounds the court of appeals applied here. *See, e.g., Spears v. Mid-Am. Waffles, Inc.,* 2012 WL 2568157, at *2 n.2 (D. Kan. July 2, 2012) (opining that *Jones v. DirectTV, Inc.,* 667 F. Supp.2d 1379, 1382 (N.D. Ga. 2009) – which applied identical reasoning as the panel opinion in this case – was overruled by *Concepcion*).

Concurring in the denial of rehearing, Judge Pooler contended that the other circuits applying *Concepcion* dealt with "incentive" to bring claims, rather than "ability" to bring claims. Pet. App. 131a. But this, too, is a distinction without a difference. It is no more economically prudent to bring a small-dollar contractual claim to arbitration than it is to bring an antitrust claim. This Court has rejected "general policy goals" as a means of overriding an otherwise clear and unambiguous arbitration agreement. *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 294 (2002); *accord McMahon*, 482 U.S. at 240. Indeed, other courts have held that the Second Circuit decision is completely at odds with *Concepcion* and *Coneff*. *See, e.g., Jasso v. Money Mart Exp., Inc.* – F.Supp.2d –, 2012 WL 1309171, at *7 (N.D. Cal. 2012) (rejecting *AMEX III*); *Brokers' Services Marketing Group v. Cellco Partnership,* 2012 WL 1048423, at **3-5 (D.N.J. Mar. 28, 2012) (rejecting same argument that *AMEX III* adopted and following *Concepcion* and *Coneff*).

The inherent unpredictability stemming from the current variation from jurisdiction to jurisdiction substantially undermines the certainty and value of the federal right to enforcement of arbitration agreements. The resulting uncertainty is especially vexing for businesses with operations, vendors or customers dispersed regionally and nationally. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 25 n.32 (1983) (the FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate"). "Once rare, class action waivers are today included in millions of credit card and other financial services agreements nationwide." Kaplinsky & Levin, *Is*

JAMS in a Jam Over Its Policy Regarding Class Action Waivers in Consumer Arbitration Agreements?, 61 Bus. Law. 923, 923 (Feb. 2006) (footnote omitted); Rice, *The Battle of Enforceability: Class Action Waivers in Mandatory Arbitration Clauses,* 27 Banking & Fin. Servs. Policy Rep. No. 4 at *1 (April 2008) (essentially same). When, as in this case, parties have done everything possible to memorialize – in the clearest and most unambiguous of terms – their agreement that there be no class adjudication, the existing uncertainty cannot be justified.

Although the impact of this issue resonates through all industries and sectors of the economy, prompt resolution of this issue is singularly urgent for employers and their attorneys. Earlier this year, the National Labor Relations Board ("NLRB") held that requiring all employment-related disputes to be resolved through individual arbitration (and disallowing class claims) violated the National Labor Relations Act ("NLRA") because it prohibited the exercise of substantive rights protected by section 7 of the NLRA. *See In re D.R. Horton, Inc.,* 357 NLRB No. 184, 2012 WL 36274 (2012). Although no court of appeals has yet spoken on the matter, district courts are already deeply divided on whether *D.R. Horton* is consistent with this Court's precedents.[6] Unless this

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[6] *Compare Delock v. Securitas Sec. Servs. USA, Inc.,* – F. Supp.2d –, 2012 WL 3150391, at **4-5 (E.D. Ark. 2012); *Morvant v. P.F. Chang's China Bistro, Inc.,* 2012 WL 1604851, at *9 (N.D. Cal. May 7, 2012); *Jasso,* – F. Supp.2d –, 2012 WL 1309171 at **7-10; *Palmer v. Convergys Corp.,* 2012 WL 425256, at *3 (M.D. Ga. Feb. 9, 2012); *and LaVoice v. UBS Fin. Servs., Inc.,* 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012) (all rejecting *D.R. Horton*); *with Herrington v. Waterstone Mortg. Corp.,* 2012 WL 1242318 (W.D. Wis. Mar. 16, 2012); *and*

Court resolves the issue presented in this case, employers will remain in an unsustainable limbo, caught between the demands of privacy law governing individual personnel records and the NLRB's newly-minted unfair labor practice edict.[7]

It is therefore essential that the Court resolve the question presented so that arbitration agreements enforceable in the vast majority of jurisdictions are not rendered unenforceable by the anti-arbitration hostility of the Second Circuit. In the current state of affairs, clients cannot be reliably counseled on how to draft arbitration agreements that will be fair and "universally enforceable." *Allied-*

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v. Bristol Care, Inc., 2012 WL 1192005 (W.D. Mo. Feb. 28, 2012) (following *D.R. Horton*).

[7] Further, even if employers wished to avoid the NLRB's wrath and entered into arbitration agreements that did not have an express waiver of class procedures, this would only lead to additional uncertainty. Courts of appeals are currently split on whether arbitration agreements that are "silent" regarding class procedures evince assent to class arbitration, or whether class arbitrations are permissible under *Stolt-Nielsen* only when the agreement explicitly allows them. *Compare Sutter v. Oxford Health Plans, LLC,* 675 F.3d 215, 223-25 (3d Cir. 2012) (class arbitration permissible even when agreement "silent" on class procedures), *pet. for certiorari filed,* No. 12-135 (July 27, 2012); *Jock v. Sterling Jewelers, Inc.,* 646 F.3d 114, 119-27 (2d Cir. 2011) (same), *cert. denied,* 132 S. Ct. 1742 (2012) *with Reed v. Fla. Metro. Univ. Inc.,* 681 F.3d 630, 638-46 (5th Cir. 2012) (no class arbitration unless agreement expressly allows it). DRI is submitting an *amicus curiae* brief in No. 12-135 urging that the Court grant the petition for certiorari. Each case – *Sutter* and this one – independently warrants certiorari. Since both are pending at the same time, the Court has an ideal opportunity to resolve pressing questions concerning the availability of class arbitration in a broad context that will greatly benefit millions of businesses and individuals. Accordingly, DRI proposes that both petitions should be granted.

Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 279 (1995). As matters now stand, lawyers advising clients regarding class action waivers in arbitration agreements can only offer the following advice on the enforceability of such clauses:

- They are enforceable against state claims (unless arbitrators or courts concoct new ways to limit for circumlocute *Concepcion*).

- Depending on the jurisdiction, they may or may not be enforceable against federal claims (and we aren't sure which ones).

- It will be very costly to litigate the enforceability of the waiver as applied to federal claims (just how costly will depend on the jurisdiction).

In *Southland Corp. v. Keating,* 465 U.S. 1, 15 (1984), this Court was "unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." That, however, is precisely the result of the court of appeals' decision here.

III. THE QUESTION IS IMPORTANT, RECURRING, AND WELL-SUITED FOR REVIEW

Arbitration is the "oldest known method of settlements of disputes[.]" *McAmis v. Panhandle E. Pipeline Co.,* 273 S.W.2d 789, 794 (Mo. App. 1954).

This Court has long favored arbitration as a means of dispute resolution. *See Burchell v. Marsh*, 58 U.S. 344, 349 (1854) ("As a mode of settling disputes, [arbitration] should receive every encouragement from courts of equity"). Congress has confirmed the strong national policy in favor of arbitration by enacting the FAA. *See, e.g., CompuCredit Corp. v. Greenwood,* 132 S.Ct. 665, 669 (2012) (citing several authorities); *Marmet Health Care Center, Inc. v. Brown,* 132 S.Ct. 1201, 1203 (2012) (same); *Southland* 465 U.S. at 10.

It is well-recognized that "[b]y agreeing to arbitrate . . . a party . . . trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi,* 473 U.S. at 628. Parties competent to enter into a contract are also competent to enter into an arbitration agreement. *United States v. Moorman,* 338 U.S. 457, 461-62 (1950). Absent a valid defense from the party opposing arbitration, courts are required to enforce arbitration agreements on their terms. *See, e.g., CompuCredit,* 132 S.Ct. at 669; *Concepcion,* 131 S.Ct. at 1745; *cf. The Harriman,* 76 U.S. 161, 173 (1869) ("It is the province of the courts to enforce contracts – not to make or modify them").

This Court has repeatedly recognized the benefits of arbitration: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. *See, e.g. Concepcion,* 131 S.Ct. at 1749; *Stolt-Nielsen,* 130 S.Ct. at 1775; *accord* Rice, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for A Judicial Standard,* 45 Hou. L. Rev. 215, 246 (2008) ("Proponents of arbitration, and

particularly of the mandatory arbitration clause, hail it as a boon to efficiency for our already-burdened judiciary as well as an economic advantage for both parties of a dispute"). As this Court aptly stated, "[c]ontracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland,* 465 U.S. at 7.

In contrast to *Southland,* the Second Circuit's approach is

> unworkable as a practical matter of judicial administration. Under his approach, every court evaluating a motion to compel arbitration would have to make a fact-specific comparison of the potential value of a plaintiff's award with the potential cost of proving the plaintiffs case. Defendants predictably will challenge the qualifications and methodology of experts who are called upon to estimate a plaintiff's costs of proof. It is highly doubtful that in striking down the *Discover Bank* rule [in *Concepcion*], the Supreme Court intended to open the door to such proceedings as a means for plaintiffs to avoid arbitration agreements.

Kaltwasser, 812 F. Supp.2d at 1049; *accord Hendricks*, 823 F. Supp.2d at 1021-22 (agreeing with above).

These same concerns were highlighted by the dissenting judges here. *See* Pet. App. 139a-40a. In short, the Second Circuit's approach cannot be

reconciled with "Congress's clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone,* 460 U.S. at 22. Allowing the decision below to stand would be "breeding litigation from a statute that seeks to avoid it." *Allied-Bruce,* 513 U.S. at 275.

Nor is the court of appeals' decision bound to the facts of this case. As the dissenting judges pointed out, there is no reason to believe that the court of appeals' "excessive costs" reasoning would be limited to antitrust cases. Experts are routinely engaged in a variety of potential class claims. *See, e.g., Bell Atlantic Corp*. v. *AT&T Corp.,* 339 F.3d 294, 306 (5th Cir. 2003) (class certification properly denied when expert's formula "in no way account[ed] for the vast differences among those class members," and "[a]ny reasonable approximation of damages actually suffered by the various class members" would require "individualized damages inquiries").[8] Indeed, Chief Judge Jacobs' dissent noted that the court of appeals' ruling "can be used to challenge virtually every consumer arbitration agreement that contains a class-action waiver – and other arbitration agreements with such a clause." Pet. App. 137a.

Commentators have already warned that, if allowed to stand, the decision below "could have the

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[8] This Court granted certiorari in *Comcast Corp. v. Behrend,* No. 11-864 (oral argument scheduled Nov. 5, 2012) to resolve whether "[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." DRI filed an *amicus brief* in that case supporting petitioner.

effect of preventing arbitration of any kind in cases where a federal statutory claim is asserted on behalf of a purported class, thereby forcing a corporate defendant into the very sort of judicial class action that it can be presumed to have wished to avoid through an arbitration agreement." Blackman, Rozenberg & Sidhu, *supra.* *Cf.* Rice, *Enforceable or Not?,* 45 Hou. L. Rev. at 224 (characterizing "the use of the class-action arbitration bans as a legitimate contract tool used to defend[] companies from the ever-increasing onslaught of frivolous multimillion-dollar class action lawsuits"). "This would be a paradoxical result indeed, and one difficult to square with the Supreme Court's decided preference for upholding arbitration agreements." *Id.*

Experience teaches – as Congress and the courts have perceived – that class actions can give rise to unacceptable abuses and risks wholly unrelated to whether the claim has the slightest merit. For example,

> When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good. [The defendant] has good reason not to want to be hit with a multi-hundred-million-dollar claim that will embroil it in protracted and costly litigation—the class has more than a thousand members, and determining the value of their claims, were liability established, might thus require more than a thousand separate hearings.

Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 677-78 (7th Cir. 2009).

The overwhelming majority of class actions have resulted not in adjudication to final judgment on their merits, but settlements. *See Concepcion,* 131 S.Ct. at 1752 (recognizing "risk of 'in terrorem' settlements that class actions entail"; citing *Kohen,* 571 F.3d at 677-78).[9] As this Court noted, "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Id.*; *accord Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008) (noting pressure for defendants to settle class actions, even if adverse judgment seems "improbable"); *In re Rhone-Poulenc Rorer Inc.,* 51 F.3d 1293, 1298 (7th Cir. 1995). But if companies are to protect themselves from the high costs of litigation and the potential of paying damages on "frivolous" class claims then the public would undoubtedly benefit. *See* Rice, *Enforceable or Not?,* 45 Hou. L. Rev. at 247 ("Because companies are able to keep their costs

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[9] Empirical studies and numerous commentators confirm the indisputable point that "the vast majority of certified class actions settle, most soon after certification." Bone & Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1291 (2002) ("[E]mpirical studies…confirm what most class action lawyers know to be true"); Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification [leads to] settlement, not full-fledged testing of the plaintiffs' case by trial"); Willging & Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 647 (2006) ("[A]lmost all certified class actions settle").

down by mitigating risk, they will pass cost savings on to the consumer in the form of lowered prices").

This case is an ideal vehicle for resolution of these important practical issues because the question is presented in a gateway context, with the justifications for class action treatment at their absolute nadir. The plaintiffs are all businesses that entered into contracts expressly precluding class-wide adjudication. The individual claims are in the thousands of dollars. If a class action waiver is unenforceable here, when would one be enforceable? Typically, when individual claims are minimal the stated justification for class-wide adjudication is that otherwise there would be no remedy to deter defendants from engaging in the conduct that is challenged. Whatever validity that contention may have in a situation where the claims have merit, the reality of the vast majority of class action cases is that the merits are never tested. And, when the claim is that a defendant violated a federal statute – here, the antitrust laws – there are ample public enforcement authorities with full power to seek remedies that provide any appropriate deterrent effect. The Second Circuit's standard turns on the cost of employing experts as compared to the potential benefit of successful litigation. There are powerful reasons to prefer public enforcement officials as the parties responsible for making that cost-benefit analysis. The reality is that government enforcement efforts, in antitrust and other regulated areas, are routinely magnets for tag-along private class actions that follow in the government's footsteps at a fraction of the cost of original litigation. In contrast, a decision by private attorneys to incur massive costs they hope eventually to impose on the

defendant for claims that will almost certainly never be tested on the merits provides little assurance that the public interest is being served. There is, accordingly, scant justification to subject defendants to the risks of paying these costs, along with their own litigation costs (including defense experts), while facing the risk of massive potential liability for claims whose merits will likely never be resolved.[10]

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[10] *See, e.g., Kamm v. Cal. City Devel. Co.*, 509 F.2d 205, 212-13 (9th Cir. 1975) (government better suited to remedy harm than private class action); *Chin v. Chrysler Corp.,* 182 F.R.D. 448, 464 (D.N.J. 1998) ("[T]here is insufficient justification to burden the judicial system with Plaintiffs' claims while there exists an administrative remedy that has been established to assess the technical merits of such claims"); *Brown v. Blue Cross & Blue Shield of Mich., Inc.,* 167 F.R.D. 40, 45-47 (E.D. Mich. 1996) (holding that defendants' settlement agreement with state attorney general and insurance commissioner adequately served the interests of the proposed class and, therefore that a class action was unnecessary). Moreover, government enforcement minimizes the possibility of conflicts between potential victims, returns more dollars to consumers without payment of counsel fees; the government is better positioned than the private bar to prioritize investigations and prosecutions without the need to comply with costly class action administrative requirements. *See, e.g.,* Griffin, *Reinventing Adequacy: The Need for Standardized Regulation*, 23 Geo. J. Legal Ethics 603, 613-16 (2010) (making similar points).

CONCLUSION

The petition for a writ of certiorari should be granted.

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