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 DISTINGUISHED LAW PROFESSORS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are distinguished professors of law from several leading law schools across the country ("*Amici* Law Professors"). *Amici* Law Professors have lectured and written extensively on issues of contract law and arbitration. They support the enforcement of arbitration clauses as written and thus the Federal Arbitration Act's central mandate requiring the enforcement of arbitration agreements "in accordance with the terms of the agreement." 9 U.S.C. § 3; *id.* § 4. *Amici* Law Professors oppose the Second Circuit's refusal to enforce the arbitration agreement at issue in this case, *see In re American Express Merchants' Litig.*, 667 F.3d 204 (2d. Cir. 2012) ("*Amex III*"), and believe that the Second Circuit's expansion of the "vindication of statutory rights" theory is simply a new manifestation of judicial hostility toward agreements to arbitrate that is inconsistent with the Federal Arbitration Act.

Amici Law Professors include:

Henry N. Butler, George Mason University Foundation Professor of Law and Executive Director of the Law & Economics Center at the George Mason University School of Law;

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

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SUMMARY OF THE ARGUMENT

Congress enacted the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, in 1925 to "revers[e] centuries of judicial hostility to arbitration agreements." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974); *see also Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). The FAA's primary "purpose was to place an arbitration agreement 'upon the same footing as other contracts, where it belongs,' H.R. Rep. No. 96, 68th Cong., 1st Sess.,

1 (1924), and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985).

Section 2 of the FAA is its cornerstone. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985). It guarantees that arbitration agreements will be "valid, irrevocable, and enforceable" as a matter of federal law except where state law grounds exist "for the revocation of any contract." 9 U.S.C. § 2.

To effectuate this guarantee, the FAA's central mandate requires the enforcement of arbitration agreements "in accordance with the terms of the agreement." 9 U.S.C. § 3; *id.* § 4. This central mandate "requires courts to enforce agreements to arbitrate according to their terms, ... even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (internal citation omitted); *see also Shearson/ American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987) ("This duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights.").

Notwithstanding this strict federal mandate, the Court has suggested that it may decline to enforce an arbitration agreement where "the existence of large arbitration costs" preclude a claimant "from effectively vindicating her federal statutory rights in the arbitral forum." *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000). As outlined in *Randolph*, this "vindication" theory is a narrow exception to the central mandate of the FAA; it requires the party opposing

arbitration to prove that costs *unique to arbitration* are so high as to foreclose *access* to the arbitral forum. *Id.* at 90-91.

The Second Circuit panel, however, "distort[ed]" *Randolph*, wildly expanding its "vindication" theory by ignoring both of its defining features. *In re American Express Merchants' Litig.*, 681 F.3d 139, 147 (2d Cir. 2012) ("*Amex* Order Denying Rehearing *En Banc*") (Jacobs, C.J., dissenting from denial of rehearing *en banc*). First, the panel considered not the costs of *arbitration*, but putative *litigation* expenses, including purported million-dollar expert witness fees. *See Amex III*, 667 F.3d at 218. Setting aside whether such exorbitant expert fees would be incurred in arbitration in the first place, they clearly are not connected to arbitration itself. That such costs would exist in litigation necessarily means that they cannot be considered to preclude access to the arbitral forum.

Moreover, it is nonsensical for a court to assume that the arbitral forum would require million-dollar procedures to resolve claims of a much smaller magnitude, given that the entire point of contracting for arbitration is to obtain "a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280-281 (1995). Indeed, it is not for the court to decide what procedures should be employed in arbitration in the first place. This is the job of the arbitrator. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

Second, and perhaps more importantly, the panel nullified the arbitration agreement at issue because it does not permit class procedures which, in the court's estimation, are the "only economically feasible means"

for plaintiffs to press their antitrust claims. *Amex III*, 667 F.3d at 218. In so doing, the panel improperly focused on whether an individual plaintiff would have sufficient financial *incentive* to bring its claim in the arbitral forum in the manner provided for in the arbitration agreement. But financial *incentives* do not bear on access, that is, whether the doors to the arbitral forum are open to a particular claimant in the first place. Moreover, employing an incentive rationale to determine whether class procedures are necessary to vindicate a plaintiff's claim is foreclosed by the Court's recent decision in *AT&T Mobility LLC v. Concepcion*, which bars courts from "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." 131 S. Ct. at 1744.

Given that it runs contrary to the FAA's central mandate as well as this Court's teaching that only Congress—not the courts—may "identify any category of claims as to which agreements to arbitrate will be held unenforceable," *Mitsubishi Motors Corp.*, 473 U.S. at 627, the "vindication" theory should be applied narrowly. The Second Circuit's expansion of this theory cannot be squared with this Court's strict enforcement of arbitration agreements except in the case of a congressional override. Indeed, it risks transforming dicta in *Randolph* into an open-ended judicial inquiry into potential reasons for invalidating an arbitration agreement. If left uncorrected, the decision below would re-open the door to a new brand of "judicial hostility to arbitration agreements," directly counter to the FAA's animating purpose. *Scherk*, 417 U.S. at 510-11. For all these reasons, *Amici* Law Professors agree with Petitioners that "the panel below exceeded its proper role under the FAA." Pet. Br. at 57.

ARGUMENT

I. THE PANEL EXPANDED *RANDOLPH*'S "VINDICATION" THEORY BEYOND RECOGNITION.

A. *Randolph* Outlined A Narrow Exception To The Rule That Arbitration Agreements Must Be Enforced As Written.

In *Randolph*, 531 U.S. 79, the Court considered the enforceability of an agreement to arbitrate entered into between an individual consumer and her lender. Despite having signed a written agreement to arbitrate all disputes arising from or relating to her loan contract, the plaintiff filed a putative class action complaint asserting federal statutory claims against the lender. *Id.* at 82-83. In an attempt to avoid arbitration, she argued that "prohibitive arbitration costs" would force her to forgo her claims rather than arbitrate them, thereby precluding her from "vindicat[ing] her statutory rights in arbitration." *Id.* at 90.

Without actually deciding whether "the existence of large arbitration costs could preclude a litigant … from effectively vindicating her federal statutory rights in the arbitral forum," the Court rejected plaintiff's argument, concluding that the record failed to show that she would "bear such costs if she goes to arbitration." *Id.* Yet the Court made clear that this "vindication" theory employed a limited cost inquiry to determine whether the claimant had been effectively denied access to the arbitral forum.

The Court's cost inquiry focused not on costs borne by a claimant in adjudicating her claim in *any* forum but, rather, only those costs unique to arbitration, *i.e.*, those costs that will be borne "if she pursues her claims in an arbitral forum." 531 U.S. at 90. In particular, the Court highlighted the "filing fees" and the "arbitrator's fee," but not attorney's fees or any other expenses that would be incurred in the course of *litigating* the plaintiff's claims. *Id.* at 90 n.6. Notably, all nine justices were in agreement on this point, as Justice Ginsburg's separate opinion keys on those costs unique to arbitration. Explaining that the Court was addressing "a 'who pays' question," Justice Ginsburg referenced only the "filing fee" and "total fees charged by the arbitrator." *Id.* at 95 (Ginsburg, J., concurring in part and dissenting in part).

Likewise, the opinion for the Court and Justice Ginsburg's separate opinion both made clear that this limited cost inquiry was intended to determine whether the plaintiff could *access* the arbitral forum. The Court articulated the question as whether "prohibitive arbitration costs" would "force[] her to forgo any claims she may have against petitioners." *Id.* at 90. Without any comparison against the size of the plaintiff's claims, it is clear that the Court was concerned with the price of admission, i.e., access to the forum. Justice Ginsburg was even more clear, characterizing the question as whether "the arbitral forum is financially inaccessible" to the plaintiff. *Id.* at 93 (Ginsburg, J.); *see also id.* ("[I]s that forum *accessible* to the party resisting arbitration."); *id.* at 94, 96.

In short, *Randolph* endorses a narrow exception to the FAA's central mandate. A court may decline to enforce an arbitration agreement where a claimant demonstrates

that she would face arbitration costs so exorbitant that they effectively deny her entry to the arbitral forum.

B. The Panel Exceeded The Bounds Of *Randolph*'s "Vindication" Theory.

As explained above, *Randolph* contemplated a narrow exception to the FAA's mandate that the courts must enforcement arbitration agreements as written. In refusing to enforce the arbitration agreement at issue here, the panel distorted *Randolph*'s vindication theory in two key respects.

First, ignoring *Randolph*'s focus on "arbitration costs," the court nullified the arbitration agreement at issue on the basis of putative *litigation* expenses. Rather than addressing the "filing fees" and the "arbitrator's fee," *Randolph*, 531 U.S. at 90 n.6, the panel considered the costs of litigation generally, including "substantial" expert witness costs and attorneys' fees. *Amex III*, 667 F.3d at 218. In so doing, the panel plainly exceeded the bounds of *Randolph*, which concerns only those costs unique to arbitration. Even assuming that Respondents would have to incur "substantial" expert witness costs and attorneys' fees at arbitration, it cannot be said that those costs impact Respondents' ability to access the arbitral forum, given that Respondents certainly would have borne those costs in a judicial forum. Such costs are not unique to arbitration, and the consideration thereof is inappropriate under *Randolph*.

Moreover, it was wrong for the panel to assume that arbitration would require Respondents to employ expert witnesses and incur the level of attorneys' fees typical of complex antitrust *litigation*. Respondents' expert

estimated that an economic study and expert services would cost "'at least several hundred thousand dollars, and might exceed $1 million.'" *Id.* at 218 (internal citation omitted). But it makes no sense to assume that any arbitrator would require a $1 million expert economic study to arbitrate a claim of $5,252 or even $38,549,[2] especially given that the reason why parties contract for bilateral arbitration rather than litigation is "to realize the benefits of private dispute resolution," including "lower costs, greater efficiency and speed." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010); *see also Allied-Bruce*, 513 U.S. at 280-281 ("a less expensive alternative to litigation"); H.R. Rep. No. 97-542, at 13 (1982) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation."); John W. Cooley & Steven Lubet, Arbitration Advocacy ¶ 1.3.1, at 56 (Nat'l Inst. for Trial Advocacy ed., 1997) ("Arbitration … is conducted in a less formal and less rigorous setting, thereby enhancing the potential for more expeditious resolution.").

Because the entire point of arbitration is to provide a "cost-effective alternative to litigation,"[3] arbitrators generally tailor the procedures to be employed in

2. Respondents' expert estimated the damages to be $5,252 for the median-volume named-plaintiff merchant and $38,549 for the largest-volume named-plaintiff merchant. *See Amex III*, 667 F.3d at 218.

3. *See* American Arbitration Association, *Arbitration Services*, http://www.adr.org/aaa/faces/services/disputeresolutionservices/arbitration?_afrLoop=52275363419732&_afrWindowMode=0&_afrWindowId=165ijz1y8a_68#%40%3F_afrWindowId%3D165ijz1y8a_68%26_afrLoop%3D52275363419732%26_afrWindowMode%3D0%26_adf.ctrl-state%3D165ijz1y8a_124 (last visited Dec. 28, 2012).

arbitration around the size of the claim. Indeed, organizations that provide arbitration services generally offer multiple options in terms of the levels of procedure to be employed that increase in complexity as the amount of the claim increases.[4] Moreover, administrative fees in arbitration are "based on the amount of the claim or counterclaim"[5] and compensation for arbitrators generally "tak[es] into account … the size and complexity of the case."[6] It thus is highly unlikely that arbitration of Respondents' claims would have required such elaborate (and expensive) procedures.[7]

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4. *See, e.g.,* JAMS: The Resolution Experts, *Arbitration Practice Overview*, http://www.jamsadr.com/managedarbitration/ (last visited Dec. 28, 2012) ("In order to save clients time and money, JAMS … allow[s] the crafting of a process that is commensurate with the dispute.").

5. American Arbitration Association, *International Dispute Resolution Procedures*, at 41 (last updated June 1, 2009) http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_002037&revision=latestreleased.

6. *Id.* at 36. The goal of tying the costs of arbitration to the nature and complexity of the case is sometimes written into the codes of professional responsibility for arbitrators. *See, e.g.*, American Arbitration Association, *Code Of Professional Responsibility For Arbitrators Of Labor-Management Disputes*, at 14 (last updated Sept. 2007) http://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_003869&revision=latestreleased ("An arbitrator must endeavor to keep total charges for services and expenses reasonable and consistent with the nature of the case or cases decided.").

7. Put another way, Respondents failed to meet their "burden of showing the likelihood of incurring such costs." *Randolph*, 531 U.S. at 92.

Perhaps worse, it is not for the court to speculate as to the procedures that must be employed in adjudicating a dispute through arbitration. It is the job of the arbitrator, and *not* the court, to determine what procedures are to be employed in arbitration. *See Howsam*, 537 U.S. at 84 ("'[P]rocedural questions which grow out of the dispute and bear on its final disposition' are presumptively *not* for the judge, but for an arbitrator, to decide." (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964))); *see also Stolt-Nielsen*, 130 S. Ct. at 1775. The panel usurped the role of the arbitrator by assuming that arbitration would require formal expert reports.

Second, and perhaps more importantly, the Second Circuit compounded its error by comparing the total costs of adjudicating the case against the amount of Respondents' potential awards in order to determine whether Respondents would have sufficient economic incentive to bring their claims on an individual basis. Giving effect to the lone expert affidavit that set forth the likely costs of an economic study, the court concluded that it would not be "economic[ally] rational[]" for the plaintiff to bring an individual action "in light of these substantial expert witness costs." *Amex III*, 667 F.3d at 217-18; *accord In re American Express Merchants' Litig.*, 634 F.3d 187, 199 (2d Cir. 2011) ("*Amex II*") ("[T]he size of any potential recovery by an individual plaintiff will be too small to justify the expense of bringing an individual action."). This analysis is unsupported by *Randolph*.

As explained above, the theory of *Randolph* is one of *access* to the arbitral forum, not whether the would-be claimant has sufficient economic interest to advance or prevail on his claim in that forum. *See, e.g.*, 531 U.S. at

93 (criticizing the majority for deciding that the party opposing arbitration "bears the burden of demonstrating that the arbitral forum is financially inaccessible to her") (Ginsburg, J.). Whether the costs of adjudicating Respondents' claims exceeds the amount of their claims—that is, whether Respondents have financial incentive to adjudicate their claims—is irrelevant. Indeed, had the relative size of the plaintiff's claim affected the analysis, the *Randolph* Court certainly would have mentioned that fact that the plaintiff characterized her claim as having a "$15 value." Br. of Resp't, *Green Tree Financial Corp.-Ala. v. Randolph*, No. 99-1235 (filed July 24, 2000) at 34, 45.

Respondents' inability to employ class procedures is likewise irrelevant under *Randolph*. The arbitration agreement at issue in *Randolph* included a class-waiver provision, 531 U.S. at 92 n.7, but the Court did not mention this fact in its analysis of the "costs of arbitration." Moreover, Randolph had argued that "[g]iven the limited economic damages at issue individually, … consumers aggrieved by the mortgage agreement would be unlikely to invoke their rights … absent their ability to aggregate their claims and proceed on a class wide basis." Br. of Resp't, *Green Tree Financial Corp.-Ala. v. Randolph*, No. 99-1235 (filed July 24, 2000) at 45. However, the potential impact of the class-waiver provision on the plaintiff's incentive to adjudicate her claims did not factor into the Court's analysis of whether the plaintiff was able "to vindicate her statutory rights in arbitration." *Randolph*, 531 U.S. at 90.

The panel's consideration of financial incentives is not only irrelevant under *Randolph*, it is actually foreclosed by *Concepcion*. In *Concepcion*, the Court expressly rejected the theory that class procedures must remain available to ensure that sufficient financial incentive exists for the advancement of claims that otherwise might not be economically feasible for adjudication. 131 S. Ct. at 1753. This is precisely the rationale employed by the panel, albeit under the guise of *Randolph*'s "vindication" theory. As Chief Judge Jacobs noted in dissent, "*Concepcion* ... vindicated the FAA against an unconscionability challenge that was materially indistinguishable from the challenge upheld in *Amex*." *Amex* Order Denying Rehearing *En Banc*, 681 F.3d at 146 (Jacobs, C.J., dissenting from denial of rehearing *en banc*).

Indeed, the panel ran headlong into the central holding of *Concepcion*. The Court in *Concepcion* held that the FAA prohibits courts from "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." 131 S. Ct. at 1744. But the panel did just that: "in light of the fact that the arbitration provision at issue here does not allow for class arbitration, ... [w]e conclude that this arbitration clause is unenforceable." *Amex III*, 667 F.3d at 219.

In short, the panel's test distorted *Randolph*'s "vindication" theory and employed a mode of analysis expressly foreclosed by *Concepcion*. The panel decision thus cannot stand.

II. IF LEFT UNCORRECTED, THE PANEL DECISION THREATENS TO UNDERCUT THE PRIMARY OBJECTIVE OF THE FEDERAL ARBITRATION ACT.

As explained above, the panel decision rests on a misunderstanding of *Randolph*, and is incompatible with *Concepcion*. But it warrants correction for another reason. The rule of *Amex III* is not grounded in any congressional command in the FAA, the antitrust laws, or any other federal statute.[8] Rather, it is an exercise of judicial policy-making that amounts to a new manifestation of the judicial hostility to arbitration that was the impetus for the FAA in the first place. Because it serves as a basis for federal courts to impose class procedures (or perhaps other complex litigation procedures) on parties that expressly opted not to employ such procedures, *Amex III* is "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen*, 130 S. Ct. at 1775.

For centuries, under the rubric of public policy—most notably, public policy against ouster of the judicial process—English and American courts often held arbitration agreements invalid or otherwise "refused to enforce arbitration agreements specifically." *See Arbitration of Interstate Commercial Disputes: Joint Hearings: Before the Subcomms. on the Judiciary*, 68th Cong. 38 (1924). This hostility was a product of jurisdictional jealousy and a distrust of both arbitrators and arbitration procedures that began in "'ancient

8. As Petitioners explain, *see* Pet. Br. at 23-24, neither the text nor the policies behind the antitrust laws conflict with a contractual requirement of individual arbitration.

times,'" when English courts fought "'for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.'" *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 211 n.5 (1956) (Frankfurter, J., concurring) (quoting *U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (S.D.N.Y. 1915) (quoting *Scott v. Avery*, 5 H.L. Cas. 811 (1856) (Campbell, L.J.))). *See also* H.R. Rep. No. 96, 68th Cong., 1st Sess., at 1-2 (1924) ("Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts.").

Congress enacted the FAA as a direct response to this "judicial hostility." *Scherk*, 417 U.S. at 510-11; *see also Mitsubishi*, 473 U.S. at 625 n.14 ("[T]he Act was designed to overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law."). It commands that arbitration agreements are "valid, irrevocable, and enforceable" as a matter of federal law. 9 U.S.C. § 2. Its central mandate thus "requires courts to enforce agreements to arbitrate according to their terms, ... even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *Greenwood*, 132 S. Ct. at 669; *Stolt-Nielsen*, 130 S. Ct. at 1773 ("[T]he central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'").

The FAA had a separate goal of promoting arbitration as a streamlined, efficient alternative to judicial process. *See, e.g.*, S. Rep. No. 68-536, at 3 (1924) (reflecting objective to avoid "the delay and expense of litigation"); H.R. Rep. No. 97-542, at 13 (1982) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation."). It therefore established a presumption in favor of arbitration, *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983), which further bolsters the mandate that courts must "rigorously" enforce agreements to arbitrate according to their terms, *Byrd*, 470 U.S. at 221. *See also Concepcion*, 131 S. Ct. at 1748 ("The overarching purpose of the FAA ... is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.").

It follows that, under the FAA, federal courts cannot fashion rules of federal substantive law that bar enforcement of arbitration clauses as written where those rules are unmoored to any contrary congressional command. Thus, for example, the Court has repeatedly rejected "judicial policy concern as a source of authority" for invalidating arbitration agreements, emphasizing that "'it is not for us to substitute our view of ... policy for the legislation which has been passed by Congress.'" *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247, 270 (2009) (quoting *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2338-39 (2008)); *see also Concepcion*, 131 S. Ct. at 1753 ("The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."); *Stolt-Nielsen*, 130 S. Ct. at 1773–1776 (holding that an arbitral

panel exceeded its power under Section 10 of the FAA by imposing class procedures based on policy judgments rather than based upon the arbitration agreement itself).

Contrary to the FAA, then, the panel decision is grounded in the policy concern that claimants will elect not to bring relatively small-dollar claims if they have waived their ability to do so on a class or collective basis. It thus requires, as a matter of judicial policy preference, that consumer arbitration agreements must either allow collective arbitration or face nullification in a broad swath of cases. In effect, it creates a presumption *against* arbitration where a claimant asserts that its federal statutory claims "would not be 'economically rational' to pursue individually." *See Amex* Order Denying Rehearing *En Banc*, 681 F.3d at 142 (Jacobs, C.J., dissenting from denial of rehearing *en banc*). The court's refusal to enforce the arbitration agreement at issue is based on the assumption that arbitration cannot vindicate the public interest to the same extent as judicial class actions, and reflects the very sort of "judicial hostility to arbitration agreements" that the FAA was enacted to reverse. *See Scherk*, 417 U.S. at 510-11; *accord Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (observing that judicial "suspicion of arbitration" is "out of step with [the Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes").

Moreover, in further defiance of the FAA, "[t]he predictable upshot is that *Amex III* will render arbitration too expensive and too slow to serve any of its purposes." *Amex* Order Denying Rehearing *En Banc*, 681 F.3d at 145 (Jacobs, C.J., dissenting from denial of rehearing *en*

banc). The process endorsed by the panel for estimating the value of a plaintiff's claims and the total costs of adjudicating those claims requires a time- and resource-intensive effort to resolve numerous factual questions, some of which would necessitate wading into the merits of the case. As Chief Judge Jacobs explained:

> Whether a dispute may require expert testimony is a question inseparable from the merits .... Without a close inquiry into the merits, no court can decide what expert testimony would be required, or how much discovery is needed. And it cannot be decided whether any discovery or testimony is needed at all without deciding if the claim is dismissible.

Id. at 145-46. Such a costly threshold inquiry would deprive the parties of the very speed and efficiency for which they contracted and thus the principal benefits of arbitration—even if the court ultimately enforced the arbitration agreement.

If allowed to stand, the panel decision will confer upon judges—under the guise of *Randolph*'s "vindication" theory—a roving mandate to cast aside arbitration agreements and to impose complex litigation procedures on parties seeking to enforce such agreements at the threshold of litigation. It "is a broad ruling that, in the hands of class action lawyers, can be used to challenge virtually every consumer arbitration agreement that contains a class-action waiver—and other arbitration agreements with such a clause." *Amex* Order Denying Rehearing *En Banc*, 681 F.3d at 143 (Jacobs, C.J. dissenting from denial of rehearing *en banc*). Such a result

would sharply conflict with the FAA's central mandate as well as the federal policies embodied in the FAA. Accordingly, as Petitioners have argued, the Court should "reaffirm that, absent express limitation by Congress on the arbitration of a federal statutory claim, there is no basis for courts to refuse to enforce the FAA's command that arbitration agreements be enforced according to their terms." Pet. Br. at 3.

CONCLUSION

For the reasons set forth herein, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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