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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 THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*. The brief supports the position of Petitioners before this Court and thus urges reversal of the decision below.[1]

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

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes nearly 300 major U.S. corporations collectively employing close to twenty million people. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices.

EEAC member companies, most of which conduct business in numerous states, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment nondiscrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using arbitration and other forms of alternative dispute resolution. A number of EEAC member companies thus have adopted company-wide policies requiring the use of arbitration to resolve all employment-related disputes. Some of those arbitration agreements contain class action waiver provisions, which primarily are designed to preserve the benefits of arbitration by avoiding costly, complex, and protracted class-based proceedings.

A two-judge panel[2] of the Second Circuit below, ostensibly applying the "federal substantive law of

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[2] The Honorable Sonia M. Sotomayor, originally a member of this panel, was elevated to the Supreme Court on August 8,

arbitrability," refused on policy grounds to enforce a commercial arbitration agreement containing a class action waiver provision. The Second Circuit panel concluded that the arbitration agreement was unenforceable based upon the Respondents' showing that the cost of proving their case would be substantial, so that absent the ability to share that cost by proceeding collectively, they would be unable to vindicate their statutory rights. *Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchs. Litig.)*, 667 F.3d 204 (2d. Cir. 2012). Although the agreement containing the challenged class action waiver provision arose in the commercial context, the Court's ruling also potentially could influence the use of mandatory arbitration agreements generally, and class action waivers specifically, in other contexts, including employment.

EEAC has filed *amicus curiae* briefs supporting the enforceability of arbitration agreements in numerous cases before this Court.[3] Because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the

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2009. The remaining two panel members, who are in agreement, have determined the matter. Pet. App. 1a n.2 (citation omitted).

[3] *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, __ U.S. __, 130 S. Ct. 1758 (2010); *Rent-A-Center, W., Inc. v. Jackson*, __ U.S. __, 130 S. Ct. 2772 (2010); and *AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, 131 S. Ct. 1740 (2011).

issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Respondents are a group of retail businesses that agreed to accept American Express (AMEX) cards for consumer purchases. Pet. App. 4a. In exchange, they signed AMEX's Card Acceptance Agreement, which contains a binding arbitration provision. Pet. App. 7a-8a. The arbitration provision includes an express class arbitration waiver clause that reads, in relevant part, "IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM … YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION." Pet. App. 8a-9a.

Respondents sued American Express in federal court, claiming that AMEX's "Honor All Cards" policy – which required the businesses to accept AMEX charge cards as well as its credit cards, constitutes an impermissible "tying arrangement" in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Pet. App. 6a. AMEX moved to compel arbitration. Pet. App. 9a. They argued that the class action waiver is unenforceable because it prevents them from effectively vindicating their statutory rights. Pet. App. 2a. Specifically, Respondents claimed that the cost of obtaining the expert testimony needed to prove their antitrust claims individually would far outweigh the amount each could be expected ultimately to recover in damages. Pet. App. 11a.

The trial court rejected Respondents' "prohibitive costs" argument and compelled arbitration, pointing

out among other things that they would incur the same costs whether they proceeded in arbitration or in court. Pet. App. 112a-113a. A three-judge panel of the Second Circuit reversed, concluding that the class action waiver was unenforceable because it essentially would "preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs." Pet. App. 62a. AMEX then petitioned the Supreme Court for a writ of certiorari. Pet. App. 12a.

While the petition was pending, this Court issued its decision in *Stolt-Nielsen, S. A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), which held that parties to an arbitration agreement cannot be forced to proceed on a class-wide basis where the agreement itself is silent as to the availability of class arbitration procedures. Pet. App. 12a-13a. The Court subsequently granted AMEX's petition, vacated the Second Circuit's ruling, and remanded the case in light of *Stolt-Nielsen*. Pet. App. 12a.

On remand, the Second Circuit deemed *Stolt-Nielsen* inapplicable, and again ruled the class action waiver unenforceable. Pet. App. 2a. Shortly thereafter, this Court held in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), that California's *Discover Bank* rule, which effectively barred the use of class action waiver clauses in arbitration agreements, was inconsistent with the Federal Arbitration Act (FAA) and therefore unenforceable as a matter of law. Pet. App. 142a.

The Second Circuit once again revisited the *AMEX* case, this time in light of *Concepcion*, and determined that neither *Concepcion* nor *Stolt-Nielsen* addresses the specific question presented. Pet. App. 3a. A two-judge panel of the Second Circuit concluded once again that because Respondents' "only economically

feasible means" of enforcing their statutory rights is "via a class action," the entire arbitration agreement was unenforceable. Pet. App. 14a.

AMEX filed a petition for rehearing and rehearing *en banc*, which was denied over the dissenting votes of five members of the appeals court. Pet. App. 127a-149a. This Court granted AMEX's second petition for a writ of certiorari on November 9, 2012.

SUMMARY OF ARGUMENT

This Court consistently has ruled that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, establishes a "liberal federal policy favoring arbitration agreements ...." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and "requires courts to enforce agreements to arbitrate according to their terms." *CompuCredit Corp v. Greenwood*, __ U.S. __, 132 S. Ct. 665, 669 (2012). The presumption favoring arbitration applies even to statutory claims, unless Congress has clearly mandated otherwise. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Indeed, the only exception to that general rule is found in the FAA itself, which allows an arbitration agreement to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Even this language, however, does not permit attacks on arbitration agreements solely because they *are* arbitration agreements, *i.e.*, that they require the parties to submit a dispute to arbitration rather than litigating in court. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011).

The ability to bring a class action is one of the procedural rights that can be waived in a valid arbitration agreement. *Id.* at 1753. Accordingly,

the Second Circuit's ruling below declaring that an arbitration agreement containing a class action waiver is unenforceable because claimants will not be able to spread among a group of litigants the cost of proving their case with expert testimony in arbitration, which they could do in class action litigation in court, must fail. The decision below is inconsistent with the FAA and *Concepcion* and should be reversed.

Moreover, invalidating arbitration agreements because they contain class action waivers defeats the advantages and mutual benefits of arbitration, especially in the employment context. Individual arbitration offers significant advantages to both employers and employees. Indeed, there are "real benefits to the enforcement of arbitration provisions . . . [in] the employment context." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001). Given that the primary purpose of employment arbitration agreements is to resolve employment disputes quickly and inexpensively, the Second Circuit's ruling creates a chilling effect on employers' efforts to maintain binding arbitration programs, and significantly undercuts the strong federal policy, as repeatedly endorsed by this Court, favoring private arbitration of employment disputes.

ARGUMENT

I. UNDER THE FEDERAL ARBITRATION ACT AND THIS COURT'S JURISPRUDENCE, AN ARBITRATION AGREEMENT CONTAINING A CLASS ACTION WAIVER MUST BE ENFORCED ABSENT A SHOWING THAT CONGRESS INTENDED TO PRECLUDE ARBITRATION, OR THAT GROUNDS EXIST FOR REVOCATION OF ANY CONTRACT

A. The Strong Federal Policy Favoring Arbitration Requires That Agreements To Arbitrate Be Enforced In Accordance With Their Terms

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, provides that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. This language both represents "a congressional declaration of a liberal federal policy favoring arbitration agreements ...," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and "reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, W., Inc. v. Jackson*, __ U.S. __, 130 S. Ct. 2772, 2776 (2010). *See generally CompuCredit Corp. v. Greenwood*, __ U.S. __, 132 S. Ct. 665, 669 (2012). The FAA thus "establishes that, as a matter of federal law, any

doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25 (footnote omitted).

Indeed, "'[the] preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [courts] rigorously enforce agreements to arbitrate.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) (citation omitted). Thus, "[b]y its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citations omitted). Accordingly, "[i]n line with these principles, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (citations omitted).

This Court repeatedly has reaffirmed the federal policy favoring arbitration, noting that the purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements ... and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted); *see also Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000). In *Gilmer*, this Court held that an

arbitration agreement signed by the plaintiff as a condition of employment, in which he pledged to submit to arbitration any dispute that might arise out of his employment or the termination thereof, was enforceable under the FAA, so as to require him to arbitrate his federal age discrimination claim. In so doing, the Court established as a general rule that, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." 500 U.S. at 26 (citations omitted).

Indeed, the sole exception to the general rule is that the FAA allows an arbitration agreement to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court pointed out in *Concepcion*, "[t]his saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." 131 S. Ct. at 1746 (citations omitted). Accordingly, the FAA does not permit attacks on arbitration agreements solely because they *are* arbitration agreements, *i.e.*, that they require the parties to submit a dispute to arbitration rather than litigating in court.

B. An Arbitration Agreement Containing A Class Action Waiver Is Enforceable Under The FAA

Parties to arbitration agreements often agree to streamlined procedural mechanisms. As this Court observed in *Gilmer*, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review

of the courtroom for the simplicity, informality, and expedition of arbitration.'" 500 U.S. at 31 (citation omitted); *see also 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. at 1469 ("The decision to resolve ... claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace ... discrimination; it waives only the right to seek relief from a court in the first instance").

The ability to bring a class action is one of the procedural rights that can be waived in a valid arbitration agreement. As the Seventh Circuit has observed:

> When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. One of those "procedural niceties" is the possibility of pursuing a class action under Rule 23.

Champ v. Siegel Trading Co., 55 F.3d 269, 276 (7th Cir. 1995) (citations omitted); *see also Stolt-Nielsen*, 130 S. Ct. at 1775 ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution," noting that "the relative benefits of class-action arbitration are much less assured ...").

This Court held in *Concepcion* that California's *Discover Bank* rule, which conditioned the enforceability of an arbitration agreement on the availability of classwide arbitration procedures, was "preempted by the FAA." 131 S. Ct. at 1753. The Court reasoned that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748. Accordingly, *Concepcion*

stands for the proposition that a state law rule making an arbitration agreement unenforceable if it contains a waiver of classwide arbitration cannot survive scrutiny under the FAA.

C. The Second Circuit's Theory That The Inability To Share Expert Witness Fees Defeats An Arbitration Agreement Containing A Class Action Waiver Is Untenable Under The FAA And *Concepcion*

If the FAA trumps a state law ruling making an arbitration agreement unenforceable because it contains a class action waiver, then a federal court ruling seeking to override a similar agreement on policy grounds must meet the same fate. Accordingly, the Second Circuit's ruling below declaring that an arbitration agreement containing a class action waiver is unenforceable because claimants will not be able to spread among a group of litigants the cost of proving their case with expert testimony in arbitration, which they could do in class action litigation in court, must fail. While the decision below is couched in terms of "federal substantive law of arbitrability" rather than a state court ruling, it cannot survive a *Concepcion* analysis, for several reasons. Pet. App. 16a (citation and internal quotations omitted).

First, the Second Circuit's ruling strikes down the arbitration agreement precisely because it *is* an arbitration agreement, *i.e.*, that it requires the parties to proceed in arbitration on an individual basis where they would be allowed to proceed on a classwide basis were they in court. As noted above, *Concepcion* specifically precludes this type of challenge to an arbitration agreement. 131 S. Ct. at 1746.

Second, this Court in *Concepcion* expressly rejected the notion, raised by the dissent in that case, that arbitration agreements containing class action waivers should not be enforced because "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." *Id.* at 1753. On the contrary, the Court said, "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* Thus, the contention that individual claims could be prosecuted more cost-efficiently in class arbitration cannot trump the FAA's mandate that arbitration agreements be enforced according to their terms. *Cf. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (noting that "federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement") (footnote omitted).

Third, this Court previously has ruled that being unable to bring a collective action in arbitration does not prevent the arbitral forum from furthering the purposes of a federal statute and thus does not preclude enforcement of an arbitration agreement. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991); *see also Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (rejecting claim that the inability to proceed collectively deprives claimants of substantive rights under the federal Fair Labor Standards Act, based on similar conclusion in *Gilmer* with respect to the Age Discrimination in Employment Act).

Fourth, the Second Circuit bases its entire rationale on a policy concern that it cloaks under "federal substantive law of arbitrability" drawn erroneously from dicta in two decisions of this Court. In

Green Tree Financial Corp.-Alabama v. Randolph, this Court rejected the contention that an arbitration agreement was unenforceable merely because it was silent as to the payment of arbitration fees and costs, and thus failed to protect a claimant from potentially significant costs of pursuing her federal statutory claim in arbitration, holding instead that the agreement's silence on the subject of fees and costs did not render it unenforceable. 531 U.S. 79 (2000). The Court remarked that "[i]t may well be that the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum." *Id*. at 90 (dictum).

Similarly, while upholding an arbitration agreement in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, the Court remarked, again in dicta, that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." 473 U.S. 614, 637 (1985) (dictum). From this language, the Second Circuit incorrectly jumped to the conclusion that where classwide arbitration procedures are unavailable to permit claimants to share their expert witness costs, a court may refuse to enforce an arbitration agreement on the ground that the claimants will be unable effectively to vindicate their statutory rights.

The Court in *Green Tree*, however, was referring specifically to potential costs of *arbitration* that do not arise in litigation, *e.g.*, administration and arbitrator's fees. *See Green Tree*, 531 U.S. at 89 ("We now turn to the question whether Randolph's agreement to arbitrate is unenforceable because it says nothing about the costs of arbitration, and thus fails to provide her protection from potentially substantial

costs of pursuing her federal statutory claims in the arbitral forum"); *see also* 531 U.S. at 90 ("She contends ... that the arbitration agreement's silence with respect to costs and fees creates a 'risk' that she will be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum, and thereby forces her to forgo any claims she may have against petitioners").

The costs at issue here, on the contrary, are those of expert witness testimony, expenditures that also would be made if Respondents were to pursue their claims in court. Thus, the expenses Respondents seek to share, and find prohibitive if they cannot, are not the costs of arbitration, but the potential costs of making their case in any forum.[4]

Ultimately, the Second Circuit panel's ruling creates a Hobson's choice for Petitioners – either allow Respondents to override the class action waiver clause in the arbitration agreement, or forego arbitration altogether and face class litigation in court. Placing Petitioners in this position contravenes the *actual* "federal substantive law of arbitrability," which is "that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Mitsubishi*, 473 U.S. at 626 (citing *Moses H. Cone Memorial Hospital*, 460 U.S. at 24-25).

As the Eleventh Circuit has pointed out, "[i]t would be anomalous indeed if the FAA – which promotes arbitration – were offended by imposing

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[4] Notably, the Second Circuit accepted at face value a consultant's opinion as to the cost of expert testimony to prove Respondents' case, and overlooked the fact that parties to arbitration, not being bound by the traditional rules of evidence, may inform the arbitrator in far less expensive ways. Pet. App. 147a.

upon arbitration nonconsensual procedures that interfere with arbitration's fundamental attributes, but not offended by the nonconsensual elimination of arbitration altogether." *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1213 (11th Cir. 2011) (citation omitted). Accordingly, the decision below is inconsistent with the FAA and *Concepcion* and should be reversed.

II. INVALIDATING ARBITRATION AGREEMENTS BECAUSE THEY CONTAIN CLASS ACTION WAIVERS DEFEATS THE ADVANTAGES AND MUTUAL BENEFITS OF ARBITRATION, ESPECIALLY IN THE EMPLOYMENT CONTEXT

As this Court has observed, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi*, 473 U.S. at 626-27. The outmoded hostility to arbitration agreements generally, and those containing class action waivers specifically, is particularly misplaced in the employment context, where individual arbitration offers significant advantages to both employers and employees. Indeed, there are "real benefits to the enforcement of arbitration provisions ... [in] the employment context." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001).

In particular, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Id.* at 123. Arbitration offers lower-level employees an opportunity to bring forth claims that would not be

economically viable to pursue in court. "The empirical evidence suggests that arbitration may be a more accessible forum than court for lower income employees and consumers with small claims." Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. Mich. J.L. Reform 813, 840 (2008). As one commentator has observed:

> The time and cost of pursuing a claim through traditional methods of litigation present the most glaring and formidable obstacles to relief for employment discrimination victims. While it might not make a difference to the upper level managerial worker who can afford the services of an expensive lawyer, and who can withstand the grueling process of litigation, those employees who are less financially sound are chronically unable to attract the services of a quality lawyer. For example, experienced litigators maintain that good plaintiff's attorneys will accept only one in a hundred discrimination claimants who seek their help. For those claimants who are denied the services because of their financial situation, the simpler, cheaper process of arbitration is the most feasible recourse.

Craig Hanlon, *Reason Over Rhetoric: The Case for Enforcing Pre-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 5 Cardozo J. Conflict Resol. 2 (2003). Indeed, parties generally favor arbitration precisely because of the economics of dispute resolution. *14 Penn Plaza*, 129 S. Ct. at 1464.

The relative speed with which arbitrations are conducted compared to litigation also benefits both parties to an employment dispute, but particularly the employee, who typically can less afford a lengthy battle.

> Most employees simply cannot afford to pay the attorney's fees and costs that it takes to litigate a case for several years. Even when an employee is able to engage an attorney on a contingency fee basis ... the employee nonetheless often must pay for litigation expenses, and put working and personal life on hold until the litigation is complete.

Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* 153-54 (Cornell Univ. Press 1997). Similarly:

> The vast majority of ordinary, lower-and middle-income employees (essentially, those making less than $60,000 a year) cannot get access to the courts to vindicate their contractual and statutory rights. Most lawyers will not find their cases worth the time and expense. Their only practical hope is the generally cheaper, faster, and more informal process of arbitration. If that is so-called mandatory arbitration, so be it. There is no viable alternative.

Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J. L. Reform 783, 810 (2008). As a practical matter, "[a]rbitration thus provides access to a forum for adjudicating employment disputes for employees whom the litigation system has failed." Bales, *supra*, at 159 (footnote omitted).

The significant benefits that employees derive from arbitration are likely to disappear altogether if they are forced instead to submit to complex, class action litigation despite having agreed to waive both the judicial forum and class action procedures or risk having their rights adjudicated in their absence.

Invalidating an arbitration agreement in favor of a judicial class action despite unambiguous contractual language to the contrary also would undermine the efficiencies of arbitrating workplace disputes. Unlike the typical two-party arbitration, employment class actions involving hundreds or thousands of class members can be extremely complex and time-consuming to defend. *Cf. Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541 (2011). Even "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 130 S. Ct. at 1775. As this Court pointed out in *Stolt-Nielsen*:

> Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties … thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. And the commercial stakes of class-action arbitration are comparable to those of class-action litigation ….

Id. (citations omitted). Even more so would the shift from bilateral arbitration to class action litigation change the nature and substance of the proceeding beyond recognition.

Furthermore, the significantly higher costs and exposure posed by class actions place enormous pressure on defendants to settle rather than run even a small risk of catastrophic loss, what this Court in *Concepcion* described as "the risk of 'in terrorem' settlements ...." 131 S. Ct. at 1752. This increases greatly the potential for what some courts have called "judicial blackmail":

> Once one understands that the issues involved in the instant case are predominantly case-specific in nature, it becomes clear that there is nothing to be gained by certifying this case as a class action; nothing, that is, except the *blackmail value* of a class certification that can aid the plaintiffs in coercing the defendant into a settlement.

Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) (emphasis added); *see also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (citing cases referring to the pressure on defendants to settle class actions as "judicial blackmail") (footnote omitted). These issues are even more acute in the context of arbitration, which by its very nature is designed to promote, rather than discourage, cost-effective resolution of individual claims in as non-adversarial a manner as possible. Overriding an arbitration agreement that waives class action procedures, thus opening the door to class action litigation where the parties have agreed explicitly not to do so, would defeat one of the most mutually advantageous purposes of arbitration – lower-cost resolution of disputes.

As Chief Judge Jacobs pointed out in his dissent to the denial of rehearing *en banc*, the decision below "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." Pet. App. 137a. Judge Jacobs' concerns apply equally to employment arbitration agreements. As Judge Jacobs foresaw, "[u]nder the panel opinion, arbitration must now begin in federal court – and be litigated there on the merits in many critical respects." Pet. App. 139a. The Second Circuit's ruling would send every case in which a party seeks to represent coworkers into court for a mini-trial on his prohibitive costs claim, however thin, despite his prior agreement to arbitrate.

Given that the primary purpose of employment arbitration agreements is to resolve employment disputes quickly and inexpensively, the Second Circuit's ruling creates a chilling effect on employers' efforts to establish binding arbitration programs, and significantly undercuts the strong federal policy, as repeatedly endorsed by this Court, favoring private arbitration of employment disputes.

CONCLUSION

For the foregoing reasons, the *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision of the court of appeals should be reversed.

Respectfully submitted,

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