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In the Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,

PETITIONERS

v.

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICUS CURIAE* THE FINANCIAL SERVICES ROUNDTABLE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Federal Arbitration Act permits courts, invoking the "federal substantive law of arbitrability," to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal law claim.

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OTHER AUTHORITIES

Administrative Office of the United States
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Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811
(2010) 23

Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843 (2010) 23

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Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules* 3 (2008) 23

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Richard Frankel, *The Disappearing Opt Out Right in Punitive Damages Class Actions*, 2011 Wis. L. Rev 563 20

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Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration*, 2001 J. Disp. Resol. 89 20

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[*]

The Second Circuit's approach to arbitration reflects an unfounded assumption about the role and value of class actions in our system of justice. It assumes that the class action device is always a necessary and desirable tool for resolving small-dollar statutory claims—so much so that federal law would invalidate any arbitration clause that does not allow for resolution of such claims on a class-wide basis.

But that approach ignores the many significant and unjustified costs imposed by the class action device and its many inadequacies as a tool for administering justice. In the face of those costs and inadequacies, it is no surprise that many parties to commercial contracts (including the merchants that are the plaintiffs in this case) choose to commit any and all disputes to arbitration on an individual, non-representative basis. And there is certainly no reason to conclude—as the Second Circuit did—that federal law precludes such a choice.

Amicus The Financial Services Roundtable ("FSR"), an association of the largest, most diversified providers of integrated financial services, has a strong interest in the resolution of this issue. FSR's member companies offer products and services to

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[*] 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 one other than The Financial Services Roundtable, its members, and its counsel made any financial contribution to the brief's preparation or submission. The parties have consented to the submission of this brief. Letters of consent from both parties are on file with the Clerk.

consumers and businesses in the banking, insurance, and securities sectors of the industry. The member companies are frequently targets of class actions, which require substantial resources to defend and which often impose costs that are entirely out of proportion to their merits. To address those concerns, FSR's members have sought to find alternative ways to resolve disputes that are more effective, are more responsive to plaintiffs, and reduce costs, while still compensating plaintiffs who have valid claims. To that end, many member companies have augmented their dispute resolution programs to include individual arbitration. FSR thus offers the Court a unique perspective informed by the experience of its member companies in both class litigation and individual arbitration.

FSR agrees with Petitioners that the decision below is wrong as a matter of doctrine. See Pet'r Br. 20-48. In this brief, however, FSR will focus on issues that the Second Circuit did not consider: the substantial monetary and economic costs of class actions, and the weakness of the class action device as a tool for administering justice.

In many instances, class actions may not provide any meaningful relief to the class but may instead serve only to enrich lawyers. Accordingly, it is far from clear that the class action is a better mechanism than individual, informal arbitration for providing relief to plaintiffs with legitimate claims. This is so whether the plaintiffs are individual consumers or, as here, merchants—either of whom may have the sorts of small-dollar claims that are particularly susceptible to class action abuse. Further, the class action device allows a single fact-finder to decide hundreds or thousands of debatable or weak claims on an all-

or-nothing basis, subjecting businesses like FSR's members to tremendous risk. This risk often forces settlements that bear little relationship to the merits of the claim. By taking this risk off the table through pre-dispute bilateral arbitration agreements, FSR's members are able to limit these costs and pass on some of the savings to their customers in the form of lower prices. For merchants such as those here, for instance, the benefit may come in the form of lower fees.

As Petitioners explain, Congress has not mandated the availability of the class action mechanism in any of the statutes at issue. See Pet'r Br. 22-24. In fact, Congress's relevant pronouncements cut the other way. For example, in passing the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, ("CAFA"), Congress recognized the flaws of class actions. Bilateral arbitration agreements are a valuable and legitimate tool to limit those flaws and reduce the costs of dispute resolution.

It is certainly rational for parties to commercial contracts to choose in advance to resolve all disputes in bilateral arbitration—and no principle of federal law or statutory interpretation prevents them from doing so. Consistent with Congress's explicit endorsement of arbitration in the Federal Arbitration Act, the Court, as it has in many other contexts, should "enforce [the] agreement[] to arbitrate according to [its] terms." *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 669 (2012).

STATEMENT

Petitioner American Express markets both charge cards and credit cards. Pet. App. 5a. Merchants who choose to do business with Petitioner with respect to

one type of card must accept Petitioner's other cards as well. *Id.* at 6a.

The contracts these merchants sign with Petitioner contain a mandatory arbitration clause. The clause provides for only bilateral arbitration; it states that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving Claims brought in a purported representative capacity * * * *" *Id.* at 9a. Thus, the agreement prevents merchants from proceeding on a classwide basis, whether in litigation or in arbitration. *Ibid.*

Despite this agreement, respondents brought this action under the Sherman and Clayton Acts, seeking to represent a class of "merchants that have accepted American Express charge cards (including the American Express corporate card), and have thus been forced to agree to accept American Express credit and debit cards * * * *" *Id.* at 4a.

Petitioners moved to compel arbitration. The district court granted the motion, holding that it was for the arbitrator, not the court, to decide the enforceability of a bilateral arbitration agreement. *Id.* at 10a.

The Second Circuit reversed, in a decision that was later vacated and remanded by this Court with instructions to reconsider in light of *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). On remand, the Second Circuit again reversed, finding that "*Stolt-Nielsen* did not require [the court] to depart from [its] original analysis." Pet. App. 13a-14a. After the Second Circuit issued its second opinion, this Court decided *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011), which held that a state law rule of unconscionability could not be

used to preclude waivers of class arbitration. The Second Circuit responded by issuing a third opinion, again adhering to its original holding. It is this decision that is now under review.

The Second Circuit held that on the record presented, requiring the plaintiff to arbitrate individually would "preclude [Plaintiffs'] ability to vindicate their federal statutory rights."[1] Pet. App. 15a. And because the parties did not agree to class arbitration, the court held that the class action would proceed in court. *Id.* at 30a. The court distinguished *Concepcion* and *Stolt-Nielsen*, holding that these decisions did not "require that all class action waivers be deemed per se enforceable." *Id.* at 18a. Rather, said the Second Circuit, when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id.* at 22a. (internal quotation marks and citation omitted). The Second Circuit then went on to hold that Respondents had met that burden.

In so holding, the Second Circuit relied on an affidavit from Respondents' expert to conclude that "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action." *Id.* at 27a. Even treble damages, the court reasoned, would not be enough to recover the necessary litigation costs. *Ibid.*

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[1] Neither party has challenged the court's holding that the enforceability of the agreement is a matter for the court, not the arbitrator.

Chief Judge Jacobs, joined by Judges Cabranes and Livingston, dissented from the denial of rehearing en banc. First, the dissent emphasized the breadth of the panel decision, pointing out that now "every class counsel and every class representative who suffers small damages can avoid arbitration by hiring a consultant (of which there is no shortage) to opine that expert costs would outweigh a plaintiff's individual loss." *Id.* at 137a. Second, the dissent observed that adjudicating the enforceability of bilateral arbitration clauses would now require estimating the expense of litigation—an analysis inseparable from the merits, resulting in further cost and delay.

SUMMARY OF ARGUMENT

Agreements to arbitrate are contracts, and they should be enforced according to their terms unless Congress has spoken to the contrary. *CompuCredit*, 132 S. Ct. at 669. In this case, Congress has given no contrary direction. Further, given the potential for abuse in class actions and the significant costs they impose, it is easy to see why Congress has never prohibited private parties from adopting arbitration clauses that require resolution of disputes on an individual basis.

First, and critically, Congress itself has spoken to the double-edged nature of class actions. In passing the Class Action Fairness Act (CAFA), Congress recognized that class actions may fail to compensate class members and can be used to subject defendants to tremendous settlement pressure, regardless of the merits of the claim.

Second, even after CAFA, class actions continue in many instances to fail to compensate both individual

class members and the class as a whole. Class actions are, of necessity, mass produced. Without considering individual circumstances, it may not be possible to ensure that each class member receives appropriate compensation.

Further, in many instances class actions serve only to compensate lawyers while failing to provide meaningful compensation for the class as a whole. This problem is particularly acute for small-dollar claims, whether brought by individual consumers or merchants, like the plaintiffs here. And it occurs in part because CAFA did nothing to address *cy pres* settlements, in which part or all of the award is donated to charity rather than given to compensate class members. These settlements can easily be used to benefit counsel and third parties at the expense of the defendant as well as the class.

Third, even after CAFA, class actions can be—and often are—used to extract significant settlements for meritless claims, driving up prices for all.

Fourth, class actions impose a tremendous burden on the federal courts, and that burden delays the availability of meaningful relief to both class members and defendants. That burden can be alleviated by voluntary use of bilateral arbitration.

Nor is there any unfairness in enforcing an agreement prohibiting class arbitration. Parties who sign a bilateral arbitration agreement (and thus agree not to litigate on a class-wide basis) make a rational choice to forgo a flawed tool that delays resolution of their individual claims and hardly guarantees them a meaningful recovery, in exchange for a substantial benefit—in the form of lower prices and access to speedier resolutions through individual ar-

bitration. Congress has not precluded such a decision, and neither should the courts.

ARGUMENT

I. Like all parties to arbitration agreements, the Petitioners are entitled to the benefit of their bargain.

An arbitration agreement is a contract, like any other. *AT&T Mobility LLC*, 131 S. Ct. at 1745. As such, it is the product of choices made by the contracting parties. Where, as here, Congress has not spoken to the contrary, the contract should be enforced. Indeed, when the parties, through a contract, weigh the costs and benefits of a difficult decision, a court should be particularly reluctant to substitute its own judgment for that of the parties.

That was the principal rationale for the Federal Arbitration Act, which was driven by a "preeminent concern * * * to enforce private agreements into which the parties had entered." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). Congress, moreover, *could* have stepped in to preclude the parties from waiving the class action mechanism, had it wished to do so. See *CompuCredit*, 132 S. Ct. at 669 (noting that FAA's mandate can be "overridden by a contrary congressional command"). But as Petitioners persuasively explain, Congress has chosen to leave that decision to the parties. See Pet'r Br. 23-24 (explaining that the Sherman Act cannot be read to require the availability of class actions).

This, moreover, is the very kind of situation where it makes sense to "enforce agreements to arbitrate according to their terms," as courts are required to do. *CompuCredit*, 132 S. Ct. at 669. The decision

whether to waive the class mechanism and commit to individual arbitration is a decision that calls for a weighing of competing costs and benefits. The Second Circuit addressed only one side of the equation, noting that class actions make it more feasible for plaintiffs, including the merchants here, to bring small claims. Pet. App. 18a-19a. As explained below, however, other considerations weigh heavily against class actions. And on balance, the parties to an arbitration agreement such as this one have decided that the costs of class litigation outweigh the benefits. The judicial branch should respect their choice and it should not presume that Congress intended otherwise.

II. Given the risks, costs, and potential for abuse inherent in the class action mechanism, it is easy to see why Congress has never precluded bilateral arbitration agreements.

The Second Circuit's refusal to respect the choices of the contracting parties—along with its implicit assumptions about Congress's intent—reflects that court's failure to grapple with the complex nature of class litigation. The court failed to consider several drawbacks of class litigation, which Congress itself has recognized in other contexts, and which explain why Congress has never mandated the availability of class actions in every statutory setting, even where potential damages are small.

A. Congress has recognized that class actions are imperfect devices that sometimes fail to compensate plaintiffs and drive up prices.

Congress's policy toward class actions is perhaps best reflected in CAFA, which greatly expanded fed-

eral jurisdiction over interstate class actions. See, *e.g.*, *Hollinger* v. *Home State Mut. Ins. Co.*, 654 F.3d 564, 569 (5th Cir. 2011) ("CAFA greatly expands federal jurisdiction over interstate class action lawsuits."). By doing so, Congress lessened the power of state courts to certify classes that would not qualify for certification under federal Rule 23. See Kalee DiFazio, *CAFA's Impact on Forum Shopping and the Manipulation of the Civil Justice System*, 17 Suffolk J. Trial & App. Advoc. 133, 137-140 (2012) (giving overview of the problem). Indeed, CAFA represents a congressional judgment that, while "[c]lass action lawsuits are an important and valuable part of the legal system," Pub. L. No. 109-2 § 2(a)(1), they have many drawbacks. These drawbacks were articulated in the Senate Report accompanying the legislation, and they can be grouped into two broad categories: shortcomings that hinder plaintiffs' ability to vindicate their rights, and shortcomings that hinder defendants' ability to protect theirs.

1. On the plaintiff side, Congress recognized the divergence between the interests of the class and the interests of class counsel, noting that it is not uncommon for "the attorneys [to] receive excessive attorneys' fees with little or no recovery for the class members themselves." S. Rep. 109-14 at 14 (2005) (hereinafter "CAFA Report"). See also Pub. L. No. 109-2 § 2(a)(3) ("Class members often receive little or no benefit from class actions, and are sometimes harmed, such has where—(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value"). It hardly serves the public good to turn a dispute between two parties into a golden egg for a third—plaintiffs' counsel. Indeed, if a business is forced to pay more to a

third party, the prices it charges for its goods and services will inevitably go up. While higher prices and fees may be justified in the name of compensation to plaintiffs with valid claims, they are hardly justified in the name of payments to lawyers.

Unfortunately, the Senate Report was able to identify several cases where lawyers were the principal beneficiaries of class actions. For instance:

- **Microsoft Antitrust Case.** In one of the many "coupon settlements" outlined in the Report, consumers received a voucher good for a small rebate off of a future purchase—but only if the voucher was mailed in along with a receipt and UPC code. Further, half of the unclaimed settlement money was used to donate Microsoft products to schools rather than provide benefits to aggrieved consumers. CAFA Report at 16.
- **Bank of Boston Case.** This settlement provided consumers with up to $8.76 each—but provided class counsel with $8.5 million in fees. *Id.* at 14.
- **Firestone Case.** This settlement provided class counsel with $19 million in fees, while Firestone agreed to redesign its tires (which it was already in the process of doing) and develop a consumer education program. The class got nothing. Notably, the settlement was negotiated and approved in state court after a federal court of appeals rejected class certification. *Id.* at 15-16.

These examples, as well as the others in the Report, make clear that it is anything but a foregone conclusion that the class action mechanism will permit a plaintiff to vindicate his or her rights. True, no system of justice is perfect; individual litigation sometimes allows contingent-fee lawyers to collect

large fees for little work. But as the Report noted, the risk of undercompensation to class members at the expense of lawyers is "particularly pronounced" in class actions such as this one, where each plaintiff "has only a small financial stake in the litigation" and thus lacks incentive to monitor the case. *Id.* at 33.

Given this inherent problem in the class action device—particularly for small claims—it is easy to see why Congress has not precluded plaintiffs' efforts to take ownership over their rights in advance by committing to bilateral arbitration.

2. Congress recognized that class actions could be unfair not only to plaintiffs, but to defendants too—and that such unfairness had ripple effects on the greater economy. As Congress declared, CAFA was intended to "benefit society by encouraging innovation and lowering consumer prices." Pub. L. No. 109-2 § 2(b)(3). The Report observed that CAFA's remedy was needed because "many state court judges are lax about following the strict requirements of Rule 23 (or the state's parallel governing rule)." CAFA Report at 14. This was problematic in part because certification creates pressure on defendants to settle, regardless of the merits of the suit.

Unwilling to countenance such a practice, the authors of the Report delivered a stinging rebuke to "the use of the class device as 'judicial blackmail' in cases that border on frivolous." *Id.* at 20. See also Pub. L. No. 109-2 § 2(a)(2) (referencing "abuses of the class action device that have—(A) harmed * * * defendants that have acted responsibly"). For instance, two insurance companies "settled a lawsuit over a long-standing industry-wide practice of rounding insurance premiums up to the nearest dollar for nearly $36

million, *even though the premiums were calculated according to specific instructions from the Texas Department of Insurance*." CAFA Report at 21 (emphasis added).

Defendants pay such settlements because the class mechanism significantly increases their risk at trial. If, as is often the case, the merit of a claim is debatable, a defendant sued by individual claimants will win some cases and lose some cases. Indeed, since juries are unpredictable, this can be true even if a claim "border[s] on frivolous." But in the class action context, the claims are bundled together, and litigation becomes an all-or-nothing proposition. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). The result is an "exorbitant inflation of penalties." *Shady Grove Orthopedic Associates, P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 (2010) (Ginsburg, J., dissenting). As Congress has recognized, these risks are built into the price of the defendant's product or service. CAFA Report at 14 (noting that "corporate defendants are forced to settle frivolous claims to avoid expensive litigation, thus driving up consumer prices"); 30 (noting that "such abuses hurt consumers by resulting in higher prices"); Pub. L. No. 109-2 § 2(b)(3) (stating intent to "benefit society by encouraging innovation and lowering consumer prices").

Simply put, Congress made clear in the deliberations leading up to CAFA that in certain situations, the class action may do more harm than good. With that as a backdrop, there is simply no basis to presume—as the Second Circuit did—that federal law would necessarily disapprove of arbitration clauses that make class actions unavailable.

B. Even after CAFA, class actions may not vindicate the rights of class members who have meritorious claims.

CAFA did not entirely eliminate the flaws of the class device. Indeed, these flaws cannot be entirely eliminated without abolishing the class device entirely, which CAFA made no attempt to do. The bundling of numerous claims, inherent in the very nature of the class suit, brings both benefits and drawbacks. And the availability of class actions for the pursuit of small-dollar claims can likewise cut both ways. In CAFA, Congress simply attempted to limit the class action device to appropriate cases by expanding federal jurisdiction.

Accordingly, even in the post-CAFA world, class actions may still fail to vindicate the rights of class members for at least two reasons. First, class action resolutions, by their nature, are not tailored to individual circumstances. Second, *cy pres* settlements, which were not addressed by CAFA, create an illusory recovery for the class—but can still create a very real recovery for class counsel and a real and significant cost for defendants.

1. Class actions resolve the claims of absent class members at wholesale, without considering the circumstances that make each case unique. Frequently, class actions settle for a lump sum that gives no consideration to the individual context of each member's harm. In these cases, the only attention paid to absent class members is the mailing or publication of the notice. In other cases, individual recoveries may vary, but they may have a cap or a floor. Finally, even in the most complex of cases, the sheer burden on the claims administrator is likely to prevent full

consideration of an individual's claims. Accordingly, in all of these situations, some class members are likely to be undercompensated, while other class members are likely to be overcompensated—even if the class as a whole receives an adequate recovery.

By contrast, bilateral arbitration allows for individual circumstances to receive direct, specific attention from the arbitrator. Congress could not have intended to preclude such an outcome—not after finding that class actions fail to benefit class members where "unjustified awards are made to certain plaintiffs at the expense of other class members." Pub. L. No. 109-2 § 2(a)(3)(B).

2. In any event, the class as a whole may be undercompensated, at least relative to counsel, as a result of a *cy pres* settlement. In a *cy pres* settlement, part or all of the money is awarded to non-profit organizations. In theory, this remedy serves to "put the unclaimed fund to its next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class." *Nachshin* v. *AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011).

But the reality falls short in three respects. First, even when *cy pres* is limited to unclaimed funds, "courts have awarded *cy pres* distributions to myriad charities which, though no doubt pursuing virtuous goals, have little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs involved." *Id.* at 1038-1039. Second, *cy pres* distributions sometimes represent the only relief in a settlement—leaving the class with nothing. Third, *cy pres* distributions can be used to set a floor on the settlement fund, forcing defendants to pay a certain amount even if only a small sum is claimed.

The latter two phenomena are particular concerns in small-dollar cases. Whether such a claim belongs to a consumer or a merchant, it may not be worth the claimant's attention. And class members may be so numerous as to be unidentifiable. Indeed, one commentator has written that "[c]y pres creates the illusion of class compensation. It is employed when—and only when—absent its use, the class proceeding would be little more than a mockery" Martin H. Redish et al., *Cy Pres Relief & the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 623, 666 (2010) (condemning the doctrine's performance of "unconstitutional alchemy by effectively transforming the underlying substantive law from a compensatory remedial model into a civil fine").

Further, the use of *cy pres*—whether as a floor or as the sole relief—allows class actions to enrich third parties at the expense of class members and defendants. Indeed, it has been said that "one of the primary effects, if not purposes, of class action cy pres is to inflate the size of class attorneys' fees." *Id.* at 640. When *cy pres* is used to set a minimum payout, class counsel's compensation can still be calculated based on the entire settlement fund, resulting in a sizable fee award even if the class recovers little. But any payout will ultimately serve to drive up prices for the defendant's product or service. And a payout that does not benefit those with valid claims cannot be justified as a policy matter.

These are not abstract concerns. Several recent class action settlements employed the *cy pres* remedy and, consequently, served more to enrich lawyers and other third parties than to compensate class members:

- **Mead Johnson Baby Formula Case.** In one case, Mead Johnson allegedly "falsely represented that its Enfamil LIPIL was the only baby formula containing two fatty acids that promote brain and eye development in infants." *Nelson* v. *Mead Johnson & Johnson Co.*, No. 11-15956, 2012 WL 2947212, at *1 (11th Cir. Jul. 20, 2012). Under the settlement, class members could choose between $6-$12 in cash and 1-2 containers of product. *Ibid.* The agreement sets a minimum class payout of $8 million; should claims paid total less than $8 million, "the remainder shall be paid in Mead Johnson products to appropriate charities." *Id.* at *2. Counsel was awarded $3.64 million. *Id.* at *5.

- **Babies R Us Antitrust Case.** In this case, Babies R Us allegedly required all retailers to sell certain goods at or above a minimum resale price. *McDonough* v. *Toys "R" Us, Inc.*, 834 F. Supp. 2d 329, 333 (E.D. Pa. 2011). Claimants who were unable to submit a valid proof of purchase would receive just $5. (Claimants who could submit a valid proof of purchase could recover twenty percent of the purchase price.) *Id.* at 351-352. As of the date of the final fairness hearing, there had been approximately 41,000 claims. *Id.* at 341. As the court acknowledged, if 45,000 claimants each received 20% of a $300 baby product, and treble damages, the total award would be $8.1 million. *Ibid.* But the settlement fund was $35.5 million, with the unclaimed portion to be distributed *cy pres*. *Id.* at 351. Class counsel earned over $11 million in fees. *Id.* at 340.

- **Heartland Data Breach Case.** In another case, Heartland Payment Systems, Inc. was the victim

of a security breach, in which hackers "obtained confidential payment-card information for over one hundred million consumers." *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1047 (S.D. Tex. 2012). Although the settlement fund for consumer claims was $1 million, there were only 11 valid claims, for a total of (at most) $1,925. *Id.* at 1075. The remainder of the settlement fund was distributed to certain non-profit organizations, *id.* at 1076, with lawyers receiving over $600,000 in fees, *id.* at 1089.

- **Vitamin C Antitrust Case.** In this case, a group of Vitamin C manufacturers allegedly "conspired to fix the price of vitamin C at non-competitive levels and to limit the supply of vitamin C for export to the United States." *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738, 2012 WL 5289514, at *1 (E.D.N.Y. Oct. 23, 2012). The indirect purchaser class was allocated $1 million of the settlement fund. The class was told that "because there are millions of class members of the Indirect Purchaser Damages Class, a direct cash distribution to Indirect Purchaser Damages Class members is not practical. Instead, settlement funds will be distributed on behalf of the Indirect Purchaser Damages Class to charitable, not-for-profit, or governmental organizations approved by the Court." *Id.* at *2. The court approved this plan, noting that it was "unclear how these purchasers could be identified in any principled or consistent way since the vast majority of them likely did not retain receipts or other proof of their purchases." *Id.* at *7.

- **Netflix Privacy Case.** In another case, Netflix allegedly retained certain consumer information after the consumers quit the service. But the aggrieved consumers will not receive a dime. The settlement web site candidly informs class members that instead, "[t]he settlement fund will be used to make donations to not-for-profit organizations. Class members will not receive payments." *Commonly Asked Questions: How much will I receive?* (2012). The settlement still awaits final approval; a fairness hearing was held on December 5, 2012.

- **Facebook Privacy Case.** Another recent case involved Facebook's alleged sharing of information about members' transactions, without member consent, through its Beacon program. The aggrieved members received nothing. Class counsel received $3 million, and approximately $6.5 million was used to fund a charity organization related to online privacy—with Facebook taking a seat on the organization's board. The Ninth Circuit approved the settlement. *Lane* v. *Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012). In dissent, Judge Kleinfeld wrote that "[t]his settlement perverts the class action into a device for depriving victims of remedies for wrongs, while enriching both the wrongdoers and the lawyers purporting to represent the class." *Id.* at 826.

These abuses persist despite judicial oversight of class settlements. Although judges no doubt attempt to scrutinize proposed settlements to the best of their ability, they have only limited information with which to do so. The plaintiff and the defendant join forces to present settlements in the best possible light. And while an objecting class member can inject

an adversarial presence into the proceeding, the objector (like the court) lacks much relevant information. Indeed, it may not have access to the parties' evidence or discovery—if there has been any discovery. See generally Richard Frankel, *The Disappearing Opt Out Right in Punitive Damages Class Actions*, 2011 Wis. L. Rev 563, 617-618.

In sum, as Congress has recognized, "[c]lass members often receive little or no benefit from class actions," Pub. L. No. 109-2 § 2(a)(3). What is more, the specter of potential class liability for questionable and meritless claims drives up the business's cost and prevents the business from offering the market benefits it could and (particularly with market pressure) would otherwise provide. Cf. *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 594 (1991) (stating that "passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued"); *IFC Credit Corp.* v. *United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 993 (7th Cir. 2008) ("As long as the market is competitive, sellers must adopt terms that buyers find acceptable; onerous terms just lead to lower prices."); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration*, 2001 J. Disp. Resol. 89, 91 ("Assuming that consumer arbitration agreements lower the dispute-resolution costs of businesses that use them, competition will (over time) force these businesses to pass their cost-savings to consumers.").

For these reasons, a party to a contract might well wish to commit to pursuing his claim in bilateral arbitration, in exchange for a benefit in the form of reduced prices and a quicker resolution in the event

of a dispute. There is no reason to believe that Congress would stand in the way—not after declaring in CAFA that by reining in abusive class actions, it intended to "benefit society by encouraging innovation and lowering consumer prices." Pub. L. No. 109-2 § 2(b)(3).

C. Even after CAFA, class actions can be used to place defendants under intense pressure to settle, regardless of the suit's merit.

CAFA may have stemmed the proliferation of "blackmail" settlements, but the problem remains inherent in the class action device. While it is beyond dispute that a plaintiff who has been legally wronged should be compensated, it is equally beyond dispute that not all claims are meritorious.

And in the class context, actual merit matters little. The mere risk of liability to a class—and with it, bankruptcy—can create "hydraulic pressure to settle, even for claims defendants deem non-meritorious." *Sullivan* v. *DB Invs., Inc.*, 667 F.3d 273, 335 n.4 (3d Cir. 2011) (Scirica, J., concurring). See also *Shady Grove*, 130 S. Ct. at 1465 n.3 (Ginsburg, J., dissenting) ("A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims."); 1998 Advisory Committee Note to Fed. R. Civ. P. 23(f) ("An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."); Pet'r. Br. 53 (recognizing the problem).

Businesses, moreover, have only limited control over this resulting expense, because they cannot control whether or not they are accused of meritless

claims. As the Petitioner points out, class actions are often spearheaded by plaintiffs' lawyers whose interests may not be aligned with the class. See Pet'r Br 54. While counsel's incentives can increase the number of meritorious suits, it no doubt increases the number of meritless ones as well. Indeed, one Court of Appeals, sitting en banc, recently held that Rule 23 does not require that a class be limited to those who have a colorable legal claim, at least in the settlement context. *Sullivan*, 667 F.3d at 297. Thus, Rule 23 arguably continues to permit the certification of a nationwide class bringing claims under state law, even when some states would not provide a cause of action at all.

In light of the potential liability risks, businesses are left with only two options, each injurious to society: cease any activity that could potentially give rise to class action liability (see Pet'r Br. 54), or raise prices to compensate.

D. Class actions consume a tremendous amount of judicial resources.

The costs of class actions are not limited to plaintiffs and defendants; they extend to the courts as well. Judicial time is a very precious commodity. The federal courts saw 427 new civil cases per authorized judgeship in 2011, up from 380 in 2007. Administrative Office of the United States Courts, *2011 Annual Report of the Director: Judicial Business of the United States Courts* 16 (2012). And class actions demand a disproportionate share of that commodity. According to one study conducted in the late 1980s, a single case styled as a putative class action demands 4.7 times as much time as the average case—more than any other kind of civil case except

capital habeas. Thomas E. Willging et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 22 (1996).

Moreover, in the federal courts at least, class actions are on the rise. One study compared class action activity in the period from January to June 2007 with the period from July to December 2001—and found a 72% increase in such activity. Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules* 3 (2008).

In addition to its obvious impact on the courts, the costly and time-consuming nature of class actions has a natural consequence that directly impacts litigants: class actions take a long time to deliver any kind of relief. According to the 1996 Willging study, class actions took two to three times as long to resolve as other civil cases in three of the four districts studied. Willging (1996) at 19. And according to another study, consumer class actions in federal courts averaged more than three years from inception to settlement. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 820 (2010).

By contrast, according to a study of 301 consumer arbitrations administered by the American Arbitration Association, the average time from filing to final award was just 6.9 months. Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 845 (2010). This speed is accompanied by meaningful relief for consumers; one study found that

consumers obtain relief in arbitration more than half the time. See Pet'r Br. 52 & n.21 (citing studies). Small-dollar claims brought by merchants would play out much the same way.

Accordingly, it is easy to see why Congress has not precluded parties to commercial contracts, whether merchants or individual consumers, from choosing the speedier alternative of bilateral arbitration, given Congress's stated intent to "assure fair and prompt recoveries for class members with legitimate claims." Pub. L. No. 109-2 § 2(b)(1).

CONCLUSION

Class actions are not a magic bullet. Far from it; there is no guarantee they will fairly vindicate the rights of class members. And they come at a high cost—to the courts, businesses, and the economy as a whole. Congress has recognized and sought to combat both of these problems. It has never expressed any intent to preclude private parties from doing the same. Accordingly, the Second Circuit's decision should be reversed, and the parties' agreement should be enforced as written.

Respectfully submitted.

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