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 OF THE FOOD MARKETING INSTITUTE AND THE NATIONAL RETAIL FEDERATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

ERIK LIEBERMAN
FOOD MARKETING INSTITUTE
2345 Crystal Drive
Suite 800
Arlington, VA 22202
(202) 452-8884

MALLORY DUNCAN
NATIONAL RETAIL FEDERATION
325 7th Street, NW
Suite 1100
Washington, DC 20004
(202) 783-7971

DAVID A. BALTO
Counsel of Record
BRADLEY A. WASSER
LAW OFFICES OF DAVID BALTO
1350 I Street, NW
Suite 850
Washington, DC 20005
(202) 789-5424
david.balto@
dcantitrustlaw.com

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES AND REGULATIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

BRIEF OF THE FOOD MARKETING INSTITUTE AND THE NATIONAL RETAIL FEDERATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE[1]

The Food Marketing Institute ("FMI") is a national trade association representing large, multi-store chains, regional firms and independent operators both in the United States and internationally. FMI conducts programs in public affairs, food safety, research, education and industry relations on behalf of its nearly 1,250 food retail and wholesale member companies in the United States and around the world. FMI's U.S. members operate more than 25,000 retail food stores and almost 22,000 pharmacies with a combined annual sales volume of nearly $650 billion. FMI's retail membership is composed of large multi-store chains, regional firms and independent operators. Its international membership includes 126 companies from more than 65 countries. FMI's nearly 330 associate members include the supplier partners of its retail and wholesale members. FMI is a not-for-profit corporation located in Arlington, Virginia and has no parent companies. No publicly-held company

[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 filed blanket consents to the filing of amicus curiae briefs.

owns a ten percent (10%) or greater ownership interest in FMI.

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats and channels of distribution, as well as restaurants and industry partners from the United States and more than 45 countries abroad. In the United States, the NRF represents the breadth and diversity of an industry with more than 25 million employees and generated sales of over $2 trillion.

The FMI and NRF (together, "Amici") are uniquely situated to provide perspective to the Court regarding the benefits of the Second Circuit's ruling in upholding the effective-vindication rule, and the practical negative impact of a reversal. The businesses that Amici represent not only serve as merchants, but also as employers, purchasers and business partners. As such, arbitration provisions are contractually standard and vitally important to Amici's members in employment contracts, as well as agreements with customers, vendors and other business partners. At the same time, Amici's members are themselves purchasers of goods and services and recognize the need to protect their ability to vindicate their rights in arbitration and private litigation. Amici in particular recognize the importance of protecting the ability of businesses to vindicate rights under the federal antitrust statutes. Large and small businesses alike have served as direct purchaser plaintiffs in some of the

more prominent recent federal antitrust matters, including litigation involving the payments card industry.[2]

SUMMARY OF ARGUMENT

This Court has long recognized the importance of the effective-vindication rule as articulated in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 637 (1985) and *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 91-92 (2000). The Second Circuit's application of the effective-vindication rule was narrowly focused on the facts of this litigation before it and should not be read any more broadly than for the proposition it holds – that the Petitioner cannot enforce an arbitration clause that would impose prohibitive costs "preclud[ing] a litigant . . . from effectively vindicating her federal statutory [antitrust] rights in the arbitral forum." *In re Am. Express Merchants' Litig.*, 667 F.3d 204, 214 (2d Cir. 2012) (quoting *Randolph*, 531 U.S. at 90) ("*Amex III*").

[2] *See, e.g., In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.,* No. 05-md-1720 (E.D.N.Y.) (preliminary settlement approved providing for industry-wide revisions of Visa's and MasterCard's point-of-sale rules and $7.2 billion in damages); *In re K-Dur Antitrust Litig.,* No. 01-cv-01652 (D.N.J.) (antitrust challenge to a reverse payments agreement, for which a writ of certiorari is pending before this Court); *In re Mushroom Direct Purchasers Antitrust Litig.*, No. 06-cv-00620 (E.D. Pa.) (antitrust action seeking to hold country's largest mushroom cooperative liable for price-fixing); *In re Processed Eggs Products Antitrust Litig.,* No. 08-md-2002 (E.D. Pa.).

The ruling below struck an appropriate balance between the pursuit of federal antitrust claims and the protection of parties' rights to enforce arbitration provisions. The Second Circuit's narrow ruling allows Respondents to prosecute the complex allegations of anticompetitive conduct brought in the first instance, applying its ruling quite specifically in the antitrust context. There is strong judicial deference to the benefits of private enforcement of the antitrust laws, particularly in complex antitrust settings involving significant monetary damages. It is uncontested that enforcement of the American Express arbitration agreement as written – in particular its collective action waiver – will grant Petitioners *de facto* immunity from private federal antitrust damages liability. While arbitration is an often necessary as well as effective tool, and one used regularly by Amici's members, particularly in the employment context, prohibitive arbitration that does not allow one party the appropriate opportunity to fairly assert rights under federal antitrust law is not the intent of the Federal Arbitration Act ("FAA").

A reversal of the Second Circuit could have unforeseen negative consequences on the use of arbitration by businesses to resolve disputes. Businesses, such as those represented by Amici, enter into arbitration agreements as both the contractor and contracted, in the pursuit of an efficient, yet informal forum in which to resolve disputes. A reversal of the Second Circuit's decision will deny parties the ability to effectively vindicate rights through arbitration by

strict enforcement of exculpatory contract terms. This undermines the purpose of the arbitral process and will have a substantial chilling effect on the willingness of businesses and other parties to enter into arbitration agreements. Likewise, it will jeopardize the arbitration programs used by Amici's members as their employees, customers, and business partners will no longer have faith in the arbitral process.

Businesses have ready means to construct arbitration agreements that allow parties to vindicate their rights without undermining the arbitration process. The Second Circuit's ruling encourages the use of such arbitration agreements, which, in turn, promotes arbitration and ensures the vitality and legitimacy of the arbitral forum. A reversal of the Second Circuit would inevitably encourage the exact opposite – mass adoption of draconian, American Express-styled arbitration agreements as a means to exculpate wrongdoing. Such a result is particularly perverse in the antitrust context, as parties with market power will use that power to implement arbitration agreements that insulate them from any effective challenge under the antitrust laws.

ARGUMENT

I. THE EFFECTIVE-VINDICATION RULE STRIKES AN APPROPRIATE BALANCE BETWEEN VINDICATING RIGHTS UNDER FEDERAL ANTITRUST LAWS AND PROTECTING THE ENFORCEMENT OF ARBITRATION PROVISIONS.

While recognizing the important jurisprudence of arbitration, the Second Circuit found that the class action waiver in American Express's arbitration agreement was unenforceable as it precluded the Respondents' ability to effectively vindicate their rights under the federal antitrust statutes. This holding embraces the balance between meeting the goals of the FAA in promoting arbitration and upholding the vitally important statutory antitrust rights of private parties and should be upheld.

A. The Effective-Vindication Rule Is Consistent With The Objectives Of The Federal Arbitration Act.

This Court has long recognized the effective-vindication rule as an essential safety valve to the FAA's broad mandate that arbitration agreements are to be enforced as written. *See Mitsubishi,* 473 U.S. at 637; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27-28 (1991); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009). The effective-vindication rule, as applied by the

Second Circuit in this case, is easily squared with the FAA's pro-arbitration aims. The FAA reflects a federal policy of actually arbitrating claims. It does not reflect a policy of eliminating claims, or immunizing a party from litigation when such an arbitration agreement bars the opportunity to litigate and precludes the ability to vindicate claims in the arbitral forum.

Furthermore, the Second Circuit's ruling does not prohibit arbitration on federal statutory claims as Petitioners and several of their supporting amici suggest. *See, e.g.*, Pet. Br. 39-40. Rather, the Second Circuit found that its decision does not impact the typical case, where a party's statutory rights can be effectively vindicated through arbitration. Nor would the doctrine invalidate agreements on the grounds that they simply decrease the incentives for claimants to prosecute cases and enforce federal statutes. So long as claimants are not *entirely stripped* of the means to pursue their claims, the FAA's goal of promoting arbitration as a viable and respected alternative to litigation is furthered by the enforcement of arbitration agreements according to their terms.

The effective-vindication rule clearly does not undermine the policies of either the federal antitrust statutes or of the FAA – in fact just the opposite. It upholds the FAA's goal of valid arbitration while also encouraging the goal of private prosecution of anti-competitive claims.

B. The Effective-Vindication Rule Is Consistent With The Objective Of The Sherman Act.

For the last century, private antitrust enforcement has been a critical check against anticompetitive conduct. *See Rowland v. California Men's Colony*, 506 U.S. 194, 208 (1993) ("there is a public interest aspect to any private suit for treble damages under the antitrust laws); *see also Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982) ("private suits are an important element of the Nation's antitrust enforcement effort"); *see also* Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U. San Francisco L. Rev. 879 (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090661. Antitrust regulation "ensures that markets remain competitive" thus "the vindication of rights doctrine can be justified on instrumentalist grounds" by ensuring the private enforcement of the antitrust laws. David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 Kansas L. Rev. 723, 754 (May 2012). The retailers represented by Amici, large and small, have a critical interest in preserving the potential threat of direct purchaser enforcement actions. Some of Amici's members have served as plaintiffs in some of the most recent and prominent direct purchaser antitrust cases. *See supra* n.2.

Moreover, the signature feature of the deterrent and remedial regime of the antitrust laws – the treble damage remedy – is designed especially for private enforcers to utilize. The federal government brings civil claims in a law enforcement capacity, for injunctive relief, and states are prohibited from using their *parens patriae* powers on behalf of businesses such as Amici's members. *See* 15 U.S.C. § 15c(a)(1) (limiting *parens* standing in federal antitrust case to actions brought on behalf of natural persons). It has been long recognized that "private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979).

In addition, in situations involving ongoing market-wide harm, as in much of the recent payment systems antitrust litigations in which merchants serve as direct purchaser plaintiffs, meaningful relief requires an injunction on behalf of large groups of merchants. The arbitration clause contained in the American Express Card Acceptance Agreement, however, explicitly precludes a merchant from seeking in arbitration any relief on behalf of any other merchant. Pet. App. 67a. Effectively this means no merchant subject to this agreement can effect systemic change. If there is a reversal of the Second Circuit's ruling, other businesses will blanket the market with American Express-style arbitration provisions and private litigation will provide no mechanism to stop market-wide anticompetitive business practices.

Companies with the greatest market power will have every incentive to further protect that power through the insertion of bilateral arbitration provisions into their standard-form agreements. Such incentives defeat the goals of both the Sherman Act and the FAA.

II. THE EFFECTIVE-VINDICATION RULE WILL HAVE LITTLE APPLICATION OUTSIDE OF ANTITRUST.

The Second Circuit's ruling narrowly applies to the factual question at hand, whether the Petitioners' arbitration agreement "is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory [antitrust] rights." *Amex III*, 667 F.3d at 212. This ruling should not be read as having the preclusive effect of invalidating other arbitration agreements.

The Second Circuit specifically placed limitations on its holding, making its applicability very narrow.

> We do not hold today that class action waivers in arbitration agreements are per se unenforceable, or even that they are per se unenforceable in the context of antitrust actions. Rather, as demonstrated by the different outcomes in our sister Circuits, we hold that each waiver must be considered on its own merits, based on its own record, and governed with a healthy regard for the fact that the FAA "is a congressional declaration

> of a liberal federal policy favoring arbitration agreements."

Id. (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. 1, 24 (1983)). The uncontested record below demonstrated that because of the exorbitant costs associated with proving their case, which far outweighed the amount of recovery under individual arbitration, Respondents were effectively barred from vindicating their federal statutory rights under the Sherman Act, and precluded from bringing an antitrust action against American Express. *Id.* The Second Circuit's application of the effective-vindication rule was correct and one that Amici fully supports.

A. The Effective-Vindication Rule Is Narrowly Tailored And Easily Administered.

Petitioners and their supporting amici incorrectly claim that the Second Circuit's ruling will have sweeping effects of invalidating arbitration agreements. *See, e.g.*, Pet. Br. 34. It is hard to imagine this to be the case since the Second Circuit's decision is exceedingly narrow, and there is such a high evidentiary burden placed on parties attempting to invoke the effective-vindication rule that it is seldom satisfied. The effective-vindication rule is rarely upheld as it applies only in cases in which parties are able to demonstrate that imposing prohibitive costs "preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." *Randolph*, 531 U.S. at 90. *See also Kristian v. Comcast Corp.*, 446 F.3d 25, 58-61 (1st Cir. 2006) ("Plaintiffs

will be unable to vindicate their statutory rights" where "to prosecute their antitrust claims successfully, Plaintiffs will have to undertake an elaborate factual inquiry . . . [costing] in excess of $600,000."). The evidentiary burdens are sufficiently heavy that in cases where parties failed to meet such burdens, courts have not balked at compelling arbitration. *See Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158 n.2 (9th Cir. 2012) ("Plaintiff's federal claim fails under *Green Tree*"); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007) (Plaintiffs "developed no evidentiary record . . . establishing how much it would cost to proceed individually against each defendant or how those increased costs would affect their ability to proceed in arbitration."); *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 82 (D.C. Cir. 2005) (Roberts, J.) ("Under the approach set forth in . . . *Green Tree*, and *Vimar*, such speculation about what *might* happen in the arbitral forum is plainly insufficient to render the agreement to arbitrate unenforceable.").

There is, moreover, no reason to assume that the application of the *Randolph* prohibitive costs test will cause courts any undue burden. The question is simply whether the amount the plaintiff is seeking, viewed as of the time the showing is made, will be exceeded by the non-recoupable costs that the claimant will necessarily incur in prosecuting the individual claim (recognizing that those costs can be diminished by provisions in the arbitration agreement itself, that allow for some measure of cost-shifting or some measure of aggregation). There is no

basis for believing that this inquiry has caused courts any trouble in the years since *Randolph*, or that it will in the future.

B. The Effective-Vindication Rule Will Have Little Application Outside Of Antitrust.

Antitrust cases are known to be among the more daunting forms of cases brought due to the complexity of market definition issues and expense of economic analysis and discovery, for example. "Ever since the Supreme Court first articulated the rule of reason in 1918, antitrust cases have been famously complex and expensive." F. Matthew Ralph and Caroline B. Sweeny, *E-Discovery and Antitrust Litigation*, 26 Antitrust ABA 58 (2011); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-58 (2007) (citing authorities on the "unusually high costs of discovery in antitrust cases"). Because current practice and doctrine require expansive and expensive analysis, Amici submit that it is unlikely that the effective-vindication rule will have much application outside of antitrust.

In most federal statutory cases, outside the antitrust context, an individual's ability to vindicate his or her individual rights will not typically require expensive expert testimony and expensive economic analysis. For example, in a standard wage-and-hour case under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*., or a discriminatory treatment claim under the Age Discrimination in Employment Act, 29

U.S.C. § 621, *et seq*., claimants will only be able to discharge their heavy burden of proving that they are unable to vindicate their rights in the arbitral forum by incurring substantial non-recoupable expenses, such as the expenses associated with expert analysis and electronic discovery.[3] Indeed, few claimants in these cases will be able to establish that expert testimony is required at all. And unless a court finds that the availability to vindicate rights is precluded by the arbitration provisions, arbitration will continue to be enforced in these contexts.

III. REVERSAL OF THE SECOND CIRCUIT'S RULING WILL RESULT IN UNFORESEEN NEGATIVE CONSEQUENCES TO THE VIABILITY OF ARBITRATION AS A MEANS OF DISPUTE RESOLUTION.

Businesses employ arbitration in order to have an informal, yet viable forum in which to resolve disputes. Oftentimes arbitration is preferred over the possibility of protracted and expensive litigation.

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[3] *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) ("it is unlikely that [ADEA] claims require more extensive discovery than RICO and antitrust claims, and since there has been no showing that the NYSE discovery provisions will provide insufficient to allow him a fair opportunity to prove his claim."). *See also*, David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 Kansas L. Rev. 723, 755 (May 2012) ("In other contexts [outside of antitrust], however, it is not clear that the . . . vindication of rights doctrine prevents negative externalities.").

Even in settings in which one party to the arbitration may have more clout over the other, arbitration can be preferred as an expedited and informal means to settle grievances, so long as the ability to vindicate rights is available. If litigants are denied the availability to effectively vindicate rights through arbitration by strict enforcement of exculpatory contractual terms, this could lead to unforeseen negative consequences to the arbitration system.

A. The Effective-Vindication Rule Is Essential To Maintaining The Legitimacy Of Arbitration.

If arbitration provisions are enforced regardless of whether parties can actually vindicate their rights via arbitration, the entire arbitral process is undermined. Both sides to an arbitration agreement have incentives to arbitrate when arbitration represents a quicker and less costly process and where the potential for resolving disputes fairly is available. Absent the ability to effectively vindicate rights, the purpose and legitimacy of arbitration is defeated.

Moreover, businesses, such as those represented by Amici, will be less likely to enter into arbitration agreements. The reason is either because they no longer see arbitration as a viable forum for dispute resolution or because the transaction costs associated with determining at the time of contracting whether any particular arbitration agreement is likely to lead to that business losing its rights if a dispute later

arises will be so great that they will simply choose to forgo arbitration altogether. Likewise, the employees, customers and business partners of Amici's members will no longer be willing to enter into arbitration agreements if they do not believe that their rights can be effectively vindicated in an arbitral forum. Thus, businesses will be forced to forego arbitration in any context and lose the substantial benefits associated with arbitration.

B. The Cost Pooling And Coordinated Arbitration Efforts Petitioners And Their Supporting Amici Propose Are Unworkable And Not Beneficial To Businesses That Truly Value Bilateral Arbitration.

Petitioners and their amici suggest that Respondents can pool their costs in preparing for arbitration, and maintain individual arbitrations – rendering collective action unnecessary. This proposal is flawed for several reasons.

First, Petitioners have made no showing that either cost pooling or coordinated arbitrations are possible or that either would decrease Respondents' costs to a level under the amount recoverable at arbitration. There is absolutely nothing in the record below regarding the procedures that Petitioners and their supporting amici now tout. Petitioners' rank speculation here is a far cry from the uncontested factual showing that Respondents made in the district court regarding prohibitive expert costs and

nowhere near what is necessary to rebut that showing.

Second, arbitration proceedings need to remain confidential. During arbitration, Amici's members are often called upon to produce confidential information, including employment records and customer data that give rise to an independent obligation to maintain confidentiality. The businesses represented by Amici cannot and do not want to waive confidentiality over such information. Yet such a waiver is a necessary predicate to litigants sharing work product across multiple arbitrations in the manner that Petitioners and their supporting amici appear to advocate.

This issue is highlighted by the facts of the underlying tying litigation. Here, the necessary market study requires extensive analysis of confidential data and documents regarding thousands of American Express accepting merchants and cannot be conducted based solely upon publicly available information. Prospective litigants therefore could not effectively pool expert costs absent a broad waiver of confidentiality. And prospective litigants are not inclined to comply with any such waiver.

Third, centrally orchestrated, serial arbitrations would pervert the purpose of entering into bilateral arbitration agreements. "The idea of serial arbitrations is unseemly, and leaves a bad taste in everyone's mouth." Steven J. Thompson, *Olympic Team Arbitrations*, 35 Val. U.L. Rev. 407, 429 (2001). Businesses,

such as those represented by Amici, bargain for individual arbitrations that work, arbitrations that allow employees and customers to vindicate their rights, and that allow the business to obtain the viable, functioning and informal forum it seeks. Because of the structure of the arbitration provision in the American Express Card Acceptance Agreement, potential litigants are forced to ban together as a class to vindicate rights, rather than individually arbitrate.[4] If arbitration agreements force litigants to assemble large groups in order to vindicate their rights, businesses potentially face more litigation due to barratry-like activities. Moreover, the arbitration process will be transformed beyond recognition. And to make matters worse, there is no compulsory res judicata or collateral effect from one arbitration to the next. The prescription of thousands of individual arbitrations is a prescription for chaos, as each case proceeds *de novo* over and over again – like Groundhog Day.

Amici recognize that there are many ways to structure arbitration agreements that allow parties to vindicate their rights, thereby preserving the

[4] The Second Circuit concluded "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action" relying on respondent's expert finding that "out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $1 million" while the highest possible cost for an individual merchant's recovery would be $38,549. *Amex III*, 667 F.3d at 218.

function of the arbitration system. For example, arbitration agreements can be structured to simply provide that the company pay all costs reasonably incurred by a prevailing plaintiff, or they may permit whatever aggregation is minimally necessary to allow the total damages sought to exceed the required non-recoupable costs. "[A] well-drafted arbitration agreement that gives companies incentive to settle meritorious claims is not exculpatory. Just as AT&T's agreement awarded attorney's fees to prevailing plaintiffs, future antitrust agreements could award expert fees to prevailing plaintiffs or to those who win more than the last settlement offer." Jacob Spencer, *Arbitration, Class Waivers, and Statutory Rights*, 35 Harv. J.L. & Pub. Pol'y 991, 1013 (Summer 2012) (internal citations omitted). The preservation of arbitrability is vitally important, as well as the interest in preserving the potent threat of direct-purchaser antitrust actions. Affirming the Second Circuit promotes both of these laudable objectives and incentivizes the implementation and use of arbitration agreements that promote the vindication of rights through the arbitral forum.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

ERIK LIEBERMAN
FOOD MARKETING INSTITUTE
2345 Crystal Drive
Suite 800
Arlington, VA 22202
(202) 452-8884

MALLORY DUNCAN
NATIONAL RETAIL FEDERATION
325 7th Street, NW
Suite 1100
Washington, DC 20004
(202) 783-7971

DAVID A. BALTO
Counsel of Record
BRADLEY A. WASSER
LAW OFFICES OF DAVID BALTO
1350 I Street, NW
Suite 850
Washington, DC 20005
(202) 789-5424

Counsel for Amici Curiae

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