No. 12 -133

IN THE
Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,
Petitioners,

v.

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

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

BRIEF *AMICUS CURIAE* OF MARCY S. COHEN, AUGUSTUS I. DUPONT, HAYWARD D. FISK, WILLIAM GRAHAM, FRANK R. JIMENEZ, ROBERT LONERGAN, and CLIFFORD B. STORMS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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August 29, 2012

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

OTHER MATERIALS

INTEREST OF *AMICI CURIAE*[1]

Marcy S. Cohen is General Counsel and Managing Director of ING Financial Holdings Corp., a large financial services company.

Augustus I. duPont is Vice President, General Counsel and Secretary of Crane Co., a diversified manufacturer of highly engineered industrial products, which is listed on the New York Stock Exchange.

Hayward D. Fisk was Vice President, General Counsel and Secretary of Computer Sciences Corporation, a Fortune 150 publicly traded computer software and systems integration company listed on the New York Stock Exchange,

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[1] *Amici* have given notice of intent to file this brief to all parties more than 10 days before this brief was filed. Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. Copies of those consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amici* affirm that no counsel for any 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 *amici curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

The views expressed in this brief are those of the individual *amici*, and not those of the companies or organizations with which they are currently or were previously affiliated.

for nearly 20 years. Previously, he was Vice President and Associate General Counsel of a major publicly traded telecommuncations company, listed on the New York Stock Exchange. Mr. Fisk served on the international board of the Association of Corporate Counsel, and on the national board of the American Society of Corporate Secretaries. Prior to his retirement from the full-time practice of law, he was a senior partner of DLA Piper LLP (US).

William Graham was Senior Vice President, General Counsel and Secretary of Bethlehem Steel Corporation, a publicly traded company listed on the New York Stock Exchange. In his 11 years as General Counsel of Bethlehem he was a member of the company's senior management team.

Frank R. Jimenez is the chief legal and government affairs officer of a "large cap" public company traded on the New York Stock Exchange. He was previously the chief legal officer of two U.S. S&P 500 companies.

Robert Lonergan was Executive Vice President and General Counsel of Rohm and Haas Company, a large publicly traded chemical manufacturing company listed on the New York Stock Exchange. Mr. Lonergan was a member of the Science, Technology and Law Panel of the National Academies and he was a trustee of the Institute for Law and Economics at the University of Pennsylvania.

Clifford B. Storms is the former Senior Vice President and General Counsel of CPC International, a publicly traded company listed on the New York Stock Exchange. He is a former member of the Connecticut ADR Panel and the Panel of Arbitrators of the American Arbitration Association Large Complex Case Program. Mr. Storms was a Trustee Emeritus of the Food and Drug Law Institute and a former member of the Advisory Committee of the Parker School of Foreign and Comparative Law, Columbia University.

Amici have served as senior legal officers for public companies for many years. They are familiar with the role arbitration clauses play in the contracts entered into between companies and between companies and consumers. Some of *amici* have had decades of experience with arbitration – as legal counsel parties, as arbitrators, and as members or supporters of organizations that administer arbitration regimes. *Amici* are familiar with the benefits of arbitration, especially the role of arbitration (and other "alternative dispute resolution" mechanisms) in facilitating business and commerce and in alleviating the burdens on courts and parties.

Amici believe that the decisions of the Second Circuit in this case are inconsistent with the purposes of the Federal Arbitration Act ("FAA") and both the long-standing and recent teaching of this Court and will deter many companies from

incorporating arbitration as a dispute resolution mechanism in their commercial dealings.

PRELIMINARY STATEMENT

The underlying arbitration involves an antitrust claim. At issue is a provision, of a kind commonly used in arbitration agreements, that bars class actions and class arbitration. In *In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009) (*Amex I*), the Second Circuit panel held that such a bar ran afoul of the federal "substantive law of arbitration" because the litigation expense of proving an antitrust claim – specifically expert testimony – would make it too expensive for claimants to pursue individual arbitrations. The panel held that a class action may proceed in court notwithstanding the agreement to arbitrate. *Id*. at 320.

This Court granted certiorari and vacated *Amex I* in light of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) ("*Stolt-Nielsen*").[2]

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[2] *Stolt-Nielsen* holds that a party to an arbitration agreement cannot be compelled to submit to class arbitration absent a "contractual basis for concluding that the party *agreed* to do so...because 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." 130 S. Ct. at 1775. In this case, the arbitration clause explicitly prohibits class arbitration.

Am. Express Co. v. Italian Colors Rest., 130 S. Ct. 2401 (2010).

On remand the two-judge panel reached the same conclusion as it had in *Amex I*. *See In re Am. Express Merchs.' Litig.*, 634 F.3d 187, 199 (2d Cir. 2011) (*Amex II*), relying on the same "expert evidence" proffered by the merchants as to the high cost of producing expert evidence to support their claims.

Shortly after the opinion in *Amex II* was filed, but before the mandate issued, this Court decided *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) ("*Concepcion*"), in which the Court held that state law may not be invoked to invalidate a class-action waiver in an arbitration agreement on the ground that the only economical way to litigate the claim is through a class action. *Id.* at 1748.

After supplemental briefing on the impact of *Concepcion*, the Second Circuit panel issued its third opinion, *In re Am. Express Merchs.' Litig.*, 634 F.3d 187 (2d Cir. 2011). *En banc* review was denied, *In re Am. Express Merchs' Litig.*, 667 F.3d 204 (2d Cir. 2012) ("*Amex III*"). In *Amex III*, the panel again concluded, relying on the same affidavit of a consultant for the merchants, that expert costs would be so high relative to potential recovery that the only effective way to litigate the antitrust claims was by a class action and that the

class action waiver is unenforceable. *Amex III*, 667 F.3d at 218-219.[3]

SUMMARY OF ARGUMENT

Certiorari should be granted because the Second Circuit's decision in *Amex III* is inconsistent with the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*. and this court's teaching on enforceability of arbitration agreements.

The Second Circuit's opinions impair the Federal Arbitration Act's strong federal policy favoring the enforcement of arbitration agreements, and frustrates the goals of arbitration and demonstrate the very longstanding judicial hostility to arbitration agreements the FAA was designed to eliminate. The *Amex* decisions are based on a concern that without the class-action vehicle claimants and lawyers will be willing to pursue "small" claims. However, this Court in *Concepcion* rejected this policy rationale and held that the argument that plaintiffs do not have sufficient incentive to pursue individual claims cannot undermine the FAA.

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[3] The Second Circuit recognized that in light of *Stolt-Nielsen* it could not require American Express to participate in class action arbitration, but by declaring the class action waiver unenforceable it opened the way for the merchants to pursue a class action in court, imposing an even greater economic burden on the party which sought to enforce the arbitration clause that contains a class-arbitration waiver.

Amex III is incompatible with the longstanding principle of federal law, embodied in the FAA and numerous Supreme Court precedents, favoring the validity and enforceability of arbitration agreements.

Certiorari review is needed because *Amex III* creates an exception to the overriding federal policy of encouraging arbitration and enforcing arbitration agreements according to the intent of the parties and swallows the rule established this Court's recent teaching on the enforceability of arbitration agreements that the overarching purpose of the FAA is to ensure the enforcement of arbitration agreements according to their terms" and to "facilitate streamlined proceedings. Certiorari is warranted to clarify the reach of *Concepcion* and whether there is a "federal statutory small claims" exception to the FAA.

ARGUMENT

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DECISION IS INCONSISTENT WITH THE FEDERAL ARBITRATION ACT AND THIS COURT'S TEACHING ON ENFORCEABILITY OF ARBITRATION AGREEMENTS

Amici urge the Court to grant the petition for certiorari to clarify its holdings in *Concepcion*, *Stolt-Nielsen* and other cases, which recognize the overriding Congressional policy of encouraging arbitration and to make it clear that there is no "public policy" exception to that overriding policy simply based on the cost of arbitration relative to the potential recovery in individual arbitration.

The Second Circuit used "public policy" to hold that arbitration agreements containing class-action waivers are unenforceable when applied to federal statutory claims if a claim would not be "economically rational" to pursue individually. *See In re Am. Express Merchs.' Litig.*, 667 F.3d at 214.

The Second Circuit's opinions impair the Federal Arbitration Act's strong federal policy favoring the enforcement of arbitration agreements, and frustrates the goals of arbitration by multiplying claims, lawsuits, and attorneys' fees. *Amex I, II and III* demonstrate that the very "longstanding judicial hostility to arbitration agreements," *Gilmer v. Interstate/Johnson Lane*

Corp., 500 U.S. 20, 24 (1991), the FAA was enacted to overcome, is undiminished.

The *Amex* decisions are based on a concern that without the ability to aggregate claims through a class-action lawyers will be unwilling to pursue "small" claims. Whether factually correct or not (the Second Circuit does not cite any record evidence to support such an hypothesis), *Concepcion* rejected this policy rationale. *See Concepcion*, 131 S. Ct. at 1753 (rejecting the argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," because rules inconsistent with the FAA cannot be imposed "even if desirable for unrelated reasons"); *see also Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 (9th Cir. 2012) (rejecting the argument that plaintiffs do not have sufficient incentive to pursue individual claims as "primarily a policy rationale" that "cannot undermine the FAA").[4]

Amex III does not properly read the FAA and this Court's cases. The Second Circuit's doctrine it makes it likely that federal district courts will be the initial venue for what should be arbitration

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[4] In *Coneff*, a putative class of AT&T wireless customers sued AT&T on a variety of claims, including a violation of the Federal Communications Act. The Ninth Circuit held that *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000), was no obstacle to the enforcement of the class arbitration waiver.

issues on the merits[5], and can be used to defeat class-action waivers altogether.

Amex III is incompatible with the FAA as it has been applied and explained by this Court repeatedly and recently. The FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements." The FAA "establishes that, as a matter of federal law, any

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[5] *Amex III* effectively requires a judicial proceeding whenever a class claim based on federal law is asserted. The party seeking to arbitrate the individual claims in accord with the arbitration agreement may be required to spend many times the cost of an arbitral proceeding and many months of court proceedings to enforce the arbitration clause. Courts will have to inquire into the merits of the claims and defenses, whether the claim is dismissible on such standard defenses as statute of limitations, laches or res judicata, whether the putative class is proper and whether the named the named claimant is a proper class representative, whether and what and how much expert testimony would be required and how costly it would be, and how much discovery is appropriate. Because *Amex III* repeatedly relies on the failure of American Express to rebut the merchants' expert affidavit on the cost of expert proof (*see, e.g., Amex III*, 667 F.3d 204, 218), a party seeking to enforce arbitration will have to spend considerable resources to engage its own consultant to rebut claims of the economic infeasibility of pursuing claims in individual arbitrations. The issues the trial court decides may create grounds for appeal, adding more expense and delay.

doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 & n.32 (1983). Section 2 of the FAA reflects a "liberal federal policy favoring arbitration," *Moses H. Cone Memorial Hospital* at 24,[6] and the "fundamental principle that arbitration is a matter of contract," *Rent-A-Center,*

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[6] *Amex III* effectively requires a judicial proceeding whenever a class claim purportedly based on federal law is asserted. The party seeking to arbitrate the individual claims in accord with the plain language of the arbitration agreement may be required to spend many times the cost of an arbitral proceeding and many months of court proceedings to enforce the arbitration clause and commence arbitration. Courts will have to inquire into the merits of the claims and defenses, whether the claim is dismissible on such standard defenses as statute of limitations, laches or res judicata, whether the putative class is proper and whether the named the named claimant is a proper class representative, whether and what and how much expert testimony would be required and how costly it would be, and how much discovery is appropriate. Because *Amex III* repeatedly relies on the failure of American Express to rebut the merchants' expert affidavit on the cost of expert proof (*see, e.g., Amex III*, 667 F.3d 204, 218), a party seeking to enforce arbitration will have to spend considerable resources to engage its own consultant to rebut claims of the economic infeasibility of pursuing claims in individual arbitrations. The issues the trial court decides may create grounds for appeal, adding more expense and delay.

West, Inc. v. Jackson, 130 S.Ct. 2772 (2010); *Stolt-Nielsen* at 1774; *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 479 (1989), and courts must enforce arbitration agreements according to their terms, *Volt Information Sciences, Inc.,* 489 U.S. 468, 478; *Stolt–Nielsen* at 1763; *Concepcion* at 1748. Section 2's saving clause permits agreements to be invalidated by "generally applicable contract defenses," but does not permit arbitration agreements to be negated by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue. *Concepcion* at 1742-43.

Concepcion reaffirmed that the "overarching purpose" of the FAA

> is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

Concepcion, 131 S. Ct. 1740.

The point of parties determining for themselves arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. From the perspective of parties who enter into arbitration agreements, there are substantial advantages to streamlined procedures: parties

may agree to "limit the issues subject to arbitration," *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 628 (1985), to arbitrate according to specific rules, *Volt, supra,* at 479, and to limit with whom they will arbitrate disputes, *Stolt–Nielsen, supra,* 130 S.Ct. at 1773." *Concepcion* at 1748-49.

Amex III is incompatible with the longstanding principle of federal law, embodied in the FAA and numerous Supreme Court precedents, favoring the validity and enforceability of arbitration agreements. *Amex III* attempts to distinguish the Supreme Court's recent holding in *Concepcion* and relies on selective reading of *dicta*[7].

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[7] *Amex III* relies heavily on *dicta* in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000). In *Green Tree*, a lender sought to compel a borrower to arbitrate claims she had raised under federal statutes. *Id*. at 83. The question was "whether [her] 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." *Id*. at 89. The Court confirmed "that federal statutory claims can be appropriately resolved through arbitration," and "rejected generalized attacks on arbitration that rest on a 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would be complainants,'" *id*. at 89-90 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)). The challenge failed because Randolph

(continued...)

Amex III can be used to challenge virtually every arbitration agreement that contains a class-action waiver – and other arbitration agreements with such a clause. While it purports to take a case-specific approach, its wording is very broad:

> We begin our analysis with the well-settled rule that class action lawsuits are suitable as a vehicle for vindicating statutory rights. Supreme Court precedent recognizes that the class action device is the only economically rational alternative when a large group of individuals or entities has

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[7](...continued)
advanced no evidence of the "cost" of the arbitration. *Id*. at 90.

A passage in *dicta* stated that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights." *Id*. at 90. However, "large arbitration costs" refers to the cost of participating in arbitration, such as "filing fees, arbitrators' costs, and other arbitration expenses." *Green Tree*, 531 U.S. at 84. *Amex III*, however, suggests that a claim that may be expensive to litigate can be deemed to entail excessive or uneconomic "arbitration costs," *Green Tree*, 531 U.S. at 84, not the cost of proving a claim.

Even if, *arguendo*, stands for the proposition *Amex III* asserts, we submit that it is inconsistent with this Court's holding in *Concepcion*. Although *Concepcion* was a federal-state "preemption" case, its dismissal of the "public policy" rationale advanced by Justice Ginsburg in dissent applies equally to this case. *See Concepcion* at 1753.

> suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action.

Amex III, 667 F.3d at 214. *Amex III* cites no cases to support these statements. Of course the "Supreme Court precedent" that "recognizes that the class action device is the only economically rational alternative" are cases decided in the context of disputes that were not subject to arbitration, and were governed procedurally by the Federal Rules of Civil Procedure.

Concepcion upheld the paramount policy favoring arbitration FAA against an unconscionability challenge that was substantively indistinguishable from the challenge in *Amex*. In *Concepcion*, the Supreme Court rejected a common-law rule, developed by the California Supreme Court, that was applied to void class-action waivers in contracts of all types. The discredited California court had said:

> [B]ecause . . . damages in consumer cases are often small and because a company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit, the class action is often the only effective way to halt and redress such exploitation. . . . Such one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party

> from liability that otherwise would be imposed under California law, are generally unconscionable.

Discover Bank v. Superior Court, 36 Cal. 4th 148, 161 (2005) (internal quotation marks, citations, and alterations omitted). The Supreme Court ruled that this attempt by California to limit arbitration agreements was inconsistent with the FAA. *Concepcion* at 1748. The majority in *Concepcion* affirmed that rules inconsistent with the FAA cannot be imposed "even if desirable for unrelated reasons," and rejected Justice Ginsburg's argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," *Id*. at 1753.

Amex III seeks to evade the clear language and import of *Concepcion*. As it had in *Amex II*, in *Amex III* the panel found that a class-waiver provision in an arbitration agreement is unenforceable if "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action." *Amex III*, 667 F.3d at 218. *Amex III* tries to limit *Concepcion* to a "path for analyzing whether a state contract law is preempted by the FAA." *Amex III*, 667 F.3d at 213 (emphasis added). *Amex III* interprets *Concepcion* as deciding only whether California's doctrine of unconscionability was preserved by the FAA's savings clause as "grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C.

§ 2. *Amex III* invalidates the arbitration agreement an almost identical type of "unconscionability" because the underlying claim was grounded in federal antitrust law." *Amex III*, 667 F.3d at 213.

The public policy rationale on which *Amex III* relies – that large "arbitration costs" should not prevent a plaintiff from "effectively vindicating" a statutory right – runs counter to the FAA's paramount public policy.[8] *Concepcion* teaches that the FAA does not allow courts to invalidate class action waivers even if "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," *Concepcion* at 1753. The theory on which *Amex III* relies to create an exception to the FAA and to distinguish *Concepcion* would swallow the rule favoring arbitration. Every plaintiff who wants to avoid arbitration can claim to be the representative of a class whose members suffered small damages and hire an "expert" to opine that litigation costs, including expert witness fees, would outweigh each class members's individual loss. The mere threat of a class action would likely prompt a settlement, even of dubious claims, rather than engage in protracted and expensive

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[8] Had Congress intended to exempt certain classes of disputes – such as those arising under the Sherman Act – from the FAA, it could have done so, but it has not.

litigation such as this American Express Merchant's saga.[9]

Amici submit that *Amex III* negates an otherwise valid arbitration agreement by conjuring up defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue, *Concepcion* at 1742-43, for the result the Second Circuit is determined to achieve is to compel a party to forego several of the principal benefits of arbitration, to wit, choice of arbitration parties, choice of issues to arbitrate,

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[9] This Court recently cautioned that certain class actions may present prime opportunities for plaintiffs to exert pressure upon defendants to settle weak claims. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). One scholar has calculated that "[t]he percentage of certified class actions terminated by a class settlement ranged from 62% to 100%, while settlement rates (including stipulated dismissals) for cases not certified ranged from 20% to 30%." Thomas E. Willging *et al.*, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U.L. Rev. 74, 143 (1996); *see also* Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1873 (2006) ("[C]lass certification operates most disturbingly when the underlying merits of class members' claims are most dubious.")

and a streamlined – and generally less expensive – process.[10]

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[10] As this Court noted in *Concepcion*, "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." *Concepcion* at 1750, citing *Stolt-Nielsen* at 1776. "Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult." *Concepcion* at 1750. Arbitrators chosen for their subject-matter expertise are not usually familiar with the complex procedural aspects of class certification. *Concepcion* at 1750-51.

As this Court explained in *Concepcion*,

> Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed *de novo* and questions of fact for clear error. In contrast, 9 U.S.C. § 10 allows a court to vacate an arbitral award *only* where the award "was procured by corruption, fraud, or undue means"; "there was evident partiality or corruption in the arbitrators"; "the arbitrators were guilty of misconduct in refusing to postpone the hearing ... or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior

(continued...)

The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements. *See Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 581 (2008); *Concepcion* at 1742. There can be little doubt, we submit, that the Second Circuit's obdurate consistency in holding the contractual class action waiver to be unenforceable, and thus denying Petitioners their contractual right to arbitration – despite previous remands in light of important recent decisions of this Court – is precisely the sort of expression of continuing "judicial hostility towards arbitration ...manifested in a great variety of devices and formulas declaring arbitration against public policy" that prompted Congress to enact the FAA. *See Concepcion* at 1747 (internal quotation marks and citations omitted).

Certiorari review is needed because *Amex III* creates an exception to the overriding federal policy of encouraging arbitration and enforcing arbitration agreements according to the intent of the parties. *Amex III* will be used to defeat class-action waivers altogether and it creates an exception that swallows the rule established by the

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[10](...continued)
by which the rights of any party have been prejudiced...."

Concepcion at 1752.

FAA and this Court's recent teaching on the enforceability of arbitration agreements.

Amex III creates a "Catch 22" – either an arbitration agreement must omit a class-action or class-arbitration waiver,[11] or, if the arbitration contract includes such a waiver, a court will nullify the waiver (and, perhaps the arbitration agreement *in toto*) and the parties will be compelled to litigate a class action in court, rather than arbitrate a manageable dispute. *Amex III*, if not reviewed and reversed, would thus negate the overarching purpose of the FAA which is to "facilitate streamlined proceedings" and to "ensure the enforcement of arbitration agreements according to their terms." *Concepcion* at 1748 (citation omitted); *see also Stolt-Nielsen* at 1763.

At a minimum, certiorari is warranted to clarify the reach of *Concepcion* and whether there is a "federal statutory small claims" exception to the FAA.

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[11] As this Court noted in *Concepcion* "[I]t [is] hard to believe that defendants would bet the company with no effective means of review [of an arbitral award], and even harder to believe that Congress would have intended to allow state courts to force such a decision." *Concepcion* at 1752. We see no principled reason why federal courts should be able to do so.

CONCLUSION

For the foregoing reasons, *amic*i urge the Court to grant the petition.

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