IN THE

Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,
Petitioners,

v.

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

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

BRIEF OF MARCY S. COHEN, AUGUSTUS I. DUPONT, HAYWARD D. FISK, WILLIAM GRAHAM, FRANK R. JIMENEZ, ROBERT LONERGAN, CLIFFORD B. STORMS AND THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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December 28, 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.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, amicus curiae International Association of Defense Counsel states the following:

The International Association of Defense Counsel is a non-profit professional association. It has no parent company and no shareholders.

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INTEREST OF *AMICI CURIAE*[1]

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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, for nearly 20 years. Previously, he was Vice President and Associate General Counsel of a

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[1] 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* nor their 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.

major publicly traded telecommunications 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). He is of counsel to Anderson Kill Wood & Bender in its Ventura, California office. He is a member of the Board of Governors of the Kansas University School of Law.

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.

The **International Association of Defense Counsel** ("IADC"), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits.

The individual *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, 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.

The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of class actions as well as arbitrations, both of which are increasingly global in reach.

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 named plaintiffs in these consolidated cases are retail businesses that entered into a written Card Acceptance Agreement with American Express. The gravamen of plaintiffs' complaint is that American Express's "Honor All Cards" policy, which requires merchants that wish to accept American Express cards to accept American

Express's charge cards as well as its credit cards, constitutes an unlawful tying arrangement under § 1 of the Sherman Act. The named plaintiffs seek to bring suit on behalf of "all merchants that have accepted American Express charge cards." App. 4a. The Card Acceptance Agreement contains a provision requiring bilateral (or "individual") arbitration, rather than class arbitration (sometimes referred to as a "class-arbitration waiver"). C.A. App. A156; *see* App. 8a-9a. The arbitration provision is "governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16, as it may be amended. C.A. App. A156; *see* App. 67a.

At issue in this case 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 the cost of adducing 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 vacated *Amex I* and remanded the case to the Second Circuit for reconsideration in light of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l*

Corp., 130 S. Ct. 1758 (2010) ("*Stolt-Nielsen*").[2] *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010).

On remand the two-judge panel[3] reached the same conclusion as it had in *Amex I. See In re Am. Express Merchs.' Litig.*, 634 F.3d 187, 198 (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 Second Circuit issued its opinion in *Amex II*, but before the mandate issued, this Court decided *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 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

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[2] *Stolt-Nielsen* held 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.

[3] Justice Sotomayor, originally a member of the panel, was elevated to the Supreme Court and did not participate in the Second Circuit's deliberations.

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 same Second Circuit two judge panel issued that court's third opinion, *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.[4] *En banc* review was denied, with vigorous dissents, *In re Am. Exp. Merchants' Litigation*, 681 F.3d 139 (2d Cir. 2012).

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[4] 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.

SUMMARY OF ARGUMENT

The decision and judgment of the Court of Appeals for the Second Circuit should be reversed because the that court's decision and reasoning are inconsistent with the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq*. and this Court's precedents on enforceability of arbitration agreements.

The *Amex* decisions are based on a concern that without the class-action vehicle claimants will not be able to "vindicate" their rights because of the "costs" of arbitration vis-a-vis the small size of potential individual recovery. 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.

Amex III creates a sweeping 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 by 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," and that "[r]equiring 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 at 1748 (2011).

The Second Circuit's position frustrates the goals of arbitration by multiplying claims and lawsuits and by forcing parties to incur additional attorneys' fees. It is in conflict with, and impairs, the strong federal policy favoring the enforcement of arbitration agreements expressed in Federal Arbitration Act, 9 U.S.C. §1, *et seq*. It also demonstrates the "judicial hostility towards arbitration," which the FAA was intended to foreclose. *Nitro-Lift Technologies L.L.C. v. Lee,* 568 U. S. ____, No. 11-1377, slip. op. at 5 (Nov. 26, 2012) (per curiam); *Concepcion*, 131 S. Ct. at 1745, 1747, 1757; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

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

ARGUMENT

I.

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

Amici urge the Court to reverse the Second Circuit's decision in *Amex III* and to confirm its holdings in *Concepcion*, *Stolt- Nielsen* and other cases, which recognize the overriding Congressional policy of encouraging arbitration. This Court should 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 invoked a "public policy" rationale 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 *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), a majority of this Court in *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").

The Second Circuit's reading of the FAA and this Court's cases is incorrect. The Second Circuit's doctrine makes it likely that federal district courts will be the initial venue for what should be arbitration issues on the merits,[5] and

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[5] *Amex III* greatly increases litigation costs and complexity because it 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 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. Moreover, 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 (continued...)

can be used to defeat class-action waivers altogether.

Amex III is incompatible with this Court's repeated explanation of the legislative policy underlying the FAA, to wit that the FAA "embodies [a] national policy favoring arbitration," *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *see also*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Concepcion*, 131 S. Ct. 1740, 1745. The FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration", *Moses H. Cone*, 460 U.S. 1 at 24-25 & n.32, reinforces the "fundamental principle that arbitration is a matter of contract," *Concepcion* at 1745; *Rent-A-Center, West, Inc. v. Jackson,* 130 S. Ct. 2772, 2776, 2777 (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 makes clear that courts must enforce arbitration agreements according to their terms,

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[5](...continued)
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. *See* Chief Judge Jacobs' dissent from denial of *en banc* review in *Amex III*, 681 F.3d 139, 142-149.

Volt Information Sciences, 489 U.S. 468, 478; *Stolt-Nielsen* at 1763; *Concepcion* at 1748.

A. The Second Circuit Misinterprets *Concepcion* and Other Precedents of This Court

Compelled class arbitration defeats the FAA's core purpose of ensuring streamlined proceedings according to the parties' intent. *See Concepcion,* 131 S. Ct. at 1748 ("[requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and . . . creates a scheme inconsistent with the FAA.").

From the perspective of parties who enter into arbitration agreements, there are substantial advantages to arbitration:

> [P]arties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate its disputes.
>
> The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.

Concepcion, 131 S. Ct. At 1748-49 (citations omitted)

The Second Circuit read *Concepcion* as being limited to its facts, to apply only to cases in which the claims in arbitration are state law claims. *See*

Amex III, 667 F.3d 204, 213-214, 219. According to the Second Circuit, *Concepcion* does not apply to the arbitration of federal statutory claims.

Concepcion has a far broader reach. *Concepcion* rested on this Court's conclusion that "class arbitration" is "not arbitration as envisioned by the FAA," because it lacks the speed and efficiency of individual arbitration, requires the burdens and "formality" of class-action litigation, and "greatly increases risks to defendants" given the magnified stakes and absence of meaningful judicial review. 131 S. Ct. at 1751-1753. Requiring parties who have contracted to arbitrate on an individual basis to agree to arbitrate on a class-wide basis as a precondition to availing themselves of the arbitral forum, the Court held, would "interfere[]" with the FAA's objective of "promot[ing] arbitration." *Concepcion* at 1749-1750.

The contention that *Concepcion* is applicable only in the federal-state preemption context (*see*, *e.g.*, *Amex III*, 667 F.3d at 212-13 and Judge Pooler's concurrence in the denial of en banc review, *In re American Express Merchants' Litigation*, 681 F.3d 139, 140 (2d Cir. 2012)) is based on a misreading of that decision. *Concepcion*'s interpretation of the FAA would be inapplicable here only if the FAA embodied a more restrictive standard for arbitration of federal claims than for state law claims. That reading is untenable in light of this Court's decision earlier this year in *CompuCredit Corp.* v. *Greenwood*, ____

U.S. ____, 132 S. Ct. 665, at 667 (2012) that the FAA's mandate to "enforce arbitration agreements according to their terms" applies "even when the claims at issue are federal statutory claims." 132 S. Ct. 665, at 667, 669.

Amici submit that it is immaterial that this case involves federal statutory rights rather than state contractual rights. To be sure, *Concepcion* was a preemption decision because the anti-arbitration rule before the Court was embodied in state law. But this Court's holding rested not on the doctrine of preemption, but squarely on its interpretation of the FAA – that "[r]equiring the availability of class wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748.

There is nothing in the FAA to indicate that arbitrable federal-law claims are to be held to a different standard than arbitrable state-law claims. The Second Circuit's distinction ignores this Court's holding that the duty to enforce an arbitration agreement "is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/AMEX, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 122-24 (2001) (arbitration not inherently inconsistent with enforcement of federal statutory rights). *See also CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (Credit Repair Organization Act); *Rent-A-Center, West, Inc. v. Jackson,* 130 S. Ct.

2772 (2100) (employment discrimination); *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247, 257 (2009) (Age Discrimination in Employment Act does not preclude arbitration of claims brought under that statute); *see also Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("[i]t is by now clear that statutory claims" – including "claims arising under the Sherman Act" – "may be the subject of an arbitration agreement, enforceable pursuant to the terms of the FAA"); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636 (1985).

Contrary to the Second Circuit's narrow reading of the decision, *Concepcion* is broadly based on the core purpose of the FAA, and that core purpose should be served wherever the FAA applies. *Concepcion* makes clear that enforcement of a class action waiver is essential to serve the FAA's mandate of preserving party autonomy in the crafting of informal and expeditious procedures for the private resolution of *individual* disputes. *See Concepcion*, 131 S. Ct. 1740, at 1749.

The enforcement of a class action waiver is necessary to fulfill the FAA's mandate wherever that statutory mandate applies. *Concepcion* defeats any substantive challenge to the waiver, be it on a categorical or a case-by-case basis, and

regardless of whether the claim to be arbitrated is based on a state or federal statute.[6]

B. Congress Has Not Excluded Antitrust Or Other Federal Statutory Claims From the Application of the FAA

Congress may exclude federal claims from the arbitrability mandate in the FAA. But this Court has repeatedly held that "Congress itself" must "evince[] an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors*, 473 U.S. at 628. Recently, in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. at 669, this Court has reinforced the message that Congress must explicitly state its intent to override the FAA's mandate that all claims, including federal statutory claims, are within the ambit of arbitration.[7]

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[6] There may be limited "procedural" challenges to a class action waiver that survive *Concepcion*. *See Concepcion,* 131 S. Ct. at 1750 n.6 (". . . States remain free to take steps addressing the concerns that attend contracts of adhesion – for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.").

[7] Neither plaintiffs below nor the Second Circuit relied on such a congressional determination: "Plaintiffs

(continued...)

Nothing in the FAA or the Sherman Act, 15 U.S.C. §§ 1, *et seq*., exempts antitrust claims from arbitration agreements. *See Mitsubishi Motors*, 473 U.S. 614 at 628, 632 (holding in antitrust case).

The Second Circuit nevertheless concluded that "Although the Sherman Act does not provide plaintiffs with an express right to bring their claims as a class in court, forcing plaintiffs to bring their claims individually here would make it impossible to enforce their rights under the Sherman Act and thus conflict [*sic*] with congressional purposes manifested in the provision of a private right of action in the statute." *Amex III*, 667 F.3d at 220. This Court rejected that contention in *Mitsubishi Motors*, explaining that "the fundamental importance . . . of the antitrust laws" does not preclude these claims from being brought in arbitration. 473 U.S. at 634.[8] Further, in *Gilmer*, this Court rejected the argument that

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[7](...continued)
here do not allege that the Sherman Act expressly precludes arbitration or that it expressly provides a right to bring collective or class actions," *Amex III*, 667 F.3d at 220.

[8] Plaintiffs did not argue to the contrary below. *In re Am. Express Merch. Litig.,* 667 F.3d at 213 ("Plaintiffs here do not allege that the Sherman Act expressly precludes arbitration or that it expressly provides a right to bring collective or class actions. . . ."

the unavailability of class procedures is a valid basis for refusing to compel arbitration of a federal claim. As this Court explained, "the fact that the [federal statute on which the claim is based] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." 500 U.S. at 32 (internal quotation marks omitted).[9]

C. The Second Circuit's "Economic Feasibility" Rationale Has Been Rejected by This Court

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. In *Amex III* the Second Circuit interprets *Concepcion* as deciding only that California's doctrine of unconscionability was not preserved by the FAA's savings clause as "grounds as exist at law or in equity for the revocation of

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[9] The argument for requiring class procedures was stronger in *Gilmer* than it is here, because the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) ("ADEA"), expressly provides for collective actions. Nevertheless, this Court held that ADEA claims may be arbitrated "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." 500 U.S. at 32 (internal quotation marks omitted).

any contract," 9 U.S.C. § 2.[10] It then invalidates the Amex arbitration agreement based on an almost identical type of "unconscionability" because the underlying claim was grounded in federal antitrust law. *Amex III*, 667 F.3d at 213.

The Second Circuit interpreted language from this Court's decision in *Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 92 (2000), as authorizing lower courts to invalidate a class action waiver based on the "prohibitively expensive costs" of proving a federal statutory claim on an individual basis, as opposed to a classwide basis: "[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." *Amex III*, 667 F.3d at 210, quoting *Green Tree,* 531 U.S. at 92).

The Second Circuit is wrong for at least two reasons.

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[10] The saving clause in section 2 of the FAA permits arbitration agreements to be invalidated by "generally applicable contract defenses," but does not permit such 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. *Amex III* seeks to evade the clear language and import of *Concepcion*.

1. The Second Circuit's Reliance on Dicta Is Not Persuasive

Despite the governing authority of *Concepcion*, the Second Circuit panel reaffirmed its prior conclusion that the arbitration agreement here is "unenforceable" because "the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive." *Amex III*, 667 F. 3d at 218, relying, in the panel's own words, on "dicta" in *Mitsubishi Motors* (667 F.3d at 214) and *Green Tree* (667 F.3d at 216). In *Green Tree,* this Court suggested that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights." 531 U.S. 79, 90 (2000), but *Green Tree* explicitly declined to address whether the arbitration agreement was unenforceable because of a class action waiver in the agreement, *see* 531 U.S. at 92 n.7.

2. The Types of Costs Considered as Prohibitive by The Second Circuit Were Not Contemplated in *Green Tree*

The Court in *Green Tree* was specifically concerned with the costs and fees incurred in electing to arbitrate, not with attorney's fees, expert witness fees, or discovery expenses. *Green Tree Fin. Corp. Ala. v. Randolph*, 531 U.S. 79, 82 (2000). *Green Tree*, if properly understood, and if it is to have any continuing applicability after *Concepcion*, should be confined to circumstances in

which a plaintiff can show that costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent that party from vindicating its rights. *Green Tree* does not apply where the prohibitively expensive costs are imposed, not by arbitration-specific expenses, but by the nature of the claim. The high costs of experts in antitrust or other complex cases are the result of the nature of the claim and the necessary proof, not by using the arbitration process or forum.

In this case, the plaintiffs did not contend, and the Second Circuit did not conclude, that the cost of access to the arbitral forum is "prohibitively expensive" when compared to the costs of bringing a case in court. Rather, the Second Circuit simply assumed, erroneously, that the "vindication" principle identified in *Green Tree* applies to cases in which the cost of proving the claim – whether in court or in arbitration – is high in relation to its value.[11]

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[11] Plaintiffs' expert's affidavit addressed, and the Second Circuit discussed, only the cost of expert evidence at an arbitration on the merits. *See* 667 F.3d at 218, quoting that expert as writing "In my opinion as a professional economist . . . it would not be worthwhile for an individual plaintiff. . . to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed $1

(continued...)

Plaintiffs do not challenge the cost of filing an arbitration claim, or the cost of paying the arbitrator(s). Rather, they argue, as did the plaintiffs in *Concepcion,* that they will be unable to afford the costs of proving their claims (particularly the payment of expert fees), because they cannot spread them among the numerous class members.[12] This challenge, rejected in *Concepcion,* does not satisfy *Green Tree's* "prohibitive cost" rationale.

The Second Circuit's interpretation of *Green Tree* directly conflicts with the *Concepcion* majority's rejection of the dissent's argument that class procedures must remain available because some claims are too small to be worth pursuing on an individual basis. 131 S. Ct at 1753. The

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[11](...continued)
million."

[12] In fact, it is not really a question of allocating, *pro rata* or *per capita*, such expenses. It is usually a matter of the attorneys being willing to bet on a large enough recovery – and hence a large enough fee – to make the expenditure of large expert fees economically prudent. Justice Breyer's dissent in *Concepcion* focused on this question of economic incentives. Even if a claimant were guaranteed to be made whole, few people would bother bringing claims for insignificant sums and no "rational lawyer"would represent them absent class proceedings. *Concepcion*, 131 S. Ct. at 1760-61 That policy rationale, replied the majority, could not undermine the FAA. *Id*. at 1753.

Concepcion dissent contended that "agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate." *See* 131 S. Ct. at 1760 (Breyer, J., dissenting) and "nonclass arbitration over such [small] sums will also sometimes have the effect of depriving claimants of their claims" and "insulate an agreement's author from liability for its own frauds," 131 S. Ct. at 1761. The *Concepcion* majority made it clear that courts "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id*. at 1753 (majority opinion); *see also Stolt-Nielsen,* 130 S. Ct. at 1770 n.7.

D. The "Vindication of Rights" Rationale Has Been Rejected by This Court

The Second Circuit panel held that an agreement to arbitrate on an individual basis is invalid whenever "the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights." *Amex II*, 634 F.3d 187, 199; see *also Amex I*, 554 F.3d at 304, *Amex III*, 667 F.3d 204, 212. According to the panel, this factual showing is case-specific – the enforceability of an arbitration agreement "must be considered on its own merits, based on its own record." 667 F.3d at 219. Relying on the affidavit of a single expert witness, the panel concluded that "the only economically feasible means for plaintiffs

enforcing their statutory rights is via a class action." *Id*. at 218.

This "vindication of statutory rights" theory is, of course, precisely the argument that this Court expressly rejected in *Concepcion* – holding irrelevant the dissent's "claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." 131 S. Ct. at 1753.

The interference with the FAA is no less pronounced when a plaintiff contends that the inability to "vindicate" a federal claim (as opposed to "vindicate" a claim under state law) mandates the availability of class proceedings. In that situation, as well, "[r]equiring 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, at 1748.

The "vindication-of-federal-statutory-rights" argument imposes increased burdens and costs on the party seeking enforcement of an arbitration agreement. That party must introduce expert evidence showing that individual arbitration is an "economically feasible means for enforcing [the plaintiffs'] statutory rights" (667 F.3d 204, 212; 634 F.3d 187, 198) and rebutting the other side's expert evidence, in light of the Second Circuit's repeated emphasis on petitioners' failure to provide facts controverting plaintiffs' expert's affidavit, *Amex I*, 554 F.3d at 319 , *Amex II*, 634 F.3d

187, 199, *Amex III*, 667 F.3d 204, 218. This would, of course, increase the costs of arbitration, dilute the efficiencies the FAA was designed to achieve, and increase the burdens on the courts.

Amex III can be used to challenge virtually every arbitration agreement that contains a class-action waiver. 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 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. The panel in *Amex III* cites no relevant cases to support these statements; the "Supreme Court precedent" cited by the Second Circuit are cases in which the issue of arbitration did not arise.

E. The Second Circuit's Decision Is in Conflict with Important Congressional Objectives and This Court's Precedents

The public policy rationale which the Second Circuit invents in *Amex III* – that large costs for proving a claim in an arbitration might prevent a plaintiff from "effectively vindicating" a statutory

right – runs counter to the FAA's direct and clear expression of paramount public policy, and swallows the rule established in *Concepcion* 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 the Second Circuit relies to distinguish *Concepcion* and to create an exception to the FAA could result in a proliferation of class actions.[13]

Amici submit that *Amex III* negates an otherwise valid arbitration agreement by conjuring up defenses that apply only to arbitration or derive

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[13] 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.") The same pressure to settle would obtain if class-wide arbitration were imposed.

their meaning from the fact that an agreement to arbitrate is at issue, contrary to the savings clause of the FAA. *See Concepcion* at 1742-43.

The Second Circuit's obdurate consistency in holding the contractual class action waiver 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); *see also Nitro-Lift Technologies,* No. 11-1377, *supra*, slip. op. at 5.

The result the Second Circuit seems determined to achieve is to compel a party to forego several of the principal benefits of arbitration, to wit, the choice of arbitration parties, the choice of issues to arbitrate, and a streamlined – and generally less expensive – process.[14]

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[14] 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." (continued...)

Amex III creates a "Catch 22" – either an arbitration agreement must omit a class-action or

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

Concepcion, 131 S. Ct. at 1752.

class-arbitration waiver,[15] 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 an otherwise manageable dispute. *Amex III*, if not reversed, would 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.

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[15] 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

Reversal of the Second Circuit's decision is necessary because *Amex III* creates an exception that swallows the rule established by the FAA and this Court's recent teaching on the enforceability of arbitration agreements.

Respectfully submitted,

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