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 OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on whether certiorari should be granted in this case to decide whether the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), as interpreted by this Court in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), and in *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000), should permit courts to override the FAA's mandate and invalidate an arbitration agreement that would require the arbitration of federal statutory claims on an individual basis only, and the plaintiff argues that he would be unable to "vindicate his federal statutory rights" due to the cost of proving his case on an individual basis.[1]

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.2(a), NELF also states that all parties were provided with ten-day written notice of NELF's intent to file this brief, which NELF's counsel emailed to counsel for all parties on August 15, 2012. Moreover, on August 14 and on August 22, 2012, counsel for Petitioners and counsel for Respondents respectively filed with this Court general written consents to the filing of amicus briefs, in support of either or neither party.

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

NELF has long been committed to a reasonable interpretation of federal statutes affecting the rights of corporations in their contractual relationships with other corporations and with individuals. In this connection, NELF filed an amicus brief in *Concepcion*, in support of the enforcement of class action waivers in arbitration agreements. The Second Circuit's decision in this case is of direct importance to NELF's corporate constituents, many of whom make use of pre-dispute arbitration agreements containing class action waivers and who might be threatened with class action litigation based on federal statutory claims.

In NELF's view, and in the view of its corporate constituents, certiorari should be granted to correct two significant errors of law contained within the Second Circuit's opinion. First, the lower court has apparently

misinterpreted *Concepcion*, which is broadly reasoned and should apply to the arbitration of federal statutory claims and should preclude either a categorical or case-specific invalidation of a class action waiver. *CompuCredit* establishes that only Congress can override the FAA's mandate, such as by creating an unwaivable right to seek a class action in the relevant federal statute. Congress has not done so here in the Sherman Act, 15 U.S.C. §§ 1 *et seq*.

Secondly, NELF believes that the Second Circuit has misinterpreted *Green Tree* and related precedent of this Court discussing the vindication of federal statutory rights. The Second Circuit has interpreted the "vindication" inquiry as authorizing courts to set aside the FAA and invalidate a class action waiver when it applies to federal claims, due to the costs associated with proving a claim on an individual basis, as opposed to a classwide basis. *Concepcion*, however, has expressly rejected this argument. Moreover, the "vindication" inquiry should refer exclusively to the costs or burdens unique to arbitration that are created by agreement and that do not exist in court. The class action waiver should survive scrutiny under *Green Tree* because, among other things, it does not create unique arbitration costs but instead concerns the allocation of the necessary costs of proof, which are extra-contractual and would apply equally in court.

NELF has regularly appeared as amicus curiae in this Court in cases raising issues of general economic significance to both the New England and the national business communities.[2] This is such a case, and NELF believes that its brief would provide an additional perspective to aid this Court in deciding whether to grant certiorari to resolve the issue presented herein.

SUMMARY OF ARGUMENT

Certiorari should be granted to clarify that, contrary to the Second Circuit's opinion in this case, this Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), broadly establishes that the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), requires enforcement of a class action waiver. General enforcement of a class action

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[2] *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Hall Street Assocs., L.L.C., v. Mattel, Inc.*, 552 U.S. 576 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Comm'r v. Banks*, 543 U.S. 426 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

waiver is necessary to serve the FAA's core purpose of ensuring party autonomy in the crafting of streamlined *individual* proceedings. Conversely, *Concepcion* also broadly establishes that invalidation of a class action waiver, under any circumstances, frustrates the FAA's core purpose, because invalidation requires classwide arbitration as a condition of the agreement's enforceability, and compelled classwide arbitration would defeat both the parties' intent and the FAA's core purpose of enforcing the agreement's terms so as to ensure streamlined proceedings. *Concepcion* should therefore apply with full force to the arbitration of federal and state claims alike, and should preclude both a categorical rule of decision and a case-specific determination invalidating a class action waiver.

Only Congress has the power, via a "contrary congressional command," to make the policy choice to bar or limit the application of the FAA's mandate to disputes arising under another federal statute. *See CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). The statute at issue, the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, contains no such "contrary congressional command" precluding the waiver of the right to seek a class action. Therefore, the FAA should require enforcement of the disputed class action waiver in this case.

Significantly, *Concepcion* has expressly rejected the key rationale for the Second

Circuit's decision, namely the disproportionately high cost of individualized proof when compared with the relatively small anticipated individual recovery. *Concepcion* makes clear that the concerns of the small-value plaintiff cannot defeat the class action waiver and trump the FAA's mandate.

Concepcion generally establishes that the class action waiver generally falls *outside* the scope of the FAA's saving clause, 9 U.S.C. § 2, which allows parties to challenge an arbitration agreement under generally applicable contract defenses. *Concepcion* generally immunizes the class action waiver from § 2 challenges because invalidation of the waiver, even under a generally applicable contract defense, would invariably compel class arbitration, and compelled class arbitration would contravene the FAA's core purpose of ensuring streamlined proceedings according to the parties' intent. That is, the FAA's saving clause cannot be interpreted to defeat the FAA itself.

Certiorari should also be granted to correct the Second Circuit's apparent misinterpretation of this Court's earlier precedent recognizing that a party may challenge an arbitration agreement by showing that the agreement precludes the vindication of federal statutory rights, particularly by imposing "prohibitively expensive costs" in arbitration. *See Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 (2000). The Second

Circuit has interpreted *Green Tree* and related precedent of this Court as having created a discretionary judicial exception to the FAA's mandate whenever a class action waiver applies to the arbitration of federal statutory claims, and the plaintiff shows that proving his or her claim on an individual basis would entail prohibitive costs. But this is precisely the argument of the small-value plaintiff that *Concepcion* expressly rejected as a basis for challenging a class action waiver and thereby defeating the FAA's mandate. And *CompuCredit* instructs that only Congress has the power to set aside the FAA's mandate in the arbitration of federal statutory claims. Congress has not done so in the Sherman Act.

The financial consequences of a class action waiver should therefore not be cognizable arbitration "costs" under *Green Tree*. Instead, that case authorizes a party to challenge the costs unique to arbitration that are wholly created by agreement and that would not exist in court, such as the payment of arbitrators' fees. *Green Tree*'s "prohibitively expensive costs" in arbitration are best understood as a particular application of this Court's "vindication" language in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), in which this Court explained that an arbitration agreement under the FAA is a kind of forum selection clause, which creates a presumptively accessible and reasonable alternative forum for the

vindication of federal statutory rights.

The "vindication" inquiry allows a party to challenge this strong federal presumption, but only by identifying unique costs or burdens under the agreement that would not exist in court and that would render arbitration an inaccessible or inadequate alternative forum for the adjudication of federal rights. *Mitsubishi* focused on the contractual terms governing the arbitral proceedings, while *Green Tree* focused instead on the cost of gaining access to arbitration under the agreement. To mount such a challenge, and remain consistent with *Concepcion* and *CompuCredit*, a party must identify terms of the arbitration agreement, *exclusive* of the class action waiver, that preclude either access to the arbitral forum or a fair opportunity to prosecute federal claims in the arbitral proceedings. Plaintiffs' challenge identifies no such terms because it focuses solely on the class action waiver and its consequences.

Plaintiffs' challenge therefore fails not only under *Concepcion* and *CompuCredit* but also under *Green Tree*. Plaintiffs do not challenge the "price of admission" to arbitration created by agreement. Instead, they argue, à la the unsuccessful plaintiffs in *Concepcion*, that, once in individual arbitration, they will be unable to afford the *inherent* costs of proving their claims because they cannot allocate them on a classwide basis. The underlying costs are

not created by agreement but instead are necessary to proving their claims and would attach equally in court.

Nor can plaintiffs argue that the allocation of those inherent costs on an individual as opposed to a classwide basis is a prohibitive cost created by agreement. The class action waiver is not so much a creature of contract as it is a salient default feature of arbitration under the FAA. *Concepcion* establishes that arbitration is presumptively, and fundamentally, a simple bilateral affair under the FAA. Parties must actually contract against this potent default term to authorize the pooling of litigation costs on a classwide basis. And, even then, *consensual* classwide arbitration, although enforceable, is nevertheless not arbitration as envisioned by the FAA and lacks its benefits. In short, any adverse financial consequences flowing from this default contract term should not be treated as "prohibitively expensive costs" of arbitration under a *Green Tree* analysis.

Finally, other courts and commentators disagree with the Second Circuit's position and embrace amicus's interpretation of the limited scope of the "vindication" inquiry and its harmonization with *Concepcion* and *CompuCredit*. This compelling split of authority with the Second Circuit's decision underscores the need for resolution of the issue by this Court to vindicate the FAA's mandate.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO CLARIFY THAT, ABSENT A CONTRARY CONGRESSIONAL COMMAND, THE FEDERAL ARBITRATION ACT SHOULD REQUIRE ENFORCEMENT OF A CLASS ACTION WAIVER IN THE ARBITRATION OF FEDERAL STATUTORY CLAIMS.

This Court should grant the petition for certiorari of Petitioners American Express Company and American Express Travel Related Services Company, Inc. (collectively "American Express") to clarify the comprehensive scope of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), which broadly establishes that enforcement of a class action waiver is necessary to serve "[t]he overarching purpose of the [Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"),] . . . [i.e.,] to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.*, 131 S. Ct. at 1748. In this case, the Second Circuit has restricted *Concepcion* to its facts, namely the arbitration of state law claims, and, even more so, the invalidation of a categorical rule of decision hostile to class action waivers. *See In re Am. Express Merch. Litig.*, 667 F.3d 204, 213-

214, 219 (2d Cir. 2012). According to the Second Circuit, *Concepcion* applies neither to the arbitration of federal statutory claims nor to a case-specific invalidation of a class action waiver based on a facially neutral defense. *Id.*

The Second Circuit has apparently misinterpreted *Concepcion*. Contrary to the lower court'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. *See Morvant v. P.F. Chang's China Bistro, Inc.*, 2012 WL 1604851, at *11 (N.D. Cal. May 7, 2012) ("While *Concepcion* was focused on preemption analysis and whether a state could establish a rule contrary to the FAA, its statement of the meaning and purposes of the FAA applies equally in the context of determining which federal statute controls here.")

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 id.*, 131 S. Ct. at 1749. Consequently, enforcement of a class action waiver is necessary to fulfill the FAA's mandate wherever that statutory mandate applies, be it to a state or federal statutory claim. *Concepcion* also defeats any substantive challenge to the waiver, be it on a

categorical or a case-by-case basis, as amicus discusses further below.[3]

Indeed, only Congress has the power to make the policy choice to bar or limit the application of the FAA's mandate to claims brought under another federal statute. As this Court recently explained, "[the FAA] requires courts to enforce agreements to arbitrate according to their terms[,] . . . even when the claims at issue are *federal statutory* claims, unless the FAA's mandate has been *overridden by a contrary congressional command.*" *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (emphasis added).

The applicable statute here, the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, contains no such "contrary congressional command" precluding the waiver of either a judicial forum or the right to seek a class action. *See also Gilmer v Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (right to seek class action is waivable procedural right unless Congress

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[3] There may be limited "procedural" challenges to a class action waiver, not raised here, that survive *Concepcion*. *See Concepcion*, 131 S. Ct. at 1750 n.6 ("Of course 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.").

provides otherwise); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (federal antitrust claims are arbitrable). Nor do plaintiffs argue anything to the contrary. *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 . . . ."). Therefore, the FAA's broad mandate, as interpreted in *Concepcion*, should apply to require enforcement of the class action waiver in American Express's arbitration agreement.

Concepcion also establishes the broad converse principle that invalidation of a class action waiver, under any circumstances, frustrates the FAA's core purpose, because invalidation invariably requires classwide arbitration as a condition of the agreement's enforceability. Compelled class arbitration, in turn, defeats the express terms of the agreement and the FAA's core purpose of ensuring streamlined proceedings according to the parties' intent. *See id.*, 131 S. Ct. at 1750. Thus, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and . . . creates a scheme inconsistent with the FAA." *Id.* at 1748. Compelled classwide arbitration, under any circumstances, transmogrifies the arbitration process as conceived under the FAA and the parties' agreement, by imposing a

legion of intractable and distortingly burdensome procedural and legal complexities that corrupt the informality and ease of the arbitral process. The result thereby defeats both the FAA's and the parties' goal of fostering streamlined simplicity. *See id.* at 1750.

This result ensues regardless of the reasons for invalidating the class action waiver, and regardless of the statutory claims that are subject to the class action waiver. It makes no difference whether the arbitrable claim is of state or federal origin, or whether invalidation is based on a rigid, *per-se* rule (such as the *Discover Bank* rule at issue in *Concepcion*), or a case-specific determination. Regardless of the source of the underlying claim or the route taken to invalidate the class action waiver, the outcome is the same: the waiver is invalidated, class arbitration is compelled as a condition of the agreement's enforceability, and the FAA's core purpose is defeated.

Significantly, *Concepcion* has expressly rejected the key rationale for the Second Circuit's decision in this case, namely the disproportionately high cost of individualized proof when compared with the relatively small anticipated individual recovery. *Compare Concepcion*, 131 S. Ct. at 1753 (concern for "small-dollar" claims cannot trump FAA's mandate) *with In re American Exp. Merchants' Litigation*, 667 F.3d at 218 (class waiver invalidated due to "the economic [ir]rationality

of bringing an individual action against Amex in light of the[] substantial expert witness costs" and relatively small anticipated individual damages).

This Court has thus made clear that a concern for the prosecution of small-value claims cannot defeat enforcement of a class action waiver under the FAA. And yet this is precisely the basis for the Second Circuit's decision. It makes no difference under *Concepcion* whether this rejected rationale is embodied in a categorical rule of decision or is "proven" after a case-specific determination (such as the Second Circuit's purported approach in this case). The latter decision offends the FAA as much as the former, because "[t]he Plaintiffs' evidence goes only to substantiating the very public policy arguments that were expressly rejected by the Supreme Court in *Concepcion*--namely, that the class action waiver will be exculpatory, because most of these small-value claims will go . . . unprosecuted." *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1214 (11th Cir. 2011).

Otherwise put, *Concepcion* establishes that the class action waiver generally falls *outside* the scope of the FAA's saving clause, contained in 9 U.S.C. § 2, which allows parties to challenge an arbitration agreement under generally applicable contract defenses. *See Concepcion*, 131 S. Ct. at 1746 ("The final

phrase of § 2 . . . permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.' This saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses . . . .") (citation and internal quotations omitted).[4]

Concepcion generally immunizes the class action waiver from § 2 challenges because invalidation of the waiver, even under a generally applicable contract defense, would invariably compel class arbitration and thereby contravene both the agreement's terms and the FAA's overarching purpose of ensuring streamlined proceedings according to the parties' intent. As this Court has explained, the FAA's saving clause cannot be interpreted to defeat the FAA itself:

> Although § 2's saving clause

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[4] Section 2 of the FAA provides, in relevant part:

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

9 U.S.C. § 2.

> preserves generally applicable contract defenses, nothing in it suggests an intent to preserve . . . rules that stand as an obstacle to the accomplishment of the FAA's objectives. . . . [A] federal statute's saving clause cannot in reason be construed as allowing a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, *the act cannot be held to destroy itself.*

Concepcion, 131 S. Ct. at 1748 (citations and internal quotations omitted) (emphasis added).

In sum, certiorari should be granted to clarify that *Concepcion* broadly establishes that the FAA requires enforcement of class action waivers in the arbitration of federal statutory claims where, as here, Congress has not provided any language to the contrary. Nor can the Second Circuit evade the reach of the FAA and *Concepcion* by invalidating the class waiver after engaging in a purportedly case-specific determination. Certiorari should accordingly be granted to vindicate the FAA's mandate as interpreted in *Concepcion*.

II. CERTIORARI SHOULD ALSO BE GRANTED TO CLARIFY THAT, ABSENT A CONTRARY CONGRESSIONAL COMMAND, ENFORCEMENT OF A CLASS ACTION WAIVER DOES NOT INTERFERE WITH THE VINDICATION OF FEDERAL STATUTORY RIGHTS.

Concepcion broadly establishes, then, that the FAA mandates enforcement of a class action waiver, notwithstanding the resulting cost of proving a claim on an individual basis, as opposed to a classwide basis. *Id.*, 151 S. Ct. at 1753. As amicus has discussed above, the Second Circuit apparently misinterpreted the FAA's broad mandate as explained in *Concepcion*.

But the lower court has also apparently misinterpreted earlier precedent of this Court as having created a discretionary judicial exception to the FAA's mandate whenever a class action waiver applies to the arbitration of federal statutory claims. *See In re Am. Express Merch. Litig.*, 667 F.3d at 214 (arbitration agreement enforceable "'so long as the prospective litigant may *effectively* vindicate its [federal] statutory cause of action in the arbitral forum.'") (quoting *Mitsubishi Motors Corp.,* 473 U.S. at 632 (emphasis added by Second Circuit)). In particular, the Second Circuit has interpreted language from this

Court's decision in *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 (2000), as authorizing lower courts to override the FAA's mandate and 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 shared, classwide basis. *See In re Am. Express*, 667 F.3d at 210 ("[W]hen '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.'") (quoting *Green Tree v. Randolph*, 531 U.S. at 92).

But this is precisely the argument of the small-value plaintiff that *Concepcion* expressly rejected as a basis for challenging a class action waiver and thereby defeating the FAA's mandate. *Concepcion*, 131 S. Ct. at 1753. Whatever "prohibitively expensive costs" of arbitration may be cognizable under *Green Tree*, the FAA precludes any consideration of the financial consequences resulting from enforcement of the class action waiver that fall on the individual claimant in arbitration. *See Concepcion*, 131 S. Ct. at 1753. And *CompuCredit* instructs that only Congress has the power to set aside the FAA's mandate in the arbitration of federal statutory claims. *See CompuCredit Corp. v. Greenwood*, 132 S. Ct. at 669. Congress has not exercised that power in the Sherman Act, such as by creating an

unwaivable right to a class action. In short, *Concepcion* and *CompuCredit* together should overrule the Second Circuit's interpretation of *Green Tree* as authorizing the invalidation of American Express's class action waiver in the arbitration.

The financial consequences of a class action waiver should therefore not be cognizable arbitration "costs" under a *Green Tree* analysis. What, then, are the prohibitive arbitration costs recognized in *Green Tree* as a potential basis for challenging an arbitration agreement? *Green Tree* authorizes a party to challenge the costs unique to arbitration that are wholly created by agreement and that would not exist in court, such as the payment of arbitrators' fees. After all, the disputed costs in *Green Tree* pertained solely to the contractual "price of admission" to arbitration. *See Green Tree*, 531 U.S. at 84, 91 (dismissing as "too speculative" plaintiff's challenge to potentially prohibitive arbitration costs because "the arbitration agreement was [merely] silent with respect to payment of *filing fees, arbitrators' costs, and other arbitration expenses*.") (emphasis added); *In re Am. Express Merch. Litig.*, 681 F.3d 139, 147 (2d Cir. 2012) (Jacobs, C.J., dissenting from denial of rehearing *en banc*) (describing *Green Tree* costs as "price of admission" to arbitration).

Green Tree's prohibitive arbitration costs are best understood as a particular application

of this Court's "vindication" language that appeared in *Mitsubishi Motors*, 473 U.S. at 637. In that case, the Court explained that an arbitration agreement under the FAA is a kind of forum selection clause, *Id.*, 473 U.S. at 630, which creates a presumptively reasonable alternative private forum for the vindication of federal statutory rights. *See id.*, 473 U.S. at 637 ("[S]o long as the prospective litigant effectively may vindicate its [federal] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.").

The "vindication" inquiry apparently allows a party to challenge this strong federal presumption that arbitration is a reasonable alternative to the judicial forum for the adjudication of federal statutory rights. But, to bring such a challenge, a party would need to identify unique costs or burdens under an agreement that would not exist in court and that would render arbitration an inaccessible or inadequate alternative forum, under the particular circumstances of the case. *See Bradford v Rockwell Semiconductor Sys., Inc*, 238 F.3d 549, 556 (4th Cir. 2001) ("[T]he appropriate inquiry [under *Mitsubishi*'s "vindication" language, quoted in *Gilmer*, 500 U.S. at 28,] evaluates whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, i.e., a case-by-case analysis that focuses, among other things, upon the claimant's ability to pay the

arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims.").

Mitsubishi focused on the contractual terms governing the arbitral proceedings and discussed the availability of a treble-damages statutory remedy under the Sherman Act. *Id.*, 473 U.S. at 636-37 & n.19. *Green Tree* focused instead on the cost of gaining access to arbitration under the agreement, such as the payment of arbitrators' fees and an arbitration filing fee. *Id.*, 531 U.S. at 84, 90-91. The "vindication" inquiry can thus apply to monetary contract terms addressing the unique costs of arbitration, and it can also apply to procedural contract terms addressing the arbitration proceedings themselves.

To mount such a challenge, however, and remain consistent with *Concepcion* and *CompuCredit*, a party must identify terms of the arbitration agreement, *exclusive* of the class action waiver, that preclude either access to the arbitral forum or a fair opportunity to prosecute federal claims in the arbitral proceedings. Plaintiffs' challenge does neither of those things because it focuses solely on the class action waiver and its consequences.

Plaintiffs' challenge therefore fails not only under *Concepcion* and *CompuCredit*, as discussed above, but also under *Green Tree*. Plaintiffs do not challenge the "price of

admission" to arbitration created by agreement. Instead, they argue, à la the unsuccessful plaintiffs in *Concepcion*, that, once in arbitration, they will be unable to afford the *inherent* costs of proving their claims (particularly the payment of expert fees), because they cannot allocate them on a classwide basis. This challenge, rejected in *Concepcion,* apparently raises two related issues: the underlying costs themselves, and their allocation. Neither issue should satisfy *Green Tree*'s "prohibitive cost" inquiry.

First, the underlying costs are not created by agreement but instead are necessary to proving plaintiffs' claims and would attach equally in court. Next, plaintiffs cannot argue that the allocation of those inherent costs on an individual as opposed to a classwide basis is a prohibitive cost created by agreement. The class action waiver is not so much a creature of contract as it is a salient default feature of arbitration under the FAA. *Concepcion* establishes that arbitration is presumptively, and fundamentally, a simple bilateral affair under the FAA. *See id.*, 131 S. Ct. at 1748. Parties must actually contract against this potent default term to authorize the pooling of litigation costs on a classwide basis. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010) (no classwide arbitration "unless there is a contractual basis for concluding that the party *agreed* to do so.") (emphasis in original). And, even then,

consensual classwide arbitration, although enforceable, is nevertheless "*not* arbitration as envisioned by the FAA [and] lacks its benefits . . . ." *Concepcion*, 131 S. Ct. at 1753 (emphasis added).[5]

In short, bilateral arbitration is part of the very fabric of arbitration under the FAA. Any adverse financial consequences flowing from this default contract term should not be treated as "prohibitive costs" of arbitration that are imposed by a particular agreement under a *Green Tree* analysis.

Finally, amicus wishes to point out that, in addition to the dissent below (*In re Am. Express Merch. Litig.*, 681 F.3d at 147), other courts and commentators disagree with the Second Circuit's position and embrace amicus's interpretation of the limited scope of the "vindication" inquiry and its harmonization with *Concepcion*. *See, e.g.*, *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158-59 & n.3 (9th Cir. 2012) (disagreeing with Second Circuit in this case and noting that "[w]e do not read *Concepcion* to be inconsistent with *Green Tree* and similar cases. . . . Although Plaintiffs argue that the claims at issue in this case cannot be

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[5] As a practical matter, neither *Concepcion* nor *Stolt-Nielsen* should preclude similarly situated parties who are subject to a class action waiver from discussing their claims with one another, or from pooling their resources to hire a lawyer or fund expert fees, so long as they proceeded individually in the arbitration of their claims.

vindicated effectively because they are worth much less than the cost of litigating them, the *Concepcion* majority rejected that premise."); *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp.2d 1042, 1050 (N.D. Cal. 2011) ("If *Green Tree* has any continuing applicability [after *Concepcion*], it must be confined to circumstances in which a plaintiff argues that *costs specific to the arbitration process*, such as filing fees and arbitrator's fees, prevent her from vindicating her claims. . . . *Concepcion forecloses plaintiffs from objecting to class-action waivers* in arbitration agreements on the basis that the potential cost of proving a claim exceed potential individual damages.") (emphasis added); *Bradford v Rockwell Semiconductor Sys.*, 238 F.3d at 556 (discussing "vindication" inquiry as a case-by-case analysis focusing on unique costs of gaining access to arbitration under particular agreement); Jacob Spencer, Note, *Arbitration, Class Action Waivers, and Statutory Rights*, 35 Harv. J.L. & Pub. Pol'y 991, 1012 (2012) ("*Green Tree* might not apply where the 'prohibitively expensive' costs are imposed, not by arbitration-specific expenses, but by the claim itself."). This compelling split of authority with the Second Circuit's decision underscores the need for resolution of the issue by this Court to vindicate the FAA's mandate.

In sum, certiorari should be granted to correct the Second Circuit's misinterpretation of this Court's "vindication" precedent as

authorizing courts to override the FAA when a class action waiver applies to federal statutory claims. To the contrary, *Concepcion* and *CompuCredit* should overrule the Second Circuit's decision and preclude a challenge to the class action waiver under an analysis derived from *Green Tree*. Consistent with *CompuCredit* and *Concepcion*, and with *Green Tree* itself, a "vindication" challenge should be limited to the unique costs of arbitration that are imposed by agreement and would not exist in court. Only such an interpretation would honor the FAA's mandate and preserve the strong federal presumption that an arbitration agreement creates a reasonable alternative forum for the adjudication of federal statutory claims.

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court grant Petitioner American Express's petition for a writ of certiorari.

Respectfully submitted,

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