

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 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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TABLE OF CONTENTS

TABLE OF AUTHORITIESii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT..... 3

I. ABSENT A CONTRARY CONGRESSIONAL COMMAND, THE FEDERAL ARBITRATION ACT REQUIRES ENFORCEMENT OF A CLASS ACTION WAIVER IN THE ARBITRATION OF FEDERAL STATUTORY CLAIMS..... 6

II. ABSENT A CONTRARY CONGRESSIONAL COMMAND, ENFORCEMENT OF A CLASS ACTION WAIVER DOES NOT INTERFERE WITH THE VINDICATION OF FEDERAL STATUTORY RIGHTS..... 15

III. *CONCEPCION* DOES NOT BAR ALL COORDINATED EFFORTS TO ENFORCE THE RIGHTS OF SMALL-VALUE CLAIMANTS. 21

CONCLUSION..... 26

TABLE OF AUTHORITIES

CASES

<i>Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez</i> , 458 U.S. 592 (1982).....	24
<i>AT&T Mobility LLC v. Concepcion</i> , 131 S. Ct. 1740 (2011)	<i>passim</i>
<i>CompuCredit Corp. v. Greenwood</i> , 132 S. Ct. 665 (2012)	<i>passim</i>
<i>Cruz v. Cingular Wireless</i> , 648 F.3d 1205 (11th Cir. 2011)	8
<i>EEOC v. Waffle House, Inc.</i> , 534 U.S. 279 (2002)	23, 25
<i>Gilmer v Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991)	11
<i>Green Tree Fin. Corp. v. Randolph</i> , 531 U.S. 79 (2000)	<i>passim</i>
<i>In re Am. Express Merch Litig.</i> , 681 F.3d 139 (2d Cir. 2012).....	18
<i>In re Am. Express Merch. Litig.</i> , 667 F.3d 204 (2d Cir. 2012).....	<i>passim</i>
<i>Marmet Health Care Ctr. v. Brown</i> , 132 S. Ct. 1201 (2012)	14
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614 (1985)	<i>passim</i>

<i>Prima Paint Corp. v. Flood & Conklin Mfg. Co.</i> , 388 U.S. 395 (1967)	14
<i>Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.</i> , 130 S.Ct. 1431 (2010) (plurality opinion)	12
<i>Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.</i> , 130 S. Ct. 1758 (2010)	7, 20
STATUTES	
9 U.S.C. §§ 1-16	1, 3, 6
9 U.S.C. § 2	<i>passim</i>
12 U.S.C. §§ 5301-5641	13
12 U.S.C. § 5518(a)	13
12 U.S.C. § 5518(b)	13
15 U.S.C. §§ 1-15	4, 10
15 U.S.C. § 15c(a)	23
OTHER AUTHORITIES	
Fed. R. Civ. P. 23	11
Arbitration Fairness Act of 2011, S. 987, 112th Cong.; H.R. 1873, 112th Cong. (2011)	12
H.R. 4181, 112th Cong. (2012)	12
Dwight R. Carswell, Comment, <i>CAFA and Parens Patriae Actions</i> , 78 U. Chi. L. Rev. 345 (2011)	24

Myriam Gilles & Gary Friedman, <i>After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion</i> , 79 U. Chi. L. Rev. 623 (2012)	12, 13, 24, 25
Richard A. Nagareda, <i>The Litigation-Arbitration Dichotomy Meets The Class Action</i> , 86 Notre Dame L. Rev. 1069 (2011).....	17
Andrew Pincus, <i>Concepcion and the Arbitration of Federal Claims</i> , Bloomberg L. (Feb. 29, 2012)....	22
Jacob Spencer, Note, <i>Arbitration, Class Action Waivers, and Statutory Rights</i> , 35 Harv. J.L. & Pub. Pol’y 991 (2012).....	21

INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation (“NELF”) seeks to present its views, and the views of its supporters, on the issue presented in this case, namely whether the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (“FAA”) permits a court to invalidate an arbitration agreement that precludes the arbitration of federal statutory claims on a classwide basis.¹

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 businesses in their contractual relationships with other businesses and with

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, on November 19, 2012, and on December 12, 2012, counsel for Petitioners and counsel for Respondents respectively filed with this Court a general written consent to the filing of amicus briefs, in support of either or neither party.

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 business constituents, many of whom make use of predispute arbitration agreements containing class action waivers. If those waivers can be invalidated, such businesses might face class action litigation based on federal statutory claims.

In NELF's view, the Second Circuit's decision contains significant errors of law that should be corrected. In essence, the lower court has misinterpreted, and thus has failed to harmonize, this Court's key precedents relevant to the issue of enforcing class action waivers in agreements to arbitrate federal statutory claims. Contrary to the lower court's opinion, this Court's decisions in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000); and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); establish collectively that the FAA requires enforcement of class action waivers in agreements to arbitrate federal statutory claims, and that only Congress has the power to override the FAA's mandate on this issue. Consequently, a court has no discretion to invalidate a class action waiver in an otherwise valid arbitration agreement, notwithstanding a concern for the costs of proving a claim on an individual rather than an aggregated basis.

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 NELF believes that this is such a case and that its brief would provide an additional perspective to aid this Court in deciding the issues presented.

SUMMARY OF ARGUMENT

The question presented in this case is two-fold: (1) Does the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (“FAA”), mandate the enforcement of class action waivers in the arbitration of federal statutory claims and, if so, (2) do courts nonetheless have the discretion to override the FAA’s mandate when the costs of proving a federal claim on an individual rather than aggregated basis may be prohibitive? In NELF’s view, the answer to the first question is yes, unless Congress has expressly provided otherwise, and the answer to the second question is no.

This Court’s decisions in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), together establish that the FAA requires the enforcement of a class action waiver contained in a

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 Env’tl. 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).

valid predispute arbitration agreement, with respect to state *and* federal statutory claims, and that only Congress has the power to override the FAA's mandate. Congress has not exercised that power in the statute at issue here, the Sherman Act, 15 U.S.C. §§ 1-15. Thus, the disputed class action waiver in this case should be enforced.

While the FAA mandates enforcement of a class action waiver contained in a valid predispute arbitration agreement, the FAA's saving clause nevertheless allows for generally applicable contract challenges to arbitration agreements that contain class action waivers, such as challenges to the agreement's formation as a whole. Another such generally applicable challenge is discussed in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000). Those cases allow challenges to contract terms pertaining to the special costs and procedures of arbitration that do not exist in court and that may preclude the vindication of federal statutory rights in a particular arbitral forum.

Contrary to the Second Circuit's opinion in this case, however, the "vindication" principle discussed in *Mitsubishi* and *Green Tree* does not consider the *inherent* costs of proving a claim, whether on an individual or classwide basis. Those costs would apply as much in court as they would in arbitration. The vindication principle, by contrast, compares the costs and procedures in arbitration with those applicable in court to determine whether an arbitration agreement has imposed special costs or burdens, such as arbitrators' fees or the deprivation of a substantive federal remedy, that

may create an unreasonable alternative forum for the adjudication of federal claims.

Plaintiffs do not challenge the special costs of arbitration under the agreement. Nor do they argue that the agreement deprives them of a substantive federal remedy. Instead, they dispute only the consequences of enforcing the class action waiver with respect to the inherent costs of proving their claims. Their challenge therefore fails under *Green Tree* and *Mitsubishi*. But their challenge also fails under both *Concepcion* and *CompuCredit*. *Concepcion* held that judicial concern for the small-value claimant cannot override the FAA's mandate enforcing class action waivers. *CompuCredit* held that only Congress can override that mandate, such as by creating a substantive, unwaivable right to seek a class action. The combined effect of the decisions in *Green Tree*, *Mitsubishi*, *Concepcion*, and *CompuCredit* therefore establishes that enforcement of a class action waiver does not create cognizable arbitration "costs" for purposes of a vindication challenge. Consequently, the Second Circuit has misinterpreted *Green Tree* as creating an end-run around the FAA, *Concepcion*, and *CompuCredit*.

Concepcion does not, however, preclude *all* coordinated efforts to enforce the rights of parties with small-value claims. For example, nothing in *Concepcion* should prevent similarly situated parties who are subject to class action waivers from pooling their resources and organizing their efforts to arbitrate their related individual claims. Nor should *Concepcion* preclude *public* enforcement of the rights of individuals who are subject to class action waivers, such as through the States' attorneys general in their capacity as *parens patriae*, and with

the assistance, if necessary, of private law firms retained on a contingent-fee basis. Such alternative means of enforcing small-value claims should prevent them from slipping through the legal cracks.

ARGUMENT

I. ABSENT A CONTRARY CONGRESSIONAL COMMAND, THE FEDERAL ARBITRATION ACT REQUIRES ENFORCEMENT OF A CLASS ACTION WAIVER IN THE ARBITRATION OF FEDERAL STATUTORY CLAIMS.

In this case, the Second Circuit has restricted this Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), to its immediate facts, namely the arbitration of state law claims, and, even further, 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 generally applicable defense. *Id.*

The Second Circuit has misinterpreted *Concepcion*. That case is broadly based on the core purpose of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), that arbitration agreements must be enforced according to their terms to ensure streamlined, individual proceedings. See *Concepcion*, 131 S. Ct. at 1748. That core purpose must be honored wherever the FAA applies,

regardless of the source of the underlying statutory claim or the basis of a challenge to the class waiver. In short, *Concepcion* and related cases establish that the FAA mandates the enforcement of class action waivers in valid arbitration agreements, unless either the arbitration agreement at issue or Congress has expressly provided otherwise.³ 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); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (only “a contrary congressional command” in another federal statute can override FAA’s mandate).

Concepcion establishes that any judicial invalidation of a class action waiver invariably defeats the FAA’s core purpose because it requires the availability of classwide arbitration as a condition of an arbitration agreement’s enforcement. “Requiring the availability of classwide arbitration [in turn,] interferes with fundamental attributes of arbitration and . . . creates a scheme inconsistent with the FAA.” *Concepcion*, 131 S. Ct. at 1748. Compelled classwide arbitration, under any circumstances, transmogrifies the arbitration

³ There may be certain limited “procedural” challenges to a class action waiver, not raised here, that survive *Concepcion*. See *id.*, 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.”).

process as conceived under the FAA and the parties' agreement, by manufacturing a legion of intractable procedural and legal complexities that defeat the informality of the arbitral process. *Id.* at 1751-53.

Contrary to the Second Circuit's opinion in this case (*In re Am. Express*, 667 F. 3d at 219), neither the FAA nor *Concepcion* would permit a class action in court as a permissible means to avoid nonconsensual classwide arbitration when a court invalidates a class action waiver. This is so because the FAA requires courts to enforce the parties' basic choice to resolve their disputes in arbitration and not in court. *See Concepcion*, 131 S. Ct. at 1745 (discussing FAA's "liberal federal policy favoring arbitration"). Under *Concepcion*, an arbitration agreement cannot be invalidated because of the class action waiver. The operative dichotomy under the FAA is therefore between individual and class arbitration, and *not* between individual arbitration and a judicial class action. As one court astutely observed, "[i]t would be anomalous indeed if the FAA--which promotes arbitration--were offended by imposing upon arbitration nonconsensual [class action] procedures that interfere with arbitration's fundamental attributes, but not offended by *the nonconsensual elimination of arbitration altogether.*" *Cruz v. Cingular Wireless*, 648 F.3d 1205, 1213 (11th Cir. 2011) (emphasis added).

Also contrary to the Second Circuit's opinion (*In re Am. Express*, 667 F. 3d at 214), *Concepcion* establishes that the class action waiver falls outside the scope of the FAA's saving clause, contained in 9 U.S.C. § 2.⁴ That provision allows parties to

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

challenge arbitration agreements 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, such as fraud, duress, or unconscionability”) (citation and internal quotation marks omitted).

Concepcion removes the class action waiver from the FAA’s saving clause because any invalidation of the class waiver, even under a general contract defense requiring a case-specific determination, would “rely on the uniqueness of an agreement to arbitrate,” i.e., its streamlined simplicity, as a basis for invalidating the arbitration agreement. *Concepcion*, 131 S. Ct. at 1747. As this Court has explained, the FAA’s saving clause cannot be interpreted to defeat the FAA itself:

Although § 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve . . . rules that stand as an obstacle to the accomplishment of the

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.

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 quotation marks omitted) (emphasis added).

Indeed, only Congress, and not the courts, has the power to make the policy choice to override the FAA’s mandate. 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 v. Greenwood*, 132 S. Ct. at 669 (citations and internal quotation marks omitted) (emphasis added).

CompuCredit illustrates that only express statutory language precluding or limiting the arbitration of claims can override the FAA’s mandate. *See CompuCredit*, 132 S. Ct. at 669, 673 (where statute provided “right to sue,” and stated that any waiver of rights “shall be treated as void,” statute “*is [nevertheless] silent* on whether claims under the [statute] can proceed in an arbitrable forum, [and therefore] the FAA requires the arbitration agreement to be enforced according to its terms.”) (emphasis added). *See also id.* at 672 (discussing other federal statutes that do expressly bar or limit arbitration of claims).

The real question here, then, is whether the Sherman Act, 15 U.S.C. §§ 1-15, contains a “contrary

congressional command” to override the FAA’s strong mandate enforcing class action waivers.⁵ The Sherman Act makes no mention whatsoever of class actions or of arbitration agreements. Nor do the plaintiffs argue to the contrary. See *In re Am. Express*, 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 . . .”). And even if the Sherman Act did provide a right to seek collective action, that alone would not create an *unwaivable* statutory right to a class action necessary to satisfy *CompuCredit* and defeat *Concepcion*. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (federal statutory right to seek class action is waivable procedural right under FAA). See also *CompuCredit*, 132 S. Ct. at 670 (“If the mere formulation of the cause of action in this standard fashion were sufficient to establish the ‘contrary congressional command’ overriding the FAA, valid arbitration agreements covering federal causes of action would be rare indeed.”) (citation omitted).

The only available class action mechanism in this case would therefore arise under Fed. R. Civ. P. 23, which readily fails *CompuCredit* because Congress has defined Rule 23’s limited procedural purpose in its statute of origin, the Rules Enabling Act. That statute mandates that “[s]uch rule[] shall not abridge, enlarge or modify any substantive right” 28 U.S.C. §2072(b). See also *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S.

⁵ It is well established that federal antitrust claims are arbitrable. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

Ct. 1431, 1443 (2010) (plurality opinion) (“A class action . . . merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. . . . [I]t leaves the parties’ legal rights and duties intact and the rules of decision unchanged.”) (emphasis added). Therefore, the FAA’s broad mandate enforcing class action waivers must apply to plaintiffs’ federal antitrust claims.

As this Court acknowledged in *CompuCredit*, however, Congress has the last word on the meaning of the FAA and its application to other federal statutes. And indeed Congress has already taken steps after *Concepcion* to reevaluate the wisdom of enforcing arbitration agreements with respect to consumer claims, employment claims, and civil rights claims.⁶ However, unless and until Congress

⁶ For example, immediately after *Concepcion* was decided, members of Congress reintroduced the proposed Arbitration Fairness Act, after the bill had remained in committee in 2007 and 2009. See Arbitration Fairness Act of 2011, S. 987, 112th Cong.; H.R. 1873, 112th Cong. (referred to S. Comm. on the Judiciary, May 12, 2011), available at <http://www.govtrack.us/congress/bills/112/s987>; <http://www.govtrack.us/congress/bills/112/hr1873> (as visited Dec. 26, 2012). See also Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. Chi. L. Rev. 623, 652 (2012) (discussing same). This bill “[d]eclares that no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, or civil rights dispute.” S. 987, H.R. 1873. Moreover, members of Congress have introduced another bill that proposes to amend the FAA “to exclude from the definition of ‘commerce’ all contracts of employment” and “[d]eclare[] that no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute.” H.R. 4181, 112th Cong. (referred to S. Comm. on the Judiciary, Mar. 8, 2012), available at <http://www.govtrack.us/congress/bills/112/hr4181> (as visited

provides otherwise, *Concepcion* instructs that class action waivers must be enforced in the arbitration of federal statutory claims.

This is not to say, however, that *Concepcion* immunizes arbitration agreements with class action waivers from generally applicable contract defenses. To the contrary, *Concepcion* honors the FAA's saving clause and therefore leaves undisturbed general contract defenses that pertain to aspects of an arbitration agreement other than the class action

Dec. 26, 2012). As of the filing of this brief, these bills are still in committee.

On another front, Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. §§ 5301-5641, creates the Consumer Financial Protection Bureau ("CFPB"), "an independent bureau within the Federal Reserve designed to protect consumers in their transactions with banks, credit card companies, mortgage brokers, and other financial institutions." Gilles & Friedman, *After Class*, 79 U. Chi. L. Rev. at 654 (discussing 12 U.S.C. §§ 5511-5603). In particular, the Dodd-Frank Act requires the CFPB to conduct a study on the use of predispute arbitration agreements in consumer financial transactions, and to submit a completed study to Congress. *See* 12 U.S.C. § 5518(a). The CFPB also has the delegated rule-making authority, consistent with the findings of its study, to "prohibit or impose conditions or limitations on the use of" such predispute arbitration agreements, "if the [CFPB] finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers." 12 U.S.C. § 5518(b). The CFPB launched its study on April 24, 2012, and it is still in progress. *See*

<http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-launches-public-inquiry-into-arbitration-clauses/>;
<http://www.cfpbmonitor.com/tag/arbitration/> (as visited Dec. 26, 2012).

waiver. *See Concepcion*, 131 S. Ct. at 1746. That is, *Concepcion* recognizes that the FAA contemplates arbitration as a reasonable private forum for the adjudication of individual disputes.

For example, a party could still challenge, post-*Concepcion*, the formation of the arbitration agreement as a whole. *See id.*, 131 S. Ct. at 1755 (Thomas, J., concurring) (discussing formation defenses of fraud, duress, and mutual mistake) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967)). *See also Marmet Health Care Ctr. v. Brown*, 132 S. Ct. 1201, 1204 (2012) (referring approvingly to state’s general unconscionability defense while instructing state supreme court, on vacatur and remand, to reconsider decision invalidating agreement to arbitrate wrongful death claim “under state common law principles that are not specific to arbitration and pre-empted by the FAA”).

Concepcion would also not disturb a party’s ability to challenge the terms of an arbitration agreement pertaining to the special costs and procedures of arbitration that do not exist in court and that may impede the vindication of federal statutory rights in a particular arbitral forum. *See Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 84, 90-91 (2000) (discussing challenge to contractual arbitration costs, such as filing fees and arbitrators’ fees); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636-37 & n.19 (1985) (discussing availability in arbitration of statutory treble-damages remedy under Sherman Act).⁷

⁷ Amicus discusses *Mitsubishi* and *Green Tree* more extensively in Part II, below, which addresses the “vindication of federal

Concepcion makes clear, however, that enforcement of a class action waiver is essential to serve the FAA's mandate of honoring party autonomy in the crafting of informal procedures for the private resolution of individual disputes. *See id.*, 131 S. Ct. at 1749. Contrary to the Second Circuit's opinion in this case, courts have no independent authority to refuse to enforce a class action waiver. This principle remains constant, regardless of the statutory claim that is subject to the class waiver, and regardless of the basis for challenging the class waiver--whether it is a rigid, *per-se* rule (such as the *Discover Bank* rule at issue in *Concepcion*) or 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*, 648 F.3d at 1214.

II. 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. This is so notwithstanding the resulting costs of

statutory rights" principle and its harmonization with *Concepcion* and *CompuCredit*.

arbitrating a claim on an individual basis. *See id.*, 131 S. Ct. at 1753 (rejecting argument of the “small-dollar” claimant). That is, judicial concern for the prosecution of small-value claims, in which the individual’s anticipated cost of proof exceeds his or her likely recovery, must yield to the FAA’s mandate. And *CompuCredit* holds that only Congress, and not the judiciary, can make the policy choice to relax the FAA’s mandate with respect to federal statutory claims.

And yet, despite this Court’s clear precedent, the Second Circuit has nevertheless invalidated the class action waiver here based precisely on the argument of the small-value claimant rejected in *Concepcion*. The lower court concluded that “the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action,” based on a record showing high anticipated expert costs and relatively low anticipated individual damages. *In re Am. Express*, 667 F. 3d at 218.⁸

The Second Circuit based its holding on its interpretation of this Court’s decisions in *Mitsubishi* and *Green Tree*, discussed above. *See In re Am. Express*, 667 F.3d at 214 (arbitration agreement enforceable “so long as the prospective litigant may *effectively* vindicate its statutory cause of action in the arbitral forum.”) (quoting *Mitsubishi*, 473 U.S. at 632 (emphasis added by Second Circuit)). In particular, the lower court concluded that *Green Tree*

⁸ In particular, plaintiffs submitted an expert’s affidavit estimating the cost of an expert economic study, ranging from several hundred thousand dollars to over \$1 million. *In re Am. Express*, 667 F. 3d at 218. By contrast, the estimated individual damages range from \$5,252 to \$38,549. *Id.*

would allow a discretionary judicial exception to the FAA's mandate when a class action waiver applies to the arbitration of federal statutory claims, and the plaintiff shows that enforcement of the class waiver would result in "prohibitively expensive costs" of individual proof. *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).

The Second Circuit has misinterpreted *Mitsubishi* and *Green Tree*. Contrary to the Second Circuit's view, those cases do not address the *inherent* costs of proving a claim, whether on an individual or classwide basis. Those costs are not created by an arbitration agreement and would apply as much in court as they would in arbitration. Instead, the "vindication" inquiry compares the arbitral forum with the judicial forum and asks whether an arbitration agreement imposes special costs or burdens, such as arbitrators' fees or the deprivation of a substantive federal remedy, that would not exist in court and that could therefore make arbitration a comparatively inaccessible or ineffective forum. *See Green Tree*, 531 U.S. at 84, 91 (discussing challenge to contractual arbitration costs, such as filing fees and arbitrators' fees); *Mitsubishi*, 473 U.S. at 636-37 & n.19 (discussing availability in arbitration of statutory treble-damages remedy under Sherman Act). *See also* Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets The Class Action*, 86 Notre Dame L. Rev. 1069, 1124 (2011) ("The question under

Green Tree is whether the difference between litigation and arbitration at hand makes the latter forum cost ‘prohibitive’ . . .”).

Otherwise put, the disputed costs in *Green Tree* pertained solely to the contractual “price of admission” to arbitration, namely the payment of arbitration filing fees, arbitrators’ fees, and other special arbitration expenses. *See Green Tree*, 531 U.S. at 84, 91 (dismissing as “too speculative” plaintiff’s challenge to potentially prohibitive arbitration costs: “the arbitration agreement was [merely] silent with respect to payment of *filing fees, arbitrators’ costs, and other arbitration expenses.*”) (emphasis added). *See also 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 discussion of “large” or “prohibitive” arbitration costs, 531 U.S. at 90-91, is a particular application of this Court’s “vindication” language that appeared in *Mitsubishi*. *See id.*, 473 U.S. at 637. In *Mitsubishi*, the Court explained that an arbitration agreement under the FAA is a kind of forum selection clause, 473 U.S. at 630, which creates a presumptively reasonable alternative private forum for the vindication of federal statutory rights. *See id.* 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.”).

Mitsubishi focused on the contractual terms governing the arbitral proceedings and discussed the

availability of a substantive statutory remedy--treble-damages under the Sherman Act. *See 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 has thus been applied to the contractual "price of admission" to arbitration and to the availability of substantive statutory remedies in arbitration.

Plaintiffs here dispute neither the "price of admission" to arbitration nor the deprivation of any substantive federal remedy under the agreement.⁹ Instead, they dispute only the consequences of enforcing the class action waiver with respect to the inherent costs of proving their claims. Their challenge therefore fails under *Green Tree* and *Mitsubishi*. But their challenge also fails under both *Concepcion* and *CompuCredit*. *Concepcion* held that judicial concern for the small-value claimant cannot override the FAA's mandate enforcing class action waivers. *Id.*, 131 S. Ct. at 1753. And *CompuCredit* held that only Congress can override that mandate, such as by creating a substantive, unwaivable right to seek a class action. *See CompuCredit*, 132 S. Ct. at 669.

The combined effect of the decisions in *Green Tree*, *Mitsubishi*, *Concepcion*, and *CompuCredit* therefore establishes that enforcement of a class action waiver here does not create cognizable

⁹ As amicus has argued in Part I, above, there is no "contrary congressional command" creating a substantive, unwaivable right to seek a class action in this case. *See CompuCredit*, 132 S. Ct. at 669.

arbitration “costs” for purposes of a vindication challenge. The Second Circuit has consequently misapplied this Court’s precedent by concluding that judicial concern for the small-value claimant can defeat the FAA’s mandate in the arbitration of federal statutory claims. The Second Circuit has misinterpreted *Green Tree* as creating an end-run around the FAA, *Concepcion*, and *CompuCredit*.

Finally, *Green Tree* is inapposite here because, unlike the variable, contractual costs of arbitration discussed in that case, the class action waiver is not so much a creature of contract as it is a salient default feature of arbitration under the FAA, which envisions arbitration on an individual basis. See *Concepcion*, 131 S. Ct. at 1751, 1753. As noted above, parties must clearly agree to override this potent default term. See *Stolt-Nielsen*, 130 S. Ct. at 775. And even consensual classwide arbitration is *not* arbitration as contemplated by the FAA. *Concepcion*, 131 S. Ct. at 1753. In short, bilateral arbitration is part of the very fabric of arbitration under the FAA. Any adverse financial consequences flowing from enforcement of this default term should not be treated as the special costs of arbitration that are imposed by a particular agreement under a *Green Tree* analysis.

In sum, this Court’s related precedent in *Concepcion*, *CompuCredit*, *Green Tree*, and *Mitsubishi* establish the clear legal principle that the financial consequences of enforcing a class action waiver can only be addressed by Congress, and not by the judiciary. Contrary to the Second Circuit’s opinion, the vindication principle is limited to the special costs or burdens of arbitration that are imposed by agreement and that do not exist in court.

Such a harmonious interpretation of these related cases is necessary to honor the FAA's mandate, preserve the separation of powers, and preserve the strong federal presumption that an arbitration agreement creates a reasonable alternative forum for the vindication of federal statutory rights.

III. CONCEPCION DOES NOT BAR ALL COORDINATED EFFORTS TO ENFORCE THE RIGHTS OF SMALL-VALUE CLAIMANTS.

As argued above, *Concepcion*, *CompuCredit*, *Green Tree*, and *Mitsubishi* defeat the Second Circuit's decision invalidating the class action waiver. Quite apart from these legal arguments, however, amicus takes issue with the Second Circuit's rationale as a factual and practical matter. Is a class action really the only "economically feasible means for plaintiffs enforcing their statutory rights"? *In re Amex*, 667 F. 3d at 218.

Amicus thinks not. For example, *Concepcion* would not prevent similarly situated parties who are subject to a class action waiver from communicating with each other about their related claims and pooling their resources to hire a lawyer, fund expert fees, and share other costs associated with proving their claims. See Jacob Spencer, Note, *Arbitration, Class Action Waivers, and Statutory Rights*, 35 Harv. J.L. & Pub. Pol'y 991, 1013 (2012) (responding to Second Circuit's conclusion in this case and suggesting "other economically feasible means of proceeding," such as where "similarly-situated plaintiffs could agree to split the costs of expert witnesses."). While the class action waiver requires that the parties proceed individually in the

arbitration of their claims, the class waiver says nothing about how the parties may *prepare* for their individual arbitrations.

Moreover, plaintiffs here are businesses and should be able to coordinate their arbitration efforts with relative ease. As the attorney who argued before this Court in *Concepcion*, on behalf of AT&T Mobility, has observed, “[i]n the context of *American Express*, where the potential claimants are organized businesses, there is a ready means for identifying and soliciting large numbers of antitrust claimants to file individual claims across which litigation costs can be manageably shared.” Andrew Pincus, *Concepcion and the Arbitration of Federal Claims*, Bloomberg L. (Feb. 29, 2012), at 3 (*available at* <http://www.mayerbrown.com/files/News/1b626009-2094-4d25-9a7b-dcc66a8bb6f6/Presentation/NewsAttachment/ed97993b-6f30-4e7a-b121-bdebb8a4c6bc/2%2029%2012%20-%20concepcion%20and%20the%20arbitration.pdf> (as visited December 26, 2012)). And the vast resources of the internet should provide an accessible and convenient means for similarly situated parties in other kinds of cases to coordinate their arbitration efforts.

In short, there are many creative ways, unaffected by *Concepcion*, by which similarly situated claimants could combine forces and share the costs and burdens of proving their related claims, thereby overcoming the difficulties that the class action waiver may present to small-value claimants.

It should also be noted that *Concepcion* would not affect broad *public* enforcement of the statutory

rights of individuals who are subject to class action waivers, including the securing of victim-specific monetary relief. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295-96 (2002) (employee’s arbitration agreement did not bar EEOC from seeking victim-specific relief). In fact, Congress has expressly authorized the States’ attorneys general, in their capacity as *parens patriae*, to enforce federal antitrust laws and seek treble damages, injunctive relief, and reasonable attorneys’ fees on behalf of their respective citizens.¹⁰

Quite apart from this express statutory grant, the Court has held that the *parens patriae* doctrine confers standing upon States’ attorneys general to sue in federal court to enforce the federal statutory rights of their constituents whenever a State’s “quasi-sovereign” interests are implicated, which include a state’s “interest in the health and well-

¹⁰ 15 U.S.C. § 15c provides, in relevant part:

(a) *Parens patriae*; *monetary relief*; *damages*; prejudgment interest

(1) Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure *monetary relief* as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title. . . .

(2) The court shall award the State as monetary relief *threefold the total damage* sustained as described in paragraph (1) of this subsection and the cost of suit, including a reasonable attorney’s fee.

(emphasis added).

being--both physical and economic--of its residents in general.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982). See also Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. Chi. L. Rev. 623, 663 (2012) (“[A]s a general matter, courts have allowed states to sue in *parens patriae* under federal statutes that create broad private rights of action but [that] are silent on the capacity of AGs, including Title VII of the Civil Rights Act of 1964, 42 USC § 1983, the Fair Housing Act, and the Americans with Disabilities Act, among others.”) (footnotes and internal quotation marks omitted). And, of course, States’ attorneys general have broad powers, under their respective State statutes and common law principles, to bring *parens patriae* suits in State courts and recover damages on behalf of their respective citizens. See Dwight R. Carswell, Comment, *CAFA and Parens Patriae Actions*, 78 U. Chi. L. Rev. 345, 347-48 (2011) (discussing same).

When States’ attorneys general lack the public resources necessary to litigate certain *parens patriae* suits, they have engaged the skilled services of private law firms, on a contingent-fee basis, to assist them in their enforcement actions. See Gilles & Friedman, *After Class*, 79 U. Chi. L. Rev. at 669 (“[S]tate AGs are, by and large, free to leverage the capital resources, expertise, and workforces of the private bar, on a no-cost basis. . . . [T]here is little to stop state AGs from engaging private law firms on a contingent fee basis to pursue claims in *parens patriae* on behalf of injured state residents.”).

Concepcion should not affect these many available *parens patriae* enforcement opportunities.

A State's attorney general is neither a party to an arbitration agreement with a class action waiver nor an agent of a State resident who may be subject to such an agreement. Rather, a State's attorney general is asserting a quasi-sovereign interest as an independent agent of the State. See Gilles & Friedman, *After Class*, 79 U. Chi. L. Rev. at 664-65 (discussing *EEOC v. Waffle House*, 534 U.S. at 295-96).

In sum, there are many viable mechanisms of enforcement that should survive *Concepcion* and would allow for the vindication of the rights of parties with small-value claims. These avenues should ensure that such claims do not slip through the legal system.

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court reverse the judgment of the Second Circuit.

Respectfully submitted,

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