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 THE STATE OF OHIO AND 21 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a private antitrust plaintiff is entitled to pursue an enforcement action in federal court, despite an arbitration clause in an agreement between the plaintiff and defendant, where the arbitration clause effectively bars cost-sharing with other plaintiffs and the claim undisputedly requires prohibitively costly expert fees, such that the plaintiff overcomes a presumption favoring arbitration by showing that it cannot "effectively [] vindicate its federal statutory rights in the arbitral forum." *Green Tree Fin. Corp. – Ala. v. Randolph*, 531 U.S. 79, 90 (2000).

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INTRODUCTION

No one doubts the importance of arbitration, and no one doubts the Court's and the Federal Arbitration Act's commitment to "ensur[ing] that private arbitration agreements are enforced according to their terms." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

At the same time, the Court has undoubtedly established an outer limit to that commitment: The arbitral forum is honored only "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614, 637 (1985); *Green Tree Fin. Corp. – Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (same). If such "effective vindication" of a claim is impossible in arbitration, a clause nevertheless demanding arbitration would amount to "a prospective waiver of a party's right to pursue statutory remedies," and the Court has indicated that it "would have little hesitation in condemning the agreement as against public policy." *Mitsubishi*, 473 U.S. at 637, n.19.

Here, the Court should affirm that this "effective vindication" requirement—though not easily invoked as a means to avoid arbitration—remains a vital principle. Nothing in the Court's arbitration cases has eliminated it, and the Court should not do so now.

Further, the Court should hold that this is, in fact, the rare case in which plaintiffs have shown that their rights cannot be effectively vindicated in arbitration. Here, the unavoidable, million-dollar cost of experts in a complex antitrust case, coupled

with a ban on the cost-sharing that would be enabled by classwide or even multiparty arbitration, amounts to a prohibitive fee on arbitration.

Finally, in assessing the effectiveness of vindicating an antitrust claim, the Court should consider the unique status of antitrust, in which every "private" case is designed to protect a broader public interest. That is not to say that antitrust claims are automatically exempt from arbitration, but only that their nature should be considered as part of a practical assessment of what "effective vindication" means. It means that the public interest in competition should be protected, and that interest is why the amici States support this cause.

STATEMENT OF AMICI INTEREST

The Amici States, along with private plaintiffs and the federal government, are part of a multipronged antitrust enforcement scheme. Petitioners' position threatens to weaken private enforcement—a key component of that scheme—and thus to erode the States' ability to protect their citizens and economies.

Congress passed the Sherman Act, 15 U.S.C. § 1 et seq., to recognize the importance of maintaining a competitive economy in the United States. *Mitsubishi,* 473 U.S. at 635. In order to ensure the statute's effective enforcement, lawmakers empowered federal agencies to pursue both criminal and civil sanctions against violators. *Id.* at 652. Moreover, Section 4C of the Clayton Act authorizes state attorneys general to bring civil antitrust actions for treble damages on behalf of the citizens of their respective states. 15 U.S.C. § 15c (a).

Not content to rely solely on government enforcement, however, Congress created a right of private action under the federal antitrust laws, to further the broad objectives of the law by both redressing private wrongs and protecting the public interest. *Mitsubishi Motors,* 473 U.S. at 635 (private cause of action plays central role in antitrust regime). The Court has recognized that enabling private antitrust enforcement "stimulates one set of private interest to combat transgressions by another without resort to government enforcement agencies," thus saving government the often hefty cost of antitrust litigation. *Bruce's Juices, Inc. v. American Can Co.,* 330 U.S. 743, 751 (1947).

A ruling in favor of Petitioners American Express Company, et al. ("AmEx"), threatens to disturb the enforcement balance that Congress created, increase the burden on government antitrust enforcement agencies, and materially harm the public interest.

SUMMARY OF ARGUMENT

The Court has repeatedly explained that arbitration clauses are enforced only "'[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum.'" *Gilmer*, 500 U.S. at 28, quoting *Mitsubishi*, 473 U.S. at 637. The Court discussed the principle in *Mitsubishi* and applied it in both *Randolph* and *Gilmer*. In *Randolph,* the Court further specified that "effective vindication" could be precluded if a prospective litigant faced "the existence of large arbitration costs."

That rule remains a vital one, and the Court said nothing to undermine that rule in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), or *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Those cases did involve the unavailability of classwide arbitration, but neither involved the issue here regarding the effective-vindication rule. The Court should not abolish or restrict the effective-vindication rule now, as it serves the important purpose of protecting statutory rights and ensuring that arbitration commitments do not amount to advance waivers of substantive rights.

Here, the costs at issue do preclude effective vindication in arbitration, as the antitrust claims at issue could not be pursued without significant expert expenses. The ban on classwide or multiparty arbitration forces a sole plaintiff to bear expert costs alone. That barrier to cost-sharing renders those expenses a cost unique to arbitration. In other words, if litigation allows cost-sharing and arbitration does not, then the cost is arbitration-specific.

Finally, antitrust's unique nature should be considered in assessing "effective vindication." No "private" antitrust claim is truly private, and true vindication involves protection of competition and consumer interests, not merely an individual competitor's economic interests.

ARGUMENT

A. Federal law allows courts to approve court litigation, despite an arbitration clause, when necessary to "effectively vindicate" federal statutory rights.

The Court has repeatedly explained that arbitration clauses need not be enforced when a party shows that it cannot "effectively vindicate" federal statutory rights in the arbitral forum. None of the Court's cases enforcing arbitration clauses has eliminated that exception, nor should the Court now eliminate this critical safety valve.

1. *Mitsubishi, Randolph,* and *Gilmer* all preserve the right to litigate outside the arbitral forum when necessary.

The Court first described the "effective vindication" principle in *Mitsubishi,* 473 U.S. 614. While the explanation was dicta, it provided the road map for application in later cases. The *Mitsubishi* Court said that an arbitral forum was proper "so long as the prospective litigant may effectively vindicate its statutory cause of action in the arbitral forum." *Id.* at 637. The *Mitsubishi* Court further noted that if an arbitration clause amounted to "a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, [the Court] would have little hesitation in condemning the agreement as against public policy." *Id.* at 637 n.19.

The Court applied this "effective vindication" rule as a holding in *Gilmer*, 500 U.S. 20. In *Gilmer*, the plaintiff sought to overcome enforcement of an arbitration clause as to his Age Discrimination in

Employment Act claim. *Id.* at 27. He argued that he could not effectively vindicate his rights in arbitration.

The *Gilmer* Court confirmed that *Mitsubishi*'s "effective vindication" principle was a governing rule, *id.* at 28, and it proceeded to weigh the plaintiff's objections to arbitration. For example, the plaintiff complained that arbitrators might not issue written opinions, and that therefore the public would not know about the alleged discrimination. *Id.* at 31-32. The Court rejected that objection, noting that the regime at issue did "require that all arbitration awards be in writing, and that the awards contain the names of the parties, a summary of the issues in controversy, and a description of the award issued." *Id.* The Court added that "the award decisions are made available to the public." *Id.* at 32. "Furthermore," said the Court, "judicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements." *Id.*

The *Gilmer* Court considered and rejected several other objections that the plaintiff raised, *id.* at 30-32, and so it ultimately enforced the arbitration clause there. In other words, the Court found that the plaintiff *could* effectively vindicate his rights in arbitration, but it allowed the arbitration to proceed only after ensuring that was the case.

The Court again re-affirmed the "effective vindication" rule in *Randolph*, 531 U.S. 79, specifically noting that the costs of arbitration could be a barrier to effective vindication. The *Randolph* Court reiterated the *Mitsubishi*/*Gilmer* formulation

of the rule, and it reasoned that "[i]t may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum." 531 U.S. at 90.

The Court rejected Randolph's attempt to avoid arbitration, however, for the simple reason that Randolph did not *show* that she faced prohibitive costs. "But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter." *Id.*

Thus, while the Court rejected Randolph's attempt, it re-affirmed the "effective vindication" principle, and it reminded future parties that a plaintiff could "invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive," as long as the party meets its "burden of showing the likelihood of incurring such costs." *Id.* at 92. Because Randolph made no showing at all, the Court left open the question of "[h]ow detailed the showing of prohibitive expense must be before requiring the party seeking arbitration [to] come forward with contrary evidence." *Id.*

Taken together, *Mitsubishi, Gilmer,* and *Randolph* all show that the Court has firmly established the "effective vindication" principle as part of the federal substantive law of arbitrability. True, the plaintiffs in both *Gilmer* and *Randolph* failed to meet their burden of showing a barrier to effective vindication, so they failed to overcome the presumption favoring arbitration. But the more important point is not the inquiry's outcome in those cases; it is that the Court *conducted the inquiry.*

While the rule's existence ought not be at issue here—only its application—the Court's reaffirmation of the rule is important because AmEx seeks to diminish the rule's standing as precedent. It rightly notes that the *Mitsubishi* language was dicta, but it then overreaches and claims that *Randolph*'s application of the rule was mere dicta. E.g., Pet. Br. at 10 ("*Randolph*'s 'prohibitive costs' *dicta*"), *id.* at 18 (questioning "[w]hether or not *Randolph*'s *dicta* would ever suggest the crafting of a judicial exception to enforcement of the FAA").

AmEx's characterization of *Randolph* is wrong, as the Court necessarily affirmed the *existence* of the rule in looking to the record to see if Randolph had shown that he faced prohibitive costs. Further, in summarizing its conclusion, the Court compared its treatment of the issue to a parallel *holding* on a parallel issue:

> We have held that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue. . . . Similarly, we believe that where, as here, 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.

Id. at 91-92 (internal citations omitted). That is the language of a holding, not dicta. Finally, the Court further identified as an open issue the quantum of that burden, *id.* at 92, and identifying that narrower

issue as unresolved would make little sense if the rule's very existence were still an open question.

Equally important, even if AmEx could wish away *Randolph* as a holding, that does nothing to eliminate the clear holding of *Gilmer*—a holding that AmEx studiously avoids. AmEx cites *Gilmer* only for undisputed statements about the importance of arbitration generally, Pet. Br. at 3, 52, and for *Gilmer*'s reference to the unavailability of class arbitration in the scheme at issue there, *id.* at 9, 10, 22, 23. But nowhere does AmEx note *Gilmer*'s endorsement and application of the effective vindication rule. Nor does AmEx ever acknowledge the rule's existence.

Further, although AmEx never fully acknowledges that the rule ever existed, AmEx also suggests that the Court has already interred the "effective vindication" rule in *Stolt-Nielsen* and *Concepcion*. But, as shown below, those cases did nothing to undermine the rule.

2. Nothing in *Stolt-Nielsen* or *Concepcion* abolishes the narrow exception allowing litigation for "effective vindication" of rights.

AmEx repeatedly suggests that this case has already been resolved, in its favor, in *Stolt-Nielsen* and *Concepcion*. Not so.

First, neither case even mentions the "effective vindication" rule. Indeed, neither case cites *Randolph* at all, and each cites *Gilmer* just once, on other points. *Stolt-Nielsen*, 130 S. Ct. at 1775; *Concepcion*, 131 S. Ct. at 1749. Second, neither case involved the issue of vindicating federal

statutory rights, or the issue of avoiding arbitration altogether in order to achieve such vindication. In *Stolt-Nielsen,* the Court rejected an attempt to impose classwide arbitration, contrary to the parties' intent for any arbitration to be bilateral only. 130 S. Ct. at 1776. That makes sense, as the arbitral forum there was not designed to accommodate such a procedure. But refusing to impose class procedures within arbitration is distinct from allowing normal class action litigation to proceed in court. And in *Concepcion,* the Court rejected a state-law rule that forbade *all* class-action waivers as per se unconscionable. 131 S. Ct. at 1750-51. That rule against blanket waivers is entirely consistent with a case-specific assessment of whether effective vindication of a certain claim is possible in a particular arbitration scheme.

Indeed, properly understood, *Concepcion* supports Italian Colors, not AmEx. That is so because *Concepcion,* while refusing to impose class arbitration on an entire category of cases, also did not categorically reject arbitration in a class of cases. It left untouched the safety valve of the case-specific effective-vindication rule. AmEx essentially seeks the same type of overbroad categorical rule, but on the other side, asking the Court to bless *all* arbitration clauses without even conducting an effective-vindication inquiry. The Court should again reject such a categorical approach in favor of the type of scrutiny that preserves both the importance of arbitration and the need for the occasional limit.

3. The Court should not abolish the "effective vindication" rule.

The Court also should reject any attempt to abolish the "effective vindication" rule. AmEx does not expressly request such abolition (perhaps because it never fully accepts the rule's existence in the first place), but it implicitly does so.

For example, AmEx complains that litigants will far too easily escape arbitration, because, it says, anyone can find an expert to testify that the costs of arbitration will be prohibitive. Pet. Br. at 31-34. But this objection, by its nature, seeks invalidation of *any* exception on effective-vindication grounds, as it goes to the rule's existence, not to the quantum-of-proof level that the Court sets.

Likewise, AmEx complains that even if the party seeking arbitration prevails, the value of an arbitration clause is lost if the parties engage in collateral litigation about whether the clause applies. *Id.* at 33. At first blush, that might seem a fair point, as overbroad collateral litigation can have that effect. But the existence of *some* such litigation inheres in *any* type of exception to an arbitration clause. Indeed, what AmEx objects to is precisely what this Court did in *Randolph* and *Gilmer* before rejecting the attempts to avoid arbitration in those cases—it *considered* them. The only way to avoid fully such "collateral litigation" would be to approve arbitration clauses blindly without any examination on effective-vindication grounds of any sort. The Court should decline any such invitation.

Indeed, while the Amici States also support the application of the "effective vindication" rule

here, as explained below, our more important purpose is to urge the Court to retain the rule. That is, even if the Court finds that Italian Colors has not discharged its burden here, the Court should, as it did in *Gilmer* and *Randolph,* reiterate that arbitration cannot be imposed when no effective vindication is possible. It should leave the door open for future plaintiffs to at least have their partial day in court, to try to show why they deserve a full day in court.

B. The plaintiffs here showed that their rights could not be effectively vindicated in the arbitral forum.

The Court should affirm not only that the effective-vindication rule is alive and well, but also that Plaintiffs here met their burden of showing that their statutory rights could not be effectively vindicated in the arbitral forum provided in their agreement with AmEx.

As the Second Circuit explained below, the "evidence presented by plaintiffs here establishes, as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." Pet. App. 25a. On the cost side, Plaintiffs showed that their antitrust claim would require expert economists to show how the "honor all cards" policy amounted to a harmful tying arrangement; in particular, expertise would be needed to show the actual harm. Plaintiffs' expert on litigation costs testified that meeting this need would cost hundreds of thousands of dollars, perhaps reaching one million dollars. *Id.* at 25a-26a. On the recovery side, Plaintiffs showed that a typical recovery would be $1500-5000, and even the largest merchant's recovery would be "$12,850, or $38,549 when trebled." *Id.* at 26a. Thus, it would not be rational for any sole plaintiff to pursue bilateral arbitration.

Notably, AmEx does not seriously dispute the accuracy of plaintiffs' numbers in either part of the equation. It does not challenge the likely recovery amounts. It does not challenge the high costs needed for success, and more important, it does not allege

that success could be achieved with a budget less than the expected recovery range.

Instead, AmEx argues that proven expert costs, such as those here, should be categorically excluded from any effective-vindication formula. Pet. Br. at 40-45. AmEx insists that this Court's precedent requires consideration only of costs expressly imposed for *access* to the arbitral forum, such as an arbitrator's fee. *Id.* at 42. It says that the costs at issue do not fit under that umbrella, because they are not required for "accessing an arbitral forum," even if those costs "make it uneconomical to bring an individual claim." *Id.*

AmEx's view of countable costs, limited to "access" costs, is wrong as a matter of both precedent and common sense. First, the rule at issue is about *effective vindication* of rights. If a given scheme allows for only futile access, where a plainitff with a viable claim walks in the door predestined to lose, it cannot be said that the rights are effectively vindicated. Second, while the Court did discuss arbitral fees in *Randolph,* 531 U.S. at 91 n.6, it did so only after referring to the possibility that effective vindication could be precluded by "the existence of large arbitration *costs*" *id.* at 90 (emphasis added). Nowhere did the Court expressly or logically tie those costs to access fees.

Indeed, the expert costs here are, in effect, an arbitral-specific form of fee, precisely because the bar on classwide or multiparty arbitration would force any sole arbitrating plaintiff to bear the cost alone. In class litigation in court, the cost of an expert can be spread across the recovering class, or at least among joined plaintiffs without class certification.

But in arbitration, any plaintiff must bear the cost by itself. That is functionally equivalent to an entrance fee, however it is titled.

The costs here are also akin to an entrance fee because they are necessary to establish "antitrust injury," which is a threshold standing requirement unique to antitrust claims. That is, a private antitrust claimant must show not only that he was harmed and that his harm was caused by the alleged violation, but he must also specifically show that he suffered "injury of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts illegal." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Thus, a private antitrust plaintiff in a case such as this not only faces heavy costs in trying to win his claim in arbitration, but often, he also faces such expenses in clearing this threshold, when, as here, the nature of the injury cannot be shown without expert analysis. And again, those costs cannot be shared or otherwise recouped under this particular arbitration scheme.

None of this is to say that the ban on class arbitration per se renders the arbitration clause unenforceable. After all, any claims that involve higher recovery, or lower costs to succeed, remain perfectly arbitrable in bilateral, non-class arbitration. Also, arbitration schemes that allow for cost-shifting or cost-sharing might effectively accommodate claims that are expensive to advance. Here, it is only the combination of factors—the sole-party requirement, the barriers to cost-shifting or cost-sharing, and the cost/recovery ratio—that

render the claim as a whole unable to be effectively vindicated.

The Court's cases are not only perfectly consistent with this approach, but more important, they exemplify it. For example, in *Gilmer,* as noted above, the Court countered objections about public knowledge of the process by pointing to the specifics of the public information provided there. 500 U.S. at 32. And in *Concepcion,* the Court detailed how the claims there were, in practical reality, quite economical to pursue in arbitration. 131 S. Ct. at 1744-45. The Court recounted the district court's description of how the minimum-recovery amount there, along with the cost-shifting system, made recovery in arbitration not only realistic, but made plaintiffs *better off in arbitration* than in court litigation. *Id.* Here, the Court should conduct the same pragmatic inquiry, and if it does, it should conclude that the balance tips against arbitration.

AmEx's contrary approach does not merely exclude Italian Colors from pursuing *this* claim, but it functionally amounts to an alternate route to abolishing the effective-vindication exception entirely. That is, under AmEx's conception of what costs count as a preclusive barrier, any arbitration clause will survive, as long as the entrance fee is low, *regardless of the statutory claim at issue or the impossibility of pursuing it.* That would mean that parties would be signing, and facing enforcement of, exactly the type of per se waivers of rights that *Mitsubishi* said would be unenforceable. That is not what the Court has said before, and it is not what the Court should say now.

C. Antitrust law is designed to vindicate the public interest in competitive markets generally, not just a private business's interest, and this goal should be considered in applying the "effective vindication" test.

The Court can and should balance both Congress's FAA policy of fostering arbitration and its Sherman Act goal of encouraging private parties to augment governmental enforcement efforts by bringing antitrust claims to the courts for resolution. In seeking the proper balance between these objectives, the courts have transitioned over the past four decades from exempting antitrust claims outright from arbitration, to the current state of the law, which provides an exception only when necessary to "effectively vindicate" federal statutory rights. While the State Amici are not advocating a return to the *per se* arbitration exception for antitrust claims, we do urge that the special nature of antitrust warrants some consideration in applying the "effective vindication" test. In looking to what rights are being effectively vindicated, courts should account for the public interest that is uniquely at stake in "private" antitrust cases.

Even as the law of arbitrability evolved to allow antitrust disputes to be arbitrated, the courts have never wavered in their recognition of the fact that private antitrust disputes are not truly private. *Mitsubishi Motors,* 473 U.S. at 635, quoting *American Safety Equipment Corp. v. J.P. Maguire & Co.,* 391 F.2d 821, 826 (1968) (claim made under the antitrust laws "is not merely a private matter"). Congress's dual purpose in creating the private right

of action under the federal antitrust laws was to provide redress to injured parties and to protect the public interest. *Id.*

Moreover, unlike most other types of commercial contract disputes that might arguably come within the purview of an arbitration clause, the resolution of antitrust claims is uniquely public-policy driven. It is well-settled that the purpose of the antitrust laws is to protect "competition, not competitors." *Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962). Indeed, even an act of "pure malice" perpetrated by one business against another does not alone state a viable claim under the antitrust laws if the competitive process was not harmed. *Brooke Group v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 225 (1993).

Thus, while the resolution of a contractual dispute over a missed shipment date or of a civil rights claim in an employment dispute may profoundly affect the parties to the dispute, the resolution of an antitrust claim affects the citizens and economy of the entire affected state or region. *Aimcee Wholesale Corp. v. Tomar Prods., Inc.,* 21 N.Y.2d 621, 627, 237 N.E.2d 223 (1968) (wrong decision on defective goods injures the parties to the dispute; wrong decision on an antitrust claim injures "the people of the State as a whole"); *see also American Safety Equipment Corp. v. J.P. Maguire & Co., Inc.,* 391 F.2d 821 (1968) (public interest is "pervasive" in antitrust cases).

The Amici States propose that courts, in applying the "effective vindication" test, consider whether the public interest in a private antitrust claim would be lost if the claim could not be

advanced at all in the arbitral forum, or could not be advanced in a way that effectively vindicates the public interest along with private interest. Such an analysis does no violence to the Congressional policy of encouraging arbitration, but rather best aligns that policy with the goal of fostering competition in the marketplace without frustrating either one.

The details of such consideration will have to be case-by-case, of course, as with the effective-vindication test generally. But at a minimum, it should call for consideration of whether the given claim is likely to be brought at all, as well as whether it will be brought in a way that includes the public interest. That requires a careful analysis of how the particular claim intersects with the particular arbitration scheme.

For example, courts should consider whether the relief available in the arbitral forum would benefit competition, and thus the market as a whole. A court could easily find that the public interest is served if the arbitrator may order injunctive relief that ends the offending behavior, whether monopolistic pricing, or a tying arrangement that drives up prices, and so on. Ending such behavior ultimately benefits consumers. However, if no such relief is available in arbitration, and the only relief would be reimbursement of the claimant—which might not be passed on to customers—that is a strike against finding "effective vindication."

Likewise, courts should consider whether the arbitration scheme is public or confidential, and whether the particular claim at issue raises concerns on that score. While confidentiality is often a benefit of arbitration, of course, the Court in *Gilmer* also

noted, as a factor favoring the arbitration scheme challenged there, that "the award decisions are made available to the public." See *Gilmer*, 500 U.S. at 32. The *Gilmer* Court also noted that most ADEA claims would not be subject to arbitration, allaying concerns about development of precedent. *Id.* Antitrust claims might differ from ADEA claims in that regard. If, as here, an antitrust claim is of the type that arises almost exclusively in contractual relationships, and if arbitration clauses are standard in the relevant contracts, that might raise a concern about whether the public interest is effectively vindicated if the challenged clause does not leave room for public knowledge of the charge. After all, private complaints can be the source of information leading to public investigation.

At the same time, courts should also consider whether the *particular* claim at issue raises such public-knowledge concerns, based on the facts of each case. Here, for example, public authorities have already pursued similar credit-card antitrust issues, separate from private enforcement. See Resp. Br. at 7 n. 4 (summarizing litigation). Therefore, this case does not seem to raise concerns about confidentiality versus public information, even if it is of a type that might otherwise raise such concerns. That demonstrates the careful, case-specific nature of the inquiry, as opposed to any categorical antitrust exemption from arbitration—or the type of blanket approval that AmEx seeks.

By contrast, the public interest in effective vindication might call for heavier consideration of the confidentiality factor in some consumer cases. If a particular claim intersects with an arbitration

scheme in a way that systemically prevents most consumers from learning of, let alone vindicating, their rights, such a systemic problem ought to be considered in the effective-vindication inquiry.

In the final analysis, a unique intersection of antitrust law and arbitration law is this: The same conditions that create an antitrust violation might also enable the type of improper arbitration clause that the Court "condemn[ed]" in *Mitsubishi* as "a prospective waiver of a party's right to pursue statutory remedies," 473 U.S at 637, n.19. That is, a monopolist, or parties in a horizontal agreement, might not only have the market power to maintain economic schemes that violate antitrust law, but might also use that same power to pressure others into accepting overly restrictive arbitration clauses, therefore insulating their behavior from being challenged in *any* forum. In some such scenarios, the clauses might be otherwise valid as to non-antitrust claims, and might not trigger an unconscionability finding. The effective-vindication rule, with special consideration for how it applies in antitrust cases, is a critical safety valve in ensuring that the valuable aims of the FAA are not distorted to thwart the equally valuable aims of federal antitrust statutes.

In sum, the unique status of antitrust claims can and should have a role in evaluation of effective-vindication claims. Here, because Italian Colors has already shown that it meets its effective-vindication burden of showing prohibitive costs under *Randolph*, the Court need not rely on the claim's status as an antitrust claim (apart from how that fact drives the cost problem). But the claim's antitrust nature further confirms what should already be the result

here, and the Court should recognize its role. That will guide courts in ensuring that the public interest in antitrust claims is effectively vindicated.

CONCLUSION

For the above reasons, the Court should affirm the Second Circuit's decision.

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