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 PROFESSIONAL ARBITRATORS AND ARBITRATION SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

RICHARD H. FRANKEL
LISA T. MCELROY
Counsel of Record
EARLE MACK SCHOOL OF LAW
DREXEL UNIVERSITY
3320 Market Street
Philadelphia, PA 19104
(215) 571-4807
ltm35@drexel.edu

Dated: January 29, 2013

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

This case involves question of substantial importance to the field of arbitration. *Amici* are professional arbitrators and scholars. They file this brief to give the Court the benefit of their many years of practical experience and scholarly study. In our view, the effective-vindication rule that pervades this Court's last 25 years of arbitration jurisprudence is crucial to promoting public confidence in the legitimacy of arbitration and furthering the federal policy favoring arbitration. Eradicating that rule will undermine arbitration's legitimacy and leave it a weakened institution in the eyes of the public. *Amici* include:

Hiro Aragaki is an Associate Professor of Law at Loyola Law School, where his research and teaching focus on arbitration and alternative dispute resolution more generally. He has written several articles and amicus briefs on arbitration law. He has represented clients in domestic and international arbitration and has served as an arbitrator and a mediator.

Roger I. Abrams is the Richardson Professor of Law at Northeastern University. An arbitrator since 1975, he has been appointed to over 2,000 cases, is an

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Letters reflecting the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk's office.

elected member of the National Academy of Arbitrators, and has authored or co-authored 30 articles on the labor arbitration process. He is the permanent arbitrator under collective bargaining agreements between Walt Disney and Actors' Equity, State of Florida and Teamsters Union, and Georgia Power and the Electrical Workers Union.

Elizabeth Bartholet is the Morris Wasserstein Professor of Law at Harvard Law School. She has served as a professional arbitrator in hundreds of cases for the American Arbitration Association commercial and labor panels, the Federal Mediation and Conciliation Service, J.A.M.S., and the National Arbitration Forum. In July 2008, she testified before the Senate Judiciary Committee on mandatory pre-dispute arbitration.

Lisa Blomgren Bingham is the Keller-Runden Professor of Public Service at Indiana University, where her research focuses on dispute resolution systems. As a former arbitrator, she has handled labor, employment, and sports disputes for the American Arbitration Association and the Federal Mediation and Conciliation Service. She was a Council Member of the American Bar Association's Section of Dispute Resolution, and Co-Chair of its Consumer Arbitration Study Group.

Richard I. Bloch is a professional labor arbitrator and mediator and Past President of the National Academy of Arbitrators. He has served as an arbitrator for many federal, state, and local government agencies and their unions. In the private sector, he served as Chief Umpire between the

United Mine Workers and the coal industry, and as arbitrator for Major League Baseball, the National Football League, and the National Hockey League.

Richard N. Block is Director and Professor Emeritus at the School of Labor and Industrial Relations at Michigan State University. He is an experienced labor-management neutral, a member of the National Academy of Arbitrators, and author of numerous articles and books on labor and employment law and labor arbitration.

David Horton is an Acting Professor of Law at the University of California, Davis, School of Law (King Hall). He teaches Contracts and Federal Arbitration Law. He has published extensively on the Federal Arbitration Act, including articles that have appeared (or will soon appear) in the N.Y.U. Law Review, Northwestern University Law Review, Georgetown Law Journal, UCLA Law Review, Notre Dame Law Review, and North Carolina Law Review.

Karen Halverson Cross is Professor of Law at The John Marshall Law School in Chicago. She has written several articles on the law of arbitration, including *Letting the Arbitrator Decide Unconscionability Challenges*, 26 Ohio St. J. on Disp. Res. 1 (2011).

Stephen Goldberg is Professor of Law Emeritus at Northwestern University School of Law and author of GETTING DISPUTES RESOLVED and the casebook DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES. He has arbitrated hundreds of disputes, including salary arbitration for Major

League Baseball and the largest interest arbitration in the U.S. (between the U.S. Postal Service and the American Postal Workers' Union). He is President of the Mediation Research & Education Project, Inc., and a member of the National Academy of Arbitrators and the Association for Conflict Resolution.

Charles L. Knapp is the Joseph W. Cotchett Distinguished Professor of Law at the University of California, Hastings College of the Law, and Max E. Greenberg Professor Emeritus of Contract Law, New York University Law School. He is co-author of PROBLEMS IN CONTRACT LAW, and has written extensively on contract law and arbitration topics.

Amy J. Schmitz is a Professor of Law at the University of Colorado at Boulder, where her teaching and research focus on the law of arbitration and contracts. Her articles on arbitration include *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPPERDINE L. REV. 279 (2012); *Arbitration Ambush in a Policy Polemic*, 3 PENN STATE YEARBOOK ON ARBITRATION AND MEDIATION 52 (2011); and *"Drive-Thru" Arbitration in the Digital Age: Empowering Consumers Through Binding ODR*, 62 Baylor L. Rev. 178 (2010).

Calvin W. Sharpe is the Galen J. Roush Professor of Business Law and Regulation and Founding Director of the Center for the Interdisciplinary Study of Conflict and Dispute Resolution at Case Western Reserve Law School. He has arbitrated hundreds of cases for the American Arbitration Association, the Federal Mediation and Conciliation Service, and

panels in the public sector and across industries in the private sector. He is a Past Vice President of the National Academy of Arbitrators and currently serves as arbitrator for the National Basketball Association and the National Football League, and their respective players' associations.

Jeffrey W. Stempel is the Doris S. and Theodore B. Lee Professor of Law at the UNLV Boyd School of Law. He has served as an arbitrator in American Arbitration Association and JAMS proceedings. His publications on arbitration include *Mandating Minimum Fairness in Mass Arbitration*, 76 U. CIN. L. REV. 383 (2008), and *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251 (2007).

Jean Sternlight is the Michael and Sonja Saltman Professor of Law at the UNLV Boyd School of Law, where she also directs the Saltman Center for Conflict Resolution. She is an internationally recognized expert on mandatory arbitration and in the field of dispute resolution more generally. She has co-authored texts on alternative dispute resolution, arbitration, and mediation, and has published numerous articles in journals such as the University of Pennsylvania Law Review, the Stanford Law Review, and Law and Contemporary Problems.

Thomas J. Stipanowich holds the William H. Webster Chair in Dispute Resolution at Pepperdine University, where he is a Professor of Law and Academic Director of the Straus Institute for Dispute Resolution. In addition to being a commercial arbitrator of long experience, he is co-author of the

five-volume treatise, FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS & REMEDIES UNDER THE FEDERAL ARBITRATION ACT; the law school course book, RESOLVING DISPUTES: THEORY AND PRACTICE FOR LAWYERS, and many other articles and works on arbitration. He has served on the Boards of Directors of the American Arbitration Association, the College of Commercial Arbitrators, and the International Institute for Conflict Prevention and Resolution (CPR), of which he was President and CEO from 2001-2006. He was also the Academic Reporter for the Consumer Due Process Protocol, and Academic Advisor on the Revised Uniform Arbitration Act.

Theodore J. St. Antoine is the James E. and Sarah A. Degan Professor of Law Emeritus at the University of Michigan, where he served as Dean of the Law School from 1971 to 1978. He is Past President of the National Academy of Arbitrators and has been a labor arbitrator for 40 years. He has served on the board of directors and the executive committee of the American Arbitration Association. He is co-author of the casebook LABOR RELATIONS LAW, now in its 12th edition, and editor of the National Academy of Arbitrators' THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS.

Barry Winograd is a full-time arbitrator and mediator and a former Vice President of the National Academy of Arbitrators. He has arbitrated labor, employment, and commercial disputes for over twenty-four years, and has served on the adjunct law school faculty at the University of California, Berkeley, and the University of Michigan, teaching

labor law and arbitration. He has written extensively on arbitration law and practice.

William J. Woodward is a Senior Fellow at Santa Clara University School of Law and an Emeritus Professor of Law at Temple University Beasley School of Law. As an arbitrator, he has handled cases involving personal injury, bankruptcy, contracts, and insurance. He has served on the Board of Arbitrators of the American Arbitration Association since 1975.

Arnold Zack is Past President of the National Academy of Arbitrators and has taught dispute resolution at Harvard Law School since 1985. He has arbitrated or mediated over 5,000 labor-management disputes since 1957, designed employment dispute-resolution systems, and written many books and articles on dispute resolution. He is a member of the Steering Committee for the Permanent Court of Arbitration in The Hague, President and Judge of the Asian Development Bank Administrative Tribunal, and was co-chair of the task force that developed the Due Process Protocol for the Mediation and Arbitration of Employment Disputes.

SUMMARY OF ARGUMENT

The effective-vindication rule is an integral component of the Federal Arbitration Act (FAA), as this Court has recognized for more than 25 years. Petitioner's argument that the FAA requires enforcement of an arbitration clause even where it is undisputed that the consequence is that resolution of the underlying claims in arbitration is impossible, if adopted, will reduce public confidence in the arbitration system and leave it a more weakened institution.

First, the effective-vindication rule has long been treated as a necessary safety-valve to protect the legitimacy of arbitration, even by parties (and their *amici*) who have appeared before this Court to argue in favor of enforcing arbitration provisions. In *AT&T Wireless Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011), petitioner asserted that a state rule forbidding procedures in contracts that precluded the effective vindication of statutory rights was precisely the kind of rule that FAA would not preempt. Similarly, petitioner in *Rent-a-Center West, Inc. v. Jackson* argued that allowing the delegation of unconscionability questions to the arbitrator was permissible because the effective-vindication rule would protect against abuse or unfair results. Thus, Petitioner's arguments that this Court's prior decisions compel reversal here are way off base.

Second, holding that arbitration clauses must be enforced even if the claims at issue cannot effectively be arbitrated will reduce public confidence in the arbitration system. The legitimacy of arbitration, a system that depends on consensual contractual

agreement, depends on public support and trust. A ruling for Petitioners here would set back arbitration in four main ways.

First, it would continue to drive down public support for arbitration. Evidence shows that while members of the public believe in arbitration as a general matter, their support for arbitration drops dramatically when they learn about the specific procedures, such as the one at issue here, that arbitration clauses often impose.

Second, it risks prompting a legislative or regulatory response that would limit arbitration in a much more categorical manner than would the nuanced, case-specific effective vindication rule. History shows that when Congress regulates arbitration, it tends to prohibit arbitration clauses in an entire category of contracts, even if many entities within those categories do not abuse the arbitration process. A decision eradicating the effective-vindication rule at a time when federal agencies such as the Consumer Financial Protection Bureau (CFPB) are currently considering whether to restrict the use of mandatory arbitration clauses gives rise to a serious possibility of a similarly categorical response. That would contrast sharply with the effective-vindication rule, which is a narrow safety-valve that is applied on a case-specific basis and that requires a party to meet a heavy evidentiary burden.

Third, even though many arbitration clauses do not preclude effective vindication of statutory rights, sanctioning Petitioner's arbitration clause would taint legitimate participants in the arbitration system by association. This would set back years of

work by arbitration providers and advocates to improve the image of arbitration in the eyes of the public. Since the early 1990s, arbitration groups have worked to develop due process protocols and other measures designed to ensure fundamental fairness in arbitration. The due process protocols have been transformational in bolstering public confidence in arbitration. Such endeavors will mean little, however, if claims cannot get to arbitration at all. If arbitration clauses are seen as a mechanism for preventing access to arbitration, then the public will perceive arbitration as illegitimate regardless of the well-honed processes that arbitration providers have in place to ensure fundamental fairness.

Finally, eradicating the effective vindication rule threatens to undermine the FAA's pro-contract goals. If parties realize that an arbitration clause will have exculpatory effects, they may be more reluctant to enter into contracts with arbitration clauses in the first place. This would reduce the use of arbitration and correspondingly increase the burden on judicial resources. Additionally, the existence of an effectively self-immunizing provision in an arbitration clause will reduce incentives for the opposing party to perform on its contractual obligations. If one party can breach with impunity, then the other party to the agreement has little incentive to carry out its own obligations.

Thus, the best way to protect arbitration is for this Court to reaffirm the vitality of the effective-vindication rule and to affirm the judgment below.

ARGUMENT

I. That Parties Can Effectively Vindicate Their Rights in the Arbitral Forum Has Been the Bedrock Assumption Underlying This Court's Recognition that the FAA Permits Arbitration of Statutory Claims.

As Respondent has persuasively shown, "[t]his Court has recognized the effective-vindication rule for as long as it has applied the FAA to federal statutory claims." Resp. Br. 19. *Amici* here agree with Respondent's description of this Court's quarter-century-long jurisprudence concerning arbitration of federal statutory claims. *Id.* at 19-28.

Amici wish only to make the additional point that parties seeking enforcement of their arbitration clauses in this Court in recent years have repeatedly relied on the safety valve of the effective-vindication rule to explain why enforcing the arbitration clause in those cases is consistent with the FAA. That they have done so underscores that an arbitration clause that prevents a party from access the arbitral forum at all has always been treated differently from other arbitration clauses that this Court has found enforceable. And there can be little dispute that, at bottom, that is exactly what this arbitration clause does—its cost provisions in combination with the requirement of bilateral arbitration make arbitration a non-viable alternative for Respondents.

For example, while Petitioner and its *amici* vigorously assert that this case is controlled by this Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), Pet. Br. 27-40,

they fail to acknowledge that the petitioner there used the effective-vindication rule as a justification for why the class-waiver in that case should be found enforceable. In *Concepcion*, the petitioner candidly acknowledged that not every procedural rule was incompatible with arbitration and that nothing in the FAA "precludes a state from imposing a general standard." Br. for Pet'r 46 n.19, *Concepcion*, 131 S. Ct. 1740, 2010 WL 3017755 (Aug. 2, 2010). The specific example that the petitioner gave of an acceptable general rule was "a requirement that the parties' chosen procedures ensure that claims *feasibly can be vindicated in arbitration*—so long as it leaves it to the parties to select those procedures." *Id.* (emphasis added). Likewise, the petitioner articulated the question presented as assuming that the effective-vindication rule was not at issue:

> Whether the Federal Arbitration Act preempts States from conditioning the enforceability of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration—*when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.*

Id. at i (emphasis added). Thus, not only was the effective-vindication rule entirely off the table in *Concepcion*, the petitioner conceded that a general rule that predicated enforcement of a contract on the ability to effectively vindicate statutory rights would

not be preempted by the FAA. The case was litigated with the recognition that the effective-vindication doctrine was an integral and indisputably legitimate component of the FAA.

Similarly, the arguments presented in *Rent-a-Center West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), reveal that a primary assumption underlying the dispute was that the effective-vindication rule would provide a crucial safeguard against arbitration clauses that denied access to the arbitral forum. There, the petitioner asserted that enforcing an arbitration clause delegating to the arbitrator the authority to resolve allegations of unconscionability was not problematic in part because the effective-vindication rule was in place to allow courts to resolve unconscionability questions when the assertedly unconscionable term had the effect of depriving a party of access to the arbitral forum. Reply Br. for Pet'r 17, *Rent-a*-Center, 130 S. Ct. 2772, 2010 WL 1554408 (Apr. 16, 2010). It acknowledged that

> [i]f a party meets the high hurdle of proving that the agreement does not provide access to arbitration and that the unconscionability defense hence cannot be decided in that forum, the court, as a threshold matter, could refuse to compel arbitration either in reliance upon this Court's decision in [*Green Tree Fin. Corp.–Ala. v.*] *Randolph* [531 U.S. 79 (2000)] or upon a finding that there is no "clear and

> unmistakable agreement to arbitrate arbitrability" . . . .

Id. Similarly, some of the same *amici* who happen to appear here to argue that the effective vindication rule is inconsistent with the FAA also appeared in *Rent-a-Center* and relied repeatedly on the effective–vindication rule to argue in favor of allowing arbitrators to decide gateway questions of unconscionability. *See, e.g.*, Br. of the Chamber of Commerce of the United States as *Amicus Curiae* Supporting Pet'r 9, *Rent-a-Center*, 130 S. Ct. 2772, 2010 WL 783668 (Mar. 4, 2010) ("Far from permitting such interference, the FAA forbids any measures that frustrate the ability of parties to set the terms and procedures of arbitration, 'so long as the terms allow the prospective litigant effectively to vindicate his or cause of action in the arbitral forum.' *Gilmer [v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)] (internal quotation marks omitted); *Randolph*, 531 U.S. at 90."); *id.* at 27 (arguing that "decisions under the FAA[] make clear that an arbitration clause should not be refused enforcement merely for perceived, general unfairness *unless one party would effectively be deprived of access to the tribunal* (for example, by excessive fees) or would be unable to vindicate his claims (for example, because of excessive restrictions on remedies). See, *e.g.*, *Randolph*, 531 U.S. at 90-91; *Gilmer*, 500 U.S. at 28; *Mitsubishi* [*Motors Corp. v. Soler Chrysler–Plymouth, Inc.*], 473 U.S. [614,] 637 [1985].") (emphasis added).

The principle that the FAA does not require enforcement of arbitration clauses that deny access to any forum is an eminently sensible one and one that follows logically from the principles this Court applies to forum-selection clauses. Arbitration clauses are "a species of forum-selection clauses." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1783 (2010). This Court has explained that forum-selection clauses are presumed valid and will be enforced unless the party challenging enforcement meets its burden of showing that the clause is unreasonable. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972). But, as this Court emphasized, the party opposing enforcement "bear[s] a heavy burden," and will only succeed if it can show "that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* at 17-18.

The effective-vindication rule, as applied to this case, provides a similarly narrow, but crucial, safety-valve. As with forum-selection challenges, the party raising the effective-vindication doctrine bears a "heavy burden" and will only succeed if it can show that particular arbitration term at issue will either deny it access to the arbitral forum or make it otherwise impossible to vindicate statutory rights in arbitration. There is nothing in the FAA that dictates a different result or that renders the effective-vindication rule void. Rather such a rule is an integral component of the FAA, and, as explained below, critical for bolstering public confidence in alternative dispute resolution and for promoting the federal policy favoring arbitration.

II. Finding the Effective-Vindication Rule To Be Inconsistent with the FAA Would Erode Public Confidence in Arbitration.

The effective-vindication rule, which helps guarantee that disputes which parties agree to arbitrate actually can be settled in arbitration, furthers the FAA's basic purposes. If this Court were to require enforcement of arbitration clauses, even where, as here, the specific terms of the arbitration clause preclude one party from accessing the arbitral forum, such a ruling may cause the public to lose confidence in arbitration as a legitimate mechanism of dispute resolution. This in turn could result in a legislative or administrative backlash against arbitration and thus reduce the availability of arbitration as a dispute resolution mechanism going forward. The adverse effect on the public's view of the integrity of arbitration can be seen in several ways.

A. Eliminating the Effective-Vindication Rule Will Reduce Public Support for Arbitration.

Eliminating the effective vindication rule may lower public opinion of the legitimacy of arbitration. Courts have recognized the importance of the rule in maintaining the integrity of the arbitration system. Without a rule safeguarding against arbitration clauses that make arbitration impossible, the institution of arbitration is inevitably weakened. As one court explained:

> [A]rbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. *Gilmer*, 500 U.S. at 28. This supposition falls apart, however, if the terms of the arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights.

Shankle v. B-G Maintenance Mgmt. of Colo., Inc., 163 F.3d 1230, 1234 (10th Cir. 1999).

Similarly, the drafters of the Revised Uniform Arbitration Act ("RUAA") recognized that the legitimacy of arbitration rests on the bedrock assumption that arbitration will be an adequate forum for enforcing the legal rights of disputants. In one comment, the drafters explained that it is critical for courts to "ensure the fairness of an agreement to arbitrate, *particularly in instances involving statutory rights that provide claimants with important remedies.*" RUAA § 6, cmt. 7, 7 U.L.A. 28 (2000) (emphasis added). The comment stresses that courts "should determine that an arbitration process is adequate to protect important rights" because "[w]ithout these safeguards, arbitration loses credibility as an important alternative to litigation." As this Court has recognized that the RUAA "incorporate[s] the holdings of the vast majority of state courts and the law that has developed under the [FAA]," *Howsam v. Dean Witter Reynolds, Inc.*,

537 U.S. 79, 84-85 (2002), the drafters' careful consideration of how principles like the effective-vindication rule bolster arbitration's credibility should not be taken lightly.[2]

That a ruling in favor of Petitioners would undermine the legitimacy of arbitration also is evident from the fact that what reduces public confidence in arbitration is not anything inherent to arbitration, but the specific procedural terms (like Petitioner's here) that many entities include in their arbitration clauses. Eliminating the effective-vindication rule would turn a public that wants to support arbitration into one that believes arbitration to be illegitimate. Recent evidence shows that while members of the public believe in arbitration in general and desire a system that provides a faster and more efficient alternative to litigation, their support for arbitration plummets upon learning about specific procedural limitations that parties like Petitioner often insert into their arbitration clauses.

A recent study conducted by the Pew Charitable Trusts is revealing. *See* Pew Charitable Trusts, *Banking on Arbitration: Big Banks, Consumers, and*

---

[2] The RUAA, which was prepared by a blue-ribbon panel of arbitrators, attorneys, and scholars interested in alternative dispute resolution, has been widely celebrated as a "worthy, and overdue, effort to modernize our arbitration laws." Samuel Estreicher & Kenneth Turnbull, *Revised Uniform Arbitration Act Approved*, N.Y.L.J., Nov. 2, 2000, at 3. The RUAA was endorsed by numerous arbitration organizations, including the American Arbitration Association, JAMS, and the National Academy of Arbitrators, as well as by the ABA. Francis J. Pavetti, *Why States Should Enact the Revised Uniform Arbitration Act*, 3 Pepp. Disp. Resol. L.J. 443, 444 n.2 (2003).

Checking Account Dispute Resolution (2012).[3] This past summer, Pew conducted a national survey of checking account holders regarding their attitudes toward arbitration. It found that a majority of those surveyed supported the idea of arbitration as a way to streamline the justice system and to provide a simpler and less costly way to resolve a dispute. *Id.* at 10. It also found, however, that "consumers across age, gender, race, income, education, and political affiliation overwhelmingly find the components that constitute the arbitration process unacceptable." *Id.* at 7. Eighty-eight percent of respondents found the "majority of the procedural components of arbitration [described to them] unacceptable." *Id.* at 10.

In other words, the public believes that arbitration is fair and legitimate until it learns about the actual provisions that are inserted into many arbitration clauses. Petitioner's arbitration clause is precisely the kind that is likely to invoke public disapproval, because it imposes procedural roadblocks that remove arbitration as a viable alternative to court. Indeed, while those surveyed want an arbitration system that provides a less-costly alternative to litigation, *id.*, it is undisputed that Petitioner's arbitration clause makes arbitration cost-prohibitive. A ruling from this Court sanctioning arbitration clauses like Petitioners will simply feed the view that arbitration is not a legitimate form of dispute resolution.

---

[3] The Pew Study is *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_arbitration_report.pdf

B. Eliminating the Effective-Vindication Rule Threatens to Spur Legislative and Regulatory Action that Will Place Much More Categorical Restrictions on Arbitration Than are Imposed by the Narrow, Case-Specific Effective-Vindication Rule.

Second, eradicating the effective-vindication rule threatens not only to reduce public confidence in arbitration, but also to prompt federal legislation and rule-making that could limit or restrict the FAA's reach. Far from promoting the "federal policy favoring arbitration," a ruling for Petitioners would thwart it.

The effective-vindication strikes the proper balance between promoting the arbitration of statutory claims and protecting the underlying statutory rights at issue in a dispute. The rule is case-specific, not categorical. It appropriately requires a heavy burden to satisfy, and as Respondent notes, has been met in only a handful of cases. Resp. Br. 28-33.

Any rule or statute enacted to address arbitration, by contrast, will not be nearly as nuanced. Legislation and administrative rules are by their nature categorical and provide no easy mechanism for fact-specific, case-by-case analysis. Congressional and agency reform thus casts a much-wider net than does the effective-vindication rule.

Indeed, the recent history of arbitration legislation shows that when Congress acts, it tends to restrict arbitration with respect to an entire category

of contracts, even though many of the entities or individuals within those categories may utilize balanced, legitimate arbitration clauses that have not been called into question. Since 1996, Congress has (1) prohibited pre-dispute arbitration clauses in contracts between franchised automobile dealers and automobile manufacturers, 15 U.S.C. § 1226; (2) prohibited pre-dispute arbitration clauses in consumer credit contracts to active duty military personnel or their dependents, 10 U.S.C. § 987(e)-(f); (3) authorized livestock and poultry farmers to decline any arbitration requirement in a contract with a livestock or poultry purchaser, 7 U.S.C. § 197(c); and (4) imposed a condition on federal defense contractors that they not require their employees to arbitrate claims of employment discrimination, or torts such as assault and battery, intentional infliction of emotional distress, harassment, and negligent supervision, hiring and retention. Pub. L. 112-10, 125 Stat. 38, 79 (Apr. 15, 2011).

Most recently, Congress enacted the Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), which regulates arbitration in several ways. It limits the use of arbitration agreements with regard to certain whistleblower claims, 18 U.S.C. § 1514A(e)(2), and also amends the Truth-in-Lending Act (TILA) to prohibit the use of arbitration to resolve claims involving residential mortgages and open-ended consumer credit plans. 15 U.S.C. § 1639c(e)(1).

The Act also gives several agencies authority to promulgate rules limiting or prohibiting the use of mandatory arbitration in areas where Congress

perceived that arbitration was being misused by parties seeking to gain an unfair advantage over their contracting counterparts. It authorizes the Securities and Exchange Commission to limit arbitration agreements between investors and broker-dealers with respect to claims arising out of federal securities laws. 15 U.S.C. § 78(o). Similarly, the Act requires the Consumer Financial Protection Bureau (CFPB) to conduct a study and report to Congress concerning arbitration agreements in connection with consumer financial services. 12 U.S.C. § 5518(a). The Act further authorizes the CFPB to limit or prohibit a mandatory arbitration agreement if it finds, consistently with its study, that such limitations are in the public interest and will help protect consumers. 12 U.S.C. § 5518(b).[4] In short, Congress has traditionally taken a meat-axe approach to regulating arbitration. This stands in sharp contrast to the scalpel-like precision of the effective-vindication rule.

The notion that eradicating the effective-vindication rule could trigger a legislative or administrative response is not merely an academic one. The CFPB currently is in the process of

---

[4] Congress also has recently considered several other bills that would similarly regulate arbitration as applied to entire categories of contracts. The Fairness in Nursing Home Arbitration Act, which was introduced last year, would prohibit mandatory arbitration in nursing home agreements. H.R. 6351, 112th Cong., § 2 (2012). Similarly, a bill introduced in the 110th Congress would amend the Uniformed Services Employment and Reemployment Rights Act to prohibit pre-dispute mandatory arbitration agreements in employment contracts subject to the Act's purview. H.R. 7178, 110th Cong., § 3 (2008).

completing its fact-finding regarding arbitration and is now considering both whether to promulgate rules and what the content of those rules will be. It is highly plausible that the CFPB will take this Court's decision into account, whatever that decision may be, in constructing its proposed rules. Indeed, a finding that the FAA requires enforcement of an arbitration clause even where the clause prevents a party from vindicating his or her statutory rights bears directly on whether arbitration "is in the public interest and for the protection of consumers." 12 U.S.C. § 5518(b). If the CFPB does act, it stands to reason that its rules will not be nearly as nuanced as the effective-vindication rule. As Respondents have persuasively explained, the effective-vindication rule harmonizes the pro-arbitration policies of the FAA with the substantive goals of the federal statutes that parties seek to enforce through arbitration. Resp. Br. 13. Eliminating the effective-vindication rule not only disrupts that harmony, but could lead agencies like the CFPB to respond with much more categorical restrictions on arbitration. In other words, Petitioner's position, if adopted, would weaken arbitration back rather than strengthen it.

C. Eliminating the Effective-Vindication Rule Would Set Back the Cause of Arbitration by Undoing Years of Work Designed to Improve the Legitimacy and Public Perception of Arbitration.

Third, adopting Petitioner's interpretation of the FAA will cast a pall not just over arbitration clauses that deny parties the ability to effectively vindicate their statutory rights in arbitration, but over arbitration more generally. To be sure, the vast majority of arbitration clauses are carefully drafted and do not run afoul of the effective-vindication rule. At the same time, sanctioning the use of those few arbitration clauses that are truly exculpatory creates the all-too-real possibility of tainting by association other arbitration users and providers, the vast majority of which are legitimate, honest participants in the alternate dispute resolution system.

Again, this possibility is not merely theoretical. The example of the National Arbitration Forum (NAF) demonstrates how the bad acts of a single entity can spill over and harm the legitimate uses of arbitration, and hence the pro-arbitration goals of the FAA. Prior to 2009, NAF was the leading forum for debt-collection arbitrations. Robert Berner & Brian Grow, *Banks v. Consumers (Guess Who Wins)*, Bus. Wk., Jun. 5, 2008 (noting that NAF conducted more than 200,000 arbitrations per year). NAF's arbitration activities came to a crashing halt in 2009 when the State of Minnesota filed a lawsuit revealing that NAF was infected by a massive conflict of interest. Complaint, State of Minnesota v. National

Arbitration Forum, et al., No 27-CV-09-18550 (Minn. Dist. Ct. July 14, 2009).[5] In short, NAF was owned by one of the nation's largest debt collectors, Mann Bracken, which itself was bringing more than 125,000 arbitrations per year in front of NAF. *Id.*, ¶ 3. Soon after the State filed suit, NAF entered into a consent decree in which it agreed to immediately cease its consumer arbitration business. Consent Decree, State of Minnesota v. National Arbitration Forum, et. al., No 27-CV-09-18550 (July 17, 2009).[6]

What is important here is not NAF's misconduct itself, but the ripple effect that its conduct set in motion. Just days after NAF entered into its consent decree, the American Arbitration Association (AAA), one of the nation's leading arbitration providers, declared that it would impose its own moratorium on administering consumer debt arbitrations, even though there was never any allegation that AAA had any conflict of interest. J.P. Duffy, *NAF and AAA Stop Administering Consumer Debt Arbitrations: Was the Arbitration Fairness Act of 2009 the Catalyst for the AAA's Decision?*, Int'l Arb. Newsletter (Aug. 13, 2009).[7] Although AAA indicated that part of its

---

[5] The full text of this complaint can be found at: http://www.ag.state.mn.us/PDF/PressReleases/SignedFiledComplaintArbitrationCompany.pdf

[6] The full text of the Consent Decree can be found at: http://pubcit.typepad.com/files/nafconsentdecree.pdf

[7] This article is *available at* http://www.dlapiper.com/naf-and-aaa-stop-administering-consumer-debt-collection-arbitrations:was-the-arbitration-fairness-act-of-2009-the-catalyst-for-the-aaas-decision/.

reason for imposing the moratorium was the need for improved due process protocols for debt-collection arbitrations, its decision also came after congressional hearings that "portrayed the NAF as a sham organization that simply rubber-stamped creditors' claims, [and] then suggested the AAA was guilty by association." *Id.* Additionally, even though NAF is just a single entity, its actions stoked fears that the arbitration system remained "ripe for abuse" because other bad actors were waiting to come fill its place. *Staff of Subcomm. on Domestic Policy of H. Comm. on Gov't Reform, Report on Arbitration Abuse*, at 10 (July 21, 2009).

The taint by association that could arise from siding with Petitioner would set back many years of effort by arbitration providers to develop standards and protocols that would enhance arbitration's public reputation and combat lingering hostilities to arbitration. Those standards will mean little, however, if the public perceives arbitration clauses as a way of keeping disputes *out of* arbitration rather as a way of moving them *into* arbitration.

Starting in the early 1990s, arbitration proponents and providers began to develop a set of due process standards for workplace arbitrations, acknowledging that while many employers adopted "serious and fair" arbitration clauses, some others did not. Searle Civil Justice Inst., *Consumer Arbitration Before the American Arbitration Association:*

Preliminary Report at 17 (Mar. 2009).[8] Notably, the primary driving force for the protocols was this Court's holding in *Gilmer*, 500 U.S. 20, affirming that statutory employment claims could be resolved in arbitration. Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 Ohio St. J. on Disp. Resol. 369, 374-75 (2007). Once it became clear that the FAA generally permitted arbitration of federal statutory claims, arbitration providers realized that they should develop standards to ensure that statutory claims could be resolved fairly. *Id.* at 374-91. These early efforts subsequently led arbitration providers such as AAA to develop, *inter alia*, employment due process protocols, consumer due process protocols, and health care due process protocols. Searle Civil Justice Inst., *supra*, at 17-19**.** All of the protocols have the primary goal of ensuring "fundamental fairness" in arbitration and include multiple principles designed to promote that goal. *Id.* at 19.

Those protocols, which took years to develop and which were the subject of extensive study, have been enormously successful in improving the reputation of arbitration as a legitimate and cost-effective alternative to litigation. *See, e.g.*, Harding, *supra*, at 369-71 (acknowledging that the protocols "have had a tremendous impact on arbitration" and that they have helped to "legitimize the prevalent and growing use of pre-dispute arbitration clauses," in both

---

[8] This document is available at https://www.aryme.com/docs/adr/2-2-1235/informe-sealy-aaa-eeuu-2009-us-sealyreport-aaa.pdf

bargained-for and adhesive contracts). They have influenced courts, legislatures, and public opinion. *See id.* at 371. AAA notes that its consumer due process protocol "has been cited or discussed in over 140 journal and law review articles in addition to various state and federal court decisions . . . ." American Arbitration Association, National Task Force on the Arbitration of Consumer Debt Collection Disputes, *Consumer Debt Collection: Due Process Protocol and Statement of Principles* 2 n.2 (Oct. 2010).[9]

The due process protocols can only provide for fair arbitration of statutory claims if those claims can reach arbitration in the first place. Yet Petitioner would have this Court enforce its arbitration clause even where it is undisputed that the clause would preclude the parties from proceeding in arbitration. Equally important, because eliminating the effective-vindication rule enables parties to keep disputes from reaching arbitration at all, such a rule makes arbitration appear illegitimate notwithstanding that arbitration providers have standards in place to ensure fair resolution of statutory claims. If claims cannot get to arbitration at all, then there is nothing that arbitrators or arbitration providers can do to demonstrate the legitimacy of their processes. Rather, as long as the public perceives the arbitration system as permitting procedural terms in arbitration clauses that make the effective

---

[9] This document is *available at* http://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_003865&revision=latestreleased.

vindication of statutory rights impossible, they will question the legitimacy of arbitration no matter what arbitration providers do to ensure that once a statutory dispute reaches arbitration, those statutory rights can be effectively vindicated. As a result, eradicating the effective-vindication rule could undo years of efforts to make arbitration more accessible, more transparent and more legitimate.

The fact that arbitration due process protocols do exist and that arbitrators are required to follow the law also undermines the claim of Petitioners' *amici* that effective vindication is possible in this case. Several *amici* assert that the bilateral arbitration requirement is not cost prohibitive because while expert testimony might be required for a court action, experts may not be necessary to the same degree for pursuing complex antitrust claims in arbitration because of arbitration's streamlined processes and greater procedural flexibility. *See, e.g.*, Br. of Distinguished Law Professors as *Amici Curiae* in Support of Petitioners 8-11. But that premise is flawed. Arbitrators are not free to ignore governing law. An arbitration award can be vacated if arbitrators disregard their obligations, exceed their authority, or are tainted by bias. 9 U.S.C. § 10(a); *cf. Stolt-Nielsen*, 130 S. Ct. at 1768 n.3 (declining to decide whether "manifest disregard" of the law is a valid ground for vacating an arbitration award, but finding that the arbitrator's decision to authorize class arbitration would satisfy the manifest disregard standard). If established substantive law requires expert testimony as a pre-condition to finding antitrust liability in court, then that case law would

apply equally to an antitrust arbitration. Thus, *amici*'s own arguments contribute to the public perception that arbitration can be a lawless enterprise when in reality it is nothing of the sort.

D. Eliminating the Effective-Vindication Rule Is Inconsistent with the FAA's Pro-Contract Purposes.

Finally, holding that the effective-vindication rule is incompatible with the FAA could undermine arbitration by (1) discouraging parties from entering into contracts with arbitration agreements ex ante, and (2) incentivizing parties to walk away from performing on their substantive contractual obligations once they realize that their counter-parties cannot be held accountable for their own breaches. First, without the safety-valve that the effective-vindication doctrine provides, parties will have to decide ex ante whether they can afford to take the risk of entering into a contract under which they will not be able to effectively vindicate their rights in any forum, arbitral or otherwise. This will likely discourage some parties from entering into agreements to arbitrate in the first place, thereby depriving those parties (and their counter-parties) from the many benefits of alternate dispute resolution and pushing more disputes into the legal system. This in turn will impose greater burdens on courts, drive up litigation costs and reduce the use of arbitration. Such an outcome would run counter to the strong federal policy favoring arbitration.

In the same vein, parties that do end up in contracts that contain exculpatory arbitration agreements will have little incentive to perform on their underlying contractual obligations. If party A discovers that party B can breach without any mechanism for being held accountable, then party A has no reason to hold up its end of the bargain. In his foundational study on cooperation, Robert Axelrod found that rational actors have a strong incentive not to cooperate, and that the risk of reciprocal punishment for non-cooperation, the so-called "tit-for-tat" paradigm, was one of the most efficient means of keeping actors honest. *See generally* Robert Axelrod, The Evolution of Cooperation (1984). But where only one party is capable of enforcing its contractual rights, that reciprocity disappears. The lack of mutually-assured enforcement will encourage parties to walk away from the contract or willfully breach if they start to worry that the other party may default on its own obligations. Given that this Court has repeatedly recognized that a primary purpose of the FAA was to promote enforcement of contractual agreements, *see, e.g.*, *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985), a rule that reduces incentives for contractual performance undermines the Act's contractual goals.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

RICHARD H. FRANKEL
LISA T. MCELROY
Counsel of Record
EARLE MACK SCHOOL OF LAW
DREXEL UNIVERSITY
3320 Market Street
Philadelphia, PA 19104
(215) 571-4807
ltm35@drexel.edu

Dated: January 29, 2013