NO. 12-133

In the Supreme Court of the United States

AMERICAN EXPRESS COMPANY, *ET AL.*,

Petitioners,

v.

ITALIAN COLORS RESTAURANT, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF PROFESSORS OF CIVIL PROCEDURE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF PROFESSORS OF CIVIL PROCEDURE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici curiae are distinguished scholars and professors of law from leading law schools around the nation.[1] *Amici* have taught, lectured and written extensively on a variety of areas of the law, including civil procedure and complex litigation. Among other things, *Amici* are keenly interested in ensuring that our nation's legal system and processes continue to fulfill the Constitution's promise of providing full and equal access to justice for all citizens.

In *Amici's* view, the Second Circuit's decision below should be affirmed because, otherwise, drafters of arbitration provisions will have the ability to use arbitration agreements to deprive citizens of their First Amendment right to access justice. If arbitration agreements are enforced against small business owners and other citizens seeking to enforce statutory rights who demonstrate that they cannot rationally pursue those claims in individual arbitration, those claimants will be forced

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[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amici Curiae* or its counsel made a monetary contribution to the preparation or submission of the brief.

to abandon their claims and, as a practical matter, will be denied access to both a court and a valid alternative dispute resolution forum.

This Court made clear in *AT&T Mobility LLC v. Concepcion* that the objective of the FAA is to "promote arbitration." 131 S. Ct. 1740, 1749 (2011). Blindly enforcing any and all arbitration agreements even against citizens who cannot rationally access arbitration cannot serve the FAA's objective because the end result will be that no arbitration takes place at all. Affirming the Second Circuit's decision below will promote the FAA's objective because it will encourage the use of arbitration provisions designed to enable all claimants to effectively vindicate their statutory rights in arbitration and lead to ever-increasing use of arbitration as an alternative forum for accessing justice. Reversing the Second Circuit will engender the use of arbitration clauses that make it more costly and difficult for claimants to vindicate their rights in arbitration and, consequently, will lead to less arbitration, not more.

The right to access justice is not reserved for the wealthy and powerful, or for those who are economically irrational. All citizens possess the same right. Unless the Court upholds the circuit court, however, that right will in short order become effectively foreclosed to many of us. *Amici*, therefore, respectfully urge the Court to affirm.

The *Amici* Professors of Civil Procedure are:

Bruce L. Hay, Professor of Law, Harvard Law School;

Deborah R. Hensler, Judge John W. Ford Professor of Dispute Resolution and Associate Dean for Graduate Studies, Stanford Law School;

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SUMMARY OF ARGUMENT

I. The Federal Arbitration Act ("FAA") was enacted to promote arbitration among contracting parties who agree to resolve their post-contractual disputes by way of streamlined proceedings in a non-judicial tribunal. The FAA was not enacted to enable one contracting party to deny access to justice to small business owners or other litigants who cannot rationally access arbitration. An order compelling such a litigant to arbitrate, by definition, fails to serve the FAA's pro-arbitration purpose because the practical result of that directive will be that no arbitration takes place at all. Thus, all such an order can realistically achieve is to deny access to justice to such claimants, thereby depriving them of their First Amendment right of petition. Such an outcome would also violate this Court's precedents providing that arbitration clauses may not be used, overtly or in practice, to prospectively waive a citizen's substantive statutory rights. In the present case, it would also undermine Congress's intent to enlist private attorneys general to help enforce the federal antitrust laws.

By ruling that arbitration agreements should not be enforced if persuasive record evidence demonstrates that it would be economically irrational for the party resisting arbitration to arbitrate, the Second Circuit's decision in *In re American Express Merchants' Litig.*, 667 F.3d 204 (2d Cir. 2012) ("*Amex*"), appropriately balances the FAA's pro-arbitration objectives, the First Amendment right to access justice, and the need to preserve citizens' statutory rights, while giving full

effect to Congress's intent to install and maintain a robust private antitrust enforcement mechanism.

II. *Concepcion* is perfectly consistent with this Court's vindication of statutory rights precedents. *Concepcion* involved individual claimants who *could* enforce their statutory rights in arbitration and, thus, it did not contemplate the present situation, where the Second Circuit found as a matter of law that the individual claimants cannot do so. Petitioners have fundamentally misread the case. Assuming *arguendo* that it applies outside of its state law preemption context at all, *Concepcion*, provides that when a claimant *can* vindicate his or her rights in individual arbitration, the claimant's procedural right to serve as a class representative to enforce the rights of others cannot trump the defendant's statutory right to arbitrate under the FAA. *Concepcion*, therefore, is easily reconciled with this Court's vindication of rights precedents, and the Second Circuit correctly concluded that *Concepcion* does not compel arbitration in the present case.

III. Affirming the Second Circuit's decision will advance the FAA's objectives by encouraging those who are genuinely interested in arbitration's dispute resolution benefits to fashion provisions that make arbitration increasingly viable for small dollar claimants. In contrast, reversing *Amex* would result in courts blindly compelling arbitration against claimants who cannot rationally pursue arbitration, which would lead to widespread use of consumer-unfriendly arbitration clauses and less arbitration.

Congress has never enacted a statute expressly stating that "contracting parties may prospectively waive their civil liability under the antitrust laws and deprive their counter-parties of their First Amendment right to sue for statutory violations." The FAA does not expressly permit either of those things, and this Court should decline Petitioners' invitation to, in essence, write those words into the statute by ruling that Congress silently intended the FAA to have those effects.

ARGUMENT

I. Compelling a Small Business Owner to Arbitrate When It Cannot Rationally Pursue Arbitration Does Not Advance the FAA's Objectives, Denies Citizens Access to Justice, and Undermines Congress's Intended Antitrust Enforcement Mechanism.

A. Congress enacted the FAA "to promote arbitration." *Concepcion*, 131 S. Ct. at 1749. To counter "judicial hostility to arbitration agreements," *id.* at 1745 (citation omitted), Congress declared an "emphatic federal policy" favoring "arbitral dispute resolution," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631 (1985); *see Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). The "overarching purpose" of the FAA, accordingly, "is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings" in a non-

judicial forum. *Concepcion*, 131 S. Ct. at 1748. While the "'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms,'" *id.* (brackets in original) (citations omitted), that purpose does not stand alone – because the whole "point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute," *id.* at 1749.

An order compelling litigants to arbitrate when the record shows that they cannot rationally do so will not serve Congress's pro-arbitration policy because it will result in no arbitration at all. An order compelling an arbitration that as a practical matter cannot be filed will not lead to an "arbitral dispute resolution," *Mitsubishi*, 473 U.S. at 631, and will not "facilitate streamlined proceedings" in an alternative forum, *Concepcion*, 131 S. Ct. at 1748. Thus, it cannot further Congress's purpose for enacting the FAA. Such an order will instead lead to the abandonment of the litigant's claims – a result that "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore [ought] not be required by [federal] law." *Cf. id.* at 1753.

Compelling a small business or other litigant to arbitrate when it cannot rationally do so can only work to deprive the litigant of access to justice. Depriving citizens of access to justice is not the purpose of the FAA. Accordingly, this Court has held that agreements to arbitrate cannot be used to compel a party to "forgo the substantive rights afforded by [a] statute," *Mitsubishi*, 473 U.S. at 628, and that arbitration can be ordered only if it

provides a *valid* alternative to a judicial forum in which "the prospective litigant effectively may vindicate" its rights, *id.* at 637; *see Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) ("claims arising under a statute designed to further important social policies may be arbitrated … 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum'") (brackets in original) (citations and some internal quotations omitted).

An arbitration agreement is "a specialized kind of forum-selection clause," *Mitsubishi*, 473 U.S. at 630, and any contractual forum selection clause – even one selecting arbitration – can be set aside if "proceedings 'in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court,'" *id.* at 632 (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)) (brackets in original).

The principle that a litigant will not be compelled to arbitrate if it cannot as a practical matter enforce its statutory rights in the arbitral forum has been endorsed by a majority of the current members of this Court. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273-74 (2009) (Supreme Court should not "resolve in the first instance" whether agreement bars parties "from 'effectively vindicating' their 'federal statutory rights in the arbitral forum'") (Thomas, J.; joined by Roberts, C. J., and Scalia, Kennedy, Alito, JJ.) (quoting *Randolph*, 531 U.S. at 90). *See also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (Kennedy,

J.; joined by Scalia, Thomas, Ginsburg, JJ.) ("Were there no subsequent opportunity for review and were we persuaded that 'the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies …, we would have little hesitation in condemning the agreement as against public policy.'") (quoting *Mitsubishi*, 473 U.S. at 637 n.19) (other citation omitted).[2]

Hence, the rule that an arbitration clause cannot be used prospectively to divest citizens of statutory rights is a bedrock principle of federal arbitration law. In *Sutherland v. Ernst & Young LLP*, citing decisions of this Court, Judge Wood cogently summarized the vindication of rights rule and its premises:

> Although federal policy strongly favors arbitration as an alternative means of dispute resolution, the arbitration of a statutory claim will be compelled only if that claim can be effectively vindicated in the arbitral forum. Otherwise, the statute's remedial and deterrent function would be circumvented, and the arbitral forum would lose its claim as a valid alternative to traditional litigation. Thus, where large arbitration costs preclude a litigant from effectively vindicating her statutory rights in the arbitral forum, the

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[2] Because a litigant who cannot rationally arbitrate will abandon its claims, there will be "no subsequent opportunity," *id*., for judicial review of the order compelling arbitration.

> arbitral agreement at issue may be unenforceable.

768 F. Supp. 2d 547, 549-50 (S.D.N.Y. 2011) (internal quotations, citations, and alterations omitted). There is no basis under the FAA or this Court's precedents to retreat from these long-standing principles and decree a new rule of law that blindly enforces arbitration agreements, even when doing so would not advance the FAA's pro-arbitration objectives.

B. There is certainly no valid reason to blindly enforce arbitration agreements against litigants who cannot rationally arbitrate if the result would be to deprive citizens of access to justice. "In an organized society," the right to access justice "is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship …." *Chambers v. Baltimore & Ohio R.R Co.*, 207 U.S. 142, 148 (1907). "The right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution." *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983); *accord Daniels v. Arcade, L.P.*, 477 F. App'x 125, 130 (4th Cir. 2012) ("The right to sue and defend in the courts ... is granted and protected by the Federal Constitution.") (quoting *Chambers*, *supra*). "'The right of petition is one of the freedoms protected by the Bill of Rights,'" and "[t]he right of access to the courts is indeed but one aspect of the right of petition." *California Motor Transp. Co. v. Trucking*

Unlimited, 404 U.S. 508, 510 (1972) (internal quotations and citations omitted).

This fundamental right of all citizens to access justice is grounded in the First Amendment:

> The First Amendment provides … that "Congress shall make no law … abridging … the right of the people … to petition the Government for a redress of grievances." We have recognized this right to petition as one of "the most precious of the liberties safeguarded by the Bill of Rights," … and have explained that the right is implied by "the very idea of a government, republican in form."

BE&K Constr. Co. v. NLRB, 536 U.S. 516, 524-25 (2002) (citations omitted). This Court, therefore, will "not 'lightly impute to Congress an intent to invade … freedoms' protected by the Bill of Rights, such as the right to petition … 'all departments of the Government,'" including "'the right of access to the courts….'" *Id.* at 525 (quoting *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961), and *California Motor Transp. Co.*, 404 U.S. at 510) (other citation omitted).

This Court's precedents during the quarter century between *Mitsubishi* and *Pyett* honor these fundamental First Amendment principles; indeed, this Court's decisions are inherently guided by them. By establishing that arbitration can be compelled under the FAA only if it "effectively" enables each party to vindicate its statutory rights, *Mitsubishi*,

473 U.S. at 637, and not if one party "will for all practical purposes be deprived of his day in court," *id.* at 632 (citation and internal quotation omitted), this Court has made plain that Congress did not intend to invade the Constitutional right to access justice by enacting the FAA but, rather, intended only to promote an alternative means of accessing justice. By ensuring that arbitration clauses will be enforced only if they in practice provide a genuinely available alternative forum for vindicating statutory rights, this Court has ensured that each citizen's right to access justice is preserved under the statute.

Petitioners and some of their *amici* erroneously deride as *dicta* this Court's repeated statements about the need to ensure effective vindication of statutory rights in the arbitral forum. Even if they were *dicta*, however, they were very compelling *dicta* because they echoed the need to preserve the fundamental Constitutional right to access justice that Congress would not lightly toss away. *See BE&K Constr.*, 536 U.S. at 525.

Petitioners ask this Court to find, for the first time, that when it enacted the FAA Congress did, in fact, enable private parties to toss aside the right to access justice for claimants who cannot rationally pursue arbitration. But there is no evidence in the FAA's text or legislative history that the 1925 Congress, by promoting an alternative forum, intended to enable one private contracting party to use arbitration agreements to deprive another contracting party of any forum altogether. Nor is there evidence that Congress even contemplated the possibility that arbitration clauses could be used in

practice to deny aggrieved parties of access to justice, or of their right to enforce their federal statutory rights. Certainly, Congress would not sacrifice access to justice on the altar of the FAA when doing so would not advance the FAA's pro-arbitration purpose.

To be sure, claimants can be forced to abandon their claims and be denied a remedy for meritorious claims if a class action lawsuit filed on their behalf is not certified or becomes decertified. But in that context the deprivation of justice is Constitutionally compelled by the defendant's right to due process. *See*, *e.g.*, *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (Rule 23 protections are "grounded in due process"). Denial of access to justice in that context is appropriate because the Fourteenth Amendment right to petition the courts is necessarily delimited by the Due Process clause. A statute, however, should not be construed as enabling private parties to deprive others of access to justice absent a clear intent by Congress to do so. *BE&K Constr.*, 536 U.S. at 525. That intent is absent here.[3]

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[3] While private arbitration contracts do not involve state action, the statutory interpretation question in this case does implicate state action: whether Congress intended the FAA to be interpreted by a court as enabling a powerful contracting party to use an arbitration clause to prospectively deprive other citizens of their right to access justice. Any statute that can be construed as limiting a Constitutional right is subject to challenge, and if it is "reasonably susceptible of two interpretations" it is this Court's "plain duty to adopt that construction which will save the statute from constitutional infirmity." *U.S. ex rel. Att'y Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909) (citation omitted). The FAA is

C. Compelling small business owners and other claimants to arbitrate when they cannot rationally do so would also undermine Congress's private antitrust enforcement objectives under the Sherman and Clayton Acts. This Court has long recognized that citizens' suits against antitrust violators serve a vital public purpose and work to deter wrongdoing that understaffed and underfunded governmental agencies lack resources to pursue. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979). Private attorneys general bringing suit are a "chief tool" and play a "central role" in Congress's enforcement scheme. *Mitsubishi*, 473 U.S. at 635 (citing *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 138-39 (1968), and *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972)).

While citizens who can "effectively" vindicate antitrust claims in arbitration can serve that role equally as well in arbitration as in court, *id.* at 637, citizens who cannot rationally arbitrate, and who therefore will have to abandon their claims if compelled to arbitrate, cannot. If such antitrust claimants are nevertheless forced to arbitrate, drafters of arbitration clauses will increasingly draft provisions that make individual antitrust arbitration less viable, *see infra* Point III, and the result will be a gaping hole in Congress's intended private antitrust enforcement mechanism.

"amenable to a limiting construction," *Skilling v. United States*, 130 S. Ct. 2896, 2929-30 (2010), that avoids it being interpreted as depriving litigants of access to justice; namely, the construction that was applied in this Court's vindication of rights precedents and in *Amex*.

There is no evidence in the FAA's text or legislative history that the 1925 Congress intended to undermine the intent of the 1890 and 1914 Congresses that passed and reenacted the treble damages provisions of the Sherman and Clayton Acts. *See id.* at 636 (treble damages remedy promulgated in 1890 and reenacted in 1914). Certainly, there is no indication that the 1925 Congress intended to repeal an integral component of the antitrust laws when doing so would not even advance the FAA's pro-arbitration purpose.[4]

D. Respondents have shown that Petitioners' supposition that upholding *Amex* could lead to "floods" of claimants avoiding arbitration and filing class actions is untrue. *See* Brief for Respondents at 28-32. But given that blindly forcing arbitration on

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[4] An agreement that expressly attempts to confer even "partial immunity from civil liability" for future antitrust violations is unenforceable. *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955). A contract that contains a *de facto* or disguised prospective antitrust immunity clause is even more insidious because it fails to give the counter-contracting party any express notice that its right to sue for antitrust violations is purportedly being waived. Under *Lawlor*, Petitioners could not legally enforce a provision in their credit card agreements stating that Petitioners are "immune from civil antitrust liability," and they likewise could not enforce an arbitration clause stating they are "immune from civil antitrust liability if you cannot afford to arbitrate," because that would constitute conferring "partial immunity" upon themselves for future antitrust violations. *A fortiori*, Petitioners cannot enforce an arbitration clause that is silent as to prospective antitrust immunity but which as a practical matter has the same effect. If Petitioners cannot overtly immunize themselves from future antitrust liability, they also cannot do so *sub silentio*.

litigants who cannot pursue it will both impinge on their Constitutional right to access justice and undermine Congress's antitrust enforcement scheme without genuinely advancing the FAA's objectives, the short answer to Petitioner's claim – even if it were true – should properly range from "it's the lesser of two evils" to "so what?" Class actions and viable arbitral proceedings have coexisted for decades as alternative means of enforcing statutory rights, and there is no reason they cannot continue to coexist. The FAA is not an anti-class action statute, nor is it a statute designed to permit defendants to cloak themselves with *de facto* antitrust or other statutory immunity, and this Court's decision in *Concepcion* did not (and could not) convert the FAA into something it is not. *See infra* Point II. The object of the FAA is to compel arbitration so long as the arbitral forum provides a genuine alternative to a court proceeding for the individual claimant. The FAA's purpose is not to compel arbitrations that will never actually take place and, thereby, deny citizens of access to justice altogether while enabling statutory violators to avoid civil liability.

The Second Circuit's *Amex* decision holding that claimants cannot be compelled to arbitrate if they prove they cannot rationally pursue individual arbitration harmonizes Congress's intent to promote arbitration with every citizen's fundamental right to access justice and Congress's private antitrust enforcement scheme. The court's decision did not reflect a "judicial hostility to arbitration" – the evil Congress sought to remedy through the FAA. *Concepcion*, 131 S. Ct. at 1745 (citation omitted). It

was instead based on the need to preserve and enforce the right of small claimants to bring antitrust claims, an accurate assessment of Congress's intent under both the FAA and the antitrust laws, and this Court's vindication of rights precedents and long-standing prohibition against contractual grants of partial antitrust immunity. The Second Circuit's decision should be affirmed.

II. As a Matter of Jurisprudence, *Concepcion* Did Not Limit or Overrule This Court's Vindication of Rights Precedents, and, In Fact, *Concepcion* is Perfectly Compatible with those Decisions.

A. This Court's *Concepcion* decision neither addressed nor implicated the vindication of statutory rights concept because it involved individual plaintiffs whom the courts at every level agreed *could* vindicate their rights in arbitration. *See Concepcion*, 131 S. Ct. at 1750, 1753 (Ninth Circuit found recovery for named plaintiffs through individual arbitration was "'essentially guaranteed,'" and District Court stated named plaintiffs were "better off" in arbitration than in a class action) (citations omitted). Consequently, the "Question Presented" in the *Concepcion* Certiorari Petition expressly carved out the vindication of rights issue: "Whether the Federal Arbitration Act preempts States from conditioning the enforcement 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." Petition for a Writ of

Certiorari, *AT&T Mobility LLC v. Concepcion*, No. 09-893, 2010 U.S. S. Ct. Briefs LEXIS 535, at *1 (Jan. 25, 2010).

The Petition's focus was that California's *Discover Bank* rule was an overly broad one holding that "agreements to arbitrate on an individual basis are unenforceable in the consumer context – even when the arbitration provision ensures that the consumer is able to vindicate his or her claims on an individual basis." *Id.* at *10. The Court then framed both the issue presented and its holding in terms of the *Discover Bank* rule. *See Concepcion*, 131 S. Ct. at 1746 ("The question in this case is whether [FAA] § 2 preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable."); *id.* at 1753 ("California's *Discover Bank* rule is preempted by the FAA.").

Thus, the vindication of rights principle that *Amex* addresses was unequivocally not at issue in *Concepcion*. Given *Concepcion's* factual and legal context, it is therefore unsurprising that neither the vindication of rights principle nor *Randolph* is mentioned in either the majority or dissenting opinions. Because *Concepcion* involved plaintiffs who could vindicate their statutory rights in arbitration, and the Court's holding did not reach beyond the confines of the specific *Discover Bank* rule preemption question presented, as a matter of jurisprudence the decision's *stare decisis* effect reaches no further. *See*, *e.g.*, *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 969-70 (3d Cir. 1979) (*stare decisis* holds that "[a] judicial precedent attaches a specific legal consequence to a detailed set of facts"

and "furnish[es] the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court") (citation omitted).

Any contention that *Concepcion* is binding precedent that controls the present appeal is thus incorrect.

B. Petitioners' argument that *Concepcion* is incompatible with this Court's vindication of statutory rights precedents, and therefore foretells their demise, also does not withstand analysis. Petitioners' argument rests on four flawed assumptions drawn from two sentences in the penultimate paragraph of the *Concepcion* majority opinion where, in response to the dissent's claim that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," the Court stated that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 131 S. Ct. at 1753 (internal citation omitted). Petitioners' flawed assumptions are:

> (1) Petitioners assume that the Court's references to "class proceedings" and "a procedure" meant class actions as well as class arbitrations.
>
> (2) Petitioners assume that a class action "procedure" is necessarily "inconsistent with the FAA."

> (3) Petitioners assume that the phrase "desirable for unrelated reasons" included the desire to vindicate statutory rights.
>
> (4) Petitioners assume the "small-dollar" claimants whose claims could "slip through the legal system" referred to the individual named plaintiffs in *Concepcion* rather than the absent members of the putative class.

Having made these four assumptions, Petitioners conclude that the Court's two sentence statement equates to a ruling that federal courts cannot permit any named plaintiff to maintain a class action in the face of any type of arbitration clause, even if the named plaintiff will be unable to vindicate its rights because it cannot rationally pursue arbitration. That conclusion is as invalid as the four assumptions on which it rests.

As to the first two assumptions, the *Concepcion* opinion, read as a whole, does not support the interpretation that "class procedures" included class actions as well as class arbitrations. In *Concepcion*, the Court found exclusively that class arbitration was "inconsistent with the FAA"; it did not say that all class procedures were. *See id.* at 1748 ("Requiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."); *id.* at 1750-51 ("The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.").

The Court's analysis, moreover, which emphasized the risks non-consensual class arbitration would pose to defendants, drew favorable comparisons in that regard to class actions. The Court stated that due to the lack of "effective means of review" under 9 U.S.C. § 10, "[a]rbitration is poorly suited to the higher stakes of class litigation." *Id.* at 1752. "In litigation," however, "a defendant may appeal" both "a certification decision" and "a final judgment" to a higher tribunal, where "[q]uestions of law are reviewed *de novo* and questions of fact for clear error." *Id.* The lack of sufficient formal procedures in class arbitration, furthermore, would create a risk that "absent class members would not be bound by the arbitration"; indeed, it is "odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied." *Id.* at 1751-52. Rule 23 procedures and judicial oversight minimize these risks in class actions.

Because the Court views class arbitration as more risky for defendants than class actions, it is unlikely that the Court would weigh class actions and class arbitrations equally when assessing their compatibility with the FAA, as Petitioners assume. For example, if the Court agrees with the Second Circuit that small business owners who cannot rationally arbitrate individually should not be compelled to do so, it seems clear from *Concepcion* that the Court would find the defendants better served if the parties' dispute was resolved in a class action than by class arbitration. Hence, in the context of the present case at least, where the objectives of both the FAA and the antitrust laws

must be balanced, class actions are less "inconsistent with the FAA" than class arbitration. Petitioners' assumption that the Court's use of the phrase "class proceedings" was meant to include class actions, therefore, is unwarranted.

Should this Court reaffirm its vindication of rights precedents and continue to enforce only arbitration clauses that do not work to deprive citizens of access to justice, the Court's preferred alternative surely would be to permit the plaintiff to maintain a class action rather than to compel the defendants to endure the risks of class arbitration.

As to Petitioners' second two assumptions, the vindication of rights principle was not at issue in *Concepcion*. *See supra* at 15-17. So, facially, there is no basis for Petitioners' interpretation that this Court, by stating that States could not compel class "procedures" even if "desirable for unrelated reasons," meant that class actions are prohibited even when they are essential to vindicate the individual named plaintiffs' statutory rights.

But Petitioners' interpretation also reflects a misunderstanding of the majority's debate with the dissent which led to the two sentences on which Petitioners rely. Because the Court accepted the lower courts' findings that the Concepcions "were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action," *Concepcion*, 131 S. Ct. at 1753 (emphasis in original), that debate could not have been about the vindication of the named plaintiffs' *own* individual rights. Rather, the more plausible

reading is that the debate was about whether California could void AT&T's arbitration clause simply because it prevented the named plaintiffs from vindicating the rights of absent class members.

The district court's opinion in *Concepcion* is revealing on this point, as it initially framed the debate in precisely those terms. *See Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 U.S. Dist. LEXIS 103712, at *32-44 (S.D. Cal. Aug. 11, 2008). The district court found that AT&T's arbitration procedures were sufficiently consumer-friendly to enable claimants to obtain full redress through individual arbitration. *Id.* at *32-37. The court nevertheless held that, under *Discover Bank*, AT&T's arbitration provision was unconscionable because it enabled AT&T to "avoid potential liability to thousands of other customers who have no knowledge of the alleged wrongdoing," and thus, would not "'serve[] as a disincentive'" for AT&T to avoid that type of wrongdoing in the first place. *Id.* at *41-42 (quoting *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 159, 30 Cal. Rptr. 3d 76, 84, 113 P.3d 1100, 1108 (2005)); *see also Discover Bank*, 36 Cal. 4th at 156-57, 30 Cal. Rptr. 3d at 81-82, 113 P.3d at 1105-06 (discussing deterrence policy of class actions).

The underlying FAA policy debate that percolated up to the Court in *Concepcion*, therefore, was whether the California courts' desire to vindicate absent class members' rights and deter wrongdoing through class procedures were permissible reasons for voiding an arbitration clause under the FAA, even though AT&T's arbitration

clause enabled individual claimants to vindicate their own rights in arbitration. This elucidates the Court's statement that States cannot require class procedures "even if it is desirable for unrelated reasons" – the "unrelated reasons" referred to protecting the absent class members who had not sued and deterring future wrongdoing by AT&T. The "small-dollar claims that might otherwise slip through the legal system," likewise, were not the claims of the named plaintiffs, but those of absent class members who did not know they had claims.

If *Concepcion* is read correctly within the context of the case's background, it becomes apparent that this Court did not implicitly overrule *Mitsubishi*, *Randolph*, and *Pyett* and hold that it would now permit an arbitration agreement to serve in practice as a prospective waiver of a claimant's statutory rights. Rather, the Court simply concluded that when individual claimants can be made whole in arbitration, their procedural right to serve as class representatives to protect absent class members and deter wrongdoing cannot trump the defendant's right to arbitrate under the FAA. Because the right to arbitrate is a substantive statutory right and the named plaintiffs' option to bring a class action is a procedural right only, *see Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980), the substantive statutory right necessarily controls, and the procedural right must give way.

Some courts have correctly read *Concepcion* in this manner.[5] Petitioners and their *amici* have not.

C. In sum, Petitioners' argument that this Court's vindication of rights precedents cannot stand in light of *Concepcion* is built on a series of false assumptions and a fundamental misreading of the case. Read correctly, *Concepcion* is entirely consistent with, and easily reconciled with, *Mitsubishi, Randolph* and *Pyett*. *Concepcion* did not hold or imply that arbitration provisions should be blindly enforced even if the named plaintiffs cannot vindicate their individual rights in the arbitral forum. It held that when the individual claimants *can* be made whole in arbitration – that is, *when* they can fully vindicate their "statutory rights in the arbitral forum," *Randolph*, 531 U.S. at 90 – the FAA's pro-arbitration policy outweighs the ancillary

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[5] *See Sutherland v. Ernst & Young LLP*, 847 F. Supp 2d 528, 537 (S.D.N.Y. 2012):

> There is a difference … between claims that might slip through the cracks because plaintiffs choose not to prosecute them individually, and claims for which a plaintiff seeks redress but is precluded from vindicating her rights. ... [T]he Concepcions could bring their claim in arbitration on an individual basis …. The fact that a plaintiff in the same situation as the Concepcions might choose not to make a claim for such a small overcharge is not the Court's concern.

See also Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950 (LBS) (JCF), 2011 U.S. Dist. LEXIS 73200, at *10-11 (S.D.N.Y. July 7, 2011) (*Concepcion*'s discussion was analogous to pitting the FAA against "the plaintiff's desire to proceed as class representative under Rule 23," which does not create "a federal statutory right to proceed on a class basis") (citation omitted).

procedural policies underlying a class representative's function.

The Second Circuit correctly applied all of this Court's arbitration precedents in *Amex*, and its decision should be affirmed.

III. Upholding *Amex* Would Advance the FAA's Objectives, While, Contrary to Petitioners' Policy-Based Arguments, Reversing *Amex* Would Undermine the FAA's Objectives.

A. *Amex* was a pro-arbitration decision. The Second Circuit's holding that arbitration clauses should not be enforced if one of the contracting parties proves it cannot rationally pursue arbitration will encourage those who are genuinely interested in the benefits of arbitration to draft arbitration clauses that ensure claimants will be able to effectively vindicate their statutory rights in arbitration. If *Amex* is affirmed, and Petitioners genuinely want to arbitrate future antitrust claims individually rather than to use arbitration clauses as a shield against civil liability, Petitioners will be encouraged to draft new arbitration clauses ensuring that their counter-contracting parties can pursue claims in arbitration. All drafters of arbitration clauses will be similarly encouraged, resulting in more consumer-friendly arbitration agreements, fewer claimants who cannot rationally seek to vindicate their rights in arbitration, and, consequently, the increased use of arbitration as a genuine dispute resolution vehicle.

Reversing *Amex* will have the opposite effect. Holding that arbitration clauses must be blindly enforced even if it leads to no arbitration taking place at all will lead to increasingly unfriendly arbitration provisions and ever-fewer arbitrations. Why, for example, would AT&T continue to pay double attorneys' fees and other costs to successful claimants in arbitration, *see Concepcion*, 131 S. Ct. at 1744 (describing AT&T's arbitration clause), if the law permitted AT&T to compel arbitration even under an arbitration clause that lacks those features?

If powerful contracting parties are able to use arbitration agreements to effectively obtain *de facto* immunity for statutory violations, their fiduciary drive to maximize profit will necessarily yield a calculus that their bottom lines would benefit best by arbitration provisions that foreclose arbitration to as many prospective claimants as possible, not by arbitration agreements that facilitate arbitration.

If the law compels arbitration even by citizens who cannot rationally arbitrate, arbitration clauses that as a practical matter deprive many prospective claimants of the ability to arbitrate will become ubiquitous, and consumer-friendly clauses will fade from existence. The inevitable result will be less arbitration, less access to justice for aggrieved small business owners and other claimants, reduced civil accountability for antitrust and other statutory violators, and a corresponding increase in those species of unlawfulness. It is difficult to imagine

how that result could serve the FAA's objectives, or any other Congressional purpose.[6]

Judge Pooler, the author of the *Amex* opinions, correctly noted when the Second Circuit denied *en banc* review that to blindly compel arbitration by litigants who cannot rationally pursue it would "clos[e] the courthouse door to all but the most well-funded plaintiffs" in federal statutory rights cases. *In re American Express Merchants' Litig.*, 681 F.3d 139, 142 (2d Cir. 2012) ("*Amex en banc*"). Under the First Amendment, the privilege of enforcing statutory rights is not reserved to powerful entities,

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[6] Some of Petitioners' *amici* mistakenly refer to the need to ensure access to justice as a "policy consideration" rather than a Constitutional one. *See* Brief of the Chamber of Commerce of the United Sates of America and Business Roundtable as *Amici Curiae* In Support of Petitioners, at 26. Based on a few anecdotes, they suggest that a "business model" will evolve to coordinate some individual arbitrations through cost-sharing arrangements. *Id*. at 29-30. But even if such an approach may be economically rational for some claimants in some cases, these *amici* offer no evidence that the practice has successfully vindicated a single claimant's rights to date, much less that *amici's* speculations about its future use someday satisfies the Constitution's mandate that all citizens have access to justice today. The history of arbitration clause litigation has shown, moreover, that if blindly enforcing arbitration clauses "as written" becomes the law of the land, drafters of arbitration provisions will soon attempt with a stroke of a pen to preclude claimants from pooling resources, just as they have barred them from pursuing collective actions and public injunctions.

These *amici* recognize that this case, at least in part, is about "access to justice," *id.*, at 30, 31, but they ignore the economic reality that the fiduciary profit motive will impel entities like Petitioners to draft arbitration clauses that minimize access to justice if the law permits them to do so.

the well-to-do, and the economically irrational. The privilege to access justice belongs to every other citizen as well.

B. Respectfully, Chief Judge Jacobs' policy-laden arguments for reversing *Amex* do not advance the objectives of the FAA, certainly not sufficiently to conclude that Congress intended to foreclose access to justice to those who cannot rationally pursue arbitration. The contention that *Amex* may be used by "class action lawyers" to oppose arbitration in any case involving small damages, *id.*, at 143, (Jacobs, C.J., dissenting), appears to assume that the FAA is an anti-class action statute – it is not. The FAA is designed to promote arbitration, and as shown above, affirming *Amex* will promote arbitration while reversing it would undermine both arbitration and the Constitutional right of citizens to access justice by other means. As a procedural matter, the argument ignores that any plaintiff's effort to resist arbitration on vindication of rights grounds "must be considered on its own merits, based on its own record," *Amex*, 667 F.3d at 219, subject to a summary judgment standard, *Sutherland*, 768 F. Supp. at 549. An entitlement to summary judgment is an analysis courts regularly perform, and which they "are perfectly capable of doing … to determine if the plaintiffs have made the necessary showing" under the Second Circuit's decision. *Amex en banc*, 681 F.3d at 142 (Pooler, J., concurring).

Chief Judge Jacobs' belief that vindication of rights litigation will turn motions to compel arbitration into "searching" merits inquiries

involving *Daubert* challenges and class certification questions, *id.*, at 144-45 (Jacobs, C. J., dissenting), is not fully explained, and it overlooks the records in *Amex* and the other vindication of rights cases, where no such thing occurred. *Amex* requires only a relatively simple cost-effectiveness analysis of whether an economically rational individual plaintiff can vindicate its rights under the statute sued upon, and if the defendant submits probative evidence that the plaintiff actually can be made whole under the terms of the arbitration clause at issue, the plaintiff will not meet its summary judgment burden.

Chief Judge Jacobs' contention that *Amex* equates being "made whole" with a "complete victory" that is "rarely achieved," *id.*, at 144, misses the critical point of the vindication of rights requirement. It is not whether a plaintiff *will* win a "complete" victory that matters, but whether the plaintiff conceivably *can* win such a victory if it pursues its remedies to the fullest. The Second Circuit found as a matter of law that the *Amex* plaintiffs cannot win *any* recovery in arbitration because they will be forced to abandon their claims, but that they can potentially win a full recovery in a class action if it is tried to conclusion. Hence, the First Amendment and the FAA dictate that those plaintiffs not be compelled to arbitrate.

Finally, while Chief Judge Jacobs recognizes that the "'overarching purpose of the FAA'" is to enforce arbitration clauses "'so as to facilitate streamlined proceedings,'" *id.*, at 145 (quoting *Concepcion*, 131 S. Ct. at 1748), he does not explain how ordering a plaintiff to file an economically

irrational arbitration that will never take place advances the FAA's purpose. If the FAA is designed to promote arbitration, the statute cannot be interpreted as intending a scheme that leads to no arbitration. "In other words, the act cannot be held to destroy itself." *Concepcion*, 113 S. Ct. at 1748.

CONCLUSION

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

Respectfully submitted.

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