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 AMICUS CURIAE PUBLIC CITIZEN, INC., SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a national consumer advocacy organization founded in 1971, appears on behalf of its members before Congress, administrative agencies, and the courts on a wide range of issues and works toward enactment and effective enforcement of laws protecting consumers, workers, and the general public. The fairness of mandatory arbitration agreements has long been a significant concern of Public Citizen, and Public Citizen attorneys have represented parties or filed amicus curiae briefs in many of this Court's cases addressing arbitration, including *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). Public Citizen is particularly concerned to ensure that enforcement of arbitration agreements in accordance with this Court's decisions does not undermine the substantive rights of litigants, and that concern lies at the heart of this case.

SUMMARY OF ARGUMENT

Can an arbitration agreement be enforced when plaintiffs who have federal antitrust claims that could viably be pursued in court prove that it will be impossible for them to present those claims in individual arbitration under the agreement? That is the question posed by this case. If this Court means what it has re-

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[1] Pursuant to Rule 37.6 of this Court, amicus curiae states that this brief was not written in whole or in part by counsel for a party and that no one other than amicus curiae made a monetary contribution to the preparation or submission of this brief. Letters from both parties consenting to all amicus briefs are on file with the Clerk.

peatedly said in its decisions under the Federal Arbitration Act (FAA)—that arbitration agreements are enforceable if they permit the effective vindication of statutory rights—then the answer to that question must be no.

The Second Circuit's decision declining to enforce the arbitration agreement at issue in this case is firmly grounded in a principle incorporated in the text and judicial construction of the FAA: Arbitration agreements are choices of forum that do not strip parties of otherwise nonwaivable rights. The FAA provides that agreements to resolve claims through arbitration are enforceable to the same extent as other contracts. 9 U.S.C. § 2. Nothing in the FAA, however, says that agreements to *waive* claims are enforceable. After all, such agreements are the opposite of agreements to arbitrate: They are agreements not to arbitrate (or litigate) at all. Thus, this Court, beginning in its seminal opinion *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985), has said over and over again that an arbitration agreement, to be enforceable, must preserve plaintiffs' substantive rights under federal statutes.

Moreover, the Court has repeatedly stated that an agreement that does not expressly waive a substantive claim but imposes conditions that effectively make it impossible for a plaintiff to assert that claim is as improper as an agreement that purports to nullify statutory rights expressly. That is, arbitration must permit "effective vindication" of statutory rights. *Id.* at 637. Thus, this Court has recognized that arbitration clauses imposing onerous fees that would make it impossible to assert federal statutory claims would be unenforceable. *See Green Tree Fin. Corp.-Alabama v.*

Randolph, 531 U.S. 79 (2000). Such agreements fall outside the FAA because they are not agreements to resolve disputes by arbitration, but agreements to prevent the resolution of disputes by any means.

For this reason, the FAA does not conflict with, but in fact reinforces, other legal doctrines that preclude enforcement of waivers of substantive rights. In this case, for example, enforcing a waiver of respondents' entitlement to challenge American Express's allegedly unlawful tying arrangement under the antitrust laws would violate the public policies incorporated in those laws. That result would also run squarely against this Court's repeated insistence that arbitration clauses must permit effective vindication of statutory rights.

Moreover, enforcing an arbitration agreement that prevents the vindication of substantive rights is by no means compelled by the result in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, where the question decided by the Court was whether a class action ban in an arbitration clause is enforceable when a class action is *not* necessary to vindicate the plaintiff's rights. Nothing in *Concepcion* requires displacement of doctrines that ensure that arbitration agreements preserve substantive rights.

In the face of respondents' demonstration that the arbitration agreement does not permit effective vindication of their rights, American Express invokes what it perceives as the benefits that arbitration may offer claimants in other types of cases—in particular, employment and consumer cases. But whatever the merits of American Express's controversial assertions that arbitration benefits litigants generally, those assertions do nothing to answer the evidence showing

that requiring arbitration on the facts of this case would amount to enforcing an invalid waiver of substantive rights. Declining to enforce an arbitration agreement in the narrow circumstances where plaintiffs demonstrate that it would deprive them of their substantive claims will not detract from any benefits that arbitration may offer in other cases.

This Court has never held that an arbitration agreement can be enforced when its procedures demonstrably make it impossible to assert a nonwaivable federal statutory claim. A holding that an arbitration clause banning class actions is unenforceable when plaintiffs prove that it prevents vindication of their rights will not undermine the FAA's goals—to make arbitration available as a means of resolving disputes. It will fulfill those goals by permitting arbitration only when it in fact serves its function of allowing the resolution of disputes. Barring assertion of substantive claims in the guise of requiring them to be arbitrated is no part of the FAA's purpose.

ARGUMENT

I. The FAA, by Its Own Terms, Does Not Authorize Waiver of Substantive Rights.

The plain language of the FAA makes agreements to *arbitrate* claims enforceable, not agreements to *waive* claims. Section 2 of the FAA provides that "[a] written provision in any ... contract evidencing a transaction involving commerce to *settle by arbitration a controversy* thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof …, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). As its language indicates, the FAA

requires enforcement of agreements to *resolve disputes* by arbitration, not agreements that *foreclose* assertion and resolution of claims.

Consistent with this language, this Court has characterized the FAA as authorizing a *choice of forum* for resolving disputes, not as a mechanism for preventing assertion of claims. In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), for example, the Court, in enforcing an agreement to arbitrate federal securities claims, described arbitration agreements as "a specialized kind of forum-selection clause." *Id.* at 519. The Court has repeated its characterization of arbitration agreements under the FAA as "forum-selection" or "choice-of-forum" clauses regularly in the decades since *Scherk*. *See*, *e.g.*, *CompuCredit*, 132 S. Ct. at 671 (2012); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 & n.10 (2002); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991); *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 483 (1989); *Mitsubishi*, 473 U.S. at 629-31.

A forum-selection clause determines *where* a claim will be decided, not *whether* it may be pursued. Thus, this Court has emphasized that under the FAA an arbitration agreement *"only* determines the choice of forum." *Waffle House,* 534 U.S. at 295 n.10 (emphasis added). As the Court explained in *Mitsubishi,* "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S. at 628. The Court has repeated these words from *Mitsubishi* no

fewer than seven times in subsequent cases. *Pyett,* 556 U.S. at 266; *Preston v. Ferrer*, 552 U.S. 346, 359 (2008); *Waffle House,* 534 U.S. at 295 n.10; *Circuit City Stores v. Adams*, 532 U.S. 105, 123 (2001); *Gilmer,* 500 U.S. at 26; *Rodriguez de Quijas,* 490 U.S. at 481; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 229-30 (1987).

Not only does the FAA not *require* enforcement of agreements that deprive parties of substantive rights in the guise of arbitration; it *prohibits* their enforcement. *Mitsubishi* stated that if an arbitration agreement "operated ... as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." 473 U.S. at 637 n.19; *accord Vimar Seguros,* 515 U.S. at 540. Thus, *Mitsubishi* announced that the FAA requires arbitration of claims only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum ...." 437 U.S. at 637. Again, the Court has reiterated these words in subsequent decisions. *See Green Tree*, 531 U.S. at 90; *Gilmer,* 500 U.S. at 28; *McMahon,* 482 U.S. at 240.

The principle that an arbitration agreement must permit effective vindication of substantive rights is no mere invention by the Court: It flows directly from the language of FAA section 2, which makes agreements to settle controversies by arbitration enforceable. An agreement that *precludes* arbitration of a particular type of claim is not an agreement to settle a dispute by arbitration. The FAA authorizes parties to determine the forum for resolving claims; it is not a source of authority for agreements waiving claims.

Moreover, the effective-vindication principle forbids not only direct waivers of rights but also agreements imposing procedural impediments preventing effective vindication of rights. Thus, an arbitration agreement, like other forum-selection provisions, is unenforceable 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.'" *Mitsubishi*, 473 U.S. at 632 (quoting *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 18 (1972)). The Court recognized this consequence in *Green Tree,* where it considered a plaintiff's claim that excessive arbitration fees prevented her from vindicating rights under the Truth in Lending Act. Quoting *Mitsubishi*, *Green Tree* reiterated that an arbitration agreement must permit effective vindication of statutory rights, 531 U.S. at 90, and acknowledged that excessive costs could prevent a party from effectively vindicating rights "in the arbitral forum." *Id.* The Court held that the plaintiff in *Green Tree* had not demonstrated prohibitive costs, but that actual proof of such costs *would* invalidate an arbitration agreement. *Id.* at 92.

II. The FAA Does Not Override Other Laws Creating Substantive Rights That Are Not Subject to Waiver.

Because an arbitration clause imposing terms requiring a party to forgo substantive rights or preventing effective vindication of rights exceeds what the FAA requires courts to enforce, the FAA does not conflict with or displace other sources of law that make particular substantive claims nonwaivable. Rather, such laws are fully consistent with the FAA and, indeed, implement the FAA's own policy.

Put another way, the *Mitsubishi* non-waiver principle and its corollary that arbitration agreements must permit effective vindication of rights is "part of the body of federal substantive law of arbitration," *Kristian v. Comcast Corp.*, 446 F.3d 25, 63 (1st Cir. 2006), and, therefore, corresponding legal doctrines prohibiting waiver of claims do not conflict with the FAA. Any suggestion that it would violate the FAA to apply *Mitsubishi's* non-waiver principle to the claims at issue here "confuse[s] an agreement to arbitrate"—which is protected by the FAA—"with a prospective waiver of the statutory right"—which the FAA does not authorize. *Pyett,* 566 U.S. at 265.

Because this case concerns only whether the effective-vindication principle applies to claims under federal law, the Court need not address its potential application to state-law claims, an issue that has not received adversary briefing in this case. *See* Resp. Br. 50. We note, however, that because the FAA does not authorize agreements waiving claims, as opposed to agreements to arbitrate them, the FAA does not conflict with, and hence should not preempt, state laws that prevent enforcement of agreements that effectively waive state-law claims. Thus, both this Court and other federal courts have recognized the applicability of *Mitsubishi*'s non-waiver principle to state-law rights.[2]

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[2] *See Preston v. Ferrer*, 552 U.S. at 359 (stating, in a case involving claims under California law, that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral ... forum" and that a party to an arbitration agreement "relinquishes no substantive rights ... California law may accord him"); *see also Circuit City,* 532 U.S. at 123 (quoting

(*Footnote continued*)

Of course, this Court has held that the FAA displaces *conflicting* state law under the Supremacy Clause. *Vaden v. Discover Bank*, 556 U.S. 49, 58-59 (2009); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271-272 (1995); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Only Congress can *override* the FAA by legislation making it inapplicable to claims otherwise within its scope. *See CompuCredit,* 132 S. Ct. at 669. But state laws precluding enforcement of agreements that prevent effective vindication of substantive rights are fully consistent with the FAA.

However that question may be resolved, there is no dispute that, as a matter of *federal* antitrust law, the substantive claims at issue here may not be waived by the very agreements containing the allegedly unlawful tying provisions. Indeed, American Express itself does not contend that the antitrust laws would permit a company whose contracts contained an unlawful tying provision to insulate that provision from challenge by adding another provision waiving any claim that the contract violated the antitrust laws.

In *Mitsubishi*, this Court recognized that an agreement purporting to waive substantive rights under the antitrust laws would be unenforceable. 473

Mitsubishi's statement that parties to arbitration do not forgo substantive rights in a case involving state-law claims); *Kristian*, 446 F.3d at 29 (holding that arbitration provisions are unenforceable if they "prevent the vindication of statutory rights under *state* and federal law") (emphasis added); *Booker v. Robert Half Intern., Inc.*, 413 F.3d 77, 79 (D.C. Cir. 2005) (holding that an arbitration agreement may not require a party to "forgo substantive rights" under local law of the District of Columbia) (Roberts, J.).

U.S. at 637 & n.19. Indeed, it would defeat the purpose of the antitrust laws—to protect consumers and competitors against the exploitation of market power—if a company could use the very market power the antitrust laws are aimed at to require its customers to agree to waive the protection of those laws. *See*, *e.g.*, *Radio Corp. of Am. v. Raytheon Mfg. Co.*, 296 U.S. 459, 462 (1935) (stating that a purported release of antitrust claims is unenforceable "when it is so much a part of an illegal transaction as to be void in its inception"); *Redel's Inc. v. Gen. Elec. Co.,* 498 F.2d 95, 100-01 (5th Cir. 1974) (holding that a release is invalid if "the release itself was an integral part of a scheme to violate the antitrust laws").

In other words, American Express may not exploit market power to require merchants not only to take its credit cards, but also to waive any antitrust tying claims, as the price of accepting its charge cards. But enforcing the arbitration clause in the circumstances of this case would allow American Express to do just that. Nothing in the FAA allows American Express to obtain indirectly what it cannot obtain directly—immunity against antitrust treble damages actions—merely by requiring its customers to agree to arbitration proceedings that make antitrust claims impossible when they agree to the allegedly illegal tying arrangement.

This conclusion is reinforced by the "savings clause" of FAA section 2, which provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This Court has recognized that one such longstanding ground for not enforcing a contract is the public policy against waivers

of statutorily protected rights. *Mitsubishi*, 473 U.S. at 637 n.19; *accord Vimar Seguros*, 515 U.S. at 540; *see also United Paperworkers Intern. Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987) (describing the "general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy").

This contract-law principle falls within the FAA's savings clause because it applies equally to arbitration agreements and other contracts: It does not "take its meaning precisely from the fact that a contract to arbitrate is at issue," but is a "generally applicable contract defense[]." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 685, 687 (1996). Nor does it "stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion,* 131 S. Ct. at 1748. Rather, the non-waiver principle prevents arbitration only in the limited set of cases where arbitrating would amount to a waiver of substantive rights, and the FAA's objectives do *not* include requiring a party to relinquish any "substantive right ... [the] law may afford him." *Preston v. Ferrer,* 552 U.S. at 359.

III. *Concepcion* Did Not Overrule the Longstanding Principles Underlying the Decision Below.

Concepcion does not require this Court to reconsider its repeated recognition that the FAA does not authorize agreements waiving substantive rights. *Concepcion* leaves unaltered the Court's repeated holdings that the FAA neither requires nor allows enforcement of arbitration agreements waiving substantive statutory rights or preventing effective vindication of rights—holdings that necessarily mean the FAA does not conflict with other federal laws serving

exactly those same interests. Moreover, the reasons for *Concepcion*'s abrogation of the California Supreme Court ruling in *Discover Bank v. Superior Court*, 113 P.3d 1100 (2005), are inapplicable here.

Concepcion held that the FAA preempted the *Discover Bank* rule because that rule "interferes with arbitration." 131 S. Ct. at 1750. In *Discover Bank,* the California Supreme Court held that a class-action ban was unconscionable "when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." 113 P.3d at 1110. *Concepcion* concluded that *Discover Bank* "classif[ied] most collective-arbitration waivers in consumer contracts as unconscionable," 131 S. Ct. at 1746, because its "malleable and toothless" requirements had "no limiting effect," as virtually all consumer contracts are adhesion contracts, most consumer disputes involve relatively small sums, and merely alleging a scheme affecting many consumers sufficed to invoke the rule. *Id.* at 1750. *Discover Bank* thus "allow[ed] any party to a consumer arbitration to demand [classwide arbitration] *ex post"* as a condition on enforcement of an arbitration agreement. *Id.* By allowing consumers in most cases to avoid arbitration altogether unless classwide arbitration were offered, *Discover Bank* "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA." *Id.* at 1748.

Nothing in *Concepcion,* however, validated arbitration clauses that purport to waive otherwise nonwaivable statutory rights. The Court did not question its many decisions from *Mitsubishi* onward holding that arbitration agreements are not waivers of substantive claims and must permit effective vindication of rights. Nor did the Court cite, let alone overturn, *Green Tree's* recognition that proof that an arbitration agreement prevents vindication of a party's rights would avoid its enforcement under the FAA.

Indeed, the question presented in *Concepcion* made clear that the validity of arbitration clauses that prevent vindication of rights was not before the Court:

> 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*.

http://www.supremecourt.gov/qp/09-00893qp.pdf (emphasis added).

Consistent with the question presented, *Concepcion* emphasized that under AT&T's arbitration agreement, the plaintiffs' claim "was most unlikely to go unresolved" because the agreement contained provisions that "provide[d] incentive for the individual prosecution of meritorious claims that are not immediately settled" and "essentially guarantee[d]" the plaintiffs would be "made whole." 131 S. Ct. at 1753. Indeed, the Court concluded that the plaintiffs actually "were better off under their arbitration agreement

... than they would have been as participants in a class action." *Id.*

Concepcion thus did not address whether an arbitration clause is enforceable when its ban on class proceedings and its lack of other provisions for cost-sharing or cost-shifting demonstrably *prevent* vindication of nonwaivable statutory rights. Rather, *Concepcion* held that the FAA preempts a rule prohibiting class-action bans where individual arbitration *assures* vindication of rights. Thus, a recent analysis of *Concepcion* concludes that:

> [T]he unconscionability defense in *Concepcion* "stood as an obstacle," for preemption purposes, because it was a categorical rule that applied to all consumer cases. The sin of the *Discover Bank* rule was that it did not require the claimant to show that the agreement operated as an exculpatory contract on a case-specific basis.

Gilles & Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. Chi. L. Rev. 623, 651 (2012).

Even a leading federal appellate decision applying *Concepcion* to bar a challenge to a class-action ban acknowledged that *Concepcion* rested largely upon the view that "although the *Discover Bank* rule was cast as an application of unconscionability doctrine, in effect, it set forth a state policy placing bilateral arbitration categorically off-limits for certain categories of consumer fraud cases ...." *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1211 (11th Cir. 2011).

By contrast, the Second Circuit's decision in this case does not place bilateral arbitration off-limits for any broad category of cases. Only when a plaintiff has met the demanding burden of proving that an arbitra-

tion agreement will not permit it to present a substantive claim in arbitration will the Second Circuit's standard render the arbitration agreement unenforceable. The proof demanded by the effective-vindication standard is not a "malleable" or "toothless" requirement that effectively allows "any party" to demand class proceedings in a broad range of cases. *Concepcion,* 131 S. Ct. at 1750. Moreover, while *Concepcion* suggests that the FAA does not allow invalidation of a class-action ban merely because some plaintiffs may "have insufficient *incentive*" to vindicate their rights, it leaves open a challenge where plaintiffs "have no effective *means* to vindicate their rights." *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 (9th Cir. 2012).

Finally, the decision below is not vulnerable to condemnation on the ground that it has a "disproportionate impact" on arbitration or is incompatible with "fundamental attributes of arbitration." *Concepcion,* 131 S. Ct. at 1748. Although the Second Circuit's decision contemplates that class procedures or other means of spreading costs of litigation will sometimes be required to ensure effective vindication of nonwaivable rights, and in those instances arbitration will be unavailable, that result will not undermine the FAA's policy favoring arbitration, as that policy does not endorse using arbitration to require parties to forgo substantive rights. By *allowing* arbitration under parties' agreements *except* when it would eliminate nonwaivable rights, the decision below maintains the most fundamental attribute of arbitration under the FAA: Arbitration is a choice of forum, not a waiver of substantive claims.

IV. American Express's Contention That Arbitration Benefits Employees and Consumers Does Not Justify Enforcement of Arbitration Agreements That Do Not Permit Vindication of Rights.

American Express does not seriously contend that the plaintiffs in this case can pursue their antitrust claims through individual arbitration under the clause at issue without incurring ruinous expenses. Nonetheless, American Express argues that the arbitration clause should be enforced because, it contends, arbitration procedures are generally beneficial to litigants. In particular, American Express contends that individual claimants in employment and consumer arbitrations fare as well as or better than comparable plaintiffs in traditional litigation and generally face low expenses of arbitration. *See* Pet. Br. 52.

The success (or lack of success) of employees and consumers in arbitration has very little bearing on this case, which involves an antitrust claim brought by commercial entities against another commercial entity under an arbitration clause that differs markedly from the agreements subject to the "consumer protective" rules that American Express discusses. Pet. Br. 51. The costs faced by consumers and employees who arbitrate claims, and their rates of success, say nothing about whether the antitrust claims at issue can viably be pursued under an arbitration agreement that permits neither collective proceedings nor other forms of cost-spreading.

Moreover, the "[e]mpirical evidence" American Express cites (Pet. Br. 52) concerns outcomes in cases that were actually pursued in arbitration. Those are, by definition, cases where the terms of the applicable

arbitration agreements did not effectively prevent the plaintiff from even pursuing her particular claims. In this case, the plaintiffs do not contend that an arbitrator would be biased against them or unlikely to rule for them on the merits if they were able to proceed in arbitration; rather, they contend that the terms of the arbitration agreement are such that it is not viable even to pursue their claims in individual arbitration because the costs would inevitably dwarf any potential recovery. Success rates of plaintiffs under agreements that do not impose such impediments do not in any way shed light on the question whether the agreements at issue here prevent effective vindication of the claims in this case.

Moreover, the evidence that American Express cites as to the benefits of arbitration for employees and consumers is dubious, at best. For example, a more recent study of employment arbitration, using a broader set of cases than that available to the author cited by American Express (*see* Pet. Br. 52) showed that employees prevailed in a substantially lower number of cases in arbitration than in litigation, and that average awards to employees in arbitration were a small fraction of those in litigation. *See* Colvin, *Employment Arbitration: Empirical Findings and Research Needs*, Disp. Resol. J., Oct. 2009, at 6, 8-11. The author concluded that "the overall picture shows a large gap in the average expected outcomes in arbitration and litigation." *Id*. at 10-11.

As for the empirical studies American Express cites concerning consumer arbitration, they are limited to a tiny set of cases in which arbitrations conducted by the American Arbitration Association (AAA) yielded final awards in 2007—only 301 cases.

See Pet. Br. 52, n.21. Given the ubiquity of arbitration agreements in consumer contracts, and AAA's national prominence as a provider of arbitration services, the tiny number of consumer cases actually handled in a year suggests that the arbitration process poses significant barriers to the assertion of consumer claims even if, in cases that surmount those barriers, consumers may succeed in winning some relief in AAA arbitration about half the time.

This case, however, does not require the Court to consider whether arbitration is suitable or advantageous for the broad range of consumer and employment cases, or even for commercial antitrust cases generally. Whatever the outcome of this case, arbitration will continue to be available in those cases in which it offers potential benefits for the parties—and, indeed, even those cases in which it may disadvantage plaintiffs relative to litigation—as long as the arbitration agreement does not operate as an effective waiver of a plaintiff's substantive claims.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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