No. 12-133

In the Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL., PETITIONERS

v.

ITALIAN COLORS RESTAURANT, ET AL.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a court should enforce an arbitration agreement under the Federal Arbitration Act, 9 U.S.C. 2, when the plaintiff demonstrates that its non-recoverable costs of arbitration will greatly exceed its potential recovery on a federal statutory claim.

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INTEREST OF THE UNITED STATES

This case presents the question whether an arbitration agreement must be enforced under the Federal Arbitration Act, 9 U.S.C. 2, even when enforcement of the agreement will effectively foreclose the plaintiffs from asserting their claims under the Sherman Act, 15 U.S.C. 1 *et seq.* Private actions are an important supplement to the government's civil enforcement efforts under federal competition laws, which the Department of Justice and the Federal Trade Commission have primary responsibility for administering. Private actions are also an important component of many other federal statutory schemes. The United States therefore has a substantial interest in ensuring that arbitration agreements are not used to prevent private parties from ob-

taining redress for violations of their federal statutory rights.

STATEMENT

1. In 1925, Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, to "place[] arbitration agreements on equal footing with all other contracts" and to "overcome judicial resistance to arbitration." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006); see *Rent-A-Center, West, Inc.* v. *Jackson*, 130 S. Ct. 2772, 2776 (2010) ("The FAA reflects the fundamental principle that arbitration is a matter of contract."). The FAA applies to "[a] written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract." 9 U.S.C. 2. Such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Ibid.*

2. a. Respondents, merchants who accept American Express cards, are the named plaintiffs in this consolidated set of putative class actions. See J.A. 51-80; see also Pet. App. 63a, 100a n.1 (detailing the separate cases and procedural posture). As relevant here, respondents allege that petitioners—American Express Company and a wholly owned subsidiary—violated Section 1 of the Sherman Act, 15 U.S.C. 1, by engaging in an unlawful tying arrangement. Specifically, respondents allege that petitioners used their market power in corporate and personal charge cards to compel respondents to accept petitioners' mass-market credit and debit cards at elevated merchant-fee rates. J.A. 72-76; see generally *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 461-462 (1992).

The contractual relationship between petitioners and respondents is governed by the Card Acceptance Agreement (Agreement), petitioners' standard form contract for merchants. The Agreement contains a mandatory arbitration clause that requires all disputes between the parties to be resolved by arbitration. Pet. App. 7a. The Agreement further provides that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis," and that "Claims * * * may not be joined or consolidated" with claims brought by other merchants. *Id.* at 9a. The Agreement does not permit the prevailing party to shift its costs to the other party, and it contains a confidentiality provision that prohibits the disclosure of information obtained in an arbitration proceeding. *Id.* at 92a; Resp. Br. 49-50.

b. The class action complaints were consolidated in the Southern District of New York. Petitioners moved to compel arbitration under the Agreement's mandatory arbitration clause. See Pet. App. 7a-9a.

The district court granted petitioners' motion. Pet. App. 100a-124a. The court held that the parties' dispute fell within the scope of the Agreement's arbitration clause, *id.* at 110a, and it rejected respondents' argument that the clause should not be enforced because "the costs of individual arbitration would eclipse the value of any potential recovery," *id.* at 112a. The court stated that the treble damages provision of the Clayton Act, 15 U.S.C. 12 *et seq.*, provided "sufficient financial incentive to pursue [respondents'] claims." Pet. App. 113a. Accordingly, the district court granted petitioners' motion to compel arbitration and dismissed the suits. *Id.* at 123a.

3. The court of appeals reversed and remanded. Pet. App. 57a-99a.

a. The court of appeals held that the enforceability of the arbitration clause should be analyzed in light of this Court's statement in *Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79 (2000), that when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id.* at 92; see Pet. App. 85a-86a. The court held that respondents had established that "they would incur prohibitive costs if compelled to arbitrate under the class action waiver." *Id.* at 86a. Respondents had submitted a declaration from an economist (Dr. Gary L. French), who estimated that the cost of the expert analysis and testimony necessary to prove respondents' antitrust claims would be "at least several hundred thousand dollars, and might exceed $1 million," while the maximum damages any plaintiff could expect was $12,850, or $38,549 when trebled. *Id.* at 86a-89a; J.A. 93. The court emphasized that petitioners did not dispute this evidence. Pet. App. 86a n.17, 93a. The court accordingly concluded that "the class action waiver in the Card Acceptance Agreement cannot be enforced in this case because to do so would grant [petitioners] de facto immunity from antitrust liability by removing [respondents'] only reasonably feasible means of recovery." *Id.* at 95a.

b. Petitioners filed a petition for a writ of certiorari (No. 08-1473). While that petition was pending, this Court issued its decision in *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). In *Stolt-Nielsen*, the Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775. The

Court then granted the petition in No. 08-1473, vacated the court of appeals' judgment, and remanded for further consideration in light of *Stolt-Nielsen*. See 130 S. Ct. 2401 (2010).

On remand, the court of appeals again reversed the district court's decision and remanded for further proceedings. Pet. App. 31a-56a. The court concluded that *Stolt-Nielsen* did not cast doubt on its earlier reasoning because *Stolt-Nielsen* held only that "parties cannot be forced to engage in a class arbitration" absent an agreement to do so. *Id.* at 42a. "It does not follow," the court of appeals stated, that a "clause barring class arbitration is per se enforceable" even when it "effectively strip[s] plaintiffs of their ability to prosecute" alleged federal statutory violations. *Ibid.* The court of appeals stayed its mandate pending petitioners' filing a petition for a writ of certiorari. Pet. Br. 13.

c. While the mandate was stayed, this Court decided *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011). The Court in *Concepcion* held that the FAA preempted a California state-law rule barring enforcement of most class-arbitration waivers in consumer contracts. *Id.* at 1748.

The court of appeals *sua sponte* reconsidered its ruling in light of *Concepcion* and again reversed and remanded. Pet. App. 1a-30a. The court concluded that, although *Concepcion* "offers a path for analyzing whether a state contract law is preempted by the FAA," *id.* at 16a, it did not abrogate *Randolph*'s holding that an arbitration agreement should not be enforced when it effectively forecloses the plaintiff from asserting federal statutory rights. See *id.* at 15a, 18a, 25a. The court of appeals explained that Dr. French's declaration established, and petitioners did not dispute, that the costs of

proving respondents' claim would far exceed the maximum possible individual recovery. *Id.* at 25a-29a. The court concluded that respondents could pursue their claims "as [a] judicial class action or not at all," and it accordingly remanded "with the instruction to deny [petitioners'] motion to compel arbitration." *Id.* at 29a-30a.

d. The court of appeals denied rehearing en banc, with five judges dissenting. Pet. App. 127a-149a.

SUMMARY OF ARGUMENT

I. Under this Court's precedents, federal statutory claims are generally arbitrable if, but only if, the applicable arbitration procedures offer plaintiffs a realistic opportunity to vindicate their federal rights.

A. The FAA establishes a generally applicable federal policy favoring the creation and enforcement of agreements to arbitrate. Although this Court at one time discountenanced agreements to arbitrate federal statutory claims, its more recent decisions have held the FAA to be fully applicable to such agreements. The Court has repeatedly cautioned, however, that such an agreement will not be enforced if its practical effect in a particular case would be to prevent the effective vindication of federal rights. The effective-vindication rule harmonizes the FAA with the various rights-conferring federal statutes under which private claims are brought. The rule allows contracting parties to agree that their disputes will be resolved by an alternative adjudicator (an arbitrator rather than a court), while denying enforcement in circumstances where an arbitration agreement functions in practical effect as a prospective waiver of substantive rights.

Petitioners suggest that the Court's various articulations of the effective-vindication rule amount to no more

than stray dicta. But the Court's affirmative rationale for enforcing agreements to arbitrate federal statutory claims—*i.e.*, that the effect of enforcement is simply to substitute one adjudicator for another, rather than to extinguish the plaintiff's cause of action—is inapposite when enforcement will as a practical matter prevent any adjudication at all. And, contrary to petitioners' contention, there is no logical basis for confining the effective-vindication rule to cases in which costs specific to arbitration render resort to the arbitral forum infeasible.

B. A plaintiff who seeks to avoid enforcement of its own agreement to arbitrate bears the burden of establishing the effective-vindication exception. Here, respondents carried that burden by submitting an expert declaration—which the court of appeals found convincing—establishing that the costs of expert assistance would greatly exceed the amount any named plaintiff could hope to recover in bilateral arbitration. Petitioners did nothing to rebut that evidence. Petitioners also have identified no viable means by which respondents' costs could have been shared or shifted so as to render arbitration under the procedures specified in the Agreement a practical and effective means of seeking redress.

The effective-vindication rule creates salutary incentives for the crafting of arbitration procedures that can realistically be used to pursue federal claims. Under this Court's existing FAA jurisprudence, companies that prefer arbitration to litigation have a strong incentive to craft workable, "plaintiff-friendly" arbitration procedures in order to obviate potential objections to enforcement of their agreements. Such provisions facilitate plaintiffs' ability to pursue their federal claims and increase the likelihood that actual arbitration will occur,

thereby furthering the purposes of both the substantive federal statute and the FAA.

C. Petitioners' reliance on *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011), is misplaced. In contrast to this case, the Court in *Concepcion* emphasized that the streamlined arbitration procedures applicable to the parties' dispute did *not* foreclose the plaintiffs' ability to seek redress. And because *Concepcion* involved the arbitrability of state-law claims, the Court had no occasion to apply the effective-vindication rule or otherwise address the proper way of reconciling the FAA with *federal* rights-conferring statutes.

II. Petitioners' approach would impede not only the assertion of federal antitrust claims, but the vindication of numerous other federal statutory rights as well. Rather than encourage the adoption of arbitration procedures that can feasibly be used even for small-value cases, petitioners' approach would legitimize the use of arbitration agreements to extract what are in substance prospective waivers of substantive federal rights. That approach would subvert the purposes of the relevant rights-conferring statutes, without furthering the FAA's purpose of encouraging actual arbitration.

ARGUMENT

I. PETITIONERS' ARBITRATION AGREEMENT IS UNENFORCEABLE BECAUSE THE PRACTICAL EFFECT OF ENFORCEMENT WOULD BE TO FORECLOSE RESPONDENTS FROM EFFECTIVELY VINDICATING THEIR SHERMAN ACT CLAIMS IN ANY FORUM

Agreements to arbitrate federal statutory claims are enforceable if, but only if, "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." See, *e.g.*, *Mitsubishi Motors Corp.* v.

Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985).[1] The "effective-vindication" rule reconciles the FAA's policy of promoting arbitration with the policies of myriad federal statutes that confer substantive rights and authorize private suits by aggrieved persons. In this case, it is undisputed that the cost of proving respondents' Sherman Act claims far exceeds the recovery that any individual respondent can obtain, and the Agreement forbids all means of sharing or shifting those costs. Respondents therefore have demonstrated that the effective-vindication rule bars enforcement of the arbitration clause under the circumstances presented here.

For almost 30 years, the effective-vindication doctrine has provided a necessary incentive for contracting parties to craft arbitration procedures that afford realistic avenues for redress of federal statutory violations. Absent that constraint, parties would be free to craft agreements whose practical effect is to confer prospective immunity from liability under a wide range of federal statutes—including the antitrust laws, antidiscrimination and employment statutes, and consumer-protection laws. Such a result would undermine the remedial and deterrent effect of numerous federal statutes, without furthering the pro-arbitration policies of the FAA.

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[1] Different questions would be presented if a contractual arbitration clause precluded the plaintiff from seeking a form of relief (*e.g.*, punitive damages or attorneys' fees) that would be available under the relevant federal law if the plaintiff prevailed in court. A provision of that sort could be set aside as an invalid prospective waiver of substantive federal rights even if the plaintiff could obtain *some* relief through arbitration. See, *e.g.*, *Graham Oil Co.* v. *ARCO Prods. Co.*, 43 F.3d 1244, 1247 (9th Cir. 1994), cert. denied, 516 U.S. 907 (1995). No such issue is presented here.

A. This Court's Decisions Upholding The Arbitrability Of Federal Claims Rest On The Premise That The Plaintiffs Could Effectively Vindicate Their Federal Claims Under The Arbitration Agreement

1. a. By providing that an agreement to arbitrate a dispute arising out of a contract or transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. 2, the FAA establishes a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The FAA creates a "body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act," under which "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 24-25.

The policy in favor of arbitration applies to both federal- and state-law claims. See, *e.g.*, *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). During the initial decades after the FAA's enactment, however, the Court was reluctant to enforce arbitration agreements when the plaintiff asserted a federal statutory right. See *Wilko* v. *Swan*, 346 U.S. 427 (1953), overruled, *Rodriguez de Quijas* v. *Shearson Am. Express, Inc.*, 490 U.S. 477 (1989). In *Wilko*, the Court characterized the question before it as one of reconciling two federal statutes—the FAA and the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, the statute the plaintiff sought to enforce. See 346 U.S. at 434-435, 438. The Court observed that the Securities Act forbade advance waivers of the Act's "provision[s]," *id.* at 434, and it found that "the right to select the judicial forum is the kind of 'provision' that cannot be waived," *id.* at 435.

The Court concluded that "the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the [Securities] Act." *Id.* at 438.

In *Mitsubishi*, *supra*, the Court changed course and held that claims under the Sherman Act are subject to arbitration. The *Mitsubishi* Court explained that the balance it had previously struck in reconciling the FAA with federal statutes conferring privately enforceable rights had been colored by an inappropriate hostility toward arbitration. 473 U.S. at 626-628; see *Rodriguez de Quijas, Inc.*, 490 U.S. at 480-481. The Court concluded that there was no inherent conflict between the Sherman Act's conferral of a private right of action to challenge anticompetitive conduct and the "congressional policy manifested in the [FAA]" because "[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." *Mitsubishi*, 473 U.S. at 627-628; see *id.* at 636 ("[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."); *Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987) (declining to apply *Wilko* because "the streamlined procedures of arbitration" do not inherently "entail any consequential restriction on substantive rights").

The Court in *Mitsubishi* identified two circumstances in which an arbitration agreement will not be enforced because the practical effect of enforcement would be to prevent the vindication of substantive federal rights. First, the Court stated that an agreement's specification of a particular arbitral forum will be set aside if "pro-

ceedings '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.'" 473 U.S. at 632 (brackets omitted) (quoting *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)). Second, the arbitration clause at issue in *Mitsubishi* provided for arbitration before a specified Japanese body, and the parties' contract specified that Swiss law would govern the agreement. *Id.* at 637 n.19. An amicus in *Mitsubishi* raised the possibility that the arbitrator might decline to apply the Sherman Act in resolving the parties' dispute. *Ibid.* The Court found that concern premature, since the arbitration panel had not yet ruled. *Ibid.* The Court observed, however, that "in the event 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 for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Ibid.*

The general rule that federal statutory claims are arbitrable is therefore subject to an important caveat, known as the effective-vindication rule: an arbitration agreement will not be enforced if, in a particular case, enforcement would prevent the effective vindication of the plaintiff's federal statutory rights. "Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate." See *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 704 (1945) (holding that prospective waiver of rights under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, was invalid). When enforcement of an arbitration agreement would foreclose the plaintiff from

seeking redress for particular federal statutory violations, the arbitration agreement operates in practical effect as a prospective waiver of the party's substantive federal rights, rather than simply as an agreement to submit a dispute to an arbitral rather than a judicial forum.

b. Since *Mitsubishi*, this Court has repeatedly reaffirmed the effective-vindication principle. In *Gilmer*, *supra*, the Court held that the parties' arbitration agreement could permissibly be applied to claims under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq*. The Court explained that it did "not perceive any inherent inconsistency between" the ADEA and the FAA, *Gilmer*, 500 U.S. at 27, because "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function," *id.* at 28 (quoting *Mitsubishi*, 473 U.S. at 637). In *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 540 (1995), the Court enforced an arbitration agreement as it applied to claims under the Carriage of Goods By Sea Act, ch. 229, 49 Stat. 1207 (46 U.S.C. 30701 note). The Court observed, however, that the district court would "have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the . . . laws has been addressed." *Ibid.* (quoting *Mitsubishi*, 473 U.S. at 638). As in *Mitsubishi*, the Court observed that the arbitration agreement would be invalid as applied if its "choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies." *Ibid.* (quoting *Mitsubishi*, 473 U.S. at 637 n.19). Most recently, in *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 273-274

(2009), the Court stated that an arbitration agreement that amounts to "a substantive waiver of federally protected civil rights will not be upheld."

In *Randolph*, *supra*, the Court applied the effective-vindication rule to a plaintiff's contention that arbitration costs would preclude her from asserting claims under the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.* Plaintiff Randolph argued that enforcement of her agreement to arbitrate her TILA claims would "force[] her to forgo" those claims because the arbitration agreement's silence concerning costs and fees "create[d] a 'risk' that she [would] be required to bear prohibitive arbitration costs." *Randolph*, 531 U.S. at 90. After reiterating the effective-vindication rule, the Court stated that "[i]t may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum." *Ibid.* The Court explained, however, that Randolph, as the "party seek[ing] to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive," bore the burden of "showing the likelihood of incurring such costs." *Id.* at 92. The Court concluded that she had not carried that burden, as she had made no "showing at all" concerning the costs that she would incur in arbitration. *Ibid.*

In sum, this Court's decisions establish that agreements to arbitrate federal statutory claims will not be enforced if enforcement would as a practical matter prevent the effective vindication of those claims. The Court's decisions also make clear, however, that a plaintiff who invokes the effective-vindication rule bears the burden of establishing the infeasibility of obtaining relief through arbitration, and that "mere speculation"

about how the arbitration might proceed is insufficient to satisfy that burden. *Booker* v. *Robert Half Int'l, Inc.*, 413 F.3d 77, 81 (D.C. Cir. 2005) (Roberts, J.).

c. The effective-vindication rule is an application of the general principle that federal statutes must be reconciled to the extent possible. *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). The FAA generally requires that arbitration agreements be enforced as written. 9 U.S.C. 2. That command must yield, however, to the extent that enforcing the agreement would subvert the "remedial and deterrent function" of another federal statute. *Mitsubishi*, 473 U.S. at 637; *Gilmer*, 500 U.S. at 27-28. In that situation, the Court will "condemn[] the agreement as against public policy" and decline to enforce it. *Mitsubishi*, 473 U.S. at 637 n.19; cf. *Credit Suisse Sec. (USA) LLC* v. *Billing*, 551 U.S. 264, 267-268 (2007) (finding implicit preclusion of the antitrust laws where antitrust liability would conflict with securities laws).

The effective-vindication rule is thus one—but not the only—instance in which the FAA's rule of enforcing arbitration agreements yields to a countervailing concern. The Court has also recognized that, when "Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum," the arbitration agreement need not be enforced. *Mitsubishi*, 473 U.S. at 628; *Gilmer*, 500 U.S. at 26; *McMahon*, 482 U.S. at 227. Where Congress's intent to foreclose such waivers is "deducible from [the] text or legislative history" of a particular federal statute, that intent supersedes the more general policy judgment reflected in the FAA. *Mitsubishi*, 473 U.S. at 628. In addition, the FAA itself contemplates that arbitration agreements may sometimes be unenforceable "upon such grounds as exist at

law or in equity for the revocation of any contract." 9 U.S.C. 2. That provision "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility* v. *Concepcion*, 131 S. Ct. 1740, 1746 (2011) (citation and internal quotation marks omitted).

Respondents contend that individual arbitration pursuant to the procedures specified in the Agreement is not a feasible means of vindicating their Sherman Act rights because each plaintiff's non-recoverable arbitration costs will greatly exceed its potential recovery. As applied to these circumstances, the effective-vindication rule is a particularly suitable means of reconciling the pertinent federal statutes because it furthers the purposes of the Sherman Act *without* undermining any congressional policy judgment reflected in the FAA. The purpose of the FAA's "policy favoring arbitration," *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25, is to enable parties to develop streamlined procedures "tailored to the type of dispute" that is likely to arise out of the parties' relationship, *Concepcion*, 131 S. Ct. at 1749. When a plaintiff could assert its claim in arbitration but would prefer a judicial forum, enforcement of the parties' agreement will "promote arbitration" in accordance with the contractually specified procedures. *Ibid.*; see 9 U.S.C. 2. But when an arbitration agreement effectively forecloses the plaintiff from seeking redress for particular federal statutory violations, enforcing the agreement will not result in actual arbitration pursuant to the contractually specified procedures. Instead, it will force the

plaintiff to abandon its claim entirely. That result serves no policy underlying the FAA.

2. Petitioners contend that this Court's articulations of the effective-vindication rule are (a) dicta and (b) limited to circumstances in which enforcement of an arbitration agreement would require the plaintiff to shoulder costs that it would not bear in litigation. Petitioners are incorrect.

Although petitioners characterize the effective-vindication rule as dicta (Br. 40-43), the Court in *Randolph* applied the effective-vindication framework to Randolph's claim. 531 U.S. at 90-92. The Court first stated the requirements for invoking the doctrine in Randolph's case and in future cases: "[W]here, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id.* at 92. The Court then held that Randolph was unable to satisfy that burden. *Ibid.* But the fact that Randolph did not prevail does not render the Court's analysis dicta. Indeed, the Court suggested that the question of "[h]ow detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence" could be determined in future cases. *Ibid.*

Randolph did no more than apply an effective-vindication principle that has consistently been a necessary part of the Court's affirmative rationale for holding that agreements to arbitrate federal statutory claims are ordinarily enforceable. The Court has explained that, in the usual case, enforcement of such agreements will not trench unduly on the policies reflected in the relevant substantive federal law *because* the effect of enforcement is simply to substitute one adjudicator for

another, rather than to extinguish the plaintiff's federal cause of action. See *Mitsubishi*, 473 U.S. at 628 ("By 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."). That rationale does not apply in circumstances where the likely practical effect of enforcing the parties' agreement is to prevent the plaintiff from obtaining *any* adjudication of the merits of its federal claim. See, *e.g.*, *id.* at 637 *("[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum*, the statute will continue to serve both its remedial and deterrent function.") (emphasis added); *Gilmer*, 500 U.S. at 28 (quoting same language in *Mitsubishi*).

Petitioners also argue (Br. 41-42) that the effective-vindication rule is limited to situations in which costs unique to arbitration—*i.e.*, fees that "would not be required to sue in court," *id.* at 41—render the procedure prohibitively expensive. But although the allegedly prohibitive expenses at issue in *Randolph* arose from arbitration-specific fees, the Court did not suggest that the arbitration-specific nature of the costs was relevant to its reasoning. 531 U.S. at 90-92. Nor is there any evident logical basis for drawing the distinction petitioners advocate. Arbitration necessarily entails some costs (most notably the arbitrator's fee) that the parties would not bear in litigation; those costs must be paid by someone; and there is (as a general matter) nothing suspect or unfair about a contractual provision that imposes some or all of those costs on the plaintiff who initiates arbitration. The rationale for declining to enforce such an agreement when arbitration-specific costs prevent effective vindication of a plaintiff's federal claim is that

the policies reflected in the FAA must be reconciled with those that underlie the relevant substantive federal statute. That rationale applies equally where, as here, the infeasibility of vindicating a plaintiff's federal claims through arbitration results from some factor other than arbitration-specific costs. See pp. 22-26, *infra*.

The Court in *Mitsubishi* stated that, if the arbitral panel designated by the parties' agreement ultimately declined to apply the Sherman Act to the plaintiffs' claims, the Court "would have little hesitation in condemning the agreement as against public policy." 473 U.S. at 637 n.19. Petitioners seek to distinguish that statement as "addressing prospective waivers of federal *substantive* rights, not procedural rules such as class procedures." Pet. Br. 48. Petitioners are correct that the effective-vindication doctrine is concerned at bottom with substantive rather than procedural rights. The Court has largely renounced the view, reflected in *Wilko* (see p. 10-11, *supra*), that a federal statutory provision authorizing aggrieved parties to file suit in court creates the sort of right that cannot be waived through an agreement to arbitrate. See *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 670-671 (2012). As the Court recognized in *Randolph*, however, rules governing the procedures under which arbitration will be conducted can sometimes have the same practical effect as an express waiver of substantive rights. 531 U.S. at 91-92. *Mitsubishi* and *Randolph* are properly viewed, not as identifying two isolated (and idiosyncratic) circumstances under which arbitration agreements will be held unenforceable, but as illustrating a common principle: an agreement to arbitrate federal statutory claims will not be enforced if, under the circumstances of a particular

case, the practical effect of enforcement would be to prevent effective vindication of a federal statutory right.

B. Respondents Have Established That The Arbitration Agreement At Issue Here Operates As An Impermissible Prospective Waiver By Foreclosing Them From Asserting Their Current Antitrust Claims

A court should "invalidate an arbitration agreement" if the plaintiff demonstrates that the agreement operates as an impermissible prospective waiver of federal statutory rights by making it "prohibitively expensive" to assert such claims in arbitration. *Randolph*, 531 U.S. at 92; see *Mitsubishi*, 473 U.S. at 637 & n.19. Respondents have satisfied that burden. It is undisputed that the costs of marshaling the evidence necessary to prove respondents' antitrust claims will far exceed the best-case recovery that any individual respondent could obtain. And the arbitration agreement precludes all means of sharing those costs—through a class action, joinder, or informal methods—or shifting them to petitioners.

1. Agreements prospectively waiving antitrust claims are invalid

The Court's reliance on the effective-vindication doctrine as a safety valve in cases involving a variety of federal statutes reflects a general presumption that prospective waivers of federal statutory rights are invalid. See pp. 12-13, *supra*; *Randolph*, 531 U.S. at 90-92 (TILA); *Gilmer*, 500 U.S. at 27-28 (ADEA); *Mitsubishi*, 473 U.S. at 637 n.19 (Sherman Act). Although Congress may authorize such waivers with respect to particular federal statutes, petitioners do not contend that any such authorization applies to respondents' Sherman Act claims, and it is well-established that parties may not prospectively waive the protections of the antitrust laws.

This Court recognized in *Mitsubishi* that a "prospective waiver of a party's right to pursue statutory remedies for antitrust violations" should be "condemn[ed] * * * as against public policy." 473 U.S. at 637 n.19. The *Mitsubishi* Court relied on a long line of authority, including *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322 (1955). There, the Court held that treating a previous antitrust suit dismissed pursuant to a settlement agreement as a res judicata bar to a subsequent suit based on post-settlement conduct would in effect confer "a partial immunity from civil liability for future violations," which would not be "consistent with * * * the antitrust laws." *Id.* at 329. The courts of appeals have repeatedly reaffirmed that agreements that operate as prospective waivers of antitrust liability will not be enforced. See, *e.g.*, *Redel's Inc.* v. *General Elec. Co.*, 498 F.2d 95, 99 (5th Cir. 1974) ("The prospective application of a general release to bar private antitrust actions arising from subsequent violations is clearly against public policy."); see also *Sanjuan* v. *American Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 250 (7th Cir. 1995), cert. denied, 516 U.S. 1159 (1996); *Three Rivers Motors Co.* v. *Ford Motor Co.*, 522 F.2d 885, 896 n.27 (3d Cir. 1975); *Gaines* v. *Carrollton Tobacco Bd. of Trade, Inc.*, 386 F.2d 757, 759 (6th Cir. 1967); *Fox Midwest Theatres* v. *Means*, 221 F.2d 173, 180 (8th Cir. 1955).

These decisions reflect the importance of private enforcement as a means of achieving the policy objectives of the antitrust statutes. Congress created the treble-damages remedy to encourage private suits alleging antitrust violations because such suits "provide a significant supplement to the limited resources available" for government enforcement. *Reiter* v. *Sonotone Corp.*, 442

U.S. 330, 344 (1979). If prospective waiver agreements were permissible, firms with substantial bargaining power could extract waivers from consumers, distributors, retailers, franchisees, and any other parties with inferior bargaining power. See 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* 226 (3d ed. 2007). That result would vitiate the effectiveness of the private remedy, making it less likely that anticompetitive conduct will be detected and deterred.[2]

2. The arbitration agreement at issue here operates as a prospective waiver of respondents' antitrust claims

The arbitration agreement at issue in this case effectively precludes respondents from asserting their antitrust claims by making it prohibitively expensive for them to do so. *Randolph*, 531 U.S. at 92. It is uncontested that proving respondents' tying claim will cost far more than any individual respondent could recover if it prevailed, yet the Agreement prohibits any means of sharing or shifting those costs.

a. Respondents, who bore the burden of demonstrating that they "will bear" prohibitive costs in arbitration, *Randolph*, 531 U.S. at 90, presented expert evidence demonstrating that the cost of proving their tying claim would far exceed the recovery that any individual re-

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[2] Petitioners suggest (Br. 22-24) that, because Congress declined to create a class-action-like mechanism when it enacted the Sherman Act in 1890, the effective-vindication rule should not apply to antitrust claims. That argument lacks merit. Respondents are not challenging the lack of class arbitration procedures as such. Rather, they assert that the agreement's lack of *any* cost-sharing or cost-shifting mechanisms leaves them unable to vindicate their claims. See pp. 24-25, *infra*. Such agreements undercut the antitrust statutes' deterrent effect and should be "condemn[ed] as against public policy." *Mitsubishi*, 473 U.S. at 637 n.19.

spondent could receive. To prevail on their claim, respondents must present expert evidence concerning, *inter alia*, petitioners' market power in the tying product market, anticompetitive effects in the market for the tied product, and the amount of damages suffered as a result of the arrangement. J.A. 88; see generally *Illinois Tool Works* v. *Independent Ink, Inc.*, 547 U.S. 28, 46 (2006). Respondents presented evidence that the expert analysis and testimony needed to establish these elements would entail expert fees and expenses of "at least several hundred thousand dollars," and possibly more than $1 million. J.A. 91. The estimated recovery for the respondent with the largest volume of American Express transactions, however, amounted to only "$12,850, or $38,549 when trebled." J.A. 92.

Petitioners have not contested respondents' estimates of either the costs of the necessary expert evidence or the damages an individual respondent might hope to recover. Pet App. 27a; Pet. Br. 49-50. Instead, they suggest (Pet. Br. 50) that a "costly economics expert report" might not be needed in an arbitration proceeding. But while arbitration entails procedures that are streamlined compared to litigation, those procedures do not relieve plaintiffs of the burden of proving their case.

Complex expert analyses are generally necessary to establish elements such as market power and damages. Petitioners have identified no reason to believe that arbitrators selected pursuant to the parties' agreement would effectively lower respondents' burden of proof by not "insist[ing] on the same complexity that federal courts would require." Pet. Br. 50; see, *e.g.*, *ZF Meritor, LLC* v. *Eaton Corp.*, 696 F.3d 254, 299 (3d Cir. 2012) ("Expert testimony is necessary to establish damages in

an antitrust case."). Nor have petitioners offered to obviate the need for the usual modes of proof by stipulating to some or all of the propositions that the expert report would otherwise be used to establish. And, given the extreme disparity between the projected non-recoverable costs of arbitration and the anticipated best-case recovery for any particular respondent, arbitration under the Agreement could be a feasible means of recovery only if respondents' calculations (which the court of appeals found to be essentially undisputed) were wildly wrong.

b. Because the costs of proving respondents' claims will greatly exceed the potential recovery for any individual respondent, some mechanism for sharing or shifting costs would be necessary to permit respondents to effectively vindicate their claims in arbitration. But the Agreement forecloses all such methods, leaving respondents with no practical means of establishing petitioners' alleged Sherman Act violations.

One way to enable respondents to assert their claims would be to permit cost-sharing through a collective action, such as a class action or joinder of multiple claimants in one arbitration proceeding. The Agreement prohibits both types of procedures, however, foreclosing respondents from spreading the costs of marshaling evidence among multiple plaintiffs. Pet. App. 8a-9a (agreement prohibits "representative" actions and provides that no claim may be "joined or consolidated" with claims brought by other parties). And while petitioners suggest (Br. 51) that individual respondents in separate arbitration proceedings could "hire the same expert witness, even outside the context of class proceedings," the Agreement's confidentiality provision effectively blocks that method of informal cost-sharing.

The Agreement provides that "all testimony, filings, documents and any information relating to or presented during the arbitration proceedings shall be deemed to be confidential information not to be disclosed to any other party." Pet. App. 92a. Petitioners have not offered to waive that restriction, nor have they addressed the court of appeals' conclusion (see *ibid.*) that it precludes the introduction in multiple arbitration proceedings of a common expert report.

Even without a class-action or joinder procedure, respondents might be able to assert their claims if the Agreement permitted expert costs to be shifted petitioners. It does not. Resp. Br. 49-50. To be sure, there is nothing intrinsically unfair about an agreement that requires each party to bear its own costs in arbitration. Inclusion of such a cost-shifting provision, however, might have rendered individualized arbitration an economically feasible means of pursuing respondents' federal claim. That obvious alternative belies petitioners' contention (*e.g.*, Br. 27) that the decision below compels class proceedings in any case where an individual plaintiff's expected arbitral costs exceed its projected maximum recovery.

c. Respondents have therefore established that, as a result of restrictions contained in the arbitration agreement, each respondent, proceeding individually, may seek redress for petitioners' alleged antitrust violations only by incurring expenses far greater than the maximum recovery an individual business could hope to obtain. No rational actor would attempt to bring a claim when a negative recovery is a certainty. Under the circumstances of this case, an order compelling arbitra-

tion therefore would preclude respondents from effectively vindicating their federal claims.[3]

3. Reaffirming the effective-vindication doctrine in the circumstances presented here would not raise administrability concerns

Reaffirming the effective-vindication doctrine in the narrow circumstances presented here will not lead to a widespread refusal to enforce arbitration agreements, nor will it lead to the unworkable inquiries petitioners envision. Pet. Br. 32-33.

In the decade since *Randolph*, the courts of appeals have applied the effective-vindication framework very sparingly. Courts have rarely declined to enforce an arbitration agreement on the ground that it prevents sharing or shifting costs that would exceed the plaintiff's individual recovery. Compare *Kristian* v. *Comcast Corp.*, 446 F.3d 25, 58 (1st Cir. 2006) (holding that plaintiffs could not effectively vindicate antitrust claims where it was undisputed that costs of expert evidence would exceed recovery), with *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007) (rejecting effective-vindication challenge to arbitration agreement

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[3] Different questions would be raised if the plaintiff's projected best-case recovery was greater than its anticipated costs of arbitration, but the likely costs of a defeat substantially exceeded the potential net gain from a victory. Cf. Pet. App. 27a (explaining that, even when attorneys' fees are potentially recoverable, the plaintiff must consider the possibility of losing in evaluating the potential costs of suit). When the disparity between risks and rewards is so great as to render arbitration an economically unreasonable endeavor, enforcement of the arbitration clause will likely have the same practical effect as a prospective waiver of substantive rights. Applying the effective-vindication doctrine to that situation, however, would raise line-drawing concerns—such as the standard under which to evaluate the plaintiff's incentives—that are not implicated here.

because plaintiffs presented no evidence on costs of individual arbitration proceedings or "how those increased costs would affect their ability to proceed in arbitration"). Courts have also rarely found that costs specific to arbitration prevented plaintiffs from arbitrating their claims. Compare, *e.g.*, *Spinetti* v. *Service Corp. Int'l*, 324 F.3d 212, 216-220 (3d Cir. 2003) (affirming order compelling arbitration after severing costs provision on the ground that plaintiffs had demonstrated that they could not afford to pay costs of arbitration), with *EEOC* v. *Woodmen of World Life Ins. Soc'y*, 479 F.3d 561, 566-567 (8th Cir. 2007) (finding *Randolph*'s standard not satisfied because employer agreed to waive agreement's cost-splitting provisions and pay arbitrator's fee on employee's behalf); *Anders* v. *Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1028-1029 (11th Cir. 2003) (similar); *Livingston* v. *Associates Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) (plaintiff failed to satisfy her burden of demonstrating prohibitive expense); *Bradford* v. *Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 557 (4th Cir. 2001) (same). There is no evident reason to suppose that the courts of appeals will abandon their prior reticence if this Court holds that an arbitration agreement is unenforceable in the circumstances presented here.

Applying the effective-vindication rule when a plaintiff demonstrates that the costs of asserting its claim under the arbitration agreement's procedures would be prohibitive also will not enmesh courts in complex and unworkable inquiries. That analysis involves a comparison between the likely costs of proving the plaintiff's claim under the arbitration procedures specified in the parties' agreement, and the potential recovery if the plaintiff prevails. Both variables are susceptible to

predictive calculation, with the aid of expert testimony if necessary. And because the burden is on plaintiffs to establish the infeasibility of arbitration, *Randolph*, 531 U.S. at 92, arbitration agreements will be enforced where the evidence on that question is uncertain. See, *e.g.*, *In re Cotton Yarn*, 505 F.3d at 285 ("mere speculation" about cost of asserting claim is insufficient).

The effective-vindication principle, it should be emphasized, is not simply a sound rule of decision for the rare case in which a federal statutory claim cannot feasibly be pursued through the arbitration procedure specified in the parties' agreement. In addition, the effective-vindication rule creates a salutary incentive for companies that prefer arbitration to ensure that such cases *remain* rare, by adopting arbitration procedures that can feasibly be invoked even for small-value claims. See, *e.g.*, *Carter* v. *Countrywide Credit Indus.*, *Inc.*, 362 F.3d 294, 300 (5th Cir. 2004) (effective-vindication challenge was mooted by Countrywide's modification of arbitration agreement to provide that Countrywide would pay arbitration costs plaintiffs challenged as prohibitive). Under the effective-vindication rule, companies can determine what mechanism of preserving plaintiffs' ability to seek redress for federal violations best suits their priorities. That flexibility furthers the policies of the FAA by enabling companies to design procedures "tailored to the type of dispute" and to the company's needs. *Concepcion*, 131 S. Ct. at 1749.

Indeed, in response to concerns about consumers' ability to bring low-value claims under arbitration agreements containing class-action waivers, many companies have modified their agreements to include streamlined procedures and premiums designed to encourage consumers to bring claims. See Ramona L.

Lampley, *Is Arbitration Under Attack?*, 18 Cornell J.L. & Pub. Pol'y 477, 513-514 (2009) (discussing evolution of "third-generation" arbitration agreements designed to encourage individual meritorious low-value claims). The agreement at issue in *Concepcion* is an example. There, AT&T Mobility modified its arbitration agreement during the course of the litigation to include cost- and fee-shifting provisions and premiums designed to ensure that consumers could bring low-value claims on an individual basis. 131 S. Ct. at 1744. Those modifications left consumers "*better off* under their arbitration agreement" than they would have been in class litigation. *Id.* at 1753. And by obviating a potential objection to enforcement of the arbitration agreement, those modifications simultaneously served the company's interest in avoiding litigation.

Under petitioners' approach, by contrast, the incentives would run in the opposite direction. Companies would have every reason to employ procedural restrictions like those at issue here to foreclose plaintiffs from asserting in *any* forum federal claims for which costs exceed the likely individual recovery. That use of arbitration agreements would nullify the deterrent and compensatory effect of the very federal statutes—such as the Sherman Act—that Congress enacted to regulate the relationship between the contracting parties. And, far from furthering the purposes of the FAA, a rule encouraging the use of such agreements would disserve those purposes by reducing the likelihood that actual arbitration will occur.

C. Applying The Effective-Vindication Doctrine In This Case Is Consistent With This Court's Decision In *Concepcion*

Petitioners' primary argument (Pet. Br. 27-40) is that the Court abrogated the effective-vindication rule in *Concepcion*, leaving companies free to draft arbitration provisions that prevent counterparties from asserting their federal claims in any forum. Petitioners are incorrect.

1. a. The plaintiffs in *Concepcion* were consumers who wished to assert low-value (approximately $30) state-law fraud claims against AT&T Mobility. 131 S. Ct. at 1744. They argued that the class-action waiver contained in their arbitration agreement was invalid under a state-law doctrine known as the "*Discover Bank* rule." *Id.* at 1746. That rule, which California courts had "frequently applied * * * to find arbitration agreements unconscionable," treated class-action waivers as unenforceable when they were contained in adhesion contracts that would give rise to predictably small individual claims, and the plaintiffs alleged that the defendant had engaged in a scheme to cheat consumers out of small sums. *Ibid.* The rationale behind the rule was that class proceedings were a more effective means of deterring conduct harmful to consumers than individual actions asserting small-value claims. See *Discover Bank* v. *Superior Court*, 113 P.3d 1100, 1108-1109 (Cal. 2005).

This Court held that the *Discover Bank* rule was preempted because it stood as "an obstacle to the accomplishment of the FAA's objective[]" of ensuring that arbitration agreements are enforced according to their terms. *Concepcion*, 131 S. Ct. at 1748. The Court explained that the *Discover Bank* rule "interfere[d] with

arbitration" because it would apply to virtually any consumer arbitration contract without regard to the contract's terms—since most such contracts are adhesion contracts involving small claims—and it would permit any party to such a contract to demand class arbitration "*ex post*." *Id.* at 1750.

b. The Court in *Concepcion* did not address, much less repudiate, the effective-vindication rule. The *Discover Bank* rule was not limited to situations in which enforcement of an arbitration agreement would leave the plaintiff entirely unable to bring her claims. Rather, the rule rendered class-arbitration waivers unenforceable in virtually every consumer adhesion contract, regardless of whether the plaintiff could feasibly vindicate her claim through individual arbitration. The rule was thus designed to preserve the "deterrent effects of class actions," *Concepcion*, 131 S. Ct. at 1745, rather than to protect a diligent plaintiff's ability to assert her own individual claim.

In the penultimate paragraph of its opinion, the Court in *Concepcion* addressed, and rejected, the dissenting Justices' conclusion "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." 131 S. Ct. at 1753. But the *reasons* the Court gave for rejecting the dissenters' analysis are inapplicable to the present case. The bulk of the relevant paragraph in the Court's opinion explained that "the claim here was most unlikely to go unresolved" because the streamlined arbitration procedures adopted by AT&T Mobility largely ensured that plaintiffs would be able to assert, and obtain full redress for, even the very low-value claims at issue. *Ibid.* Here, by contrast, the premise of the court of appeals' decision was that respondents' rights could *not*

feasibly be vindicated through individual arbitration proceedings.

The Court in *Concepcion* also observed that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 131 S. Ct. at 1753. By its terms, however, that is an observation about the power of "States." It suggests at most that, under the Supremacy Clause, the FAA might have superseded the *Discover Bank* rule even if the arbitration agreement had effectively precluded the plaintiffs from asserting their fraud claims in any forum. The recognition that the FAA displaces any conflicting state-law rule says nothing about the enforceability of an arbitration agreement that would preclude the vindication of a substantive *federal* right. In that context, the effective-vindication rule governs the reconciliation of the two federal statutes. *Randolph*, not *Concepcion*, controls that analysis. See pp. 14-15, *supra*.

2. Petitioners also contend (Br. 27-34) that applying the effective-vindication rule here would contravene *Concepcion* by "conditioning the enforceability" of an arbitration agreement on "the availability of classwide arbitration procedures." *Id.* at 28 (quoting *Concepcion*, 131 S. Ct. at 1744). The problem with the Agreement here, however, is not that it requires individual arbitration, but that it prevents respondents from vindicating their current federal claims at all. Accordingly, the court of appeals did not hold that respondents were entitled to assert their claims in a class arbitration proceeding. Cf. *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775-1776 (2010) (holding that courts may not order class arbitration when the agreement does not expressly provide for it). Instead, the court simply held that the arbitration clause should not

be enforced as applied to respondents' Sherman Act claims. Pet. App. 30a.

II. THE EFFECTIVE-VINDICATION PRINCIPLE ENSURES THAT ARBITRATION PERMITS PRIVATE ENFORCEMENT OF NUMEROUS FEDERAL STATUTES

The effective-vindication rule has long served to ensure that, "[b]y agreeing to arbitrate a [federal] statutory claim, a party does not forgo the substantive rights afforded by the statute." *Mitsubishi*, 473 U.S. at 628. That rule prevents arbitration clauses from being used as a mechanism through which consumers, employees, and businesses are induced to waive their rights to assert federal claims against their counterparties. Private actions are a vital supplement to government enforcement not only under the antitrust laws, but also under a wide range of other federal statutes. Those include consumer-protection statutes such as the Servicemembers Civil Relief Act, 50 U.S.C. App. 501 *et seq.*; antidiscrimination statutes such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Credit Opportunity Act, 15 U.S.C. 1691 *et seq.*; and labor and employment statutes such as the FLSA, and the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301 *et seq.*

Claims under many of these statutes may predictably generate only small damages awards for any particular plaintiff. Yet these statutes confer important protections from practices that are broadly harmful even if they do not result in large monetary damages to particular affected individuals. These statutes also reflect a congressional judgment that private enforcement, even of small-value claims, is an important component of the statutory scheme. By holding that an arbitration agreement will not be enforced if enforcement would

prevent a particular plaintiff from seeking redress for its federal claims, the effective-vindication rule encourages companies drafting arbitration agreements to ensure that even small-value federal claims can be effectively pursued through arbitration. The use of such streamlined procedures furthers the policies that underlie both the FAA and the various federal statutes that confer rights of private enforcement. See pp. 28-29, *supra*.

Under petitioners' approach, by contrast, companies could use a combination of class-action and joinder prohibitions, confidentiality requirements, and other procedural restrictions to increase the likelihood that a plaintiff's cost of arbitration will exceed its projected recovery. Companies could then require assent to such unwieldy procedures as a condition of doing business, accepting employment, or purchasing products. That would deprive a range of federal statutes of their intended deterrent and compensatory effect, see *Brooklyn Savings Bank*, 324 U.S. at 710, without promoting the actual use of arbitration as an alternative means of dispute resolution. The FAA is intended to ensure that arbitration is not disfavored as a means of vindicating claims, including federal statutory claims. It is not intended to prevent federal claims from being brought in any forum.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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