No. 12-133

IN THE
Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,
Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Petitioners' Rule 29.6 Statement was set forth at page iii of their opening brief, and there are no amendments to that Statement.

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Respondents argued below – and the Second Circuit held – that the merchant plaintiffs' inability to pursue their antitrust tying claims as a "collective action" rendered their agreement to arbitrate unenforceable. That argument and holding conflict with the FAA and this Court's decisions in *Concepcion* and *Stolt-Nielson*, and find no support in the Court's earlier statements in *Randolph* and *Mitsubishi*. Section 2 of the FAA and this Court's decisions make clear that, when a party agrees to forgo court procedures in favor of bilateral arbitration, such agreements must be enforced, including as to federal claims, absent a clear direction *from Congress* that particular claims are not appropriate for arbitration. Respondents cite nothing in the FAA or the Sherman Act that would authorize a court to override their agreement.

Rather than rely on any statutory provision, respondents, joined by the United States, ask this Court to fashion an "effective vindication" exception to the FAA – an exception that respondents improbably contend applies only to federal but not state-law claims – that would allow courts to decide, based on the self-interested predictions of parties and their paid experts, that a federal claim will be too expensive or risky to pursue in bilateral arbitration. But nothing in this Court's precedents suggests that an otherwise enforceable agreement becomes unlawful when the parties' *ex ante* procedural choices allegedly make it unattractive, *ex post*, to pursue a particular claim. In no prior case has this Court embraced the notion that for every potential federal statutory claim there must be a procedural path in which the risk-adjusted rewards exceed the potential costs. No such principle governs even in litigation, much less

has it been held to override valid arbitration agreements.

Respondents attempt to equate their "effective vindication" principle with a rule against prospective waiver of federal statutory claims, but the bilateral arbitration agreement at issue here is not in form or in substance a prospective waiver of any federal claim. The arbitrators are bound to apply federal antitrust law, and petitioners conduct their business with that knowledge (and under continued scrutiny by state and federal enforcers as well). As this Court held in *Vimar Seguros* and *CompuCredit*, although arbitral procedures may affect a party's practical ability to pursue its claim, the claimant's *substantive* rights remain intact as long as the "*guarantee of the legal power to impose liability*" is preserved. *CompuCredit*, 132 S. Ct. at 671; *see* Pet. Br. 24-27.

Furthermore, nothing in the arbitration agreement prevents plaintiffs from doing exactly what they now claim (at 35) they would "gladly" do, namely, engage in bilateral arbitration and share costs and otherwise cooperate in pursuing their cases. To the extent the Second Circuit suggested such options were foreclosed, it misinterpreted the language of the agreement and ignored petitioners' express concession that such cost-sharing was permitted. And respondents ignore their own insistence below that nothing less than class procedures would allow them to "effectively vindicate" their claims.

All such issues, however, "must be decided in the first instance by the arbitrator." *Vimar Seguros*, 515 U.S. at 540. It would be wholly unworkable for district courts, before deciding whether to enforce an arbitration agreement, to hold a mini-trial on the costs and benefits of arbitration and to speculate

about what procedures will apply and what evidence might be required. Any such threshold inquiry will also reopen the door to the very "judicial hostility" to arbitration this Court has condemned. "[T]he national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed." *Mitsubishi*, 473 U.S. at 638. Respondents' anticipatory concerns about the adequacy of bilateral arbitration procedures do not constitute grounds to refuse to "permit[] the arbitration to go forward." *Id.* at 638.

ARGUMENT

I. THE SECOND CIRCUIT'S INVALIDATION OF THE PARTIES' ARBITRATION AGREEMENT DUE TO THE CLASS-ACTION WAIVER CONTRAVENES THE FAA AND THIS COURT'S PRECEDENTS

The record below belies respondents' contention (at 38) that this case is "not at all" about class proceedings. As the Second Circuit repeatedly stated, "the only issue before us is the narrow question of whether the class action waiver provision . . . should be enforced." App. 3a (*Amex III*); *see also*, *e.g.*, App. 32a (same in *Amex II*); App. 58a, 85a (same in *Amex I*). That "narrow question" was precisely the one raised by respondents in the district court and on appeal.[1] And that is the question on which this Court granted certiorari. Pet. i.

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[1] *See* Opp. to Mot. To Compel 11 (6/21/04) ("The sin of the agreements . . . is that they bar collective action."); Pls.' C.A. Br. 17 (9/11/06) ("[t]he district court erred in failing to hold the collective action ban unenforceable").

Respondents never argued, as they do now (at 36), that the defect in the arbitration agreement was the absence of "some other alternative mechanism," such as "cost-shifting" or "cost-sharing," to facilitate their claims in *bilateral* arbitration. In fact, respondents expressly argued that cost-sharing and cost-shifting would be inadequate without the prospect of a large aggregate recovery. *See infra* pp. 19-20.

The decision below – which refused to enforce the arbitration agreement because it did not allow for class proceedings – should be reversed because it is contrary to the FAA and this Court's decisions in *Concepcion* and *Stolt-Nielsen*.

A. The Parties' Arbitration Agreement Is Enforceable Under FAA § 2

The FAA's text forecloses the Second Circuit's refusal to enforce the parties' arbitration agreement. Pet. Br. 20-22. FAA § 2's enforcement mandate does not distinguish between federal and state-law claims; as respondents concede, this Court has long held that it applies with full force to federal statutory claims. *See*, *e.g.*, *CompuCredit*, 132 S. Ct. at 669; *Mitsubishi*, 473 U.S. at 625. Although § 2's "saving clause" preserves generally applicable *state-law* contract-revocation doctrines, it does not authorize the creation of new federal common-law contract defenses. *See Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). And it does not tolerate defenses that single out arbitration for special scrutiny, as respondents' "effective vindication" rule does. *See Doctor's Assocs.*, 517 U.S. at 687.

Respondents' sole textual argument (at 23) is that the phrase "provision . . . to settle by arbitration" impliedly excludes from FAA § 2 any agreement that would effectively prevent the vindication of a federal

claim. But a "provision . . . to settle by arbitration" is simply an "agreement to arbitrate," and § 2 makes such agreements enforceable subject only to the saving clause. If Congress had meant to carve out such an exception to § 2, it would have said so, as it did in the ensuing "saving clause." *Cf. CompuCredit*, 132 S. Ct. at 672.

Moreover, respondents' interpretation contradicts *Concepcion*. If § 2 precluded enforcement of arbitration procedures that could result in the "complete elimination of claims," Resp. Br. 23, the *Discover Bank* rule – which was grounded in "California's policy against exculpation," *Concepcion*, 131 S. Ct. at 1746 – would not have been preempted by § 2: at most, it would have been narrowed. And respondents never explain why Congress would have intended to treat state-law claims differently from federal claims in this regard. *See infra* pp. 9-10.

B. Congress, Not the Courts, Has Authority To Override FAA § 2

1. Respondents' argument that this Court is authorized to create an implied exception to the FAA based on the Sherman Act has no basis in either statute and is contrary to this Court's repeated holdings that Congress alone may override the FAA.

In *Mitsubishi*, the Court held that agreements to arbitrate federal statutory claims are enforceable absent some congressional command to the contrary: "Having made the bargain to arbitrate, the party should be held to it unless *Congress itself* has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." 473 U.S. at 628 (emphasis added). *Mitsubishi*'s holding has become a foundational principle of this Court's FAA § 2 jurisprudence. *See Gilmer*, 500 U.S. at 26 (quoting

Mitsubishi); *Randolph*, 531 U.S. at 90 (same); *Pyett*, 556 U.S. at 258 (same); *see also Shearson/American Express*, 482 U.S. at 227.

As this Court reiterated in *CompuCredit*, which respondents ignore, "[t]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies." 132 S. Ct. at 672 n.4 (internal quotations omitted; alterations in original). Congressional "silen[ce]" is insufficient. *Id.* at 673. Respondents do not even attempt to shoulder this burden.

The requirement of an affirmative congressional override is essential to the FAA's purposes. As this Court repeatedly has held, the FAA was enacted to curtail courts' ability to invalidate arbitration agreements based on "judicial hostility." *E.g.*, *Concepcion*, 131 S. Ct. at 1747; *CompuCredit*, 132 S. Ct. at 668; *Gilmer*, 500 U.S. at 24. Permitting courts to read into any federal right of action an implied exception to § 2 – as the government urges this Court to do – would revive and give free rein to the old judicial hostility to arbitration.

2. The requirement of congressional override also correctly applies this Court's doctrine of implied repeal. Contrary to respondents' suggestion (at 20), the implied-repeal doctrine does not allow courts to disregard a law enacted by Congress whenever they perceive a tension between the policies of two federal statutes. Rather, "'[w]hen two statutes are capable of co-existence,' . . . 'it is the duty of the courts, *absent a clearly expressed congressional intention to the contrary*, to regard each as effective.'" *Vimar Seguros*, 515 U.S. at 533 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)) (emphasis added). Moreover, the intention to repeal "must be clear and manifest."

Morton, 417 U.S. at 550-51 (internal quotations omitted).

The FAA and the Sherman Act are capable of coexistence. Arbitration and antitrust claims are not "inherently" inconsistent. *Mitsubishi*, 473 U.S. at 633. Although private lawsuits are one facet of the antitrust enforcement regime, the Sherman Act leaves such private claims – and the procedures by which they will be resolved – "at all times under the control of the individual litigant." *Id*. at 636.

Respondents do not dispute that Congress has not expressed *any* intention to make class procedures for Sherman Act claims non-waivable – even as to claims that might otherwise be uneconomical to bring individually. The absence of any affirmative expression of intent by Congress is dispositive under *CompuCredit*.

Indeed, Congress decided not to add class proceedings in 1890, even for "small" consumer claims. *See* Pet. Br. 7. In view of that history, it is impossible to argue, as required by *Mitsubishi*, 473 U.S. at 628, that Congress "evinced an intention" in the Sherman Act to preclude parties from waiving class procedures for those claims. Rather than dispute this point, respondents (at 27) dismiss it as "irrelevant" because Rule 23 permits class proceedings under certain circumstances. But in arbitration the parties, not the Federal Rules, determine the "rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479. Absent some congressional indication that class procedures are necessary for Sherman Act claims, the court below had no authority to invalidate the parties' arbitration agreement because it did not allow such procedures.

C. The Decision Below Contravenes *Concepcion*

1. Respondents' contention (at 35) that the decision below is consistent with *Concepcion* because it "does not order class arbitration" disregards *Concepcion*'s express holding. In finding the *Discover Bank* rule preempted, this Court broadly held that FAA § 2 prohibits courts from refusing to enforce arbitration agreements due to the absence of class procedures. *See* 131 S. Ct. at 1744. That is what the court below did here. *See* Pet. Br. 37-38.

Respondents also disregard *Concepcion*'s reasoning. As this Court made clear, class arbitration would undermine "streamlined proceedings and expeditious results." 131 S. Ct. at 1749 (internal quotations omitted). Refusing to enforce an arbitration agreement due to the lack of class procedures interferes with Congress's objectives because it allows plaintiffs to demand class arbitration "*ex post*," which in turn will force defendants to abandon arbitration altogether. *Id.* at 1753.

2. The United States argues (at 31-32) that *Concepcion*'s holding depended on the existence of "plaintiff-friendly" provisions in AT&T Mobility's arbitration clause. But *Concepcion* specified that its holding applies "*even if*" – not "unless" – "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." 131 S. Ct. at 1753 (emphasis added). If the United States were correct, the Court would have *narrowed*, not preempted, the *Discover Bank* rule. In any event, plaintiffs here are pursuing claims worth thousands of dollars – which they concede are not "small-dollar" claims – and plaintiffs now have abandoned the argument (made repeatedly below) that class proce-

dures are the only means by which they can vindicate their claims. *See infra* pp. 19-20.

3. Respondents (half-heartedly supported by the United States) dismiss *Concepcion* as relating only to preemption of state law. Resp. Br. 40; U.S. Br. 32. But nothing in the FAA or this Court's decisions supports that distinction.

Concepcion predicated its preemption holding on its interpretation of FAA § 2 as compelling enforcement of the parties' arbitration agreement even when they have agreed to forgo class-action procedures. By its terms and under this Court's precedents, there is no arguable basis in § 2 for respondents' argument that the FAA treats federal claims differently from state-law claims. *See supra* p. 4.

Concepcion's reasoning also applies equally to federal and state-law claims. Refusing to enforce arbitration agreements because they preclude class proceedings frustrates the FAA's objectives whether federal or state-law claims are involved. Indeed, the *Discover Bank* rule, though a state-law contract defense, had been applied to deny arbitration of federal statutory claims. *See* Pet. Br. 39. *Concepcion* did not purport to preserve the *Discover Bank* rule in such situations. It preempted the rule across the board.

Respondents' argument also ignores *Stolt-Nielsen*, upon which this Court drew heavily in *Concepcion*. The Court in *Stolt-Nielsen* rejected judicial policy concerns about "negative value claims" in the context of Sherman Act claims. 130 S. Ct. at 1769 n.7. *Stolt-Nielsen* thus supports the conclusion that *Concepcion*'s holding is not properly limited to state-law claims. Rather, *Concepcion* stands broadly for the proposition that courts may not invalidate arbitra-

tion agreements because they forbid class procedures – even when federal claims are at issue.

4. Limiting *Concepcion* to state-law claims would undermine the FAA's objectives. Creative lawyers could readily conjure up a federal statutory cause of action if that would allow them to evade *Concepcion*. Plaintiffs have already begun doing so. *See* U.S. Chamber et al. Cert. Br. 7-8. It is critical for the Court to interpret the FAA uniformly to "discourage litigants from manipulating their allegations" to evade its mandate. *Rodriguez de Quijas*, 490 U.S. at 485.

Also, it makes "little sense for similar claims, based on similar facts," to be split between arbitration and litigation. *Id.* Such duplicative proceedings will lead not only to inefficiency, but also to inconsistent results between virtually identical state and federal claims. *See* Pet. Br. 40. Respondents offer no response to this point.

II. RESPONDENTS' EFFORT TO STITCH TOGETHER A BROAD "EFFECTIVE VINDICATION" EXCEPTION DISTORTS *MITSUBISHI* AND *RANDOLPH*

Respondents ask this Court to declare a new "effective vindication" exception to the enforcement of arbitration agreements. But even sympathetic commentators have acknowledged that this argument is a gambit by "creative plaintiffs' lawyers" to resurrect, in even broader form, the unconscionability challenge that this Court held contrary to the FAA in *Concepcion*.[2] Nothing in *Mitsubishi* or *Randolph* supports that result.

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[2] Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L.

A. *Mitsubishi*'s "Effective Vindication" Language Does Not Authorize Courts To Decline To Enforce Bilateral Arbitration Agreements

Respondents rest (at 18) virtually their entire case on *Mitsubishi*'s comment that, "so 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." 473 U.S. at 637. They interpret that statement to authorize federal courts to invalidate arbitration agreements if they do not guarantee procedural rules that make plaintiffs' claims economically attractive to pursue on a risk-adjusted basis.

Respondents' interpretation of *Mitsubishi*'s language is at odds with the main thrust of that decision. *Mitsubishi* reversed this Court's earlier hostility toward arbitration of federal claims, which was rooted in skepticism that bilateral arbitration procedures would be adequate to vindicate federal policies. *See Wilko*, 346 U.S. at 432, 435-36. Instead, *Mitsubishi* embraced bilateral arbitration of federal antitrust claims due to its "adaptability and access to expertise," its ability to "keep the effort and expense required to resolve a dispute within manageable bounds," and the demonstrated benefits of "streamlined proceedings and expeditious results" even in complex federal cases. 473 U.S. at 633.

Mitsubishi did not hedge in holding that bilateral arbitration is consistent with federal substantive law. The Court made a "flat statement" that, "'[b]y agreeing to arbitrate a statutory claim, a party does

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Rev. 373, 376, 406 (2005) (noting that plaintiffs' lawyers came up with the "effective vindication" theory after unconscionability challenges "met with failure").

not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Rodriguez de Quijas*, 490 U.S. at 481 (quoting *Mitsubishi*, 473 U.S. at 628). And, as discussed above, it held that bilateral arbitration agreements must be enforced unless "Congress itself" has evinced a contrary intention. 473 U.S. at 628.

As respondents concede (at 25), moreover, *Mitsubishi*'s "effective vindication" language related to the "substantive preclusion of federal statutory claims," not the adequacy of arbitration procedures. *See* Pet. Br. 45-48. Respondents' effort to expand that language to procedural rules that might impede the cost-effective prosecution of claims proves far too much. Even in litigation, there are no guarantees that plaintiffs will have procedural mechanisms that allow them to pursue their claims at a cost that is lower than their expected recovery, particularly when adjusted for the risk of loss. For example, the "American Rule" presumptively precludes plaintiffs from recovering the costs of enforcing their claims, even if they prevail. *Fox*, 131 S. Ct. at 2213. Federal law allows for some fee- and cost-shifting, but it caps the amount and types of awardable costs. 28 U.S.C. §§ 1821, 1920.

Federal law thus does not guarantee plaintiffs recovery of the transaction costs of pursuing their claim. Yet this Court never has suggested that these procedural limits may be overridden in the name of the "effective vindication" of federal statutory policies – even when they make small claims not worth pursuing. When it believes special rules are needed, Congress takes those matters into its own hands, by enacting treble damages, special cost-shifting provi-

sions, or other measures to further facilitate claims. *See*, *e.g.*, *Mitsubishi*, 473 U.S. at 636.

There is no basis in the Sherman Act or in this Court's decisions for treating the class-action mechanism as sacrosanct. Prior to 1938, class actions were not generally available in damages actions. *See* Pet. Br. 5. The Sherman Act's framers thus had no expectation that class actions would be available to help spread the costs of private suits. After 1966, class actions became more widespread. But often they remain unavailable due to Rule 23's strictures, which apply even where denying class treatment would "effectively frustrate [plaintiff's] attempt to vindicate the policies underlying [federal statutory] laws." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175-76 (1974).

The same is true in arbitration. The FAA promotes the freedom of parties to "structure their arbitration agreements as they see fit." *Mastrobuono*, 514 U.S. at 57. Congress, of course, can override or limit private arbitration if it concludes its benefits should yield to other substantive aims, just as it can modify other generally applicable procedures for particular statutory contexts. *See supra* pp. 5-6. But *Mitsubishi* did not adopt the extreme proposition that federal *courts* may invalidate otherwise agreed-upon procedural rules on the basis of implied federal statutory policies whenever they believe those rules unduly impede plaintiffs from pursuing their claims. *Mitsubishi*'s "effective vindication" language stands only for the proposition that, as long as arbitration provides an alternative forum in which federal substantive law will be applied to the parties' dispute, the policies of both the FAA and the underlying federal statute are properly served. *See* Pet. Br. 47-48.

B. *Randolph* Did Not Create a Broad "Effective Vindication" Rule

Randolph expressly declined to address whether the lack of a class-action mechanism rendered an arbitration agreement unenforceable. *See* Pet. Br. 44. Respondents cannot explain how *Randolph* is properly read to answer a question it never considered.

Moreover, the portion of *Randolph* on which respondents rely was *dicta*, as even the Second Circuit acknowledged. App. 22a. *Randolph*'s actual holding was that an arbitration agreement need not "affirmatively protect a party from potentially steep arbitration fees," and "silence" on which party will bear such fees "does not render the agreement unenforceable." 531 U.S. at 82. That was all the Court needed to hold to decide that the plaintiff's challenge to the agreement was "plainly insufficient." *Id.* at 91.

Furthermore, the Court did not indicate, even in *dicta*, that high costs would render an agreement to arbitrate unenforceable. Randolph "contend[ed]" that, because of a risk of high arbitration costs, she was "unable to vindicate her statutory rights in arbitration." *Id.* at 90. In observing that it "may well be" that large arbitration costs could have that effect, *id.*, the Court simply acknowledged that Randolph might, on an appropriate showing, be able to establish the *factual predicate* for her legal contention. But the Court never considered (let alone endorsed) that legal contention, because it held that, on the record before it, Randolph had made no "showing at all" on the factual point. *Id.* at 90-92. Thus, *Randolph* did not even suggest an answer to the question whether and, if so, in what circumstances an arbitration agreement can be invalidated based on a "prohibitive costs" showing.

This Court should not embrace respondents' reading of *Randolph*. It is critical to the FAA's core objectives that arbitrability be a straightforward determination free of undue cost or delay. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22 (noting "Congress's clear intent, in the [FAA], to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible"). A fact-intensive threshold standard – which would require evidentiary presentations and contested fact-finding to allow a court to anticipate all the costs of the actual proceeding (balancing those costs against the risk-adjusted potential returns) – will spawn routine arbitrability mini-trials that will undermine the value of *all* arbitration agreements. *See Vimar Seguros*, 515 U.S. at 536 ("It would be unwieldy and unsupported by the terms or policy of the statute to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the carrier."). The Court in *Randolph* never suggested that such an inquiry was appropriate.

If the Court were to accept, or leave open the possibility of, a "prohibitive costs" exception to the FAA, it should clearly limit that exception to arbitration-specific fees and other special costs of "admission" to the arbitral forum. *See* Pet. Br. 41-42. Respondents concede (at 25) that *Randolph* itself addressed only those costs. They also do not dispute that the overwhelming majority of federal circuits have applied *Randolph* only to threshold costs of "access." *See* Pet. Br. 42-43. Expanding the "prohibitive costs" inquiry to allow plaintiffs to invalidate arbitration agreements based on costs that are neither related to access nor unique to arbitration would be, as the

Court noted in *Vimar Seguros*, "unwieldy and unsupported by the terms or policy of the statute." *See infra* pp. 17-18.[3]

C. Respondents' "Effective Vindication" Rule Would Thwart the FAA in a Broad Range of Cases

Respondents' "effective vindication" rule is an extremely "broad rul[e]" that will undermine bilateral arbitration agreements in innumerable cases. App. 137a (Jacobs, J.). Respondents do not dispute that the Second Circuit's rule is even broader than the *Discover Bank* rule, which rendered unenforceable "virtually any consumer arbitration contract without regard to the contract's terms." U.S. Br. 31; *see* Pet. Br. 32-34.

1. Respondents' repeated claim (at 15) that their "effective vindication" rule is "exceedingly narrow" is not credible. *First*, respondents argue (at 29) that the evidentiary burden is "very high." But this case proves the opposite. All it took was an 11-paragraph declaration by plaintiffs' hired expert, uncritically accepted by the Second Circuit, to invalidate the parties' agreement. The record here confirms that respondents' vague test is an invitation to reignite courts' hostility toward arbitration agreements. *See infra* pp. 20-23.

Second, respondents argue (at 33) that only two circuits in "[t]wenty years of lower court decisions" have found the "effective vindication" rule satisfied. That is highly misleading, because those are the only two appellate decisions to have refused to limit *Ran-*

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[3] The plaintiffs in *Concepcion* unsuccessfully proposed just such an expansion of *Randolph*'s effective-vindication language. Brief for Respondents 51, *Concepcion*, *supra* (No. 09-893).

dolph's "prohibitive costs" *dicta* to filing fees and other threshold arbitration costs. *See* Pet. Br. 42-43. What is more telling is that, during *Amex*'s short lifetime, plaintiffs have routinely mounted "effective vindication" challenges and have repeatedly prevailed in the district courts in the Second Circuit. *See* U.S. Chamber et al. Br. 20. If the rule is accepted by this Court, invalidation of arbitration agreements will become routine in every circuit.

Third, notwithstanding their contrary assertion (at 32), respondents' theory would allow plaintiffs to avoid arbitration for a wide range of claims. As the United States acknowledges (at 33), there are a "wide range of . . . federal statutes" that "predictably generate only small damages awards for any particular plaintiff." Even as to larger claims, respondents' rule will lead to invalidation of bilateral arbitration agreements any time a plaintiff can identify an arguable need for a detailed expert report. In the antitrust area, for example, that would allow parties to avoid bilateral arbitration agreements in any case requiring a market-definition or market-power analysis – a broad swath of the antitrust landscape. *See* Antitrust Scholars Br. 24-27.

Fourth, the Second Circuit held that, in making their cost-benefit analysis, "plaintiffs must include the risk of losing." App. 91a. Thus, even if the potential recovery would exceed the likely costs incurred in arbitration, class procedures may still be required if the risk-adjusted recovery does not. The United States (at 26 n.3) also appears to embrace this reasoning, which – taken to its untenable conclusion – would mean that the more frivolous (and risky) the claim, the greater the need for class proce-

dures to make plaintiffs' (and their lawyers') gamble worthwhile.

Finally, respondents deny (at 32) that their test will require burdensome upfront litigation because it boils down to "whether the nonrecoupable costs that must be incurred in arbitration, but could be avoided or spread in litigation, exceed the plaintiff's potential recovery." But those variables are highly uncertain, especially when adjusted for risk. Moreover, they are subject to the divergent opinions and predictions of parties and their paid experts.

Respondents criticize (at 48-49, 53) petitioners for not putting in their own contrary evidence before the district court. Predictably, such dueling expert affidavits would have led to discovery, depositions, and a hearing – precisely what is happening now in district courts in the Second Circuit – all before the court could even resolve whether to enforce the arbitration agreement. Such routine, costly, and time-consuming litigation will impede the effectiveness of all arbitration agreements.[4]

2. Respondents contend that this interference is necessary because, without an "effective vindication" exception to FAA § 2, arbitration agreements will become tools for defendants to obtain *de facto* immunity from federal statutory liability. But, as this Court held in *Vimar Seguros* and *CompuCredit*, although arbitral procedures may affect a party's practical ability to pursue its claim, the claimant's *substantive* rights remain intact as long as the

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[4] Respondents do not even address what would happen if they convince a judge that class proceedings are necessary to vindicate their claims but class certification is later denied under Rule 23. Is the bilateral arbitration agreement then to be enforced after a year or more of expensive litigation?

"*guarantee of the legal power to impose liability*" is preserved. *CompuCredit*, 132 S. Ct. at 671; *see* Pet. Br. 24-27. Thus, bilateral arbitration under mutually agreed-upon rules cannot be equated with a waiver of federal *substantive* rights. That conclusion is particularly straightforward here, where respondents' assertion that they will be unable to pursue their antitrust claims in bilateral arbitration is unsupported by the record. *See infra* pp. 20-23. Moreover, respondents ignore the fact that state and federal officials are presumptively able to enforce the law. *See* Pet. Br. 6-7.

D. The Proceedings Below Do Not Support Respondents' Claim That They Cannot "Effectively Vindicate" Their Antitrust Claim in Arbitration

Respondents repeatedly claim that (1) they are not insisting on class procedures, and (2) petitioners conceded that the class-action waiver precludes respondents from effectively vindicating their claims. Both claims mischaracterize the record.

1. Notwithstanding their current claim (at 35) that they would "gladly" arbitrate bilaterally under more generous terms, respondents consistently argued below that class procedures were the *only* means of vindicating their claims. In fact, they expressly rejected cost-sharing and similar measures as alternatives to a class action.

As discussed further below, American Express agreed – in both the district court and the Second Circuit – that "nothing [in the arbitration agreement] prevents Plaintiffs from hiring one expert to be shared by all Plaintiffs so that costs such as review of documents could be shared by Plaintiffs in whatever cost-sharing arrangement they agree to among them-

selves." Defs.' Opp. to Mot. To Alter or Amend J. 3 n.1 (4/11/06); *accord* Defs.' C.A. Br. 26-27 (11/1/06). It was *respondents* that objected that pooling of expert resources would be "impractical[]" and therefore a "non-starter." Pls.' C.A. Reply Br. 13-14 (11/17/06). Respondents further argued to the Second Circuit that bilateral arbitration would be infeasible "[e]ven if all disbursements and fees were recoverable by a prevailing party in a one-on-one arbitration under the Clayton Act," because "no self-interested litigant can be expected to advance close to $1 million" for a chance merely to recoup its costs plus a small recovery. Pls.' C.A. Br. 26; *see also* C.A. App. 627-28 (arguing that cost-shifting is irrelevant to the inquiry because it still forces plaintiffs to lay out the costs upfront and does not compensate them for the risk of losing). Respondents' consistent position was that only the prospect of aggregate damages would make pursuing their claims sufficiently attractive. The record thus belies respondents' contention (at 38) that this case is "not at all" about class proceedings.

2. No matter how many times respondents repeat the assertion, it is not "uncontested" that respondents cannot vindicate their claims in bilateral arbitration. Not only, as noted, did petitioners contest the point below and offer suggestions about how respondents could vindicate their claims without class procedures, but the district court agreed with petitioners. App. 113a-114a.

Respondents' principal evidence to the contrary was Dr. French's brief declaration opining that a detailed market analysis by a high-priced economist would cost up to $1 million. JA88. Respondents' lawyer further opined that additional costs for document management and "well over 30 depositions"

would be more than $300,000. JA83-84. Respondents jump (at 46) to the conclusion that "it will cost *each* of these businesses" that amount to prove their claims in arbitration. (Emphasis added.) But that does not follow.

Arbitration's central purpose is to provide more streamlined procedures. *See* Pet. Br. 49-52. JAMS, for example, calls for discovery to be guided by "[t]he amount in controversy" and "[t]he complexity of the factual issues."[5] Arbitral rules also authorize particularly streamlined procedures for small claims.[6] Thus, it is unrealistic and improper to assume that arbitrators adjudicating a $5,000 antitrust claim would insist on a $1 million expert report or 30 depositions.

Claimants or arbitrators also could employ procedural tools to reduce costs. As noted, petitioners themselves proposed that multiple plaintiffs could, as they commonly do, pool resources or share a single expert. *See* U.S. Chamber et al. Br. 27-30.[7] Arbitra-

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[5] JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases, Ex. A (eff. Jan. 6, 2010), http://www.jamsadr.com/arbitration-discovery-protocols/.

[6] AAA, Commercial Arbitration Rules & Mediation Procedures 31 (eff. June 1, 2009), http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased.

[7] In holding otherwise, the Second Circuit misinterpreted the agreements' confidentiality provision. App. 92a. That provision merely ensures that arbitration proceedings remain private rather than public. As petitioners conceded, it does not prohibit arbitrators from permitting claimants in related arbitrations to share a single expert or pool expert resources subject to appropriate protective orders. Petitioners' concession should have been taken as decisive on this point because, even on the Second Circuit's mistaken reading of the provision, a party can

tors also could facilitate sharing of expert fees – which respondents now admit (at 2) "would make bilateral arbitration feasible" – by appointing their own experts. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987) (holding that 28 U.S.C. § 1920(6) allows fee-shifting for court-appointed as distinct from party experts); Fed. R. Evid. 706(c)(2).[8]

Dr. French offered *no* analysis of any of these possibilities. And his analysis presumes that a class could be certified in this case – which cannot properly be assumed given the requirements of Rule 23. *See* Pet. Br. 44 n.16. Respondents thus have offered mere speculation to support their "effective vindication" claim. *See Randolph*, 531 U.S. at 92 (mere "speculation" does not even shift the burden to defendant to introduce contrary evidence); *Booker*, 413 F.3d at 81 (claimant's "burden cannot be carried by 'mere speculation' about how an arbitrator 'might' interpret or apply the agreement").

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always waive a procedural protection in the arbitration agreement. *See, e.g.*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (arbitration "is simply a matter of contract between the parties"); *Employers Ins. of Wausau v. Banco De Seguros Del Estado*, 199 F.3d 937, 942 (7th Cir. 1999) (stating that parties can modify arbitration procedures).

[8] A recent amendment of petitioners' merchant agreement contains a provision that may allow merchants prevailing in bilateral arbitration to be reimbursed for certain reasonable costs and fees, including attorney and expert witness fees, as part of their recovery. Whether that amendment applies to respondents' claims and, if so, the scope of any cost-shifting allowed would be a question for the arbitrators in the first instance. *See infra* p. 23. Petitioners do not rely on this amendment in their challenge to the decision below.

In *Mitsubishi*, the Court noted: "There is no reason to assume at the outset of the dispute that . . . arbitration will not provide an adequate mechanism" to resolve antitrust disputes. 473 U.S. at 636. While rejecting an anticipatory challenge to arbitration on choice-of-law grounds, the Court made clear that "the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed." *Id.* at 638. Similarly, in *Vimar Seguros*, the Court held that choice of law "must be decided in the first instance by the arbitrator." 515 U.S. at 540. Here, too, it is up to the arbitrators to determine in the first instance what procedures will, consistent with the parties' agreement, provide for an efficient, cost-effective resolution of any given claim, whether state or federal. Respondents' anticipatory concerns about the adequacy of bilateral arbitration procedures do not constitute grounds to refuse to "permit[] the arbitration to go forward." *Mitsubishi*, 473 U.S. at 638.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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