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,
Respondents.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.[1]

Business Roundtable ("BRT") is an association of chief executive officers of leading U.S. companies with over $7.3 trillion in annual revenues and nearly 16 million employees. BRT member companies comprise nearly a third of the total value of the U.S. stock market and pay $182 billion in dividends to shareholders.

Relying on the Federal Arbitration Act's policies promoting arbitration and this Court's vindication of those policies over the past half-century, many of *amici*'s members use arbitration agreements in millions of their contractual relationships. By reducing the high litigation costs associated with resolving disputes in court, those agreements create cost sav-

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

ings that result in lower prices for consumers, higher wages for employees, and benefits for the entire national economy.

Virtually all present-day arbitration agreements require that disputes be resolved on an individual, rather than class-wide, basis. As this Court explained in *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011), and *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), class procedures are irreconcilable with the simplicity, informality, and expedition that are characteristic of arbitration.

The Second Circuit in this case refused to enforce the parties' agreements to arbitrate on an individual basis, instead holding that respondents' federal antitrust claims must proceed as a putative class action in federal court. Because the Second Circuit's ruling threatens to destroy the advantages of arbitration and to deter companies from entering into arbitration agreements, *amici* have a strong interest in this case.

SUMMARY OF ARGUMENT

The decision below seeks to carve out a new "effective vindication of rights" exception to the FAA's mandate that arbitration agreements be enforced according to their terms. But neither the FAA itself nor any other federal statute authorizes such an exception. The Second Circuit's exercise in judicial policymaking cannot stand.

To begin with, although the court of appeals purported to ground its analysis in the "federal substantive law of arbitrability" created by the FAA, its rule finds no support in that statute. This Court in *Concepcion* specifically rejected a State's effort to impose

class procedures on arbitration in order to facilitate "small-dollar claims that might otherwise slip through the legal system." 131 S. Ct. 1740, 1753 (2011). That holding rested on this Court's conclusion that class arbitration is "not arbitration as envisioned by the FAA," "lacks its benefits," and is therefore "inconsistent with the FAA." *Ibid.* There is no basis for believing that the FAA views the fundamental—and therefore protected—characteristics of arbitration differently when a plaintiff's claim arises under federal law.

Nor do the federal antitrust laws justify the Second Circuit's decision to condition the enforcement of an arbitration agreement on the availability of class proceedings. It is well-established that antitrust claims may be arbitrated, and nothing in the antitrust laws suggests that Congress intended to require that antitrust arbitrations proceed on a class-wide basis.

Although the panel located support for its newly minted rule in this Court's pre-*Concepcion* decisions, its reliance on those decisions is misplaced. In *Green Tree Financial Corp.–Alabama* v. *Randolph*, 531 U.S. 79 (2000), this Court indicated in *dictum* that a party might resist arbitration on the ground that costs *unique to arbitration*—such as filing fees and similar arbitration-specific forum costs—preclude access to the arbitral forum altogether. Similarly, *dictum* in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), at most supports the notion that courts need not enforce provisions in arbitration agreements that would bar a party from pursuing a claim under United States antitrust law at all.

Moreover, the Second Circuit's "effective vindication" test would in practice create a procedural morass that would completely undermine the objectives of the FAA. Indeed, that test is not administrable even on its own terms. There is no way for courts to reliably forecast, at the very outset of litigation, the total costs of proving a claim or the expected recovery that would result. Doing so would require courts to resolve myriad factual issues—including disputed questions on the merits that have been contractually assigned to an arbitrator—and to determine whether a class could be certified if the case remains in court.

This fact-specific and time-intensive inquiry is precisely what the FAA was designed to prevent. Even if a court eventually upholds the arbitration agreement, the victory would be a Pyrrhic one because the process will have negated at the outset most of the benefits of arbitration. And because there are no clear or objective standards for conducting this inquiry, it empowers judges who are hostile to arbitration to impede the enforcement of arbitration agreements, contrary to the FAA's policy of promoting arbitration.

Finally, the Second Circuit was mistaken in assuming that formal class-action procedures are ever essential to the vindication of claims. On the contrary, arbitration claimants may use a variety of informal means to pool resources and share any significant litigation expenses (including expert-witness costs) to the extent those expenses need be incurred in arbitration. Furthermore, the vast majority of disputes that arise are individualized and accordingly cannot be brought as collective or class actions. Especially when such claims are relatively small, arbitration is the only realistic means for resolving

these disputes. On the whole, therefore, arbitration greatly increases access to justice for small claims. Under the Second Circuit's rule, however, enforcing arbitration agreements would become so burdensome and so uncertain that many businesses will abandon arbitration altogether, with adverse consequences for millions of consumers, employees, and small businesses nationwide.

ARGUMENT

I. COURTS LACK AUTHORITY TO DENY ENFORCEMENT OF ARBITRATION AGREEMENTS BASED ON A POLICY CONCERN THAT ARBITRATION MIGHT NOT BE COST-EFFECTIVE.

The FAA sharply limits the power of courts to refuse to enforce arbitration agreements. In providing that such agreements are "valid, irrevocable, and enforceable" (9 U.S.C. § 2), Congress sought to guarantee that "courts * * * place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1745 (2011) (citations omitted). The FAA precludes courts from "rely[ing] on * * * judicial policy concern[s] as a source of authority" for refusing to enforce arbitration agreements. *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 270 (2009); see also *Concepcion*, 131 S. Ct. at 1747 (FAA was intended to eliminate the "'great variety' of 'devices and formulas' declaring arbitration against public policy"). Unless the FAA or another federal statute prohibits enforcement of an arbitration agreement according to its terms, or permits the application of a state-law rule barring enforcement of the agreement, the arbitration agreement must be enforced.

No such federal statutory authority supports the Second Circuit's view that courts may decline to enforce agreements to arbitrate claims individually upon concluding that there is "more than a speculative risk" that plaintiffs may be unable to "effectively" vindicate their statutory rights without a class action. Pet. App. 11a, 22a, 86a. That rule lacks any sound basis in the FAA, federal antitrust law, or this Court's decisions.

A. The FAA Does Not Permit Courts To Refuse To Enforce Arbitration Agreements On The Ground That They Preclude Class Procedures.

The Second Circuit purported to ground its analysis in the "federal substantive law of arbitrability." Pet. App. 16a, 78a, 96a. In particular, the court posited that the savings clause in Section 2 of the FAA authorizes courts to refuse to enforce an arbitration agreement upon finding that the agreement would "remov[e] the plaintiffs' only reasonably feasible means of recovery" under the antitrust laws. Pet. App. 12a, 95a–96a.

The Second Circuit erred in construing the savings clause to authorize courts to condition enforcement of arbitration provisions on a case-by-case assessment of whether class-wide procedures may be necessary to enable plaintiffs to vindicate their statutory claims. In *Concepcion*, this Court expressly rejected as irrelevant the dissent's contention "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," explaining that, under the FAA, States cannot condition the enforcement of arbitration agreements on the availability of class-action

procedures "even if it is desirable for unrelated reasons." 131 S. Ct. at 1753.

There is no basis under the FAA for applying a different rule when a plaintiff's cause of action is supplied by federal law. The principle that undergirds *Concepcion*'s holding—that the FAA mandates "enforc[ing] agreements to arbitrate according to their terms"—applies "***even when*** the claims at issue are federal statutory claims." *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 669 (2012) (emphasis added).

Concepcion's holding rested on this Court's conclusion that "class arbitration" is "not arbitration as envisioned by the FAA" and "lacks its benefits." *Concepcion*, 131 S. Ct. at 1753. For this reason, requiring parties to permit class-wide resolution of claims in arbitration is tantamount to prohibiting arbitration altogether—a result that is manifestly at odds with the FAA's "design[] to promote arbitration." *Id.* at 1749. Under *Concepcion*, courts may not reject fundamental features of arbitration—such as the resolution of disputes on a bilateral basis or the waiver of jury trials—by "say[ing] that such agreements are exculpatory" or by invoking "public-policy disapproval of exculpatory agreements." *Id.* at 1747.

That conclusion is just as true when a plaintiff brings claims under federal law as when the plaintiff's claims arise under state law. It would be bizarre indeed if the "federal substantive law of arbitrability" invoked by the Second Circuit required the very result—conditioning the enforcement of arbitration agreements on the availability of class procedures—that this Court declared in *Concepcion* to be "inconsistent with the FAA." 131 S. Ct. at 1748.

Moreover, nothing in the text or history of the FAA indicates that the statute's conception of the nature of arbitration and the fundamental characteristics protected by the FAA—streamlined discovery, bilateral proceedings, and a decision maker selected by the parties—vary depending on whether federal or state-law claims are at issue. While Congress remains free to prescribe different rules of decision for enforcing arbitration agreements in the context of federal and state claims, it certainly has not done so in the FAA itself.

B. The Federal Antitrust Laws Do Not Afford Courts The Power To Reject Arbitration Agreements That Waive Class Procedures.

Federal and state claims do stand on a different footing under the FAA in one respect: Congress, unlike a state legislature, may create exceptions to the FAA's pro-arbitration mandate. But the Court has repeatedly held that "Congress itself" must "evince[] an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *see also Pyett*, 556 U.S. at 258 (same).

Neither the Second Circuit nor respondents contend that the federal antitrust laws "expressly preclude[] arbitration or * * * expressly provide[] a right to bring collective or class actions." Pet. App. 17a n.5. Nor could they.

To begin with, as this Court has repeatedly held, "claims arising under the Sherman Act," like other federal statutory claims, "may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500

U.S. 20, 26 (1991); see also *Mitsubishi*, 473 U.S. at 636. Moreover, nothing in the federal antitrust laws indicates that Congress intended to preclude parties from waiving class procedures in arbitration. Indeed, the notion that the federal antitrust laws require that class procedures be available to private plaintiffs, whether in arbitration or in court, is ahistorical. Both the Sherman Act and the Clayton Act were enacted more than a half-century before the birth of the modern class action in Rule 23.[2] To the contrary, in enacting the Sherman Act, Congress specifically "rejected a proposal to allow a group of consumers to bring a collective action as a class." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979).[3]

The court below nonetheless concluded that individual arbitration of the plaintiffs' antitrust claims would "conflict with congressional purposes manifested in the provision of a private right of action in the [Sherman Act]." Pet. App. 17a n.5. It relied heavily on this Court's observation that "'private suits provide a significant supplement'" to public enforcement of the antitrust laws. Pet. App. 27a–28a. But this Court rejected that reasoning in *Mitsubishi*, explaining that "the fundamental importance * * * of the antitrust laws" does not preclude these claims from being brought in arbitration. 473 U.S. at 634; see *id.* at 634–640. There is no "inherent conflict"

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[2] Just as "class arbitration was not even envisioned by Congress when it passed the FAA in 1925" (*Concepcion*, 131 S. Ct. at 1752), class arbitration and class-action litigation did not exist in anything like their modern form when Congress passed the Sherman Act in 1890 and the Clayton Act in 1924.

[3] In subsequently enacting the Clayton Act, Congress did not discuss class proceedings at all. Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 Mich. L. Rev. 1, 27 (1989).

(*Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220, 227 (1987)) between individual arbitration and the purpose of the antitrust laws; claimants can recover the same individual remedies (such as treble damages and attorneys' fees) in arbitration as in court.[4]

Moreover, the Court has rejected the notion that "the mere formulation of the cause of action" in a statute is "sufficient to establish the contrary congressional command overriding the FAA." *CompuCredit*, 132 S. Ct. at 670 (internal quotation marks omitted). Quite the opposite: This Court has "repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court." *Id.* at 671. Indeed, it has explained, even when Congress has ***expressly*** provided for class or collective procedures for statutory claims, that "does not mean that individual attempts at conciliation were intended to be barred." *Gilmer*, 500 U.S. at 32 (internal quotation marks omitted).[5]

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[4] In any event, to the extent there is any validity to the Second Circuit's view that "[t]he Clayton Act's fee-shifting provisions [are] inadequate to alleviate our concerns given the low expert reimbursement rate" that the statute authorizes (Pet. App. 53a), the proper response is to petition Congress to provide for greater recovery of expert fees, not to manufacture a judicial exception to the FAA. As Chief Judge Jacobs noted, Congress's decision to allow prevailing parties to recover attorneys' fees and costs—but not all expert witness fees—indicates that "Congress deem[ed] these incentives sufficient to encourage private suits," a determination to which courts should defer. Pet. App. 138a.

[5] The case for requiring class procedures was arguably stronger in *Gilmer* than it is here, because the ADEA—unlike the antitrust laws—expressly provides for collective actions (see 29 U.S.C. § 626(b)). Nevertheless, this Court stated that ADEA

Finally, contrary to the Second Circuit's view (Pet. App. 18a), an arbitration agreement that would have been fully enforceable prior to the adoption of Rule 23 in its current form cannot now be declared unenforceable simply because class actions are thought to provide a more economical means to proceed. The right to compel arbitration—*i.e.*, to require specific performance of arbitration agreements—that the FAA creates is part of the "federal substantive law of arbitrability." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Rule 23, by contrast, was promulgated under the Rules Enabling Act, which "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011) (quoting 28 U.S.C. § 2072(b)).[6]

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claims may be arbitrated "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." *Gilmer*, 500 U.S. at 32 (internal quotation marks omitted). Here, where Congress did not expressly require class procedures, there is certainly no basis for a court to impose such a requirement. Cf. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 720 (1967) (when a statute "expressly provides the remedies for vindication of the cause, other remedies should not readily be implied").

[6] Put differently, Rule 23 confers "a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 331 (1980). And it is well established that, under the FAA, the parties may "'trade[] the procedures * * * of the courtroom'"—including discovery rules and class or collective procedures—"'for the simplicity, informality, and expedition of arbitration.'" *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi*, 473 U.S. at 628).

C. This Court's Pre-*Concepcion* Decisions Do Not Authorize Invalidation Of Arbitration Agreements That Waive Class Actions.

The Second Circuit relied heavily on this Court's decisions in *Green Tree Financial Corp.–Alabama* v. *Randolph*, 531 U.S. 79 (2000), and *Mitsubishi*. Pet. App. 19a–25a. Given that the decision below is squarely inconsistent with *Concepcion*, it is not surprising that, upon inspection, these cases offer no support for the rule adopted by the panel.

1. *Randolph* involved a plaintiff's contention that her arbitration agreement was unenforceable because it did not "affirmatively protect [her] from potentially steep arbitration costs." 531 U.S. at 82. While rejecting that challenge as speculative, this Court indicated in *dicta* that courts might "invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive" (*id.* at 92), stating 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" (*id.* at 90).

Contrary to the Second Circuit's view, the Court's discussion of "vindication" in *Randolph* was limited to circumstances in which an arbitration agreement imposes excessive costs on the claimant that are ***unique to arbitration***—*i.e.*, costs that would not be incurred if the plaintiff's claim were instead brought in a judicial forum. That is why *Randolph* refers to "arbitration costs" (531 U.S. at 90) and "arbitration expenses" (*id.* at 84), and the two examples it offers—"filing fees" and "arbitrators'

costs" (*ibid.*)—both are costs unique to the arbitral forum.

Thus, to the extent that *Randolph* permits consideration of costs, the focus is not on the ordinary costs of proving a claim, but instead on whether the price of gaining entry to the arbitral forum is prohibitively greater than the equivalent filing fees and similar forum access charges that the plaintiff would incur in federal court. The driving principle is one of ***unique limitations on access*** to the arbitral forum. See Pet. App. 144a (Jacobs, C.J., dissenting from denial of rehearing en banc) (*Randolph* "is about the price of admission" rather than "expense generally"); accord Pet. App. 111a (Daniels, J.) (*Randolph* is limited to "'costs which would not be incurred in a judicial forum'") (quoting *Ball* v. *SFX Broad., Inc.*, 165 F. Supp. 2d 230, 240 (N.D.N.Y. 2001)). As Judge Fogel has explained, *Randolph* is "confined to circumstances in which a plaintiff argues that costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent her from vindicating her claims." *Kaltwasser* v. *AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1050 (N.D. Cal. 2011).

In this case, the Second Circuit did not conclude (and respondents did not contend) that the cost of accessing the arbitral forum is "prohibitively expensive"—*i.e.*, that the difference between arbitral fees and judicial filing fees is so great as to prevent plaintiffs from pursuing arbitration. The panel erred in citing *Randolph* for the completely different notion that an arbitration agreement may be invalidated whenever a court concludes that the costs of ***proving*** a claim are high in relation to its value.

2. The Second Circuit's reliance on *Mitsubishi* is equally mistaken. A footnote in that case states in dictum that if the agreement's "choice-of-forum and choice-of-law clauses operated in tandem" to eliminate "a party's ***right to pursue*** statutory remedies for antitrust violations," the Court would likely invalidate those provisions. 473 U.S. at 637 n.19 (emphasis added). *Mitsubishi* thus addressed a situation in which the agreement would operate to bar the plaintiff from pursuing an antitrust claim under United States law ***at all***. See also *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 539–541 (1995) (noting that *Mitsubishi* would provide recourse if arbitrators were not permitted to apply United States law). That is not the situation here: If respondents elect to pursue their claims, an arbitral forum is available to hear those claims and to render a decision on the merits.

Respondents may say that an arbitral forum is not "practically" available to them because they do not wish to incur the alleged expenses of proving their antitrust claims. But that is wholly different from the concern raised in *Mitsubishi* about categorical waivers of the right to present an antitrust claim under United States law at all.

II. THE SECOND CIRCUIT'S RULE IS NOT ADMINISTRABLE AND WOULD FRUSTRATE THE OBJECTIVES OF THE FAA.

This Court has repeatedly declared that a "prime objective" of the FAA "is to achieve 'streamlined proceedings and expeditious results.'" *Preston* v. *Ferrer*, 552 U.S. 346, 357 (2008) (quoting *Mitsubishi*, 473 U.S. at 633). That requires "an expeditious and summary hearing" on motions to compel arbitration "with only restricted inquiry into factual issues."

Moses H. Cone, 460 U.S. at 22. The FAA would be frustrated if courts could hinder speedy resolution of disputes by "impos[ing] prerequisites to enforcement of an arbitration agreement." *Preston,* 552 U.S. at 356.

The Second Circuit's vindication test, however, does exactly that. It effectively "breed[s] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995). The decision below therefore cannot be reconciled with the core objectives of the FAA.

A. The Court Of Appeals' "Vindication" Test Is Not Administrable Even On Its Own Terms.

The decision below enables a party resisting arbitration to transform any motion to compel arbitration into satellite litigation about whether arbitration would be an economically reasonable means of resolving the dispute. As Judge Fogel has put it, if the Second Circuit were correct, "every court evaluating a motion to compel arbitration would have to make a fact-specific comparison of the value of a plaintiff's award with the potential cost of proving the plaintiff's case." *Kaltwasser*, 812 F. Supp. 2d at 1049.

First, if this Court endorses the vindication argument, plaintiffs' lawyers undoubtedly will seek to invoke it broadly in an effort to avoid this Court's holding in *Concepcion*. Although this case involves an antitrust claim, plaintiffs have sought to invalidate arbitration agreements on "vindication" grounds in cases asserting claims arising under a variety of federal statutes. As Chief Judge Jacobs observed, the panel's vindication test "can be used to challenge

virtually every consumer arbitration agreement" (Pet. App. 137a) because it "is always so easy to assert" that a claim cannot effectively be vindicated on an individual basis (Pet. App. 134a).[7] Indeed, "every class counsel and every class representative who suffers small damages" can simply "hir[e] a consultant (of which there is no shortage) to opine that expert costs would outweigh a plaintiff's individual loss." Pet. App. 137a.

Second, because the Second Circuit's premise is that class procedures would be available if a claim proceeds in court, the case-by-case "vindication" analysis necessarily would require courts to determine whether the claims at issue could be certified under Rule 23: If they could not be, there would be no valid reason for refusing to enforce the parties' agreement to forgo class procedures. Cf. Pet. App. 139a (court must resolve "whether the putative class is duly constituted and properly represented, without which there is no class claim").

But this Court has explained repeatedly that the class-certification determination requires considerable factual development, including with respect to some issues that overlap with the merits of the putative class claim. As this Court recently pointed out, "[f]requently [the] 'rigorous analysis'" required by Rule 23 "will entail some overlap with the merits of the plainitff's underlying claim. That cannot be helped. '[T]he class determination generally involves

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[7] Although the Second Circuit expressly limited its vindication rationale to cases in which the plaintiffs have pleaded claims under federal law, that is cold comfort, given the ease with which plaintiffs can dress up ordinary state-law claims in the garb of a federal cause of action.

considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Wal-Mart*, 131 S. Ct. at 2551–2552 (quoting *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 160 (1982)); see also *Concepcion*, 131 S. Ct. at 1751 (discussing complexity of class-certification inquiry).

Third, the vindication test is unworkable because there is no objective or reliable way to forecast, at the very outset of litigation, the total cost of proving a claim or the expected recovery that would result.[8] That is all the more so because courts that generally have limited, if any, experience with arbitration may erroneously presume that arbitration would involve the same hurdles and obstacles that a plaintiff would face in court.[9]

Either way, moreover, courts would have to resolve myriad factual issues. As Chief Judge Jacobs put it, the panel's decision "makes the district court the initial theater of arbitral conflict on the merits (how else does a district court estimate the costs of a litigation?)." Pet. App. 136a. The kinds of questions that a court would need to resolve include, but by no means are limited to:

- The nature and amount of factual evidence a plaintiff is likely to put forward in support of

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[8] The "arbitration costs" and "arbitration fees" referred to in *Randolph* (531 U.S. at 84, 90 & n.6), by contrast, are generally easy to ascertain by reference to the terms of an arbitration agreement and rules of the arbitral forum.

[9] In fact, arbitration is much more informal than litigation and spares litigants from the rigors of the federal rules of evidence and civil procedure. In addition, in individual arbitration there is no need for the plaintiff to spend months or years litigating the class-certification issues specified in Rule 23.

the allegations in its complaint, and the evidence that the defendant is likely to submit in response.

- The estimated costs of document-based discovery and depositions that would be permitted in arbitration (which requires knowing the identity of the witnesses).
- Whether expert testimony is needed and, if so, which experts and at what cost.
- The prospects that the parties might settle an individual arbitration, making a formal arbitration hearing unnecessary.
- Whether the features of the arbitration provision at issue make it possible for plaintiffs to vindicate their claims effectively on an individual basis.

To undertake all of these inquiries (and more) would require district judges to hold a not-so-mini-trial at the outset of every case in which a party seeks to resist arbitration—and that trial would have to address not only the costs of litigating in court but also the different costs of litigating in arbitration (see note 9, *supra*), so that the district court could compare the two.

These inquiries are likely to require plenary discovery, briefing, and argument about what types of evidence and analysis are needed to arbitrate the case, including how expensive merits discovery and the arbitral hearing would be. The parties "predictably will challenge the qualifications and methodology of experts who are called upon to estimate a plaintiff's cost of proof." *Kaltwasser*, 812 F. Supp. 2d at 1049. Other "evidentiary issues" may preclude the

court from accepting the parties' submissions "at face value." *Fromer* v. *Comcast Corp.*, 2012 WL 3600298, at *6 (D. Conn. Aug. 21, 2012); cf. *LaVoice* v. *UBS Fin. Servs., Inc.*, 2012 WL 124590, at *8 (S.D.N.Y. Jan. 13, 2012) ("whether LaVoice's expert's testimony would even be admissible remains unclear to the Court"). Courts will be forced to confront "*Daubert* and other vexed questions" merely to determine whether a case will proceed in arbitration or in court. Pet. App. 139a (Jacobs, C.J.). And even once questions of admissibility are resolved, the dispute may ultimately come down to picking sides between "battling experts." *Fromer*, 2012 WL 3600298, at *6.

Worse still, as the Second Circuit did in this case, courts might take a shortcut by electing to "uncritically adopt[] the affidavit of a paid consultant" hired by one of the parties. Pet. App. 137a (Jacobs, C.J.). The sole basis for the Second Circuit's determination that respondents cannot cost-effectively arbitrate their claims was a single self-serving affidavit from a paid expert retained by plaintiffs' counsel. Pet. App. 14a–15a. And that affidavit is flimsy at best, lacking any empirical rigor: It merely guesses that the cost of the market study will fall "in the middle of the range" for such studies, anywhere from "several hundred thousand dollars" to "$1 million" (Pet. App. 14a, 51a–52a; see also Pet. App. 147a (Jacobs, C.J.) (respondents' expert offered only "a guess" of "nearly one million dollars"))—and does not even purport to show that a market study of similar complexity would be required in an individual arbitration.[10]

[10] Indeed, the affidavit was based entirely on data from complex, trial-court litigation lasting several years, and was not based on any experience with individual arbitration. See J.A. 88–91.

District courts applying the Second Circuit's test have followed suit, uncritically adopting the cost estimates fed to them by plaintiffs' attorneys and their hired experts. See, *e.g.*, *In re Elec. Books Antitrust Litig.*, 2012 WL 2478462, at *3 (S.D.N.Y. June 27, 2012) (appeal pending); *Raniere* v. *Citigroup Inc.*, 827 F. Supp. 2d 294, 314–315 (S.D.N.Y. 2011) (appeal pending); *Sutherland* v. *Ernst & Young LLP*, 768 F. Supp. 2d 547, 551–552 & n.5 (S.D.N.Y. 2011) (appeal pending).[11]

Fourth, the vindication rule articulated by the Second Circuit is especially problematic because it is devoid of any objectively administrable standard. Indeed, the Second Circuit disclaimed any effort to identify objective benchmarks that may be applied consistently across cases. Instead, it indicated that courts must always conduct this inquiry on an *ad hoc* basis. See Pet. App. 29a ("each waiver must be considered on its own merits, based on its own record").

The indeterminate contours of this vindication test make it every bit as "toothless and malleable" as the *Discover Bank* rule that this Court rejected in *Concepcion* (131 S. Ct. at 1750)—if not more so. As Chief Judge Jacobs pointed out, the panel's decision is "unbounded" and "does not vouchsafe what is meant for a suit to be 'economically feasible,' or when a hypothetical 'economically rational' plaintiff might

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[11] The court below and several district courts have criticized defendants for not submitting competing cost estimates from their own hired experts. Pet. App. 11a, 27a; *Fromer*, 2012 WL 3600298, at *6; *In re Elec. Books*, 2012 WL 2478462, at *3. By effectively ***mandating*** a battle of the experts, these courts multiply the costs of enforcing arbitration agreements and the number of evidentiary issues that must be resolved, highlighting the problems with the Second Circuit's approach.

be willing to pursue a claim." Pet. App. 136a, 138a. And unlike the rule at issue in *Concepcion*, which at least "require[d] that damages be predictably small" (131 S. Ct. at 1750), the Second Circuit would apparently find plaintiffs unable to vindicate claims worth "several hundred thousand dollars" or more (Pet. App. 14a, 26a).

Further contributing to the manipulability of the Second Circuit's test is the requirement that a plaintiff need only show "more than a speculative risk" (Pet. App. 11a) that it will be unable to vindicate its own federal statutory rights. But nowhere does the panel explain what quantum of evidence is required to push a plaintiff's asserted risk across the line from "speculative" to "more than speculative."

Unsurprisingly, the malleability of the Second Circuit's vindication test is already being exploited to "work[] mischief" in the district courts. Pet. App. 136a (Jacobs, C.J.). Thus, courts within the Second Circuit have held that the availability of fee-shifting for prevailing parties is not sufficient incentive for pursuing meritorious claims, notwithstanding Congress's apparent determination to the contrary. See, *e.g.*, *Raniere*, 827 F. Supp. 2d at 316 (mandatory "[f]ee shifting alone is not per se sufficient to render a class action waiver enforceable"); *Sutherland*, 768 F. Supp. 2d at 553 (S.D.N.Y. 2011); cf. *Arguelles-Romero* v. *Super. Ct.*, 109 Cal. Rptr. 3d 289, 306 n.20 (Ct. App. 2010) ("There is an element of self-fulfilling prophecy to these declarations; it cannot be the law that attorneys who may specialize in representing consumers can control whether a class action waiver is unenforceable simply by refusing to represent plaintiffs on an individual basis.").

Moreover, the Second Circuit indicated that courts must consider plaintiffs' "risk of losing"—and hence of not recovering their attorneys' fees—in the *ad hoc* vindication analysis. Pet. App. 27a, 91a; see also, *e.g.*, Pet. App. 138a (Jacobs, C.J.) (noting that the panel "demands a 'risk-of-losing' premium"); *Fromer*, 2012 WL 3600298, at *6; *Raniere*, 827 F. Supp. 2d at 317; *Sutherland* v. *Ernst & Young LLP*, 856 F. Supp. 2d 638, 642 (S.D.N.Y. 2012).[12] But courts are not in the business of forecasting a plaintiff's precise odds of success at the outset of a case—nor is it likely that such forecasts are even possible. Cf. *LaVoice*, 2012 WL 124590, at *8 (dismissing such forecasts as "pure speculation"). On this approach, moreover, the less meritorious the claim (and thus the greater the risk of loss), the more likely that the plaintiff will be able to evade arbitration—a perverse result that would magnify the cost of defending against frivolous claims.

B. The Second Circuit's Approach Produces Precisely The Results That The FAA Was Enacted To Prevent.

The Second Circuit's vindication test, if upheld, would have disastrous consequences for the enforcement of arbitration agreements. Routine motions to compel arbitration will require burdensome discovery, formal hearings, and time-consuming interlocutory appeals. Courts will be required to assess nu-

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[12] Indeed, in one case the district court refused to enforce arbitration agreements even though the defendant offered to pay expert witness fees for prevailing claimants, because "eligibility for such an award would depend on her success in the arbitral forum, an uncertainty that the Second Circuit noted in *American Express*." *Sutherland*, 856 F. Supp. 2d at 642.

merous issues related to the merits of the plaintiffs' claims, precisely what the FAA is designed to prohibit. And the court's broad discretion in conducting this largely standardless inquiry opens the door to a resurgence of the very judicial hostility to arbitration that the FAA was intended to eradicate.

First, the Second Circuit's approach would generate prolonged and expensive delays in the enforcement of arbitration agreements—even though "prolonged litigation" is "one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland Corp.* v. *Keating*, 465 U.S. 1, 7 (1984). If the decision below is upheld, costly and extended threshold litigation will routinely impede the enforcement of arbitration in countless cases. See pages 16–19, *supra* (discussing factual issues).

In many cases, the vindication test would render arbitration "too expensive and too slow to serve ***any*** of its purposes." Pet. App. 140a (Jacobs, C.J.) (emphasis added). Furthermore, "even if arbitration is given a green light at the end of the judicial proceeding, the party seeking to arbitrate may already have spent many times the cost of an arbitral proceeding just enforcing the arbitration clause." Pet. App. 139a.

Second, as Chief Judge Jacobs observed, this evidentiary showdown over the feasibility of arbitration inevitably will devolve into an accelerated litigation of the merits. Pet. App. 139a. For starters, "it cannot be decided whether any discovery or testimony is needed at all without deciding if the claim is dismissible" on the pleadings as a matter of law and whether a class may be certified. *Ibid.* In many cases, the court would also need to adjudicate "such prior questions as the statute of limitations and laches, control-

ling law, res judicata, etc." *Ibid.*; see, *e.g.*, *Raniere*, 827 F. Supp. 2d at 315 (addressing choice-of-law and statute-of-limitations disputes in order to apply vindication test). Because the Second Circuit's approach requires a court to address so much of the merits, it "effectively displaces arbitration with a trial court proceeding whenever lawyers assert a class claim." Pet. App. 139a.

Even a preliminary judicial inquiry into the merits conflicts with this Court's precedents holding that merits issues are to be decided by the arbitrator, not by a court. See, *e.g.*, *Nitro-Lift Techs., L.L.C.* v. *Howard*, 133 S. Ct. 500 (2012) (per curiam); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006). By requiring courts' deep involvement in assessing issues relating to the merits of the plaintiff's claim, the Second Circuit's test plainly violates this principle.

Third, by conditioning the enforceability of arbitration agreements on an inherently speculative and indeterminate inquiry, the Second Circuit standard empowers federal and state court judges who are hostile to traditional, bilateral arbitration to impede the enforcement of such agreements.

As this Court has explained, Congress enacted the FAA as "a response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 111 (2001). That judicial hostility to arbitration "manifested itself in a great variety of devices and formulas declaring arbitration against public policy." *Concepcion*, 131 S. Ct. at 1747 (internal quotation marks omitted). By passing the FAA, Congress sought "to reverse the

longstanding judicial hostility to arbitration agreements." *Gilmer*, 500 U.S. at 24.

Widespread judicial hostility to arbitration nonetheless persists today among many state and federal courts. See generally Aaron-Andrew Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, 1432–1443 (2008) (documenting continued resistance to arbitration among lower courts); Br. of Chamber of Commerce of U.S. at 13–27, *Rent-A-Center, West, Inc.* v. *Jackson*, 130 S. Ct. 2772 (2010) (No. 09-497), 2010 WL 783668 (same). The Second Circuit's vague, malleable, and manipulable standard provides an avenue for these courts to act upon that hostility.

Fourth, the indeterminate and case-specific nature of the Second Circuit test carries another significant adverse consequence: Parties to an arbitration agreement could not know at the time of contracting whether their agreement will be enforced with respect to any particular subsequently arising dispute. By casting a cloud over the enforceability of all arbitration agreements—even those, as here, involving business parties—the "vindication" standard thus eviscerates one of Congress's prime goals in enacting the FAA: to provide parties with certainty regarding the enforceability of such agreements.[13] As we discuss below, the inevitable consequence of that uncertainty will be a reduction in the use of arbitration to

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[13] State-law unconscionability standards are applied as of the time of contracting precisely to avoid the tremendous uncertainty regarding the enforceability of agreements that results from a standard based on post-contracting events. See, *e.g.*, *Tuckwiller* v. *Tuckwiller*, 413 S.W.2d 274, 276–280 (Mo. 1967).

resolve disputes, again the precise opposite of Congress's purpose.

III. THE SECOND CIRCUIT'S ASSUMPTION THAT IT IS NOT POSSIBLE TO VINDICATE MODEST-SIZED CLAIMS ON AN INDIVIDUAL BASIS IN ARBITRATION IS MISTAKEN.

The Second Circuit's decision ultimately rests on the concern that some plaintiffs might be unwilling or unable to pursue their claims without class actions. As this Court has said time and again, however, judicial policy concerns about arbitration are not a valid basis for refusing to enforce otherwise-valid arbitration agreements. See, *e.g.*, *Concepcion*, 131 S. Ct. at 1747; *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1768–1770 (2010); *Pyett*, 556 U.S. at 270. The responsibility for addressing such policy considerations lies exclusively with Congress, not the courts.

Even if public policy were relevant, however, the Second Circuit's rule could not be sustained. *First*, the panel was incorrect to assume that formal class-action procedures are essential to the vindication of small claims. On the contrary, arbitration claimants have ready access to many other, informal means to pool resources and share common costs so that each claimant bears only a fraction of the total expense. These informal measures can play the same cost-sharing role in arbitration that class actions perform in litigation, but without all of the burdensome procedural formalities of judicial litigation.

Second, the decision below failed to consider the full range of disputes to which arbitration applies. The vast majority of claims that could be asserted

under arbitration agreements are highly individualized disputes that cannot be brought as collective or class actions. For these disputes, arbitration is typically the only realistic means of resolving individual claims. If the decision below were upheld, however, many businesses likely would abandon arbitration altogether, depriving millions of consumers, employees, and small businesses of this critical benefit. Surely any policy analysis therefore must consider this increased access to justice for the vast majority of disputes.

A. Class-Action Procedures Are Not Necessary For Claimants To Pool Resources And Share Costs.

1. The Second Circuit was incorrect to assume that individual arbitration would require each plaintiff to bear the full cost of retaining an expert to conduct an antitrust market study. Arbitration claimants bringing overlapping or identical claims based on common facts are not each required to reinvent the wheel. Although bilateral arbitration requires each claimant to bring a separate proceeding, nothing about arbitration prevents claimants (or their attorneys) from sharing the expenses of expert witnesses, fact investigation, and attorney preparation.[14]

This case is particularly amenable to cost-sharing among claimants. The plaintiffs here are businesses that could easily identify and solicit large numbers of similarly situated businesses to file indi-

[14] Similarly, nothing precludes plaintiffs' attorneys from sharing successful strategies or from pooling information and evidence gathered from non-confidential sources.

vidual claims across which litigation costs can be spread. Indeed, although the named plaintiffs are small businesses, the class includes many large retailers with the resources to facilitate such organization.

In the initial iteration of its opinion in this case, the Second Circuit suggested that respondents might not be able to share the costs of the market study because their arbitration agreements require that information obtained through the arbitration proceedings be kept confidential. Pet. App. 92a. But contrary to the panel's reading, that requirement would not prevent plaintiffs from collectively preparing their arbitration demands and assembling the evidence for their *prima facie* cases before arbitration begins. In fact, another district court recently rejected the argument that a similar confidentiality provision barred a group of retail grocers from sharing the purportedly necessary $1.4 million cost of expert testimony for their antitrust claims against wholesale grocers. See *In re Wholesale Grocery Prods. Antitrust Litig.*, 2011 WL 9558054, at *5 (D. Minn. July 5, 2011) (appeal pending). Because the plaintiffs could "cooperate amongst themselves and other [p]laintiffs to share arbitration costs" and could "share costs stemming from analysis of public information," they could afford to arbitrate their claims individually even though the expert witness fees far exceeded the value of any individual claim. *Ibid.*

2. This sort of coordination and cost-sharing has become increasingly common. Indeed, respondents themselves are forced to admit that this is a "rare case" in which a plaintiff is "truly unable * * * to share costs," recognizing that their (erroneous) in-

terpretation of the confidentiality clause is their only basis for such a contention. Br. in Opp. 16; see also *id.* at 23.

Given the strong financial incentives, it is no surprise that at least some plaintiffs' lawyers are beginning to recognize that pursuing serial individual arbitrations (or small-claims actions) can be an economically viable business model—especially in view of the ability to reach multiple similarly situated individuals by means of websites and social media. For a discussion of this phenomenon, see Carolyn Whetzel & Jessie Kokrda Kamens, *Opt Out's Use of Social Media Against Honda In Small Claim Win Possible "Game Changer,"* Bloomberg BNA Class Action Litig. Rep. (Feb. 10, 2012).

For example, prior to *Concepcion* a plaintiff had filed a putative class action alleging that AT&T improperly measures the amount of data used by iPhones and iPads, thereby supposedly causing customers to pay more for data usage than they otherwise would. The district court, following this Court's holding in *Concepcion*, compelled the plaintiff to arbitrate in accordance with his arbitration agreement. *See Hendricks* v. *AT&T Mobility LLC*, 823 F. Supp. 2d 1015 (N.D. Cal. 2011).

Subsequently, counsel for Hendricks filed separate demands for arbitration on behalf of over 1,000 claimants—each making virtually identical allegations and relying on the same expert witness whom Hendricks had proffered in support of his class-action lawsuit. The parties have been arbitrating the claims on an individual basis.

Another lawyer "set up a website to recruit plaintiffs" to bring multiple identical small-claims cases

alleging improper marketing of credit information. See Sara Foley & Jessica Savage, *Court Filings Boost Revenue*, Corpus Christi Caller Times, Nov. 27, 2010, *at* http://www.caller.com/news/2010/nov/27/court-filings-boost-revenue/. Similarly, a former lawyer who sued an automaker in small claims court after opting out of a class action set up a website to publicize her case, along with profiles on Twitter and Facebook and a video on YouTube. She since was "contacted by hundreds of other car owners seeking guidance in how to file small claims suits if they opted out of" the class action. Linda Deutsch, *Honda Loses Small-Claims Suit Over Hybrid MPG*, Associated Press, Feb. 1, 2012, *at* http://www.msnbc.msn.com/id/46228337/ns/business-autos/t/honda-loses-small-claims-suit-over-hybrid-mpg/.

These examples demonstrate that, especially in an era in which the Internet and social media can be used effectively to reach out to potential claimants, individual plaintiffs (and their counsel) can readily identify other businesses or individuals with similar claims who can share in the costs of pursuing claims. For this reason, the Second Circuit was mistaken in concluding that class actions or class arbitration are the only effective means for individual plaintiffs to share the costs of proving small claims.

B. The Second Circuit's Decision Would Have Disastrous Consequences For Consumers And Employees Who Need A Less Expensive Alternative To Litigation.

The Second Circuit's analysis suffers from yet another flaw: It disregards the fact that bilateral arbitration overwhelmingly ***increases*** access to justice for millions of individuals throughout the Nation.

This Court has repeatedly observed that "arbitration's advantages often would seem helpful to individuals * * * who need a less expensive alternative to litigation." *Allied-Bruce*, 513 U.S. at 280.[15] In the absence of enforceable arbitration agreements, "the typical consumer who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set)" would be left "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery." *Id.* at 281. The Court has likewise recognized that "[a]rbitration agreements * * * may be of particular importance in employment litigation, which often involves smaller sums of money." *Circuit City*, 532 U.S. at 123.

For most of these disputes, the ***only*** realistic access to justice is through arbitration. If consumers, employees, and small businesses with small individualized claims do not have access to simplified, low-cost arbitration and are forced into court, they will be priced out of the judicial system entirely. Even when cases are brought as putative class actions, classes are certified only about 20 percent of the time. See, *e.g.*, Thomas Willging & Shannon Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 635–636, 638 (2006). Among consumer class actions that are certified, moreover, the percentage of consumers who participate in the en-

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[15] See also, *e.g.*, *Concepcion*, 131 S. Ct. at 1749 ("[T]he informality of arbitral proceedings * * * reduc[es] the cost and increas[es] the speed of dispute resolution."); *Stolt-Nielsen*, 130 S. Ct. at 1775 (observing that "the benefits of private dispute resolution" include "lower costs" and "greater efficiency and speed").

suing settlements is often astonishingly small—routinely on the order of one percent or less.[16] In other words, for many consumers and employees, "it looks like arbitration—or nothing." Theodore St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 792 (2008) (addressing employment arbitration).[17]

Consumers and employees also benefit from the informality of arbitration, which frees them from the

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[16] *See* Deborah Hensler *et al.*, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 96 (RAND Inst. for Civ. Justice 2000), *at* http://www.rand.org/pubs/monograph_reports/MR969/; Cheryl Miller, *Ford Explorer Settlement Called a Flop*, The Recorder, July 13, 2009, at 1 (only 75 out of "1 million" class members—or 0.0075 percent—participated in class settlement); *Synfuel Techs., Inc.* v. *DHL Express (USA), Inc.*, 463 F.3d 646, 649–650 (7th Cir. 2006) (a "paltry three percent" of class members had filed claims under the settlement); *In re Apple iPhone 4 Prods. Liab. Litig.*, 2012 WL 3283432, at *1 (N.D. Cal. Aug. 10, 2012) (between 0.16 and 0.28 percent of class members filed claims); *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139, 145 (S.D.N.Y. 2008) (2,700 out of 10 million class members made claims); *Palamara* v. *Kings Family Rests.*, 2008 WL 1818453, at *1–2 (W.D. Pa. Apr. 22, 2008) ("approximately 165 class members" out of 291,000 "had obtained a voucher" under the settlement); *Berry* v. *Volkswagen Grp. of Am., Inc.*, 2012 WL 2094490, at *1–2 (Mo. Ct. App. June 12, 2012) (appeal pending) (177 out of 22,304 class members—or 0.79 percent—submitted claims).

[17] It is not just those consumers and employees with disputes who benefit from arbitration. The lower cost of dispute resolution reduces the costs of doing business, which manifests in lower prices for consumers and higher wages for employees. See, *e.g.*, Stephen Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 91; Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. Legal Stud. 1, 5–7 (1995); cf. *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 594 (1991).

"procedural" and "evident[iary]" hurdles that often stymie plaintiffs in courts. See, *e.g.*, John Cooley & Steven Lubet, *Arbitration Advocacy* ¶ 1.3.1 (2d ed. 2003).[18] For this reason, consumers and employees tend to fare better in arbitration than in court.

For example, a recent study of claims filed with the American Arbitration Association found that consumers win relief 53.3% of the time. Christopher Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 845 (2010). Likewise, employees who arbitrate their claims are more likely to prevail than employees who litigate. See, *e.g.*, Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998). And awards obtained by employees in arbitration are typically the same or even larger than court awards. See Michael Delikat & Morris Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Res. J. 56, 58 (Nov. 2003–Jan. 2004).

The Second Circuit evidently assumed that its approach would be a win-win proposition for individuals and small businesses, because courts could

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[18] For example, the American Arbitration Association's consumer rules contemplate "desk arbitrations," in which the arbitrator can resolve the dispute on the papers if neither party requests a hearing. Am. Arbitration Ass'n, *Consumer-Related Disputes Supplementary Procedures* § C-5, *at* http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_004127&RevisionSelectionMethod=LatestReleased (visited Dec. 7, 2012). The AAA also has procedures designed to handle employment disputes involving modest sums. See Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Res. J. 9, 11 (2003).

compel arbitration when they deem it to be beneficial to those parties and deny it when they perceive it to be harmful to them. Instead, however, the principal effect of the Second Circuit's decision—if it is upheld—would be to deprive consumers, employees, and other individuals of the benefits of arbitration by deterring its use. By injecting "uncertainty as to procedure and outcome" in the enforcement of arbitration agreements, the decision below greatly intensifies "the risk [of] using arbitration clauses due to the uncertainty present." Gregory Cook & A. Kelly Brennan, *The Enforceability of Class Action Waivers in Consumer Agreements*, 40 UCC L.J. 331, 333, 348 (2008).

Like the rule invalidated in *Concepcion*, the Second Circuit's rule "sacrifices the principal benefit of arbitration" by "mak[ing] the process slower, more costly, and more likely to generate procedural morass." 131 S. Ct. at 1751. And even when arbitration is enforced, "the party seeking to arbitrate may already have spent many times the cost of an arbitral proceeding just enforcing the arbitration clause." Pet. App. 139a (Jacobs, C.J.). Given these trade-offs, it is "hard to believe" that many businesses would continue to offer their customers and employees the option of arbitrating their disputes. Cf. *Concepcion*, 131 S. Ct. at 1752. Instead, companies will abandon arbitration altogether.

If the decision below is allowed to stand, arbitration and its benefits would no longer be made available to many consumers and employees. It would dampen the national economy and increase the burden on the already-clogged court system to handle cases that otherwise would have been arbitrated.

Because that result is contrary to the FAA's objectives, the decision below should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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