11-5213

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

TARA RANIERE, NICHOL BODDEN, AND MARK VOSBURGH, on behalf of themselves individually and on behalf of all other similarly situated persons,

Plaintiffs-Appellees,

— v.—

CITIGROUP, INC., CITIBANK, N.A., and CITIMORTGAGE, INC.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

The Society for Human Resource Management has no parent corporation. No publicly held corporation owns any portion of the SHRM, and the SHRM is neither a subsidiary nor an affiliate of any publicly owned corporation.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES AND RULES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

INTEREST OF THE AMICI CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country.[1] An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of vital concern to the nation's business community, including cases involving the enforceability of arbitration agreements with employees or consumers. *See*, *e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *In re Am. Express Merchants' Litig.*, No. 06-1871-cv (2d Cir.) (filed Feb. 15, 2012); *Pyett v. Pa. Bldg. Co.*, 498 F.3d 88 (2d Cir. 2007), *rev'd sub nom. 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Second Circuit Rule 29.1(b), amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than the amici, their members, or their counsel made a monetary contribution intended to fund its preparation or submission. All parties have consented to the filing of this brief.

The Society for Human Resources Management ("SHRM") is the world's largest association devoted to human resource management, with a membership of over 250,000 human resources professionals worldwide. Among the purposes of the Society, as set forth in its bylaws, are to promote the use of sound and ethical human resources management practices in the profession and to be the voice of the profession. Accordingly, SHRM regularly files amicus curiae briefs in cases raising critically important issues to its members, such as the enforceability of employee arbitration agreements. *See*, *e.g.*, *Circuit City Stores, Inc. v. Adams*, *supra*.

Many Chamber members regularly include arbitration agreements in their contracts with employees and customers, and many SHRM members recommend the use of such agreements, because arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Arbitration agreements in the employment context typically require that disputes be resolved on an individual, rather than class or collective, basis. If allowed to stand, the district court's decision in this case—which held that agreements to arbitrate on an individual basis are per se unenforceable when an employee files a collective action under the Fair Labor Standards Act ("FLSA")—would frustrate the intent of contracting parties, undermine their existing agreements, and erode the benefits offered by arbitration as an alternative to litigation. Moreover, the district court's holding that such an

agreement cannot be enforced as to any employee so long as a single member of the putative class or collective action might not be able to vindicate his or her claims is equally problematic. Because the simplicity, informality, and expedition of arbitration would be sacrificed if the decision below were affirmed, the Chamber and SHRM have a strong interest in this case.

SUMMARY OF THE ARGUMENT

The district court declared that agreements to arbitrate on an individual basis are "per se unenforceable" under the FLSA. As CitiMortgage points out, ***no court had ever before*** declared that collective actions under the FLSA are categorically unwaivable. To the contrary, every other court to consider the issue has refused to draw such a sweeping conclusion.

The district court's novel reading of the FLSA is patently erroneous. The Federal Arbitration Act mandates that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract." 9 U.S.C. § 2. Accordingly, as the Supreme Court explained earlier this year, "federal statutory claims" are fully arbitrable "unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

The district court nonetheless refused to enforce the arbitration agreement between the parties on the sole ground that the agreement precludes collective treatment of claims. According to the district court, "a waiver of the right to proceed collectively under the FLSA is per se unenforceable." App. 52. That conclusion is irreconcilable with the Supreme Court's recent holding that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

The district court deemed *Concepcion* irrelevant because *Concepcion* "involved the vindication of state, not federal, rights." App. 49. But the Supreme Court's interpretation of the FAA in *Concepcion* defines the federal substantive law of arbitrability; the meaning of the FAA does not vary depending on whether state or federal claims are at issue. The Court could not have been more clear in explaining that imposing "class procedures" on arbitration "is not arbitration as envisioned by the FAA." 131 S. Ct. at 1752-53.

And while Congress—unlike the states—can deviate from the FAA, it did not do so in enacting the FLSA. Because the FLSA neither expressly precludes arbitration nor specifically mandates the use of collective procedures in arbitration, the district court manifestly erred in holding—contrary to the unanimous view of

five Circuits (Opening Br. 31)—that the FLSA forbids enforcing the arbitration agreement in this case.

Nor can the district court's conclusion be justified on the ground that the named plaintiffs would be unable to vindicate their own claims under the FLSA in individual arbitrations. Indeed, the district court itself expressly found that "[e]ach of the[] [plaintiffs'] potential individual recoveries" is "large enough that it would be [reasonable] for either plaintiff, or her counsel, to pursue her claim individually" in arbitration. App. 65. In nonetheless holding that these plaintiffs need not arbitrate because at least one potential class member might be unable to avail himself or herself of arbitration too, the district court erred. Because virtually all class or collective actions will have at least one class member with more modest claims, the district court's holding is tantamount to an across-the-board rule against the enforceability of agreements to arbitrate on an individual basis. Nothing in the FAA, the FLSA, or any other federal law licenses a federal court to bar enforcement of an arbitration agreement because of its possible effect on individuals who are not before the court.

Finally, the practical implications of the decision below weigh strongly in favor of reversal. Both businesses and their employees benefit from agreements to arbitrate on an individual basis. Many employees are better able to pursue their disputes in arbitration, which is quicker and easier than judicial proceedings. At

the same time, arbitration agreements lead to reduced dispute-resolution costs for businesses, which translate into higher wages for employees and lower prices for consumers. By casting a shadow over the enforceability of millions of employment arbitration provisions, the district court's ruling threatens to eliminate those benefits.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE FLSA'S AUTHORIZATION OF COLLECTIVE ACTIONS MAKES AGREEMENTS TO ARBITRATE ON AN INDIVIDUAL BASIS PER SE UNENFORCEABLE.

A. The FAA Requires Courts To Enforce Arbitration Agreements—Including Agreements To Arbitrate On An Individual Basis—According To Their Terms.

1. Under the FAA, contracting parties "are generally free to structure their arbitration agreements as they see fit" and may "specify by contract the rules under which that arbitration will be conducted." *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989). The FAA allows parties to designate which issues are to be arbitrated; to specify which parties shall participate in each arbitration proceeding; to prescribe the procedural rules that will govern the arbitration; and to select the arbitrator who will resolve their disputes. *See, e.g.*, *Concepcion*, 131 S. Ct. at 1748-49; *Stolt-Nielsen*, 130 S. Ct. at 1774.[2]

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[2] Arbitration agreements remain subject to generally applicable state contract law, including state unconscionability law. *See Marmet Health Care Ctr., Inc. v.* (cont'd)

The Supreme Court has twice explained that parties may enter into agreements to arbitrate on an individual basis and decline to provide for aggregation of claims (*e.g.*, class or collective actions). In *Gilmer v. Interstate/Johnson Lane Corp*., the Supreme Court declared that an arbitration clause must be enforced "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." 500 U.S. 20, 32 (1991) (internal quotation marks omitted). The Court explained that "the fact that the [statute] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." *Id.* (internal quotation marks omitted). As CitiMortgage points out in its opening brief (at 31, 34-36), a number of federal courts of appeals—relying in part on *Gilmer*—have held that the FAA requires the enforcement of agreements to arbitrate on an individual basis.[3]

Brown, __ S. Ct. __, 2012 WL 538286, at *2 (U.S. Feb. 21, 2012) (a court may "consider whether * * * arbitration clauses * * * are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA").

[3] The district court relied on a statement by a prior panel of this Court that the quoted language from *Gilmer* is dictum. App. 51-52 (citing *In re Am. Express Merchants' Litig.* (*Amex II*), 634 F.3d 187, 195-96 (2d Cir. 2011)). Since *Concepcion*, however, that panel *sua sponte* granted rehearing and (though reaching the same ultimate conclusion) did not repeat its earlier statement that *Gilmer*'s endorsement of agreements to arbitrate on an individual basis is dictum. *Compare In re Am. Express Merchants' Litig.* (*Amex III*), __ F.3d __, 2012 WL 284518, at *10-*11 (2d Cir. Feb. 1, 2012), *with Amex II*, 634 F.3d at 194-96, *and In re Am. Express Merchants' Litig.* (*Amex I*), 554 F.3d 300, 313-14 (2d Cir. (cont'd)

Moreover, in *Concepcion*, the Supreme Court confirmed that the FAA contemplates that arbitration takes place on an individual basis. The plaintiffs in *Concepcion* argued that because their arbitration agreement precluded them from pursuing class-wide relief, it was unconscionable under California law. 131 S. Ct. at 1745. The lower courts agreed, relying on the California Supreme Court's decision in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), which effectively imposed a categorical prohibition against agreements to arbitrate on an individual basis.

The Supreme Court reversed, holding that California's essentially *per se* refusal to enforce agreements to arbitrate on an individual basis was preempted by the FAA, because "[r]equiring the availability of classwide arbitration procedures interferes with fundamental attributes of arbitration." *Concepcion*, 131 S. Ct. at 1748. Starting with the purpose of the FAA, the Court explained that "[t]he point of affording parties discretion in designing arbitration" is "to allow for efficient, streamlined procedures tailored to the type of dispute" at issue. *Id.* at 1749. That purpose would be frustrated if class-action waivers were not fully enforceable. Because class-wide resolution of claims "requires procedural formality" to comply with due process, mandating class arbitration "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more

2009), *cert. granted and vacated sub nom. Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010).

likely to generate procedural morass than final judgment." *Id.* at 1751 (emphasis omitted).

Furthermore, the Supreme Court explained, when Congress enacted the FAA "to promote arbitration" (*id.* at 1749), the type of arbitration that was contemplated necessarily was ***individual*** arbitration. At that time, all arbitration agreements called for arbitration on an individual basis; "class arbitration was not even envisioned by Congress when it passed the FAA in 1925," as it "is a 'relatively recent development.'" *Id.* at 1751. As the Court pointed out, the FAA's legislative history "contains nothing—not even the testimony of a stray witness in committee hearings—that contemplates the existence of class arbitration." *Id.* at 1749 n.5. Similarly, there is no reason to believe that Congress contemplated arbitration of ***collective*** actions—which did not take their current form until 1947 (*see* App. 53-57)—when it enacted the FAA in 1925.

2. The district court nonetheless adopted a rule that agreements to arbitrate claims under the FLSA on an individual basis are "per se" unenforceable. App. 52. The district court reasoned that *Concepcion* "addressed only whether a state law rule holding class action waivers unconscionable was preempted by the FAA" and therefore is inapplicable in cases involving federal claims, which must be resolved on the basis of "federal arbitral law." App. 48.

But *Concepcion* ***was*** based on "federal arbitral law"; after all, the decision is grounded in Section 2 of the FAA, the "effect of [which] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act" (*Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). And the Court's decision rested on its conclusion that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA" (*Concepcion*, 131 S. Ct. at 1748).[4]

As the Supreme Court recently reiterated, the FAA generally "requires courts to enforce agreements to arbitrate according to their terms," unless there is a clear congressional command overriding the FAA, "***even when*** the claims at issue are federal statutory claims." *CompuCredit*, 132 S. Ct. at 669 (emphasis added). If the statute is "silent" on whether Congress intended to override the FAA, then "the FAA requires the arbitration agreement to be enforced according to its terms." *Id*. at 673.[5]

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[4] The Supreme Court explained that, given the high stakes of class arbitration and the absence of an "effective means of review" of an erroneous class-certification decision or class-wide arbitral award, it is "hard to believe that defendants would bet the company" by agreeing to such a procedure. 131 S. Ct. at 1752. Instead, they will simply give up on arbitration.

[5] Significantly, in the last 25 years the Supreme Court has examined numerous statutes creating private rights of action—including some that make the private right of action nonwaivable—and has concluded that none of them (cont'd)

That principle applies with equal force when the question is whether a party may avoid enforcement of his or her arbitration agreement on the ground that it does not permit the use of class or collective procedures. That is because, as *Concepcion* held, a legal rule requiring class procedures, whether in court or in arbitration, "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA" (*Concepcion*, 131 S. Ct. at 1748). Only Congress—not federal courts making federal common law—may override the congressional determination embodied in the FAA by expressly conditioning the arbitrability of particular claims on the availability of class-wide (or collective) procedures.[6]

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overrides the FAA. *See CompuCredit*, 132 S. Ct. at 674 (Credit Repair Organization Act); *Gilmer*, 500 U.S. at 35 (Age Discrimination in Employment Act); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484-86 (1989) (Securities Act of 1933); *McMahon*, 482 U.S. at 238, 242 (Securities Exchange Act of 1934 and Racketeering Influenced and Corrupt Organizations Act); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-29 (1985) (Sherman Act); *see also Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (noting that parties agreed that Truth in Lending Act does not "evince[] an intention to preclude a waiver of judicial remedies").

[6] The Supreme Court has made clear that federal courts may not create federal-common-law rules that are inconsistent with Congress's determinations as reflected in federal statutes. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) ("when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of law-making by federal courts disappears").

B. The FLSA Does Not Contain A Clear Congressional Command Against Agreeing To Arbitrate Claims On An Individual Basis.

As the district court acknowledged, plaintiffs "do not contest" that "Congress did not intend the underlying FLSA claims implicated here to be non-arbitrable." App. 34-35. Indeed, since *Gilmer*, courts have uniformly held that FLSA claims are subject to arbitration. *See*, *e.g.*, *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297-99 (5th Cir. 2004); *Bailey v. Ameriquest Mortg. Co.*, 346 F.3d 821, 823 (8th Cir. 2003); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502-03 (4th Cir. 2003); *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 313 (6th Cir. 2000); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319-20 (9th Cir. 1996); *Copello v. Boehringer Ingelheim Pharm. Inc.*, __ F. Supp. 2d __, 2011 WL 3325857, at *7 (N.D. Ill. Aug. 2, 2011); *Zekri v. Macy's Retail Holdings, Inc.*, 2010 WL 4660013, at *1 (N.D. Ga. Nov. 4, 2010); *Martin v. SCI Mgmt. L.P.*, 296 F. Supp. 2d 462, 467 (S.D.N.Y. 2003).

Nor did Congress indirectly make FLSA claims non-arbitrable by declaring agreements to arbitrate FLSA claims on an individual basis unenforceable. In reaching the contrary conclusion, the district court pointed to two features of the FLSA: (1) Congress "created a unique form of collective actions for * * * claims brought under the FLSA" (App. 52); and (2) substantive rights under the FLSA are nonwaivable (App. 45). But neither of these features displaces the FAA's requirement that courts enforce arbitration agreements according to their terms.

CompuCredit dispenses with the first basis for the district court's holding. In that case, the Supreme Court rejected the argument that, by creating a private right of action in the Credit Repair Organization Act ("CROA"), setting forth special procedures for class actions and declaring the protections of the statute non-waivable, Congress evinced an intent to override the FAA. 132 S. Ct. at 670. The Court explained that "[i]t is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including the relief available, in the context of a court suit." *Id*. at 670. Nonetheless, the Court pointed out, "we have repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court." *Id.* at 671 (citing, *e.g.*, *Gilmer*, 500 U.S. at 28).

The FLSA's provision for collective actions in court no more constitutes a congressional declaration of intent to bar arbitration on an individual basis than the provisions of the CROA constitute an indication of congressional intent to bar arbitration of CROA claims. The district court's assumption to the contrary cannot survive *CompuCredit*.

The district court's conclusion that a collective action under the FLSA is a non-waivable substantive right is no more defensible. To be sure, the ***substantive*** rights provided in the statute—*e.g.*, minimum wages and overtime pay—and the ***substantive*** remedies set forth in the statute—*e.g.*, liquidated damages—are non-

waivable. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945); *Bormann v. AT&T Commc'ns, Inc.*, 875 F.2d 399, 401 (2d Cir. 1989) ("private waiver ***of claims*** under the [FLSA] has been precluded") (emphasis added). But neither the Supreme Court nor this Court has ever held that the FLSA mandates that any particular ***procedures*** be available.

The difference between procedural matters (such as collective actions) and substantive protections under the FLSA is significant. Because the minimum-wage and overtime provisions are meant to restrict parties' freedom to contract for wage and hour terms that otherwise might prevail in the marketplace, allowing parties to bargain around these restrictions would "nullify" the Act. *O'Neil*, 324 U.S. at 707. And because a waiver of damages may be functionally equivalent to a "release of claims" (*Bormann*, 875 F.2d at 401), it must be treated the same as a waiver of the substantive rights to a minimum wage or overtime pay.

By contrast, a waiver of collective-action procedures in exchange for the benefits of arbitration poses no such danger, so long as the employee is entitled to recover all of the same remedies on an individual basis in arbitration and the filing fee and administrative costs of arbitration are not so onerous as to preclude the employee from accessing the arbitral forum. That is certainly the case here: The district court expressly found that "no * * * practical obstacles exist to individual recovery by [the plaintiffs] here," particularly "in consideration * * * that the

arbitral agreement here provides for mandatory shifting of attorney's fees." App. 65; *see also Adkins*, 303 F.3d at 502 n.1.

Moreover, the history of the FLSA's collective-action provision underscores that the provision was designed to ***restrict*** the degree to which employees could aggregate claims under the Act. Congress enacted the collective-action provision as part of the Portal-to-Portal Act of 1947, 61 Stat. 84, which repealed earlier provisions of the FLSA authorizing representative and class actions on an "opt-out" basis. As other courts have explained, the purpose of this 1947 amendment was to counteract the "'national emergency' created by a flood of suits under the FLSA" on a representative or class basis. *Arrington v. Nat'l Broad. Co.*, 531 F. Supp. 498, 500 (D.D.C. 1982). Although the district court suggested that "[c]ollective actions under the FLSA are a unique animal" (App. 52), what makes the provision unique is that Congress ***curtailed*** the ability of employees to pursue opt-out class actions. In short, as the Fourth Circuit has held, there is "no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a non-waivable right to a class action"—or a collective action—"under that statute." *Adkins*, 303 F.3d at 503.

C. Plaintiffs Cannot Avoid Their Arbitration Agreements By Contending That They Are Unable To Vindicate Their Federal Statutory Claims.

Plaintiffs may seek to rely on *In re American Express III*, in which a two-judge panel of this Court recently refused to enforce the defendant's arbitration provision because (in the panel's view) the plaintiffs had proven that they could not realistically vindicate their federal antitrust claims on an individual basis in arbitration. 2012 WL 284518, at *12-*14. We submit that *Amex III* was wrongly decided; for this reason, the Chamber has filed an amicus brief supporting the defendant's petition for rehearing en banc in that case. *See* Br. of the Chamber of Commerce of the United States of Am. as *Amicus Curiae* in Supp. of Pet. for Reh'g *En Banc*, *Amex III*, No. 06-1871-cv (2d Cir. Feb. 15, 2012).

But even if *Amex III* were to remain the law of this Circuit, that decision does not support the district court's ruling. As the *Amex III* panel explained, the vindication-of-federal-statutory-rights doctrine does not mean that "class action waivers in arbitration agreements are per se unenforceable." *Amex III*, 2012 WL 284518, at *14. Rather, "each [class] waiver must be considered on its own merits, based on its own record, and governed with a healthy regard for the fact that the FAA 'is a congressional declaration of a liberal federal policy favoring arbitration agreements.'" *Id.* (quoting *Moses H. Cone*, 460 U.S. at 24). Accordingly, even

under *Amex III*, the district court manifestly erred in declaring that class-arbitration waivers are per se unenforceable under the FAA.

Moreover, the "vindication" rationale is inapplicable here for the independent reason that the district court expressly determined that the named plaintiffs ***could*** effectively vindicate their FLSA claims in arbitration on an individual basis. App. 59-66. Accordingly, even under *Amex III*, it was error for the district court to invalidate those plaintiffs' arbitration agreements.

The district court nonetheless invalidated these plaintiffs' arbitration agreements on the basis of its conclusion that at least "one potential class member" might find arbitration infeasible, which could lead to "piecemeal litigation"—with the claims of some class members being resolved in arbitration and those of others being pursued in court. *Id.* at 66-67 & n.20. But a concern about "piecemeal litigation" is not a ground for invalidating an arbitration agreement; the Supreme Court has held that the "preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation" of a dispute in arbitration and in court. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *see also KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24 (2011) (citing *Dean Witter*). Moreover, *Amex III* makes clear that the "'party seek[ing] to invalidate an arbitration agreement on the ground that

arbitration would be prohibitively expensive * * * bears the burden of showing the likelihood of incurring such costs.'" 2012 WL 284518, at *11 (quoting *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 92 (2000)). Prohibitive costs that ***other*** potential class members might face therefore are insufficient.

II. THE DISTRICT COURT'S DECISION WOULD HAVE DISASTROUS CONSEQUENCES FOR ARBITRATION ACROSS A WIDE ARRAY OF INDUSTRIES.

The district court's ruling not only is mistaken as a matter of law; if upheld, it would have grave consequences for businesses, employees, and the national economy as a whole.

The district court apparently believed that its per se rule poses no threat to employment arbitration agreements, because the holding still would allow for arbitration on a collective basis. App. 52. But that conclusion disregards the Supreme Court's repeated admonition that departing from bilateral arbitration destroys the benefits of arbitration as envisioned by the FAA. *See Concepcion*, 131 S. Ct. at 1750-53; *Stolt-Nielsen***,** 130 S. Ct. at 1775-76. As noted above, superimposing collective-action procedures on arbitration sacrifices the cost savings, informality, and expedition of traditional, individual arbitration. *See* pages 8-9, *supra*. Accordingly, as a practical matter, the effect of the district court's decision is to deny employees and businesses any access to arbitration at all, for no company would willingly enter into collective arbitration given these

trade-offs. *See Concepcion*, 131 S. Ct. at 1752 ("We find it hard to believe that defendants would" enter into agreements permitting class arbitration); *see also Stolt-Nielsen*, 130 S. Ct. at 1775 ("[C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."). Instead, companies will abandon arbitration altogether.

Nor are the effects of the decision below likely to be limited to claims under the FLSA, or even to the employer-employee context. Plaintiffs are sure to argue that the district court's rationale extends to all manner of federal statutory claims—thus potentially calling into question arbitration agreements in millions of employment, consumer, and business-to-business transactions. Like the FLSA's passing mention of collective actions, a multitude of other federal statutes refer to or authorize class actions without explicitly guaranteeing an unwaivable right to proceed on a class-wide basis. *See*, *e.g.*, *CompuCredit*, 132 S. Ct. at 670 (discussing Credit Repair Organization Act); *see also*, *e.g.*, 15 U.S.C § 1640 (Truth in Lending Act); *id.* § 1692k (Fair Debt Collection Practices Act); 29 U.S.C. § 2617(a)(2) (Family and Medical Leave Act).

It also is predictable that plaintiffs in a wide variety of cases will seek to capitalize on the district court's conclusion that a class-arbitration waiver is per se unenforceable in an FLSA case because at least "one potential class member"

might find individual arbitration infeasible, even if the named plaintiffs are perfectly capable of arbitrating their claims on an individual basis. App. 66-67 & n.20. Many lawsuits under the FLSA (or other statutes, for that matter) could include a member or two with much smaller damages than the rest of the putative class—for example, if one member of the putative class was employed for just a few days, and thus could allege relatively little in the way of unpaid wages.[7] Similarly, in consumer or antitrust class actions, one member of the class may have particularly modest damages because he or she engaged in only a single, small transaction with the defendant. And in virtually every class action, the applicable statute of limitations will have the effect of reducing at least one class member's claim to a minimal amount by virtue of the fact that most of the alleged injury occurred before the limitations period and thus is time-barred from recovery.

Plaintiffs thus will try to invoke the district court's reasoning to oppose motions to compel arbitration in virtually every collective or class action. The profound uncertainty created by the district court's refusal to enforce the arbitration agreements at issue in accordance with their terms will have serious

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[7] Indeed, plaintiffs are already making this argument. *See* Notice of Supp. Authority at 2 n.1, *Lavoice v. UBS Fin. Servs., Inc.*, No. 1:11-cv-02308-BSJ-JLC (S.D.N.Y. Nov. 29, 2011) (contending that decision below in this case militates against compelling arbitration of FLSA action against UBS because three putative class members "worked at UBS for such a short period of time that their overtime claims" are so modest that "individual arbitration would be irrational").

practical consequences. To begin with, the district court's per se rule threatens to undermine the settled expectations of parties to arbitration agreements.

In addition, by cutting off access to the arbitral forum, the district court's decision risks harming the very employees that the decision purports to assist. Arbitration is faster than litigation and lowers the costs for employees who wish to pursue claims. The Supreme Court has repeatedly observed that "arbitration's advantages often would seem helpful to individuals * * * who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995); *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"); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."). Indeed, the Supreme Court has noted that employees in particular benefit from arbitration: "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Adams*, 532 U.S. at 123.

These benefits of arbitration are especially pronounced for employees with individualized claims that are not amenable to being brought on a class or collective basis—the most common type of employee dispute. If such employees do not have access to simplified, low-cost arbitration and are forced into court, they will be priced out of the judicial system entirely. By contrast, the AAA frequently handles such employment disputes involving modest sums. *See*, *e.g.*, Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Res. J. 9, 11 (2003). In other words, for many employees, "it looks like arbitration—or nothing." Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 792 (2008).

Employees also benefit from the informality of arbitration, which frees them from the "procedural" and "evident[iary]" hurdles that often stymie plaintiffs in courts. *See*, *e.g.*, John W. Cooley & Steven Lubet, *Arbitration Advocacy* ¶ 1.3.1, at 5 (2d ed. 2003). Likely for that reason, employees tend to fare better in arbitration than in court. Studies have shown that employees who arbitrate their claims are more likely to prevail than employees who litigate. *See*, *e.g.*, Lewis L. Malty, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Human Rts. L. Rev. 29, 46 (1998). For example, one study of employment arbitration in the securities industry concluded that employees who arbitrate were 12% more likely to win their disputes than employees litigating in the Southern District of New

York. *See* Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003-Jan. 2004). And awards obtained by employees in arbitration ***are typically the same or even larger*** than court awards. *See id.*

Moreover, it is not just the employees with disputes who benefit from arbitration. These benefits extend even to those who never have a dispute of any kind, because arbitration "lower[s] [businesses'] dispute-resolution costs," which manifest in a "wage increase" for employees. Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254-56 (2006). And the customers of that business also benefit, because "whatever lowers costs to businesses tends over time to lower prices to consumers." *Id.* at 255; c*f. Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (customers who accept contracts with forum-selection clauses "benefit in the form of reduced fares reflecting the savings that the [company] enjoys by limiting the fora in which it may be sued").

If the decision below is allowed to stand, however, all of these benefits would be lost. Because that result would dampen the national economy and force the already clogged court system to handle the numerous cases that otherwise

would have been arbitrated—a scenario that the FAA was designed to prevent—the district court's decision should be reversed.

CONCLUSION

The district court's order denying the motion to compel arbitration should be reversed.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 5,579 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify, pursuant to Federal Rule of Appellate Procedure 25(c) and Second Circuit Rule 25.2 that on this 22nd day of February 2012, I caused the foregoing brief to be electronically filed with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. In addition, I caused a PDF version of this brief to be e-mailed to counsel for the parties at the following e-mail addresses:

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