No. 12-133

IN THE
Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,

Petitioners,

v.

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

Respondents.

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

BRIEF *AMICUS CURIAE* OF DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

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December 28, 2012

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI — The Voice of the Defense Bar ("DRI") is an international organization of more than 23,000 attorneys engaged in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Consistent with this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system. DRI has long been a supporter of efforts to make the civil justice system more fair and efficient.

To promote these objectives, DRI participates as *amicus curiae* in cases, such as this one, that raise issues of import to its membership, to their clientele and to the judicial system. *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 130 S.Ct. 1758 (2010). DRI filed a brief as *amicus curiae* at the petition stage of this case urging that the Court grant certiorari.

Based on its members' extensive practical experience, DRI is uniquely suited to explain why this Court should reverse the judgment in this case. If affirmed, the decision below will adversely affect the judicial system and the rule of law by subjecting

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amicus curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

parties to expensive, prolonged proceedings to which they never agreed when contracting for arbitration.

INTRODUCTION AND SUMMARY OF ARGUMENT

The enforceability of millions of arbitration agreements turns on the answer to the question presented in this case: in what circumstances, if any, may courts invalidate arbitration agreements that prohibit class-wide arbitration of federal claims.[2] The Second Circuit's ruling conflicts in multiple fundamental respects with the Federal Arbitration Act's ("FAA") strong federal policy favoring arbitration agreements. There is no valid basis for allowing parties to evade a clear and unambiguous class action waiver simply on a showing that an individual claim is not economically feasible because of the cost of retaining expert witnesses. Unless it is reversed, the ruling below will undermine arbitration's recognized advantages and will create powerful disincentives to arbitration. Accordingly, allowing the decision below to stand would be "breeding litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995).

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[2] "Once rare, class action waivers are today included in millions of credit card and other financial services agreements nationwide." Kaplinsky & Levin, *Is JAMS in a Jam Over Its Policy Regarding Class Action Waivers in Consumer Arbitration Agreements?,* 61 Bus. Law. 923, 923 (Feb. 2006) (footnote omitted); Rice, *The Battle of Enforceability: Class Action Waivers in Mandatory Arbitration Clauses,* 27 Banking & Fin. Servs. Policy Rep. No. 4 at *1 (April 2008) (essentially same).

All parties to this litigation are business entities that entered into commercial contracts prescribing bilateral arbitration as the dispute resolution mechanism of choice. The contracts memorialize in the clearest, most unambiguous of terms the parties' agreement that their disputes are *not* subject to class-wide adjudication. Yet, the court of appeals overrode that express contractual waiver of class action proceedings solely because of the potential cost of retaining an expert witness to support plaintiffs' claims. In direct contrast to the written contract, the Second Circuit held in this case that the class action waiver was not enforceable and also that the arbitration agreement was not enforceable. In short, the case was not subject to individual adjudication or even to arbitration. That result does not reflect valid contract interpretation, nor does it reflect valid statutory construction. Nor, in the final analysis, does that result reflect sound public policy because it leaves to chance and uncertainty an important subject that the parties had every reason to believe their written contract had definitively resolved.

The decision below makes the enforceability of arbitration agreements highly unpredictable for businesses with operations, vendors or customers dispersed regionally and nationally. This uncertainty substantially undermines the federal right to enforce arbitration agreements and conflicts with the FAA's purpose of making such agreements predictably enforceable in accordance with contractual terms. Moreover, by refusing to enforce the agreement at issue in this case, the court of appeals made clear that it has adopted a rule that contracts providing for bilateral arbitration are

unenforceable whenever a plaintiff contends that its case will entail expensive expert testimony. In effect, the decision below creates a judicial cost-shifting mechanism that is contrary to sound legislative policy determinations.

ARGUMENT

I. THE DECISION BELOW MISREADS THIS COURT'S PRECEDENTS

This Court has long endorsed arbitration as a means of dispute resolution. *See Burchell v. Marsh*, 58 U.S. 344, 349 (1854) ("As a mode of settling disputes, [arbitration] should receive every encouragement from courts of equity"). In enacting the FAA, Congress confirmed the strong national policy in favor of arbitration. *See, e.g., CompuCredit Corp. v. Greenwood,* 132 S.Ct. 665, 669 (2012) (citing several additional precedents); *Marmet Health Care Center, Inc. v. Brown,* 132 S.Ct. 1201, 1203 (2012); *Southland Corp. v. Keating,* 465 U.S. 1, 10 (1984).

It is well-recognized that "[b]y agreeing to arbitrate . . . a party . . . trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Parties competent to enter into a contract are also competent to enter into an arbitration agreement. *United States v. Moorman,* 338 U.S. 457, 461-62 (1950). And courts are required to enforce arbitration agreements in accordance with their stated terms. *See, e.g., CompuCredit,* 132 S.Ct. at 669; *Concepcion,* 131 S.Ct. at 1745; *Granite Rock Co.*

v. Int'l Broth. of Teamsters, 130 S.Ct. 2847, 2857 (2010); *cf. The Harriman,* 76 U.S. 161, 173 (1869) ("It is the province of the courts to enforce contracts – not to make or modify them").

Commentators have already criticized the decision below and have observed that "the correctness of the Second Circuit's decision is very doubtful" in light of this Court's precedents. Blackman, Rozenberg & Sidhu, *Tackling Class Action Waivers in Arbitration Clauses,* N.Y.L.J. (June 11, 2012). That view is indeed accurate. This Court's precedents compel reversal.

A. This Court has Rejected "Excessive Costs" and "Policy" Rationales for Invalidating Class Action Waivers

None of the explanations offered by the Second Circuit provides a valid basis for distinguishing this Court's controlling decisions. Both *Stolt-Nielsen* and *Concepcion* held that class claims are not appropriate subjects for arbitration unless the parties expressly agree otherwise, and *Concepcion* directly held that the FAA preempts state laws invalidating commercial arbitration agreements on the ground that they forbid class arbitration. Further, *Concepcion* necessarily rejected the central premise underpinning the Second Circuit decision, *viz.,* the "prohibitive costs" justification for conditioning enforcement of arbitration agreements on the availability of classwide arbitration procedures.

The "prohibitive costs" justification figured prominently in the *Concepcion* dissent, but made no headway with the majority. Specifically, the dissenting opinion in *Concepcion* declared that "agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate." 131 S.Ct. at 1760 (Breyer, J., dissenting); *see id.* at 1761 ("nonclass arbitration over such [small] sums will also sometimes have the effect of depriving claimants of their claims" and "insulate an agreement's author from liability for its own frauds"). But, the *Concepcion* majority made clear that courts "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1753 (majority opinion); *see also Stolt-Nielsen,* 130 S.Ct. at 1770 n.7 (essentially same).

Accordingly, the Second Circuit was wrong to rely on a position advanced by the dissent that the majority in *Concepcion* rejected. *See, e.g., Coneff v. AT&T Corp.,* 673 F.3d 1155, 1158 (9th Cir. 2012) (noting that *Concepcion* "majority expressly rejected the dissent's argument regarding the possible exculpatory effect of class-action waivers"). The majority's rejection of this point is particularly noteworthy because the respondent in *Concepcion* repeatedly cited "costs" as a justification for invalidating the class waiver. *See* Brief for Respondent in No. 09-893, at 29, 41, 43-44, 51-52; *see also Hendricks v. AT&T Mobility, LLC,* 823 F. Supp.2d 1015, 1021 (N.D. Cal. 2011) (making same point). With that backdrop, the majority expressly rejected the argument that "class proceedings are necessary to prosecute small-dollar claims that

might otherwise slip through the legal system." 131 S.Ct. at 1753. Had the view of the *Concepcion* respondent — espoused by the dissent — prevailed, the Court's judgment necessarily would have been different. *Cf. Carroll v. Carroll's Lessee,* 57 U.S. 275, 287 (1853); *see also Sumner v. Mata,* 455 U.S. 591, 596-97 (1982) (*per curiam*) (reversing where the court of appeals on remand "reinstated" its prior conclusion, followed the "dissenting opinion" in the prior case before this Court, and "apparently misunderstood the terms of [this Court's] remand").

In contrast with the decision below, three other circuits have correctly interpreted *Concepcion* as repudiating "excessive costs" defenses to class waivers in arbitration agreements. *See Quilloin v. Tenet HealthSystem Philadelphia, Inc.,* 673 F.3d 221, 232 (3d Cir. 2012) (citing *Concepcion* and rejecting argument that "class action litigation is the only effective remedy such as when the high cost of arbitration compared with the minimal potential value of individual damages denies every plaintiff a meaningful remedy"); *Coneff,* 673 F.3d at 1159 ("Although Plaintiffs argue that the claims at issue in this case cannot be vindicated effectively because they are worth much less than the cost of litigating them, the *Concepcion* majority rejected that"); *Cruz v. Cingular Wireless, LLC,* 648 F.3d 1205, 1214 (11th Cir. 2011) (noting that plaintiffs produced evidence that it would be economically impractical to bring individual claims in arbitration, and agreeing that most of these small-value claims will go undetected and unprosecuted, yet nonetheless holding that "faithful adherence to *Concepcion* requires the rejection of the Plaintiffs' argument"); *accord* Pet.

App. 138a, 141a, 148a-49a (dissenting opinions citing these cases).[3]

It is no answer to say — as Judge Pooler commented in an opinion concurring in the Second Circuit's denial of rehearing — that the other circuits applying *Concepcion* dealt with an "incentive" to bring claims, rather than with the "ability" to bring claims. Pet. App. 131a. That is an illusory distinction. Moreover, this Court rejects "general policy goals" as a basis for overriding an otherwise clear and unambiguous arbitration agreement. *See, e.g., EEOC v. Waffle House, Inc.,* 534 U.S. 279, 294 (2002); *accord McMahon*, 482 U.S. at 240.

Nor does it matter (*see* Pet. App. 16a, 129a), that this case involves federal statutory rights rather than state contractual rights. *See* Blackman, Rozenberg & Sidhu, *supra* at 5 ("[t]he Supreme Court may find this to be a distinction without a difference, and reject the Second Circuit's view"); *accord* Pet. App. 143a ("This labored analysis does not rise to a distinction, and treats the reasoning of *Concepcion* as an obstacle to be surmounted or evaded"). *Concepcion* rested squarely on the language of the FAA. Since that language preempts conflicting state law under the Supremacy Clause, then *a fortiori* the same reading of the same

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[3] *See also, e.g., Jasso v. Money Mart Exp., Inc.* — F. Supp.2d —, 2012 WL 1309171, at *7 (N.D. Cal. 2012) (rejecting Second Circuit opinion in this case); *Brokers' Servs. Mktg. Group v. Cellco P'ship,* 2012 WL 1048423, at **3-5 (D. N.J. Mar. 28, 2012) (following *Concepcion* and rejecting same argument that Second Circuit adopted).

language governs federal law. Indeed, this Court has specifically held that the duty to enforce an arbitration agreement "is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/AMEX, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *accord CompuCredit,* 132 S.Ct. at 669; *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247, 257 (2009) (Age Discrimination in Employment Act does not preclude arbitration of claims brought under that statute); *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 122-24 (2001) (arbitration not inherently inconsistent with enforcement of federal statutory rights). Surely nothing in the FAA or the federal antitrust statutes exempts antitrust claims from arbitration agreements. *See Mitsubishi*, 473 U.S. at 628, 632 (non-dicta direct holding in antitrust case).[4]

B. The Court of Appeals Improperly Treated Dicta from this Court as Binding

Despite the governing authority of *Stolt-Nielsen* and *Concepcion* the court of appeals felt

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[4] Further, even if the waiver here somehow were deemed to conflict with "rights" provided by Fed. R. Civ. P. 23, parties are free to waive procedural rules. *See, e.g.*, *Caudle v. Am. Arbitration Assn.*, 230 F.3d 920, 921 (7th Cir. 2000) ("[a] procedural device aggregating multiple persons' claims in litigation does not entitle anyone to be in litigation; a contract promising to arbitrate the dispute removes the person from those eligible to represent a class of litigants"); *Lloyd v. MBNA Am. Bank,* 27 Fed. Appx. 82, 84 (3d Cir. 2002) (right to a class action is "merely procedural" and may be waived); *see also* Pet. App. 147a ("The ability to spread costs among a class is only a procedural right"), 148a (similar).

bound by, in the panel's words, "dicta" (Pet. App. 19a, 22a) in *Green Tree Fin. Corp. v. Randolph,* 531 U.S. 79 (2000) and *Mitsubishi.* In *Randolph,* this Court suggested that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights." 531 U.S. 79, 90 (2000). Treating that dicta as "controlling," the panel reaffirmed its prior conclusion that the arbitration agreement here is "unenforceable" because "the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive." Pet App. 24a, 25a (internal quotations omitted).[5]

This holding was erroneous for multiple reasons. First, dictum is not binding, especially when more recent opinions counsel a different result. *See, e.g., Parents Involved in Comm. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 737 (2007)

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[5] Although respondents now purport to dispute (Pet. Opp. 13) that the relevant *Randolph* passage was *dicta,* they are incorrect. In addition to the explicit understanding of the Second Circuit, numerous other courts have correctly recognized that the *Randolph* passage was *dicta. See, e.g., James v. Conceptus, Inc.*, 851 F. Supp.2d 1020, 1034 (S.D. Tex. 2012); *D'Antuono v. Serv. Road Corp.,* 789 F. Supp.2d 308, 334 (D. Conn. 2011); *Little v. Auto Stiegler, Inc.* 63 P.3d 979, 992 (Cal. 2003). Commentators have done likewise. *See, e.g.,* Drahozal & Wittrock, *Is There a Flight From Arbitration?,* 37 Hofstra L. Rev. 71, 110 n.181 (2008) (*Green Tree*'s "costs" language was "dictum"); Noyes, *If You (Re)Build It, They Will Come: Contracts To Remake The Rules of Litigation in Arbitration's Image*, 30 Harv. J. L & Pub. Pol., 579, 588 n.28 (2007) (same); Jackson, *Green Tree v. Randolph*: *Will the Court's Decision Lessen The Effect of the FAA in Consumer Arbitration?,* 6 T.G. Jones L. Rev. 57, 60 (2002) (same). *See also* Pet. App. 143a-45a (dissenting opinions).

(plurality opinion); *Jama v. ICE*, 543 U.S. 335, 351 n.12 (2005) ("Dictum settles nothing, even in the court that utters it"); *Cohens v. Va.,* 6 Wheat. 264, 399-400 (1821) (Marshall, C.J.). Indeed, *Randolph* expressly declined to address whether the arbitration agreement was unenforceable because of a class action waiver. *See* 531 U.S. at 92 n.7.

Even if the relevant language of *Randolph* were not dicta, the Second Circuit read too much into the decision. *Randolph* dealt only with costs unique to arbitration that could effectively foreclose access to the arbitral forum. *See, e.g., Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp.2d 1042, 1049 (N.D. Cal. 2011) ("[i]f *Green Tree* [*v. Randolph*] has any continuing applicability, it must be 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. *Concepcion* forecloses plaintiffs from objecting to class-action waivers in arbitration agreements on the basis that the potential cost of proving a claim exceed potential individual damages"). In this case, the only supposedly excessive costs are for *experts,* not for the *arbitrators.* Indeed, the Second Circuit panel opinion made it crystal clear that its concern is not with the cost of arbitration at all. It is solely the cost of pursuing an individual claim in any forum that animates the panels' holding. Pet App. 27a ("We again find 'Amex has brought no serious challenge to the plaintiffs' demonstrations that their claims cannot be pursued as individual actions, whether in federal court or in arbitration'"). No decision from this Court extends

the dicta in *Randolph* to situations where such costs would be the same in both arbitration *and* litigation.

The court of appeals' reliance on dicta from a footnote in *Mitsubishi,* 473 U.S. at 637 n.19, finds even less support. *See* Pet. App. 19a, 50a, 94a, 128a.[6] This Court has never invalidated an arbitration agreement under the "prospective waiver" dicta from *Mitsubishi.* Of course, Mitsubishi arose in the context of potential concern that United States substantive law would not be applied in an international arbitration. No such concern exists here. Further, this Court has clarified that the *Mitsubishi* footnote is relevant — if at all — only at the arbitral award-enforcement stage. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,* 515 U.S. 528, 540-41 (1995); *see also Lindo,* 652 F.3d at 1267 (same point). Yet the Second Circuit treated *Mitsubishi* as controlling at the pre-award stage. This misapplication of *Mitsubishi* should be corrected.

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[6] There is no dispute that this language from *Mitsubishi* was dicta. *See, e.g., Lindo v. NCL (Bahamas), Ltd.* 652 F.3d 1257, 1266-67 (11th Cir. 2011); *Richards v. Lloyd's of London*, 135 F.3d 1289, 1295-96 (9th Cir. 1998) (en banc); *D'Antuono v. Service Road Corp.,* 789 F. Supp.2d 308, 332-33 (D. Conn. 2011); *Grynberg v. BP P.L.C.,* 596 F. Supp.2d 74, 78-79 (D. D.C. 2009).

II. FLAWS IN THE SECOND CIRCUIT'S POLICY JUSTIFICATIONS PROVIDE ADDITIONAL REASONS FOR REVERSAL

Even if this Court's precedents allowed policy factors to override the express language of arbitration agreements, sound reasons would still dictate reversal. This Court has repeatedly recognized the benefits of arbitration: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. *See, e.g. Concepcion,* 131 S.Ct. at 1749; *Stolt-Nielsen,* 130 S.Ct. at 1775; *accord* Rice, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for A Judicial Standard,* 45 Hou. L. Rev. 215, 246 (2008) ("Proponents of arbitration, and particularly of the mandatory arbitration clause, hail it as a boon to efficiency for our already-burdened judiciary as well as an economic advantage for both parties of a dispute"). As this Court cautioned: "[c]ontracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland,* 465 U.S. at 7.

Class action waivers "have been upheld by the vast majority of federal courts and most ... state courts, notwithstanding objections by consumers that class action waivers are unconscionable and inconsistent with statutory rights." Kaplinsky & Levin, 61 Bus. Law. at 923-24 (footnote omitted). In contrast to such decisions — and to this Court's

ruling in *Southland* — the Second Circuit's approach is

> unworkable as a practical matter of judicial administration. Under his approach, every court evaluating a motion to compel arbitration would have to make a fact-specific comparison of the potential value of a plaintiff's award with the potential cost of proving the plaintiffs case. Defendants predictably will challenge the qualifications and methodology of experts who are called upon to estimate a plaintiff's costs of proof. It is highly doubtful that in striking down the *Discover Bank* rule [in *Concepcion*], the Supreme Court intended to open the door to such proceedings as a means for plaintiffs to avoid arbitration agreements.

Kaltwasser, 812 F. Supp.2d at 1049; *accord Hendricks*, 823 F. Supp.2d at 1021-22 (agreeing with above).

These same concerns were highlighted by the judges who dissented from the denial of rehearing in this case. *See* Pet. App. 139a-40a. In short, the Second Circuit's approach cannot be reconciled with "Congress's clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 22 (1983). *Accord, Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995).

Nor is the court of appeals' decision bound to the facts of this case. As the dissenting judges pointed out, there is no reason to believe that the court of appeals' "excessive costs" reasoning would be limited to antitrust cases. Costly experts are engaged in a variety of potential claims. Indeed, Chief Judge Jacobs' dissent noted that the court of appeals' ruling "can be used to challenge virtually every consumer arbitration agreement that contains a class-action waiver — and other arbitration agreements with such a clause." Pet. App. 137a.

Commentators have already warned that, if allowed to stand, the decision below "could have the effect of preventing arbitration of any kind in cases where a federal statutory claim is asserted on behalf of a purported class, thereby forcing a corporate defendant into the very sort of judicial class action that it can be presumed to have wished to avoid through an arbitration agreement." Blackman, Rozenberg & Sidhu, *supra* at 5. *Cf.* Rice, *Enforceable or Not?,* 45 Hou. L. Rev. at 224 (characterizing "the use of the class-action arbitration bans as a legitimate contract tool used to defend[] companies from the ever-increasing onslaught of frivolous multimillion-dollar class action lawsuits"). "This would be a paradoxical result indeed, and one difficult to square with the Supreme Court's decided preference for upholding arbitration agreements." Blackman, Rozenberg & Sidhu, *supra* at 5.

Experience teaches — as Congress and the courts have perceived — that class actions can give rise to unacceptable abuses and risks wholly

unrelated to whether a claim has the slightest merit. "Such leverage can essentially force corporate defendants to pay ransom . . ." S. Rep. No. 109-15, at 17 20-21 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 21. But the court of appeals' decision gives plaintiffs even more front-loaded power in settlement negotiations. Rather than follow the Second Circuit's course, this Court would do well to heed the voices of judges who live with the reality of class action litigation at the trial level:

> When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good. [The defendant] has good reason not to want to be hit with a multi-hundred-million-dollar claim that will embroil it in protracted and costly litigation—the class has more than a thousand members, and determining the value of their claims, were liability established, might thus require more than a thousand separate hearings.

Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 2010 WL 3855552, at *28 (E.D. Pa. Sept. 30, 2010) (citation omitted); *accord* Barnett, *The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 Mo. L. Rev. 207, 208 (2010) (similar point).

The overwhelming majority of class actions result not in adjudication to final judgment on the merits, but in settlements. *See Concepcion,* 131 S.Ct. at 1752 (recognizing "risk of 'in terrorem' settlements that class actions entail"; citation omitted).[7] As this Court noted, "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Concepcion,* 131 S.Ct. at 1752; *accord Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008) (noting pressure for defendants to settle class actions, even if adverse judgment seems "improbable"). If companies can protect themselves against the high costs of litigation and the potential of paying damages on "frivolous" class claims then the public undoubtedly benefits. *See* Rice, *Enforceable or Not?,* 45 Hou. L. Rev. at 247 ("Because companies are able to keep their costs down by mitigating risk, they will pass cost savings on to the consumer in the form of lowered prices").

If the decision below is affirmed, clients cannot be counseled reliably on how to draft

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[7] Empirical studies and numerous commentators confirm that "the vast majority of certified class actions settle, most soon after certification." Bone & Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1291 (2002) ("[E]mpirical studies . . . confirm what most class action lawyers know to be true"); Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification [leads to] settlement, not full-fledged testing of the plaintiffs' case by trial"); Willging & Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 647 (2006) ("[A]lmost all certified class actions settle").

arbitration agreements that will be fair and "universally enforceable." *Allied-Bruce,* 513 U.S. at 279. By its stated terms, the Second Circuit decision is incompatible with the concept of universal enforceability: "we hold that each waiver must be considered on its own merits, based on its own record ...." Pet. App. 29a. If this Court were to affirm, clients and the lawyers from whom they seek advice regarding class action waivers in arbitration agreements would be left totally adrift. Trial and appellate courts nationwide would also be totally adrift.

The consequences of such entrenched uncertainty are readily discernible: more litigation and burgeoning expense as, with increasing frequency, the parties' expressly stated preference for quicker, less costly individual arbitration is thwarted. Subject to the vagaries of different jurisdictions reading identical contractual language in different ways, or coming to different conclusions on similar records of "expense," it is predictable that some parties may come to disfavor arbitration clauses altogether. In *Southland,* this Court was "unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." 465 U.S. at 15. That, however, is precisely the upshot of the court of appeals' decision here. The resulting uncertainty is especially vexing for businesses with operations, vendors or customers dispersed regionally and nationally. *Moses H. Cone,* 460 U.S. at 25 n.32 (the

FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate"). When, as in this case, parties have done everything possible to clearly and unambiguously memorialize their agreement that disputes be resolved without class adjudication, judicially-created uncertainty cannot be justified.

Typically, when individual claims are minimal the stated justification for class-wide adjudication is that otherwise there would be no remedy to deter defendants from engaging in the conduct that is challenged. The Second Circuit adverted to that rationale. Pet. App. 11a-12a (enforcing the class action waiver "'would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recover'")(quoting earlier panel opinion); *see, e.g., id.* at 25a-30a. Whatever validity that contention may have in a situation where the claims have merit, the reality of the vast majority of class action cases is that the merits are never tested. And, when the claim is that a defendant violated a federal statute — here, the antitrust laws — public enforcement authorities have full power to seek remedies that provide any appropriate deterrent effect.

In this case, plaintiffs are all businesses that entered into contracts expressly precluding class-wide adjudication. The individual claims are in the thousands of dollars and the potential individual recoveries range up to almost $40,000. Pet. App 26a. If a class action waiver is unenforceable here, when would one be enforceable?

There are powerful reasons to prefer public enforcement officials as the parties responsible for making the critical cost-benefit analysis. Government enforcement efforts, in antitrust and other regulated areas, are routinely magnets for tag-along private class actions that follow in the government's footsteps at a fraction of the cost of original litigation. In contrast, a decision by private attorneys to incur massive costs they hope eventually to impose on the defendant for claims that will almost certainly never be tested on the merits provides little assurance that the public interest is being served. There is, accordingly, scant justification to subject defendants to the risks of paying these costs, along with their own litigation costs (including defense experts), while facing the risk of massive potential liability for claims whose merits will likely never be resolved.[8]

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[8] *See, e.g., Kamm v. Cal. City Devel. Co.*, 509 F.2d 205, 212-13 (9th Cir. 1975) (government better suited to remedy harm than private class action); *Chin v. Chrysler Corp.,* 182 F.R.D. 448, 464 (D.N.J. 1998) ("[T]here is insufficient justification to burden the judicial system with Plaintiffs' claims while there exists an administrative remedy that has been established to assess the technical merits of such claims"); *Brown v. Blue Cross & Blue Shield of Mich., Inc.,* 167 F.R.D. 40, 45-47 (E.D. Mich. 1996) (holding that defendants' settlement agreement with state attorney general and insurance commissioner adequately served the interests of the proposed class and, therefore that a class action was unnecessary). Government enforcement minimizes the possibility of conflicts among potential victims, and returns more dollars to injured parties without payment of counsel fees. Moreover, the government is better positioned than the private bar to prioritize investigations and prosecutions without the need to comply with costly class action administrative

A final practical shortcoming of the Second Circuit's approach is that it misperceives or overlooks significant aspects of real-world litigation. For example, the panel observed (Pet. App. 27a) that even the treble damages and fee-shifting provisions of the Clayton Act were "inadequate to alleviate our concerns" because "plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs" (internal quotes omitted). But, why should the risk of losing a non-meritorious case be a factor that enables a plaintiff to avoid its contractual agreement to bilateral arbitration? And, if the prospect that a claim will fail can be a factor on the plaintiff's side of the equation, why eliminate or discount that very same prospect on the defense side of the equation? In short, why compel all parties to incur massive class action litigation expenses on the assumption that plaintiffs will have a successful claim for which they may shift their expert witness costs to the defendant without even weighing the distinct possibility that plaintiff's claims may have no merit whatsoever?

Viewed in proper context, the Second Circuit's approach creates a cost-shifting mechanism that conflicts with statutory limits on recovery of expert witness fess. The opinions below advert to the per diem limit in 28 U.S.C. §1821(b) for taxing witness costs in favor of the prevailing party. Pet. App. 91a, 132a. In the Second Circuit's analysis, the modest per diem figure constitutes a reason to support class

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requirements. *See, e.g.,* Griffin, *Reinventing Adequacy: The Need for Standardized Regulation*, 23 Geo. J. Legal Ethics 603, 613-16 (2010) (making similar points).

action status. That conclusion is incorrect for multiple reasons. First, it is the limit Congress selected. *Id.* at 137a-138a (dissenting opinion). Courts cannot simply substitute their own policy notions in place of policy judgments enacted by Congress and signed into law by the President. *See, e.g., Eldred v. Ashcroft,* 537 U.S. 186, 222 (2003); *Hartford Underwriters Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14 (2000); *see also Walters v. Nat'l Ass'n of Radiation Survivors,* 473 U.S. 305, 319-34 (1985) (upholding statutory $10/day maximum fee recovery for attorneys representing veterans in benefits cases). Second, the statutory limit on fees taxable as costs upon entry of judgment does not control the amounts that can be allocated for expert witnesses in the event of a settlement. And, since the vast majority of cases certified as class actions result in settlement (*see* pp. 15-16 & n. 7, *supra*), §1821(b) is not dispositive in the vast majority of relevant cases. Third, precisely because so few class actions are contested through trial, there is no justification for overriding millions of contractual agreements because of a statutory limit on witness fees in the rare event of an adjudicated final judgment.

Even in the circumstances that the Second Circuit envisions, other available cost-sharing mechanisms would permit cases to proceed without undoing the parties' written contracts. When a defendant's conduct allegedly injured many potential plaintiffs (which should, by definition, be every case that meets the numerosity requirement of Fed. R. Civ. P. 23(a)(1)), nothing prevents an agreement among plaintiffs to share the costs of hiring an

expert to prepare a report that could be used in all cases, or to designate a "lead" case that will dispose of issues in ways that are applicable to the remaining plaintiffs. These cost-sharing opportunities are available whether all plaintiffs are represented by the same lawyers or multiple lawyers are involved. And, they actually involve a sharing of costs by parties on the same side of the case regardless of the result. In contrast, the Second Circuit's holding involves no "sharing" or spreading of costs among plaintiffs unless the entire expense is shifted to the defendant.

Moreover, it has become a reality of litigation in the 21st century that outside funding sources underwrite claims deemed to be attractive investments. *See, e.g.,* Raymond, *More Attorneys Exploring Third-Party Litigation Funding*, N.Y.L.J. (June 4, 2010). Without addressing the wisdom or policy ramifications of non-party litigation funding, it would be shortsighted to devise rules of law — as the Second Circuit did in this case — that focus solely on the imagined costs and potential benefits to "plaintiffs" without recognizing that entities other than the "plaintiffs" will incur much, if not all, of the costs and will derive much, if not most, of the benefit from a settlement or favorable judgment. Indeed, given the existence of such non-party underwriters, courts should be even more wary to promote a system that confers upon plaintiffs in the earliest stages of litigation the powerful weapon of class certification as a club for inducing settlements in cases of dubious merit. *See supra* at 15-16.

The Second Circuit's policy choice is further flawed because it encourages an escalation of litigation costs for the parties and the courts. It is not hard to imagine the race for ever more expensive experts when the likelihood of class action status increases as the expert's fee increases. There should be no mistake about the prolix, costly proceedings that the decision below will generate. The foundation of the Second Circuit holding — indeed, the cornerstone of its preference for case-by-case analysis — is that Amex did not produce sufficient evidence of alternative ways for plaintiffs to enforce their "statutory rights." Pet App. 11a, 27a, 38a, 53a, 93a. Under the Second Circuit's regime, a defendant who signed a written contract that provides for arbitration as the sole dispute-resolution mechanism and that expressly precludes class-wide adjudication will now be drawn into proceedings where it must litigate such threshold issues as: Is the proposed expert analysis necessary or reasonable? Do any alternative methodologies exist? Are less expensive experts available? Further, the defendant will need to retain an expert on litigation costs to counter plaintiff's expert. In a system based on more rational, more practical economic premises, these are just the sort of issues and costs one would seek to avoid by opting for individual arbitration in the first place.

Under the decision below, all of this will play out in court just to determine whether the arbitration agreement is enforceable. Since this issue will be litigated at the most preliminary stages of the dispute, it should be clear that at that point there could be no confidence that plaintiff's claim

has any merit or even that plaintiff will be able to satisfy the requirements for class certification. Accordingly, this Court should refuse to accept the policy judgments that inform the Second Circuit's holding.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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December 28, 2012