Supreme Court, U.S.
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12-133

No. __-____

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

PETITION FOR A WRIT OF CERTIORARI

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July 30, 2012

QUESTION PRESENTED

Whether the Federal Arbitration Act permits courts, invoking the "federal substantive law of arbitrability," to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners American Express Company and American Express Travel Related Services Company, Inc. were defendants in the district court proceedings and appellees in the court of appeals proceedings.

Respondents Italian Colors Restaurant; 429 Supermarkets Corp.; Bunda Starr Corp. d/b/a Buy-Rite; Chez Noelle Restaurant Corp.; Cohen Rese Gallery, Inc.; DRF Jewelers Corp.; Il Forno, Inc.; Mai Jasmine Corp.; Mascari Enterprises d/b/a Sound Stations; Mims Enterprises, Inc. d/b/a Mims Restaurant; National Supermarkets Association Inc.; and Phoung Corp. were plaintiffs in cases consolidated before the district court and appellants in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners American Express Company and American Express Travel Related Services Company, Inc. state the following:

American Express Company is a publicly traded company. It has no parent company; however, Berkshire Hathaway, Inc. owns more than 10 percent of its outstanding common shares. American Express Travel Related Services Company, Inc. has not issued shares to the public and is a wholly owned subsidiary of American Express Company.

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American Express Company and American Express Travel Related Services Company, Inc. (collectively, "American Express") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

INTRODUCTION

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), this Court held that the Federal Arbitration Act ("FAA") prohibits arbitrators from imposing class arbitration on parties that have not agreed to such procedures. Then, in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), this Court held that the FAA preempts state laws invalidating commercial arbitration agreements on the ground that they forbid class arbitration. These cases embody a straightforward principle: the FAA's overarching purpose is to require enforcement of arbitration agreements "in accordance with the terms of the agreement." 9 U.S.C. § 4. Accordingly, "class arbitration, to the extent it is manufactured" by force of law rather than the product of voluntary agreement, is "inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1750-51. Likewise, "conditioning the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures" also "creates a scheme inconsistent with the FAA," because it overrides the terms of agreements calling for bilateral rather than class arbitration. *Id.* at 1744, 1748, 1753.

The decision below flouts these basic tenets. For the third time, a panel of the Second Circuit has directed courts throughout the circuit to invalidate commercial arbitration agreements in a wide range of cases on the ground that the agreements preclude class arbitration. Specifically, in the Second Circuit,

bilateral arbitration agreements will not be enforced if the court deems a class action the "only economically feasible means" for the plaintiff to pursue its federal-law claim because the predicted costs of pursuing an individual claim, including costs that would be incurred in litigation as well as arbitration, would exceed the expected recovery. *See* App. 27a-29a.

In creating this sweeping, unwritten loophole in the FAA, the panel: (1) ignored this Court's order vacating and remanding the panel's original decision for reconsideration in light of *Stolt-Nielsen*; (2) disregarded this Court's holding in *Concepcion*, which rejected a materially indistinguishable California state-law rule that prohibited enforcement of arbitration agreements that did not permit class-wide arbitration; and (3) created a split with the Ninth Circuit, as well as the Third and Fifth Circuits. Recognizing these points, five active circuit judges voted to rehear the case *en banc*.[1]

This Court should grant certiorari because, as Judge Cabranes wrote in his separate dissent from denial of rehearing *en banc*, "the issue at hand is indisputably important, creates a circuit split, and surely deserves further appellate review." App. 148a; *see also id.* ("This is one of those unusual cases where one can infer that the denial of *in banc* review can only be explained as a signal that the matter can and should be resolved by the Supreme Court.").

First, as Chief Judge Jacobs explained in his opinion dissenting from denial of rehearing *en banc*, the decision below "cannot be squared with the FAA,

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[1] Chief Judge Jacobs wrote a dissenting opinion in which Judge Cabranes and Judge Livingston joined. Judge Cabranes also wrote a separate dissenting opinion. Judge Raggi wrote a dissenting opinion in which Judge Wesley joined.

as it has been applied and explained by [this] Court." App. 136a. Given that *Concepcion* held that "the FAA preempts even state law that permits evasion of a class action waiver clause," there can be no possible "justification for permitting *precisely* the same sort of evasion as part of the 'federal substantive law of arbitrability.'" App. 143a. The panel's "labored" effort to distinguish *Concepcion* on the ground that this case implicates the "federal substantive law of arbitrability" rather than state contract law is nonsensical and evades "the broad language and clear import of *Concepcion*." *Id.*

Second, the panel's decision "splits with [the] recent holding of the Ninth Circuit" in *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012), which expressly "disagree[d]" with the decision below, *id.* at 1159 n.3. App. 141a (opinion of Jacobs, J.). Also, as the panel earlier acknowledged, the decision below conflicts with two other circuits' pre-*Concepcion* decisions, which hold that an agreement providing exclusively for bilateral arbitration is enforceable unless – unlike here – there is evidence of congressional intent to preclude such arbitration in the substantive federal statute in question. *See* App. 47a (stating that it "cannot agree" with *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), and *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294 (5th Cir. 2004)).

Third, the decision below, if left unaddressed, will abrogate the FAA's core requirement that courts enforce the intent of the parties who enter into arbitration agreements. Class-arbitration waivers are "commonly used" in commercial arbitration agreements, and the Second Circuit's "broad ruling," "in the hands of class action lawyers, can be used to

challenge virtually every . . . agreement[] with such a clause." App. 137a (Jacobs, J.). Under the panel's rule, "every class counsel and every class representative who suffers small damages can avoid arbitration by hiring a consultant (of which there is no shortage) to opine that expert [or other] costs would outweigh a plaintiff's individual loss." *Id.* And, given how many American businesses can be sued in the courts of the Second Circuit, the decision below will, absent review, become the *de facto* nationwide rule and make that circuit the new magnet for class-action plaintiffs seeking to evade *Concepcion* and *Stolt-Nielson*, and to circumvent mandatory commercial arbitration agreements. Indeed, the decision below is "already working mischief in the district courts." App. 136a (Jacobs, J.).

Four times in three years, this Court has instructed lower courts to enforce arbitration agreements according to their terms. *See CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 671-73 (2012); *Concepcion*, 131 S. Ct. at 1745-46; *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010); *Stolt-Nielsen*, 130 S. Ct. at 1773-76. The panel in this case has repeatedly disregarded that instruction and instead held that lower courts may invalidate arbitration agreements that do not permit classwide arbitration, even where the parties have expressly agreed to waive class proceedings in favor of bilateral arbitration. This Court's review is not only warranted, but urgently required.

OPINIONS BELOW

The Second Circuit's opinion on rehearing in light of *Concepcion* (App. 1a-30a) is reported at 667 F.3d 204 ("*Amex III*"). The court's prior opinion after further consideration in light of *Stolt-Nielsen* (App. 31a-56a) is reported at 634 F.3d 187 ("*Amex II*"). The court's initial opinion (App. 57a-99a), which was vacated and remanded by this Court, is reported at 554 F.3d 300 ("*Amex I*"). The memorandum opinion and order of the district court (App. 100a-124a) is not reported (but is available at 2006 WL 662341).

JURISDICTION

The Second Circuit entered its judgment on March 8, 2011. On May 9, 2011, the panel *sua sponte* ordered supplemental briefing on the impact of *Concepcion*. On August 1, 2011, prior to the deadline for American Express's petition for certiorari,[2] the Second Circuit issued a statement that the panel was "*sua sponte* considering rehearing" in light of *Concepcion*. App. 125a-126a. As a result, under this Court's Rule 13.3, the time for American Express's petition for certiorari did not start to run until the panel's decision on rehearing. The panel issued that decision on February 1, 2012. American Express filed a timely petition for rehearing *en banc* on February 10, 2012, which was denied on May 29, 2012. App. 127a-149a. This petition is timely under Rule 13.3 because it was filed within 90 days after the denial of rehearing *en banc*. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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[2] On May 24, 2011, Justice Ginsburg had extended the time for filing a certiorari petition to August 5, 2011. App. 153a.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Arbitration Act and the Sherman Act are reproduced at App. 150a-152a.

STATEMENT

1. The named plaintiffs in these consolidated cases are retail businesses – most with annual revenues between $5 million and $40 million, *see* Pet'rs C.A. Br. 5 n.1 (Nov. 1, 2006) – that chose to accept American Express cards for purchases. Each named plaintiff entered into a written Card Acceptance Agreement (the "Agreement") with American Express that contains a provision requiring bilateral rather than class arbitration (sometimes referred to as a "class-arbitration waiver"). C.A. App. A156; *see* App. 8a-9a. The arbitration provision is "governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16, as it may be amended (*the FAA*)." C.A. App. A156; *see* App. 67a.

The gravamen of Plaintiffs' complaint is that American Express's "Honor All Cards" policy, which requires merchants that wish to accept American Express cards to accept American Express's charge cards as well as its credit cards, constitutes an unlawful tying arrangement under § 1 of the Sherman Act.[3] The named plaintiffs seek to bring suit on behalf of "all merchants that have accepted American Express charge cards." App. 4a.

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[3] A charge card generally "requires its holder to pay the full outstanding balance at the end of a standard billing cycle," while a credit card, though it can be paid in full at the end of each billing cycle, also "allows the cardholder to pay a portion of the amount owing at the close of a billing cycle, subject to interest charges." App. 102a n.6.

2. American Express moved to compel arbitration. Plaintiffs did not dispute that the arbitration clause in the Agreement covers their antitrust claims. Plaintiffs argued, however, that under *Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000), the arbitration agreement's class-action waiver precluded them from "'effectively vindicating [their] federal statutory rights in the arbitral forum'" because each plaintiff would face "costs amounting to hundreds of thousands of dollars, despite seeking average damages of only $5,000." App. 111a (quoting *Randolph*, 531 U.S. at 90). The district court granted the motion to compel arbitration and dismissed plaintiffs' lawsuits. The court rejected plaintiffs' "prohibitive costs" argument, holding that *Randolph* related only to "*costs which would not be incurred in a judicial forum.*" *Id.* Because the costs plaintiffs identified – expert and attorney's fees – would be incurred whether in court or in arbitration, the court held that they provided no basis to avoid arbitration.

3. In *Amex I*, the Second Circuit reversed. The panel concluded that the class-action waiver provision in the parties' arbitration agreement was invalid under the "federal substantive law of arbitrability" – i.e., the body of judicial decisions interpreting the FAA, § 2 of which provides that arbitration agreements "'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" App. 77a-78a (quoting 9 U.S.C. § 2).[4]

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[4] All parties agreed for purposes of this litigation that the enforceability of the arbitration agreement, including the provision requiring individual arbitration, was appropriately decided by the court, not the arbitrator. *See* App. 75a-77a.

The Second Circuit panel dismissed as inapplicable this Court's holdings that arbitration clauses are enforceable under the FAA "'"unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."'" App. 81a (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), quoting in turn *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). *Gilmer*, in particular, had rejected plaintiff's argument that "'arbitration procedures cannot adequately further the purposes of the [Age Discrimination in Employment Act of 1967 ("ADEA")] because they do not provide for broad equitable relief *and class actions*.'" *Id.* (quoting *Gilmer*, 500 U.S. at 32) (emphasis added).[5] In holding *Gilmer* inapplicable, the panel acknowledged its disagreement with the Third and Fifth Circuits, which had relied on *Gilmer* in upholding arbitration agreements barring class procedures. *See* App. 82a-83a (disagreeing with *Johnson* and *Carter*).

Instead of following this Court's longstanding FAA holdings, the panel invoked *dicta* from two cases that it claimed were "somewhat closer to th[e] issue" presented. App. 84a. First, the panel construed *Randolph*'s statement that "'the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum'" to license federal courts to strike down class-action waivers anytime an indi-

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[5] As *Gilmer* explained, "even if the arbitration could not go forward as a class action . . . , the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." 500 U.S. at 32 (internal quotations omitted; brackets in original).

vidual claimant could show that the anticipated costs of pursuing its claim would exceed the amount of its expected recovery, regardless of the fact that such costs would be incurred whether the claim proceeded in litigation or arbitration. App. 84a, 86a (quoting *Randolph*, 531 U.S. at 90).

The panel then concluded based on an affidavit by plaintiffs' paid litigation-costs expert that expert witness fees would be "at least several hundred thousand dollars, and might exceed $1 million" – far higher than the average plaintiff's anticipated recovery ($5,000). App. 89a. Moreover, the panel said, "[e]ven with respect to reasonable attorney's fees, which are shifted under Section 4 of the Clayton Act, the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs." App. 91a. The panel thus concluded that *Randolph*'s "prohibitive costs" *dicta* governed because plaintiffs' "claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration." App. 93a.

Second, the panel invoked *dicta* from this Court's opinion in *Mitsubishi* suggesting that a "choice-of-law" clause that functioned as a "prospective waiver of a party's right to pursue statutory remedies for antitrust violations" might be void "against public policy." 473 U.S. at 637 n.19. The panel reasoned that provisions prohibiting class arbitration constitute such a "prospective waiver" anytime the costs of pursuing an individual claim, "whether in federal court or in arbitration," exceed the anticipated recovery for each plaintiff. App. 93a-94a. The panel thus concluded that such "prohibitive costs" constitute a "valid ground" under the "saving clause" in § 2 of the FAA "for the revocation of the [parties'] class action

waiver." App. 95a-96a (citing 9 U.S.C. § 2). After invalidating the class-action waiver, the panel remanded the matter to allow American Express the opportunity to withdraw its motion to compel arbitration. *See* App. 98a-99a.

4. This Court granted certiorari, vacated *Amex I*, and remanded for further consideration in light of *Stolt-Nielsen*. *Stolt-Nielsen* held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 130 S. Ct. at 1773, 1775. This Court also rejected the *Stolt-Nielsen* arbitral panel's reasoning that class arbitration should be permitted as a policy matter because the "vast majority" of plaintiffs had "negative value claims" that cost more to litigate than the claimant could expect to recover – the same rationale advanced by plaintiffs here and adopted by the panel below. *Id.* at 1769 n.7 (internal quotations omitted).

5. On remand, the remaining panel members (Judges Pooler and Sack)[6] again refused to enforce the parties' arbitration agreement. The panel construed *Stolt-Nielsen* as a "narrow ruling on contractual construction" that only barred courts from using public policy to engraft a class-arbitration provision onto an otherwise "silent" arbitration agreement. According to the panel, "nothing in *Stolt-Nielsen* bars a court from using public policy to find contractual language [in an arbitration agreement] void." App. 55a. Perversely, the panel concluded that, in light of *Stolt-Nielsen*'s holding that courts may not impose class arbitration on unwilling parties, *Amex I* had to

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[6] Justice Sotomayor was a member of the panel before her elevation to this Court.

be *broadened* to invalidate the parties' arbitration agreement in its entirety, not just the class-arbitration waiver provision. *See* App. 54a. On April 11, 2011, the court stayed its mandate pending American Express's filing of a petition for certiorari.

6. On April 27, 2011, this Court held in *Concepcion* that the FAA preempts California's *Discover Bank* rule,[7] which California courts had "frequently applied . . . to find arbitration agreements unconscionable" where they did not permit class arbitration. 131 S. Ct. at 1746. The *Discover Bank* rule provided that class-action waivers in arbitration agreements are invalid if (1) "the waiver is found in a consumer contract of adhesion"; (2) "disputes between the contracting parties predictably involve small amounts of damages"; and (3) the plaintiff alleges "a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." 113 P.3d at 1110. This Court held the *Discover Bank* rule was preempted, notwithstanding the "saving clause" in § 2 of the FAA, because "conditioning the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures" "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1744, 1748. *Concepcion* also specifically rejected the argument that the "prohibitive costs" facing plaintiffs with small claims could justify requiring the availability of classwide arbitration procedures as a condition for enforcing an arbitration agreement. *See id.* at 1753 (rejecting the dissent's argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system").

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[7] *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

7. On February 1, 2012, after "*sua sponte* considering rehearing," App. 125a-126a, the panel held that "*Concepcion* does not alter [its] analysis." App. 3a. It narrowly construed *Concepcion* as merely "offer[ing] a path for analyzing whether a state contract law is preempted by the FAA," whereas its decision rested on "'a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability.'" App. 16a (quoting *Amex I*, App. 96a). According to the panel, *Concepcion* and *Stolt-Nielsen* merely stand "for the principle that parties cannot be forced to arbitrate disputes in a class-action arbitration"; they do not foreclose courts from invalidating arbitration agreements due to the absence of class-arbitration provisions. App. 16a-17a. Thus, for the third time, the panel held that arbitration agreements providing for bilateral but not class arbitration are "unenforceable" if the claimant can demonstrate that "the cost of . . . individually arbitrating their dispute . . . would be prohibitive," even though the costs at issue would be incurred whether the claim was brought in litigation or arbitration. App. 25a, 28a (internal quotations omitted). The panel reversed the district court and remanded with instructions to deny American Express's motion to compel arbitration. *See* App. 30a.

8. On May 29, 2012, the Second Circuit denied rehearing *en banc* over the dissenting votes of five circuit judges. *See supra* note 1.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CIRCUMVENTS THIS COURT'S DECISIONS MANDATING ENFORCEMENT OF ARBITRATION AGREEMENTS ACCORDING TO THEIR TERMS

A. Certiorari Is Warranted To Vindicate This Court's Decision in *Concepcion*

This Court should grant certiorari because the decision below is "incompatible with the longstanding principle of federal law, embodied in the FAA and numerous Supreme Court precedents, favoring the validity and enforceability of arbitration agreements." App. 141a (Jacobs, J.). *Concepcion*, in particular, held that "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures" is impermissible under the FAA. 131 S. Ct. at 1744.

The panel nonetheless dismissed, as "tempting" but "facile," the argument that "*Concepcion* applies a fortiori here, requiring reversal of our holding in *Amex II*." App. 15a. In thus brushing aside *Concepcion*, the panel below "evad[ed] the broad language and clear import" of this Court's opinion. App. 143a. The panel gave two reasons for refusing to apply *Concepcion* as controlling precedent in this case. Neither has merit.

First, *Amex III* construed *Concepcion* as standing only "for the principle that parties cannot be *forced* to arbitrate disputes in a class-action arbitration." App. 16a-18a. In the panel's view, so long as the court does not "order[] the parties to participate in class arbitration," App. 17a, *Concepcion* is inapplicable. But *Concepcion* explicitly held that conditioning the enforceability of arbitration agreements on the availability of class arbitration frustrates the FAA's core

purposes no less than actually imposing class arbitration. *See* 131 S. Ct. at 1750 (holding *Discover Bank* preempted even though that rule "does not *require* classwide arbitration"). As the Court stated: "The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration [as a condition of enforcing an arbitration agreement] interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748. Plainly, the decision below contravenes *Concepcion*, which not only precludes rules that literally compel parties to engage in class arbitration but also forecloses the outcome the panel reached here – refusing to enforce an arbitration agreement because it does not permit classwide arbitration. *See id.* at 1744.[8]

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[8] As *Concepcion* explained, allowing plaintiffs to insist on class arbitration *ex post* frustrates the FAA's core purposes because the "fundamental" "changes brought about by the shift from bilateral arbitration to class-action arbitration" will predictably force defendants to forgo arbitration altogether. 131 S. Ct. at 1750, 1753 (internal quotations omitted). The procedural complexity necessitated by class arbitration "sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1751. Moreover, class arbitration dramatically increases the stakes without providing for any judicial review. As this Court stated: "We find it hard to believe that defendants would bet the company with no effective means of review." *Id.* at 1752. Thus, "[f]aced with even a small chance of a devastating loss, defendants will be pressured into . . . 'in terrorem' settlements." *Id.*; *see also Stolt-Nielsen*, 130 S. Ct. at 1775-76; *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class . . . places pressure on the defendant to settle even unmeritorious

Second, the panel said that *Concepcion* addressed "whether a state contract law is preempted by the FAA" and did not affect the panel's "'vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability.'" App. 16a (quoting *Amex I*, App. 96a). As Chief Judge Jacobs noted, that "labored analysis does not rise to a distinction, and treats the reasoning of *Concepcion* as an obstacle to be surmounted or evaded." App. 143a.

The "federal substantive law of arbitrability" invoked by the panel is merely the body of judicial precedents interpreting the FAA, including § 2, which *Concepcion* held to preempt state laws "conditioning the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures." 131 S. Ct. at 1744. If § 2 preempts the *Discover Bank* rule, the "federal substantive law of arbitrability," which is governed by that same section, cannot authorize lower federal courts to create a rule for federal claims that is materially indistinguishable from the state-law rule held preempted by § 2.[9] Thus, *Concepcion*'s holding that the FAA preempts

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claims."); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

[9] Before *Concepcion*, the panel recognized in *Amex II* that its holding was just a "different iteration" (App. 55a) of the Second Circuit's state-law unconscionability holding in *Fensterstock v. Education Finance Partners*, 611 F.3d 124 (2d Cir. 2010), which *Concepcion* abrogated. *See Affiliated Computer Servs., Inc. v. Fensterstock*, 131 S. Ct. 2989 (2011) (vacating and remanding in light of *Concepcion*); *Fensterstock v. Education Fin. Partners*, 426 F. App'x 14 (2d Cir. 2011) (summary order recognizing *Concepcion*'s abrogation of its unconscionability holding).

California's *Discover Bank* rule *necessarily* forecloses lower courts from interpreting the "federal substantive law of arbitrability" to achieve a result that is equally "inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1751.

Likewise, the fact that this case involves federal rather than state-law claims does not support the panel's decision to disregard *Concepcion*. *See* App. 16a. The *Discover Bank* rule had been applied to invalidate bilateral arbitration of federal statutory claims, including Sherman Act claims. *See, e.g., In re Apple & AT&TM Antitrust Litig.*, 596 F. Supp. 2d 1288 (N.D. Cal. 2008). *Concepcion* categorically declared *Discover Bank* "inconsistent with the FAA," without any suggestion that its holding was contingent on the state-law nature of the Concepcions' claims. 131 S. Ct. at 1748; *see also In re Apple & AT&TM Antitrust Litig.*, No. C 07-05152 JW, 2011 WL 6018401, at *4 (N.D. Cal. Dec. 1, 2011) (rejecting plaintiffs' argument that *Concepcion* did not apply to federal antitrust claims and reversing its prior decision not to compel arbitration).

This Court, moreover, has repeatedly recognized that bilateral arbitration is wholly consistent with the enforcement of federal law, including the Sherman Act. *See, e.g., Mitsubishi*, 473 U.S. at 628-40. Indeed, just last Term, this Court reiterated that "contractually required arbitration of claims satisfies the statutory prescription of civil liability in court." *CompuCredit*, 132 S. Ct. at 671. Accordingly, the FAA "requires courts to enforce agreements to arbitrate according to their terms . . . *even when the claims at issue are federal statutory claims*, unless the FAA's mandate has been overridden by a con-

trary congressional command." *Id.* at 669 (emphasis added; citation and internal quotations omitted).

Thus, the panel's suggestion that bilateral arbitration is inconsistent with the "vindication of [the federal] statutory rights" at issue in this case, App. 16a (internal quotations omitted), is demonstrably wrong. Congress can of course exempt any particular statute from bilateral arbitration. But it has not done so here. Not only does the Sherman Act lack any such exemption, but the Act's drafters specifically rejected "an amendment that would have permitted a type of plaintiff class action in which liability would be determined as to a large group of plaintiffs but damages would be assessed to each individually." Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 Mich. L. Rev. 1, 25 (1989); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).[10] Clearly, Congress did not view class actions – or class arbitrations – as necessary to the vindication of the pro-competition policies behind the Sherman Act. It is fully consistent with both the FAA and the antitrust laws to enforce an arbitration agreement that requires bilateral arbitration of plaintiffs' antitrust claims. The federal nature of those antitrust claims thus provides no justification for the panel's disregard of *Concepcion* and this Court's longstanding FAA precedents.

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[10] Instead of promoting consumer class actions, the Sherman Act's framers preferred to rely on the regulatory effects of "competitor lawsuits" and "the power of the United States government to bring suit" under § 4 of the Sherman Act. Hovenkamp, 88 Mich. L. Rev. at 26 & n.81. The Clayton Act applied the Sherman Act's private right of action to all of the antitrust laws, but it likewise did not adopt any private class enforcement mechanism. *See id.* at 27.

B. Certiorari Is Warranted To Correct the Second Circuit's Misreading of *Dicta* in *Randolph* and *Mitsubishi*

Rather than follow the plain language of the FAA and this Court's precedents, the panel below relied on "selective quotation from Supreme Court dicta" in *Randolph* and *Mitsubishi*. App. 141a (Jacobs, J.). None of those *dicta* supports the Second Circuit's sweeping new exception to the FAA. Rather, as reflected in the panel's opinion, those *dicta* have sown confusion among the lower courts and have now yielded a decision from a prominent court that sharply undercuts this Court's recent arbitration precedents.

First, the panel relied on "distortion of dicta from [*Randolph*]." App. 143a (Jacobs, J.). There, the plaintiff sought to avoid arbitration of her claim under the federal Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.* The plaintiff argued that the agreement's failure to specify which party would bear the costs of arbitration created a "risk" that she would "be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum." 531 U.S. at 89-90. This Court rejected that challenge, finding that "the arbitration agreement's silence on the subject [of costs] . . . is plainly insufficient to render it unenforceable." *Id.* at 91.

In *dicta*, *Randolph* commented that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum." *Id.* at 90. But the reference to "large arbitration costs" was not a reference to any and all costs, whether in arbitration or litigation. It referred to costs *unique* to arbitration – such as filing fees,

the arbitrator's fees, and other administrative fees imposed by the arbitral forum – that might be so high as to preclude *access* to the arbitral forum. *See Randolph*, 531 U.S. at 89 (referring to "the costs *of arbitration*") (emphasis added); *id.* at 90 & n.6 (referring to the "filing fee," "arbitrator's fee," and "administrative fees") (internal quotations omitted); *id.* at 93 (Ginsburg, J., concurring in part and dissenting in part) (describing the question as one of "access[]" – i.e., "who pays for the arbitral forum").

In other words, *Randolph*'s *dicta* related to the extra "price of admission" that a plaintiff has to pay a private arbitrator that would not be required to sue in court. App. 144a (Jacobs, J.).[11] It did not authorize lower courts to invalidate arbitration agreements anytime litigation costs generally, as distinguished from the specific costs of accessing an arbitral forum, would make it uneconomical to bring an individual claim. *See Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 12, 13 (1st Cir. 2009) (Boudin, J.) (stating that the test is "whether the arbitration regime . . . is structured so as to *prevent* a litigant from having *access* to the arbitrator to resolve claims," and noting that "court litigation can also be expensive, but at least one does not need to pay the judge") (second emphasis added); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1483-85 (D.C. Cir. 1997) (stating that arbitra-

[11] Plaintiffs here have never contended – much less demonstrated – prohibitive *arbitration-specific* costs. *See Randolph*, 531 U.S. at 90 & n.6 (dismissing challenge because the "record d[id] not show" that plaintiff would bear excessive arbitration costs).

tion costs are of concern because "[litigants] would never be required to pay for a judge in court").[12]

The Second Circuit's unfounded expansion of *Randolph*'s *dicta* is foreclosed by *Concepcion*, "which more directly and more recently addresses the issue on appeal in this case." *Coneff*, 673 F.3d at 1159. *Concepcion* specifically rejected "prohibitive costs" as a justification for refusing to enforce bilateral arbitration agreements. In response to the dissent's argument "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," 131 S. Ct. at 1753, the majority squarely held that courts "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons," *id.*; *accord Stolt-Nielsen*, 130 S. Ct. at 1770 n.7 (rejecting the same policy justification for imposing class arbitration on non-consenting parties). The Court also rejected the Concepcions' argument that California's "policy against exculpation" justified the *Discover Bank* rule. 131 S. Ct. at 1746-47. Thus, as *Concepcion* makes clear, whatever the utility of the cost-spreading feature of class arbitration, it cannot justify imposing that fundamentally different procedure on parties who never agreed to it. *See also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270 (2009) (reject-

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[12] The panel cited a number of circuit court cases that quoted *Randolph*'s *dicta* about "prohibitive costs," but *none* of them involved costs of litigation generally. Rather, *all* of them involved arbitration-specific costs that restrict access to the arbitral forum, and found that the evidence was insufficient to warrant refusal to enforce the arbitration agreement. *See In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007); *Livingston v. Associates Fin., Inc.*, 339 F.3d 553, 558-59 (7th Cir. 2003); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *see also* App. 146a n.2 (Jacobs, J.).

ing "judicial policy concern as a source of authority" for invalidating arbitration agreements).

"Similarly misleading is the panel's quotation of *Mitsubishi*." App. 145a (Jacobs, J.). The *dicta* from *Mitsubishi* relied on by the panel addressed the hypothetical possibility that a foreign arbitral panel in that case might read the contract's choice-of-law provision to "displace American law." 473 U.S. at 637 n.19. In response, this Court said it had "no occasion to speculate on th[e] matter," because Mitsubishi sought only "to enforce the agreement to arbitrate, not to enforce an award." *Id.* The Court "merely note[d]" that if, at the award-enforcement stage, the arbitration clause and the "choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations," it would refuse to enforce the agreement based on "public policy." *Id.* *Mitsubishi*'s concern was that the arbitral panel would refuse to apply U.S. substantive law to the dispute. Here, however, the parties' arbitration agreement creates no risk that the arbitrators will refuse to apply the Sherman Act to the parties' dispute. All the parties did was agree to forgo a purely *procedural* option that might be available in court (if plaintiff satisfies Federal Rule of Civil Procedure 23). Nothing in *Mitsubishi* suggests that is impermissible. To the contrary, *Mitsubishi* itself held that bilateral arbitration of antitrust claims is fully consistent with the policies underlying the federal antitrust laws. *See id.* at 638; *see also Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1265-69 (11th Cir. 2011).[13]

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[13] Moreover, this Court has clarified that *Mitsubishi*'s *dicta* do not authorize *invalidating* an arbitration agreement; rather, the choice-of-law issue is "premature" until the arbitral "'award-

In short, the Second Circuit's decision creates an expansive new exception to the FAA under which courts may routinely invalidate bilateral arbitration agreements because they do not provide for class-arbitration procedures. This Court's intervention is needed because the decision below effectively negates *Concepcion*, conflicts with longstanding FAA precedents of this Court, and frustrates the core purposes of the FAA under countless arbitration agreements nationwide.

II. THE DECISION BELOW CREATES A CIRCUIT SPLIT REGARDING THE ENFORCEABILITY OF AGREEMENTS CONTAINING CLASS-ACTION WAIVERS

This Court's intervention also is warranted because the decision below creates a circuit split with the Ninth Circuit, as well as the Third and Fifth Circuits. These differences among the circuits on an important question of federal arbitration law should now be resolved.

A. First, the decision below splits with the Ninth Circuit's decision in *Coneff*, which enforced an arbitration agreement containing a class-arbitration waiver in a case raising federal claims and expressly "disagree[d]" with *Amex III* on the ground that it is foreclosed by *Concepcion*. 673 F.3d at 1159 n.3. All three dissenting opinions from denial of rehearing *en banc* recognized this circuit split. *See* App. 141a (Jacobs, J.), 148a (Cabranes, J.), 148a-149a (Raggi, J.).

In *Coneff*, wireless customers brought a putative class-action lawsuit against AT&T Mobility ("AT&T")

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enforcement stage.'" *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539-40 (1995) (quoting *Mitsubishi*, 473 U.S. at 638).

asserting violations of both state consumer-protection law and the federal Communications Act of 1934. *See* 673 F.3d at 1157. AT&T moved to compel arbitration as provided for by the parties' service agreement. Invoking *Randolph*, the *Coneff* plaintiffs argued that the service agreement, which contained a class-action waiver, was unenforceable because it precluded "effective vindication" of their state and federal statutory claims. *Id.* at 1158.[14] Specifically, like plaintiffs here, they argued that their claims "cannot be vindicated effectively because they are worth much less than the cost of litigating them." *Id.* at 1159.

The Ninth Circuit rejected the plaintiffs' arguments and compelled arbitration. It held that *Concepcion* "is broadly written" to preclude courts from "'conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.'" *Id.* at 1158 (quoting 131 S. Ct. at 1744). Moreover, it refused to read *Randolph* as warranting an "implied exception" to *Concepcion*. *Id.* Rather, it concluded that *Randolph* is not inconsistent with *Concepcion*, and, even if it were, courts "would remain bound by *Concepcion*," because it "more directly and more recently addresses the issue on appeal." *Id.* at 1159. Finally, addressing the decision below, the Ninth Circuit stated: "To the extent that the Second Circuit's opinion is not distinguishable, we disagree with it." *Id.* at 1159 n.3; *see also Knutson v. Sirius XM Radio Inc.*, Civ. No. 12-cv-

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[14] The court assumed that *Randolph* applied to state-law claims, although it recognized that it has been applied only to cases raising federal claims. *See* 673 F.3d at 1158 n.2. The court found it unnecessary to decide the issue because the *Coneff* plaintiffs also raised a federal claim.

418 AJB (NLS), 2012 WL 1965337, at *5 (S.D. Cal. May 31, 2012) (stating that *Coneff* "rejected" the Second Circuit's "effective vindication of statutory rights" policy argument for abrogating bilateral arbitration agreements); *Jasso v. Money Mart Exp., Inc.*, No. 11-CV-5500 YGR, 2012 WL 1309171, at *7 (N.D. Cal. Apr. 13, 2012) ("to the extent that *Amex II*'s holding rested on the principle that a class waiver should be unenforceable where the amounts at issue in the claims and the expense of prosecuting the claims would effectively preclude vindication of statutory rights, that argument has been soundly rejected by the Ninth Circuit's subsequent decision in *Coneff*") (citation omitted).[15]

Two prominent circuit courts have now squarely divided over the question presented. Had this case been litigated in the Ninth Circuit, plaintiffs' challenge to the class-arbitration waiver would have

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[15] *Coneff* also suggested that *Amex III* was distinguishable because plaintiffs in *Amex III* argued that they lacked the *means* – not just the *incentive* – to pursue their claims on an individual basis. But it acknowledged that distinction was tenuous. Rightly so. As Chief Judge Jacobs recognized, *Amex III* demands not only that plaintiffs be able to recover all of their costs; it demands a "'risk-of-losing' premium." App. 138a; *see* App. 27a ("Even with respect to reasonable attorney's fees, . . . the plaintiffs must include the risk of losing, and thereby not recovering any fees, in their evaluation of their suit's potential costs.") (internal quotations omitted). "This formulation betrays a dominant consideration – that, without the class-action vehicle, no lawyer will be incentivized to pursue these claims. That may be; but *Concepcion* rejected this very policy rationale." App. 138a (Jacobs, J.); *accord Jasso*, 2012 WL 1309171, at *7 ("[A]ny effort to distinguish the situation in *Amex II* . . . from *Concepcion* fails."); *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1048-49 (N.D. Cal. 2011) (explaining that *Amex II*'s vindication-of-rights rule applies the same "underlying rationale" as *Discover Bank*).

been rejected as inconsistent with *Concepcion*, and the parties' arbitration agreement would have been enforced. In the future, plaintiffs will predictably bring suit in the courts of the Second Circuit, rather than the Ninth, to avoid *Coneff* and this Court's holding in *Concepcion*. This Court should grant review to resolve this conflict.

B. The need for certiorari is enhanced by the panel's acknowledged disagreement with pre-*Concepcion* decisions of the Third Circuit, in *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), and the Fifth Circuit, in *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294 (5th Cir. 2004). *See* App. 47a (stating that the court "cannot agree" with *Johnson* and *Carter*). The law of both of those circuits is – correctly – that class-action waivers in arbitration agreements are enforceable, irrespective of the size of the individual plaintiff's claim, unless Congress has precluded such waivers in the underlying substantive statute.

In *Johnson*, Judge Becker held that an agreement providing for bilateral arbitration was enforceable under the FAA because neither of the two federal statutes in question – TILA and the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693 *et seq.* – conferred an *unwaivable* right to a class action. 225 F.3d at 377-78. Judge Becker rooted that conclusion in a straightforward reading of *Gilmer*, which explained that "the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." 500 U.S. at 27, 32 (internal quotations omitted; alteration in original). Thus, although TILA and the EFTA contemplate that class actions would serve as "an important encouragement

to . . . voluntary compliance" with federal law, *Johnson*, 225 F.3d at 372 (internal quotations omitted), that social policy does not justify invalidating arbitration agreements on the basis that they lack class procedures. *Johnson* did not consider it relevant that the value of the plaintiff's claim – the amount of the plaintiff's loan – was at most $250. *See id.* at 369. As the Second Circuit panel acknowledged, *see* App. 46a-47a, 82a-83a, *Johnson* cannot be reconciled with the decision below, in either reasoning or result.[16]

Nor can the decision below be reconciled with the Fifth Circuit's decision in *Carter*, with which the panel also expressly disagreed. *See* App. 46a-47a, 82a-83a. *Carter* adopted *Johnson*'s analysis and held that agreements that contain class-arbitration waivers should be enforced absent some indication of congressional intent to preclude them. *See* 362 F.3d at 298. And, like *Johnson*, and directly contrary to the decision below, *Carter* enforced the parties' arbitration agreement without regard to the value of the plaintiff's claim relative to anticipated arbitration costs relevant to their analysis. *See id.*[17] Had this

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[16] *See also Brokers' Servs. Mktg. Group v. Cellco P'ship*, Civil Action No. 10-3973 (JAP), 2012 WL 1048423, at *4-*5 (D.N.J. Mar. 28, 2012) (stating that *Amex I* "cannot be squared with the reasoning of either the Supreme Court or the Third Circuit") (citing *Johnson* and *Concepcion*).

[17] The Seventh and Eleventh Circuits also have adopted Judge Becker's reasoning in *Johnson*. *See Livingston*, 339 F.3d at 558-59; *Randolph v. Green Tree Fin. Corp. – Alabama*, 244 F.3d 814, 818 (11th Cir. 2001), *on remand from Green Tree Fin. Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000). The Fourth Circuit's position is unclear. It has embraced a rule similar to *Amex III*, in *dicta*. *See In re Cotton Yarn Antitrust Litig.*, 505 F.3d at 285. But earlier precedent had followed *Johnson*. *See Adkins*, 303 F.3d at 503.

case been brought in either the Third or Fifth Circuit, the parties' arbitration agreement would have been upheld in full. This acknowledged disagreement among the circuits further supports this Court's review.[18]

III. CERTIORARI IS WARRANTED BECAUSE OF THE NATIONAL IMPORTANCE OF THE ISSUES RAISED BY THE DECISION BELOW

The question presented here is just as important as the questions this Court decided in *Stolt-Nielsen* and *Concepcion*. This Court's intervention is necessary to provide clarity and uniformity to the law, and safeguard the FAA's fundamental commitment to the enforceability of commercial arbitration agreements. This Court's review is urgent given the broad impact that the Second Circuit's decision will have on American businesses nationwide.

A. As this Court's frequent FAA decisions demonstrate, commercial arbitration agreements are vital to promoting expeditious and cost-effective resolution of a broad range of claims, including (as here) claims between businesses. The Second Circuit's decision will result in the invalidation of innumerable arbitration agreements, thus betraying the FAA's "principal purpose" to "ensure that private arbitration agree-

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[18] Like the Second Circuit, the First Circuit has also invalidated a class-arbitration waiver without any indication of congressional intent to do so. *See Kristian v. Comcast Corp.*, 446 F.3d 25, 54 (1st Cir. 2006) (invalidating class-arbitration waiver despite acknowledging that the "arbitration agreements' class mechanism prohibition is *not* in direct conflict with the relevant antitrust statutes, state and federal, which do not mention class actions"). *Kristian*, like *Amex III*, cannot be squared with either *Johnson* or *Carter*.

ments are enforced according to their terms." *Concepcion*, 131 S. Ct. at 1748 (internal quotations and alteration omitted).

Amex III directs courts to invalidate bilateral arbitration agreements anytime they decide that "the damages due to any single individual or entity are too small to justify bringing an individual action." App. 18a. The breadth of that rule is illustrated by this case. The panel below reasoned that plaintiffs' individual claims were economically infeasible absent a class action because each plaintiff's expected recovery would not exceed *several hundred thousand* dollars or even *$1 million*. *See* App. 14a. Such high costs are not unique to antitrust claims; many other claims involve "an expensive and protracted process." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52-53 (1971) (plurality op.). Thus, the panel's expansive test will predictably lead to abrogation of bilateral arbitration agreements for a large number of claims. *See also Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 551-52 (S.D.N.Y. 2011) (invalidating class-arbitration waiver based on anticipated litigation costs of $200,000 for a wage-and-overtime claim).

The decision below is potentially even broader than the *Discover Bank* rule. *Discover Bank* was limited to "small" claims – a limitation this Court called "toothless and malleable," noting with evident disapproval that one court had deemed a claim for $4,000 "small" enough to qualify. *Concepcion*, 131 S. Ct. at 1750. Here, even an individual antitrust claim asserting several hundred thousand dollars in damages would, according to the panel, not be "economically feasible" given expert costs of up to $1 million. App. 27a. Moreover, *Concepcion* held the *Discover*

Bank rule preempted even though it was, by its terms, limited to circumstances: (1) where "'the waiver is found in a consumer contract of adhesion'"; and (2) "'when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.'" 131 S. Ct. at 1746 (quoting *Discover Bank*, 113 P.3d at 1110). *Amex III*, by contrast, contains no such limiting terms and applies to "*any* individual plaintiff" (not just consumers) asserting *any* type of claim (not just deliberate fraud). App. 97a. Indeed, plaintiffs here would not satisfy *Discover Bank* because, among other things, they are not consumers but rather retail businesses – most with significant annual revenues. Given that *Amex III* calls for the invalidation of even more arbitration agreements than the *Discover Bank* rule, it is even more clearly "inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1750-51.

B. The decision below also undermines the key benefits of *all* arbitration agreements – even those that withstand challenge – by turning the threshold arbitrability question into a detailed inquiry into the merits, which will increase costs and delay and inject enormous uncertainty into parties' expectations regarding the process for dispute resolution. Under the decision below, any arbitration in which plaintiffs seek class treatment will be subject to protracted proceedings in district court and "be litigated there on the merits in many critical respects." App. 139a (Jacobs, J.). As Chief Judge Jacobs recognized, the "economic feasibility" of an individual claim cannot be assessed "[w]ithout a close inquiry into the merits" of the claim. *Id.* For example, "[w]hether a dispute may require expert testimony is a question

inseparable from the merits (and raises *Daubert* and other vexed questions)." *Id.* Nor can the feasibility of a claim be assessed without delving into "such prior questions as the statute of limitations and laches, controlling law, [and] res judicata, . . . not to mention . . . whether the putative class is duly constituted and properly represented, without which there is no class claim." *Id.* Thus,

> [e]ven if arbitration is given a green light at the end of the judicial proceeding, the party seeking to arbitrate may have already spent many times the cost of an arbitral proceeding just enforcing the arbitration clause. . . . The predictable upshot is that *Amex III* will render arbitration too expensive and too slow to serve any of its purposes.

App. 139a-140a.

C. Finally, the conflict created by the panel's decision will "encourage and reward forum shopping." *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984). After *Discover Bank* was decided, for example, forum-shopping plaintiffs successfully brought claims on behalf of non-California residents in California federal court, to evade binding arbitration. *See, e.g., Masters v. DirecTV, Inc.*, Nos. 08-55825 & 08-55830, 2009 WL 4885132, at *1 (9th Cir. Nov. 19, 2009) (unpublished) (applying California law to a "nationwide class action"). Some of the plaintiffs in this very case tried to engage in forum shopping by filing their cases in California, before their cases were transferred to the court below.[19] The decision below will create even

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[19] *See* Order at 6, *Italian Colors Restaurant v. American Express Co.*, No. C 03-3719 SI (N.D. Cal. Nov. 7, 2003) (transferring the *Italian Colors* case to the Southern District of New York and concluding that the plaintiffs had engaged in improper "forum shopping") (C.A. App. A19).

greater incentives for forum shopping than *Discover Bank*, because it rests on *federal* law. Thus, any putative class action brought in the courts of the Second Circuit will be subject to that decision, irrespective of the plaintiffs' States of residence and irrespective of the parties' contractual choice-of-law provisions. As a result, the decision below will make the Second Circuit the forum of choice for class-action plaintiffs seeking to avoid the terms of valid, binding arbitration agreements.

The importance of this Court's review is bolstered by the number of corporations that plaintiffs can sue in the courts of the Second Circuit. New York is the hub of numerous major U.S. and global industries, including the banking and financial services, insurance, real estate, and media and advertising industries. One in ten Fortune 500 companies is headquartered there. *See* http://money.cnn.com/magazines/fortune/fortune500/2012/states/NY.html. An even larger number of companies do business and are therefore subject to jurisdiction there. Given the ease with which corporations can be haled into court in the Second Circuit, and the new incentive for plaintiffs to bring putative class-action suits there, the Second Circuit's rule will, if unreviewed, become the *de facto* nationwide rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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