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 FOR EXPERIAN INFORMATION SOLUTIONS, INC., AND CONSUMERINFO.COM, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Experian Information Solutions, Inc. ("Experian") is a nationwide consumer reporting agency that maintains credit files on more than 200 million consumers. ConsumerInfo.com, Inc. ("CIC") is a corporate affiliate of Experian that markets to consumers, and often enters into agreements with consumers that mandate arbitration of disputes and waive the ability to pursue claims as part of a class. Experian and CIC therefore have a strong interest in preserving individual arbitration as a streamlined, efficient, and cost-effective means of resolving disputes.

Experian and CIC have direct experience with the delay, inefficiency, and interference with arbitration occasioned by claims that class resolution is necessary to "vindicate" statutory rights. For instance, in *Johnson v. ConsumerInfo.com, Inc.*, the plaintiff consumers filed putative class-action lawsuits against CIC despite having contractually agreed to arbitration and waived class treatment. After a federal district court rejected their argument that class-action litigation was necessary to vindicate their state law statutory rights, and granted a motion to compel arbitration, multiple plaintiffs appealed to the Ninth Circuit, where the appeals have been pending for more than a year, *see Johnson v.*

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[1] All parties have consented in writing to the filing of this *amici curiae* brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or counsel made a monetary contribution to the preparation or submission of this brief.

ConsumerInfo.com, Inc., No. 11-56520, *et al.*, and the arbitrations have not proceeded.

Given the plaintiffs' vindication-of-rights argument in *Johnson*, and the widespread use of such arguments by class-action lawyers in the wake of *Concepcion*, Experian and CIC have a strong interest in ensuring the recognition that (1) whatever scope the vindication-of-rights notion is given is inherently limited to federal statutory rights and cannot apply to state law rights, and (2) the vindication notion cannot empower courts to invalidate arbitration agreements on the basis adopted below—a judicial conclusion that class litigation (rather than individual arbitration) is essential to the vindication of a particular category of claims.

SUMMARY OF ARGUMENT

To the extent, if any, that a court may invalidate an agreement to arbitrate so as to "effectively vindicate" statutory rights, that vindication principle is necessarily limited to *federal* statutory rights, and, further, cannot be based (as the decision below was based) on a determination that individual arbitration is inadequate to vindicate the rights at issue.

I. Any vindication principle, if it exists at all, is limited to federal claims. All of this Court's cases suggesting even the possibility of a vindication exception to arbitration have invoked reasoning that is inherently limited to federal rights. The vindication principle is based on the idea that there may be circumstances in which another federal statute may override the mandate of the Federal Arbitration Act ("FAA"). But if a state statute is at issue, the requirements of the FAA necessarily prevail over state law. Thus, only the vindication of

federal claims could even theoretically overcome the FAA rule mandating enforcement of arbitration agreements.

II. Even for federal claims, there is no broad exception to the FAA for vindication of rights. The vindication-of-rights concept that was the basis of the Second Circuit's ruling below arose from cases that have since been discredited. In particular, the idea that arbitration could not sufficiently vindicate rights originated in cases like *Wilko v. Swan*, 346 U.S. 427 (1953), which has been overruled, and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56 (1974), which has been limited to its precise holding with its anti-arbitration reasoning firmly rejected. While a few more recent cases have mentioned the vindication idea, none has suggested that courts are empowered to determine—as the court below determined—that the individual arbitration contemplated by the FAA is inherently inadequate to the vindication of certain rights that (in the court's estimation) require class treatment.

Rather, only Congress can decide that arbitration does not suffice to vindicate certain types of claims. No such vindication exception can be derived from the FAA itself, because the FAA establishes, in mandatory language, the principle that—subject to specific exceptions spelled out in the FAA—arbitration does effectively vindicate claims. Thus, the only legitimate basis for a vindication exception to arbitration would be a contrary congressional command in some federal statute other than the FAA. And given the well-established rule that federal statutes should not be deemed in conflict unless absolutely necessary, there must be some particular

statutory language to overcome the dictates of the FAA. There is no such statutory language in the antitrust laws.

Moreover, even if the Court were to determine that there is room for a vindication doctrine with respect to affirmative obstacles created by an arbitration agreement (such as exorbitant arbitration fees), that principle could not be extended to permit the determination made below—that certain claims *require* class action litigation, such that individual arbitration is deemed inadequate to vindicate those rights. This Court's cases make clear that the FAA's endorsement of arbitration envisions *individual* arbitration. Accordingly, the FAA embodies a broad determination that individual arbitration *is* adequate to the resolution of all manner of disputes, and it denies judges the power to carve out areas in which (in their opinion) arbitration is deemed inadequate. The Second Circuit's determination that the claims at issue here cannot be adequately vindicated in individual arbitration is thus directly contrary to the FAA.

ARGUMENT

I. A "VINDICATION OF RIGHTS" EXCEPTION TO THE ENFORCEMENT OF ARBITRATION AGREEMENTS EXISTS, IF AT ALL, ONLY WITH RESPECT TO FEDERAL STATUTORY RIGHTS.

In the aftermath of *Concepcion*, the "vindication of statutory rights" principle that was the basis of the decision below has become a favorite of class-action lawyers seeking to evade arbitration agreements that

preclude class proceedings.[2] As explained in detail below (*see infra* Point II), *amici* strongly agree with Petitioners that the FAA contains no implied exception for the vindication of statutory rights; that, to the extent, if any, that a vindication principle may arise from other, rights-creating federal statutes, the Second Circuit went far beyond what the FAA and this Court's cases permit; and, accordingly, that the judgment below must be reversed.

Amici first wish to make the preliminary point that, to the extent the Court considers recognizing any form of "vindication" principle in this case, it is important that it remain clear that—contrary to some arguments being made (and thus far uniformly rejected) in the wake of *Concepcion*[3]—any such principle must necessarily be limited to the vindication of *federal* statutory rights, and can have no application to rights based in state law.

First, all of the cases discussing (in *dicta*) vindication of rights as a possible exception to enforcement of an arbitration agreement concerned federal rights. *See Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79, 90 (2000) (Truth in Lending Act claim); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (Age Discrimination in Employment Act claim); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,*

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[2] *See* Brief of the United States Chamber of Commerce, *et al.*, in Support of Petition for Writ of Certiorari at 6-8.

[3] *See, e.g.*, *Homa v. Am. Express Co.*, 2012 WL 3594231, at *4-*6 (3d Cir. Aug. 22, 2012); *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1235-36 (11th Cir. 2012).

Inc., 473 U.S. 614, 628-29 (1985) (Sherman Act claim); *Gardner-Denver Co.*, 415 U.S. at 38 (Title VII claim); *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 352 (1971) (claim for seamen's wages under 46 U.S.C. § 596). And this Court has explicitly referred to vindication of *federal* rights, not to all possible rights. *See Randolph*, 531 U.S. at 90 ("[T]he existence of large arbitration costs could preclude a litigant from effectively vindicating her *federal* statutory rights in the arbitral forum.") (emphasis added); *Mitsubishi*, 473 U.S. at 628 (arbitration agreements must be enforced by their terms "unless *Congress* itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue") (emphasis added).

Indeed, the entire theory, as articulated in these cases, turns on whether there is a *congressional intention* to override the FAA. As this Court explained in *Mitsubishi*, the FAA's directive to enforce arbitration agreements can be superseded only by another congressional enactment:

> Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.

473 U.S. at 628. Even in this case, the Second Circuit expressly framed the issue as whether an arbitration clause was enforceable because it

"precluded [plaintiffs'] ability to vindicate their *federal* statutory rights." *In re Am. Express Merchants' Litig.*, 667 F.3d 204, 212 (2d Cir. 2012) ("*Amex III*") (emphasis added).

The limitation to federal rights makes sense because only a conflicting federal statute could override the FAA. In contrast, if a state law conflicts with the FAA, the requirements of the FAA must prevail, because state statutes are necessarily subordinate to the federal policies expressed in the FAA. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."). As this Court has explained, "in recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, . . . the FAA pre-empts state laws which require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478 (1989). In short, the vindication notion can apply only if another *federal* statute conflicts with the FAA. It can have no application to state law claims.

II. THE EXPANSIVE "VINDICATION OF RIGHTS" PRINCIPLE ADOPTED BELOW CANNOT BE SQUARED WITH THIS COURT'S CASES APPLYING THE FAA.

Properly understood, this Court's cases offer little support for any vindication-of-rights doctrine that would override the FAA in the absence of an affirmative congressional intention to preclude arbitration for particular rights or classes of cases.

Moreover, to the extent there is room for a vindication of rights doctrine at all, it is necessarily limited to obstacles (such as excessive fees) that are created *by the arbitration agreement or procedures*. It cannot empower courts to strike down an arbitration agreement—as the Second Circuit did below—on the ground that the *nature of the claims* renders individual arbitration inadequate to the task. Indeed, that is the very sort of judicial determination the FAA was enacted to prohibit.

A. The roots of the vindication-of-rights idea make clear that there is no exception to arbitration simply because a court concludes that arbitration does not sufficiently vindicate certain rights.

This Court's *dicta* about vindication of rights are rooted in cases that are now discredited, and this Court's more recent cases have never applied the vindication concept to invalidate an arbitration agreement. Nor has this Court stated, even in those *dicta*, that the courts have free-floating authority to override the FAA whenever they are of the opinion that arbitration will be inadequate in a particular class of cases. The FAA itself contains no exception for such circumstances, and accordingly an agreement to arbitrate can be invalidated to "vindicate federal rights" only if another federal statute actually conflicts with the FAA.

The vindication idea first arose in Justice Harlan's concurring opinion in *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971). *Arguelles* held that section 301 of the Labor Management Relations Act, which provides for the enforcement of grievance and arbitration provisions of collective-bargaining

agreements, did not abrogate, but merely added an optional remedy to, the remedy of 46 U.S.C. § 596, which permits seamen to sue for wages in federal court. *Id.* at 357. In his opinion, Justice Harlan reasoned that "the choice of forums inevitably affects the scope of the substantive right to be vindicated before the chosen forum," and "where arbitration is concerned, the Court has been acutely sensitive to these differences." *Id.* at 359-60 (Harlan, J., concurring). For this idea, Justice Harlan relied upon *Wilko v. Swan*, 346 U.S. 427 (1953), where the Court "carefully analyzed" the effect arbitration would have on the substantive federal right at issue and "concluded that conflicting congressional goals would best be served by" construing the Securities Act as precluding waiver of a judicial forum. *Arguelles*, 400 U.S. at 360 (Harlan, J., concurring). Justice Harlan's "vindication" language was then quoted in *Gardner-Denver*, 415 U.S. at 56, which held that the prior submission of a Title VII claim to arbitration did not foreclose the employee from bringing the claim in court. The Court used this language immediately following its statement that "deferral to arbitral decisions would be inconsistent with" what the Court inferred was Congress's intention that federal courts "exercise final responsibility for enforcement of Title VII." *Id.*

These roots of the vindication idea make clear that it rests on principles that this Court has later rejected. To begin with, *Wilko* – the basis for Justice Harlan's original invocation of the idea that arbitration could not "vindicate" certain federal rights – has been overruled, on the ground that it was "pervaded by . . . the old judicial hostility to arbitration." *Rodriguez de Quijas v.*

Shearson/American Express, Inc., 490 U.S. 477, 480 (1989); *see also id.* at 481 ("To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."). The Court has likewise repudiated the broad anti-arbitration reasoning in *Gardner-Denver*:

> [A]part from their narrow holdings, the *Gardner-Denver* line of cases included broad dicta that were highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights. That skepticism, however, rested on a misconceived view of arbitration that this Court has since abandoned.

14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 265 (2009). In short, the notion that vindication of federal rights empowers the courts to make their own assessment of whether arbitration is well suited to particular claims—and to invalidate arbitration agreements when their assessment is negative—is rooted in precisely the hostility to arbitration that the FAA, and this Court's modern case law, condemn.

Since *Gardner-Denver*, none of the cases discussing the vindication idea has held that courts can simply examine whether arbitration does an effective job of vindicating a particular kind of claim. In *Mitsubishi*, the vindication concept arose in the context of the concern that because "the international arbitral tribunal owe[d] no prior allegiance to the legal norms of particular states[,] . . . it ha[d] no

direct obligation to vindicate their statutory dictates." 473 U.S. at 636. Nonetheless, the Court recognized that the tribunal "should be bound to decide that dispute [regarding American antitrust law] in accord with the national law giving rise to the claim," *id.* at 636-37; *see also id.* at 637 n.19, and therefore "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Id.* at 637. Thus, "vindication" in *Mitsubishi* simply represented the arbitration panel actually considering the federal statutory claim, rather than applying other law.[4]

Indeed, earlier in the opinion, *Mitsubishi* held that a federal statutory claim would not be arbitrable only if the federal statute at issue expressed such an intention, stating that "it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable." *Id.* Similarly, in *Gilmer*, this Court held that "[a]lthough all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party should be held to it

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[4] In *14 Penn Plaza LLC*, the Court used the term "vindication" in a similar fashion, to refer to a situation where a union might bar a plaintiff from bringing his claim in an arbitration. *See* 556 U.S. at 273-74 ("Respondents also argue that the CBA operates as a substantive waiver of their ADEA rights because it not only precludes a federal lawsuit, but also allows the Union to block arbitration of these claims. . . . [W]e are not positioned to resolve in the first instance whether the CBA allows the Union to prevent respondents from effectively vindicating their federal statutory rights in the arbitral forum." (internal citations and quotation marks omitted)).

unless *Congress itself* has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Id.* at 26 (emphasis added; quoting *Mitsubishi*, 473 U.S. at 628). In short, a federal claim cannot be arbitrated only if Congress expresses such an intention in a federal statute.

The same principle follows from *Randolph*. In *Randolph*, the court of appeals had "determined that the arbitration agreement failed to provide the minimum guarantees that respondent could vindicate her statutory rights" based on "'steep' arbitration costs." 531 U.S. at 84. This Court laid out the steps to decide the issue: "In determining whether statutory claims may be arbitrated, we first ask whether the parties agreed to submit their claims to arbitration, and then ask *whether Congress has evinced an intention* to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 90 (emphasis added). In that case, the parties did agree and there was no intention expressed in the statute. *Id.* The Court went on to reject the plaintiff's argument that she was "unable to vindicate her statutory rights in arbitration" because she might "be required to bear prohibitive arbitration costs," holding that the record did not support this argument. *Id.* Accordingly, *Randolph* had no occasion to decide whether—and if so, under what circumstances—the cost of arbitration could preclude arbitrability. Nor did *Randolph* (or any of this Court's other cases) identify any source of authority for a court to invalidate an otherwise enforceable arbitration agreement on this ground.

In sum, any broad idea of vindication of rights as an exception to arbitration is based on a now-rejected

notion of hostility to arbitration, and this Court's modern arbitration cases have never endorsed free-floating judicial authority—in the absence of any congressional determination that a class of claims should not be arbitrated—to assess whether arbitration will adequately vindicate those claims.

B. The only legitimate source of a determination that arbitration cannot vindicate certain federal rights would be clear congressional intent in a federal statute other than the FAA.

The vindication principle does not and cannot come from the FAA itself, because the mandatory language of the FAA leaves no room for such an exception. Section 2 of the FAA states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract*.

9 U.S.C. § 2 (emphasis added). Thus, the FAA makes clear that an arbitration provision is enforceable except upon grounds for revocation of any contract. The only exception that the FAA makes for a kind of claim is for "contracts of employment of seamen, railroad employees, or any other class of workers

engaged in foreign or interstate commerce," *id.* § 1, which demonstrates that Congress specified the claims to which it did not want the FAA to apply. It is Congress's role, not the role of the courts, to create exceptions to the FAA not mentioned in the statute. *See 14 Penn Plaza*, 556 U.S. at 270 ("Congress is fully equipped to identify any category of claims as to which agreements to arbitrate will be held unenforceable." (internal quotation marks omitted)).

Indeed, the entire premise behind the FAA is that arbitration can vindicate claims, and it is not the role of the courts to decide which claims are proper for arbitration and which are not. Supreme Court precedents "place it beyond dispute that the FAA was designed to promote arbitration." *Concepcion*, 131 S. Ct. at 1749. The FAA represents an "emphatic federal policy in favor of arbitration." *Mitsubishi*, 473 U.S. at 631. "It 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 contrary congressional command." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (internal quotation marks and citations omitted).

Furthermore, the contrary congressional command must be something specific in the other statute expressing an intent not to allow arbitration, rather than a judicial determination that arbitration is not an adequate method for resolving certain claims. "[T]he recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of

arbitration is one of the chief reasons that parties select arbitration." *14 Penn Plaza*, 556 U.S. at 269. Accordingly, "objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum." *Id.* In addition, there is no statute that authorizes courts to assess, case by case, how successfully arbitration might vindicate the rights at issue—and the mandate of the FAA is to the contrary. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 536 (1995) ("It would be unwieldy and unsupported by the terms or policy of the statute to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the [party]."). Unless a statute specifically authorizes courts to assess case by case whether arbitration will adequately vindicate particular rights, such an inquiry has no foundation in law.

The requirement of some particular statutory language to overcome the dictates of the FAA is simply an application of the rule that federal statutes should not be deemed in conflict, so that one is ignored, unless absolutely necessary. "[C]ourts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Pittsburgh & Lake Erie R. Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989) (internal quotation marks omitted). Indeed, if arbitration is not allowed for particular claims, then it effectively repeals the FAA for application to those claims. And this Court has "repeatedly stated that absent a clearly expressed

congressional intention, an implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009) (internal quotation marks and alterations omitted).[5] Thus, the FAA's rule requiring enforcement of arbitration provisions – subject to the limited exceptions of the FAA – applies to all claims unless another federal statute establishes an irreconcilable conflict with the FAA.

Here, there is no such conflict. The Second Circuit does not cite any language in the Sherman Act or the Clayton Act that supposedly conflicts with the FAA. *See Amex III*, 667 F.3d at 213 n.5 ("[T]he Sherman Act does not provide plaintiffs with an express right to bring their claims as a class in court . . . ."). *Mitsubishi* in fact concerned Sherman Act claims, and this Court noted "the absence of any explicit support for such an exception in either the Sherman Act or the Federal Arbitration Act." 473 U.S. at 628-29. Nonetheless, the Second Circuit held that "forcing plaintiffs to bring their claims individually here would make it impossible to enforce

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[5] *See also, e.g.*, *JEM Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141-42 (2001) ("Petitioners next argue that the PVPA altered the subject-matter coverage of § 101 by implication. Yet the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. The rarity with which the Court has discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue." (internal quotation marks, citations, and alterations omitted)).

their rights under the Sherman Act and thus conflict with congressional purposes manifested in the provision of a private right of action in the statute." 667 F.3d at 213 n.5. Thus, the only congressional language that supposedly creates a conflict is simply the existence of a private right of action. However, the existence of this right does not suggest congressional intent not to allow arbitration, let alone create the kind of clear conflict that would allow courts to ignore the FAA. Indeed, the Second Circuit's theory would support a finding that arbitration can conflict with congressional purpose for virtually all federal claims. But Congress made clear the only limitation on arbitration, and that limitation is the "any contract" exception, 9 U.S.C. § 2, not some amorphous idea of vindication of rights.

Moreover, a vindication doctrine is unnecessary to ensure that federal claims are not effectively precluded by onerous provisions in arbitration agreements. For example, onerous conditions (such as exorbitant fees) can be challenged when they are unconscionable, under the FAA's own exception for "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. And, of course, Congress can provide that a particular class of claims does not fall within the FAA.

C. In all events, the courts are not empowered to invalidate arbitration on the ground that class litigation is essential to the vindication of the rights at issue.

The Second Circuit did not identify any defect in the arbitration agreement or procedures at issue in this case. Instead, it held, in essence, that individual arbitration was *inherently* inadequate to vindicate

the rights at issue, because (in the court's view) those rights can only be vindicated by class-action litigation. And the court relied on reasoning that threatens to extend to any small-dollar claim that might not be economical to litigate individually—the very sort of claim for which the informality and streamlined nature of arbitration can be most beneficial. For multiple reasons, the FAA places this sort of determination beyond the power of the courts.

1. First, such a determination—that individual arbitration is inadequate to vindicate certain classes of claims—is precisely what the FAA was passed to eliminate. It is important to recognize that a determination that class resolution is essential to the vindication of certain claims amounts to a determination that arbitration—not just the particular arbitration agreement at issue, but arbitration generally—is *not* adequate for such claims. As this Court has repeatedly made clear, the arbitration envisioned in the FAA is individual arbitration.[6] And therefore the FAA embodies a binding congressional determination that (absent a contrary determination in a different statute) individual arbitration *is* adequate to the resolution of *all* legal claims.

In particular, in *Stolt-Nielsen*, this Court held that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply

[6] Parties are of course free to *agree* to class arbitration, but *Stolt-Nielsen* and *Concepcion* make clear that the FAA principally contemplates individual arbitration, and requiring class arbitration interferes with the goals of the FAA.

agreeing to submit their disputes to an arbitrator." *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010). The Court explained: "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution[,] . . . [b]ut the relative benefits of class-action arbitration are much less assured . . . ." *Id.* Thus, the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." *Id.* at 1776.

And in *Concepcion*, this Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1748. Moreover, "class arbitration was not even envisioned by Congress when it passed the FAA in 1925" because "class arbitration is a relatively recent development." *Id.* at 1751 (internal quotation marks omitted). Indeed, class actions (let alone class arbitrations) for monetary relief were not available when the FAA was passed. *See* Pet'r Br. at 5. Given this history, and the fundamental differences in class arbitration that potentially undermine the goals of arbitration, class arbitration "is not arbitration as envisioned by the FAA." *Id.* at 1752.

Finally, the background understanding when Congress passes any statute is that arbitration is permissible, and thus it cannot be that the mere fact of arbitration is inconsistent with the statute. As this Court held in a very recent case, a statute passed against that background will not be deemed to reject arbitration without express language to that effect.

See CompuCredit, 132 S. Ct. at 672 ("At the time of the [Credit Repair Organizations Act's] enactment in 1996, arbitration clauses in contracts of the type at issue here were no rarity. . . . Had Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest."). Because courts cannot assume arbitration is insufficient to vindicate federal rights – and the background assumption in the FAA and federal statutes is that arbitration is individual arbitration – courts likewise cannot assume class arbitration is necessary for vindication.

In short, the Second Circuit's determination that individual arbitration is inadequate to the vindication of the antitrust claims in this case conflicts with the FAA's determination that individual arbitration *is* adequate, and amounts to precisely the type of determination the FAA was designed to supersede.

2. Furthermore, the judicial determination that the vindication of particular categories of rights requires class resolution usurps the role of Congress. It is Congress's role to determine whether certain kinds of claims require class action treatment rather than individual arbitration.

A class action cannot be deemed legally necessary unless Congress says so, because there is no legal basis in the first place to treat class actions as necessary to vindicate rights. The Second Circuit started with a flawed premise: "We begin our analysis with the well-settled rule that class action lawsuits are suitable as a vehicle for vindicating statutory rights." *Amex III*, 667 F.3d at 214. However, suitability is not the issue, but rather

whether class actions are a part of statutory rights, such that they allow courts to refuse to enforce arbitration agreements notwithstanding the FAA.

Class actions do not satisfy this test because there is no "right" to a class action. There are numerous reasons why a particular plaintiff can be barred from proceeding as part of a class even if he shows that is not economical for him to proceed individually. For example, if there are not many others similarly situated, if class representation is inadequate, if the claims have an element that must be decided individually, or if a class action would be unmanageable, then class certification may be denied.

Simply put, a class action is not an individual right, but a procedural tool. And the procedures for dealing with claims are not embedded into statutory rights unless the statute provides for such procedures. Indeed, the rules for class actions can (and have been) changed over the years, without any plausible argument that these changes unlawfully undermine statutory rights. This point is even clearer for state claims, because states have many different class action rules, and one state (Virginia) does not allow class actions at all. *See* American Bar Ass'n, *Survey of Class Action Law – 2010*, *available at* http://apps.americanbar.org/litigation/mo/premium-lt/articles/classactions/ClassActionSurvey2010.pdf. Thus, unless a statute explicitly gives a right to class treatment, the absence of a class action does not violate a person's right to vindicate his claim.

Furthermore, the procedural rules for arbitration are generally immune from scrutiny under the FAA. As this Court has held, "[a]rbitration under the FAA is a matter of consent," and "[j]ust as [the parties]

may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989) (internal citation omitted). Moreover, Congress limited judicial inquiry to the "any contract" exception specifically to avoid having courts require particular procedures based on hostility to arbitration. In particular, the idea that the class-action procedure is necessary for small claims is contrary to the FAA. If Congress wanted the FAA to be inapplicable to small claims – which is a significant portion of the claims that would go to arbitration – it would have said so. Indeed, under the Second Circuit's theory, the FAA would become inapplicable in many cases where arbitration is most worthwhile.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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