No. 12-133

In the Supreme Court of the United States

QUESTION PRESENTED

Whether a court should enforce an arbitration agreement under the Federal Arbitration Act, 9 U.S.C. 2, when the plaintiff demonstrates that its non-recoverable costs of arbitration will greatly exceed its potential recovery on a federal statutory claim.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 6
Argument:
I. Petitioners' arbitration agreement is unenforceable because the practical effect of enforcement would be to foreclose respondents from effectively vindicating their Sherman Act claims in any forum 8
A. This Court's decisions upholding the arbitrability of federal claims rest on the premise that the plaintiffs could effectively vindicate their federal claims under the arbitration agreement 10
B. Respondents have established that the arbitration agreement at issue here operates as an impermissible prospective waiver by foreclosing them from asserting their current antitrust claims 20
1. Agreements prospectively waiving antitrust claims are invalid 20
2. The arbitration agreement at issue here operates as a prospective waiver of respondents' antitrust claims 22
3. Reaffirming the effective-vindication doctrine in the circumstances presented here would not raise administrability concerns 26
C. Applying the effective-vindication doctrine in this case is consistent with this Court's decision in Concepcion 30
II. The effective-vindication principle ensures that arbitration permits private enforcement of numerous federal statutes 33
Conclusion 35

TABLE OF AUTHORITIES

Cases: Page

Anders v. Hometown Mortg. Servs., Inc.,
346 F.3d 1024 (11th Cir. 2003) 27
AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740
(2011) .....passim
Booker v. Robert Half Int'l, Inc ., 413 F.3d 77
(D.C. Cir. 2005) 15
Bradford v. Rockwell Semiconductor Sys., Inc,
238 F.3d 549 (4th Cir. 2001) 27
Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697,
704 (1945) 12, 34
Buckeye Check Cashing, Inc v. Cardegna,
546 U.S. 440 (2006) 2
Carter v. Countrywide Credit Indus., Inc .,
362 F.3d 294 (5th Cir. 2004) 28
CompuCredit Corp. v. Greenwood, 132 S. Ct. 665
(2012) 19
Cotton Yarn Antitrust Litig., In re, 505 F.3d 274
(4th Cir. 2007).....26, 28
Credit Suisse Sec., LLC v. Billing , 551 U.S. 264
(2007) 15
Discover Bank v. Superior Court , 113 P.3d 1100
(Cal. 2005) 30
Eastman Kodak Co. v. Image Technical Servs, Inc .,
504 U.S. 451 (1992) 2
EEOC v. Woodmen of World Life Ins. Soc'y,
479 F.3d 561 (8th Cir. 2007) 27
14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009).....13
Fox Midwest Theatres v. Means, 221 F.2d 173
(8th Cir. 1955).....21
Gaines v. Carrollton Tobacco Bd. of Trade, Inc., 386
F.2d 757 (6th Cir. 1967) 21

Cases—Continued: Page

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 10, 13, 15, 18, 20
Graham Oil Co. v. ARCO Prods. Co, 43 F.3d 1244 (9th Cir. 1994), cert. denied, 516 U.S. 907 (1995) 9
Green Tree Fin. Corp.-Alabama v. Randolph,

Statutes—Continued: Page

Sherman Act, 15 U.S.C. 1 et seq.....1, 9, 20, 22, 24
15 U.S.C. 1.....2
Truth in Lending Act, 15 U.S.C. 1601 et seq.....14, 20
Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301 et seq.....33

Miscellaneous:

2 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law (3d ed. 2007).....22
Ramona L. Lampley, Is Arbitration Under Attack?, 18 Cornell J.L. & Pub. Pol'y 477 (2009).....28

(1XtF

taining redress for violations of their federal statutory rights.

The contractual relationship between petitioners and respondents is governed by the Card Acceptance Agreement (Agreement), petitioners' standard form contract for merchants. The Agreement contains a mandatory arbitration clause that requires all disputes between the parties to be resolved by arbitration. Pet. App. 7a. The Agreement further provides that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis," and that "Claims * * * may not be joined or consolidated" with claims brought by other merchants. Id. at 9a. The Agreement does not permit the prevailing party to shift its costs to the other party, and it contains a confidentiality provision that prohibits the disclosure of information obtained in an arbitration proceeding. Id. at 92a; Resp. Br. 49-50.

b. The class action complaints were consolidated in

a. The court of appeals held that the enforceability of the arbitration clause should be analyzed in light of this Court's statement in Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79 (2000), that when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." Id. at 92; see Pet. App. 85a-86a. The court held that respondents had established that "they would incur

Court then granted the petition in No. 08-1473, vacated the court of appeals' judgment, and remanded for further consideration in light of Stolt-Nielsen. See 130 S. Ct. 2401 (2010).

On remand, the court of appeals again reversed the district court's decision and remanded for further proceedings. Pet. App. 31a-56a. The court concluded that Stolt-Nielsen did not cast doubt on its earlier reasoning because Stolt-Nielsen held only that "parties cannot be forced to engage in a class arbitration" absent an agreement to do so. Id. at 42a. "It does not follow," the court of appeals stated, that a "clause barring class arbitration is per se enforceable" even when it "effectively strip[s] plaintiffs of their ability to prosecute" alleged federal statutory violations. Ibid. The court of appeals stayed its mandate pending petitioners' filing a petition for a writ of certiorari. Pet. Br. 13.

c. While the mandate was stayed, this Court decided AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011). The Court in Concepcion held that the FAA preempted a California state-law rule barring enforce-

proving respondents' claim

thereby furthering the purposes of both the substantive federal statute and the FAA.

C. Petitioners' reliance on AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), is misplaced. In contrast to this case, the Court in Concepcion emphasized that the streamlined arbitration procedures applicable to the parties' dispute did not foreclose the plaintiffs' ability to seek redress. And because Concepcion involved the arbitrability of state-law claims, the Court had no occasion to apply the effective-vindication rule or otherwise address the proper way of reconciling the FAA with federal rights-conferring statutes.

II. Petitioners' approach would impede not only the assertion of federal antitrust claims, but the vindication of numerous other federal statutory rights as well. Rather than encourage the adoption of arbitration procedures that can feasibly be used even for small-value cases, petitioners' approach would legitimize the use of arbitration agreements to extract what are in substance prospective waivers of substantive federal rights. That approach would subvert the purposes of the relevant rights-conferring statutes, without furthering the FAA's purpose of encouraging actual arbitration.

ARGUMENT

I. PETITIONERS' ARBITRATION AGREEMENT IS UNENFORCEABLE BECAUSE THE PRACTICAL EFFECT OF ENFORCEMENT WOULD BE TO FORECLOSE RESPONDENTS FROM EFFECTIVELY VINDICATING THEIR SHERMAN ACT CLAIMS IN ANY FORUM

Agreements to arbitrate federal statutory claims are enforceable if, but only if, "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." See, e.g, Mitsubishi Motors Corp. v.

Soler Chrysler-Plymouth, Inc. , 473 U.S. 614, 637 (1985).[1] The "effective-vindication" rule reconciles the FAA's policy of promoting arbitration with the policies of myriad federal statutes that confer substantive rights and authorize private suits by aggrieved persons. In this case, it is undisputed that the cost of proving respondents' Sherman Act claims far exceeds the recovery that any individual respondent can obtain, and the Agreement forbids all means of sharing or shifting those costs. Respondents therefore have demonstrated that the effective-vindication rule bars enforcement of the arbitration clause under the circumstances presented here.

For almost 30 years, the effective-vindication doctrine has provided a necessary incentive for contracting parties to craft arbitration procedures that afford realistic avenues for redress of federal statutory violations. Absent that constraint, parties would be free to craft agreements whose practical effect is to confer prospective immunity from liability under a wide range of federal statutes—including the antitrust laws, antidiscrimination and employment statutes, and consumer-protection laws. Such a result would undermine the remedial and deterrent effect of numerous federal statutes, without furthering the pro-arbitration policies of the FAA.

---

[1] Different questions would be presented if a contractual arbitration clause precluded the plaintiff from seeking a form of relief (e.g, punitive damages or attorneys' fees) that would be available under the relevant federal law if the plaintiff prevailed in court. A provision of that sort could be set aside as an invalid prospective waiver of substantive federal rights even if the plaintiff could obtain some relief through arbitration. See, e.g,

A. This Court's Decisions Upholding The Arbitrability Of

The Court concluded that "the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the [Securities] Act." Id. at 438.

In Mitsubishi, supra, the Court changed course and held that claims under the Sherman Act are subject to arbitration. The Mitsubishi Court explained that the balance it had previously struck in reconciling the FAA with federal statutes conferring privately enforceable rights had been colored by an inappropriate hostility toward arbitration. 473 U.S. at 626-628; see Rodriguez de Quijas, Inc., 490 U.S. at 480-481. The Court concluded that there was no inherent conflict between the Sherman Act's conferral of a private right of action to challenge anticompetitive conduct and the "congressional policy manifested in the [FAA]" because "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." Mitsubishi, 473 U.S. at 627-628; see id. at 636 ("[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987) (declining to apply Wilko because "the streamlined procedures of arbitration" do not inherently "entail any consequential restriction on substantive rights").

The Court in Mitsubishi identified two circumstances
, 482 U.S. 227mwTT2 1 .94 0 TDdn[(, 482 Uc-.0679 (toward arbitration.)]TJ9.1(io)5.1(20

ceedings 'in the contractual forum will be so gravely difficult and inconvenient that the resisting party will for all practical purposes be deprived of his day in court.'" 473 U.S. at 632 (brackets omitted) (quoting The Bremen v. Zapata Off-Shore Co, 407 U.S. 1, 18 (1972)). Second, the arbitration clause at issue in Mitsubishi provided for arbitration before a specified Japanese body, and the parties' contract specified that Swiss law would govern the agreement. Id. at 637 n.19. An amicus in Mitsubishi raised the possibility that the arbitrator might decline to apply the Sherman Act in resolving the parties' dispute. Ibid. The Court found that concern premature, since the arbitration panel had not yet ruled. Ibid. The Court observed, however, that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." Ibid.

The general rule that federal statutory claims are arbitrable is therefore subject to an important caveat, known as the effective-vindication rule: an arbitration agreement will not be enforced if, in a particular case, enforcement would prevent the effective vindication of the plaintiff's federal statutory rights. "Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate." See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 704 (1945) (holding that prospective waiver of rights under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq, was invalid). When enforcement of an arbitration agreement would foreclose the plaintiff from

seeking redress for particular federal statutory violations, the arbitration agreement operates in practical effect as a prospective waiver of the party's substantive federal rights, rather than simply as an agreement to submit a dispute to an arbitral rather than a judicial forum.

b. Since Mitsubishi , this Court has repeatedly reaffirmed the effective-vindication principle. In Gilmer

(2009), the Court stated that an arbitration agreement that amounts to "a substantive waiver of federally protected civil rights will not be upheld."

In Randolph,

about how the arbitration might proceed is insufficient to satisfy that burden. Booker v. Robert Half Int'l, Inc. , 413 F.3d 77, 81 (D.C. Cir. 2005) (Roberts, J.).

c. The effective-vindication rule is an application of the general principle that federal statutes must be reconciled to the extent possible. Morton v. Mancari , 417 U.S. 535, 551 (1974). The FAA generally requires that arbitration agreements be enforced as written. 9 U.S.C. 2. That command must yield, however, to the extent that enforcing the agreement would subvert the "remedial and deterrent function" of another federal statute. Mitsubishi , 473 U.S. at 637; Gilmer , 500 U.S. at 27-28. In that situation, the Court will "condemn[] the agreement as against public policy" and decline to enforce it. Mitsubishi , 473 U.S. at 637 n.19; cf. Credit Suisse Sec. (USA) LLC

law or in equity for the revocation of any contract." 9 U.S.C. 2. That provision "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." AT&T Mobility v. Concepcion

plaintiff to abandon its claim entirely. That result serves no policy underlying the FAA.

2. Petitioners contend that this Court's articulations of the effective-vindication rule are (a) dicta and (b) limited to circumstances in which enforcement of an arbitration agreement would require the plaintiff to shoulder costs that it would not bear in litigation. Petitioners are incorrect.

Although petitioners characterize the effective-vindication rule as dicta (Br. 40-43), the Court in Randolph applied the effective-vindication framework to Randolph's claim. 531 U.S. at 90-92. The Court first stated the requirements for invoking the doctrine in Randolph's case and in future cases: "[W]here, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." Id. at 92. The Court then held that Randolph was unable to satisfy that burden. Ibid. But the fact that Randolph did not prevail does not render the Court's analysis dicta. Indeed, the Court suggested that the question of "[h]ow detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence" could be determined in future cases. Ibid.

Randolph did no more than apply an effective-vindication principle that has consistently been a necessary part of the Court's affirmative rationale for holding that agreements to arbitrate federal statutory claims are ordinarily enforceable. The Court has explained that, in the usual case, enforcement of such agreements will not trench unduly on the policies reflected in the relevant substantive federal law because the effect of enforcement is simply to substitute one adjudicator for

another, rather than to extinguish the plaintiff's federal cause of action. See Mitsubishi , 473 U.S. at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."). That rationale does not apply in circumstances where the likely practical effect of enforcing the parties' agreement is to prevent the plaintiff from obtaining any adjudication of the merits of its federal claim. See, e.g, id. at 637 ("[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum , the statute will continue to serve both

the policies reflected in the FAA must be reconciled

This Court recognized in Mitsubishi that a "prospective waiver of a party's right to pursue statutory remedies for antitrust violations" should be "condemn[ed] * * * as against public policy." 473 U.S. at 637 n.19. The Mitsubishi Court relied on a long line of authority, including Lawlor v. National Screen Service Corp, 349 U.S. 322 (1955). There, the Court held that treating a previous antitrust suit dismissed pursuant to a settlement agreement as a res judicata bar to a subsequent suit based on post-settlement conduct would in effect confer "a partial immunity from civil liability for future violations," which would not be "consistent with * * * the antitrust laws." Id. at 329. The courts of appeals have repeatedly reaffirmed that agreements that operate as prospective waivers of antitrust liability will not be enforced. See, e.g, Redel's Inc. v. General Elec. Co., 498 F.2d 95, 99 (5th Cir. 1974) ("The prospective application of a general release to bar private antitrust actions arising from subsequent violations is clearly against public policy."); see also Sanjuan v. American Bd. of Psychiatry & Neurology, Inc. , 40 F.3d 247, 250 (7th Cir. 1995), cert. denied, 516 U.S. 1159 (1996); Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 896 n.27 (3d Cir. 1975); Gaines v. Carrollton Tobacco Bd. of Trade, Inc., 386 F.2d 757, 759 (6th Cir. 1967); Fox Midwest Theatres v. Means, 221 F.2d 173, 180 (8th Cir. 1955).

These decisions reflect the importance of private enforcement as a means of achieving the policy objectives of the antitrust statutes. Congress created the treble-damages remedy to encourage private suits alleging antitrust violations because such suits "provide a significant supplement to the limited resources available" for government enforcement. Reiter v. Sonotone Corp, 442

U.S. 330, 344 (1979). If prospective waiver agreements were permissible, firms with substantial bargaining power could extract waivers from consumers, distributors, retailers, franchisees, and any other parties with inferior bargaining power. See 2 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law 226 (3d ed. 2007). That result would vitiate the effectiveness of the private remedy, making it less likely that anticompetitive conduct will be detected and deterred.[2]

2. The arbitration agreement at issue here operates as a prospective waiver of respondents' antitrust claims

The arbitration agreement at issue in this case effectively precludes respondents from asserting their antitrust claims by making it prohibitively expensive for them to do so. Randolph, 531 U.S. at 92. It is uncontested that proving respondents' tying claim will cost far more than any individual respondent could recover if it prevailed, yet the Agreement prohibits any means of sharing or shifting those costs.

a. Respondents, who bore the burden of demonstrating that they "will bear" prohibitive costs in arbitration, Randolph, 531 U.S. at 90, presented expert evidence demonstrating that the cost of proving their tying claim would far exceed the recovery that any individual re-

---

[2] Petitioners suggest (Br. 22-24) that, because Congress declined to create a class-action-like mechanism when it enacted the Sherman Act in 1890, the effective-vindication rule should not apply to antitrust claims. That argument lacks merit. Respondents are not challenging the lack of class arbitration procedures as such. Rather, they assert that the agreement's lack of any cost-sharing or cost-shifting mechanisms leaves them unable to vindicate their claims. See pp. 24-25, infra. Such agreements undercut the antitrust statutes' deterrent effect and should be "condemn[ed] as against public policy." Mitsubishi, 473 U.S. at 637 n.19.

spondent could receive. To prevail on their claim, respondents must present expert evidence concerning, inter alia , petitioners' market power in the tying product market, anticompetitive effects in the market for the tied product, and the amount of damages suffered as a result of the arrangement. J.A. 88; see generally Illinois Tool Works v. Independent Ink, Inc ., 547 U.S. 28, 46 (2006). Respondents presented evidence that the expert analysis and testimony needed to establish these elements would entail expert fees and expenses of "at least several hundred thousand dollars," and possibly more than $1 million. J.A. 91. The estimated recovery for the respondent with the largest volume of American Express transactions, however, amounted to only "$12,850, or $38,549 when trebled." J.A. 92.

Petitioners have not contested respondents' estimates of either the costs of the necessary expert evidence or the damages an individual respondent might hope to recover. Pet App. 27a; Pet. Br. 49-50. Instead, they suggest (Pet. Br. 50) that a "costly economics expert report" might not be needed in an arbitration proceeding. But while arbitration entails procedures that are streamlined compared to litigation, those procedures do not relieve ht while5(edue4,e69(t pr)-7(y)-3.6( )]Te34 0 TDTeD.0203c)]Td

an antitrust case."). Nor have petitioners offered to obviate the need for the usual modes of proof by stipulating to some or all of the propositions that the expert report would otherwise be used to establish. And, given the extreme disparity between the projected non-recoverable costs of arbitration and the anticipated best-case recovery for any particular respondent, arbitration under the Agreement could be a feasible means of recovery only if respondents' calculations (which the court of appeals found to be essentially undisputed) were wildly wrong.

b. Because the costs of proving respondents' claims will greatly exceed the potential recovery for any individual respondent, some mechanism for sharing or shifting costs would be necessary to permit respondents to effectively vindicate their claims in arbitration. But the Agreement forecloses all such methods, leaving respondents with no practical means of establishing petitioners' alleged Sherman Act violations.

One way to enable respondents to assert their claims would be to permit cost-sharing through a collective action, such as a class action or joinder of multiple claimants in one arbitration proceeding. The Agreement prohibits both types of procedures, however, foreclosing respondents from spreading the costs of marshaling evidence among multiple plaintiffs. Pet. App. 8a-9a (agreement prohibits "representative" actions and provides that no claim may be "joined or consolidated" with claims brought by other parties). And while petitioners suggest (Br. 51) that individual respondents in separate arbitration proceedings could "hire the same expert witness, even outside the context of class proceedings," the Agreement's confidentiality provision effectively blocks that method of informal cost-sharing.

The Agreement provides that "all testimony, filings, documents and any information relating to or presented during the arbitration proceedings shall be deemed to be confidential information not to be disclosed to any other party." Pet. App. 92a. Petitioners have not offered to waive that restriction, nor have they addressed the court of appeals' conclusion (see ibid.) that it precludes the introduction in multiple arbitration proceedings of a common expert report.

Even without a class-action or joinder procedure, respondents might be able to assert their claims if the Agreement permitted expert costs to be shifted petitioners. It does not. Resp. Br. 49-50. To be sure, there is nothing intrinsically unfair about an agreement that requires each party to bear its own costs in arbitration. Inclusion of such a cost-shifting provision, however, might have rendered individualized arbitration an economically feasible means of pursuing respondents' federal claim. That obvious alternative belies petitioners' contention (e.g., Br. 27) that the decision below compels class proceedings in any case where an individual plaintiff's expected arbitral costs exceed its projected maxi-

tion therefore would preclude respondents from effectively vindicating their federal claims.[3]

3. Reaffirming the effectiv e-vindication doctrine in the circumstances presented here would not raise administrability concerns

Reaffirming the effective-vindication doctrine in the narrow circumstances presented here will not lead to a widespread refusal to enforce arbitration agreements, nor will it lead to the unworkable inquiries petitioners envision. Pet. Br. 32-33.

In the decade since Randolph, the courts of appeals have applied the effective-vindication framework very sparingly. Courts have rarely declined to enforce an arbitration agreement on the ground that it prevents sharing or shifting costs that would exceed the plaintiff's individual recovery. Compare Kristian v. Comcast Corp., 446 F.3d 25, 58 (1st Cir. 2006) (holding that plaintiffs could not effectively vindicate antitrust claims

because plaintiffs presented no evidence on costs of individual arbitration proceedings or "how those increased costs would affect their ability to proceed in arbitration"). Courts have also rarely found that costs specific to arbitration prevented plaintiffs from arbitrating their claims. Compare, e.g, Spinetti v. Service Corp. Int'l , 324 F.3d 212, 216-220 (3d Cir. 2003) (affirming order compelling arbitration after severing costs provision on the ground that plaintiffs had demonstrated that they could not afford to pay costs of arbitration), with EEOC v. Woodmen of World Life Ins. Soc'y, 479 F.3d 561, 566-567 (8th Cir. 2007) (finding Randolph's standard not satisfied because employer agreed to waive agreement's cost-splitting provisions and pay arbitrator's fee on employee's behalf); Anders v. Hometown Mortg. Servs., Inc., 346 F.3d 1024, 1028-1029 (11th Cir. 2003) (similar); Livingston v. Associates Fin., Inc., 339 F.3d 553, 557 (7th Cir. 2003) (plaintiff failed to satisfy her burden of demonstrating prohibitive expense);

predictive calculation, with the aid of expert testimony if necessary. And because the burden is on plaintiffs to establish the infeasibility of arbitration, Randolph, 531 U.S. at 92, arbitration agreements will be enforced where the evidence on that question is uncertain. See, e.g, In re Cotton Yarn , 505 F.3d at 285 ("mere speculation" about cost of asserting claim is insufficient).

The effective-vindication principle, it should be emphasized, is not simply a sound rule of decision for the rare case in which a federal statutory claim cannot feasibly be pursued through the arbitration procedure specified in the parties' agreement. In addition, the effective-vindication rule creates a salutary incentive for companies that prefer arbitration to ensure that such cases remain rare, by adopting arbitration procedures that can feasibly be invoked even for small-value claims. See, e.g, Carter v. Countrywide Credit Indus. , Inc ., 362 F.3d 294, 300 (5th Cir. 2004) (effective-vindication challenge was mooted by Countrywide's modification of arbitration agreement to provide that Countrywide would pay arbitration costs plaintiffs challenged as prohibitive). Under the effective-vindication rule, companies can determine what mechanism of preserving plaintiffs' ability to seek redress for federal violations best suits their priorities. That flexibility furthers the policies of the FAA by enabling companies to design procedures "tailored to the type of dispute" and to the company's needs. Concepcion, 131 S. Ct. at 1749.

Indeed, in response to concerns about consumers' ability to bring low-value claims under arbitration agreements containing class-action waivers, many companies have modified their agreements to include streamlined procedures and premiums designed to encourage consumers to bring claims. See Ramona L.

Lampley, Is Arbitration Under Attack? , 18 Cornell J.L.

C. Applying The Effective-Vindication Doctrine In This Case Is Consistent With This Court's Decision In *Concepcion*

Petitioners' primary argument (Pet. Br. 27-40) is that the Court abrogated the effective-vindication rule in *Concepcion*, leaving companies free to draft arbitration provisions that prevent counterparties from asserting their federal claims in any forum. Petitioners are incorrect.

1. a. The plaintiffs in *Concepcion* were consumers who wished to assert low-value (approximately $30) state-law fraud claims against AT&T Mobility. 131 S. Ct. at 1744. They argued that the class-action waiver contained in their arbitration agreement was invalid under a state-law doctrine known as the "*Discover Bank* rule." *Id.* at 1746. That rule, which California courts had "frequently applied * * * to find arbitration agreements unconscionable," treated class-action waivers as unenforceable when they were contained in adhesion contracts that would give rise to predictably small individual claims, and the plaintiffs alleged that the defendant had engaged in a scheme to cheat consumers out of small sums. *Ibid.* The rationale behind the rule was that class proceedings were a more effective means of deterring conduct harmful to consumers than individual actions asserting small-value claims. See *Discover Bank* v. *Superior Court*, 113 P.3d 1100, 1108-1109 (Cal. 2005).

This Court held that the *Discover Bank* rule was preempted because it stood as "an obstacle to the accomplishment of the FAA's objective[]" of ensuring that arbitration agreements are enforced according to their terms. *Concepcion*, 131 S. Ct. at 1748. The Court explained that the *Discover Bank* rule "interfere[d] with

arbitration" because it would apply to virtually any consumer arbitration contract without regard to the contract's terms—since most such contracts are adhesion contracts involving small claims—and it would permit any party to such a contract to demand class arbitration "ex post" Id. at 1750.

b. The Court in Concepcion did not address, much less repudiate, the effective-vindication rule. The Discover Bank rule was not limited to situations in which enforcement of an arbitration agreement would leave the plaintiff entirely unable to bring her claims. Rather, the rule rendered class-arbitration waivers unenforceable in virtually every consumer adhesion contract, regardless of whether the plaintiff could feasibly vindicate her claim through individual arbitration. The rule was thus designed to preserve the "deterrent effects of class actions," Concepcion, 131 S. Ct. at 1745, rather than to protect a diligent plaintiff's ability to assert her own individual claim.

In the penultimate paragraph of its opinion, the Court in Concepcion addressed, and rejected, the dissenting Justices' conclusion "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." 131 S. Ct. at 1753. But the reasons the Court gave for rejecting the dissenters' analysis are inapplicable to the present case. The bulk of the relevant paragraph in the Court's opinion explained that "the claim here was most unlikely to go unresolved" because the streamlined arbitration procedures adopted by AT&T Mobility largely ensured that plaintiffs would be able to assert, and obtain full redress for, even the very low-value claims at issue. Ibid. Here, by contrast, the premise of the court of appeals' decision was that respondents' rights could not

feasibly be vindicated through individual arbitration proceedings.

The Court in *Concepcion* also observed that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." 131 S. Ct. at 1753. By its terms, however, that is an observation about the power of "States." It suggests at most that, under the Supremacy Clause, the FAA might have superseded the *Discover Bank* rule even if the arbitration agreement had effectively precluded the plaintiffs from asserting their fraud claims in any forum. The recognition that the FAA displaces any conflicting state-law rule says nothing about the enforceability of an arbitration agreement that would preclude the vindication of a substantive federal right. In that context, the effective-vindication rule governs the reconciliation of the two federal statutes. *Randolph*, not *Concepcion*, controls that analysis. See pp. 14-15, *supra*.

2. Petitioners also contend (Br. 27-34) that applying the effective-vindication rule here would contravene *Concepcion* by "conditioning the enforceability" of an arbitration agreement on "the availability of classwide arbitration procedures." *Id.* at 28 (quoting *Concepcion*, 131 S. Ct. at 1744). The problem with the Agreement here, however, is not that it requires individual arbitration, but that it prevents respondents from vindicating their current federal claims

be enforced as applied to respondents' Sherman Act claims. Pet. App. 30a.

II. THE EFFECTIVE-VINDICATION PRINCIPLE ENSURES THAT ARBITRATION PERMITS PRIVATE ENFORCEMENT OF NUMEROUS FEDERAL STATUTES

The effective-vindication rule has long served to ensure that, "[b]y agreeing to arbitrate a [federal] statutory claim, a party does not forgo the substantive rights afforded by the statute." Mitsubishi , 473 U.S. at 628. That rule prevents arbitration clauses from being used as a mechanism through which consumers, employees, and businesses are induced to waive their rights to assert federal claims against their counterparties. Private actions are a vital supplement to government enforcement not only under the antitrust laws, but also under a wide range of other federal statutes. Those include consumer-protection statutes such as the Servicemembers Civil Relief Act, 50 U.S.C. App. 501 et seq; antidiscrimination statutes such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq, and the Equal Credit Opportunity Act, 15 U.S.C. 1691 et seq; and labor and employment statutes such as the FLSA, and the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301 et seq.

Claims under many of these statutes may predictably generate only small damages awards for any particular plaintiff. Yet these statutes confer important protections from practices that are broadly harmful even if they do not result in large monetary damages to particular affected individuals. These statutes also reflect a congressional judgment that private enforcement, even of small-value claims, is an important component of the statutory scheme. By holding that an arbitration agreement will not be enforced if enforcement would

prevent a particular plaintiff from seeking redress for its federal claims, the effective-vindication rule encourages companies drafting arbitration agreements to ensure that even small-value federal claims can be effectively pursued through arbitration. The use of such streamlined procedures furthers the policies that underlie both the FAA and the various federal statutes that confer rights of private enforcement. See pp. 28-29, supra.

Under petitioners' approach, by contrast, companies could use a combination of class-action and joinder prohibitions, confidentiality requirements, and other procedural restrictions to increase the likelihood that a plaintiff's cost of arbitration will exceed its projected recovery. Companies could then require assent to such unwieldy procedures as a condition of doing business, accepting employment, or purchasing products. That would deprive a range of federal statutes of their intended deterrent and compensatory effect, see Brooklyn Savings Bank, 324 U.S. at 710, without promoting the actual use of arbitration as an alternative means of dispute resolution. The FAA is intended to ensure that arbitration is not disfavored as a means of vindicating claims, including federal statutory claims. It is not intended to prevent federal claims from being brought in any forum.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE C. OVERTON
Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
GINGER D. ANDERS
Assistant to the Solicitor General
CATHERINE G. O'SULLIVAN
ROBERT B. NICHOLSON
DAVID SEIDMAN
ADAM D. CHANDLER
Attorneys

DAVID C. SHONKA
Acting General Counsel
Federal Trade Commission

JANUARY 2013