No. 08-1198

In The Supreme Court of the United States

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE, THE AMERICAN INDEPENDENT BUSINESS ALLIANCE, AND THE NATIONAL COMMUNITY PHARMACISTS ASS'N AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

ALBERT A. FOER
President
RICHARD M. BRUNELL
Director of Legal Advocacy
AMERICAN ANTITRUST INSTITUTE
2919 Ellicott St., N.W.
Washington, D.C. 20008
(617) 435-6464

DAN E. GUSTAFSON
Counsel of Record
DANIEL C. HEDLUND
MICHELLE LOOBY
GUSTAFSON GLUEK PLLC
650 Northstar East
608 Second Ave. South
Minneapolis, MN 55402
(612) 333-8844

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INTEREST OF *AMICI CURIAE*[1]

The American Antitrust Institute (AAI) is an independent non-profit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. *See* http://www.antitrustinstitute.org. AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 90 prominent antitrust lawyers, law professors, economists, and business leaders.[2] AAI submits this brief because a policy that disfavors collective arbitrations, as advocated by petitioners, would undermine the enforcement of the antitrust laws by significantly increasing the risks that victims of price-fixing conspiracies will be unable to vindicate their statutory rights.

The American Independent Business Alliance (AMIBA) is a non-profit advocacy and education organization that helps communities design and

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[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel have made a monetary contribution to its preparation or submission.

[2] AAI's Board of Directors alone has approved of this filing for AAI. The individual views of members of the Advisory Board may differ from AAI's positions. Certain members of the Advisory Board serve as counsel for respondent, but they played no role in the Directors' deliberations with respect to this brief.

implement programs to support independent locally owned businesses and maintain ongoing opportunities for entrepreneurs. *See* http://amiba.net/. AMIBA supports more than 65 affiliates (community organizations) across 32 states and has helped many more cities and towns with programs to support their local independents. AMIBA's affiliates represent more than 15,000 independent businesses across virtually every sector of business. AMIBA is concerned that restricting the ability of businesses to unite in class arbitrations will harm small and independent business, which provide an important competitive check against their larger rivals. Small and independent businesses are already vulnerable to powerful suppliers. The only practical way for them to protect themselves against anticompetitive conduct by suppliers is by uniting in a class action or class arbitration.

The National Community Pharmacists Association (NCPA) is a non-profit trade association that represents the pharmacist owners, managers, and employees of more than 23,000 independent community pharmacies across the United States. *See* http://www.ncpanet.org/. Independent pharmacies dispense more than 41% of the nation's retail prescription medicines. NCPA believes in the inherent virtues of the American free-enterprise system and seeks to ensure the ability of independent community pharmacists to compete in a free and fair marketplace. However, the ability of independent pharmacies to compete is impaired when they are

prevented from combining to pursue antitrust claims in class actions or class arbitrations.[3]

SUMMARY OF ARGUMENT

It would be anomalous if admitted members of a global criminal price-fixing cartel were given the benefit of the doubt in interpreting a silent arbitration clause to preclude class arbitration when it would be superior to other available methods for fairly and efficiently adjudicating the claims of cartel victims, if not the only practical means by which many of the customers of the cartel may recover. Barring class arbitration of Sherman Act claims absent a clear statement to the contrary, as petitioners propose, is inconsistent with the longstanding objectives of the private treble-damages remedy.

The private treble-damages action has always been "a bulwark of anti-trust enforcement," *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968), and remains so today. It operates as a complement to the government's criminal and civil enforcement actions, allowing the government to focus on prosecution rather than compensation, and

[3] NCPA is a party to class-action lawsuits challenging certain practices of pharmacy benefit managers under the Sherman Act, one of which has been ordered to arbitration. One of the counsel for respondent here also represents the NCPA in those actions.

as a substitute for government enforcement in other cases because the enforcement agencies cannot be expected to ferret out all or even most of the anticompetitive conduct in the economy. Indeed, private enforcement is the dominant way that the antitrust laws are enforced, and the treble-damages remedy provides most of the deterrent value of the monetary sanctions against antitrust violations. But without class actions, the treble-damages remedy would be largely defanged in cases of cartels and other antitrust violations that cause widespread harm to many victims, where individual actions are generally prohibitively costly.

In order to preserve the deterrent value of the private treble-damages action, class arbitrations should not be disfavored by petitioners' clear-statement rule. On the contrary, antitrust policy and ordinary principles of contract construction demand that ambiguous arbitration agreements be construed to permit class arbitration. Indeed, given the risks that victims of price-fixing conspiracies will be unable to vindicate their statutory rights, waivers of class actions, in court or arbitration, should be disfavored.

ARGUMENT

I. CLASS ACTIONS ARE ESSENTIAL TO ANTITRUST ENFORCEMENT

A. Private Antitrust Enforcement Is an Integral Part of the Congressional Plan to Protect Competition

The Sherman Act is "a comprehensive charter of economic liberty," *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 4 (1958), "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc*., 405 U.S. 596, 610 (1972). "Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress." *Hawaii v. Standard Oil Co.,* 405 U.S. 251, 262 (1972).

This Court has often emphasized the importance of private actions to the enforcement of the antitrust laws. *See, e.g., Mitsusbishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("Without doubt, the private cause of action plays a central role in enforcing this regime."); *California v. American Stores Co.*, 495 U.S. 271, 284 (1990) (describing private enforcement as "an integral part of the congressional plan for protecting competition"); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977) (recognizing "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws"). To ensure vigorous private enforcement, Congress

expressly authorized private parties injured by antitrust violations to sue in federal courts without regard to the amount in controversy, and provided for mandatory treble damages, plus attorneys' fees and costs for successful plaintiffs.[4] *See* 15 U.S.C. § 15.

"[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws." *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130-31 (1969). Indeed, "[t]he treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators." *Mitsubishi Motors,* 473 U.S. at 635; *see Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) ("Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations.").

The bipartisan Antitrust Modernization Commission, created by Congress, recently reviewed the civil and criminal remedies under the antitrust laws and reiterated that "[p]rivate antitrust enforcement plays

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[4] The provisions in § 5 of the Clayton Act that suspend the statute of limitations for private actions during the pendency of a government suit and that allow plaintiffs to use a final judgment in a government action as *prima facie* evidence of liability in a later private action, *see* 15 U.S.C. §§ 16(a), (i), are further evidence that "[p]rivate enforcement of the Act was in no sense an afterthought . . . ." *American Stores*, 495 U.S. at 284.

a critically important role in implementing the U.S. antitrust laws." Antitrust Modernization Commission Report & Recommendations ("AMC Report") 243 (2007). The AMC recommended that the treble-damages rule be retained in its current form because it "well serves" its deterrence and compensation objectives. *Id*. at 246; *see id.* at 247 ("There is broad consensus that treble damages are appropriate for hard-core cartel conduct.").

Treble damages are critical for deterrence because "some anticompetitive conduct is likely to evade detection and challenge," and therefore antitrust violations would be profitable *ex ante* if violators were liable only for single damages or the amount of their overcharges. *Id.* at 246; *see generally* William M. Landes, *Optimal Sanctions for Antitrust Violations,* 50 U. Chi. L. Rev. 652, 656-57 (1983); *see also Perma Life Mufflers*, 392 U.S. at 139 ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."). Moreover, as the AMC noted, "[t]reble damages help to ensure that the violator pays damages that more fully reflect the harm to society caused by the anticompetitive conduct" that is otherwise not recoverable, AMC Report at 246, including the time value of money (prejudgment interest), allocative efficiency losses, and "umbrella effects." *See generally* Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 Ohio St. L. J. 115 (1993).

Treble damages also promote the antitrust law's compensation goal. As the AMC noted, "in light of the fact that some damages may not be recoverable (e.g., compensation for interest prior to judgment, or because of the statute of limitations and the inability to recover 'speculative' damages) treble damages help ensure that victims will receive at least their actual damages." AMC Report at 246; *see also American Soc'y of Mechanical Engineers, Inc. v. Hydrolovel Corp.*, 456 U.S. 556, 575 (1982) ("Treble damages 'make the remedy meaningful by counterbalancing the difficulty of maintaining a private suit' under the antitrust laws." (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977))) (internal quotation marks omitted).

B. Private Actions Are the Dominant Way the Antitrust Laws Are Enforced

The Court has repeatedly referred to the private litigant's role in antitrust enforcement as that of a "private attorney general." For example, in *Mitsubishi Motors*, the Court observed, "The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest." 473 U.S. at 635 (internal quotation marks omitted); *Associated Gen. Contractors v. Carpenters*, 459 U.S. 519, 542 (1983) (describing private parties bringing antitrust actions as performing "the office of a private attorney general"); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.,* 483 U.S. 143, 151 (1987)

(Clayton Act "bring[s] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate"); *Hawaii v. Standard Oil*, 405 U.S. at 262 (by enacting the antitrust laws, "Congress encouraged [private parties] to serve as 'private attorneys general' ").

Indeed, private actions are the dominant means by which antitrust violations are remedied and deterred. In *Reiter*, the Court noted "private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." 442 U.S. at 344. In the late 70's, when the Court decided *Reiter*, "nearly 20 times as many private antitrust actions [were] pending in the federal courts as actions filed by the Department of Justice." *Id.* Today, the number of private antitrust cases brought in federal court exceeds the number of U.S. government actions (civil and criminal) by more than 25 to 1. Although the number of private actions has declined significantly since 1978, the number of government actions has fallen even more sharply (in percentage terms). *See* American Antitrust Institute, *The Next Antitrust Agenda* 222, 228 (Albert A. Foer ed., 2008).

Enforcement by "private attorneys general" serves an important and unique role in Congress' overall enforcement scheme, sometimes as a complement to government enforcement (in "follow on" actions), sometimes as a substitute. A study analyzing 40 of some of the largest recent successful private

antitrust cases found that of the $18-19.6 billion recovered for victims in those cases, almost half of the total recovery came from 15 cases that did not follow government actions. *See* Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases,* 42 U.S.F.L. Rev. 879, 897 (2008).[5] Notably, the total amount of criminal fines obtained by the government during the same period for all prosecutions ($4.2 billion) was less than one quarter of the private recoveries in the 40 cases studied and significantly less than the private recoveries in the 11 cases in the study that involved criminal penalties. *See id.* at 893-95.[6]

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[5] In addition to the 15 cases that clearly did not follow government actions, another six cases involved "mixed" public/private origin, which netted recoveries of $4.2 billion, and nine other cases provided relief significantly broader in scope than the government enforcement action. *See* Lande & Davis at 897-98, 909-10. Sometimes, it was the government that piggybacked on private actions. *See, e.g., In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 n.31 (E.D.N.Y. 2003); *In re Vitamins Antitrust Litig.*, 398 F. Supp. 2d 209, 226 (D.D.C. 2005) (explaining that class-action counsel uncovered the illegal activity of vitamin manufacturers across the globe and shared the information with the Department of Justice "enabling the criminal investigation to begin").

[6] The study did not compare the criminal fines obtained in the 11 cases to the civil recoveries in those cases. The vitamins cartel is instructive, however. That "case" led to record criminal fines of about $900 million and private recoveries of $3.9 to $5.2 billion. *See* John M. Connor, *The Great Global Vitamins Conspiracies, 1985-1999* at 131 (Apr. 9, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120936. Notably, despite the enormous sanctions, the combined criminal and private

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In many instances, private enforcement is the only available means to redress an antitrust violation. As Professors Lande and Davis explain:

> As a practical matter, the government cannot be expected to do all or even most of the necessary enforcement for various reasons including: budgetary constraints; undue fear of losing cases; lack of awareness of industry conditions; overly suspicious views about complaints by "losers" that they were in fact victims of anticompetitive behavior; higher turnover among government attorneys; and the unfortunate, but undeniable, reality that government enforcement (or non-enforcement) decisions are, at times, politically motivated.

Lande & Davis at 906.

Professor Baxter, President Reagan's antitrust chief, noted that private litigants with specialized knowledge "may have a comparative advantage over the Division in the cost of and efficiency in prosecuting a given case," and that private litigation frees up "the government to prosecute and spend resources . . . against more systemic violations for which no private plaintiff is likely to sue or for which criminal sanctions are desirable." William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 Tex.

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recoveries amounted to less than 80% of the cartel overcharges in real terms. *See id.* at 139-40.

L. Rev. 661, 690-91 (1982). Baxter suggested that the executive branch has come to rely on private enforcement because the "common-law approach to antitrust law adopted by Congress requires that the executive branch have discretion to select the particular cases it prosecutes" and "to the extent that suits by private plaintiffs produce an efficient development of antitrust law, it becomes less critical for the executive branch to ensure that the courts have appropriate cases and arguments before them." *Id.* at 678, 682.

In fact, the Department of Justice routinely relies on private treble-damages antitrust lawsuits to provide victims with restitution in cases where it has criminally prosecuted the antitrust violators. Although restitution is required under the Department's corporate leniency program, *see* Dep't of Justice, Corporate Leniency Policy (Aug. 10, 1993), http://www.usdoj.gov/atr/public/guidelines/0091.pdf, and is permitted in plea bargains, *see* 18 U.S.C. § 3663(a)(3), "[i]n most Sherman Act criminal cases, restitution is not sought or ordered because civil causes of action will be filed to recover damages," Dep't of Justice, Model Annotated Corporate Plea Agreement Last Updated July 13, 2009 at 7 n.6, http://www.usdoj.gov/atr/public/guidelines/corp_plea_agree.pdf; *see also id.* at 9 n.14 ("It is extremely rare to have restitution included as part of a plea agreement in a Sherman Act case, as civil suits are normally filed by victims to recover damages."); Dep't of Justice, Frequently Asked Questions Regarding the Antitrust Division's

Leniency Program and Model Leniency Letters 18 (Nov. 19, 2008) ("Restitution is normally resolved through civil actions with private plaintiffs."), http://www.usdoj.gov/atr/public/criminal/239583.pdf. For instance, in this case the government did not seek restitution from petitioners Odfjell and Jo Tankers because it assumed that the "pending civil actions" would take care of it. *See* Resp. Br. 6 (citing sentencing memoranda).

C. Collective Actions Are Necessary to Make the Treble-Damages Remedy Meaningful

Class actions play a particularly important role in ensuring that the treble-damages remedy serves its intended function of deterring antitrust violations and compensating victims.[7] As the AMC concluded, "[t]he vitality of private antitrust enforcement in the United States is largely attributed to two factors: (1) the availability of treble damages plus costs and attorneys' fees, and (2) the U.S. class action mechanism, which allows plaintiffs to sue on behalf of both

[7] Congress has recognized the importance of class actions to the legal system generally. In the Class Action Fairness Act of 2005, Congress found that although there have been some abuses, which the Act sought to correct, "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action . . . ." Pub. L. No. 109-2, § 2(a)(1), 119 Stat. 4 (2005).

themselves and similarly situated, absent plaintiffs." AMC Report at 241. The Court has emphasized the important role that class actions play in enforcing the federal antitrust laws. *See, e.g., Hawaii v. Standard Oil*, 405 U.S. at 266 ("[C]lass actions . . . may enhance the efficacy of private [antitrust] actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture."); *Reiter*, 442 U.S. at 343 n.6 (noting that "the treble-damages remedy of § 4 took on new practical significance for consumers with the advent of Fed. Rule Civ. Proc. 23"); *see also In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 21 (D.D.C. 2001) ("[L]ong ago the Supreme Court recognized the importance that class actions play in the private enforcement of antitrust actions . . . . Accordingly, courts have repeatedly found antitrust claims to be particularly well suited for class actions . . . .").

Cartels and other antitrust violators that inflict widespread economic harm would have little to fear from the treble-damages remedy without class actions because individual treble-damages actions by customers are not common. For example, in the Lande and Davis study of 40 of some of the most successful recent private antitrust cases, only six did not involve class actions, *see* Lande & Davis at 901, and those were suits by competitors, *see id*. at 899.[8]

[8] To be sure, large firms may opt out of class actions to pursue their claims separately, particularly where liability is clear, but those opt-out actions often benefit from class actions

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Private antitrust actions are extremely expensive to pursue either in arbitration or in court because they involve "complicated question[s] of fact" and the application of "equally complex" law to those facts. *Kristian v. Comcast Corp.*, 446 F.3d 25, 58 (1st Cir. 2006). Attorneys' fees and expert witness fees, even in garden-variety price-fixing cases, typically will be in the millions of dollars. *See, e.g., In re Electrical Carbon Products Antitrust Litig.*, 447 F. Supp. 2d 389, 409-10 (D.N.J. 2006) (fees and expenses exceeded $6 million in case that settled before class certification; approximately $400 million of purchases at issue). Even when some of the defendants have pled guilty to criminal price-fixing charges, pursuing a private damages action can "be quite onerous, expensive, and time-consuming," *id.* at 399, because liability against other defendants may not be easy to prove, the statute of limitations (and the period of liability) will frequently be at issue, and it is costly to prove damages, not to mention defend against the inevitable motions to exclude expert witnesses and other motions that defendants file. The fact that the prevailing plaintiff's attorneys' fees are recoverable under the Clayton Act does not ordinarily make individual actions (in arbitration or court) practical because expert witness expenses are effectively not

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being brought in the first instance. *See, e.g., In re Linerboard Antitrust Litig.*, 333 F. Supp. 2d 343, 349 (E.D. Pa. 2004) (identifying discovery and other benefits that class counsel afforded opt-out plaintiffs).

recoverable, *see In re American Express Merchants' Litig.*, 554 F.3d 300, 318 (2d Cir. 2009), *cert. pending sub nom. American Express Co. v. Italian Colors Restaurant*, No. 08-1473 (filed May 29, 2009), and the recovery of attorneys' fees does not compensate attorneys for the risk of not prevailing, *see Kristian*, 446 F.3d at 59 n.21 (noting that disproportion between fees and recovery would make it difficult for attorney to justify being made whole, and "being made whole is hardly a sufficient incentive for an attorney to invest" in an uncertain case on a contingent basis); *City of Burlington v. Dague*, 505 U.S. 557 (1992) (under common fee-shifting statute, lodestar may not be adjusted upward to reflect the fact that attorneys were retained on a contingent-fee basis).

Given the expense of litigation, individual antitrust cases challenging cartel behavior are often negative value cases, *i.e.*, cases "in which the stakes to each member are too slight to repay the cost of the suit." Alba Conte & Herbert B. Newberg, 2 *Newberg on Class Actions* § 4:33, at 290 (4th ed. 2002). "Economic reality dictates" that such actions "proceed as a class action or not at all." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974); *see Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (" 'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries

into something worth someone's (usually an attorney's) labor.'" (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))).

The existence of a negative value suit is often said to be the "most compelling rationale for class certification." *E.g., Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 312 (D.D.C. 2007) (internal quotation marks omitted); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually."); *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980) (class action "may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise" thereby "vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost").

Even when an individual case against a cartel might be economically feasible, direct purchasers may be hesitant to bring suit "for fear of disrupting relations with their suppliers." *Illinois Brick*, 431 U.S. at 746. By providing safety in numbers, the class-action device allows businesses to sue their suppliers without fear of retribution. Moreover, where there are many victims, multiple individual actions will inevitably be more costly than a properly certified collective action; indeed, a collective arbitration or class action may only go forward where the arbitrator or court determines that a class action is "superior to other available methods for fairly and

efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); American Arbitration Ass'n Supplementary Rules for Class Arbitration 4(b) (same). Raising the cost of private suits by requiring plaintiffs to use inferior and less efficient methods of adjudication hardly seems consistent with "the legislative purpose in creating a group of private attorneys general to enforce the antitrust laws . . . ." *Illinois Brick*, 431 U.S. at 746 (internal quotation marks omitted).

II. PRE-DISPUTE WAIVERS OF CLASS ARBITRATIONS IN ANTITRUST CASES SHOULD BE DISFAVORED

In *Mitsubishi Motors,* the Court, while recognizing the importance of the private damages remedy and that a "'claim under the antitrust laws is not merely a private matter,'" overturned the then-uniform rule of the courts of appeal that federal antitrust claims were not arbitrable under the *American Safety* doctrine. 473 U.S. at 635 (quoting *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826 (2d Cir. 1968)). The Court held that an agreement to arbitrate such claims could be enforced, "at least where the international cast of a transaction would otherwise add an element of uncertainty to dispute resolution . . . ." *Id.* at 636.[9]

[9] The Reagan Administration had urged the Court not to overturn the bar against arbitrating antitrust claims because the "important public interest ingredient of antirust claims . . . renders them inappropriate for determination by arbitration."

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Importantly, however, the Court held that such an agreement would not be enforceable where arbitration would not permit the litigant to vindicate his or her statutory rights. The Court declared that "so 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," *id.* at 637, but "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," *id.* at 637 n.19; *see also Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79, 90 (2000) (reaffirming that an arbitration provision could only be enforced so long as the prospective litigant could effectively vindicate his or her statutory rights).

The vindication-of-statutory-rights qualification to the enforceability of agreements to arbitrate antitrust claims is consistent with the established principle that "an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy." *American Express,* 554 F.3d at 319; *see Mitsubishi Motors*, 473 U.S. at 637 n.19 (citing cases); *Lawlor v. Nat'l Screen Service Corp.,* 349 U.S. 322, 329 (1955)

Brief for the United States as Amicus Curiae Supporting Respondent at 12, *Mitsubishi Motors*, 473 U.S. 614 (1985) (No. 83-1569), 1985 WL 669814.

("in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action," an agreement that confers even "a partial immunity from civil liability for future violations" is inconsistent with the antitrust laws); *Kristian*, 446 F.3d at 48 (prospective waiver of treble damages is not enforceable).

Petitioners suggest that because respondent is not an individual consumer it does not need the benefit of the collective action device to vindicate its statutory rights. *See* Pet. Br. 50-51. However, as the Second Circuit explained in *American Express*, the vindication-of-statutory-rights analysis does not depend "on the 'size' of any or all of the merchant plaintiffs; it depends upon a showing that the size of the recovery received by any individual plaintiff will be too small to justify the expenditure of bringing an individual action." 554 F.3d at 320. Antitrust class actions are routinely brought by classes composed of business entities, as opposed to individual consumers. *See, e.g., In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82 (D. Conn. 2009) (class consisting of purchasers of synthetic rubber, primarily companies in roofing and automotive industries); *Visa Check/MasterMoney*, 297 F. Supp. 2d 503 (class comprised of merchants that accepted credit cards); *Linerboard*, 333 F. Supp. 2d 343 (class comprised of purchasers of corrugated sheets and containers). Indeed, because of the *Illinois Brick* rule, which precludes indirect purchasers from obtaining damages for federal antitrust violations, *see Illinois Brick*, 431 U.S. 720, businesses are the only victims

that can recover in most price-fixing cases, and they act as a surrogate for injured consumers down the chain of distribution who absorb much of the overcharge.[10]

Assuming they are enforceable at all, waivers of collective actions in antitrust cases – whether implied, as petitioners contend here, or express – should be disfavored because they significantly threaten to prevent victims of antitrust violations from vindicating their statutory rights and to undermine the deterrent value of the treble-damages remedy. As explained above, given the expense of antitrust litigation in relation to the potential individual recoveries in actions against cartels and other violations involving widespread harm, the alternative to a collective action in such cases is not likely to be many individual actions, but few actions at all. *See, e.g., American Express,* 554 F.3d at 320 (holding that a class-action waiver could not be enforced "because to do so would grant Amex de facto immunity from

[10] *Illinois Brick* was based on the assumption that allowing direct purchasers to recover the full amount of the overcharge, regardless of their actual harm, best served the consumer-protective deterrence objectives of the treble-damages remedy. *See* 431 U.S. at 746. Class-action waivers undermine that assumption. As Professor Gilles has explained, "the only people who can bring an antitrust class action in federal court [direct purchasers] are those upon whom collective action waivers may most easily and directly be imposed." Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 418 (2005).

antitrust liability by removing plaintiffs' only reasonably feasible means of recovery"); *Kristian*, 446 F.3d at 61 (declining to enforce class-action waiver on the ground that "the social goals of federal and state antitrust laws will be frustrated because of the 'enforcement gap' created by the de facto liability shield"). With collective-action waivers, companies that engage in price fixing may be able to limit, and in many cases eliminate, their exposure to treble damages for the harm they cause, making it more likely that the crime will pay.[11]

In any event, the significant risk that class-action waivers would prevent victims of antitrust violations from vindicating their statutory rights and undermine the deterrent value of the treble-damages remedy is sufficient to reject petitioners' proposed

[11] To be sure, the Court has held in an action under the Truth in Lending Act that a party that "seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs." *Randolph*, 531 U.S. at 92. However, this is not inconsistent with a presumption against enforcing waivers of collective actions because such a presumption does not affect whether claims will be arbitrated, but only affects the form the arbitration will take. *Cf. American Express*, 554 F.3d at 310 (noting that the issue of whether to enforce class-action waiver in arbitration does not implicate "the ancient judicial hostility to arbitration" as a form of dispute resolution) (internal quotation marks omitted). Moreover, a claim under the Truth in Lending Act does not involve the same privileged status as private antitrust actions which uphold our "charter of economic liberty."

rule of construction that "silent" arbitration clauses should be read to preclude class arbitration. *See Time Warner Entertainment Co. v. Everest Midwest Licensee, L.L.C.*, 381 F.3d 1039, 1045 (10th Cir. 2004) ("Contracts affecting the public's interest generally are liberally interpreted to favor the public.") (internal quotation marks omitted); *Herrera v. Katz Communications, Inc.*, 532 F. Supp. 2d 644, 647 (S.D.N.Y. 2008) (interpreting ambiguous arbitration agreement to permit recovery of prevailing plaintiff's attorneys' fees where the interpretation "serves the public interest" under the civil rights laws).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

ALBERT A. FOER
President
RICHARD M. BRUNELL
Director of Legal Advocacy
AMERICAN ANTITRUST INSTITUTE
2919 Ellicott St., N.W.
Washington, D.C. 20008
(617) 435-6464

DAN E. GUSTAFSON
Counsel of Record
DANIEL C. HEDLUND
MICHELLE LOOBY
GUSTAFSON GLUEK PLLC
650 Northstar East
608 Second Ave. South
Minneapolis, MN 55402
(612) 333-8844