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 OF THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The American Antitrust Institute (AAI) is an independent and nonprofit 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.[1] The goals of U.S. competition policy could be seriously undermined if Congress' interest in promoting the speedy and efficient resolution of claims through arbitration is not properly balanced against Congress' interest in promoting private enforcement of the antitrust laws. When arbitration provisions fail to provide for the effective vindication of Sherman Act rights, they fail to serve the congressional policies underlying either statute, and disserve both.

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

The AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. A majority of AAI's Board of Directors alone has approved this filing for the AAI. The individual views of members of the Advisory Board may differ from the AAI's positions.

INTRODUCTION AND SUMMARY OF ARGUMENT

In granting certiorari in this case, the Court posed the following question: "Whether the Federal Arbitration Act ("FAA") permits courts, invoking the 'federal substantive law of arbitrability,' to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal law claim." *In re American Express Merchants' Litig.*, 667 F.3d 204 (2d Cir. 2012), *cert. granted sub nom.*, American Express Co. v. Italian Colors Restaurant, 81 U.S.L.W. 3070 (U.S. Nov. 9, 2012). In two recent decisions, this Court has plainly held that a party may not be compelled to submit to class arbitration unless it has agreed to do so. *Stolt-Nielsen, S.A. v. Animal Feeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010); *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1753 (2011). These decisions were based at least in part on the conclusion that "arbitration is ill-suited to the higher stakes of class litigation." *Concepcion*, 131 S. Ct. at 1752.

In light of this Court's holdings in *Concepcion* and *Stolt-Neilsen*, and particularly in light of the Second Circuit's disposition of the case below, *see In re American Express Merchants Litig.*, 667 F.3d 204, 219 (2d Cir. 2012) ("*Amex III*") (holding that *Stolt-Nielsen* precludes court from compelling the parties to submit to class-wide arbitration), the proper question before this Court is not whether an arbitration agreement can be invalidated on the grounds that it does not permit *class-wide arbitration*, but rather, whether an arbitration agreement

can be invalidated where plaintiffs irrefutably demonstrate that bilateral arbitration will effectively preclude their ability to vindicate their federal antitrust claims. Put another way, the question before this Court is whether congressional policy favoring private enforcement of the antitrust laws must yield to a competing federal policy favoring arbitration. The Second Circuit struck the appropriate balance between these two competing federal policies when it concluded that "[e]radicating the private enforcement component from our antitrust law scheme cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes." *Amex III*, 667 F.3d at 218.

The Sherman Act's enforcement scheme, and particularly its treble damages remedy, manifests a congressional policy favoring private enforcement of the federal antitrust laws. This Court has specifically recognized that "private enforcement is an integral part of the congressional plan for protecting competition" and "plays a central role in enforcing this regime." *See California v. American Stores Co.*, 495 U.S. 271, 284 (1990); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985). Indeed, this Court has repeatedly referred to the private litigant's role in antitrust enforcement as that of a "private attorney-general" who protects the public's interest. *Id.*

Just as private actions are integral to the enforcement of the antitrust laws, class actions are integral to the private enforcement scheme. This Court has repeatedly emphasized the important role that class actions play in enforcing the federal antitrust laws. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (recognizing that private suits, including class actions, "provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations"). Without class actions, cartelists and other antitrust violators would have little to fear, as individual treble damages actions by direct purchasers are extremely rare. *See infra* Part I.B.

While recognizing the pivotal importance of private enforcement of the antitrust laws, this Court held in *Mitsubishi Motors* that congressional policy did not preclude arbitration of federal antitrust claims. 473 U.S. at 640. This ruling however, was explicitly premised on the understanding that "[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." *Id.* at 628. As this Court explained, "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. The underlying principle behind *Mitsubishi Motors* (and later cases discussing this principle) is that arbitration is intended to operate as

a transfer of forum, rather than a suppression of statutory rights.

The purpose of the FAA is to foster efficient and speedy adjudication of claims, not to suppress the vindication of statutory rights. *See Concepcion*, 131 S. Ct. at 1749 (identifying a goal of the FAA as the "encouragement of efficient and speedy dispute *resolution*") (emphasis added). On the record before the Court (a record that Amex did not seriously challenge), Plaintiffs demonstrated that their claims could not reasonably be pursued on an individual basis, whether in federal court or in arbitration. *Amex III*, 667 F.3 at 218. Thus, the application of the FAA to require bilateral arbitration in this case would have *the opposite effect* as that intended by the FAA; *precluding* rather than *promoting* speedy and efficient dispute resolution. Neither the goals of the FAA, nor the goals of the Sherman Act are forwarded by a rule of law that requires litigants to press antitrust claims in a forum in which no rational person would pursue the claim.

Petitioners' readings of this Court's decisions in *Mitsubishi Motors* and *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 82 (2000), are overly narrow and illogical. There is no practical difference between burdening the exercise of a statutory right because the costs to proceed in arbitration are too high, and burdening the exercise of a statutory right because the costs of proceeding on an individual basis are too high. It is the fact that the rights

are burdened, not the manner in which they are burdened, that is important.

In any event, neither *Mitsubishi Motors* nor *Randolph* purported to provide a litany of factual situations where effective vindication was unlikely or impossible. Instead, this Court decided both cases on the facts presented, holding that the plaintiffs there had failed to make the requisite factual showing that effective vindication of their statutory claim was not possible in an arbitral forum. Here, by contrast, Plaintiffs have made the requisite showing – unrebutted by Petitioners – that their claims cannot reasonably be pursued as individual actions.

The Second Circuit's decision is not foreclosed by *Concepcion*. *Concepcion* was decided on preemption grounds. *See, e.g.*, 131 S. Ct. at 1753 ("Because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' California's *Discover Bank* rule is *preempted* by the FAA.") (emphasis added). The preemption analysis employed in *Concepcion* is simply inapplicable where two federal statues are in apparent conflict. Unlike *Concepcion*, this case presents the question of whether and under what circumstances *federal* policy in favor of private enforcement of the antitrust laws must yield to (supposedly) contrary federal policy in favor of arbitration. Where, as here, even the goals of the FAA are not served by requiring arbitration, this Court should reach a different conclusion than it reached in *Concepcion*.

Having no real answer to Plaintiffs' demonstration that their claims cannot be pursued on an individual basis, both Petitioners and their *amici* extol the virtues of bilateral arbitration and impugn the ethics and efficacy of class actions. Even ignoring the unrebutted fact that *Plaintiffs' claims* would never be pressed in bilateral arbitration proceedings, Petitioners and their *amici* do not and cannot cite authority supporting the proposition that arbitration of *complex* claims requiring intensive economic and expert analysis would be resolved more efficiently and cheaply in arbitration than they would in court. In fact, complex claims such as the antitrust claims now before the Court are not well suited for resolution in arbitration. *See infra* Part III.

Certainly class actions are not perfect, and in recent years, Congress has taken action to cure perceived abuses in the class action mechanism. But the fact remains that in a large swath of antitrust cases – for example, those challenging cartel behavior resulting in overcharges to direct purchasers – class actions are the predominant (and perhaps only practical) means of deterring violations and recovering overcharges to injured purchasers. The Court should not adopt a rule of law that could foreclose access to a key enforcement mechanism under the federal antitrust laws.

The decision of the court below appropriately balanced federal policy favoring arbitration and federal policy favoring the enforcement of the antitrust laws. As Plaintiffs demonstrated, requiring

bilateral arbitration of their claims would not result in "efficient and speedy dispute *resolution*," but rather would result in *no resolution* of these claims at all. The court below correctly concluded that Plaintiffs had demonstrated, as required by this Court's precedent, that arbitration was not an adequate and accessible substitute forum in which to resolve their federal antitrust claims. The judgment of the court of appeals should be affirmed.

ARGUMENT

I. THE SHERMAN ACT'S ENFORCEMENT SCHEME AND ITS TREBLE DAMAGES REMEDY MANIFEST A CONGRESSIONAL POLICY FAVORING PRIVATE ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS.

A. The Antitrust Laws Were Carefully Crafted to Encourage and Foster Private Enforcement Actions.

Congress enacted the Sherman Act in 1890 as the first of several antitrust laws aimed at protecting consumers from perceived abuses in the marketplace. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). The Act gave responsibility for enforcing the laws to both the Department of Justice and private parties. Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (2004)). To ensure the latter had sufficient incentives to detect

and file actions against antitrust violators, the Act included a treble damages remedy and allowed recovery of attorney's fees and costs for successful plaintiffs. *Id.* (codified as amended at 15 U.S.C. § 15 (2000)); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486, n.10 (1977) (recounting the history of the Sherman Act and observing that treble damages were conceived primarily as a remedy for "'the people of the United States as individuals.'" (quoting 21 Cong. Rec. 1767-1768 (1890) (remarks of Sen. George)). The provision of treble damages to successful private parties clearly evinces a congressional intention to promote private enforcement of the antitrust laws. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) ("[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."); *see also Perma Life Mufflers Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968) ("[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.").

This Court has specifically recognized that private enforcement is "an integral part of the congressional plan for protecting competition." *See California v. American Stores Co.*, 495 U.S. 271, 284 (1990) (describing *Mitsubishi Motors*, 473 U.S. at 635, which notes, "[w]ithout doubt, the private cause of action plays a central role in enforcing this regime"); *Illinois*

Brick Co. v. Illinois, 431 U.S. 720, 745 (1977) (recognizing "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws"). Indeed, it has repeatedly referred to the private litigant's role in antitrust as that of a "private attorney general." *See, e.g., Mitsubishi Motors*, 473 U.S. at 635 ("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.") (internal quotation omitted); *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"); *see also Associated Gen. Contractors v. Carpenters*, 459 U.S. 519, 542 (1983) (describing private antitrust plaintiffs as "perform[ing] the office of a private attorney general").

The late William Baxter, who served as Assistant Attorney General in the Reagan Administration, suggested that the executive branch has even come to rely on private enforcement because this "common-law approach to antitrust law adopted by Congress requires that the executive branch have discretion to select the particular cases it prosecutes . . . [; 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." William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 Tex. L. Rev. 661, 678, 682 (1982). Moreover, private party lawsuits do not require a large expenditure of government resources, thereby shifting "the expense of enforcement away from the governmental agencies." *See* Joseph P. Bauer, *Multiple Enforcers and Multiple Remedies: Reflections on the Manifold Means of Enforcing the Anti-trust Laws: Too Much, Too Little, or Just Right?*, 16 Loy. Consumer L. Rev. 303, 310 (2004).

In many instances, private enforcement is the only available means to redress an antitrust violation. Government enforcement is "inevitably selective and not always likely to concern itself with local, episodic, or less than flagrant violations." Spencer Weber Waller, *Symposium: Private Law, Punishment, and Disgorgement: The Incoherence of Punishment in Antitrust*, 78 Chi.-Kent. L. Rev. 207, 211 (2003). Government objectives also shift over time, resulting in uneven enforcement of certain antitrust provisions. *Id.* at 230 ("[E]nforcement priorities change from administration to administration, or with appointment of a new Assistant Attorney General or FTC chair. For ideological reasons, budgetary constraints, and staff workloads, cases may never be brought that would have been a front-burner issue at another time."). Private enforcement ensures that all types of antitrust violations will be pursued and the enforcement system will remain stable, regardless of the political leadership in power at the time. *See* Spencer

Weber Waller, *The Future of Private Rights of Action in Antitrust*, 16 Loy. Consumer L. Rev. 295, 299 (2004) ("[v]igorous private enforcement has lent the system a certain stability in the United States in comparison to other more centralized systems of competition law"). 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.

Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases, 42 U.S.F.L. Rev. 879, 906 (2008).

Perhaps for these reasons, private actions have now become the *dominant means* by which antitrust violations are remedied and deterred.[2] In the late 1970's, when the Court decided *Reiter v. Sonotone*

[2] Today, private enforcement accounts for 90-95 percent of all antitrust actions. *See* Bauer, *supra*, at 308, n.22 (collecting data).

Corp., 442 U.S. 330 (1979), "nearly 20 times as many private antitrust actions [were] pending in the federal courts as actions filed by the Department of Justice." *Id.* at 343. 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. *See* American Antitrust Institute, *The Next Antitrust Agenda* 222 (Albert A. Foer ed. 2008). A 2008 study analyzing 40 of some of the largest successful private antitrust cases since 1990 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, 891, 897 (2008).[3] Another six of the 40 cases, which netted recoveries of $4.2 billion, had a "mixed" public/private origin, and in another nine of the 40 cases, a private enforcement action yielded relief significantly broader in scope than relief obtained in the government enforcement action. *See id.* at 897-98, 909-10. Sometimes, it is the government that "piggybacks" 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) (explaining that the Department of Justice filed a

[3] The study does not purport to be a comprehensive account of all antitrust settlements or actions during the period. *See* Lande & Davis at 889. Research for the study was funded by the AAI. *See id.* at 879.

lawsuit based in part on information provided by class counsel); *In re Vitamins Antitrust Litig.*, 398 F. Supp. 2d 209, 226 (D.D.C. 2005) (noting 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"). Notably, the $4.2 billion in total criminal fines obtained by the government for all prosecutions during the Lande and Davis study period was less than one quarter of the total in private recoveries during the same period from just the 40 private cases studied. *See* Lande & Davis at 893-94.

In short, private actions are a key, in fact *the key* component in the congressional plan to promote enforcement of the antitrust laws. A decision that private rights of action must give way under all circumstances to a federal policy favoring arbitration, as urged by Petitioners here, must be rejected.

B. Class Actions Are Integral to the Private Enforcement Scheme.

This Court has repeatedly emphasized the important role that class actions play in enforcing the federal antitrust laws. *See Amchem Prods., 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)). Class actions are responsible for much of the antitrust laws' deterrence value. *See Reiter*, 442 U.S. at 344 (recognizing that class actions "provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations"). Without class actions, certain antitrust violations would not be pursued because of the small amount an individual plaintiff may expect to recover. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) ("A critical fact . . . is that petitioner's individual stake . . . is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.").

Not only has this Court recognized the importance of class actions, but Congress has too. In the Class Action Fairness Act, Congress found that "[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." Class Action Fairness Act of 2005, 28 U.S.C. § 1711, Pub. L. No. 109-2, Sec. 2, Feb. 18, 2005, 119 Stat. 4, Findings and Purposes (a)(1). The Senate Report accompanying the Act stated that "[c]lass actions were designed to provide a mechanism

by which persons, whose injuries are not large enough to make pursuing their individual claims in the court system cost efficient, are able to bind together with persons suffering the same harm and seek redress for their injuries. As such, class actions are a valuable tool in our jurisprudential system." S. Rep. No. 109-14, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 4, 5. To effectuate Congress' enforcement scheme, private lawsuits and class actions must both remain viable.

It is widely recognized that class actions play a particularly important role in ensuring that the private damages remedy serves its intended function of deterring antitrust violations and compensating victims. As the bipartisan Antitrust Modernization Commission concluded, "The 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 themselves and similarly situated, absent plaintiffs." Antitrust Modernization Commission, *Report and Recommendations* 241 (2007).

Cartels, which are the subject of universal and worldwide condemnation, would have little to fear without class actions because individual treble-damages actions by customers are not common. *Compare* II Phillip Areeda & Herbert Hovenkamp, Antitrust ¶ 311 (3d ed. 2007 and Supp. 2012) (noting the "relative simplicity of class action treatment of

simple price-fixing cases and the strong policy, now held worldwide, of condemning naked price fixing"). For example, in the Lande and Davis study, only six of the 40 successful cases did not involve class actions. *See* Lande & Davis, *supra*, at 901. Private antitrust actions are extremely expensive to pursue 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). Attorney's 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 Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 401, 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).

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 Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

Petitioners argue that Congress' rejection of a proposal to include a class action mechanism when deliberating the Sherman Act in 1890 reflects a congressional judgment that small dollar claims may

be left to be vindicated through other enforcement mechanisms – such as competitor lawsuits and government enforcement actions. Petitioners' Br. at 24. Neither law nor logic supports this argument. Competitors lack standing to pursue damages for many Sherman Act violations, including claims arising out of hard core, naked price-fixing agreements. In such a case, damages may be recovered only by a direct purchaser, the very entity that might also be a party to an arbitration agreement.

Petitioners' argument likewise ignores numerous statements both by this Court and others that class actions provide a "significant supplement to the limited resources available to [government enforcement agencies] for enforcing the antitrust laws and deterring violations." *See Reiter*, 442 U.S. at 344. Weakening and perhaps even eliminating one of those enforcement mechanisms is inconsistent with the congressional scheme.

II. AN ARBITRATION AGREEMENT THAT REQUIRES BILATERAL ARBITRATION OF FEDERAL ANTITRUST CLAIMS IS UNENFORCEABLE WHERE PLAINTIFFS CAN ESTABLISH THAT ENFORCEMENT OF THE PROVISION EFFECTIVELY PRECLUDES VINDICATION OF THEIR FEDERAL STATUTORY RIGHTS.

Recognizing both the congressional policy favoring private enforcement of the antitrust laws and the importance of the class action mechanism to

Congress' private enforcement scheme, the Second Circuit concluded that the arbitration agreement between the parties below could not be enforced. *Amex III*, 667 F.3d at 218. Relying on Plaintiffs' unrebutted showing that the costs of the necessary expert analysis would far exceed the individual treble damage recovery for even the largest merchant Plaintiff, the court found that enforcing the arbitration agreement in the case before it would "flatly ensure[ ] that no small merchant may challenge [Defendants'] tying arrangements under the federal antitrust laws." *Id.* at 218. Concluding that "[e]radicating the private enforcement component from our antitrust law scheme cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes," *id.*, the Second Circuit declined to enforce the arbitration agreement. *Id.* at 219. *Cf.* Areeda & Hovenkamp, *supra* at ¶ 311 (discussing *Stolt-Nielson*: "reading the arbitration agreement so as to preclude class action treatment may have been tantamount to making any price-fixing overcharge action effectively unavailable for a large portion of the customers at issues.").

The decision of the court below is consistent with established authority in this Court and properly balances federal policies behind the Sherman Act and the Federal Arbitration Act.

A. This Court Has Held that Arbitration Provisions Are Unenforceable Where they Preclude Plaintiffs from Effectively Vindicating their Federal Statutory Rights.

In a series of decisions from the mid-1980s through the early 1990s, this Court held that statutory claims, including federal statutory claims arising under the Sherman Act, were subject to arbitration.[4] The underlying philosophy of those decisions, as expressed in *Mitsubishi Motors* was that "[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." 473 U.S. at 628. As this Court explained, "[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." *Id.* at 637; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) ("claims under [federal] statutes are appropriate for arbitration . . . '[s]o long as the prospective litigant effectively may vindicate [his

[4] *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 628 (1985) (holding Sherman Act claims amenable to arbitration); *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 232 (1987) (RICO claims are subject to arbitration); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding that age discrimination claim was subject to compulsory arbitration pursuant to arbitration agreement in securities registration application).

or her] statutory cause of action in the arbitral forum,'" allowing the statute "'to serve both its remedial and deterrent function.'") (quoting *Mitsubishi Motors*, 473 U.S. at 637).

In *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 82 (2000), this Court set out the framework for determining when an arbitration provision will be enforced. It restated and reaffirmed that an arbitration provision could only be enforced so long as the prospective litigant could effectively vindicate his or her statutory rights. *Randolph*, 531 U.S. at 90 (citing *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi Motors*, 473 U.S. at 637)). Further, this Court recognized that there could be circumstances in which an arbitration agreement is unenforceable because it would not permit the vindication of a litigant's statutory rights. *Id.* at 90 ("It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum."). However, because the plaintiff had not met her burden of establishing that she would actually bear high arbitration costs and because in fact the record "contain[ed] hardly any information" at all on the question of costs, this Court found the plaintiff's argument "too speculative to justify the invalidation of an arbitration agreement." *Id.* at 90-91.

Subsequent to *Mitsubishi Motors* and *Randolph*, a number of Circuit Courts have recognized the requirement that the arbitral forum allow for the effective vindication of statutory rights. *See, e.g.,*

Kristian v. Comcast Corp., 446 F.3d 25, 54 (1st Cir. 2006) ("We have said that the legitimacy of the arbitral forum rests on 'the presumption that arbitration provides a fair and adequate mechanism for enforcing statutory rights.'"); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 658 (6th Cir. 2003) ("employers should not be permitted to draft arbitration agreements that deter a substantial number of potential litigants from seeking any forum for the vindication of their rights."); *Inv. Partners, LP v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 318 (5th Cir. 2002) ("Investment Partners can vindicate its statutory rights in arbitration pursuant to the terms of its agreement."); *McCaskill v. SCI Mgmt. Corp.*, 285 F.3d 623, 626 (7th Cir. 2002) (recognizing this Court's holding, in *Gilmer*, that claims under federal statutes may be appropriate for arbitration as long as the litigant may effectively vindicate her statutory cause of action in the arbitral forum, and the statute will continue to serve its remedial and deterrent purposes), *reh'g granted and vacated*, 298 F.3d 677 (7th Cir. 2002); *Blair v. Scott Specialty Gates*, 283 F.3d 595, 607 (3d Cir. 2002) ("[T]he Supreme Court has also made clear that arbitration is only appropriate 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum' allowing the statute to serve its purposes.") (quoting *Mitsubishi Motors*, 473 U.S. at 637); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 895 (9th Cir. 2002) ("Courts have since interpreted Gilmer to require basic procedural and remedial protections

so that claimants can effectively pursue their statutory rights.").

Despite the above cited authority, Petitioners eschew the notion that the concept of effective vindication of statutory rights is part of the "federal substantive law of arbitrability." Brief for Petitioners ("Petitioners' Br.") at 29. As they characterize it, "'the federal substantive law of arbitrability' is simply the 'body of federal substantive law interpreting and effectuating FAA section 2. . . .'" *Id.* But case law developing the legal and factual principles under which an arbitration clause *will not be enforced* is just as much a part of the "substantive law interpreting and effectuating [the] FAA" as cases discussing the principles under which such agreements *will be enforced*. All such questions concern the "validity, revocability and enforceability of arbitration agreements." *See Robert Lawrence Co. v. Devonshire Fabric, Inc.*, 271 F.2d 402, 409 (2d Cir. 1959) ("the body of law created by the FAA is substantive not procedural in character and . . . it encompasses questions of interpretation and construction, as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce.").

The decision of the court below appropriately balanced federal policy favoring arbitration and federal policy favoring the enforcement of the antitrust laws. The national policy favoring the enforcement of arbitration agreements does not stand in a vacuum. Instead, the goal of the FAA is to encourage

"efficient and speedy dispute resolution." *Concepcion*, 131 S. Ct. at 1749. *See also* Brief *Amici Curiae* of Distinguished Law Professors in Support of Petitioners ("Professors in Sup. of Pet'rs. Br.") at 16 (identifying goal of FAA to "facilitate streamlined proceedings" and to promote "efficient alternative[s] to [the] judicial process."). But as plaintiffs demonstrated below, the enforcement of the arbitration agreement here does nothing to forward the goals of the FAA. There is little doubt that requiring bilateral arbitration of these claims would not result in "efficient and speedy dispute resolution," but rather, would result in no resolution of these claims at all. The court below correctly concluded that Plaintiffs had demonstrated, as required by this Court's precedents, that arbitration was not an adequate and accessible substitute forum in which to resolve their federal antitrust claims.

B. Petitioners' and Their *Amici's* Narrow Construction of the *Randolph* Case and the Effective Vindication Doctrine Are Irrational in Light of the Federal Policies Underlying Both the FAA and the Sherman Act.

Both Petitioners and their *amici* argue that *Randolph* and *Mitsubishi Motors* are narrow decisions that should be limited to the facts presented in those cases. Specifically, Petitioners argue that *Randolph*'s holding is limited to situations where costs unique to arbitration (such as filing and arbitrator's

fees) would be prohibitive. *See* Petitioners' Br. at 41; Professors in Sup. of Pet'rs. Br. at 7. Similarly, Petitioners contend that *Mitsubishi Motors* must be limited to its facts – concerning only arbitration provisions that override substantive federal law. Petitioners' Br. at 45. That narrow and technical reading of those cases makes no sense, especially in light of the articulated purpose of the "effective vindication" principle.

"Effective vindication" is designed to ensure that the federal statute involved "will continue to serve both its remedial and deterrent function." *See Mitsubishi Motors*, 473 U.S. 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 its remedial and deterrent function*.") (emphasis added). Thus, there is no practical difference between burdening the exercise of a statutory right because the costs to proceed in arbitration are too high, and burdening the exercise of a statutory right because the costs of proceeding on an individual basis are too high. It is the fact that the rights are burdened, not the manner in which they are burdened, that undermines a statute's "remedial and deterrent functions."

Moreover, neither *Randolph* nor *Mitsubishi Motors* purports to list a litany of situations in which the arbitral forum might burden the effective vindication of statutory rights. Instead, this Court decided both cases on the facts presented, holding that the plaintiffs there had failed to make the requisite

factual showing that effective vindication of their statutory claim was not possible in an arbitral forum. In stark contrast to the record in *Randolph*, there is nothing "speculative" about Plaintiffs' contention in the instant case that the high cost of establishing defendants' liability for antitrust violations in bilateral arbitration proceedings absolutely precludes them from vindicating their statutory rights. Plaintiffs' showing stands absolutely unrebutted, with Petitioners and their *amici* offering only suggestions and speculation to counter the proffered evidence.[5]

On the record before it, the Second Circuit's conclusion that no rational litigant or attorney would proceed with these claims, except as a class action, is reasonable. *See Kristian*, 446 F.3d at 54 ("The *realistic* alternative to a class action is not 17,000,000 individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.00.") (quoting *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)). Plaintiffs demonstrated, as required by *Randolph*, that resort to an arbitral forum would

[5] *See* Petitioners' Br. at 50-51, discussing the use of non-class procedural mechanisms (such as sharing attorneys and experts) to minimize costs. Petitioners made no showing below as to the feasibility of these proposals and on their face they are questionable. For example, even if pooling resources and sharing experts were feasible in light of the arbitration clauses at issue, *see* Respondents' Br. at 48-50, the expert would likely have to testify in each proceeding, a wasteful, expensive and inefficient process that would be avoided in class proceedings.

effectively preclude the vindication of their federal statutory rights under the Sherman Act.

C. The Decision Below Does Not Run Afoul of *Concepcion*.

The question presented in *Concepcion* was whether the *Discover Bank* rule recognized under California law (*see Discover Bank v. Sup. Court*, 36 Cal. 4th 148 (2005) (holding that class action waivers in most consumer adhesion contracts are unconscionable and therefore unenforceable) was in the nature of a "generally applicable contract defense," or whether the rule, as applied, specifically disfavors arbitration and thus must yield to contrary congressional intent as embodied in the FAA. *Concepcion*, 131 S. Ct. at 1750.

In concluding that the rule must yield to the FAA, this Court employed a preemption analysis, holding that because the rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [it] is *preempted by the FAA*." *Id.* at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (emphasis added). *See also, id.* ("*[S]tates* cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.") (emphasis added); *id.* at 1748 ("[N]othing in [Section 2 of the FAA] suggests an intent to preserve *state-law rules* that stand as an obstacle to the accomplishment of the FAA's objectives.") (emphasis added). In short, the decision

stands for the proposition that *state laws* and *state public policy interests* must yield to conflicting federal policy embodied in the FAA.[6]

The preemption analysis this Court used in *Concepcion* is simply inapplicable when two competing *federal* policies are at issue. Indeed, despite the fact that this Court has repeatedly used the language of "effective vindication" when evaluating the enforceability of agreements to arbitrate federal claims, and despite the fact that numerous circuit courts of appeals (in addition to the Second Circuit) have also used this language, this Court did not ever mention effective vindication in *Concepcion*, nor discuss the effect of its decision on that long-standing federal doctrine.

Unlike the situation present in *Concepcion*, this case presents the question of whether and under what circumstances federal policy in favor of private enforcement of the antitrust laws must yield to (supposedly) contrary federal policy in favor of arbitration. Where, as here, even the goals of the FAA are not served by requiring arbitration, this Court should

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[6] In what must be characterized as *dicta,* this Court also noted that it was not convinced that the small dollar consumer claims at issue in *Concepcion* would not be brought in individual arbitrations. Instead it noted that given the particular claim and arbitration provision involved, it was "most unlikely" that the plaintiffs' claim would go unresolved in the absence of collective adjudication. *Id.* at 1753. Thus, the *Concepcion* plaintiffs did not make the factual showing made here that vindication of the claim was practically precluded in bilateral arbitration.

reach a different conclusion than it reached in *Concepcion*.

III. THE ARBITRATION FORUM IS ILL-SUITED TO THE LITIGATION OF COMPLEX ANTITRUST CLAIMS SUCH AS THOSE REQUIRING EXTENSIVE EXPERT ANALYSIS.

In support of their positions Petitioners and their *amici* extol the benefits of bilateral arbitration. Leaving aside for the moment the unrebutted fact that there *would be no arbitration* of the claims made here, the benefits of bilateral arbitration, at least with respect to antitrust claims in which detailed expert analysis is required, are highly overstated. Antitrust cases often involve intricate legal issues that even experienced judges may have difficulty deciding. These difficulties are compounded in arbitration because the resolution of legal issues will not be subject to judicial review. *See Concepcion*, 131 S. Ct. at 1752 (review of arbitrators' decisions "focuses on misconduct rather than mistake [and] [p]arties may not contractually expand the grounds or nature of judicial review"). As Judges Smith and Moye have noted:

> [T]he very attributes that make arbitration an attractive alternative to formal litigation for certain contractual relationships make it ill-suited for others. Many cases sent to arbitration often pose important legal questions. The resolution of these matters outside of the

> court system deprives the citizenry of an open, accessible development of the common law as it pertains to commercial, consumer and employment disputes.

Judge Craig Smith & Judge Eric V. Moye, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 Tex. Tech. L. Rev 281, 297 (2012) (footnotes omitted). Put another way, "[m]andatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions." *Id.* at 300. *See also Concepcion*, 131 S. Ct. at 1752 ("[T]he absence of multilayered review [in arbitration] makes it more likely that errors will go uncorrected.").

Both Petitioners and their *amici* refer to articles and studies that purport to demonstrate consumer satisfaction with the arbitration process. *See, e.g.*, Petitioners' Br. at 51-52; Brief of *Amici Curiae* American Bankers Association *et al.* in Support of Petitioners ("Am. Bankers Assoc. Br.") at 9-14. None of these materials, however, appear to relate to arbitrations of complex claims, such as antitrust actions, and many studies appear to be sponsored by parties with a financial interest in promoting arbitration. Other commentators, however, suggest grave problems with aspects of the alternative dispute resolution process. *See* Smith & Moye, *supra*, at 299 (discussing "arbitrator bias" and the inherent conflicts of interest created by the financial incentives in the arbitration industry).

Petitioners' *amici* also argue that individual arbitration is cheaper and more efficient than class actions or class arbitrations, and that businesses pass along these savings to consumers. *See, e.g.*, Am. Bankers Ass'n. Br. at 10. However, even if businesses would pass along their lower dispute-resolution costs to consumers, "the notion that it is to the public's advantage that companies be relieved of legal liability for their wrongdoing so that they can lower their cost of doing business is contrary to a century of consumer protection laws." *See Ting v. AT&T*, 182 F. Supp. 2d 902, 931 n.16 (N.D. Cal. 2002), *aff'd in relevant part*, 319 F.3d 1126 (9th Cir. 2003).

In short, there is little support for the proposition that arbitration of complex matters, such as claims that require intensive economic and expert analysis, would be resolved more efficiently and cheaply in arbitration than they would in court. In fact, for various reasons, including inter alia the lack of judicial review, the absence of res judicata, and the potential for duplicative proceedings, such claims are not well suited for resolution in arbitration.

IV. PETITIONERS' AND THEIR *AMICI'S* ATTACKS ON CLASS ACTIONS ARE IRRELEVANT AND UNFOUNDED.

Petitioners and their *amici* contend that the Second Circuit's decision reflects a "pro-class action policy" bias that fails to account for the serious drawbacks to the class action device. Petitioners' Br. at 19.

Among the points made by Petitioners and their *amici* are the following:

- Class Actions can be vehicles for collusive settlements that benefit the lawyers and not the class.[7]
- Class actions are unfair to defendants and "can distort the underlying substantive law by creating hydraulic pressure to settle even meritless claims."[8]
- The deterrent role that class actions play can be served by other means including government enforcement and other types of collective actions.[9]

As an initial matter, these arguments are irrelevant. Congress enacted Rule 23 to provide for the maintenance of class actions in appropriate circumstances. Fed. R. Civ. P. 23. To the extent that the class action mechanism has been abused (and no doubt there have been abuses), the appropriate course is to act, as Congress has, through amendments to Rule 23, such as the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1711 *et seq*. Perceived problems with the

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[7] *See, e.g.,* Petitioners' Br. at 54; Am. Bankers Ass'n. Br. at 14-15.

[8] *See, e.g.,* Petitioners' Br. at 19; Brief for *Amicus Curiae* The Financial Services Roundtable in Support of Petitioners ("Fin. Serv. Br.") at 21.

[9] *See, e.g.,* Petitioners' Br. at 55; Brief of *Amicus Curiae* New England Legal Foundation in Support of Petitioners ("New Engl. Leg. Found. Br.") at 21-25.

class action device in general (or more pointedly with certain cases in particular) should not be addressed by putting the class action mechanism out of the reach of appropriate and meritorious cases.

In any event, while Petitioners and their *amici* refer to the problem of meritless class actions and complain about unfairness when certification of such actions creates "hydraulic pressure to settle" (Petitioners' Br. at 19), there is no reliable empirical evidence that settlements of meritless class actions are common. For example, when the Antitrust Modernization Commission recently studied whether the antitrust laws should be modernized and considered the claims of some critics that the range of available remedies under the antitrust laws resulted in excessive payments by defendants, it reported that "[n]o actual cases or evidence of systematic overdeterrence were presented to the Commission. . . ." Antitrust Modernization Commission *Report*, *supra* at 247; *see also* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 103 (2010) ("claims of excessive costs, abuse, and frivolousness in litigation may have much less substance than many think, and extortionate settlements may be but another urban legend"); Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1395 n.164 (2003) ("[t]here is little empirical evidence supporting the theory that frivolous lawsuits are common").

Significantly, the suggestion that businesses routinely settle "meritless" class actions with substantial payments is a myth. "Meritless filings are not met with payoff money; they are met with motion practice, and sometimes sanctions." Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 159 (2006); *see id.* at 158 ("Class action practice in the real world is characterized by a very high incidence of successful motions to dismiss, successful motions for summary judgment, and unsuccessful motions for class certification."); *see also* Silver, *supra*, at 1393 ("Dispositive motions make it hard for plaintiffs to use the threat of endless litigation to obtain payments on unmeritorious claims."); Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 U.C.L.A. L. Rev. 65, 70 n.12 (1996) ("In real litigation . . . defendants' counsel are generally quite adept at placing time-consuming and expensive motions and other obstacles in the path of plaintiffs' counsel . . . such that it seems unlikely a plaintiff can create a sufficient threat, based on disparity of litigation cost alone, to coerce a settlement.").

Similarly, the notion that class action lawyers are the primary beneficiaries of class actions also does not withstand scrutiny. For example, the Fitzpatrick study cited by the Center for Class Action Fairness shows that in 2006 and 2007, class action settlements in federal court recovered nearly $33 billion in monetary relief, of which roughly $5 billion, or about 15 percent,

was awarded to class action lawyers. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Leg. Stud. 811, 811 (2010); *see also* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Leg. Stud. 248, 262, 265 (2010) (comprehensive study of class action settlements showing that mean fee was 23 percent of class award, with lawyers receiving a smaller proportion as the size of the recovery increased, *e.g.*, a mean fee of 12 percent for recoveries exceeding $175.5 million). Lande and Davis reported that the 34 antitrust class actions in their study recovered a total of about $14-15 billion for businesses and consumers, before deducting attorney's fees. *See* Lande & Davis at 899, 901 (sum of direct and indirect purchasers' recoveries). And that did not include the monetary value of any injunctive relief, which in some instances dwarfed the compensatory relief. *See id.* at 891, 901-02; *e.g., Visa Check/Mastermoney*, 297 F. Supp. 2d 503, 511-12 (E.D.N.Y. 2003) (noting "injunctive relief will result in future savings to the Class valued from approximately $25 to $87 billion or more," while compensatory relief was $3.38 billion). In the 30 cases where the information was available, attorney's fees (and expenses) constituted approximately 14.5 percent ($1.4 billion) of the cash recoveries in those cases ($9.7 billion). *See* Lande & Davis at 902-03 & n.95, 911-12 (noting that percentage of recovery declined as recovery increased).

There are surely occasional abuses by class action lawyers, just as there are sometimes abuses by defense lawyers. *See* Miller at 66 ("[T]he defense bar and its clients are not always innocent victims of frivolous litigation or abusive conduct; indeed defense attorneys [may] protract pretrial processes . . . to coerce contingent-fee lawyers . . . into settlement"). However, there is simply no basis for the claim that businesses routinely settle meritless class actions or that such settlements undercut the deterrent value of class actions generally.

Amicus curiae The Financial Services Roundtable, after cherry picking several settlements it describes as unfair or abusive, makes the incredible assertion that "it is easy to see why Congress has not precluded plaintiffs' efforts to take ownership over their rights in advance by committing to bilateral arbitration." Fin. Serv. Br. at 12. Of course, there is no support for the proposition that it is *plaintiffs* who "choose" to enter into bilateral arbitration agreements in order to enforce their rights. Nor is there anything in the court's decision below that would preclude plaintiffs from opting out of a class action and pursuing their claims in arbitration if they wished. To the contrary, it is the defendants who "choose" the arbitral forum for plaintiffs, effectively precluding plaintiffs from having any "choice" in the matter whatsoever. Moreover, it is equally clear that defendants choose arbitration not to promote the litigation of these small claims, but in fact to avoid litigating them at all. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740,

1761 (Breyer, J., dissenting) (noting that where small-dollar claims are concerned, "'[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits . . . '") (quoting *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).

Indeed, research supported by the AAI suggests three conclusions: (1) that class actions play a crucial role in private enforcement, enabling direct and indirect purchasers to recover at least $15 billion in damages over the previous two decades, *see* Joshua P. Davis & Robert H. Lande, *Towards an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, ___ Seattle U. L. Rev. ___ (forthcoming 2013), *available at* http://ssrn.com/abstract=2132981, at pp. 18-19; (2) that private antitrust enforcement likely provides a more effective deterrent of antitrust violations than criminal enforcement by the Department of Justice, *see id.* at pp. 8-11; *see generally* Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U. L. Rev. 315 (2011); and (3) that sanctions from the combination of private and public antitrust enforcement create much too weak a deterrent of antitrust violations, at least when it comes to illegal cartels. *See generally* Robert H. Lande & John M. Connor, *Cartels As Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev. 427 (2012). The implication is that antitrust

enforcement, including through class actions, should be strengthened, not undermined.

CONCLUSION

For the reasons hereinabove stated, and for those set forth in Respondents' brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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