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 *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF PETITIONERS

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Amici Curiae American Bankers Association ("ABA"), American Financial Services Association ("AFSA") and Consumer Bankers Association ("CBA") (together, "*Amici*") respectfully submit this brief in support of Petitioners American Express Company and American Express Travel Related Services Company, Inc. (together, "AMEX"). All counsel of record received timely notice of *Amici's* intent to file this brief under Supreme Court Rule 37 and provided blanket consent to the filing in letters filed with this Court on November 19, 2012 and December 12, 2012.[1]

AMICI'S INTEREST IN THIS CASE

ABA is the principal national trade association of the banking industry in the United States. It represents banks and holding companies of all sizes in each of the fifty states and the District of Columbia, including community, regional and money center banks. ABA also represents savings associations, trust companies and savings banks. ABA members hold an overwhelming majority—approximately 95%—of the domestic assets of the U.S. banking industry. ABA frequently appears in litigation, either as a party or *amicus curiae*, in order to protect and promote the interests of the banking industry and its members.

AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA has a broad membership, ranging from large international financial services firms to single office, independently owned consumer

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[1] No counsel for any party authored this brief in whole or in part. No counsel, party or person other than *Amici* and their members made a monetary contribution intended to fund the preparation or submission of the brief.

finance companies. The association represents financial services companies that hold a leadership position in their markets and conform to the highest standards of customer service and ethical business practices.

CBA is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

Many of *Amici*'s members, constituent organizations and affiliates (collectively, "Members") have independently adopted as standard features of their consumer contracts provisions that call for individual arbitration of disputes arising from or relating to those contracts, upon the election of either party. They use arbitration because it is a prompt, fair, inexpensive and effective method of resolving disputes and because arbitration minimizes the disruption and loss of good will that often results from litigation. Members strive to ensure that their arbitration agreements provide a fair, efficient and cost-effective means for both Members and their customers to resolve disputes between them.

The core mandate of the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1 *et seq.*, is to enforce private arbitration agreements according to their terms. Last year, in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), this Court held that consumer

arbitration agreements are fully enforceable even if they prohibit class-wide arbitration of claims that are too small individually to assert in court or in arbitration. Notwithstanding this decision, the Panel below ruled that AMEX's arbitration agreement with the merchants that accept AMEX charge and credit cards was unenforceable because, the Panel believed, the merchants did not have enough at stake to justify individual arbitration. This erroneous decision threatens to undercut *Concepcion* and to throw into doubt the enforceability of the arbitration agreements utilized by our Members. Accordingly, *Amici* have a compelling interest in the issues at stake in this case and in reversal of the Panel's decision.

SUMMARY OF ARGUMENT

The Panel decision below is fundamentally inconsistent with this Court's ruling in *Concepcion*, which held that the FAA precludes courts from refusing to enforce bilateral arbitration agreements based on the perceived policy advantages of class procedures. In addition, it fosters the distinct misimpression that individual arbitration is far less desirable than class action litigation as a procedure for resolving disputes. However, there is substantial empirical data establishing that individual arbitration benefits contracting parties, enables statutory rights to be vindicated even in small dollar cases and avoids the serious pitfalls associated with class actions. Moreover, individual arbitration does not exculpate defendants because governmental enforcement provides an effective remedy for alleged wrongdoing. Thus, the Panel's policy justifications for invalidating the parties' arbitration agreement are not only unavailing under *Concepcion*, but also wrong on their own terms.

ARGUMENT

The law recognizes a strong interest in the enforceability of contracts in accordance with their terms. *See Sander v. Alexander Richardson Invs.*, 334 F.3d 712, 721 (8th Cir. 2003) ("Public policy demands enforcing contracts as written and recognizing the parties' freedom to contract."). Prior to the adoption of the FAA, this public policy was circumvented with respect to arbitration agreements by state and federal courts alike, which refused to enforce such agreements. *Vaden v. Discover Bank*, 556 U.S. 49, 64 (2009).

The FAA was designed specifically "'to reverse the longstanding judicial hostility to arbitration agreements . . . .'" *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)). It embodies a liberal federal policy favoring arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Accordingly, Section 2 of the FAA, 9 U.S.C. § 2 ("Section 2"), provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Section 2 creates federal substantive law of arbitrability that is binding on state as well as federal courts. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). It "command[s] that an arbitration agreement is enforceable just as any other contract . . . ." *Vaden*, 556 U.S. at 64. In *Concepcion,* this Court applied this rule to an arbitration agreement that included a provision precluding class proceedings.

I. *Concepcion* Mandates A Ruling In Favor Of AMEX.

In *Concepcion*, this Court rejected the so-called "*Discover Bank*" rule, adopted by the California Supreme Court in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), and implemented by the Ninth Circuit in the lower court proceedings leading to the *Concepcion* decision. *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Under the *Discover Bank* rule, an arbitration provision containing a class action waiver is conclusively deemed unconscionable and hence unenforceable "when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." 113 P.3d at 1110. The rule was designed to ensure that parties with superior negotiating power cannot use arbitration to exempt themselves from responsibility for their own fraud or willful injury to the person or property of another. *Id.*

This Court found the *Discover Bank* rule incompatible with the FAA because "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." 131 S. Ct. at 1751. "'In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and

speed, and the ability to choose expert adjudicators to resolve specialized disputes.'" *Id.* at 1751 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1776 (2010)). By contrast, "[c]lasswide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes." *Id.* at 1750. Among other things, "before an arbitrator may decide the merits of a claim in classwide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted." *Id.* at 1751. Therefore, this Court concluded, the FAA preempts the *Discover Bank* rule because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748.

The logic of *Discover Bank*, as articulated by the California Supreme Court, is that a consumer in a small-claims case will never have enough at stake to merit initiating an individual arbitration proceeding. Likewise, the Panel below concluded—wrongly, we submit—that the high costs of an antitrust proceeding, even under streamlined arbitral procedures, would also deprive a potential plaintiff of the ability to vindicate its rights. Thus, *Discover Bank* and the instant case are flip sides of the same coin: In one scenario, rights supposedly cannot be vindicated because of the low amounts in controversy; in the other, the thought is that the rights cannot be vindicated due to the high costs of seeking recovery. Because the Panel below, like the California Supreme Court in *Discover Bank* and the Ninth Circuit in *Laster,* justified its refusal to enforce the arbitration agreement on its conclusion that

enforcement would preclude the plaintiffs from enforcing their rights, the Panel decision is wholly at odds with *Concepcion*'s reversal of *Laster* and rejection of *Discover Bank*.

The majority in *Concepcion* acknowledged the argument "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." Notwithstanding this rationale for the *Discover Bank* rule (and the Ninth Circuit decision in *Laster*), this Court instructed that "States cannot require a procedure that is inconsistent with the FAA . . . ." 131 S. Ct. at 1753. Thus, it held that "California's *Discover Bank* rule is preempted by the FAA." *Id.*

The Panel below claimed that *Concepcion* did not "address[] the issue presented here: whether a class-action arbitration waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their *federal statutory rights*." *In re Am. Express Merchs. Litig.*, 667 F.3d 204, 212 (2d Cir. 2012) ("*Amex III*") (emphasis added). According to the Panel, "*Concepcion* plainly offers a path for analyzing whether a *state contract law* is preempted by the FAA. Here, however, our holding rests squarely on 'a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability.'" *Id.* at 213 (emphasis added) (citing the vacated decision in *In re Am. Express Merchs. Litig.*, 554 F.3d 300, 320 (2d Cir. 2009) ("*AMEX I*")).

The Panel below never attempted to explain why the legal rights at issue in *Concepcion,* while founded on state contract principles, merited less protection under the "federal substantive law of arbitrability" than the federal statutory rights at issue in the

instant case. The time when this Court afforded disfavored FAA treatment to statutory causes of action is long past. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (holding that Sherman Act claims are arbitrable under the FAA). And, certainly, nothing in the FAA suggests that the coverage of the FAA is broader for state-law causes of action than federal claims. The FAA establishes a federal substantive law of arbitrability that applies equally in state as well as federal courts. *Southland Corp.*, 465 U.S. at 12. To the extent that state law is inconsistent with the FAA, it is preempted by the FAA.

Moreover, the Panel did not assert that Congress, when it enacted and subsequently amended the Sherman and Clayton Acts (both before and after adoption of the FAA), manifested any intent in the special context of antitrust lawsuits to override the strong federal policy favoring the enforcement of arbitration agreements. Thus, while the plaintiffs in *Concepcion* asserted state law claims and the plaintiffs here are asserting federal antitrust claims, the distinction is legally irrelevant.

In fact, the "federal substantive law of arbitrability," as articulated in the explicit language of the FAA, recognizes a single exception to the enforcement of arbitration agreements as written: The sole grounds for invalidating an arbitration agreement are those that "exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Panel below never attempted to explain how its vindication of statutory rights analysis meets the statutory test requiring grounds "for the revocation of any contract." 9 U.S.C. § 2. Clearly, a rule that would enforce an arbitration agreement if the plain-

tiff asserts a state law claim but would invalidate the arbitration agreement if the plaintiff instead attempts to allege a federal antitrust violation does not provide a basis for the revocation even of the arbitration agreement, much less a basis for the "revocation of any contract."

II. Individual Arbitration Benefits Contracting Parties And The Public And Avoids Serious Pitfalls Associated With Class Actions.

A. The Benefits Of Individual Arbitration.

"The advantages of arbitration are many: It is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing . . . dealings among the parties." H.R. Rep. No. 97-542, at 3 (1982). These "advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (citation omitted). For example, the District Court in *Concepcion* concluded that "a reasonable consumer may well prefer quick informal resolution with likely full payment over class litigation that could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." *Laster v. T-Mobile USA, Inc.*, No. 05-cv-1167, 2008 U.S. Dist. LEXIS 103712, at *37 (S.D. Cal. Aug. 11, 2008).

The benefits of arbitration are not limited to parties who have disputes. Rather, *all* contracting parties benefit from the lower dispute resolution

costs inherent in arbitration. This is because economic considerations encourage companies to pass on to their customers, in whole or in part, the lower dispute resolution costs they incur as a result of arbitration. Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 91-93.

Moreover, published studies show significant additional benefits to arbitration, as well as high levels of satisfaction for parties who participate in arbitration. *See, e.g.,* Harris Interactive, *Arbitration: Simpler, Cheaper and Faster Than Litigation* (Apr. 2005), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf (strong satisfaction with arbitration results and process, including speed and simplicity); RoperASW, *2003 Legal Dispute Study* (Apr. 2003) (survey, conducted by telephone of a random cross-section of 1,036 adult Americans, ages 18 and older, concluded that 64% of individuals would choose arbitration over court litigation and 67% believe court litigation takes too long); ABA Section of Litigation Task Force on ADR Effectiveness (August 2003) (survey of trial lawyers showed that seventy-eight percent of trial attorneys find arbitration faster than lawsuits and eighty-six percent of trial attorneys find arbitration costs are equal to or less than lawsuit costs); Michael Delikat & Morris M. Kleiner, *Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, ABA Section of Litigation, Conflict Management, Vol. 6, Issue 3 (Winter 2003) (individuals prevail at least slightly more often in arbitration than through lawsuits; monetary relief for individuals is slightly higher in arbitration than in lawsuits; arbitration is approximately 36% faster

than a lawsuit); Michael A. Perino, *Report to the Securities and Exchange Commission Regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities Arbitrations* (2002) (ninety-three percent of consumers using arbitration find it to be fair; consumers prevail 20% more often in arbitration than in court); Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2004) (study examined the outcomes of 226 arbitrations in lending-related, consumer-initiated cases based on data from January 2000 to January 2004, and a telephone survey of a random sample of claimants, and observed that: (a) consumers prevailed more often than businesses in cases that went to an arbitration hearing, with 55% of the cases that faced an arbitration decision being resolved in favor of the consumer; (b) consumers obtained favorable results (including settlements) in 79% of the cases that were reviewed; and (c) 69% of consumers surveyed were satisfied with the arbitration process); Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, 14 Metropolitan Corp. Counsel 32 (2006) (study compared "win" rates and case durations from certain disclosed 2003-2004 consumer arbitration awards from California with publicly available outcome information from the Bureau of Judicial Statistics on litigated contract cases involving individuals in the 75 largest counties in the United States and concluded that (a) consumers who brought arbitration claims against businesses prevailed in 65.5% of cases, while plaintiffs litigating contract claims in court prevailed 61.5% of the time overall, and (b) the median duration for arbitrations was 4.35 months, compared with 19.4 months for court lawsuits); Lewis L. Maltby, *Private Justice:*

Employment Arbitration and Civil Rights, 30 Colum. Hum. Rts. L. Rev. 29, 48, 63 (1998) (director of ACLU's National Task Force on Civil Liberties in the Workplace concluded that employees collectively receive 10.4% of their demand in litigation, compared with 18% in arbitration, and "arbitration holds the potential to make workplace justice truly available to rank-and-file employees for the first time in our history").

In 2009, the Searle Civil Justice Institute of Northwestern University School of Law released the first in-depth study of consumer arbitrations administered by the AAA. *See* Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitration*, 25 Ohio St. J. on Disp. Resol. 843 (2010). The study, which was based on a review of 301 consumer arbitrations that were closed by award between April and December 2007, reached the following conclusions: (1) The upfront cost of arbitration for consumer claimants is quite low (an average of $96 for claims less than $10,000 and $219 for claims between $10,000 and $75,000). These amounts are below the levels specified in the AAA fee schedule for low-cost arbitrations and are the result of arbitrators reallocating consumer costs to businesses. (2) AAA consumer arbitration is an expeditious way to resolve disputes (an average of 6.9 months). (3) Consumers won some relief in 53.3% of the cases filed and recovered an average of $19,255 (52.1% of the amount claimed). (4) No statistically significant repeat-player effect was identified using a traditional definition of repeat-player business. (5) Arbitrators awarded attorneys' fees to prevailing consumers in 63.1% of cases in which the consumer sought such an award and the average attorneys' fee award was

$14,574. (6) A substantial majority of consumer arbitration clauses (76.6%) fully complied with the AAA Due Process Protocol. (7) AAA's review of arbitration clauses for Protocol compliance was effective (98.2% of the time) at identifying and responding to clauses with Protocol violations. (8) AAA refused to administer a significant number of consumer cases because of Protocol violations by businesses. In 2007, AAA refused to administer at least 85 consumer cases, and likely at least 129 consumer cases (9.4% of its case load) because the business failed to comply with the Protocol. (9) As a result of AAA's Protocol compliance review, some businesses either waive problematic provisions or revise arbitration clauses to remove provisions that violate the Protocol.

A second study by the same organization, this one involving debt collection, showed that: "[C]onsumers prevailed more often in arbitration than in court . . . . [T]he likelihood of creditors winning in arbitration is less than in court." The authors further concluded that "nothing in our study provides any evidence of biased outcomes in arbitration." Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 Hastings Bus. L.J. 77, 80, 83 (2011). *See also* Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 Penn St. L. Rev. 1051 (2009) (study based upon an analysis of data derived from debt collection arbitrations commenced by creditors concluded that "the consumer arbitration process provides a more pro-consumer environment for claims adjudication than does the traditional court system").

The Panel decision fosters the distinct misimpression that individual arbitration (a) is far less desirable than class action litigation as a procedure for resolving disputes and (b) exculpates the corporate defendant. *See, e.g.*, 667 F.3d at 219 ("Since the plaintiffs cannot pursue these claims as class arbitration, either they can pursue them as judicial class action or not at all."); *id.* (requiring individual arbitration would "immunize" AMEX against liability). In other words, according to the Panel, class action litigation is not only superior to individual arbitration, but it is the only viable procedure that protects consumers where class arbitration is not permitted. The above studies and empirical data and the experience of *Amici* members in individual arbitrations contradict the Panel's conclusions.

B. The Problems With Class Actions.

While significant benefits are provided by individual arbitration proceedings, the existence of substantial problems with class actions cannot be disputed. *See* Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (RAND Institute for Civil Justice 2000) (leaving open the "great big question" whether class actions, on balance, serve the public well); *Mirfasihi v. Fleet Mortgage Corp.,* 356 F.3d 781, 785 (7th Cir. 2004) (rejecting settlement giving class counsel a "generous fee" because the settlement "sold . . . 1.4 million claimants down the river"); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 778 (3d Cir. 1995) (noting that class actions can become a vehicle for collusive settlements); 151 Cong. Rec. H726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner, sponsor of Class Action Fairness Act)

("The class action judicial system has become a joke, and no one is laughing except the trial lawyers . . . all the way to the bank."). Certainly, reasonable consumers could well prefer cost savings and other arbitration benefits to the speculative prospect of "relatively paltry potential recoveries" in class actions. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

Even where statutory claims are litigated in court, most consumers choose to litigate on an individual, rather than a class action basis. According to the LexisNexis CourtLink® database, over the past decade, 93% to 98% of all TILA claims brought in the federal courts were brought as individual actions, rather than class actions, even though TILA expressly permits class actions to be brought:

Year	**TILA Individual Actions**	**TILA Class Actions**
2002	539 (94% of total)	37 (6% of total)
2003	474 (93% of total)	39 (7% of total)
2004	554 (97% of total)	20 (3% of total)
2005	473 (97% of total)	19 (3% of total)
2006	671 (98% of total)	17 (2% of total)
2007	665 (95% of total)	40 (5% of total)
2008	733 (94% of total)	51 (6% of total)
2009	1,320 (97% of total)	40 (3% of total)
2010	928 (98% of total)	17 (2% of total)
2011	539 (98% of total)	15 (2% of total)

C. AMEX's Compliance With Federal Antitrust Laws Is Subject To Government Enforcement Mechanisms.

Notwithstanding Congress' considered decision *not* to provide for class actions under the antitrust laws, the Panel below concluded that enforcement of the class action waiver "'would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery.'" *AMEX III,* 667 F.3d at 211 (quoting *AMEX I*, 554 F.3d at 320). Not only is that conclusion unjustified, but the threat and reality of government enforcement also provide a powerful brake on improper conduct and an effective remedy for any wrongdoing that does occur.[2]

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[2] Prior to *Concepcion,* a number of courts relied upon government enforcement mechanisms in upholding the validity of arbitration agreements with class action prohibitions. *See, e.g., Johnson v. West Suburban Bank*, 225 F.3d 366, 375-76 (3d Cir. 2000) (even if class actions are not available in arbitration, numerous administrative mechanisms exist to enforce the federal Truth in Lending Act); *accord*, *Gay v. CreditInform*, 511 F.3d 369, 381 (3d Cir. 2007); *Randolph v. Green Tree Fin. Corp.-Ala.*, 244 F.3d 814, 818 (11th Cir. 2001). *See also Pitchford v. AmSouth Bank*, 285 F. Supp. 2d 1286, 1292 (M.D. Ala. 2003) (sustaining class action waiver in arbitration agreement in view of administrative enforcement mechanisms for violations of the federal Equal Credit Opportunity Act and the federal policy favoring arbitration); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1137-1138 (D. Kan. 2003). Moreover, Congress has *eliminated* private actions entirely (not just class actions) under several consumer credit statutes, relying *entirely* upon the efficacy of robust administrative enforcement. *See, e.g.,* Omnibus Consolidated Appropriations Act of 1997, Pub. L. 104-208, § 2604(a), 110 Stat. 3009-470 (eliminating private actions under the Truth-in-Savings Act); *Perry v. First Nat'l Bank*, 459 F.3d 816 (7th Cir. 2006) (holding

The U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), among other agencies, play an aggressive role in enforcing the antitrust laws. Section 4 of the Sherman Act, 15 U.S.C. § 4, and Section 15 of the Clayton Act, 15 U.S.C. § 25, give the DOJ authority to obtain preliminary and permanent injunctions, divestitures, rescission and forfeitures. The DOJ has been particularly aggressive in enforcing antitrust laws in the payment cards industry. In litigation filed in 2010, the DOJ alleged that MasterCard, Visa and AMEX rules restrained merchants from encouraging consumers to use preferred payment forms, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The settlement reached with MasterCard and Visa required those card networks to discontinue enforcing rules preventing merchants from offering consumers discounts or other incentives for using particular payment networks, cards within that network, or other payment methods. *United States v. Am. Express Co.*, No. 10-4496, 2011 U.S. Dist. LEXIS 87560 (E.D.N.Y. July 20, 2011). American Express continues to litigate this case.

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that amendments to the Fair Credit Reporting Act eliminated private actions against consumer report users). And when Congress recently enacted the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the "CARD Act"), Pub. L. 111-24, 123 Stat. 1734, it placed a number of the CARD Act's substantive provisions in a part of TILA that is not enforceable through private actions. *See* 15 U.S.C. § 1640(a) (creating private right of action for violations of *Part B* of TILA); 15 U.S.C. §§ 1665c-e (CARD Act provisions, placed outside Part B, requiring reduction in interest rates in specified circumstances, limiting penalty fees and requiring consideration of the cardholder's ability to repay).

Additionally, the DOJ frequently brings criminal prosecutions under the Sherman Act. Section 1 of the Sherman Act, 15 U.S.C. § 1, the most commonly used criminal antitrust provision, establishes imprisonment and fines for individuals of up to ten years and $1 million and fines for corporations of up to $100 million for each count. The DOJ has the authority to seek greater fines under 18 U.S.C. § 3571, equal to twice the gross financial loss or gain resulting from a violation.

Section 5 of the FTC Act, 15 U.S.C. § 45, gives the FTC authority to seek remedies for unfair methods of competition, including antitrust violations, that include: (1) penalties up to $16,000 per violation, 15 U.S.C. § 45(m), 16 C.F.R. § 1.98; (2) injunctions and ancillary relief, 15 U.S.C. § 53(b); and/or (3) "such relief as the court finds necessary to redress injury to consumers . . . [including] rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages . . . ." 15 U.S.C. § 57b(b). *See also FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) (holding that, in an injunction proceeding, a court has the authority to grant any ancillary relief that is "necessary to accomplish complete justice," including the power to grant rescission); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (asset freeze).

D. It Is Up To Congress, Not This Court, To Determine Whether And When The Benefits Of Arbitration Should Be Sacrificed In Favor Of Class Action Proceedings.

Of course, Congress enacted the FAA and Congress can repeal or narrow it at any time. Congress could provide in another statute that private actions to enforce rights under the statute are exempt from the FAA. *See, e.g.,* Section 1414(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), 15 U.S.C. § 1639c (providing generally that no "residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction"). It could even give an administrative agency the power to cut back on the FAA in specified circumstances. *See* Section 1028 of Dodd-Frank, 12 U.S.C. § 5518 (providing that, in specified circumstances, the Consumer Financial Protection Bureau, "by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties"). But the optimal balance between arbitration and litigation (or other dispute resolution mechanisms) is ultimately a legislative, not a judicial, function, and this Court should not engraft onto the FAA its own views of the proper policy.

CONCLUSION

For the foregoing reasons and the reasons set forth in AMEX's brief, *Amici* respectfully request that this Court reverse the Panel decision below.

Respectfully submitted,

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