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# "To a Hammer Everything Looks Like a Nail": The Supreme Court's . Misapplication of the Vindication of Rights Doctrine

Rebecca Wolf

*American University Washington College of Law*

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# “TO A HAMMER EVERYTHING LOOKS LIKE A NAIL”: THE SUPREME COURT’S MISAPPLICATION OF THE VINDICATION OF RIGHTS DOCTRINE

REBECCA WOLF\*

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## I. INTRODUCTION

Italian Colors Restaurant, a small merchant in California, decided to contract with American Express to accommodate wealthy consumers and corporate clients who use the American Express personal and corporate charge cards.<sup>1</sup> Under the provisions of the American Express agreement, Italian Colors was also forced to accept American Express's general-purpose credit card, which does not attract a similarly affluent and profitable clientele.<sup>2</sup> But for American Express's "Honor All Cards" policy, most merchants would not accept the general-purpose credit card because it does not bring in enough profit to justify the higher fees that come with it.<sup>3</sup> Nevertheless, American Express charged the same merchant discount fee on both the charge and credit cards, which is about thirty-five percent higher than its competitors at Visa and MasterCard.<sup>4</sup> Thus, not only did Italian Colors have to accept a credit card it would not otherwise, it lost an additional seventy cents on every such purchase.<sup>5</sup> American

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1. See Amended Complaint at ¶¶ 1, 3, 24-25, *In re Am. Express Merch. Litig.*, No. 03-cv-09592-GBD (S.D.N.Y. Feb. 19, 2009) (noting that American Express issues corporate charge cards to 70% of Fortune 500 companies).

2. See *id.* at ¶¶ 2, 33 (explaining that all merchants contracting with American Express were required to accept any card bearing the American Express name, trademark, logo, or service mark).

3. See *id.* at ¶¶ 19, 36 (noting that the general-purpose credit card, unlike the charge card, does not require cardholders to pay off their full balance at the end of every month).

4. See *id.* at ¶¶ 22, 36 (noting that American Express charges a merchant discount fee of 2.7% for all of its cards, whereas Visa and MasterCard each impose a 2.0% merchant discount fee).

5. See *id.* at ¶ 17 (claiming the merchants were damaged by having to accept the credit cards that could impose a higher fee than would prevail absent the tying arrangement).

Express's policy of conditioning the availability of the corporate charge card on the merchants' agreement to also accept their general-purpose credit card is considered a "tying" arrangement, which may be *per se* illegal under the federal antitrust laws.<sup>6</sup>

Italian Colors filed suit and sought to certify a class of similarly aggrieved merchants.<sup>7</sup> Unfortunately for Italian Colors, the merchant agreement they signed with American Express included an arbitration clause prohibiting merchants from participating as a class or acting in a representative capacity.<sup>8</sup> According to an expert economist, Italian Colors and similar small merchants could only hope to receive less than six thousand dollars in trebled damages for a claim that could cost one million dollars in expert fees.<sup>9</sup> Italian Colors was then at a crossroads because it did not have the resources to pay for arbitration, and it could not spread the costs amongst those merchants who could also bring a claim.<sup>10</sup> As a result, no merchant could feasibly pursue arbitration and American Express did not have to face consequences for illegal activity.<sup>11</sup>

Italian Colors and its fellow merchants successfully raised this argument in the Second Circuit, which held that a class action waiver that makes individual arbitration prohibitively expensive is unenforceable as a *de facto* waiver of liability for American Express if the merchants have no suitable forum through which they can vindicate their rights.<sup>12</sup> American Express

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6. See, e.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 2, 10 (1984) (acknowledging a *per se* illegal tying arrangement exists when a seller possessing sufficient market power for the tying product exploits its control to force buyers to purchase a separate product the buyer either did not want or would have purchased elsewhere on different terms).

7. See *In re Am. Express Merch. Litig. (Italian Colors III)*, 667 F.3d 204, 207 (2d Cir.) (describing the purported class as all merchants who accepted American Express credit cards as a result of accepting American Express charge cards), *reh'g en banc denied*, 681 F.3d 139 (2d Cir.), *cert. granted sub nom. Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012), overruled by, 133 S. Ct. 2304 (2013).

8. See *id.* at 209 (outlining the dispute resolution clause under which merchants may only bring a claim individually in arbitration or small claims court).

9. See *id.* at 218 (citing an economic study stating that the plaintiffs' costs could exceed one million dollars, where the average merchant could expect \$5252 or less in trebled damages).

10. See *id.* (citing an economist's opinion that it would be economically irrational for an individual merchant to arbitrate).

11. See *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (recognizing that when a plaintiff's expected damages are infinitesimal compared to potential costs and no claims can be aggregated, no plaintiff will bring a claim); see also *Italian Colors III*, 667 F.3d at 209-11 (noting the merchants in this action cannot afford to arbitrate unless they can proceed as a class).

12. See *Italian Colors III*, 667 F.3d at 204 (concluding that the arbitration agreement was unenforceable because the plaintiffs could not proceed in arbitration

challenged the Second Circuit's holding, posing the question to the Supreme Court of "[w]hether the Federal Arbitration Act 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 statutory claim."<sup>13</sup> Based in part on the Court's recent decision in *AT&T Mobility LLC v. Concepcion*,<sup>14</sup> the Supreme Court held that the merchants did not present a legitimate "vindication of rights" claim and that the Federal Arbitration Act (FAA) required the Court to enforce the arbitration agreement.<sup>15</sup>

This Comment argues that an arbitration agreement in an adhesion contract that precludes class arbitration and makes individual arbitration prohibitively expensive is unenforceable under the FAA because it effectively prevents plaintiffs from vindicating their federal statutory rights.<sup>16</sup> This Comment also argues that *Italian Colors* is distinguishable from *Concepcion* because the merchants demonstrated arbitration was prohibitively expensive, and because the FAA should not be construed to override the substantive rights afforded by other federal statutes.<sup>17</sup>

Part II examines how courts interpret the savings clause of the FAA to hold arbitration agreements unenforceable, specifically when arbitration in a particular plaintiff's case does not provide an adequate forum for the vindication of federal statutory rights.<sup>18</sup> Part II also discusses *Concepcion* and the Supreme Court's recent decision in *Italian Colors*, rejecting the vindication of rights doctrine as to the merchants' claim that American Express's arbitration agreement was unenforceable.<sup>19</sup>

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without incurring prohibitive costs).

13. Petition for Writ of Certiorari at i, *Am. Express Co.*, 2012 WL 3091064 (No. 12-133).

14. 131 S. Ct. 1740, 1750 (2011) (holding a California law barring many class action waivers was preempted by the FAA for allegedly disfavoring arbitration).

15. See *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310-12 (2013) (holding that there was no congressional command to invalidate the arbitration agreement and that the Court's precedents did not require invalidating an arbitration agreement where the plaintiffs merely could not afford to prove their claim).

16. See *Italian Colors III*, 667 F.3d at 219 (holding an arbitration agreement containing a class action waiver unenforceable because allowing the plaintiffs to aggregate their claims was the only economically rational way to vindicate their statutory rights).

17. See *id.* at 213 (holding that *Concepcion* did not control the question presented because substantive rights under federal law were at stake, as opposed to state contract law).

18. See *infra* Part II (outlining how the FAA has been interpreted by the courts, and how the Supreme Court established the vindication of rights doctrine applied in *Italian Colors III*).

19. See *infra* Part II (explaining how the Supreme Court rejected the Second

Part III argues that the Supreme Court should have held that the vindication of rights doctrine falls squarely under the FAA, and that the Second Circuit properly held American Express's arbitration agreement unenforceable vis-à-vis Italian Colors.<sup>20</sup> Part III also asserts that *Concepcion* is distinguishable as addressing purely state law, and argues that Supreme Court precedent establishes that a plaintiff may assert a prohibitive costs defense regardless of the form of those prohibitive costs.<sup>21</sup> Part IV offers policy arguments for ratifying the vindication of rights doctrine in order to preserve the viability of small-dollar claims.<sup>22</sup> Finally, Part V concludes that had the Court invalidated the kinds of arbitration agreements crafted by American Express, future courts could have ensured that the FAA is reconciled with other federal statutes and make arbitration agreements as enforceable as other contracts.<sup>23</sup>

## II. BACKGROUND

### *A. The Federal Arbitration Act, Preemption, and Federal Harmonization*

The FAA, enacted in 1925, was intended to reverse judicial hostility to the arbitral forum and ensure arbitration agreements are as enforceable as any other contract.<sup>24</sup> Thus, Congress established a mandate to enforce arbitration agreements according to their terms and resolve doubts as to the breadth of an agreement in favor of arbitration.<sup>25</sup> Contract disputes are generally arbitrable, unless the contested issue relates to the making and performance of the arbitration clause itself.<sup>26</sup>

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Circuit's attempt to distinguish the Court's recent opinion in *Concepcion*).

20. See *infra* Part III (arguing that even if an arbitration agreement must be upheld in cases that may affect the vindication of state-law rights, the FAA should not be extended to prevent the vindication of federal statutory rights).

21. See *infra* Part III (concluding that the holding in *Concepcion* should be limited to questions of state law but that its comparison of bilateral and class arbitration should be applied to the question of prohibitive costs).

22. See *infra* Part IV (discussing the importance of the class action mechanism in small-dollar claims).

23. See *infra* Part V (concluding that the vindication of rights doctrine is necessary to ensure plaintiffs who would incur prohibitive costs can still pursue a claim).

24. See generally 9 U.S.C. § 2 *et seq.* (2006); *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1274 (2009) (describing the "ouster" doctrine, under which courts refrained from ordering parties to submit their claims to arbitration despite an arbitration agreement because those clauses 'ousted' the courts of their jurisdiction).

25. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (finding a congressional declaration of a liberal policy favoring arbitration and that questions of arbitrability must be addressed with a "healthy regard" for arbitration).

26. See *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395, 404

Since enactment of the FAA, courts have upheld arbitration agreements so long as the agreement does not violate general principles of state contract law or directly undermine the substantive federal statutory rights at issue.<sup>27</sup> Section Two of the FAA, known as the Act's savings clause, provides that any contract agreeing to settle disputes in arbitration is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>28</sup> Courts can invalidate arbitration agreements under state contract law for the same defenses that would render any contract unenforceable, such as fraud, duress, or unconscionability, so long as the defenses proffered do not arise specifically because an agreement to arbitrate is at issue.<sup>29</sup>

When a state law is in direct conflict with a federal law or impedes a federal objective, the federal law may preempt the state law.<sup>30</sup> When two federal laws are in conflict, however, preemption is not a concern; instead, courts must make an effort to balance the interests of both federal statutes and give weight to each.<sup>31</sup> When one statute is more recent than the other, courts must give effect to the latest statute while allowing the earlier legislative expression to continue to operate.<sup>32</sup> Courts should not assume

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(1967) (holding that an arbitrator could resolve a claim of "fraud in the inducement" because the fraud related to the contract generally, rather than the making of the arbitration agreement); *see also* *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (holding the Act was applicable in state court because the legislative history suggested Congress did not intend to confine arbitrations to only those seeking enforcement in federal court).

27. *See, e.g., Morrison v. Circuit City Stores*, 317 F.3d 646, 663 (6th Cir. 2003) (en banc) (holding an arbitration agreement containing cost-splitting and remedy-limitation provisions unenforceable for undermining the deterrent and remedial purposes of Title VII).

28. 9 U.S.C. § 2 (2012); *see also Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (recognizing that the FAA savings clause permits courts to invalidate arbitration agreements for contract defenses such as fraud, duress, or unconscionability).

29. *See, e.g., Perry v. Thomas*, 482 U.S. 483, 492, 493 n.9 (1987) (limiting unconscionability as a defense when the theory is derived from the uniqueness of arbitration).

30. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (noting further that state law can be preempted when Congress evinced an intention to occupy the field).

31. *See Pennsylvania v. Dep't of Health & Human Servs.*, 723 F.2d 1114, 1119 (3d Cir. 1983) (noting that "statutory provisions enacted at different times [are] read as harmoniously as possible").

32. *See Int'l Union of Elec. Radio & Mach. Workers, AFL-CIO v. NLRB*, 289 F.2d 757, 761 (D.C. Cir. 1960) (concluding that when successive enactments are inconsistent, a court must resolve the ambiguity to give effect to the latest statute and still allow the earlier statute to be operative).



that legislators intended to render an earlier statute in the United States Code superfluous when interpreting two conflicting federal statutes.<sup>33</sup>

*B. Supreme Court Precedent Establishing the Vindication of Rights Doctrine*

Federal statutory claims are arbitrable so long as Congress did not indicate a desire to foreclose arbitration of the particular statutory right at issue, including claims under the antitrust laws.<sup>34</sup> If the agreement to arbitrate requires potential litigants to forgo federal substantive rights, however, the agreement is unenforceable because the plaintiffs cannot effectively vindicate their rights in arbitration.<sup>35</sup>

In *Mitsubishi Motors*, the Court considered whether to adopt a categorical rule to bar antitrust claims from arbitration.<sup>36</sup> The Court declined to adopt such a rule because Congress did not explicitly intend to preclude antitrust claims from arbitration and there was no inherent conflict between the two.<sup>37</sup> Moreover, the plaintiffs did not contest that the statute could not function as Congress intended in arbitration or that they would have to forgo the substantive rights afforded by the statute.<sup>38</sup> The Court held, however, that an arbitration agreement is only enforceable “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.”<sup>39</sup> Indeed, as long as arbitration merely provides a change in forum but does not affect any substantive rights in the underlying statutory scheme, an arbitration agreement does not run afoul of

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33. See *Bilski v. Kappos*, 130 S. Ct. 3218, 3228 (2010) (finding that an interpretation of one statute which would render enforcement of the earlier statute impracticable was impermissible).

34. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636-37 (1975) (holding that antitrust claims were arbitrable because there was no congressional indication in the text or legislative history of the Sherman Act that the statute protected against waiver of the right to a judicial forum).

35. See *id.* at 637 n.19 (acknowledging the Court would readily condemn an agreement that effectively operated as a prospective waiver of a party’s right to pursue statutory remedies).

36. See *id.* at 623-25 (rejecting the premise that an arbitration agreement could not protect the viability of federal statutory claims that would typically protect the non-drafter without an agreement to arbitrate those particular statutory claims).

37. See *id.* at 633-34 (reasoning that the complexity of antitrust claims alone was insufficient to rule as a matter of law that antitrust claims were inherently inconsistent with arbitration).

38. See *id.* at 637 (indicating that the antitrust laws would continue to serve both their remedial and deterrent functions so long as the plaintiffs could effectively vindicate their rights).

39. See *id.* (declining to speculate as to whether the particular agreement at issue in fact had such an effect on the claimant’s federal statutory rights).

this principle.<sup>40</sup> Since *Mitsubishi Motors*, the Court has found that arbitration is not inherently inconsistent with the federal statutes often applicable to contracts containing arbitration agreements, such as the Securities Exchange Act and the Age Discrimination in Employment Act.<sup>41</sup>

In addition to the requirement that a plaintiff must get the full benefit of the substantive rights provided for in the statute, plaintiffs may not be subjected to arbitration if they could not bring a claim without incurring prohibitive costs.<sup>42</sup> In *Green Tree*, a financial institution compelled a mobile home purchaser to arbitrate her claims under the Truth in Lending Act and the Equal Credit Opportunity Act.<sup>43</sup> The plaintiff alleged that Green Tree's agreement, which was silent as to arbitration expenses, posed the risk that arbitration would be financially inaccessible.<sup>44</sup> Acknowledging that possibility, the Court held a plaintiff alleging that arbitration would be prohibitively expensive bears the burden of proving the likelihood of incurring such costs.<sup>45</sup> In sum, *Green Tree* adds to the "effective vindication" equation the requirement that a plaintiff should not incur prohibitive costs.<sup>46</sup>

The combination of the tests arising out of *Mitsubishi Motors* and *Green*

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40. See *id.* at 628 (finding that a party only agrees to a change in forum by assenting to an arbitration agreement, and does not agree to forgo any substantive rights).

41. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31-32 (1991) (holding that claims under the ADEA were arbitrable because the arbitrators had the power to grant the same remedies and equitable relief that a plaintiff could receive in court); see also *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 230 (1987) (concluding that absent obvious legislative intent and any apparent conflict, plaintiffs' statutory claims were arbitrable because they could realize the same remedies in arbitration and litigation).

42. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (recognizing that large arbitration costs may preclude a litigant with limited financial means from effectively vindicating her federal statutory rights); see also *Italian Colors III*, 667 F.3d 204, 212 (2d Cir.) (noting that prohibitive costs exist when the cost of pursuing arbitration would dwarf any potential recovery), *reh'g en banc denied*, 681 F.3d 139 (2d Cir.), *cert. granted sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012).

43. See 531 U.S. at 79 (claiming petitioners violated the Truth in Lending Act by failing to disclose an insurance requirement and the Equal Credit Opportunity Act by requiring her to arbitrate her statutory claims).

44. See *id.* (positing that an agreement silent as to arbitration costs created a risk she would bear prohibitive costs).

45. See *id.* at 90-92 (finding the arbitration agreement was enforceable because the plaintiff did not develop any evidentiary record attesting to the likelihood she would incur prohibitive costs).

46. See *id.* at 90 (indicating that prohibitive costs is a relevant inquiry in determining whether a plaintiff can effectively vindicate her federal statutory rights).

*Tree* is the vindication of rights doctrine, which states that an arbitration agreement is enforceable so long as a plaintiff can effectively vindicate her rights in arbitration.<sup>47</sup> A plaintiff can effectively vindicate her rights when the substantive rights under the statute are still in place and prohibitive costs will not preclude the plaintiff from bringing a claim in arbitration.<sup>48</sup>

The Supreme Court has tended to disfavor class actions in the arbitration context because it changes the nature of arbitration and arguably compromises some of its benefits.<sup>49</sup> In *Stolt-Nielsen*, the Court determined that an arbitrator could not permit a group of plaintiffs to proceed as a class unless there was a contractual basis for concluding that the parties agreed to do so.<sup>50</sup> If the arbitration agreement is silent as to whether it permits class arbitration, courts now must assume the lack of consent is an implicit prohibition on collective proceedings.<sup>51</sup> The holding in *Stolt-Nielsen* that class arbitration is only permitted when it is expressly provided for is a foreshadowing of the Court's ultimate determination in *AT&T Mobility LLC v. Concepcion* that aggregated proceedings are inconsistent with arbitration.<sup>52</sup>

### C. AT&T Mobility LLC v. Concepcion

The Supreme Court held in *AT&T Mobility LLC v. Concepcion* that the FAA preempted a state law prohibiting class action waivers in small-dollar claims because class arbitration interferes with the benefits of arbitration. The *Concepcions* filed a class action against AT&T for false advertising

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47. See *Italian Colors III*, 667 F.3d at 216 (holding that *Mitsubishi Motors* and *Green Tree* require courts to find arbitration agreements unenforceable when the plaintiffs can demonstrate that arbitration is so prohibitively expensive that they cannot vindicate their rights).

48. See *Green Tree*, 531 U.S. at 90 (holding that prohibitive costs for the plaintiff could provide grounds for finding an arbitration agreement unenforceable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636-37 (1975) (finding that a plaintiff cannot effectively vindicate her rights in arbitration if the substantive rights afforded by the applicable federal statute are compromised).

49. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1759, 1775-76 (2010) (opining that bilateral arbitration is fundamentally different from class arbitration in its informality, simplicity, and expediency).

50. See *id.* at 1775 (holding that a party may not be compelled to submit to class arbitration absent clear assent to do so because it changes the nature of the agreement to such a degree that an arbitrator cannot assume the parties consented to it).

51. See *id.* (holding that even though an arbitrator may presume parties implicitly authorized some procedures, an implicit agreement to authorize class arbitration is no such procedure because of the differences between class and bilateral arbitration).

52. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011) (noting that *Stolt-Nielsen* portrayed the character of class arbitration as 'fundamentally' different from bilateral arbitration (quoting *Stolt-Nielsen*, 130 S. Ct. at 1776)).

and fraud under California's *Discover Bank* rule, which states that class action waivers are unenforceable in adhesion contracts when small damages are at stake and the drafter attempts to cheat large numbers of consumers out of individually small amounts of money.<sup>53</sup> Pursuant to their wireless service agreement containing an arbitration clause and a class action waiver, AT&T moved to compel arbitration.<sup>54</sup> The district court and the Ninth Circuit concluded that the prohibition of class actions was unconscionable, despite finding the agreement was largely consumer friendly and would likely make the plaintiffs whole, even in bilateral arbitration.<sup>55</sup> Notably, the Ninth Circuit determined that the FAA did not preempt, and was consistent with, the *Discover Bank* rule, considering the rule an unconscionability principle that applied to contracts generally and placed arbitration agreements on equal footing.<sup>56</sup>

Although the *Discover Bank* rule nominally applied to all contracts, the Supreme Court found that the state law rule would have a disproportionate impact on arbitration agreements, thereby interfering with Congress's objective in enacting the FAA.<sup>57</sup> This disproportionate impact arises out of the Court's perception that class action waivers affect agreements to arbitrate more often than other contracts, likening the waivers to a waiver of judicially monitored discovery or the Federal Rules of Evidence.<sup>58</sup> According to the Court, requiring the availability of class wide arbitration interferes with the "fundamental attributes" of arbitration—its simplicity and expediency—by involving more procedures and slowing down the process.<sup>59</sup> Because class arbitration enlarges the potential number of

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53. *See id.* at 1744 (believing AT&T engaged in false advertising and fraud by charging sales tax on a cell phone advertised as free).

54. *See id.* (citing the arbitration clause which mandated plaintiffs to bring claims individually, not as a class member, in any purported class or representative proceeding).

55. *See id.* at 1744-6 (agreeing with the *Concepcions* that because the provision was unconscionable under *Discover Bank*, finding the arbitration agreement unenforceable fell under the FAA savings clause).

56. *See id.* at 1745-47 (finding a waiver of class actions in litigation unconscionable under *Discover Bank*).

57. *See id.* at 1747-48 (finding the overarching purpose of the FAA was to facilitate streamlined proceedings, and that class arbitrations do not comport with this purpose).

58. *See id.* at 1748, 1750 (concluding that most consumer contracts in today's world are contracts of adhesion containing class action waivers). *But see* Brief for Respondent at 32-33, *Concepcion*, 131 S. Ct. 1740 (No. 09-893) (distinguishing waivers to discovery or the Federal Rules of Evidence from class action waivers because the former are inherently associated with litigation while the latter is compatible with both litigation and arbitration).

59. *See Concepcion*, 131 S. Ct. at 1750-51 (opining that class arbitration slows down the proceeding because additional procedures accompany the consideration of

plaintiffs, and thus the amount of potential damages, businesses may have less incentive to resort to arbitration, especially where a court would only overturn a judgment upon a showing of corruption or partiality by the arbitrator.<sup>60</sup> Moreover, requiring the availability of class arbitration generally says nothing about the particular plaintiffs' ability to arbitrate bilaterally.<sup>61</sup> Pursuant to AT&T's agreement that provided enough consumer-friendly provisions to incentivize plaintiffs to proceed individually, the Concepcions did not need to aggregate their claims to be made whole.<sup>62</sup> Because of AT&T's contract provisions requiring a seven thousand five hundred dollar premium and double attorney's fees, the Concepcions were essentially guaranteed at least a full recovery.<sup>63</sup> The Court repeatedly noted the Concepcions could have received even excess compensation in bilateral arbitration because of the provisions in AT&T's arbitration agreement.<sup>64</sup> Therefore, class arbitration was not only inconsistent with arbitration's fundamental attributes but was also unnecessary in the case at bar.<sup>65</sup> Notably, the Court recognized that a class action waiver could keep "small-dollar" claimants from seeking to resolve their disputes, but that possibility did not disturb its holding.<sup>66</sup> Because a rule requiring the availability of class proceedings in certain scenarios may make arbitration less attractive, the FAA preempted the *Discover Bank*

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absent parties).

60. *See id.* at 1750-52 (suggesting that because class arbitration poses higher transaction costs to defendants who will be less likely to resort to the arbitral forum, the *Discover Bank* rule has the effect of displacing arbitration agreements).

61. *See id.* at 1753 (rejecting the dissent's contention that class proceedings would be necessary to protect small-dollar claims because the Concepcions' claim was likely to be resolved).

62. *See id.* (providing further that AT&T was responsible for the costs of all meritorious claims, the customer must arbitrate close to home, and for some claims, the customer could opt for arbitration over the phone or purely by papers).

63. *See id.* at 1753 (indicating that plaintiffs with meritorious claims would have an incentive to bring their small-dollar claims because they would actually realize a sufficient recovery).

64. *See* Transcript of Oral Argument at 29-32, *Concepcion*, 131 S. Ct. 1740 (No. 09-893) (opining that the Court should only be concerned with the instant parties and not the arbitration agreement's effect on third parties); *see also Concepcion*, 131 S. Ct. at 1753 (finding the arbitration agreement at issue cognizable under the savings clause of the FAA because the Concepcions did not need to proceed as a class in order to resolve their claim with AT&T).

65. *See Concepcion*, 131 S. Ct. at 1753 (indicating that the class action mechanism cannot to be preserved in any instance that interferes with the FAA's objectives).

66. *See id.* (considering the possibility that small-dollar claims could fall through the cracks in our legal system "desirable for unrelated reasons").

rule.<sup>67</sup>

#### D. Italian Colors

##### 1. *The Second Circuit Held That the Vindication of Rights Doctrine Warranted Invalidating the Arbitration Agreement.*

The Second Circuit in *Italian Colors* held that the arbitration agreement between American Express and the plaintiff merchants was unenforceable, despite the holding in *Concepcion*, because arbitration was so cost-prohibitive that plaintiffs could not vindicate their federal statutory rights.<sup>68</sup> Under the provisions of the arbitration agreement, each merchant that wanted to bring a claim would have to pay all of the costs of arbitration on her own, including expert and attorney's fees.<sup>69</sup> According to an expert economist, Italian Colors would likely incur hundreds of thousands of dollars in expert fees to prove its antitrust claims, and receive less than six thousand dollars in damages.<sup>70</sup> Relying on the expert economist's study, plaintiff merchants claimed that enforcing the class action waiver, in addition to the agreement's prohibition on cost sharing or cost shifting, would preclude them from vindicating their rights because bilateral arbitration would be prohibitively expensive.<sup>71</sup>

The Second Circuit held that the arbitration agreement was unenforceable and that *Concepcion* did not directly apply to the question presented.<sup>72</sup> Applying the vindication of rights doctrine, the Second Circuit held that if a plaintiff could not feasibly pursue a claim individually and

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67. See *id.* at 1751-52 (claiming that arbitration is poorly suited to the higher stakes of class litigation and doubting that Congress intended to allow an arbitrator to handle those kinds of claims).

68. See *Italian Colors III*, 667 F.3d 204, 214 (2d Cir.) (holding that *Concepcion* did not require the Second Circuit to uphold an arbitration agreement if the plaintiffs could demonstrate that they could not feasibly vindicate their federal statutory rights), *reh'g en banc denied*, 681 F.3d 139 (2d Cir.), *cert. granted sub nom.* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 594 (2012), overruled by 133 S. Ct. 2304 (2013).

69. See *id.* at 209-11 (finding in the arbitration clause a provision that prohibits merchants from acting in any sort of representative capacity or spreading out fees amongst other plaintiffs).

70. See *id.* at 218 (citing an economic study finding the costs of the plaintiffs' case could exceed one million dollars, where the average merchant could expect only \$5252 in trebled damages).

71. See *id.* (citing the economist's affidavit stating it would be economically irrational to pursue a claim individually when the expected damages would only pay a small fraction of the expert fees necessary to make a plaintiff's case).

72. See *id.* at 206, 219 (holding that when a plaintiff can sufficiently demonstrate that pursuing arbitration individually would be prohibitively expensive, an arbitration agreement containing a class action waiver is unenforceable).

was barred from collective action, valid grounds existed for revocation of the class action waiver under the FAA.<sup>73</sup> Recognizing that the burden lies on the party seeking to avoid arbitration to prove the likelihood of incurring prohibitive costs, the court held that the plaintiffs had sufficiently met their burden.<sup>74</sup> In other words, the court applied the vindication of rights doctrine to hold that a class action waiver can make arbitration prohibitively expensive when the plaintiff can show the costs of arbitrating individually would dwarf its recovery.<sup>75</sup>

According to the Second Circuit, *Concepcion* only analyzed when state contract law is preempted by the FAA, while its holding concerned whether a litigant could effectively vindicate a federal statutory right in arbitration.<sup>76</sup> In particular, the Second Circuit found that the federal antitrust statutory scheme explicitly intended to encourage private enforcement by awarding treble damages and reasonable attorney's fees and costs under the Clayton Act.<sup>77</sup> The court also found that the fee-shifting provisions awarded under the Clayton Act would be insufficient to fully compensate the plaintiffs.<sup>78</sup> Because most attorneys counsel plaintiffs on a contingency-fee basis, no competent attorney would take on such a complex antitrust case when she could not expect to make a profit even if she wins the case.<sup>79</sup> Removing the plaintiffs' only reasonable means of

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73. See *id.* at 210 (finding *Green Tree* controlling to the extent it holds an arbitration agreement is unenforceable if a plaintiff demonstrates arbitration would be prohibitively expensive).

74. See *id.* at 210-12 (finding the economist's affidavit credible in establishing that American Express's agreement ensures no merchant will seek to vindicate its rights by removing the plaintiffs' only reasonably feasible means of recovery).

75. See *id.* at 219 (emphasizing that it was not holding that class action waivers in arbitration agreements are *per se* unenforceable, but rather that each waiver should be analyzed by its effect on the particular parties' ability to arbitrate).

76. See *id.* at 213-14, 219 (recognizing that *Concepcion* and *Stolt-Nielsen* prohibited courts from requiring parties to submit to class arbitration absent an express agreement to do so, but noting that its holding would make no such requirement).

77. See *In re Am. Express Merch. Litig. (Italian Colors I)*, 554 F.3d 300, 317-18 (2d Cir. 2009) (rejecting the defendant's argument that the Clayton Act would provide the plaintiffs with sufficient financial incentives to arbitrate individually because even those provisions were inadequate to fully recoup their expenses), *vacated*, 130 S. Ct. 2401 (2010), *aff'd*, 634 F.3d 187 (2d Cir. 2011), *aff'd on reh'g*, 667 F.3d 204 (2d Cir.), *reh'g en banc denied*, 681 F.3d 139 (2d Cir.), *cert. granted sub nom. Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012), overruled by 133 S. Ct. 2304 (2013).

78. See *Italian Colors III*, 667 F.3d at 218 (finding insufficiencies because the trebling of small individual damages would not cover the expert fees, and the plaintiffs must factor in the risk of losing and recovering no fees at all).

79. See *Kristian v. Comcast Corp.*, 446 F. 3d 25, 58-59 (1st Cir. 2006) (noting that plaintiffs' attorney in antitrust suits make huge upfront expenditures and factor in the uncertainty of success).

recovery was troubling to the court due to the effect it would have on the role of private citizens in supplementing the government's efforts to enforce the antitrust laws.<sup>80</sup> Further, *Green Tree* does not limit the forms of prohibitive costs to those unique to arbitration, such as the filing fee and the cost for the arbitrator, and other circuits have concluded that the relevant inquiry is how expensive arbitration would be *in toto* from the claimant's point of view.<sup>81</sup>

*2. The Supreme Court Held That the Vindication of Rights Doctrine, If It Indeed Exists, Does Not Apply to Arbitration Agreements That Do Not Implicate the "Right to Pursue" a Claim Under Federal Law.*

On June 20, 2013, the Supreme Court, in a 5-3 decision,<sup>82</sup> reversed the Second Circuit and held that American Express's arbitration agreement was enforceable.<sup>83</sup> The Court reasoned that the FAA requires courts to "rigorously enforce" arbitration agreements, even when a violation of a federal statute is at issue, "unless the FAA's mandate has been overridden by a contrary congressional command."<sup>84</sup> Focusing on the plaintiffs' complaint that the arbitration agreement included a class action waiver, the Court determined that neither the antitrust laws nor congressional approval of Federal Rule of Civil Procedure 23 was such a "congressional command." First, the antitrust laws themselves say nothing about class actions and those laws were enacted before class actions were fully contemplated.<sup>85</sup> Neither, the Court reasoned, does congressional approval

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80. See *Italian Colors I*, 554 F.3d at 312-13 (indicating that class actions may be the only effective mechanism for private parties bringing antitrust actions to effectively vindicate their rights).

81. See *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001) (believing "the proper inquiry under *Gilmer* is not where the money goes but rather the amount of money that ultimately will be paid" because plaintiffs would be deterred from pursuing their statutory rights no matter who receives their funds).

82. The majority opinion, authored by Justice Scalia, was joined by Chief Justice Roberts and Justices Alito, Kennedy, and Thomas. Justice Kagan, joined by Justices Breyer and Ginsburg, dissented. Justice Sotomayor, who was on the panel in the first decision in the Second Circuit, was recused.

83. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (concluding that the FAA did not permit a court, before requiring the parties to arbitrate, to make a determination on a case-by-case basis that the plaintiffs could cost-effectively produce the evidence necessary to succeed on the merits of their underlying claim).

84. See *id.* at 2309 (quoting *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (emphasizing the FAA's mandate that courts require parties to submit to arbitration with whom the parties agreed to arbitrate and under the terms to which the parties assented) (internal quotation marks omitted)).

85. See *id.* at 2309-10 (noting that Rule 23, which provides for class certification if



of class certification in certain circumstances amount to an entitlement to such proceedings when federal statutory rights are at issue.<sup>86</sup>

The Court concluded that the language in *Mitsubishi Motors* invoked by the Second Circuit in favor of recognizing the vindication of rights doctrine is purely dicta, because the *Mitsubishi Motors* Court declined to invalidate the arbitration agreement at issue.<sup>87</sup> Additionally, the Court emphasized that the concern espoused by *Mitsubishi Motors* was a plaintiff's "right to pursue" statutory remedies.<sup>88</sup> According to the Court, a plaintiff's "right to pursue" a federal statutory claim is only abridged if the agreement on its face bars the claim. In other words, the cost of proving a federal statutory claim is a consideration apart from a plaintiff's right to pursue that claim, and only the latter can affect the enforceability of an arbitration agreement.<sup>89</sup> As such, because a class action waiver still, on its face, preserves a party's right to bring a claim individually in arbitration, there is no need under *Mitsubishi Motors* or the FAA to invalidate an arbitration agreement on that basis.<sup>90</sup> While the Court conceded that an agreement in which the drafter imposed extremely high administrative fees could affect a party's right to pursue a statutory claim, the Court concluded that a claim that would be expensive to prove did not, in and of itself, interfere with that right.<sup>91</sup>

The Court also broadened the holding in *Concepcion*. Rather than confining the holding to preemption and the *Discover Bank* rule's

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certain qualifications are met, was enacted much later than the Sherman and Clayton Acts).

86. *See id.* at 2310 (pointing out that it is difficult for plaintiffs to meet all of the requirements of Rule 23, so much so that most cases do not get past the class certification stage).

87. *See id.* at 2310 & n.2 (noting that the Court in *Mitsubishi Motors* rejected the contention that arbitration in that case was inadequate and that the Second Circuit also addressed the same language as dicta).

88. *See id.* at 2310-11 (citing *Mitsubishi Motors*, 437 U.S. 614, 637 n.9 (1985)) (positing that the "right to pursue statutory remedies" would be affected by a provision that explicitly precluded a party from bringing a certain claim, or possibly an agreement that imposed high administrative fees, but not the kind of claim brought by the merchants).

89. *See id.* (positing that an agreement explicitly barring Sherman Act claims, or imposing extremely high administrative fees, would on its face be exculpatory and would not be permissible).

90. *See id.* at 2311 (opining that the "right to pursue" a statutory remedy is not impinged simply because it is not economically worthwhile to expend the money necessary to prove that claim).

91. *See id.* (asserting that a class action waiver only prevents multiple plaintiffs from asserting a claim against a defendant but does not prevent any one plaintiff from bringing that claim).

impermissible categorical ban on class action waivers, the Court opined that *Concepcion* “established . . . that the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims.”<sup>92</sup> Because the Second Circuit in *Italian Colors* similarly sought to preserve small-dollar claims through invalidating arbitration agreements, the Court reasoned that the merchants’ claim must fail.<sup>93</sup> Moreover, the Court concluded that the case-by-case test established by the Second Circuit would impose significant procedural barriers before parties could proceed with arbitration, which in turn would interfere with the purpose of the FAA—to promote streamlined resolution of disputes in arbitration.<sup>94</sup>

*3. The Dissent Argued That the Vindication of Rights Doctrine Should Apply to an Arbitration Agreement That “Effectively” Interferes With a Claimant’s Ability to Bring a Claim in Arbitration.*

The dissent asserted that the vindication of rights doctrine requires invalidation of an arbitration agreement “when (but only when) it operates to confer immunity from potentially meritorious claims.”<sup>95</sup> The arbitration agreement crafted by American Express, the dissent argued, has the same effect as an arbitration agreement that is exculpatory on its face—the agreement might as well have stated that “Merchants may bring no Sherman Act claims.”<sup>96</sup> The latter clause unquestionably would be unenforceable as a clear waiver of the right to bring those claims.<sup>97</sup> The dissent reasoned that the vindication of rights doctrine should not be limited to provisions that are so “baldly exculpatory,” because drafters could get around it by crafting clauses that merely have the same effect.<sup>98</sup>

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92. *See id.* at 2312 & n.5 (stating that the interest in ensuring the viability of small-dollar claims is unaffected by the FAA’s mandate to enforce arbitration agreements).

93. *See id.* (asserting that the interest in preserving small-dollar claims in arbitration was “unrelated” the principles arising out of the FAA).

94. *See id.* at 2312 (opining that the imposition of such procedures would “undoubtedly destroy the prospect of speedy resolution” that was the purpose of the FAA’s mandate to favor enforcement of arbitration agreements).

95. *See id.* at 2313 (Kagan, J., dissenting) (asserting that the vindication of rights doctrine harmonizes the FAA’s principles with other federal statutes).

96. *See id.* at 2313-14 (opining that the latter clause would be unenforceable, even in an arbitration agreement, for interfering with Congress’s clear intention to encourage private citizens to bring antitrust claims).

97. *See id.* (noting that a prospective waiver of the right to bring an antitrust agreement is unenforceable in any kind of contract, including an arbitration agreement).

98. *See id.* at 2314 (illustrating that setting filing fees at extremely high levels, requiring a statute of limitations of one day, or limiting the remedies an arbitrator may award would have the same effect as a clause that explicitly barred a federal statutory

Prohibiting any claimant from introducing economic studies or testimony, for example, has the same effect as a clause that plainly bars Sherman Act claims because no plaintiff can successfully bring an antitrust claim without such evidence.<sup>99</sup> The dissent argued that the vindication of rights doctrine has to cover both scenarios if it is to have any effect at all, and if it is going to comply with the Court's precedent.<sup>100</sup> Indeed, the Court has held that claims are only arbitrable "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum."<sup>101</sup>

The dissent pointed out that the vindication of rights doctrine "furthers the purposes not just of laws like the Sherman Act, but of the FAA itself" because the policy behind the FAA is to promote the efficient resolution of claims, not to prevent potentially meritorious low-dollar claims from coming to fruition.<sup>102</sup> By declining to recognize the doctrine for the kind of claim brought by *Italian Colors*, the dissent argued that the Court is sanctioning companies to draft arbitration agreements that make it impossible to resolve a dispute.<sup>103</sup> In enacting Section Two of the FAA, Congress envisioned a process in which more arbitration takes place and claimants may effectively enforce federal and state law, not a process in which plaintiffs are, for all intents and purposes, precluded from doing so.<sup>104</sup> Furthermore, because the bar is high for the kinds of claims that would fall under the rule—those in which the claimant would face prohibitive costs or some other impenetrable barrier to arbitration—and the

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claim).

99. *See id.* (positing that a provision preventing a party from gathering the evidence necessary to successfully bring a claim should similarly be unenforceable because it would permit a company like American Express to use its market power to perpetuate its monopoly).

100. *See id.* (arguing that the Court reached the wrong result because the Court's precedent establishes that an arbitration agreement is unenforceable if the agreement effectively precludes prospective litigants from vindicating their federal statutory rights in arbitration).

101. *Accord Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 437 U.S. 614, 637 (1985) (calling upon courts to invalidate arbitration agreements if they require parties to effectively waive their rights to bring federal statutory claims).

102. *See Italian Colors*, 133 S. Ct. at 2315 (Kagan, J., dissenting) (noting that the FAA sought to promote efficient resolution of claims, not to devise a way for parties to attain de facto liability for their violations of the law).

103. *See id.* (asserting that drafters could devise countless ways to prevent parties from bringing claims in arbitration without running afoul of *Mitsubishi Motors* under the Court's reasoning).

104. *See id.* (determining that the purposes of the FAA would be compromised by permitting drafters to get around arbitration because the FAA mandates courts to promote such procedures).

claimant's case must be grounded in "concrete proof," the vindication of rights doctrine would only invalidate a small number of agreements and therefore would not interfere with the efficient resolution of most claims in arbitration.<sup>105</sup>

Contrary to the majority's assertion, the dissent argued that the language in *Mitsubishi Motors* was not dictum: the Court there held that claims are arbitrable "so long as the plaintiffs could effectively vindicate their rights."<sup>106</sup> The Court in *Green Tree*, moreover, applied that rule to emphasize that prohibitive costs could prevent plaintiffs from effectively vindicating their rights.<sup>107</sup> The majority's contention that the rule only covers agreements that prevent the "right to pursue statutory remedies," the dissent contended, ignores the principle espoused by *Mitsubishi Motors* and *Green Tree*; "[w]hen an arbitration agreement prevents the effective vindication of statutory rights, a party may go to court."<sup>108</sup> This principle would indeed cover the agreements the majority accepts, but it would also cover an agreement that is not exculpatory on its face but has the same effect.<sup>109</sup> The dissent disagreed with the majority's contention that *Green Tree* limited the relevant "prohibitive costs" to filing fees or the arbitrator's compensation, and therefore its holding could apply to any arbitration agreement that would make pursuing a claim prohibitively expensive, however that may be.<sup>110</sup>

Applying the vindication of rights doctrine to the case at hand, the

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105. *See id.* at 2315-16 (noting that the Court has placed significant limits on the kinds of claims that warrant invalidating an arbitration agreement under the vindication of rights doctrine though evidentiary burdens and a narrow focus).

106. *See id.* at 2317 n.3 (Kagan, J., dissenting) (arguing that the *Mitsubishi Motors* Court only declined to decide whether the particular arbitration agreement "in fact" effectively precluded the claimant from vindicating its federal statutory rights, but explicitly stated that if it did have that effect, the Court would condemn it).

107. *See id.* at 2315-16 (noting that the Court in *Green Tree* expounded on the principle in *Mitsubishi Motors* and applied it to the situation in which a claimant would realize prohibitive costs in arbitration).

108. *See id.* at 2317 (arguing that the distinction drawn by the Court to deny the merchants the benefit of the vindication of rights doctrine was improper in light of the principle arising out of *Mitsubishi Motors* and *Green Tree*).

109. *See id.* at 2317-18 (citing *Mitsubishi Motors*, 437 U.S. 614, 637 n.19 (1985)) (maintaining that agreements that merely have an exculpatory effect should be condemned because they still "operate . . . as a prospective waiver of a party's [federal right[s]]" (alteration in original)).

110. *See id.* at 2318 ("[*Green Tree*] gave no hint of distinguishing among the different ways an arbitration agreement can make a claim too costly to bring. Its rationale applies whenever an agreement makes the vindication of federal claims impossibly expensive—whether by imposing fees or proscribing cost-sharing or adopting some other device.")

dissent argued that the agreement should have been invalidated because Italian Colors presented solid evidence that the arbitration agreement acted as a “prospective waiver” of the ability to bring an antitrust claim.<sup>111</sup> The plaintiffs proffered an expert economist affidavit submitting that they would have to pay anywhere from several hundred thousand dollars to one million dollars for an expert market study, and would only receive one tenth of that amount in damages.<sup>112</sup> This affidavit, combined with American Express’s prohibition on class actions, joinder, or any kind of information sharing that could facilitate cost sharing among merchants, fulfilled both the “prohibitive cost” requirement and the “concrete proof requirement.”<sup>113</sup>

The dissent also argued that the majority’s perception of the merchants’ claims was unduly limited.<sup>114</sup> The merchants indeed contested the class action waiver, but only because the cumulative effect of the waiver and the other provisions in the agreement that precluded any cost sharing or cost shifting made individual arbitration economically impracticable.<sup>115</sup> An agreement that included a class action waiver but provided for cost shifting to the successful party, for example, might still provide an avenue for effective vindication of federal statutory rights.<sup>116</sup> The Second Circuit stated that a class action was the “only economically feasible means” for Italian Colors to pursue a claim after determining that the agreement also foreclosed all other avenues that would reduce an individual merchant’s costs.<sup>117</sup> Italian Colors only sought to confirm that an arbitration agreement

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111. *See id.* at 2316 (noting that it would be economically irrational for a merchant to attempt to pursue an antitrust claim individually against American Express because the cost of the necessary expert study would be ten times the potential recovery).

112. *See id.* (arguing that this assertion constituted a legitimate “prohibitive costs” argument that should have been undertaken by the majority).

113. *See id.* (arguing that, based on the facts in the record, the merchants could not succeed in proving their antitrust claim in arbitration without proffering the expensive economic study, and therefore American Express’s arbitration agreement should have been invalidated because it foreclosed any possible way for the merchants to present that study).

114. *See id.* at 2318 (maintaining that the Court improperly viewed the merchants’ claim as solely about class actions because the merchants challenged the effect of the entire agreement as a whole).

115. *See id.* (illustrating that a class action waiver could be legitimate if it were coupled with another provision that facilitated some form of cost sharing or cost shifting, thereby enabling the merchants to feasibly pursue an antitrust claim in arbitration).

116. *Id.*

117. *See id.* at 2318-19 (noting that the Second Circuit considered whether American Express would assume the merchants’ costs if the merchants were successful in arbitration or would permit the merchants to share information so that they could

would be invalidated if the plaintiffs could sufficiently demonstrate that the agreement effectively was so prohibitively expensive that the plaintiffs were effectively barred from arbitrating their disputes.<sup>118</sup>

Finally, the dissent posited that *Concepcion* was not relevant to the disposition of this case.<sup>119</sup> The plaintiffs in *Concepcion* were solely challenging a class action waiver even though the parties could vindicate their rights without it, whereas the merchants here challenged the arbitration agreement as a whole because it impaired the merchants' ability to vindicate their rights.<sup>120</sup> The dissent asserted that *Concepcion* could not control this case because the *Discover Bank* rule in *Concepcion* was dismissed on preemption grounds, but the Court could not use those same grounds when a federal law was at issue.<sup>121</sup> As such, the Court did not address the vindication of rights doctrine in *Concepcion*, nor could it, because the case did not concern federal law.<sup>122</sup> The dissent pointed out that *Concepcion* made no mention of *Mitsubishi Motors* or *Green Tree*, and the parties conceded that the *Concepcions* were likely to be made whole even in bilateral arbitration.<sup>123</sup> Because the vindication of rights doctrine applied to the merchants' claims and was supported by the Court's precedents, three justices on the Court dissented.

### III. ANALYSIS

#### *A. American Express's Arbitration Agreement Should Have Been Invalidated Because the Agreement Prevented the Plaintiffs From Vindicating Their Rights, Thereby Falling Directly Under the Savings*

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share an expert market study).

118. *Accord Italian Colors III*, 667 F.3d 204, 210-11 (2d Cir. 2012), overruled by 133 S. Ct. 2304 (2013) (asserting that the plaintiffs met their burden of demonstrating that they would incur costs that were prohibitive if they were forced to proceed with individual arbitration).

119. *See Italian Colors*, 133 S. Ct. at 2319-20 (Kagan, J., dissenting) (reiterating that because *Italian Colors* did not solely challenge the class action waiver, *Concepcion* cannot directly control the merchants' claims).

120. *See id.* at 2320 (positing that the only way the Court can assert *Concepcion's* relevance is through its "false pretense" that the merchants were requiring the Court to solely consider and invalidate the class action waiver).

121. *See id.* (noting that *Concepcion* could not have implicated the vindication of rights doctrine because the doctrine only applies to cases of two competing federal statutes, not when a state law allegedly frustrates the FAA).

122. *See id.* (stating that, contrary to the federal antitrust laws, the Court is not concerned in vindicating a state law that conflicts with a federal law).

123. *See id.* (asserting that *Concepcion* cannot be directly on point when the Court did not cite the most relevant precedents establishing and applying the vindication of rights doctrine).

*Clause of the FAA.*

*1. The Vindication of Rights Test as Established in Italian Colors Is a Defense That Falls Under the Savings Clause of the FAA.*

The vindication of rights doctrine as to the claims brought by the merchants in *Italian Colors* falls squarely within the savings clause of Section Two of the FAA.<sup>124</sup> Under Section Two, arbitration agreements can be revoked “upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>125</sup> This places the burden on the court to determine whether a particular defense offered by a plaintiff to avoid arbitration would be recognized under state contract law.<sup>126</sup> Any kind of contract that acts as a prospective waiver of a defendant’s liability could not be enforced under state or federal law because it is unconscionable.<sup>127</sup> The vindication of rights doctrine is analogous to this general unconscionability principle, which is a valid defense under Section Two so long as it does not arise specifically because an agreement to arbitrate is at issue.<sup>128</sup>

Under the Second Circuit’s reasoning, a contract is unenforceable if it effectively prevents the plaintiff from bringing a claim in any forum, not just the arbitral forum, and the court found enforcement of the arbitration agreement here would give the merchants no forum to enforce their rights.<sup>129</sup> In other words, the rule applied by the Second Circuit focuses on

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124. See *Italian Colors III*, 667 F.3d at 219 (acknowledging the FAA embodies a strong policy favoring arbitration but holding a class action waiver that precludes effective vindication of statutory rights is unenforceable).

125. See, e.g., *Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1987) (noting that traditional contract defenses can revoke an arbitration agreement so long as they do not arise specifically because an agreement to arbitrate is at issue).

126. See *Doctor’s Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (recognizing that courts may interpret arbitration agreements and invalidate them for contract defenses such as fraud, duress, or unconscionability under the FAA savings clause).

127. Compare *Am. Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1, 17-18 (2001) (finding a waiver of class actions in litigation unconscionable under *Discover Bank* because it was exculpatory), with *Kristian v. Comcast Corp.*, 446 F.3d 25, 47-48, 52-53 (1st Cir. 2006) (finding an arbitration clause prohibiting treble damages, attorney fees, and class actions was unenforceable because it prevented the vindication of federal statutory rights).

128. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (noting that the savings clause could not be construed to uphold state law that impedes the FAA’s objectives).

129. See *Italian Colors III*, 667 F.3d 204, 211 (2d Cir.) (noting that enforcing the class action waiver in this case would eradicate the only viable avenue for plaintiffs to vindicate their rights, thus granting American Express “*de facto* immunity” for their wrongdoing (quoting *Italian Colors I*, 554 F.3d 300, 320 (2d Cir. 2009)), *reh’g en banc*

the end result, not the means through which a particular plaintiff may pursue a claim.<sup>130</sup> The rule favors the arbitration agreement only to the extent that arbitration merely represents a change in forum and does not compromise the fundamental rights or remedies available under the applicable federal statute, such as the Sherman and Clayton Acts.<sup>131</sup> If a contract generally could not lawfully invoke a class action waiver that would effectively prevent a plaintiff from bringing a claim, a court could not uphold such a *de facto* waiver of liability just because it arises in an arbitration agreement.<sup>132</sup>

The plaintiffs in *Italian Colors* did not proffer a defense that arises specifically because an agreement to arbitrate is at issue, nor did they truly contest arbitration at all.<sup>133</sup> Rather, the cumulative effect of the provisions in the arbitration agreement prevented them from bringing their antitrust claims in any forum, not just the arbitral forum.<sup>134</sup> This is the exact sort of contractual agreement Congress intended to prohibit in enacting the savings clause of the FAA, and it falls squarely under the plain meaning of that clause.<sup>135</sup> By commanding that arbitration agreements be held unenforceable for the same defenses that would render any contract unenforceable, Congress intended to ensure that a defendant could not escape liability merely by inserting an exculpatory clause in an arbitration

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*denied*, 681 F.3d 139 (2d Cir.), *cert. granted sub nom.* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 594 (2012), overruled by 133 S. Ct. 2304 (2013).

130. *See id.* at 219 (stating that its holding does not render all class action waivers in antitrust actions unenforceable and requires each waiver to be analyzed on a case-by-case basis).

131. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (emphasizing that arbitration of statutory claims works because it typically provides another forum for plaintiffs to resolve their statutory claims).

132. *See Italian Colors III*, 667 F.3d at 211 (finding that the class action waiver could not be enforced because it would grant American Express “*de facto* immunity from antitrust liability” (quoting *Italian Colors I*, 554 F.3d at 320)).

133. *See* Brief for Plaintiff-Appellant at 28, *In re Am. Express Merch. Litig.*, 2006 WL 6198567 (2d Cir. 2006) (No. 06-1871-cv) (noting that the class action waiver, if applied in court, would still be subject to revocation).

134. *See id.* (contending that the provisions in the arbitration agreement effectively “operate as a prospective waiver” of the merchants’ right to bring antitrust claims (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.13 (1985))).

135. *See Italian Colors III*, 667 F.3d at 218 (doubting that Congress intended to eliminate the express private right of action in our antitrust laws in light of its “strong private enforcement mechanisms and incentives”); *see also Mitsubishi Motors*, 473 U.S. at 637 n.19 (acknowledging the Court would readily condemn an agreement under the FAA that effectively operated as a prospective waiver of a party’s right to pursue statutory remedies).



agreement.<sup>136</sup> To hold otherwise would be to place agreements to arbitrate on a higher footing than other contracts, which goes beyond the confines of the FAA and the Supreme Court's interpretation of the savings clause.<sup>137</sup>

*2. The Vindication of Rights Doctrine Limits the Application of the FAA and the Enforcement of Arbitration Agreements by Ensuring the Substantive Rights Under the Antitrust Laws Remain in Force.*

As the Second Circuit noted, *Concepcion* plainly determined whether a state contract law was preempted.<sup>138</sup> It did not purport to hold as a matter of law that a court could never invalidate a class action waiver in an arbitration agreement.<sup>139</sup> Because *Italian Colors* relied on federal antitrust law rather than state law, *Concepcion* does not directly control the question presented.<sup>140</sup> Instead, the Court should have reconciled Congress's established mandate favoring arbitration without construing that mandate so broadly as to negate the Sherman and Clayton Acts.<sup>141</sup>

Thus, even if the vindication of rights doctrine as applied in *Italian Colors* does not fall squarely under Section Two, it is still necessary to ensure that courts are not enforcing arbitration agreements to the detriment of conflicting federal statutes such as the Sherman and Clayton Acts.<sup>142</sup> As the dissent correctly pointed out, the vindication of rights doctrine "furthers the purposes not just of laws like the Sherman Act, but of the FAA itself" because the doctrine ensures that meritorious small-dollar claims are still

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136. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (recognizing that immunizing an arbitration agreement from judicial challenge despite its unlawful exculpatory effect would be inconsistent with the savings clause).

137. See *id.* (recognizing that courts may not make arbitration agreements more enforceable than other contracts).

138. See *Italian Colors III*, 667 F.3d at 212 (finding that *Concepcion* does not directly control the question presented because its holding was grounded in preemption law).

139. See *id.* at 214, 216-17 (noting that *Stolt-Nielsen* and *Concepcion* do not require all class action waivers to be *per se* enforceable and leaving later courts to decide whether a class action waiver is enforceable when the litigants face prohibitive costs).

140. See *id.* at 213 (positing that *Concepcion* merely provided the basis for determining when state contract law impedes the objectives of the FAA, while its holding rested on "federal law of arbitrability").

141. See *Int'l Union of Elec. Radio and Mach. Workers, AFL-CIO v. NLRB*, 289 F.2d 757, 761 (D.C. Cir. 1960) (discussing that conflicts between two federal statutes should be resolved in a way that gives effect to the latest statute and still allows the earlier statute to be operative).

142. See *Bilski v. Kappos*, 130 S. Ct. 3218, 3228 (2010) (holding that a court should not interpret a statute in a way that would render enforcement of an earlier statute impracticable).

viable while also promoting the efficient resolution of claims.<sup>143</sup> The FAA's mandate to favor arbitration was intended to encourage parties to arbitrate, not to encourage drafters to craft agreements that made it impracticable to ever reach the arbitral forum.<sup>144</sup> The vindication of rights doctrine, therefore, reconciles the FAA's mandate to enforce the terms of arbitration agreements with the merchants' right in *Italian Colors* to bring an antitrust claim.<sup>145</sup> The vindication of rights doctrine gives effect to both the FAA and the Sherman Act by enforcing mandatory arbitration agreements according to their terms, but only to the extent that the particular claimant can vindicate the particular rights at issue in each case.<sup>146</sup> Enforcing arbitration agreements with the caveat that prospective litigants may effectively vindicate their rights preserves the substantive rights afforded by federal statutes and still ensures that arbitration agreements are generally enforced according to their terms.<sup>147</sup> Holding the merchant agreement enforceable notwithstanding a clear demonstration of prohibitive costs would undermine the antitrust laws' encouragement of private actions because the instant parties would be unable to enforce those laws.<sup>148</sup> To weigh in favor of an arbitration agreement when there is substantial evidence demonstrating that the merchants could not effectively vindicate their federal statutory rights would only give effect to the FAA and, thus, fail to balance the interests of both federal statutes.<sup>149</sup>

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143. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2315 (2013) (Kagan, J., dissenting) (pointing out that the FAA envisioned more arbitration and did not intend to promote exculpatory clauses that inhibit access to arbitration).

144. See *id.* ("What the FAA prefers to litigation is arbitration, not de facto immunity.").

145. See *Italian Colors III*, 667 F.3d at 213 (holding that an arbitration agreement is unenforceable only when the provisions effectively "defeat the remedial purpose of the statute" (quoting *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998))).

146. See *id.* at 216. (citing *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999)) (recognizing that the FAA's policy favoring arbitration, even when federal statutory claims are at issue, is not without bounds).

147. See generally Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 628 (2012) (reasoning that *Green Tree* provides a compromise between the FAA and competing statutes by requiring the plaintiff to prove the likelihood of incurring prohibitive costs).

148. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1975) (concluding that as long as a potential litigant may effectively vindicate its statutory claim in arbitration, the statute continues to serve its function).

149. See *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 865 (7th Cir. 1998) (concluding that absent a clear expression from Congress that it intended one federal statute to preempt another, courts must give two federal statutes simultaneous effect).

Because the government does not have the resources to investigate and prosecute every antitrust violation, the ability of private citizens to supplement their efforts is necessary to ensure antitrust laws are adequately enforced.<sup>150</sup> Congress provided for treble damages to successful private plaintiffs in the antitrust law scheme to encourage private parties to prosecute antitrust violations.<sup>151</sup> Moreover, because it is difficult and expensive to prove an antitrust claim, class actions may be the only mechanism for private parties to have both the means and the incentive to bring a claim.<sup>152</sup> Thus, the Court should allow the parties to proceed as a class if individual arbitration is impracticable.<sup>153</sup> This is not to say that the class action procedure is necessary to bringing an antitrust claim.<sup>154</sup> Once a court recognizes that a plaintiff, encouraged by Congress to bring private actions, would face such prohibitive costs that it would not be able to bring a claim individually, that court should allow the claim to proceed as a class.<sup>155</sup> In the case at bar, because the merchants provided an expert

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150. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (noting that there are nearly twenty times more private antitrust suits than actions filed by the Department of Justice).

151. *See id.* at 343-44 (noting that the provisions of the Clayton Act were meant to encourage private citizens to enforce antitrust laws and deter future violations).

152. *See, e.g., Paschall v. Kansas City Star Co.*, 695 F.2d 322, 339 (8th Cir. 1982) (recognizing the large expense of research and expert fees necessary for a plaintiff to prove an antitrust claim (citing *Welsch v. Likins*, 68 F.R.D. 589, 596-98 (D. Minn. 1975))).

153. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980) (recognizing that class actions may motivate plaintiffs to bring cases that might not be brought otherwise, thereby vindicating the rights of others who may not find it worthwhile to bring a claim).

154. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633-34 (1985) (holding that antitrust actions are not inherently inconsistent with bilateral arbitration).

155. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 129 (1986) (Stevens, J., dissenting) (noting it would be odd for an antitrust statute to define a violation in such a fashion that no private party could enforce it). This point, of course, is not without limits. The vindication of rights doctrine does not permit plaintiffs to vindicate their federal statutory rights no matter what obstacle they face. Plaintiffs could not invoke the doctrine, for example, if they did not meet Rule 23's class certification requirements or if they did not file their claim before the statute of limitations tolled. The doctrine only states that Congress did not intend for the FAA to prevail when arbitration agreements no longer represent merely a change in forum, but rather require parties to waive rights they would otherwise have possessed. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (emphasizing that arbitration of statutory claims works because it typically provides another forum for plaintiffs to resolve their statutory claims); *Mitsubishi Motors*, 473 U.S. at 628 (noting that a plaintiff can effectively vindicate substantive rights afforded by federal statutes as long as arbitration is merely a change in forum).

economist's affidavit proving they could not feasibly bring a claim individually, the vindication of rights doctrine should be ratified and the plaintiffs should be able to aggregate their claims.<sup>156</sup>

*B. The Supreme Court Incorrectly Applied the Vindication of Rights Doctrine as Required By Mitsubishi Motors and Green Tree.*

The Second Circuit in *Italian Colors* applied the vindication of rights doctrine arising out of *Mitsubishi Motors* and *Green Tree* to determine whether the merchants could effectively vindicate their rights in bilateral arbitration.<sup>157</sup> Under *Mitsubishi Motors*, the inquiry is whether arbitration merely provides a different forum or whether the plaintiffs would have to forgo the substantive rights under the applicable federal statute.<sup>158</sup> Under *Green Tree*, courts must analyze whether the plaintiff would incur such prohibitive costs in arbitration that enforcing the arbitration clause would preclude a plaintiff from bringing a claim in any forum.<sup>159</sup> The Supreme Court in *Italian Colors* incorrectly applied these precedents by assuming that an arbitration agreement that was not facially exculpatory would not interfere with a plaintiff's ability to vindicate her federal statutory rights in the arbitral forum.<sup>160</sup>

*1. Under Mitsubishi Motors, the Substantive Rights Afforded by the Federal Antitrust Laws Would Be Compromised if the Arbitration Agreement Was Enforced.*

*Mitsubishi Motors* requires arbitration agreements to be enforceable so long as they do not undermine the relevant statutory scheme.<sup>161</sup> Here,

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156. See *Italian Colors III*, 667 F.3d 204, 218 (2d Cir.) (citing *Italian Colors I*, 554 F.3d 300, 319 (2d Cir. 2009), *reh'g en banc denied*, 681 F.3d 139 (2d Cir.), *cert. granted sub nom.* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 594 (2012)), overruled by 133 S. Ct. 2304 (2013) (emphasizing that American Express did not truly contest that plaintiffs could not feasibly pursue a claim individually in federal court or in arbitration).

157. See *id.* at 214-18 (analyzing *Mitsubishi Motors* and *Green Tree* to hold that the vindication of rights doctrine requires American Express's arbitration agreement to be held unenforceable).

158. See *Mitsubishi Motors*, 473 U.S. at 628 (noting that a plaintiff can effectively vindicate substantive rights afforded by federal statutes as long as arbitration is merely a change in forum).

159. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (recognizing that prohibitive arbitration costs could preclude a plaintiff from effectively vindicating her rights).

160. See *Italian Colors III*, 667 F.3d at 214-17 (holding that the class action waiver precluded the merchants' only reasonably feasible means of recovery, making the arbitration agreement unenforceable).

161. See *Mitsubishi Motors*, 473 U.S. at 627 (noting that a party typically does not

however, enforcement of the arbitration agreement would undermine the statutory scheme under the Sherman and Clayton Acts by compromising the merchants' ability to complement the government's efforts to enforce the antitrust laws.<sup>162</sup>

As *Mitsubishi Motors* expressed, Congress did not indicate that antitrust violations should not be subjected to arbitration, nor is there any inherent conflict.<sup>163</sup> By enforcing an agreement that makes arbitration exponentially more costly than the claim is worth, however, the antitrust laws' remedial and deterrent functions potentially may no longer serve their purpose.<sup>164</sup> Because the Clayton Act provides for trebled damages and reasonable attorney's fees and costs, Congress intended to encourage private citizens to bring antitrust actions to supplement the efforts of state and federal government.<sup>165</sup> If a corporation can craft an arbitration agreement that makes pursuing a claim prohibitively expensive, private suits will not be brought in any forum and the statute will not function properly.<sup>166</sup> Thus, one of the factors that was not present in *Mitsubishi Motors* is present here: if the arbitration agreement is specifically enforced, the plaintiffs would be forced to forgo their substantive rights under the statute because they would not be able to effectively vindicate their rights under the antitrust laws.<sup>167</sup> Further, the statutory scheme of the antitrust laws would be undermined because those private citizens seeking to enforce the antitrust laws would be unable to bring a claim in any forum.<sup>168</sup> Accordingly, the first prong of

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forgo the substantive rights afforded by federal statutes simply by agreeing to arbitrate a statutory claim).

162. See *Italian Colors III*, 667 F.3d at 210-11 (emphasizing that eradicating the private enforcement component from the antitrust law scheme cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes).

163. See *Mitsubishi Motors*, 473 U.S. at 632-35 (determining from the text and legislative history of the Sherman Act that arbitration was not inherently consistent with effective vindication of the federal antitrust laws).

164. See *id.* at 637 (indicating that a federal statute would not continue to serve its remedial and deterrent functions if the prospective litigant may not effectively vindicate its statutory cause of action).

165. See *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972) (holding that Congress encouraged private citizens to serve as "private attorneys general" by offering potential litigants trebled damages and attorney's fees and costs).

166. See *Carnegie v. Household Int'l Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (recognizing the realistic alternative to a class action is not a multiplicity of individual suits, but rather no individual suits, because the cost would dwarf the benefit).

167. Cf. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-29 (1991) (finding that the plaintiff could effectively vindicate his rights in arbitration because the forum provided for all of the remedies he could have received in litigation).

168. *Accord Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) (recognizing

the vindication of rights inquiry under *Mitsubishi Motors* is satisfied because the plaintiffs demonstrated that the functions of the antitrust laws would not be in place and arbitration in this instance would tend to undermine the statutory scheme.<sup>169</sup>

2. *The Merchant Plaintiffs Met Their Burden of Proving They Would Incur Prohibitive Costs Under Green Tree.*

The plaintiffs in *Italian Colors* met their burden of proving prohibitive costs under *Green Tree* through an expert economist's affidavit that described the level of expert fees necessary to successfully bring their claim and posited that individual actions were financially infeasible.<sup>170</sup> The expert economist, after conducting initial research, concluded that the cost for an expert economic study alone could exceed one million dollars, and the average plaintiff could only expect less than six thousand dollars in damages even after trebling.<sup>171</sup> In his professional opinion, it was not realistic for an individual to bring a claim in either arbitration or litigation.<sup>172</sup> Whereas the plaintiff in *Green Tree* did not provide any evidence as to her likely costs, the plaintiffs in *Italian Colors* provided a detailed affidavit from an expert economist, whose credibility was not questioned, attesting to their prohibitive costs.<sup>173</sup> Moreover, those costs are necessary to handle the complex issues in proving American Express's tying arrangement and are not merely prohibitive in the sense that they do

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that the class action may be the only economically rational alternative when a large group suffers damages that are individually too small to justify bringing an individual action).

169. See, e.g., *Standard Oil Co.*, 405 U.S. at 275 (recognizing that private litigants are a necessary aspect of antitrust enforcement to supplement the efforts of the government).

170. Compare *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (holding that a plaintiff asserting prohibitive costs as a basis for avoiding arbitration bears the burden of proving the likelihood of incurring such costs), with *Italian Colors III*, 667 F.3d 204, 218 (2d Cir.) (concluding an expert economist's affidavit noting the economic irrationality of bringing a claim met their burden of production), *reh'g en banc denied*, 681 F.3d 139 (2d Cir.), *cert. granted sub nom. Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012), overruled by 133 S. Ct. 2304 (2013).

171. See *Italian Colors III*, 667 F.3d at 218 (noting that expert studies in individual antitrust actions typically cost between \$300,000 and \$2,000,000, and that the merchants' claim would fall within that range).

172. See *id.* (determining that collective proceedings would be the only realistic recourse for the plaintiffs where expert fees could cost one million dollars).

173. See *id.* at 218 (noting that American Express did not challenge the validity of the economist's affidavit); see also *Green Tree*, 531 U.S. at 90 (holding the arbitration agreement was enforceable because the plaintiff did not provide any evidence to substantiate her prohibitive costs claim).

not provide enough incentive to bring a claim.<sup>174</sup>

Although most challenges to arbitration agreements have been unsuccessful, arbitration agreements containing class action waivers are not *per se* enforceable.<sup>175</sup> Though prior Supreme Court precedent has almost uniformly enforced arbitration agreements when there was an effective vindication defense, the Court has rarely heard a case in which the plaintiffs could actually demonstrate that in their specific case it would be unjust to enforce the arbitration agreement because the plaintiffs could not vindicate their rights.<sup>176</sup> The facts of *Italian Colors* were unique in this way because of the extremely high costs of pursuing a claim and the remarkably low damages the merchants could expect as a result.<sup>177</sup>

The fatal flaw of *Mitsubishi Motors* was that the plaintiffs attempted to persuade the Court to adopt a categorical rule that enforcing the particular statute was inconsistent with arbitration.<sup>178</sup> In *Green Tree*, the plaintiff made a bare assertion of prohibitive costs with no evidence to substantiate her claim.<sup>179</sup> By contrast, upholding the Second Circuit's decision in *Italian Colors* would have simply imposed a case-by-case analysis by which a court determines the costs each plaintiff would incur and the deterrent effect those costs would have on a plaintiff's ability to pursue a claim.<sup>180</sup> Indeed, the Second Circuit found the merchants offered much

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174. See, e.g., *Paschall v. Kansas City Star Co.*, 695 F.2d 332, 339 (8th Cir. 1982) (citing *Welsh v. Likins*, 68 F.R.D. 589, 596-98 (D. Minn. 1975)) (recognizing that the enormous expense of research and expert fees are indispensable to a plaintiff's efforts to successfully prove a complex antitrust claim); cf. *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 (9th Cir. 2012) (finding the arbitration agreement enforceable when the inquiry was not whether the plaintiffs could effectively vindicate their rights but whether they had the incentive to bring a claim).

175. See *Italian Colors III*, 667 F.3d at 217 (qualifying the fact that most plaintiffs have not avoided arbitration because of prohibitive costs or their lack of sufficient evidence to that end).

176. See Respondents' Brief in Opposition at 10, *Italian Colors III*, No. 12-133, 2012 WL 4960369 (noting it would be a rare occurrence for a plaintiff to be able to provide sufficient evidence of prohibitive costs to meet the *Green Tree* test).

177. See *Italian Colors III*, 667 F.3d at 218 (finding that enforcement of the class action waiver in this case would flatly ensure no small merchant could challenge the tying arrangement).

178. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627-35 (1975) (finding unpersuasive the plaintiff's argument that antitrust actions should not be subject to arbitration); accord *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-27 (1991) (rejecting plaintiff's contention that ADEA actions as a matter of law are incompatible with arbitration).

179. See *Green Tree*, 531 U.S. at 90 (finding the plaintiff's prohibitive cost argument did not rise beyond the speculative level).

180. See *Italian Colors III*, 667 F.3d at 219 (noting their holding did not render arbitration agreements *per se* unenforceable, and instead required future parties to

more than a bare assertion of prohibitive costs, and demonstrated that the effect of the class action waiver is that no merchant will bring a claim and American Express will not have to comply with the antitrust laws.<sup>181</sup> In sum, because the plaintiffs in *Italian Colors* satisfied both prongs of the tests arising out of *Mitsubishi Motors* and *Green Tree*, the arbitration agreement should have been invalidated.<sup>182</sup>

3. *The Supreme Court's Decision Failed to Apply These Tests and Came To The Erroneous Conclusion That The Merchants' "Right To Pursue" Their Federal Statutory Claims Was Unimpaired.*

i. *The Court's Conclusion That the Merchants Did Not Assert a Prospective Waiver of Their "Right to Pursue" a Statutory Claim Under Mitsubishi Motors Failed to Account for the Practical Effect of the Arbitration Agreement as a Whole.*

The Court rejected the merchants' assertion that the arbitration agreement was unenforceable as a "prospective waiver" of their federal statutory rights because *Mitsubishi Motors* only condemned an arbitration agreement that acts "as a prospective waiver of a party's right to pursue statutory remedies."<sup>183</sup> A class action waiver does not interfere with that right on its face, the Court reasoned, and therefore cannot be invalidated under *Mitsubishi Motors*.<sup>184</sup> Moreover, the Court determined that the ability to *prove* a claim is not synonymous with the "right to pursue" that

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litigate the merits of their own waiver based on the particular facts of their case).

181. *See id.* at 218 (recognizing that trebling plaintiff's expected damages would still not pay for the expert fees estimated to be necessary to make a merchant's case).

182. *See id.* at 216 (citing *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999) (acknowledging that arbitration is not an adequate alternative forum for resolving statutory claims when the arbitration agreement is constructed to remove the individual's ability to bring such a claim)).

183. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310-11 (2013) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.9 (1985)) (dismissing the merchants' argument that American Express's arbitration agreement acted as a prospective waiver of the parties' federal statutory rights because the merchants only had trouble proving their claim). The Court incorrectly asserted that the vindication of rights doctrine as established by *Mitsubishi Motors* was purely dicta. *See id.* at 2310 & n.2. The Court in *Mitsubishi Motors* quite clearly held that an arbitration agreement was only enforceable "so long as the prospective litigant may effectively vindicate its statutory cause of action in the arbitral forum." 473 U.S. at 637. Still, even if the vindication of rights doctrine originated as dictum, it became law when the Court applied its principles in *Green Tree* to hold that an arbitration agreement is unenforceable if it makes arbitration prohibitively expensive. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 513 U.S. 79, 90 (2000).

184. *See Italian Colors*, 133 S. Ct. at 2311 (positing that a class action waiver still preserves a party's right to bring a claim individually in arbitration).



claim, and therefore the merchants' claim did not fall under the rule.<sup>185</sup>

An arbitration agreement that prevents a party from compiling the proof that is necessary to pursue the claim, however, has effectively inhibited the party's "right to pursue" that claim.<sup>186</sup> In *Mitsubishi Motors*, the Court stated that when an arbitration agreement "*operat[es]* . . . as a prospective waiver" of a party's right to pursue a federal statutory claim, it must be invalidated.<sup>187</sup> The Court also stated that an arbitration agreement is only enforceable "so long as the prospective litigant *effectively* may vindicate its statutory cause of action in the arbitral forum."<sup>188</sup> Indeed, the Court emphasized that an arbitration agreement would be "set[ ] aside" if "proceedings in the contractual forum [would] be so gravely difficult" that the prospective litigant would "*for all practical purposes* would be deprived of his day in court."<sup>189</sup> Reading these conclusions together makes clear that the cumulative effect of the arbitration agreement determines its enforceability, not whether any one provision is "baldly exculpatory."<sup>190</sup> As such, the dissent got it right: "[w]hen an arbitration agreement prevents the effective vindication of statutory rights, a party may go to court."<sup>191</sup>

An arbitration agreement indeed prevents the effective vindication of statutory rights when it explicitly prohibits a party from bringing a certain claim.<sup>192</sup> But an arbitration agreement no less prohibits the effective

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185. See *id.* (asserting that the class action waiver itself did not affect the right to effective vindication of a statutory claim because class actions were not always required to realize such vindication of the rights under the antitrust laws).

186. See *id.* at 2314 (Kagan, J., dissenting) (illustrating potential examples of clauses that would have the same affect as the "baldly exculpatory" provisions that the Court would condemn but that would be upheld under the majority's interpretation of the vindication of rights doctrine).

187. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 637 n.19 (1985) (stating that the Court would "have no trouble condemning" an arbitration agreement whose provisions effectively prevented a party from pursuing a federal statutory claim).

188. See *id.* at 637 (emphasis added) (requiring the parties to arbitrate because there had been no argument that the particular arbitration agreement precluded the claimant from effectively vindicating its rights in arbitration).

189. See *id.* at 632 (internal quotation marks omitted) (positing that an arbitration agreement that was unconscionable would not be enforced under the FAA).

190. See *Italian Colors*, 133 S. Ct. at 2317-18 (Kagan, J., dissenting) (considering the "world of other provisions" a drafter could create to limit its liability without including a "baldly exculpatory" provision).

191. See *id.* at 2317 (arguing that the vindication of rights doctrine as perceived by *Mitsubishi Motors* and *Green Tree* could come in to play in a wide variety of circumstances and that a holistic view of the agreement is necessary to determine its enforceability).

192. See *id.* at 2310 (majority opinion) (conceding that an agreement explicitly barring a party from bringing a certain federal statutory claim would fall under the

vindication of statutory rights when the provisions collectively have the same effect, however the drafter is able to realize that result.<sup>193</sup> In this case, the Court ignored that the merchants essentially no longer have the “right to pursue” their antitrust claims because the arbitration agreement forecloses all possible ways for the merchants to present an expert report necessary to prove their antitrust claims.<sup>194</sup> Thus, the merchants still met their burden under *Mitsubishi Motors* because the agreement deprived the merchants of any feasible way to vindicate their rights under the antitrust laws.<sup>195</sup>

*ii. The Court Erroneously Concluded That the Costs Necessary to Prove the Merchants’ Antitrust Claims Were Outside of the Scope of the Court’s Holding in Green Tree.*

American Express asserted, and the Court impliedly agreed, that any asserted prohibitive costs must be those that are unique to arbitration, such as the initial filing fee and the costs for the arbitrator.<sup>196</sup> Because the expert and attorney’s fees that the merchants claimed were prohibitive were not unique to arbitration, those costs cannot be used as a mechanism to avoid arbitration.<sup>197</sup> The Court couched this conclusion in its determination that a prohibitively expensive filing fee—which facially restricts access to the arbitral forum—was categorically different from a prohibitively expensive expert study that is necessary to prove a claim.<sup>198</sup> Still, because the cost to prove a claim would be the same in litigation and arbitration absent any agreement to the contrary, this is arguably the distinction the Court actually drew.<sup>199</sup> This reasoning is erroneous and is a misapplication of the holding

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vindication of rights doctrine).

193. See *id.* at 2317 (Kagan, J., dissenting) (maintaining that any variety of clauses could have the same effect as a clause that is blatantly exculpatory, but that still renders the clause a “prospective waiver” of a party’s federal statutory rights).

194. See *id.* at 2320 (lamenting that American Express successfully shielded itself from antitrust liability because of the Court’s interpretation of the FAA).

195. See *id.* at 2316-17 (asserting that the Second Circuit was correct in concluding that Italian Colors met its burden under *Mitsubishi Motors* that the arbitration agreement was unenforceable because it effectively precluded the merchants from vindicating their rights under the antitrust laws).

196. See *id.* at 2310-11; Petition for Writ of Certiorari, *supra* note 13, at 18 (considering *Green Tree*’s reference to large arbitration costs to mean costs that would not be borne in litigation and thus would preclude access to the arbitral forum).

197. See *Italian Colors*, 133 S. Ct. at 2310-11; Petition for Writ of Certiorari, *supra* note 13, at 19 (arguing that the dicta in *Green Tree* related to the “price of admission,” and did not warrant expansion to include costs that could be incurred in both litigation and arbitration).

198. See *Italian Colors*, 133 S. Ct. at 2310-11.

199. See *id.* at 2311 n.3 (“But more importantly, [a clause prohibiting a party from

in *Green Tree*.<sup>200</sup>

As a threshold matter, the prohibitive costs asserted by the merchants arguably would be unique to arbitration because the class action waiver would only apply if American Express elected to use arbitration.<sup>201</sup> Therefore, even assuming prohibitive costs were required to be unique to arbitration, the plaintiffs still met their burden of proving prohibitive costs.<sup>202</sup> Still, this distinction is not in accord with the central holding in *Green Tree*.<sup>203</sup>

The Court in *Green Tree* recognized that a plaintiff could avoid arbitration on the “ground that arbitration would be prohibitively expensive,” not that filing fees and arbitrator’s costs would be prohibitively expensive.<sup>204</sup> Nor did the Court state whether the nature of the prohibitive expenses had any bearing on the analysis.<sup>205</sup> Though the Court referenced the cost of admission as the relevant inquiry for prohibitive costs, it did not limit the cost of admission to the costs that the plaintiff asserted may be prohibitive in her case.<sup>206</sup> Put differently, just because the plaintiff in

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presenting expert testimony], assuming it makes vindication of a claim impossible, makes it impossible not just as a class action but even as an individual claim.”).

200. See, e.g., *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001) (stating that prohibitive costs are only concerned with the amount of money ultimately paid by the plaintiff because plaintiffs would be deterred from pursuing their statutory rights no matter who receives their funds).

201. See Respondents’ Brief in Opposition at 14, *Am. Express Co. v. Italian Colors Restaurant*, No. 12-133 (2012) (noting that the plaintiffs would only be forced to pay prohibitive costs under the arbitration agreement but would not have to outside arbitration).

202. See *Italian Colors III*, 667 F.3d 204, 218-19 (2d Cir.) (finding that the plaintiffs met their burden of proving the likelihood of incurring prohibitive costs based on the expert economist affidavit), *reh’g en banc denied*, 681 F.3d 139 (2d Cir. 2012), *cert. granted sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012), overruled by 133 S. Ct. 2304 (2013).

203. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2316 (2013) (Kagan, J., dissenting) (arguing that the merchants’ expert study constituted a prohibitive cost because “[n]o rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands”).

204. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (recognizing that prohibitive costs could prevent a litigant from effectively vindicating federal statutory rights, which would make the arbitration agreement unenforceable).

205. See *id.* at 91 (choosing not to analyze what would constitute a sufficient demonstration of prohibitive costs because the plaintiff developed no evidentiary record on that point).

206. See *id.* at 84 (referencing the potentially prohibitive arbitration costs for a plaintiff, including the filing fee and paying the arbitrator); *cf. In re Am. Express Merch. Litig.*, 681 F.3d 139, 142 (2d Cir.) (Pooler, J., concurring) (noting that the merchants were prosecuting claims that would require more extensive proof than other

*Green Tree* claimed that the arbitrator's compensation and filing fees would be prohibitive does not mean that the cost of admission does not include anything necessary to bring a successful claim.<sup>207</sup> The Supreme Court's conclusion in *Italian Colors* that the "right to pursue" a federal statutory remedy is not implicated by prohibitive costs involved in proving that claim does not comport with *Green Tree*'s analysis.<sup>208</sup> The proper inquiry is whether an arbitration agreement prevents a party from effectively vindicating federal statutory rights because of prohibitive expenses, and the Court does not distinguish between potential forms of prohibitive costs.<sup>209</sup> If the concern is the practical effect arbitration will have on a particular litigant's ability to bring a claim, which it should be under *Mitsubishi Motors*, the form of the expense is almost irrelevant.<sup>210</sup> That the costs are in the form of expert fees makes them no less prohibitive from the litigant's point of view than if they were filing fees or the cost for the arbitrator.<sup>211</sup> Either way, the litigant is precluded from bringing a claim, and the purpose and function of the applicable federal statute is not served.<sup>212</sup>

Prohibitive costs, additionally, do not need to be unique to arbitration because the correct comparison after *Concepcion* is not between litigation

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statutory claims, which later courts could analyze in determining whether plaintiffs made their showing of prohibitive costs), *denying reh'g en banc to Italian Colors III*, 667 F.3d 204 (2d Cir. 2012).

207. See Respondents' Brief in Opposition, *supra* note 201, at 15 (reckoning that the analysis in *Green Tree* acknowledged that arbitration costs could be prohibitively expensive, but it did not emphasize that only forum-specific costs were relevant to the prohibitive costs inquiry).

208. See *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2311 (2013) (asserting that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy").

209. See *id.* at 2317 (Kagan, J., dissenting) (arguing that that the majority's exclusion of the cost of proof from the prohibitive inquiry was foreclosed by *Mitsubishi Motors* and *Green Tree*); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 660 (6th Cir. 2003) (en banc); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001) (believing the effect on the plaintiffs is the same no matter who receives their funds).

210. See *Morrison*, 317 F.3d at 664 (including the fact that attorneys cover most of the fees and advance the expenses in litigation into its analysis of whether a plaintiff would incur prohibitive costs in arbitration).

211. See *id.* (instructing courts to consider the costs a litigant would face in litigation vis-à-vis arbitration, and whether the additional costs of arbitration would deter plaintiffs with a statutory claim from bringing that claim in arbitration).

212. See *Bradford*, 238 F.3d at 556 (reasoning that a claimant could not be deterred from pursuing a claim in arbitration simply because his fees would be paid to the arbitrator).

and arbitration, but between bilateral arbitration and class arbitration.<sup>213</sup> In *Concepcion*, the Court analyzed the differences between bilateral and class arbitration to hold that the change from bilateral to class arbitration would be fundamental and would completely change the character of the proceedings.<sup>214</sup> According to the Court, the switch from bilateral to class arbitration greatly increases the costs to the defendants in the form of greater procedure and higher risks.<sup>215</sup> It is appropriate, then, to use the same mode of analysis when considering the plaintiff's costs, rather than American Express's comparison of arbitration to litigation.<sup>216</sup>

Comparing the cost differential between bilateral and class arbitration from the plaintiff's point of view makes clear that the change would similarly be fundamental.<sup>217</sup> If the plaintiffs were permitted to proceed as a class, they would be able to spread out the costs of experts and attorneys to make proving their claim more manageable.<sup>218</sup> If they were forced to each initiate individual actions in arbitration, those costs could not be spread out, and the result is that no plaintiff will bring a claim at all.<sup>219</sup> Thus, examining the issue of prohibitive costs the way the Court framed the analysis in *Concepcion* again leads to the conclusion that the merchants in *Italian Colors* would face prohibitive costs if compelled to resolve their

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213. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011) (comparing bilateral and class arbitration to conclude that the changes between the two are fundamental). *But see* Petition for Writ of Certiorari, *supra* note 13, at 18-19 (comparing the cost differential between litigation and arbitration to argue that prohibitive costs must be those that are strictly unique to arbitration).

214. See *Concepcion*, 131 S. Ct. at 1750-51 (holding that because class arbitration would sacrifice the principle advantages of arbitration and increase costs to the defendants, the *Discover Bank* rule unduly interfered with the FAA).

215. See *id.* at 1751-52 (finding that greater procedures, particularly those procedures involved in class actions, would be too complex and high-risk for arbitration in the absence of multilayered review).

216. See Petition for Writ of Certiorari, *supra* note 13, at 18-9 (comparing the cost differential between litigation and arbitration to argue that prohibitive costs must be those that are strictly unique to arbitration).

217. See Respondents' Brief in Opposition, *supra* note 201, at 14 (noting that the merchants could spread the expert and attorney's fees amongst other merchants in litigation but do not get that luxury in arbitration).

218. See *Italian Colors III*, 667 F.3d 204, 209-210 (2d Cir.) (citing the arbitration clause of American Express's Merchant Agreement, which only precludes aggregation of claims if the parties elect to use arbitration), *reh'g en banc denied*, 681 F.3d 139 (2d Cir.), *cert. granted sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012), overruled by 133 S. Ct. 2304 (2013).

219. See *id.* at 219 (concluding that the class action waiver is a *de facto* waiver of liability for the defendants because it makes individual arbitration so expensive that no merchant will bring a claim).

dispute in arbitration.<sup>220</sup> In sum, no matter how the inquiry is framed or what costs are considered, the plaintiffs successfully demonstrated that prohibitive costs would inhibit their ability to vindicate their federal statutory rights in arbitration, and the agreement cannot be enforced.<sup>221</sup>

*C. Concepcion Does Not Directly Apply to Italian Colors Because the Vindication of Rights Doctrine Arose Out of Federal Law and Did Not Suffer From the Same Pitfalls as the Discover Bank Rule.*

The Second Circuit and the dissent interpreted *Concepcion*'s holding strictly as an application of obstacle preemption, but the majority interpreted *Concepcion* more broadly to prohibit any attempts to evade binding arbitration, even if the plaintiff could not vindicate her federal statutory rights.<sup>222</sup> Even if the rule arising out of *Italian Colors* was synonymous with the *Discover Bank* rule preempted in *Concepcion*, which it is not, the dissent correctly pointed out that the *Concepcion* Court did not address the effect its holding would have on a federal statutory right.<sup>223</sup> The Court was silent on its earlier holdings relating to the effective vindication of federal statutory rights in *Mitsubishi Motors* and *Green Tree*.<sup>224</sup> The Court did not mention these cases because *Concepcion* simply found a state law was preempted as an obstacle to a federal objective, and the *Concepcions* did not establish they could not adequately vindicate their rights.<sup>225</sup>

Moreover, the Court erroneously conflated *Concepcion*'s preemption

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220. See *Concepcion*, 131 S. Ct. at 1751 (indicating that the switch from bilateral to class arbitration was the appropriate inquiry for determining whether a judge-made rule impinged on the FAA); *Italian Colors III*, 667 F.3d at 215-16 (recognizing that class arbitration may be the only effective mechanism for vindicating the merchants' rights in this particular case).

221. See *Italian Colors III*, 667 F.3d at 212 (finding valid grounds existed for revoking the class action waiver under the FAA because the plaintiffs demonstrated arbitration was prohibitively expensive).

222. See, e.g., *Ranier v. Citigroup, Inc.*, 827 F. Supp. 2d 294, 310 (S.D.N.Y. 2011) (suggesting *Concepcion* could be interpreted to permit courts to uphold arbitration agreements even if the practical effect of enforcement was to leave plaintiffs without an adequate forum to vindicate their rights under state law).

223. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (holding that Congress did not intend, by enacting the savings clause of the FAA, to uphold state laws that contravene the FAA's objectives).

224. See *Italian Colors III*, 667 F.3d at 216 (reasoning that the vindication of rights doctrine was preserved after *Concepcion* because the Court did not mention either *Mitsubishi Motors* or *Green Tree*).

225. See *Concepcion*, 131 S. Ct. at 1752 (finding that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons").

analysis with the harmonization of two federal statutes.<sup>226</sup> When a state law is in conflict with a federal law, the federal law prevails.<sup>227</sup> That is not the case when two federal laws are in conflict.<sup>228</sup> The FAA should not override the federal antitrust laws because class arbitration requires more procedure than bilateral arbitration.<sup>229</sup> Thus, *Concepcion* should not have been read more broadly to encompass the challenge brought by the merchants in *Italian Colors*.<sup>230</sup> Still, even under a broad reading of *Concepcion*, because the facts surrounding and including the arbitration agreement are sufficiently different, the Court should not have concluded that *Concepcion* controlled whether this particular arbitration agreement was enforceable under the FAA.<sup>231</sup>

*1. The Dissent Was Correct That Italian Colors Is Distinguishable From Concepcion Because the Vindication of Rights Doctrine Does Not Pose the Same Preemption Concerns, Nor Was the Doctrine Contemplated By Concepcion.*

The dissent was correct that *Concepcion* was not relevant to the disposition of this case.<sup>232</sup> First, *Concepcion* disposed of the *Discover Bank* rule on preemption grounds, because the state law acted as an obstacle to the objective of a federal law.<sup>233</sup> Here, the Court was charged

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226. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (opining that *Concepcion* “all but resolves this case” because *Concepcion* prohibits a court from imposing procedural barriers to arbitration or requiring the availability of class proceedings).

227. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (stating that federal law can preempt state law when the state law is an obstacle to the accomplishment of federal objectives).

228. See *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 861-62 (7th Cir. 1998) (noting that preemption analysis is inapplicable when two federal statutes are in conflict).

229. See *Ranier v. Citigroup, Inc.*, 827 F. Supp. 2d 294, 310 (S.D.N.Y. 2011) (reasoning that even a broad reading of *Concepcion* would not warrant a finding that the analysis articulated in *Italian Colors* was invalid).

230. See *In re Am. Express Merch. Litig.*, 681 F.3d at 140 (Pooler, J., concurring) (finding the *Concepcion* Court’s failure to mention the line of cases establishing the vindication of rights doctrine an indication that those holdings were still good law).

231. See *id.* (noting a critical distinction between *Italian Colors III* and *Concepcion* in the fee-shifting provisions that could make the plaintiffs whole in *Concepcion* but not *Italian Colors III*).

232. See *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting) (asserting that *Concepcion* is irrelevant to this case because *Concepcion* concerned a state law that barred class action waivers even when class proceedings were unnecessary to sufficiently vindicate a claimant’s rights).

233. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747-48 (2011) (concluding that the *Discover Bank* rule interfered with the FAA’s mandate to favor the

with reconciling two conflicting federal interests.<sup>234</sup> Because *Concepcion* was not charged with making that reconciliation, the Court had to give the vindication of rights doctrine independent consideration on that basis alone.<sup>235</sup> Second, the *Concepcions* sought to invalidate an arbitration agreement because it did not contain a class action waiver, regardless of whether a class action was necessary for the *Concepcions* to resolve the dispute.<sup>236</sup> The merchants in *Italian Colors*, on the other hand, sought to invalidate an arbitration agreement because the cumulative effect of all of the provisions in the arbitration agreement foreclosed the merchants' ability to bring their antitrust claims.<sup>237</sup> As the dissent correctly pointed out, the Court's view that the merchants' claim rested solely on the availability of class actions is the sole connection between *Concepcion* and *Italian Colors*.<sup>238</sup> Moreover, *Concepcion* did not answer the crux of the question in this case: whether an arbitration agreement is unenforceable if the plaintiffs can demonstrate that the terms of the agreement effectively prevent them from bringing a claim.<sup>239</sup> Contrary to the Court's assertion, *Concepcion* did not address this question because the Court concluded that the *Concepcions* could effectively vindicate their rights under the terms of

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enforcement of arbitration agreements according to their terms by continually invalidating arbitration agreements with class action waivers).

234. See *Italian Colors*, 133 S. Ct. at 2320 (Kagan, J., dissenting) (opining that *Italian Colors* is distinguishable from *Concepcion* because standard preemption analysis is inapplicable to a potential conflict between two federal statutes); *Italian Colors III*, 667 F.3d 204, 213 (2d Cir. 2012) (asserting that *Concepcion* was inapposite because the vindication of rights doctrine is rooted in federal law of arbitrability), overruled by 133 S. Ct. 2304 (2013).

235. See *Italian Colors*, 133 U.S. at 2320 (Kagan, J., dissenting) (arguing that because *Concepcion* was not charged with harmonizing any tension between two federal statutes, the vindication of rights doctrine was not implicated by the decision).

236. See *Concepcion*, 131 S. Ct. at 1753 (emphasizing that the *Concepcions* did not need the benefit of class proceedings in order to be made whole).

237. See *Italian Colors*, 133 S. Ct. at 2318 (Kagan, J., dissenting) (arguing that the case at hand could not solely be concerned with class action waivers because the agreement needs to be viewed as a whole to determine if it indeed does not provide any avenue for effective vindication).

238. See *id.* (positing that the viability of *Concepcion* in the majority opinion rested solely in the "false premise" that the merchants were only challenging American Express's use of the class action waiver).

239. See *id.* (noting that the vindication of rights doctrine was not discussed in *Concepcion* because the Court was not faced with an issue in which the parties at hand could not effectively vindicate their rights in arbitration); *Concepcion*, 131 S.Ct. at 1753 (holding that the *Discover Bank* rule was an impermissible obstacle to the FAA because it invalidated class actions even where unnecessary for the particular claim to be resolved).



the arbitration agreement.<sup>240</sup> As such, *Concepcion* does not “all but resolve[ ] this case.”<sup>241</sup>

2. *Unlike the Discover Bank Rule, the Vindication of Rights Doctrine Applied a Case-by-Case Test and Thus Would Not Have a Disproportionate Impact on Arbitration Agreements.*

Although the *Discover Bank* rule on its face applied to all contracts equally, the effect of the rule would be to displace arbitration agreements.<sup>242</sup> The test envisioned by the California Supreme Court purported to provide for a case-by-case analysis, but was so broad that it was, in effect, a categorical rule that made class action waivers *per se* unenforceable.<sup>243</sup> The *Discover Bank* rule intended only to cover consumer contracts of adhesion, but the Court found that failed to limit the rule’s scope.<sup>244</sup> Also, the rule failed to describe what constitutes small damages or how verifiable a claim of unfair practices must be by the time the defendant moves to compel arbitration.<sup>245</sup> The result would allow most consumers in California to bring a claim under the *Discover Bank* rule and avoid arbitration even though they could effectively vindicate their rights through bilateral arbitration.<sup>246</sup>

The Second Circuit’s reasoning in *Italian Colors* did, however, provide the limiting principle that was missing in *Discover Bank*.<sup>247</sup> Rather than

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240. See *Concepcion*, 131 S. Ct. at 1753.

241. See *Italian Colors*, 133 S. Ct. at 2312 (asserting that because *Concepcion* invalidated previous attempts to interfere with the “primary attributes” of arbitration, *Concepcion* “all but resolves this case”).

242. See *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1750-51 (2011) (concluding that the rule, though on its face applied to all contracts equally, would have a disproportionate impact on arbitration agreements, and thus fell outside of section 2 of the FAA).

243. See *id.* at 1750-51 (holding that the *Discover Bank* rule would effectively manufacture class arbitration rather than allow parties to arbitrate according to the terms of their agreement).

244. See *id.* at 1750 (finding that it would be rare today to come across a consumer contract that was not an adhesion contract and most such contracts include arbitration clauses).

245. See *id.* (noting the second and third prongs of the *Discover Bank* rule are so “toothless and malleable” that they have no limiting effect and any consumer could demand class arbitration).

246. See *id.* at 1753 (recognizing that AT&T’s arbitration agreement was so consumer-friendly that the *Concepciones* would not only have been made whole, but would have been better off in arbitration).

247. See *Italian Colors III*, 667 F.3d 204, 212-14 (2d Cir.) (indicating *Discover Bank* employed a blanket prohibition on class action waivers, whereas the merchants sought revocation of the arbitration agreement in their particular instance), *reh’g en*

creating a test that purports to apply to all contracts but in fact disfavors arbitration, the Second Circuit's vindication of rights analysis required a detailed inquiry into the specifics of each plaintiff's case, what costs are necessary to make that case, and whether those costs are prohibitive.<sup>248</sup> The vindication of rights doctrine as applied by the Second Circuit and the dissent would not have opened the floodgates for anyone who signed a class action waiver to avoid arbitration, as feared by the Court in *Concepcion*.<sup>249</sup> The Second Circuit and the dissent both emphasized that most plaintiffs who have brought a prohibitive costs defense in the past have failed because of the high bar set by *Green Tree* to prove prohibitive costs.<sup>250</sup> Thus, the rule would not tend to disfavor arbitration or have a disproportionate impact on arbitration agreements; it would only affect the plaintiffs who could provide sufficient evidence to demonstrate they actually could not vindicate their rights.<sup>251</sup>

*3. In Italian Colors, the Merchants Could Not Be Made Whole Through Bilateral Arbitration Because the Arbitration Agreement Did Not Have Similar Customer-Friendly Provisions.*

In *Concepcion*, the arbitration agreement drafted by AT&T had a number of consumer-friendly provisions that made even bilateral arbitration an attractive alternative to litigation.<sup>252</sup> Notably, the parties stipulated that AT&T would pay all costs for non-frivolous claims and would pay a seven thousand five hundred dollar premium if the arbitrator gives an award greater than AT&T's last settlement offer.<sup>253</sup> The district

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*banc denied*, 681 F.3d 139 (2d Cir.), *cert. granted sub nom. Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012), overruled by 133 S. Ct. 2304 (2013).

248. *See id.* at 218 (emphasizing that the weight of the evidence plaintiffs offered to prove their prohibitive costs defense in finding the arbitration agreement was unenforceable).

249. *See In re Am. Express Merch. Litig.*, 681 F.3d 139, 142 (2d Cir.) (Pooler, J., concurring) (noting that the decision will not permit every future plaintiff to establish a "vindication of rights" defense by hiring expensive attorneys and artfully choosing experts), *denying reh'g en banc to Italian Colors III*, 667 F.3d 204 (2d Cir. 2012).

250. *See Italian Colors III*, 667 F.3d at 217 (citing cases in the Fourth and Third Circuits in which plaintiffs failed to prove prohibitive costs; considering that failure a lack of sufficient evidence and thus an unviable legal theory).

251. *See id.* (finding that the burden of proof on a plaintiff to demonstrate the existence of prohibitive costs is high, and that courts will be able to decide when a record is sufficient).

252. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (noting AT&T's arbitration agreement made it easy for consumers to go through the arbitration process and involved few procedures).

253. *See id.* (noting AT&T additionally agreed it could not seek reimbursement of its attorney's fees and stipulated that the arbitrator could award any form of individual

court and the Ninth Circuit both found that use of arbitration was likely to make the plaintiff whole even if the case never reached arbitration or litigation and could potentially provide excess payment.<sup>254</sup> Additionally, the district court found that consumers who were members of a class would likely be worse off than a consumer who arbitrated on an individual basis.<sup>255</sup> Thus, the Court did not consider the effect prohibitive costs might have on a litigant's ability to pursue a claim because there were no prohibitive costs.<sup>256</sup> In fact, the Concepcions' fiscal ability to pursue a claim in arbitration without aggregating their claims was one of the linchpins in the Court's reasoning.<sup>257</sup>

In *Italian Colors*, American Express provided no such incentives.<sup>258</sup> Instead, it mandated that all merchants that wanted to resolve a dispute pay all of the up-front costs and bear the full risk of losing.<sup>259</sup> In contrast to the district court's finding that the Concepcions could be made whole or even be better off in bilateral arbitration, the merchants in *Italian Colors*

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relief).

254. See *id.* at 1752 (concluding that, as is the case with class action litigation, class action arbitration will force defendants to settle unmeritorious claims).

255. See *id.* at 1753 (finding consumers who proceeded as a class would be worse off because of the time value of money and the opportunity to only receive "a small percentage of a few dollars").

256. See *id.* (stating the Concepcions were given sufficient incentives to arbitrate their disputes in bilateral arbitration).

257. See *id.* at 1753 (noting the Ninth Circuit's concession that aggrieved customers who filed complaints with AT&T would be essentially guaranteed to be made whole and would be better off engaging in bilateral arbitration than proceeding as a class). The *Concepcion* Court assumed that the Concepcions did not need the benefit of the class action mechanism to resolve their dispute because of AT&T's consumer-friendly provisions. See *id.* While it is true that those provisions made it more likely the Concepcions would bring a claim than the merchants in *Italian Colors*, those provisions still may not have provided an adequate incentive to bring a claim. Whether or not a party has adequate incentive to bring a claim, however, is not the wrong that the vindication of rights doctrine attempts to remedy. See, e.g., *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 (9th Cir. 2012) (finding the arbitration agreement enforceable when the inquiry was whether the plaintiffs had sufficient incentive to bring a claim, not whether the plaintiffs had the ability to effectively vindicate their rights).

258. See *Italian Colors III*, 667 F.3d 204, 209-10 (2d Cir.) (finding the terms of American Express's arbitration agreement to amount to a waiver of liability), *reh'g en banc denied*, 681 F.3d 139 (2d Cir.), *cert. granted sub nom.* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 594 (2012).

259. See *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 2304 (2013) (Kagan, J., dissenting) (noting that American Express's arbitration agreement, in addition to the class action waiver, included a prohibition on joinder or consolidation, precluded any cost-shifting, and imposed a confidentiality provision that foreclosed the possibility that merchants could agree to share an expert report).

provided persuasive evidence that they would not even come close.<sup>260</sup>

On its face, the fee-shifting provisions provided by the Clayton Act appear to have the same effect as AT&T's agreement to assume all of the claimants' costs.<sup>261</sup> However, a closer look demonstrates that the cost shifting that the Clayton Act provides would not make the plaintiffs whole.<sup>262</sup> First, the Clayton Act does not have a fee-shifting provision for expert fees, which account for the majority of the merchants' prohibitive costs.<sup>263</sup> Second, the Clayton Act's provision for the shifting of reasonable attorney's fees and costs will not fully account for the merchants' expenses.<sup>264</sup> Attorney's fees are typically not awarded in excess of the value of the underlying claim, which is miniscule in this case compared to what the fees will ultimately be.<sup>265</sup> Consequently, because most attorneys counsel plaintiffs on a contingency-fee basis, no competent attorney would take on such a complex antitrust case when she could only hope to recover a small percentage of what her representation is worth.<sup>266</sup> As a result, the very costs that the merchants asserted were prohibitive could not be recouped in arbitration even if they won their case.<sup>267</sup>

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260. See *Italian Colors III*, 667 F.3d at 217-19 (relying on an expert economist's affidavit to find that the merchants could not feasibly pursue their antitrust claims on an individual basis in arbitration).

261. See 15 U.S.C. § 15(a) (2006) (providing an award of the cost of the suit, including a reasonable attorney's fee, for successful private party plaintiffs in an antitrust suit).

262. See Brief for Trial Lawyers for Public Justice as Amici Curiae Supporting Plaintiff-Appellants at 6, *Italian Colors Rest. v. Am. Express Travel Related Serv. Co.*, 554 F.3d 300 (2d Cir. 2009) (No. 06-1871-cv) (presuming the district court interpreted the Clayton Act provision to mean successful plaintiffs could recoup all of their costs).

263. See *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441-42 (1987) (noting that the Clayton Act prohibits courts to award expert fees in excess of thirty dollars).

264. See Brief for Trial Lawyers for Public Justice, *supra* note 262, at 10 (finding the merchant plaintiffs would not be able to obtain representation unless they paid out of their own pockets because the Clayton Act fee-shifting provisions are inadequate).

265. See *id.* at 7-8 (noting that attorney's fees are never awarded in excess of the underlying claim which, in this case, would cause a law firm to lose money because damages are so minimal).

266. See *Kristian v. Comcast Corp.*, 446 F.3d 25, 58-59 (1st Cir. 2006) (noting the large initial outlay in time and money for a plaintiff's attorney in antitrust suits and the uncertainty of success, which makes these claims unattractive for attorneys).

267. See *Italian Colors III*, 667 F.3d 204, 209-10 (2d Cir. 2012) (finding the plaintiffs could not effectively vindicate their rights in arbitration because expert and attorney's fees would be prohibitively expensive), *reh'g en banc denied*, 681 F.3d 139 (2d Cir.), *cert. granted sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012), overruled by 133 S. Ct. 2304 (2013).

4. *The Dicta in Concepcion Regarding Prohibitive Costs Does Not Apply to Italian Colors Because It Was Outside the Context of the Vindication of Rights Doctrine.*

The *Concepcion* Court did briefly mention the possibility that small dollar claims could keep a litigant from bringing a claim, but because those plaintiffs had a sufficient financial incentive to arbitrate, the Court did not strongly consider the question.<sup>268</sup> The possibility that prohibitive costs could keep a litigant out of court, then, is still a viable avenue for plaintiffs who meet their burden of production to avoid arbitration under Section Two of the FAA.<sup>269</sup> Not only is it still good law, but it is necessary in situations like the one presented here.<sup>270</sup> Because the vindication of rights doctrine would not disfavor arbitration, there are no incentives to arbitrate, and the merchants could not recoup their costs. It would be inequitable and contrary to established precedent to enforce the arbitration agreement.<sup>271</sup>

#### IV. POLICY IMPLICATIONS AND SUGGESTIONS

*A. Without the Rule Adopted By the Second Circuit in Italian Colors, the Class Action Mechanism Will Be Largely Unavailable for the Small-Dollar Claims It Was Created to Protect, and Will Allow Businesses to Avoid Culpability for Violating Consumers' Rights.*

As the Supreme Court has continued to favor arbitration over litigation and has endorsed the use of broad arbitration clauses, businesses have been able to insert onerous arbitration agreements in an array of contracts.<sup>272</sup> This is so even when the parties, such as the merchants in *Italian Colors*, are considered sophisticated because they still may have little or no bargaining power.<sup>273</sup> The Court in *Concepcion* correctly pointed out that

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268. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (considering the dissent's argument that class action waivers were necessary for small dollar claims that could slip through the legal system "desirable for unrelated reasons").

269. See *Italian Colors III*, 667 F.3d at 217 (finding that the lack of plaintiffs' success in proving prohibitive costs under the vindication of rights doctrine went to "the quality of the evidence presented, not the viability of the legal theory").

270. See *Concepcion*, 131 S. Ct. at 1760 (Breyer, J., dissenting) (highlighting the benefits of class proceedings in situations where small-dollar claimants would more likely decide not to bring suit in any forum on an individual basis).

271. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (concluding that as long as a potential litigant may effectively vindicate its statutory claim in arbitration, the statute continues to serve its function).

272. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (holding arbitration clauses in employment contracts were consistent with the FAA).

273. See Andrea Doneff, *Arbitration Clauses in Contracts of Adhesion Trap "Sophisticated Parties" Too*, 2010 J. DISP. RESOL. 235, 249-50 (2010) (finding that the

the days when consumer contracts were not contracts of adhesion are a thing of the past.<sup>274</sup> After *Concepcion*, the widespread use of broad arbitration clauses will be even more pervasive because the Court has essentially shown businesses how to craft an agreement that will shield them from liability.<sup>275</sup> This means that most adhesion contracts—from employment contracts, to cell phone contracts, to those entered into by the merchants and American Express—will either expressly or implicitly proscribe class actions and will almost always be upheld.<sup>276</sup> At least as to state law claims, plaintiffs will no longer attempt to bring small-dollar claims because it is not economically viable when the expense would dwarf any potential recovery.<sup>277</sup> As a result, businesses may implement the exact scheme the *Discover Bank* rule attempted to proscribe by explicitly or implicitly embedding a class action waiver into its standard form contract.<sup>278</sup> Though *Concepcion* stated the *Discover Bank* rule was preempted because it was overbroad, in light of the Court's apparent distaste for class arbitration it would likely come to a similar conclusion

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Court has taken a hands-off approach to arbitration agreements and that unequal bargaining power is not a sufficient reason to hold an agreement unenforceable).

274. See *Concepcion*, 131 S. Ct. at 1750 (reasoning that the *Discover Bank*'s requirement of adhesion contract failed to limit the rule's scope because most consumer contracts are adhesive (citing *Carbajal v. H & R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004)).

275. See Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 627 (2012) (noting that most arbitration agreements after *Concepcion* will be upheld because of the sweeping holding); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 378 (2005) (noting that the class action mechanism is necessary to incentivize businesses to avoid the misconduct that leads to such consequential liability).

276. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1774-76 (2010) (holding that courts cannot compel parties to submit to class arbitration if the arbitration agreement does not expressly permit it); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31-32 (1991) (finding that claims arising out of employment contracts are arbitrable because arbitration is not inherently inconsistent with federal employment statutes).

277. See *Concepcion*, 131 S. Ct. at 1752 (holding that state laws that tend to disfavor arbitration are preempted by the FAA); see also *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (recognizing that when a plaintiff's expected damages are infinitesimal compared to potential costs and no claims can be aggregated, no plaintiff will bring a claim).

278. See *Concepcion*, 131 S. Ct. at 1746 (describing the *Discover Bank* rule that attempted to catch businesses engaging in the kind of fraudulent behavior complained of by the *Concepcions*); *Stolt-Nielsen*, 130 S. Ct. at 1774-76 (finding that an arbitration agreement that did not mention the availability of class proceedings implicitly prohibited it).

under a case-by-case test because the FAA would still preempt state law.<sup>279</sup> As a result, small-dollar state law claims across the board would go largely unresolved, and businesses would not be held accountable for the sorts of violations that typically give rise to class actions.<sup>280</sup>

Now that the Court has rejected the vindication of rights doctrine, the class action mechanism may be largely unavailable in both state and federal courts.<sup>281</sup> As a result, only the most affluent and dedicated of consumers would be able to bring private actions, and those who are not as fortunate would be out of luck.<sup>282</sup> This is arguably a far broader holding than what *Concepcion* states; *Concepcion* merely proscribed an overbroad definition of what is unconscionable when the instant parties actually could vindicate their rights in bilateral arbitration.<sup>283</sup> The Court's conclusion that the vindication of rights doctrine conflicts with the FAA has essentially ruled out unconscionability as a defense that falls under the savings clause, which the majority expressly chose not to do in *Concepcion*.<sup>284</sup> Further, by incorporating the savings clause, Congress clearly intended for some arbitration agreements to still be unenforceable.<sup>285</sup> The FAA was not meant to bar claims that otherwise could not go forward without class actions; it only intended to provide a more efficient choice of forum.<sup>286</sup>

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279. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM & MARY L. REV. 1, 22-23 (2000) (noting the recent Supreme Court has indicated a strong preference for mandatory arbitration and set precedent to ensure that arbitration clauses will be enforced in most situations).

280. See, e.g., *Acorn v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1169 (N.D. Cal. 2002) (noting that plaintiffs must be able to vindicate their rights to give businesses the incentive to avoid conduct that leads to class actions in the first place).

281. See David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 239 (2012) (positing that the Court has effectively rendered arbitration clauses *per se* enforceable, so defendants can use class action waivers in arbitration agreements to immunize themselves from facing liability).

282. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) (recognizing that when damages are inconsequential, proceeding as a class is the only realistic option for resolving those disputes).

283. See *Concepcion*, 131 S. Ct. at 1750 (overturning *Discover Bank* because the rule it espoused was not sufficiently limited to prevent any party to a consumer contract from demanding class arbitration *ex post*).

284. See *id.* at 1753-55 (Thomas, J., concurring) (writing separately to suggest that the only applicable defenses under the savings clause were those relating to the making of an agreement, such as fraud or duress, and unconscionability was an invalid defense).

285. See *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (recognizing that the FAA savings clause permits courts to invalidate arbitration agreements for traditional contract defenses such as unconscionability).

286. See *Concepcion*, 131 S. Ct. at 1759 (Breyer, J., dissenting) (positing how

In order to ensure that the class action mechanism is not eviscerated, Congress should consider amending the FAA to make explicit that arbitration agreements would be unenforceable if their provisions would preclude plaintiffs from effectively vindicating their rights in arbitration.<sup>287</sup> Then, it would be clear when enforcing an arbitration agreement would compromise a federal statute because the FAA itself would be compromised.<sup>288</sup>

#### V. CONCLUSION

Because the Second Circuit's holding in *Italian Colors* is entirely consistent with prior Supreme Court precedent, its holding should not have been disturbed by the Supreme Court.<sup>289</sup> Under Section Two of the FAA, the Court should have found that an arbitration agreement is unenforceable when the plaintiffs provide persuasive evidence that arbitration does not provide an adequate forum for vindicating their federal statutory rights.<sup>290</sup> Arbitration is an inadequate forum for vindicating statutory rights when the cost of admission, including necessary expert fees, is so prohibitively expensive that a plaintiff will be precluded from bringing a claim.<sup>291</sup> As a result of the Court's ruling, we can no longer ensure that arbitration agreements are only enforced when arbitration provides a change in forum and does not require plaintiffs to forgo substantive rights, as envisioned by the FAA.<sup>292</sup>

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arbitration would actually be carried out in practice had not been fully fleshed out when the FAA became law, and the legislative history suggests it would primarily be sought to resolve disputes of fact, not law).

287. See Gilles & Friedman, *supra* note 275, at 652 (noting an attempt in Congress to provide that class action waivers are unenforceable in standard-form consumer and employment contracts).

288. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627-37 (1985) (finding that the applicable federal statute is not served if the terms of an arbitration agreement effectively preclude the prospective litigants from vindicating their federal statutory rights).

289. See *Italian Colors III*, 667 F.3d 204, 214 (2d Cir.) (utilizing the vindication of rights doctrine because it is consistent with *Green Tree* and *Mitsubishi Motors*, which have not been overruled by the Court), *reh'g en banc denied*, 681 F.3d 139 (2d Cir.), *cert. granted sub nom.* Am. Express Co. v. *Italian Colors Rest.*, 133 S. Ct. 594 (2012), overruled by 133 S. Ct. 2304 (2013).

290. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (holding that prohibitive costs can preclude a plaintiff from effectively vindicating statutory rights).

291. See *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001) (finding that any form of prohibitive costs is relevant to determine whether a plaintiff can vindicate her rights, not just those unique to arbitration).

292. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (noting that the non-drafter of an arbitration clause does not waive her



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federal statutory rights simply by agreeing to arbitrate a statutory claim, as long as arbitration merely represents a change in forum).