

RIDING THE WAIVER: *IN RE AMERICAN EXPRESS MERCHANTS' LITIGATION* AND THE FUTURE OF THE VINDICATION OF STATUTORY RIGHTS

Abstract: On February 1, 2012, the U.S. Court of Appeals for the Second Circuit held in *In re American Express Merchants' Litigation* that a class action waiver was unenforceable because class litigation was the only economically feasible way for the plaintiffs to vindicate their statutory rights under the Sherman Act. In doing so, the Second Circuit properly balanced the policy underlying the Federal Arbitration Act and the policy favoring the vindication of rights provided by federal statute. This Comment argues that the Second Circuit properly interpreted the vindication of statutory rights analysis in light of U.S. Supreme Court jurisprudence.

INTRODUCTION

Congress enacted the Federal Arbitration Act ("FAA") in 1925 in response to widespread judicial hostility to arbitration agreements.¹ Congress intended to remedy this hostility with a national policy favoring arbitration, placing arbitration agreements on an equal footing with all other contracts.² Section 2, the FAA's primary substantive provi-

¹ Federal Arbitration Act (FAA), 9 U.S.C. § 2 (2006); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011). Arbitration is a method of dispute resolution involving one or more neutral third-party arbitrators who are usually chosen by the disputing parties and whose decision is binding. BLACK'S LAW DICTIONARY 119 (9th ed. 2009). In England, judicial hostility to arbitration agreements was justified on the ground that such agreements were against public policy because they "oust the jurisdiction" of the courts. *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 983 (2d Cir. 1942) (citing *Kill v. Hollister*, (1746) 95 Eng. Rep. 532 (K.B.) 532; 1 Wils. K.B. 129). Most American courts in the nineteenth century adopted this attitude. *Id.* at 984.

Judicial hostility to arbitration traditionally has been expressed through two doctrines: (1) "revocability," which allows parties to repudiate arbitration agreements at any time before the arbitrator's award is made, and (2) "invalidity" or "unenforceability," which flatly denies any remedy for the failure to honor an arbitration agreement. *Southland Corp. v. Keating*, 465 U.S. 1, 32 (1984). Congress intended the FAA to abolish the rule that agreements for arbitration will not be specifically enforced, so that whenever parties agree by contract to submit controversies to arbitration and one party refuses, the court will appoint an arbitrator and the arbitration will proceed. 66 CONG. REC. 984 (1924) (statement of Sen. Thomas J. Walsh); *see* S. REP. NO. 68-536, at 2-3 (1924).

² *See* *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); Michael H. LeRoy, *Are Arbitrators Above the Law? The "Manifest Disregard of the Law" Standard*, 52 B.C. L. REV. 137, 174 (2011).

sion, provides parties with a way to avoid enforcement of an arbitration agreement.³ Specifically, the saving clause of section 2 provides that arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁴

After the FAA was enacted, courts initially excluded from arbitrability suits that asserted federal statutory claims.⁵ More recently, however, the U.S. Supreme Court has ruled that these claims may be “appropriately resolved” through arbitration.⁶ According to the Court, federal statutory claims can be arbitrated only when arbitration can effectively vindicate the parties’ statutory rights.⁷ This is known as the

³ 9 U.S.C. § 2; *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

⁴ 9 U.S.C. § 2; *Concepcion*, 131 S. Ct. at 1746. The complete text of section 2 of the FAA provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

⁵ See David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723, 723 (2012). Courts excluded federal statutory claims from arbitrability under what was known as the “non-arbitrability doctrine.” *Id.* The non-arbitrability doctrine held that Congress did not intend for federal statutory claims to go to arbitration. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 223 (1985); Horton, *supra* note 5, at 723. The U.S. Supreme Court initially was concerned that arbitration’s informality would undermine the power of federal statutory schemes because arbitrators lack legal training and need not memorialize their decisions in writing. See *Wilko v. Swan*, 346 U.S. 427, 431–32, 35 (1953); Horton, *supra* note 5, at 730–33. This presented a problem because federal statutes may serve a societal interest that affects many more people than the parties in any particular case. Horton, *supra* note 5, at 731; see *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826 (2d Cir. 1968).

⁶ See, e.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89 (2000) (recognizing that the Supreme Court has enforced some arbitration agreements in the past); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (compelling arbitration for a claim under the Age Discrimination in Employment Act claim even though the Act furthered important policies); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (noting that arbitration agreements only change the forum and do not cause a party to forgo the substantive rights afforded by statute); see also Horton, *supra* note 5, at 723–24 (discussing the Court’s changing attitude toward arbitration agreements).

⁷ See *Green Tree*, 531 U.S. at 90, 92; *Mitsubishi*, 473 U.S. at 628; Horton, *supra* note 5, at 723–24.

vindication of statutory rights analysis.⁸ The U.S. Court of Appeals for the Second Circuit's 2012 holding in *In re American Express Merchants' Litigation* (*Amex III*) offers an expansive interpretation of the vindication of statutory rights analysis that saves a small subset of suits from arbitrability.⁹

Part I of this Comment provides an overview of the factual and procedural background of *Amex III* and explores Supreme Court precedent concerning the vindication of statutory rights analysis.¹⁰ Part II examines how the Second Circuit panel and the dissenting opinion in the denial for rehearing en banc reached different conclusions about the proper application of the vindication of statutory rights analysis.¹¹ Finally, Part III argues that the Second Circuit panel's approach to applying the vindication of statutory rights analysis in *Amex III* is consistent with Supreme Court jurisprudence and is the proper outcome.¹²

I. THE HISTORY OF *AMEX III* AND THE VINDICATION OF STATUTORY RIGHTS ANALYSIS

Section A of this Part explores the extensive factual and procedural history of *Amex III*.¹³ Section B then provides an overview of the vindication of statutory rights analysis as set forth by the U.S. Supreme Court in prior cases.¹⁴

A. *The Factual and Procedural Background of Amex III*

In 2006, in *In re American Express Merchants' Litigation*, a group of plaintiffs filed a class action in the U.S. District Court for the Southern District of New York on behalf of all merchants that accept American Express (Amex) cards.¹⁵ They sued over the "Honor All Cards" provi-

⁸ See Horton, *supra* note 5, at 724; see also *infra* notes 47–55 and accompanying text (discussing the vindication of statutory rights analysis).

⁹ 667 F.3d 204, 219 (2d Cir.), *cert. granted sub nom.* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 594 (Nov. 9, 2012) (No. 12-133); see *In re Am. Express Merchs.' Litig. (Amex IV)*, 681 F.3d 139, 142 (2d Cir. 2012) (order denying rehearing en banc); Horton, *supra* note 5, at 724.

¹⁰ See *infra* notes 13–56 and accompanying text.

¹¹ See *infra* notes 57–85 and accompanying text.

¹² See *infra* notes 86–105 and accompanying text.

¹³ See *infra* notes 15–46 and accompanying text.

¹⁴ See *infra* notes 47–56 and accompanying text.

¹⁵ *Amex III*, 667 F.3d at 207–08; *In re Am. Express Merchs.' Litig.*, No. 03-CV-9592(GBD), 2006 WL 662341, at *1 (S.D.N.Y. 2006), *rev'd*, 667 F.3d 139 (2d Cir. 2012). The named plaintiffs were (1) California and New York corporations which operate businesses that have contracted with Amex, and (2) the National Supermarket Association, Inc., "a

sion in the Card Acceptance Agreement contract they signed with Amex.¹⁶ This provision required the plaintiff merchants to accept both Amex credit cards and charge cards at the same high discount rate.¹⁷

The plaintiffs claimed this Card Acceptance Agreement damaged them by forcing them either to accept both Amex charge and credit cards or to accept no Amex cards at all.¹⁸ This meant merchants could either pay high discount fees on Amex credit cards or lose sales from businesses, travelers, affluent consumers, and others who traditionally used Amex charge cards.¹⁹ The plaintiffs asserted that being forced to accept Amex credit cards harmed them because the discount rate Amex charged for its credit cards was at least thirty-five percent higher than those of other mass-market credit cards such as Visa, MasterCard, and Discover.²⁰ Thus, the plaintiffs alleged, the requirement that they accept charge cards and credit cards together at the same fee amounted to an illegal “tying arrangement” in violation of section 1 of the Sherman Act.²¹

Notably, the Card Acceptance Agreement over which the plaintiffs sued contained a class action waiver provision and an arbitration

voluntary membership-based trade association that represents the interests of independently owned supermarkets.” *Amex III*, 667 F.3d at 207.

¹⁶ *Amex III*, 667 F.3d at 207–08.

¹⁷ *Id.* at 208. The “discount rate” or “discount fees” are the fees a card issuer withholds as a percentage of each purchase made with its card at the merchant’s establishment. *See id.* A charge card requires its holder to pay the full balance at the end of each billing cycle. *See id.* at 207. A credit card allows the cardholder to pay only a portion of the amount. *Id.* According to the plaintiffs, Amex issued charge cards to corporate clients and affluent consumers who spent more money than credit card holders on their average purchase and were therefore “particularly attractive” to merchants. *Id.*

¹⁸ *See id.* at 207–08.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*; *see* 15 U.S.C. § 1 (2006). The Sherman Act was designed to preserve free and unfettered competition as the rule of trade and to protect the public from conduct that unfairly destroys competition in the market. 15 U.S.C. § 1; *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). Additionally, Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972); *see* 15 U.S.C. § 15; 28 U.S.C. § 1337 (2006). Because the Sherman Act was designed to promote the national interest in a competitive economy, plaintiffs who assert claims under the Act are similar to private attorneys general who protect the public interest. *See Am. Safety Equip. Corp.*, 391 F.2d at 826–27.

The Supreme Court has defined a “tying arrangement” as “an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.” *N. Pac. Ry. Co.*, 356 U.S. at 5–6, *cited in Amex III*, 667 F.3d at 208 n.4.

clause.²² The class action waiver precluded signatories from bringing a class action or having any claim arbitrated on anything other than an individual basis.²³ Amex moved to compel arbitration pursuant to the arbitration clause.²⁴ In response, the district court dismissed the plaintiffs' claims, holding that the arbitration clause was applicable to the dispute.²⁵ The district court further held that issues related to the enforceability of an arbitration contract and its specific provisions are for the arbitrator to decide once arbitrability had been established.²⁶

The plaintiffs appealed the district court's decision.²⁷ On appeal, in the 2009 case, *In re American Express Merchants' Litigation (Amex I)*, a panel of the U.S. Court of Appeals for the Second Circuit held that the issue of a class action waiver's enforceability was a matter for the court and not for the arbitrator.²⁸ The Second Circuit further held that the class action waiver was not enforceable because the plaintiffs sustained their burden of showing that individual arbitration would be prohibitively expensive and that a class action was the only way to vindicate

²² *Amex III*, 667 F.3d at 210; *In re Am. Express Merchs.' Litig.*, 2006 WL 662341, at *10. The Card Acceptance Agreement's arbitration clause provided that "[a]ny Claim shall be resolved upon the election by you or us, by arbitration pursuant to this arbitration provision and the code of procedure of the national arbitration organization to which the Claim is referred in effect at the time the Claim is filed." *Amex III*, 667 F.3d at 209.

²³ *Amex III*, 667 F.3d at 210. The relevant text of the class action waiver provides:

If arbitration is chosen by any party with respect to a claim, neither you nor we will have the right to litigate that claim in court or have a jury trial on that claim. . . . Further, you will not have the right to participate in a representative capacity or as a member of any class of claimants pertaining to any claim subject to arbitration. The arbitrator's decision will be final and binding. . . .

There shall be no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving Claims brought in a purported representative capacity on behalf of the general public, other establishments which accept the Card (Service Establishments), or other persons or entities similarly situated.

Id. at 209 (emphasis omitted).

²⁴ *In re Am. Express Merchs.' Litig.*, 2006 WL 662341, at *1, *3.

²⁵ *Id.* at *3.

²⁶ *Id.* at *6 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 396–97 (1967); *Campaniello Imps., Ltd. v. Saporiti Italia S.P.A.*, 117 F.3d 655, 667 (2d Cir. 1997)); see *Amex III*, 667 F.3d at 210.

²⁷ *Amex III*, 667 F.3d at 210.

²⁸ 554 F.3d 300, 310–11 (2d Cir. 2009), *vacated sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401, 2401 (2010).

their statutory rights under the Sherman Act.²⁹ Amex then filed a petition for writ of certiorari.³⁰

In 2010, the U.S. Supreme Court granted certiorari and vacated the Second Circuit panel's decision in *Amex I*.³¹ The Court then remanded the case for further consideration in light of its 2010 holding in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*³² In *Stolt-Nielsen*, the Court held that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.³³

On remand in 2011, in *In re American Express Merchants' Litigation* (*Amex II*), the Second Circuit held that the Supreme Court's decision in *Stolt-Nielsen* did not affect its analysis in *Amex I*.³⁴ The Second Circuit reasoned that *Stolt-Nielsen* only held that a party may not be compelled to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.³⁵ The Second Circuit concluded that *Stolt-Nielsen* did not require all class action waivers to be deemed per se enforceable, and thus declined to order class arbitration in *Amex II*.³⁶

In 2011, shortly after the Second Circuit panel's ruling in *Amex II*, the U.S. Supreme Court decided *AT&T Mobility LLC v. Concepcion*.³⁷ In *Concepcion*, the Court held that the FAA preempted California common law, which deemed most class action arbitration waivers in consumer contracts unconscionable.³⁸ Reaffirming the liberal federal policy favoring arbitration agreements, the Supreme Court reasoned that, by requiring the availability of class-wide arbitration, the California rule interfered with fundamental attributes of arbitration and created a scheme inconsistent with the FAA.³⁹

²⁹ *Id.* at 315–16; see *Amex III*, 667 F.3d at 210–11.

³⁰ Petition for Writ of Certiorari at 1, *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010) (No. 08-1473), 2009 WL 1511739, at *1.

³¹ *Am. Express Co.*, 130 S. Ct. at 2401.

³² *Id.*; see *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010).

³³ *Stolt-Nielsen*, 130 S. Ct. at 1775.

³⁴ 634 F.3d 187, 189, 199 (2d Cir. 2011); see *Stolt-Nielsen*, 130 S. Ct. at 1775; *Amex III*, 667 F.3d at 212; *Amex I*, 554 F.3d at 310–11. The court reasoned that a class action was the plaintiffs' only economically feasible means of enforcing their statutory rights. *Amex II*, 634 F.3d at 198.

³⁵ *Amex II*, 634 F.3d at 198.

³⁶ *Id.* at 200; see *Amex III*, 667 F.3d at 213–14.

³⁷ *Concepcion*, 131 S. Ct. at 1753; see *Amex II*, 634 F.3d at 200.

³⁸ *Concepcion*, 131 S. Ct. at 1753.

³⁹ *Id.* at 1748–49.

In 2012, in *Amex III*, a Second Circuit panel reconsidered the class action waiver issue in light of *Concepcion*.⁴⁰ The *Amex III* panel ruled that *Concepcion* did not affect its *Amex I* holding that the class action waiver provision at issue was unenforceable.⁴¹ It reasoned that because *Concepcion* did not overrule two previous Supreme Court cases on which *Amex I* relied, the Second Circuit's analysis in *Amex I* remained valid.⁴²

After *Amex III*, an active judge of the Second Circuit requested a poll on whether to rehear the case en banc.⁴³ In May 2012, however, in *In re American Express Merchants' Litigation (Amex IV)*, the Second Circuit issued an order denying rehearing.⁴⁴ Chief Judge Dennis Jacobs issued a dissenting opinion, contending that the Second Circuit's *Amex III* opinion created a circuit split with the U.S. Court of Appeals for the Ninth Circuit's holding in the 2012 case, *Coneff v. AT&T Corp.*⁴⁵ He also provided reasons distinct from those offered by the Ninth Circuit for why the vindication of statutory rights analysis did not invalidate the arbitration agreement.⁴⁶

B. *The Vindication of Statutory Rights Analysis*

Under the vindication of statutory rights analysis, an arbitration agreement can be invalidated if the costs of arbitration are great enough that prospective litigants are unable to effectively vindicate the rights granted to them by the statute under which they are bringing

⁴⁰ See *Amex III*, 667 F.3d at 206, 212.

⁴¹ See *id.* at 216–17.

⁴² *Id.*; see *Green Tree*, 531 U.S. at 89; *Mitsubishi*, 473 U.S. at 628; see also *infra* notes 47–56 (discussing these cases in detail).

⁴³ *Amex IV*, 681 F.3d at 139.

⁴⁴ *Id.*

⁴⁵ *Id.* at 142, 145 (Jacobs, C.J., dissenting); see *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1157 (9th Cir. 2012). The plaintiffs in *Coneff* entered into a service agreement containing an arbitration clause with a class action waiver. *Coneff*, 673 F.3d at 1157. When AT&T moved to compel arbitration, the plaintiffs argued that the arbitration provision was unenforceable because, even after *Concepcion*, class action waivers that preclude vindication of statutory rights are unenforceable. *Id.* at 1158. The Ninth Circuit held that because the arbitration clause contained fee-shifting provisions like those in *Concepcion*, “aggrieved customers who filed claims would be essentially guaranteed to be made whole.” *Id.* at 1159. The Ninth Circuit distinguished the inability to vindicate statutory rights on an individual basis from the incentive to do so. *Id.* The court acknowledged that the costs of pursuing individual arbitration may provide a disincentive to vindicate rights provided by a federal statute, but called these “unrelated policy concerns” that, “however worthwhile,” cannot undermine the FAA. *Id.*

⁴⁶ *Amex IV*, 681 F.3d at 146–49 (Jacobs, C.J., dissenting).

suit.⁴⁷ The U.S. Supreme Court set forth this analysis in its 1985 decision in *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.* and its 2000 ruling in *Green Tree Financial Corp.-Alabama v. Randolph*.⁴⁸

Mitsubishi was the first Supreme Court case to establish the vindication of statutory rights analysis.⁴⁹ In *Mitsubishi*, the Court held that arbitration is permissible “so long as the prospective litigant may effectively vindicate its statutory cause of action in the arbitral forum.”⁵⁰ In such cases, the policy interests underlying that statutory cause of action are protected.⁵¹ Thus, the Court’s holding ensured that an arbitral forum would preserve access to the same rights as would be available in court.⁵² The Court did not elaborate, however, on what it means for a litigant to “effectively vindicate its statutory cause of action.”⁵³

Additionally, in *Green Tree*, the Supreme Court addressed the impact of costs on the vindication of statutory rights analysis.⁵⁴ The Court noted that evidence of large arbitration costs could preclude a litigant from effectively vindicating statutory rights in the arbitral forum.⁵⁵ The Court further held that when a party seeks to invalidate an arbitration agreement on the basis that arbitration would be prohibitively expensive, that party bears the burden of demonstrating the likelihood of incurring such costs.⁵⁶

II. VARYING INTERPRETATIONS OF THE VINDICATION OF STATUTORY RIGHTS ANALYSIS AS APPLIED TO *IN RE AMERICAN EXPRESS MERCHANTS’ LITIGATION*

The Second Circuit panel’s 2012 decision in *Amex III* and Chief Judge Dennis Jacobs’s dissent later that year from the Second Circuit’s denial of rehearing en banc in *In re American Express Merchants’ Litigation* (*Amex IV*) offer two different interpretations of the vindication of statu-

⁴⁷ See *Green Tree*, 531 U.S. at 92; *Mitsubishi*, 473 U.S. at 637; Horton, *supra* note 5, at 733–36 (summarizing the vindication of statutory rights analysis).

⁴⁸ See *Green Tree*, 531 U.S. at 92; *Mitsubishi*, 473 U.S. at 637; Horton, *supra* note 5, at 733–36.

⁴⁹ See *Mitsubishi*, 473 U.S. at 637.

⁵⁰ *Id.*

⁵¹ See *id.*

⁵² *Id.* at 638.

⁵³ *Id.* at 637.

⁵⁴ See *Green Tree*, 531 U.S. at 90–92. The plaintiff contended that the arbitration agreement’s silence with respect to costs and fees created a risk that she would incur prohibitive arbitration costs if required to pursue her claim in an arbitral forum. *Id.* at 90.

⁵⁵ See *id.* at 92.

⁵⁶ See *id.*

tory rights analysis.⁵⁷ Section A of this Part discusses the Second Circuit's use of the vindication of statutory rights analysis to invalidate a class action waiver.⁵⁸ Section B then examines Chief Judge Jacobs's contrary view that the vindication of statutory rights analysis should not restrict the federal government's preference for arbitration.⁵⁹

A. *The Second Circuit's Opinion*

The Second Circuit held in *Amex III* that the vindication of statutory rights analysis invalidated the class action waiver contained in the merchants' Card Acceptance Agreement.⁶⁰ In reaching its decision, the court invoked the analysis articulated by the U.S. Supreme Court in the 1985 case, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, and the 2000 case, *Green Tree Financial Corp.-Alabama v. Randolph*.⁶¹

The Second Circuit first articulated an expansive reading of the vindication of statutory rights analysis, reasoning that this interpretation best preserved the plaintiffs' ability to recover on their claims.⁶² Because the Supreme Court merely established, but did not define, the vindication of statutory rights analysis in *Mitsubishi*, the Second Circuit had little guidance in its interpretation.⁶³ The Second Circuit noted that a prospective litigant must be able to "effectively vindicate its statutory cause of action in the arbitral forum."⁶⁴ It then examined dicta from a footnote in *Mitsubishi*, indicating that it would violate public policy if contracts were permitted to operate as prospective waivers of parties' rights to pursue statutory remedies for antitrust violations.⁶⁵

Applying that language to *Amex III*, the Second Circuit reasoned that the Card Acceptance Agreement's class action waiver removed the plaintiffs' only reasonably feasible means of recovery, and thus operated as a prospective waiver of the plaintiffs' rights to pursue statutory

⁵⁷ See *In re Am. Express Merchs.' Litig. (Amex IV)*, 681 F.3d 139, 142–49 (2d Cir. 2012) (Jacobs, C.J., dissenting) (order denying rehearing en banc); *In re Am. Express Merchs.' Litig. (Amex III)*, 667 F.3d 204, 210–11, 214–19 (2d Cir. 2012), cert. granted sub nom. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (Nov. 9, 2012) (No. 12-133).

⁵⁸ See *infra* notes 60–75 and accompanying text.

⁵⁹ See *infra* notes 76–85 and accompanying text.

⁶⁰ *Amex III*, 667 F.3d at 219.

⁶¹ *Id.* at 210, 214; see *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90–92 (2000); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636–40 (1985).

⁶² *Amex III*, 667 F.3d at 213–17.

⁶³ See *Mitsubishi*, 473 U.S. at 632, 637 n.19; *Amex III*, 667 F.3d at 214.

⁶⁴ See *Amex III*, 667 F.3d at 214 (emphasis added) (quoting *Mitsubishi*, 473 U.S. at 632).

⁶⁵ *Id.*; see *Mitsubishi*, 473 U.S. at 637 n.19.

remedies.⁶⁶ According to the court, this was a ground for revoking the class action waiver, thereby triggering the saving clause of the FAA and rendering the arbitration agreement invalid.⁶⁷ Such prospective waivers in an arbitration agreement, the Second Circuit reasoned, would render parties unable to vindicate their statutory rights.⁶⁸

The Second Circuit then concluded that the costs of arbitration, discussed by the Supreme Court in *Green Tree*, referred to costs that would not have been incurred had the case been brought in court, rather than in an arbitral forum.⁶⁹ The Second Circuit examined what circumstances could create a prospective waiver of a party's right to pursue a statutory remedy for an antitrust violation.⁷⁰ In doing so, the court again looked to *Green Tree*, which suggested that a party can invalidate an arbitration agreement "on the ground that arbitration would be prohibitively expensive."⁷¹ The Second Circuit reasoned that, given the high cost of bringing an antitrust claim against Amex, arbitration on an individual basis would be so cost-prohibitive as to make pursuing that claim effectively impossible without the use of a class action.⁷² In many cases, the cost of individually litigating a claim would be high enough to offset any recovery that a single plaintiff could receive.⁷³ Thus, according to the *Amex III* court, a class action waiver mandating individual arbitration would prevent plaintiffs from vindicating their statutory rights.⁷⁴ Accordingly, the Second Circuit ruled that the arbitration clause in the Card Acceptance Agreement, which contained the class action waiver, was unenforceable.⁷⁵

⁶⁶ *Amex III*, 667 F.3d at 211.

⁶⁷ *Id.*; see Federal Arbitration Act, 9 U.S.C. § 2 (2006).

⁶⁸ *Amex III*, 667 F.3d at 214.

⁶⁹ *Id.* at 217; see *Green Tree*, 531 U.S. at 90–91.

⁷⁰ *Amex III*, 667 F.3d at 216–17.

⁷¹ *Id.* at 216 (quoting *Green Tree*, 531 U.S. at 91–92).

⁷² See *id.* The court noted that a class action may make it financially feasible for parties to bring claims they would not otherwise be able to pursue. *Id.* at 214. As the court explained, in some instances "[e]conomic reality dictates that [a] petitioner's suit proceed as a class action or not at all." *Id.* (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974)).

⁷³ See *id.* at 218. In this case, it would have cost the plaintiffs between \$300,000 and \$2,000,000 to hire an expert witness to assist in their claim. *Id.* at 217. The most that any one plaintiff might expect to receive in damages, however, was \$38,549. *Id.* at 218.

⁷⁴ See *id.* at 218.

⁷⁵ See *id.* at 219.

B. *Chief Judge Dennis Jacobs's Dissent*

Whereas the Second Circuit panel interpreted the vindication of statutory rights analysis in a way favorable to preserving plaintiffs' right to recover, Chief Judge Jacobs, in his dissent to the denial of rehearing en banc, interpreted it in light of the federal policy favoring arbitration.⁷⁶ Chief Judge Jacobs argued that the policy underlying the FAA contradicts the Second Circuit's holding in *Amex III*.⁷⁷ The Second Circuit's opinion, he argued, could be used to invalidate any arbitration agreement containing a class action waiver.⁷⁸ This contradicted Supreme Court precedent and the FAA's liberal policy favoring arbitration.⁷⁹ The Chief Judge also noted that even if a claim is "economically feasible," plaintiffs are never guaranteed to recover the damages, costs, attorney's fees, expert charges, and other expenses they seek.⁸⁰

Additionally, whereas the *Amex III* panel concluded that the "costs of arbitration" mentioned in *Green Tree* applied to costs incurred as a result of arbitration, Chief Judge Jacobs argued that they only referred to the costs of access to the arbitral forum.⁸¹ Accordingly, he argued that the panel had misinterpreted *Green Tree*.⁸² Under his interpretation, when *Green Tree* described the preclusive effects of "large arbitration costs," it was referring to the costs of access to an arbitral forum itself, not the costs of supporting a claim in the manner the arbitral forum required.⁸³ Moreover, Chief Judge Jacobs drew a distinction be-

⁷⁶ See *Amex IV*, 681 F.3d at 143 (Jacobs, C.J., dissenting). Two judges, José A. Cabranes and Debra Ann Livingston, concurred in Chief Judge Jacobs's dissent. *Id.*

⁷⁷ *Id.* at 143, 146.

⁷⁸ *Id.* at 143–44. Although the Second Circuit suggested a case-by-case approach, Chief Judge Jacobs opined that *Amex III*'s statement that class actions may be the only economically feasible way to vindicate a claim offered plaintiffs a way to render class action waivers categorically void. *Id.*

⁷⁹ *Id.* at 145.

⁸⁰ *Id.* at 144. Chief Judge Jacobs went on to note that such a result is "rarely achieved by even the most successful litigants." *Id.*

⁸¹ *Green Tree*, 531 U.S. at 81; see *Amex IV*, 681 F.3d at 142–49 (Jacobs, C.J., dissenting).

⁸² *Amex IV*, 681 F.3d at 147 (Jacobs, C.J., dissenting). Chief Judge Jacobs also argued that the panel had misinterpreted *Mitsubishi*. *Id.*; see *Mitsubishi*, 473 U.S. at 637 n.19. Specifically, he stated that when the Supreme Court condemned contracts that constituted a prospective waiver of a party's statutory rights, it was concerned with an arbitral panel that might refuse to apply American law to a federal statutory claim. *Amex IV*, 681 F.3d at 147 (Jacobs, C.J., dissenting); see *Mitsubishi*, 473 U.S. at 637 n.19. The issue in *Mitsubishi* was the arbitrability of federal statutory claims arising under a valid arbitration clause providing for international arbitration. *Mitsubishi*, 473 U.S. at 616–17.

⁸³ *Green Tree*, 531 U.S. at 81; *Amex IV*, 681 F.3d at 147 (Jacobs, C.J., dissenting). The Chief Judge stated that these costs were those enumerated in *Green Tree*, such as "filing

tween these arbitration costs, which he claimed would render arbitration agreements invalid, and the costs of individually litigating an expensive claim in court or in an arbitral forum, which would not.⁸⁴ Chief Judge Jacobs reasoned that the fact that a claim is expensive to litigate does not mean that the claim cannot be litigated, and therefore does not preclude parties from vindicating their rights.⁸⁵

III. THE SECOND CIRCUIT'S APPROACH BETTER COMPORTS WITH SUPREME COURT PRECEDENT

In *Amex III*, the Second Circuit correctly interpreted the vindication of statutory rights analysis as articulated by the Supreme Court in *Green Tree Financial Corp.-Alabama v. Randolph* in 2000 and *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.* in 1985.⁸⁶ The Second Circuit properly balanced the liberal federal policy favoring arbitration with the federal policy of protecting an individual's ability to vindicate statutory rights by preserving the right to a class action.⁸⁷ By contrast, Chief Judge Jacobs' dissent in the 2012 case, *In re American Express Merchants' Litigation (Amex IV)*, offered a pro-arbitration interpretation of the competing interests underlying the vindication of statutory rights analysis.⁸⁸

The Second Circuit properly balanced the competing federal policies of favoring arbitration and protecting the ability of prospective litigants to vindicate their federal statutory rights.⁸⁹ This approach, broadly interpreting *Green Tree* and *Mitsubishi*, called for a case-by-case examination of whether a class action waiver would effectively preclude a party from vindicating its federal statutory rights.⁹⁰ Accordingly, it

fees, arbitrators' costs, and other arbitration expenses." *Amex IV*, 681 F.3d at 147 (Jacobs, C.J., dissenting) (quoting *Green Tree*, 531 U.S. at 84).

⁸⁴ *Amex IV*, 681 F.3d at 147 (Jacobs, C.J., dissenting).

⁸⁵ *Id.*

⁸⁶ *In re Am. Express Merchs.' Litig. (Amex III)*, 667 F.3d 204, 217 (2d Cir. 2012), *cert. granted sub nom.* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 594 (Nov. 9, 2012) (No. 12-133); *see* *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90-92 (2000); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985); *see also* Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 782, 788, 794 (2012) (explaining how the FAA's policy favoring arbitration interacts with other federal statutory rights).

⁸⁷ *See Amex III*, 667 F.3d at 217; *see also* Weston, *supra* note 86, at 782.

⁸⁸ *See* 681 F.3d 139, 147-49 (2d Cir. 2012) (Jacobs, C.J., dissenting) (order denying rehearing en banc).

⁸⁹ *See Amex III*, 667 F.3d at 218-19.

⁹⁰ *See id.*; Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 642-43 (2012).

does not provide a blanket ban on class action waivers.⁹¹ The Second Circuit instead suggested that arbitration should be allowed in a particular case so long as it does not have the effect of precluding the vindication of federal statutory rights.⁹²

Conversely, the dissent's approach improperly balances these competing policies by favoring arbitration over affording private parties the ability to effectively vindicate their statutory rights.⁹³ By interpreting the Supreme Court's holding in *Green Tree* as limited to costs strictly related to the mechanics of arbitration, Chief Judge Jacobs would drastically narrow the scope of the vindication of statutory rights analysis.⁹⁴ As a result, class action waivers would proliferate, potentially curtailing or even eliminating the class action's role in private enforcement of federal statutes.⁹⁵ The dissent's approach would also elevate the liberal federal policy favoring arbitration over the ability of parties to vindicate their rights through private enforcement.⁹⁶

Additionally, the Second Circuit's approach better comports with the Supreme Court's articulation of the vindication of statutory rights analysis.⁹⁷ In *Green Tree*, the Court held that an arbitration agreement could be invalidated on the ground that arbitration would be prohibitively expensive.⁹⁸ In *Mitsubishi*, the Court noted that if a contract operated as a prospective waiver of a party's right to pursue statutory remedies for an antitrust violation, it would go against public policy.⁹⁹ Accordingly, in *Amex III*, the Second Circuit followed Supreme Court precedent by holding that the vindication of statutory rights should prevail over the federal policy favoring arbitration.¹⁰⁰ Moreover, the Supreme Court has also stated that the purpose of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to each dispute.¹⁰¹ The Second Circuit

⁹¹ See *Amex III*, 667 F.3d at 219.

⁹² See *id.*; Gilles & Friedman, *supra* note 90, at 642–43.

⁹³ See *Amex IV*, 681 F.3d at 143–49 (Jacobs, C.J., dissenting).

⁹⁴ See *id.* at 147–48.

⁹⁵ See Gilles & Friedman, *supra* note 90, at 625–28.

⁹⁶ See *Amex IV*, 681 F.3d at 142, 145 (Jacobs, C.J., dissenting); see also Gilles & Friedman, *supra* note 90, at 625–28 (discussing the history of private parties enforcing public laws through class actions).

⁹⁷ *Green Tree*, 531 U.S. at 92.

⁹⁸ *Mitsubishi*, 473 U.S. at 637.

⁹⁹ See *Green Tree*, 531 U.S. at 92; *Mitsubishi*, 473 U.S. at 637; *Amex III*, 667 F.3d at 218–19.

¹⁰⁰ See *Amex III*, 667 F.3d at 218–19.

¹⁰¹ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011); see also Horton, *supra* note 5, at 727, 759 (explaining that the federal policy favoring arbitration is intended to facilitate more efficient dispute resolution).

recognized, in accordance with *Green Tree* and *Mitsubishi*, that this interest is not served if the arbitration process is designed to preclude the vindication of a party's rights under a federal statute.¹⁰²

On November 9, 2012, the Supreme Court granted certiorari to *Amex III*.¹⁰³ The Court should uphold the Second Circuit's ruling because it is more consistent with the Court's own decisions in *Green Tree* and *Mitsubishi*.¹⁰⁴ Additionally, adopting the dissent's approach would result in the proliferation of class action waivers and decrease the viability of the class action as a private enforcement mechanism for antitrust violations.¹⁰⁵

CONCLUSION

The Second Circuit panel's decision in *Amex III* and Chief Judge Dennis Jacobs' dissent in *Amex IV* differed in their interpretations of the vindication of statutory rights analysis. The Second Circuit panel interpreted the vindication of statutory rights analysis broadly, taking "costs of arbitration" to mean costs of litigation that arise while pursuing a claim in the arbitral forum. Under this approach, the court invalidated a class action waiver, holding that a class action was the only economically feasible way for the plaintiffs to pursue their claims. Chief Judge Jacobs, however, took a narrow approach to the vindication of statutory rights doctrine, interpreting "costs of arbitration" to mean only the costs of accessing the arbitral forum. Under this approach, the dissent would have enforced the class action waiver because the costs of accessing the arbitral forum did not preclude arbitration.

Upon review, the Supreme Court should uphold the Second Circuit panel's decision because it properly balances the policy favoring the vindication of statutory rights against the policy favoring arbitration. Moreover, the panel's approach is consistent with Supreme Court jurisprudence concerning the vindication of statutory rights analysis.

MATTHEW HARRIS

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¹⁰² *Amex III*, 667 F.3d at 218–19; see *Green Tree*, 531 U.S. at 90–92; *Mitsubishi*, 473 U.S. at 637.

¹⁰³ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594, 594 (2012) (granting certiorari).

¹⁰⁴ See *Green Tree*, 531 U.S. at 92; *Mitsubishi*, 473 U.S. at 637; *Amex III*, 667 F.3d at 218–19.

¹⁰⁵ See *Mitsubishi*, 473 U.S. at 635; Gilles & Friedman, *supra* note 90, at 660.