No. 08-1198

IN THE

Supreme Court of the United States

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

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AND AARP AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTEREST OF AMICI CURIAE

The American Association for Justice ("AAJ") and AARP respectfully submit this brief as *amici curiae*.[1] The parties have filed letters of consent to the filing of amicus briefs.

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil actions. AAJ's mission includes the development of the law providing redress for wrongful injury, not only to provide compensation for the victims of misconduct, but also to deter such misconduct at the outset. An important issue in this case is the validity of "agreements" that require claimants—even those whose claims are too small to be pursued individually—to resolve disputes one at a time. Whether this requirement arises from interpretation of a contract that is silent on the matter, or from an explicit waiver of collective actions, AAJ is concerned that such requirements are a practical barrier to the vindication of important rights.

AARP is a non-partisan, non-profit organization with nearly 40 million members, dedicated to addressing the needs and interests of people aged 50 and older. As the largest membership organization serving older people, AARP is greatly concerned about widespread fraudulent, deceptive, and unfair practices perpetrated against consumers in a broad

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

range of transactions because many of such practices have a disproportionate impact on older people. AARP also advocates on behalf of employment rights for older people. AARP thus supports laws and public policies designed to protect and preserve the legal means for them to seek redress when older persons are harmed in the consumer and employment marketplace. Among these activities, AARP advocates for improved access to the civil justice system for people with small claims or seeking to enforce important civil and statutory rights, and supports the availability of the full range of enforcement tools, including class actions. AARP has filed *amicus curiae* briefs in this Court, federal appellate courts, and state supreme and appeals courts, addressing the importance of preserving court access to the full range of redress that Congress and state legislatures enacted for the protection of consumers and employees, especially those with relatively small amounts in dispute or seeking to enforce important civil and statutory rights.

SUMMARY OF THE ARGUMENT

1. a. Although the contract at issue in this case is silent regarding arbitrations on a class basis, the contracts consumers, employees and small businesses most frequently enter into often contain provisions that explicitly prohibit any arbitration or litigation of aggregated claims. Such "collective action waivers" were developed by attorneys for franchisors, credit card companies, wireless phone service providers, and other corporate entities fearful of large class action verdicts. They have little to do with agreements to arbitrate—in fact they ban all types of arbitration except for individual claims. Nevertheless, they are inserted into arbitration

agreements in an effort to take advantage of the policy favoring their enforcement.

Collective action waivers do not explicitly deprive individuals of all legal recourse for corporate wrongdoing. But that is their practical effect for those individuals with small claims, because of the economic realities of arbitration.

b. Arbitration is costly for individuals, particularly in view of the filing fees paid to private arbitration companies and the hourly fees and expenses paid to private arbitrators, which must be paid in advance. In the case of small claims, the costs can greatly outweigh any potential recovery. In the civil justice system, class actions serve to make small claims economically viable by aggregating them, thereby spreading the costs and attracting competent counsel. Requiring arbitration of disputes individually makes them economically infeasible. In effect, such contractual requirements serve as exculpatory clauses, guaranteeing that even intentional misconduct that enriches a company by taking small amounts from numerous consumers will result in little or no accountability.

c. Increasingly, courts have held collective action waivers to be unconscionable and thus unenforceable under state law. Specifically, those decisions hold that such provisions are not invalid per se, but, where claimants can prove they preclude the vindication of important rights, they violate public policy. Courts have so held based on facts showing that the cost of arbitrating an individual's claim would be prohibitive in relation to the potential recovery, that competent attorneys are unable or unwilling to undertake representation of such

individual claims, and that very few individuals have actually pursued such claims.

2. Contrary to the assertions of *amici* supporting Petitioners in this case, the decisions invalidating collective action waivers comport both with the Federal Arbitration Act and with the federal policy favoring arbitration.

a. Contract provisions prohibiting class arbitrations are not enforceable under § 2 of the FAA because they are not provisions to settle a controversy by arbitration. They are provisions against arbitration. The statute does not limit arbitrations to individual resolutions and this Court has indicated that collective arbitrations are not inconsistent with the FAA.

b. Even if collective action waivers fall within the scope of § 2, the Act specifically provides for non-enforcement on the basis of generally applicable state law. The defense of unconscionability has long been widely recognized and applied to contracts generally, as has the doctrine that contract terms that violate public policy shall not be enforced. The argument that courts apply these general rules of law more aggressively against arbitration agreements is wholly speculative and calls for unacceptable interference in the role of state courts to declare state law.

c. The growing body of decisional law invalidating collective action waivers is not only well within the limits placed on state law by the FAA, it also comports with federal arbitrability principles enunciated by this Court. Agreements to arbitrate claims involving violation of important statutory

rights may be enforced where the shift from the judicial forum to arbitral one does not result in the loss of substantive rights. Courts may withhold enforcement, however, where the provision effectively prevents the party from vindicating his or her statutory rights in the arbitral forum. This is precisely the case with respect to collective action waivers in disputes involving small claims, and this Court should reject any attempts to transform them into legitimate arbitration agreements.

ARGUMENT

I. CONTRACT PROVISIONS BANNING RESOLUTION OF DISPUTES ON A CLASS BASIS MAY BE HELD UNENFORCEABLE IF FOUND TO PREVENT PARTIES FROM VINDICATING IMPORTANT CONSUMER AND EMPLOYEE RIGHTS

A. Collective Action Waivers Have Become a Widespread Feature of Consumer and Employment Contracts for Most Americans.

The arbitration agreement at issue in this case is silent with respect to the arbitration of the aggregated identical claims of a class of contract parties. Although such silence in agreements presents unresolved legal issues, it has become increasingly rare in the contracts entered into by most Americans. It is far more typical that individuals who buy from, work for, or have other dealings with large corporations find themselves presented with standard contracts that not only require arbitration of claims against the company, but also required that claims be arbitrated

individually. Commonly, such "collective action waivers" preclude class arbitrations or the consolidation of similar, or even identical claims.

A representative contract provision of this type reads as follows:

> You agree that, by entering into this Agreement, you and Cingular are waiving the right to a trial by jury . . . . You and Cingular agree that YOU AND CINGULAR MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding. Further, you agree that the arbitrator may not consolidate proceedings [on] more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding, and that . . . if this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void.

Scott v. Cingular Wireless, 161 P.3d 1000, 1003 n.2 (Wash. 2007). *See also Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1215-16 (9th Cir. 2008) and *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 91-93 (N.J. 2006) (setting forth other examples of contract provisions banning class actions and class arbitrations).

Provisions such as these are fairly recent. They were devised in the 1990s in response to class action

lawsuits by small business franchisees against franchisors. *See* Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141, 142 (1997). Corporate counsel for credit card companies, electronics manufacturers, wireless service providers, often working cooperatively in secret, devised ever more broadly worded collective action "waivers," inserted into contracts that few consumers would read or understand. Myriam Gilles, *Opting Out of Liability*: *The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 395-99 (2005).[2]

On its face, such provisions do not abolish the consumer's remedy. It merely requires a company's thousands or even millions of customers who entered into identical contracts to pursue their grievances under the contract one at a time. In practice, the drafters were confident that few would actually do so. As one corporate counsel for an early adopter of such waivers advised, a franchisor "should be able to require each franchisee in the potential class to pursue individual claims in a separate arbitration. Since many (and perhaps most) of the putative class members may never do that, . . . an arbitration clause should enable the franchisor to dramatically reduce its aggregate exposure." Dunham, *supra*, at 142.[3] That is, as one early critic recognized, they

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[2] Professor Gilles coined the term "collective action waiver" to refer to broad contractual "agreements" to waive "not only the right to participate in class actions, but also the right to participate in classwide arbitrations or to aggregate claims with others in any form of judicial or arbitral proceeding." *Id.* at 376 n.15.

[3] This forecast proved correct. For example, in the first two years in which its contracts featured mandatory

were not designed to reduce transaction costs, but to increase those costs to the consumer and thereby discourage valid claims. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U.L.Q. 673, 683 (1996). Judge Richard Posner memorably explained: "The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

Collective action waivers are not agreements to arbitrate; quite the contrary. Nevertheless, the corporate lawyers who created them "wrapped their newborn in the cloak of an arbitration clause, protecting it against attack with the now-sacrosanct policies of the FAA." Gilles, *supra*, at 396. As another scholar observed, the clauses were inserted into broad arbitration agreements by "overzealous drafters" who hoped that "the courts' enthusiasm for enforcing arbitration clauses would spill over onto the logically separable remedy limitation, one that would have had no chance of enforcement without the arbitration clause." David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 49-50 (2003).

Initial enforcement by the courts led to ever-wider use of ever more aggressive waivers. Presently, "[t]he

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arbitration clauses, credit card issuer First USA filed 51,622 arbitration claims against card users, while only four consumers made a claim against the company. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1655 (2005).

outright banning of class action in mandatory arbitration clauses has become a standard policy for many corporations that transact with consumers." Bryan Allen Rice, *Comment, Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standard*," 45 HOUS. L. REV. 215, 224 (2008). Professor Sternlight correctly describes this phenomenon as "do it yourself" law reform that needs no yea vote from elected lawmakers. Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 11 (2000).

These provisions are not designed to simply move disputes from the judicial to the arbitral forum with no loss of substantive rights, as the FAA was designed to encourage. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *Shearson/American Express v. McMahon*, 482 U.S. 220, 232 (1987). Instead, their purpose is to immunize corporate defendants from any liability or accountability for wrongdoing by preventing potential victims from seeking redress either in court or before an arbitrator. They succeed at this because of the economic realities of arbitration.

B. Contract Provisions Prohibiting Class Litigation and Class Arbitration Create Immunity for Wrongdoers and Prevent Victims from Vindicating Their Statutory Rights.

Reacting against a wave of decisions upholding consumer rights, *amici* supporting Petitioner urge this Court to reach beyond the Question Presented in this case and take a position in support of such

collective action waivers. Essentially, they argue that the FAA favors only one-at-a-time arbitration. This Court should reject that suggestion.

The civil justice system, for all its virtues, can be dauntingly expensive for individuals and small businesses. The fee for one's own attorney, the cost of obtaining expert opinions, and other expenses would place justice out of reach of most people if they were required to finance their cases unaided.

Where there exists the potential for a substantial recovery, such as in cases involving serious personal injury, the plaintiff's attorney can facilitate access to the civil justice system by advancing those costs and agreeing to be paid on a contingency fee basis. *See* Stuart M. Speiser, LAWSUIT 560-63 (1980) (discussing the economics of preparing a high-value tort case).

As one state court recently observed: "Contingency fee agreements serve an important function in American life. Such agreements permit persons of ordinary means access to a legal system which can sometimes demand extraordinary expense." *In re Estate of Johnson*, 899 N.E.2d 198, 203 (Ohio Ct. App. 2008) (citation omitted). For that reason, the contingency fee is often called the "key to the courthouse door," enabling ordinary Americans "to pursue their claims with competent counsel." *Cross v. American Country Ins. Co.*, 875 F.2d 625, 629 (7th Cir. 1989).

But where an individual's potential recovery is less than the likely cost of obtaining it, pursuing a civil action is economically infeasible, both for the plaintiff and the plaintiff's attorney. This Court has recognized that the aggregation of small claims in a

single action makes representation by competent counsel possible.

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997), quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) (finding in a case involving small damages, "[e]conomic reality dictates that [a plaintiff's] suit proceed as a class action or not at all.").

The same holds true with respect to the arbitration of small claims. Despite hopeful expectations that "allow[ing] parties to avoid the costs of litigation" would benefit the individual whose claim "involves smaller sums of money," *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001), the reality has been that many consumers, employees, and small businesses have found arbitration of their claims prohibitively expensive. A study described as "the first comprehensive collection of information on arbitration costs," found that under the contracts that consumers and employees most often enter into, "[t]he cost to a plaintiff of initiating an arbitration is almost always higher than the cost of instituting a lawsuit." Public Citizen, *The Costs of*

Arbitration, at 1 (2002), http://www.citizen.org/documents/ACF110A.PDF.

Not only does arbitration not reduce transaction costs in most types of cases, it adds a substantial filing fee paid to an arbitration provider, such as the American Arbitration Association, as well as an hourly fee plus expenses paid to the arbitrator. *Id*. at 2-3.

A critical factor limiting access to justice is not simply the overall cost of arbitration, but the fact that much of it must be paid in advance. Even people with substantial claims may find that mounting fees make arbitration of their dispute unaffordable.[4] Public Citizen's study concluded that the costs of resolving consumer disputes in arbitration "have a deterrent effect, often preventing a claimant from even filing a case." *Id*. at 1. Many others, confronted by increasing costs and fees, "are forced to drop their claims." *Id*. at 5. Those findings are confirmed by other observers. *See* National Consumer Law Center, CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS §1.3.6, at 9 (4th

[4] For example, in *Olshan Foundation Repair Co. v. Ayala,* 180 S.W.3d 212 (Tex. App. 2005), plaintiffs alleged that the foundation installed by defendant had failed. The plaintiffs paid a $4,130 fee to file their claim with the American Arbitration Association, as required by their contract. The AAA then submitted an invoice seeking immediate payment of $33,150 as plaintiffs' share of the arbitrator's fee. Not only did this amount to 28 percent of the Ayalas' combined annual gross income, it greatly exceeded the $22,650 that they had paid for the work. The court concluded that the arbitration clause was unconscionable and unenforceable under Texas law. *Id*. at 216.

ed. 2004) (High arbitration costs "favor companies and hurt consumers by deterring valid claims."); Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133, 161 (2004). ("The costs of arbitration can be so high that they deny consumers access to a forum in which to air their disputes.").

As is true in the civil justice system, a practical way to preserve the individual's ability to seek redress for small claims is to allow the aggregation of similar claims for resolution in a class arbitration. For that reason, scholars have warned that the growing reliance on contract provisions prohibiting class arbitration carries great potential for abuse and overreaching. *See, e.g.*, 3 Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS, § 9:67 n.2 (4th ed. 2008) ("The bar on class arbitration threatens the premise that arbitration can be a fair and adequate mechanism for enforcing statutory rights."); Gilles, *supra*, at 378 (arguing that "sound public policy requires collective litigation be available for small-claim plaintiffs who would not have the incentive or resources to remedy harms or deter wrongdoing in one-on-one proceedings"); J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1770 (2006) (urging non-enforcement of class action waivers "where such waivers have the practical effect of extinguishing individual claims.").

A growing number of courts have similarly concluded that collective action waivers are unconscionable and therefore unenforceable under state law where, due to the cost of individual arbitrations of small claims, the provisions operate

as exculpatory clauses and effectively prevent individuals from vindicating their statutory rights.

See, e.g., Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. Sup. Ct. 2005) (holding unconscionable an arbitration clause in credit card contract where it was alleged that the party with superior bargaining power had carried out a scheme to deliberately cheat large numbers of consumers out of small sums); *Powertel*, *Inc. v. Bexley*, 743 So.2d 570, 576 (Fla. Dist. Ct. App. 1999) (clause prohibiting class action "effectively insulates Powertel from liability under state consumer laws" and is therefore substantively unconscionable); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 262 (Ill. 2006) (where the purpose is to insulate the company from potential liability, "the class action waiver is unconscionable and unenforceable"); *Woods v. QC Financial Services*, 280 S.W.3d 90, 97 & 98 (Mo. App. 2008) (payday lender's contract provision precluding class arbitration "reduces the possibility of attracting competent counsel" and, by individualizing claims "absolutely and completely insulates and immunizes Appellant from scrutiny and accountability for its business practices."); *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 99, 101 (N.J. 2006) (provision precluding arbitration on a class basis effectively shielded payday lender from state statutory consumer protections and was thus unconscionable and unenforceable); *Fiser v. Dell Comp. Corp.*, 188 P.3d 1215, 1221 (N.M. 2008) (enforcement of class action ban "would be tantamount to allowing Defendant to unilaterally exempt itself" from state consumer protection law); *McNulty v. H & R Block*, 843 A.2d 1267, 1273-74 (Pa. Super. Ct. 2004) (tax preparer's ban on class arbitration required each individual to pay $50 filing

fee to resolve claim of $37; "When . . . clauses like this are used as a sword to strike down access to justice instead of a shield against prohibitive costs, we must defer to the overriding principle of access to justice."); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1008 (Wash. 2007) (clause which "prevents the use of arbitration to vindicate a broad range of [Consumer Protection Act] rights" was unenforceable as substantively unconscionable under Washington law); *Dunlap v. Berger*, 567 S.E.2d 265, 280 (W. Va. 2002) (clause prohibiting class arbitrations was unconscionable where it would "prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law.").

Federal courts applying state law of unconscionability include *Kristian v. Comcast Corp*., 446 F.3d 25, 61 (1st Cir. 2006) (Applying Massachusetts law, "If the class mechanism prohibition here is enforced, Comcast will be essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law" and "the social goals of federal and state antitrust laws will be frustrated because of the 'enforcement gap' created by the de facto liability shield."); *Homa v. American Express Co*., 558 F.3d 225, 230 (3rd Cir. 2009) (credit card agreement that precluded class action for violation of state Consumer Fraud Act "violates the fundamental public policy of New Jersey"); *Lowden v. T-Mobile USA, Inc*., 512 F.3d 1213, 1219 (9th Cir. 2008) (class action waiver in cellular telephone contract unconscionable under Washington law); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 984

(9th Cir. 2007) (class action waiver in cellular phone contract unconscionable under California law); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) (cable provider's arbitration clause and class action waiver unconscionable under Georgia law because subscribers are left without adequate remedies); *Caban v. J.P. Morgan Chase & Co.*, 606 F.Supp.2d 1361, 1368-72 (S.D. Fla. 2009) (class action waiver unenforceable under Delaware law where small claims required arbitration on a class basis); *Coneff v. AT & T Corp.*, 620 F.Supp.2d 1248, 1259 (W.D. Wash. 2009) (wireless provider's class action waiver provision unconscionable under Washington law because without a class action, the vast majority of customers would never obtain justice).

Reacting against this wave of decisions upholding consumer rights, *amici* supporting Petitioner urge this Court to reach beyond the Question Presented and hold that the federal policy favoring arbitration encompasses only one-at-a-time arbitrations and that state laws permitting arbitration on a class basis are displaced by the Federal Arbitration Act. *See* CTIA-The Wireless Association Br. 9 (If arbitration agreements "can be interpreted to permit class arbitration . . . in furtherance of a state policy favoring class actions . . . [t]hat result would be inimical to the federal policy favoring arbitration."); DRI Br. 12-26 (class arbitrations are fundamentally different from individual arbitrations and lack procedural due process protections for corporate defendants); Chamber of Commerce Br. 19 ("[T]he FAA mandates displacement not only of rules that keep parties out of arbitration altogether, but also of arbitration-specific rules that allow arbitration to proceed . . . in ways contrary to the parties' intent.");

Pacific Legal Foundation Br. 7 (The "right to choose how to resolve disputes" is paramount over public policy goals). Clearly those *amici* would have this Court cast doubt on those cases invalidating express contractual "agreements" to arbitrate only on an individual basis.

We submit to the contrary, that the growing body of decisional law preserving the individual's access to a forum to vindicate important rights is consonant with the FAA and this Court's arbitration decisions.

C. Collective Action Waiver May Be Held Non-Enforceable Under State Law Based on Factual Inquiry Into Its Impact As A Barrier to the Vindication of Important Rights.

This Court has already declined to bestow a blanket imprimatur on collective action waiver provisions. The Court in *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000), stated that "the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. . . . [and] render it unenforceable." *Id.* at 90-91. The Court added, however, that when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id.* at 92. In *Randolph*, the record contained "hardly any information on the matter" so that plaintiff's allegations were "too speculative to justify the

invalidation of an arbitration agreement." *Id.* at 90-91.[5]

Following this Court's lead in *Randolph*, no court has held collective action waivers unenforceable per se. *See, e.g., Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 62 (1st Cir. 2007) (declining an invitation to so hold). Courts have instead, as this Court instructed, viewed such challenges as questions of fact, to be decided on a case by case basis in view of the circumstances and the evidence presented by the party challenging the clause.[6] *See, e.g., In re Cotton Yarn Antitrust Litigation*, 505 F.3d 274, 285 (4th Cir. 2007) ("[I]f a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively

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[5] In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), the Court was confronted with an agreement which, like the agreement in the present case, was silent with regard to class arbitrations. The Court did not address whether a provision affirmatively banning class arbitration might be unenforceable.

[6] Such a challenge to the waiver provision, as distinguished from a challenge to the contract itself is for the court, rather than the arbitrator, to decide. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006). It is "a gateway dispute about whether the parties are bound by a given arbitration clause." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). *Accord, In re American Express Merchants' Litigation,* 554 F.3d 300, 311 (2d Cir. 2009); *Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868, 877 (11th Cir. 2005) (whether a class action waiver is unenforceable because it "would have the practical effect of providing Defendants immunity" is an issue concerning the making of the arbitration agreement and is therefore a decision for the federal court under the FAA, 9 U.S.C. § 4 (2000)).

expensive, such a showing could invalidate an agreement.").

Thus. some courts have upheld collective action waivers where, as in *Randolph*, the plaintiff did not provide sufficient evidence that, without class arbitration, the cost to plaintiff to obtain an individual arbitration would be prohibitive. *See In re Cotton Yarn Antitrust Litigation*, 505 F.3d at 285 ("[U]ninformed speculation about cost falls far short of satisfying the plaintiffs' burden of proving that the costs of proceeding individually against the defendants would be prohibitive and thus would prevent them from effectively vindicating their statutory rights."); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) ("the Livingstons have not offered any specific evidence of arbitration costs that they may face . . .").

Other courts have held that particular provisions were not unconscionable where the corporation agreed to bear much of the expense, removing cost as a barrier. *See, e.g., Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868 (11th Cir. 2005) (ban on class arbitrations was not a barrier to remedy where prevailing plaintiffs were entitled under state law to recover attorney fees and the company would advance filing fees and administrative fees); *Large v. Conseco Finance Servicing Corp.*, 292 F.3d 49 (1st Cir. 2002) (upholding class action waiver where the company volunteered to pay the costs of arbitration). A statement by this Court indicating blanket approval of collective action waivers would remove any incentive for contracting corporations to ameliorate the most significant barrier for individuals by easing the cost of arbitration.

Those courts that have declined to enforce arbitration provisions barring collective action have done so primarily on the basis of detailed inquiry into whether plaintiffs who are required to pursue claims one at a time have a practical and feasible remedy, or one that is merely illusory. A sampling of decisions in a variety of contexts illustrates the rigor of that inquiry, focusing on whether the costs facing plaintiffs in individual arbitrations outweigh the potential arbitral award and whether a significant number of aggrieved individuals have actually pursued individual remedy.

For example, the plaintiff in *Reuter v. Davis*, 2006 WL 3743016 (Fla. Cir. Ct. 2006), filed a class action against a check-cashing service alleging that the service illegally charged in excess of 45% annual interest. Plaintiff presented sufficient evidence for the court to find that the "chance that Ms. Reuter could have obtained competent counsel absent the possibility of class action status" was "effectively zero." That finding was supported by the facts showing that, although over 66,000 customers engaged in over 1,000,000 such transactions during a five year period and the alleged loan sharking was punishable as a third-degree felony under Florida law, not a single individual claim was filed. *Id*. at *4. The court concluded that the class action waiver was unenforceable as unconscionable because it effectively exculpated the defendant from statutory claims. *Id*. at *5.

In *Coneff v. AT & T Corp*., 620 F.Supp.2d 1248 (W.D. Wash. 2009), customers of a wireless telecommunications service provider brought a putative class action alleging the company deliberately degraded lower-priced service in order to

sell more expensive plans. The provider relied on its contract provision requiring arbitration and stating that the "arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding." The court rejected the company's characterization of the arbitration provision as uniquely "pro-consumer," pointing out that of over 70 million customers, only 200 consumer arbitrations have been conducted nationwide since 2003. *Id.* at 1258. Moreover, plaintiffs submitted declarations of consumer lawyers from across the country, all of whom testified that it was impractical to pursue the small claims, ranging from about $5 to $275, on an individual basis. *Id.* at 1257. The court concluded that "given the prohibitively expensive costs of individual adjudication" defendants were using their arbitration provisions "to effectively exculpate themselves from any potential liability for unfair or deceptive acts or practices in commerce." *Id.* at 1259.

Similarly, in *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007), customers brought a class action alleging that their wireless service provider overcharged consumers between $1 and $45 per month in unlawful charges. Cingular's customer contract, as amended by a "stuffer" included with their monthly bill, precluded both class actions and class arbitrations. Plaintiffs presented expert testimony that the state attorney general's office relied on private class actions "to correct the deceptive or unfair industry practice and to reimburse consumers for their losses." *Id.* at 1004. Additionally, an attorney specializing in consumer law explained that the claims against Cingular were too small and complex to be adjudicated separately. He testified that he would be unwilling to take on

such cases and that it was "very unlikely that any other private practice attorney would be willing to do so." *Id.*

Small businesses are also at risk that contract provisions prohibiting collective action will preclude them from vindicating their statutory rights. Plaintiffs in *In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009), pet. for cert. filed, No. 08-1473 (May 29, 2009), are merchants and small businesses who alleged that in their contracts to accept defendant's highly desired charge cards, they were required to honor less desirable credit and debit cards at excessive fees, amounting to an illegal tying arrangement in violation of Section 1 of the Sherman Act. *Id.* at 307-08. The contract also provided for arbitration of claims and explicitly provided, "There shall be no right or authority for any Claims to be arbitrated on a class action basis." *Id*. at 306. Plaintiffs presented expert testimony that the cost of a necessary antitrust study, expert fees and litigation expenses in an individual case would total between $600,000 and $1 million. The average award a successful individual plaintiff could expect, even after trebling of damages, ranged from a little more than $9,000 to $38,549. *Id*. at 316-17. The court concluded that because plaintiffs' claims "cannot reasonably be pursued as individual actions," the ban on collective action "flatly ensures that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws" and is therefore unenforceable. *Id*. at 319.

In *Kristian v. Comcast*, 446 F.3d 25 (1st Cir. 2007), cable television subscribers brought an antitrust class action against their cable provider. Defendant moved to compel arbitration of claims on

an individual basis, relying on their contract provision precluding arbitrations on a class basis. The court of appeals summarized the declarations of plaintiffs' legal and economic experts: Each individual plaintiff's estimated recovery, trebled, "would range from a few hundred dollars to perhaps a few thousand dollars." *Id.* at 54. By contrast, "the expert fees alone are estimated to be in the hundreds of thousands of dollars; and attorney's fees could reach into the millions of dollars." *Id.* The practical effect, the court concluded, was to force claimants "to assume financial burdens so prohibitive as to deter the bringing of claims," *Id.* at 55.

These decisions by state and federal courts are faithful to this Court's instruction in *Randolph* that collective action waivers may be declared unenforceable where plaintiff has borne the burden of proving that such provisions stand as a barrier to the vindication of statutory rights. *See also* Jean R. Sternlight & Elizabeth J. Jensen, *Mandatory Arbitration: Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse*, 67 LAW & CONTEMP. PROBS. 75, 87 (2004) (noting that plaintiffs challenging such provisions have succeeded "when they can support their assertions factually, rather than ask courts to assume" that small claims cannot be brought individually).

II. DECISIONS AGAINST ENFORCEMENT OF COLLECTIVE ACTION WAIVERS AS PRECLUDING THE VINDICATION OF IMPORTANT RIGHTS ARE CONSISTENT WITH THE FAA AND WITH THE FEDERAL POLICY FAVORING ARBITRATION

Petitioner's *amici* contend that any state law "allowing class arbitrations to be superimposed on" arbitration agreements is inconsistent with, and subject to preemption by, the Federal Arbitration Act. *See, e.g.*, Chamber of Commerce Br. 18. Their position is at odds with the decisions of this Court and with the plain text of the FAA itself.

A. Collective Action Waivers Are Not Entitled To Enforcement Under the FAA.

Section 2 of the Act requires that "[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable . . ." 9 U.S.C. § 2 (1976). Collective action waivers that now appear in many consumer and employee contracts are not within the scope of § 2. They are in fact written provisions *prohibiting* the arbitration of certain claims.

This Court has at least indirectly indicated that class arbitrations are not at all inconsistent with individual arbitrations encouraged by the FAA. For example, the Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), noted with apparent approval the fact that the NYSE arbitration rules at issue in that case not only govern individual arbitrations, but "also provide for collective proceedings." *Id.* at 32.

In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), the Court granted certiorari on the question of whether South Carolina's interpretation of an arbitration agreement as permitting class arbitration was "consistent with the Federal Arbitration Act." *Id.* at 447. A plurality of this Court held that interpretation of the agreement was for the arbitrator, and made clear that a class arbitration would be permissible if the arbitrator so construed the contract on remand. *See id.* at 452-54. Justice Stevens, supplying the fifth vote in support of the judgment, explicitly stated "[t]here is nothing in the Federal Arbitration Act that precludes" class arbitrations. *Id.* at 454-55 (Stevens, J., concurring in the judgment).

Recently, Justice Scalia, writing for the majority in *Arthur Andersen LLP v. Carlisle*, ____ U.S. ____ , 129 S. Ct. 1896 (2009), indicated there no federal impediment to state law favoring arbitration on a class basis: "Whatever the meaning of this vague prescription [of "a healthy regard for the federal policy favoring arbitration"], it cannot possibly require the disregard of state law *permitting* arbitration by or against nonparties to the written arbitration agreement. *Id.* at 1902 n.5. (emphasis in original).

As one state supreme court summarized, "[W]e see no reason why the purposes of favoring individual arbitration would not equally favor class-wide arbitration." *Scott v. Cingular Wireless*, 161 P.3d 1000, 1008 (2007). After all, "[t]he FAA favors arbitration, not exculpation." *Id.*

B. Non-Enforcement of Collective Action Waivers Found to Prevent the Vindication of Statutory Rights Comports With the FAA.

1. Arbitration agreements may be held non-enforceable under laws generally applicable to contracts.

Even if provisions disallowing class arbitration were deemed to come within § 2, non-enforcement based on a judicial determination that the provision presents a practical barrier to the vindication of important statutory rights comports with the FAA.

Contrary to the assertions raised by Petitioner's *amici*, the FAA does not guarantee that the intent of the parties shall always be carried out. *See* CTIA-The Wireless Association Br. 5 the "preeminent concern" of Congress in the FAA is rigorous enforcement of contracts as written); Pacific Legal Foundation Br. 15 (The goal of the FAA is not efficiency, but "to enforce agreements into which the parties had entered.").

Section 2 provides that arbitration agreements shall be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1976) (emphasis supplied). As this Court has consistently emphasized, Congress enacted the FAA to put arbitration agreements "on equal footing with all other contracts." *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, ___, 128 S. Ct. 1396, 1402 (2008), quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Congress designed Section 2 "to make arbitration agreements as enforceable as other contracts, but not

more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n.12 (1967).

Consequently, state law "is applicable to determine which contracts are binding under § 2 and enforceable under § 3 '*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.'" *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. at 1902, quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987) (emphasis in original). In particular, "generally applicable contract defenses, such as fraud, duress, or *unconscionability*, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996) (emphasis added). Decisions invalidating collective action waivers as unconscionable under state law are therefore wholly consistent with the FAA because they are not based on "state laws applicable *only* to arbitration provisions." *Id.* at 687 (emphasis in original).

2. Courts have properly held collective action waivers unconscionable and non-enforceable as violative of public policy under state contract law.

The decisions holding collective action waivers unenforceable under state law have been based primarily on generally applicable unconscionability principles. As this Court suggested in *Doctor's Associates, supra*, that contract defense is a state law of general applicability and is not limited to arbitration provisions.

The unconscionability doctrine originated in England and was expressly recognized by United

States equity courts as early as 1795. Howard O. Hunter, MODERN LAW OF CONTRACTS § 19:06 (rev. ed. 1993). *See also* Francis J. Swayze, *The Growing Law*, 25 YALE L.J. 1, 1 (1915) (observing that courts have historically "refused their aid to the unconscionable bargain.").

RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) states the general rule: "If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract," and adds by way of comment that "the policy against unconscionable contracts or terms applies to a wide variety of types of conduct." *Id.* at comment a. Similarly, the Uniform Commercial Code permits a court to refuse to enforce a contract or a clause thereof which was "unconscionable at the time it was made." U.C.C § 2-302.

A closely related doctrine is the historic principle that a contract term "is unenforceable on grounds of public policy if . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement." RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981). That principle, too, is broader and older than the FAA. *See, e.g., Hulse v. Bonsack Mach. Co.*, 65 F. 864, 867-69 (4th Cir. 1895) (discussing whether a mechanic's contract assigning to the employer the rights to any improvements to the company's machines was unenforceable as contrary to the public policy encouraging creativity and invention).

The term "unconscionability" is not specifically defined in state law, but "is rooted in the fact-sensitive public interest assessment." *Muhammed*, 912 A.2d at 102. Upon proof that plaintiff's statutory

claims are so small that the ban on class arbitration effectively precludes a plaintiff from vindicating her statutory rights, a number of courts have concluded that such provisions are unconscionable. As the Washington Supreme Court was careful to note, its holding did not invalidate all class-action waivers. *Scott*, 161 P.3d at 1009 n.7. "We mean to say only that class action waivers that prevent vindication of rights . . . are invalid . . . . [W]hether any particular class action waiver is unenforceable will turn on the facts of the particular case. *Id*. Similarly, the Third Circuit emphasized that its decision against enforcement of a class action waiver as unconscionable was based on "the fundamental public policy of New Jersey" that consumers be able to pursue their statutory rights under the state's consumer protection laws." *Homa*, 558 F.3d at 230-31.

The Eleventh Circuit, applying Georgia law, has also held that contract provisions blocking individuals from asserting their statutory rights can be unconscionable. In *Dale v. Comcast*, 498 F.3d 1216 (11th Cir. 2007), the court determined that enforceability of a class action waiver should be determined on a case by case basis, after considering all the facts and circumstances including the fairness of the provision, the cost to the individual plaintiff of prosecuting its claim when compared to the potential recovery, the ability to recover attorney's fees and other costs and thus obtain legal representation to prosecute the underlying claim, and the practical effect that the waiver will have on the corporation's ability "to engage in unchecked market behavior that may be unlawful." *Id*. at 1224. *See, also, Lowden v. T-Mobile USA, Inc*., 512 F.3d 1213, 1219 (9th Cir. 2008) (holding class action waiver contained in

cellular telephone contract unconscionable under Washington law); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 984 (9th Cir. 2007) (holding class action waiver in cellular phone contract unconscionable under California law).

The Chamber of Commerce acknowledges that courts may decline to enforce arbitration provisions based on generally applicable state law of contracts. Chamber of Commerce Br. 18. The Chamber contends, however, that judges apply the doctrine of unconscionability "more aggressively to arbitration agreements than to other contracts." *Id.* at 19 n.6, quoting Steven J. Ware, *Arbitration and Unconscionability After Doctor's Associates Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1034 (1996), and citing two other articles for the same proposition. None of these authorities support the Chamber's argument.

Professor Ware's article deals exclusively with unconscionability as applied to contracts of adhesion and unequal bargaining power. Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004), points to no decision announcing a more aggressive standard for arbitration cases, but simply but contends that judges find arbitration agreements unconscionable more often now than 20 years ago. *Id.* at 194-96. The third article, Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61, focuses entirely on California law and mentions arbitration waivers only once in passing. Id. at 88. Together, these weak speculations

provide a woefully inadequate basis for this Court to undertake to second-guess state courts on matters of state law.

3. Non-enforcement of collective action waivers that block the vindication of statutory rights is consistent with federal principles of arbitrability.

The growing body of decisions based on state law unconscionability is not only consistent with § 2 of the Federal Arbitration Act's restriction on state law, but also with the federal law of arbitrability developed by this Court.

The fact that a party's cause of action arising under a federal statute serves to advance important social policies does not preclude enforcing an agreement to submit the party's claim to arbitration. "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum," this Court has explained, "the statute will continue to serve both its remedial and deterrent function," *Green Tree Financial Corp v. Randolph*, 531 U.S. 79, 90 (2000), quoting *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 28 (1991), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 637 (1985).

Thus, although the FAA is silent on challenges to the effectiveness of the arbitral forum, this Court has stated that "the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum" and "render [the agreement] unenforceable." *Id*. 531 U.S. at 90-91.

This public policy contract defense is not limited to arbitration agreements. In this case, for example, the putative class seeks to pursue remedies under federal antitrust laws. *See* Pet. Br. 6-7. This Court has made clear that "in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action," an agreement which confers even "a partial immunity from civil liability for future violations" is inconsistent with the public interest. *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955). Applying this principle in the context of enforcing an arbitration agreement, this Court stated that, if the agreement's choice-of-forum and choice-of-law clauses "operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy. *Mitsubishi*, 473 U.S. at 637 n.19.

On this basis, the Second Circuit recently held that a waiver provision in a contract between a credit card company and accepting merchants "cannot be enforced in this case because to do so would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery." *In re American Express Merchants' Litigation*, 554 F.3d 300, 320 (2d Cir. 2009). The court expressly stated that its ruling was not based on state law of unconscionability, but "on a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability." *Id.*

III. CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

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