

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   AMERICAN EXPRESS COMPANY, ET AL., :

4                   Petitioners                   :   No. 12-133

5                   v.                               :

6   ITALIAN COLORS RESTAURANT, ET AL   :

7   - - - - - x

8   Washington, D.C.

9   Wednesday, February 27, 2013

10

11                   The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States  
13   at 11:31 a.m.

14   APPEARANCES:

15   MICHAEL KELLOGG, ESQ., Washington, D.C.; on behalf of  
16       Petitioners.

17   PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of  
18       Respondents.

19   MALCOLM L. STEWART, ESQ., Deputy Solicitor General,  
20       Department of Justice; for United States, as amicus  
21       curiae, supporting Respondents.

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1 P R O C E E D I N G S

2 (11:31 a.m.)

3 CHIEF JUSTICE ROBERTS: This is Case Number  
4 12-133, American Express v. Italian Colors Restaurant.  
5 Mr. Kellogg.

6 ORAL ARGUMENT OF MICHAEL KELLOGG

7 ON BEHALF OF THE PETITIONERS

8 MR. KELLOGG: Thank you, Mr. Chief Justice,  
9 and may it please the Court:

10 The court below thrice refused to enforce  
11 the parties' arbitration agreement because he thought  
12 that class procedures were necessary to vindicate the  
13 plaintiff's Sherman Act claims.

14 That holding was reversible error for at  
15 least three reasons. First, it has no basis in either  
16 the FAA or the Sherman Act. Second, it creates an  
17 unworkable threshold inquiry. And third, it is  
18 unnecessary to any legitimate policy concerns raised by  
19 the court below.

20 JUSTICE GINSBURG: Mr. Kellogg, suppose it  
21 goes to arbitration as you think it should, and the  
22 arbitrator says to the merchant, to prove your case, you  
23 have to show the relevant market, you have to show that  
24 American Express had market power, that it used that  
25 power to the detriment of its competitors, and the way

1    these sections -- the way these tying cases have gone  
2    is you get an expert.  And I don't see that you can  
3    prove it in -- in a new way.

4                   I mean, the whole point of this is that the  
5    expense to win one of these cases is enormous.  And no  
6    single person is not worth that person's while.

7                   MR. KELLOGG:  Well, three responses to that,  
8    Your Honor.  The first is, that it is up to the  
9    arbitrator in the first instance to devise procedures to  
10   deal with claims in an efficient and cost-effective  
11   manner.

12                  Second, to the extent that an expert report  
13   is required that would cost a lot of money, we have  
14   conceded below that the parties could share costs of  
15   that expert just as they could share the costs of a  
16   lawyer.

17                  And, third, the alternative is to have an  
18   inquiry upfront, that this Court has rejected in  
19   Concepcion, that you cannot condition the enforcement of  
20   an arbitration agreement on the availability of class  
21   procedures.

22                  It's up to --

23                  JUSTICE GINSBURG:  What was the -- what was  
24   the -- I missed that.  The sharing of the costs, how  
25   does that work?  It's certainly not in the agreement,

1 not in the arbitration agreement, that -- that American  
2 Express is going to pay for the expert for the other  
3 side.

4 MR. KELLOGG: We acknowledge below that they  
5 could share costs among multiple plaintiffs --

6 JUSTICE GINSBURG: Oh. Oh.

7 MR. KELLOGG: -- before that. The sharing  
8 of costs. Now, under the court below's regime --

9 JUSTICE GINSBURG: And then what you would  
10 you have, five, six different arbitrations going, and in  
11 each of those five or six cases, you would have -- they  
12 could share? They could share the million dollar cost  
13 of this -- the experts?

14 MR. KELLOGG: They can share the cost of the  
15 expert. And, of course, they get their attorneys' fees  
16 back, plus reasonable statutory costs, plus potentially  
17 treble damages.

18 The alternative, as the court below held, is  
19 that the district court has to decide in the first  
20 instance, I'm not going to send it to arbitration  
21 because I think they need a class action. To make that  
22 determination, he first has to do a Rule 23 analysis.  
23 Would there even be a class certified in this case?

24 Only 20 percent of putative classes are  
25 certified. And that's not an inquiry that the Court

1     should be making at the outset.

2                   JUSTICE GINSBURG:   I -- I'm sorry, but I  
3     don't think I got the answer to my question.  Is -- the  
4     arbitrator has now said we have to have an expert, and  
5     the plaintiff says -- or the complainant says, I haven't  
6     got the wherewithal, and if I have six friends who bring  
7     individual arbitrations, that's not nearly enough.

8                   So what happens then, the case ends, and  
9     it's not possible --

10                  MR. KELLOGG:  As we said, they would be able  
11     to share an expert between multiple plaintiffs, but  
12     there is no guarantee in the law that every claim has a  
13     procedural path to its effective vindication.

14                  This Court held in Eisen, for example, even  
15     though the Court acknowledged that it was a \$70 claim,  
16     it could only be brought as a class action, but the  
17     plaintiff in that case said, I can't afford to do the  
18     notice costs, and the Court said well, then, the class  
19     is decertified because the plaintiff has to put up the  
20     notice.

21                  The whole point of arbitration of course is  
22     that it expands the universe of claims that can be  
23     brought efficiently and effectively for small consumers.

24                  JUSTICE KAGAN:  Mr. Kellogg, do you think  
25     that if in your arbitration agreement you had a clause

1    which just said, I hereby agree not to bring any Sherman  
2    Act claim against American Express, could -- could your  
3    arbitration agreement do that?

4                   MR. KELLOGG: Under this Court's decision in  
5    Mitsubishi, I believe not.

6                   JUSTICE KAGAN: It -- it couldn't,  
7    right because we would say no, there has to be an -- an  
8    opportunity for a vindication of statutory rights, is  
9    that right?

10                  MR. KELLOGG: Correct.

11                  JUSTICE KAGAN: And -- and suppose that the  
12    arbitration clause said something different. Suppose  
13    that the arbitration clause said, I -- I hereby agree  
14    that I will not present any economic evidence in an  
15    antitrust action against American Express.

16                  Could it do that?

17                  MR. KELLOGG: I think that would be subject  
18    to review under State unconscionability principles, and  
19    would probably be struck down, Your Honor, just like any  
20    other provision that essentially prevents --

21                  JUSTICE KAGAN: Well, even putting aside  
22    State unconscionability principles, wouldn't you think  
23    that our Mitsubishi case and our Randolph case would  
24    again come in and say, my gosh, this arbitration clause  
25    prevents any effective vindication of the rights to

1 bring an antitrust suit.

2 Wouldn't you say that.

3 MR. KELLOGG: I -- I don't think Mitsubishi  
4 can be read that broadly, Your Honor. To the contrary,  
5 the whole point of Mitsubishi was that arbitration is an  
6 effective forum for vindicating Federal statutory  
7 rights. Mitsubishi --

8 JUSTICE KAGAN: So you think -- I'm sorry.  
9 Go ahead.

10 MR. KELLOGG: I'm sorry. Mitsubishi dealt  
11 with the very specific question of a waiver, a  
12 substantive waiver of your rights, not with the  
13 procedures to vindicate those rights.

14 As, for example, in the Vimar Seguros case,  
15 where the Court said, well, you might have to go to  
16 Japan, but we're not going to get into the business of  
17 weighing the costs and benefits.

18 JUSTICE KAGAN: So I just want to make sure  
19 I understand your answer, which is that you read  
20 Mitsubishi and Randolph as so narrow that you would say  
21 that the principle that they embody does not prevent  
22 American Express from saying, you cannot produce -- you  
23 cannot use any economic expert or any economic testimony  
24 in an antitrust suit.

25 MR. KELLOGG: You know, I think the better



1 place to handle that would be State unconscionability  
2 law. Whether the Court would want to expand the ports  
3 of Mitsubishi to say that.

4 It's not clear to me what the statutory  
5 justification for that would be, given that the Sherman  
6 Act -- the question here, of course, concerns class  
7 procedures. And given that the Sherman Act was passed  
8 at a time when there were no class procedures, and given  
9 that the Court in Concepcion --

10 JUSTICE KAGAN: Well, my -- my question is  
11 not about class procedures, it's about allowing economic  
12 evidence to help prove your claim. And you said, no  
13 problem, even though it is, of course, true in the real  
14 world that to prove a successful antitrust claim, you  
15 need economic evidence.

16 MR. KELLOGG: Correct.

17 JUSTICE KAGAN: And you said that's  
18 fine because you're going to read Mitsubishi and  
19 Randolph in such a way that it allows an arbitration  
20 clause to 100 percent effectively absolutely frustrate  
21 your ability to bring a Sherman Act suit.

22 MR. KELLOGG: I have no doubt that such a  
23 provision would be struck down. I think the proper way  
24 to do that would be under State unconscionability law,  
25 which Section 2 specifically preserves. But if the

1 Court felt the need to expand Mitsubishi in that narrow  
2 respect, that would still not help the Respondents here,  
3 who are saying that you should condition the enforcement  
4 of the arbitration clause on the availability of class  
5 procedures, which this Court held in Concepcion is  
6 fundamentally inconsistent with the purposes of the FAA.

7 JUSTICE KAGAN: Well, I think -- I think  
8 what they are saying is something a little bit  
9 different, which is that if you go -- if you accept my  
10 premise that the arbitration clause could not say no  
11 economic evidence, what the -- Respondents here are  
12 saying is, well, now you have to give us the ability to  
13 produce economic evidence and maybe that involves class  
14 procedures, maybe it involves something else.

15 It could involve some other cost-sharing  
16 mechanism. But if the arbitration clause works to  
17 prevent us from sharing costs in such a way that we can  
18 produce that evidence, then once again we have a problem  
19 about completely frustrating the effect of the Sherman  
20 Act.

21 MR. KELLOGG: Well, I think -- I think not  
22 Your Honor. And I think we have to return to the fact that  
23 the only provision at issue here was the class action  
24 waiver. That was the only issue that they raised below.  
25 It was the issue decided by the Court. It was the issue

1 on which this Court granted certiorari, and it's  
2 directly contrary to this Court's decision in  
3 Concepcion.

4 I have no doubt that if there were  
5 provisions in a contract that essentially prevented a  
6 plaintiff from raising a substantive claim or from  
7 presenting evidence that they might have in support of  
8 that claim, that it would be struck down under State  
9 unconscionability principles or under Mitsubishi. But I  
10 don't think we can expand Mitsubishi into a  
11 free-floating inquiry for district courts into the costs  
12 and benefits of each case.

13 They would have to sit down and say, well,  
14 what evidence is going to be needed in this case and how  
15 much evidence is going to be required. They would have  
16 to say, what are the document production costs?  
17 According to the court of appeals, they would even need  
18 to say, what are your chances of winning? Because, say  
19 it's going to cost a million dollars, but you only have  
20 a 50 percent chance --

21 JUSTICE GINSBURG: I thought that the only thing  
22 that the court of appeals said is, you have to pay  
23 300,000 minimum for the expert, the most you can get in  
24 treble damages is 5,000. It didn't go into all the  
25 other things that you were saying. It said nobody in

1 his right mind will bring such a lawsuit to pay \$300,000  
2 to get \$5,000.

3 MR. KELLOGG: And nobody in their right mind  
4 in Eisen would -- would pay a million dollars in notice  
5 costs to get \$70 on --

6 JUSTICE SCALIA: I guess you could have said  
7 the same thing under the Sherman Act before Rule 23  
8 existed, right?

9 MR. KELLOGG: You could have.

10 JUSTICE SCALIA: Before there was such as  
11 thing as class actions.

12 MR. KELLOGG: Under that position --

13 JUSTICE SCALIA: The same thing would have  
14 been true. If, indeed, your claim was so small that you  
15 can't claim -- can't pay an expert, you, as a practical  
16 matter, don't bring the suit.

17 MR. KELLOGG: That was true. In fact,  
18 Congress at the time of passing the Sherman Act  
19 specifically considered adding class procedures and  
20 declined to do so. For the first 4 decades of the  
21 Sherman Act, there were no class procedures even left.

22 Even today, in court, as I noted, only  
23 20 percent of cases actually get the class certified.  
24 The whole point of arbitration, as I noted, is to expand  
25 the scope of claims, small consumer claims, that can be

1 brought in an efficient and cost-effective manner.

2 JUSTICE ALITO: Do you think the nature of  
3 their underlying -- their antitrust claim is relevant to  
4 this? They are claiming that they were unlawfully  
5 compelled to enter into the contract that they say, as a  
6 practical matter, precludes them from raising the  
7 antitrust issue. Does that -- does it matter?

8 MR. KELLOGG: Well, a couple of points on  
9 that. They certainly weren't compelled to enter the  
10 contract. Lots of merchants don't take American  
11 Express. It was a voluntary choice on their part. But  
12 more fundamentally, the only provision that they have  
13 ever challenged in this case is the class action waiver.  
14 They have not suggested below that there was any problem  
15 with cost-sharing or other ways that they might deal  
16 with the specific question how to present their case in  
17 arbitration.

18 JUSTICE GINSBURG: In the AT&T Mobility  
19 case, the Court remarked that this was a -- that the  
20 arbitration agreement had certain provisions that made  
21 it easier for the consumer to use the arbitral forum.  
22 Is there anything like that in this arbitration clause?

23 MR. KELLOGG: I'm sorry, I didn't -- I  
24 didn't quite follow that, Your Honor. A provision in  
25 the arbitration clause that makes it easier to --

1 JUSTICE GINSBURG: Yes, where not some other  
2 consumer in another arbitration, not that sharing of the  
3 costs, but wasn't AT&T Mobility going to pick up a good  
4 part of the tab of the cost of the arbitration?

5 MR. KELLOGG: That's correct, there were  
6 provisions in AT&T that the Court said would make small  
7 value claims easier to process. I would note that in  
8 Concepcion the Court said even if small value claims  
9 could not be brought, it would still fundamentally  
10 change the nature of arbitration to insist upon class  
11 procedures. So I don't think that helps them in  
12 distinguishing Concepcion.

13 JUSTICE KENNEDY: One of the ways I have  
14 been thinking about this case is to think about  
15 arbitration and the whole point of arbitration is to  
16 have a procedure where you don't have costs, you have as  
17 an arbitrator an antitrust expert or the best in the  
18 class in the third year antitrust course in law school.

19 And they cite reports, and -- you know, it's  
20 classic to have contractors sit in as arbitrators in  
21 construction claims; just because it's cheaper and they  
22 know -- so I was thinking that that's substantial  
23 justification for your position. But your argument so  
24 far seems to say that doesn't make any difference. Even  
25 if they can't bring the suit in an economic way -- the

1 arbitration in an economic way, that that's irrelevant.  
2 That's -- that's what I'm getting from your argument.

3 MR. KELLOGG: I did not mean to imply that,  
4 Your Honor. The key point is that it's up to the  
5 arbitrator in the first instance to find the most  
6 efficient and cost effective way to resolve a particular  
7 claim.

8 And it's not necessarily the case that  
9 complicated -- that huge numbers of documents --  
10 plaintiff said, we will need 5 million documents and we  
11 will need a very, very expensive expert and they got an  
12 affidavit from a very, very expensive expert saying,  
13 this is what I would charge to do this.

14 The whole point of arbitration, of course,  
15 is that its informality actually expands the universe of  
16 claims, of small value claims that can be brought  
17 effectively.

18 JUSTICE KAGAN: Mr. Kellogg, are you  
19 suggesting that you can win an antitrust suit in  
20 arbitration without presenting economic evidence of such  
21 things as monopoly power, antitrust injury, damages?  
22 How could somebody do that?

23 MR. KELLOGG: No, I acknowledge that they  
24 would probably need a report in this case.

25 JUSTICE BREYER: Why? I mean, I could be

1 your arbitrator. I know exactly what I would do. I  
2 would ask for five things, which will be admitted, and  
3 one thing that's going to be difficult for them to  
4 prove. I don't see why an expert in antitrust would  
5 have to have this enormous report.

6 MR. KELLOGG: Well, I -- perhaps I --

7 JUSTICE BREYER: Do you want to concede I'm wrong? --

8 MR. KELLOGG: -- conceded too much to  
9 Justice Kagan.

10 JUSTICE BREYER: Yes, maybe.

11 (Laughter.)

12 MR. KELLOGG: But in this case, if you look  
13 at the complaint, the market definition that they're  
14 seeking to establish is, if I might put it, somewhat  
15 gerrymandered. It essentially consists --

16 JUSTICE BREYER: If you want to argue that  
17 stuff, which I -- then I guess maybe they're right.  
18 Maybe you do need experts on that. I don't know that we  
19 want to get into this, but I just want to know if you  
20 want to concede that there is no way to win this case in  
21 arbitration unless they spend \$300,000.

22 MR. KELLOGG: I did not mean to concede that  
23 at all, Your Honor. The whole point of arbitration is  
24 the informality and the speed of the procedures.

25 And in addition, to the extent that there



1 does need to be some sort of safety valve, of course  
2 Congress can deal with that question. Congress recently  
3 in the Dodd-Frank Act said, in certain circumstances  
4 we're going to allow the Consumer Financial Protection  
5 Board to determine whether class action waivers will be  
6 permitted. But obviously there's nothing either in the  
7 FAA or in the Sherman Act that would justify such an  
8 inquiry here.

9 JUSTICE KAGAN: Well, Mr. Kellogg, could I  
10 go back to Justice Alito's point because I'm not sure I  
11 quite understood your -- your answer to it.  
12 Essentially, the claim here, right, is that this is a  
13 party with a monopolistic power, such that -- and this  
14 is just the Plaintiff's allegation, it may or may not be  
15 true, but -- but they say that American Express is using  
16 its market power to impose particular contract terms.  
17 And they have a tying thing, but it could just as easily  
18 be the case that American Express could be using its  
19 economic power to impose terms essentially making  
20 arbitration of antitrust claims impossible.

21 And why shouldn't we understand this problem  
22 as connected to the very allegation that's being  
23 brought? That -- you know, how is it, how is it going  
24 to be possible in a case where there's a monopoly power  
25 able -- able to impose contracts terms that -- that you

1 can create an arbitration clause, which essentially  
2 prevents that from being challenged?

3 MR. KELLOGG: Well, there is a separate  
4 issue below which the court did not reach about whether  
5 the arbitration clause itself had been improperly  
6 imposed. But the question before the Court has to do  
7 with the class action waiver, which this Court in  
8 Concepcion said there's no statutory basis for the  
9 courts to preclude application of that waiver.

10 It's also -- would create a completely  
11 unworkable inquiry at the outset of litigation in order  
12 to determine whether to refer a case to arbitration in  
13 the first place, and it's unnecessary because State law  
14 unconscionability, can deal with contracts of adhesion  
15 or unfair terms. The arbitrator in the first instance  
16 can deal with how to cost effectively arbitrate the  
17 claims in issue.

18 JUSTICE GINSBURG: Did -- did American  
19 Express say, as Justice Breyer suggested, that, well we  
20 will concede A, B, and C, so the only issue on which you  
21 need proof is D? As I understood it, American Express  
22 never took the position that it would -- it would  
23 concede certain issues so that you could limit the  
24 proof.

25 MR. KELLOGG: Well, Your Honor, we took the

1 position even in district court that they could pool  
2 their resources --

3 JUSTICE GINSBURG: No, I'm not  
4 talking about --

5 MR. KELLOGG: -- and share the cost of the  
6 claim.

7 JUSTICE GINSBURG: I'm not talking about  
8 pooling with other single merchants bringing single  
9 arbitrations. I'm asking whether American Express -- so  
10 here's the complaint. It says, I have to prove relevant  
11 markets separately. And did American Express take the  
12 position, no, you don't have to prove all that. I think  
13 that's what Justice Breyer was suggesting. There's only  
14 one thing that's really in controversy, and the rest we  
15 could stipulate.

16 But I didn't see anything in all the time  
17 this case has been in the courts on American Express's  
18 part to say that we are not going to demand the  
19 full breadth of proof.

20 MR. KELLOGG: Well, that's -- that's not  
21 actually correct. We did not say that we're going to  
22 relieve them of their burden of proof on any issues, but  
23 we did say, and the district court agreed with us, that  
24 the arbitrators are capable of dealing with these claims  
25 in an efficient and cost-effective way that would allow

1 the plaintiffs to bring them.

2 JUSTICE SCALIA: I suppose that American  
3 Express wouldn't have had to agree to arbitration at  
4 all, right? They could have just said -- you know,  
5 you -- you have a cause of action, you sue us in court,  
6 right? They could say that, legally, couldn't they?

7 MR. KELLOGG: We could. And indeed --

8 JUSTICE SCALIA: And until Rule 23 was  
9 adopted, that would mean -- you know, if you had a small  
10 claim, tough luck, right? De minimis non curate lex.  
11 If it's just negligible, it's impracticable for you to  
12 bring a Federal claim. And that would not violate the  
13 Sherman Act, would it?

14 MR. KELLOGG: Correct. That -- that very  
15 issue was present in the Eisen case.

16 CHIEF JUSTICE ROBERTS: I'm a little  
17 confused about this business about pooling resources and  
18 whether it's prohibited or permitted. Tell me exactly  
19 what your position is on that.

20 MR. KELLOGG: Our position is that multiple  
21 claimants in arbitration could share the costs of an  
22 expert for preparation of a report.

23 CHIEF JUSTICE ROBERTS: Well, it seems to  
24 me -- I don't see how that concession is at all needed  
25 by the other side. I mean, let's just say they have a

1 trade association or something. They -- they can all  
2 get together and say we want to prepare an antitrust  
3 expert report about what American Express is doing, and  
4 they do, and then presumably, one of them can use it in  
5 the arbitration. Any problem with that?

6 MR. KELLOGG: That -- no problem with that,  
7 and that's absolutely right. But the plaintiffs below  
8 said that wasn't good enough. They said, we need the  
9 aggregate damages provided in a class action to make  
10 this worthwhile because if we're just going to  
11 essentially get costs --

12 JUSTICE SCALIA: But they could borrow the  
13 money from a lawyer instead of from the trade  
14 association, right?

15 MR. KELLOGG: Well, or from a hedge fund,  
16 which increasingly finances litigation.

17 CHIEF JUSTICE ROBERTS: Well, again, that  
18 doesn't seem too difficult. You either have your trade  
19 association or you have a big meeting of all them and  
20 say we need to pay for this expert report and once we've  
21 got it -- you know, I'm going to represent each of you  
22 individually in individual arbitrations and I'm going to  
23 win the first one, and then the others are going to fall  
24 into place and they'll get a settlement from American  
25 Express that's going to be -- satisfy their concerns.

1 MR. KELLOGG: Absolutely right.

2 CHIEF JUSTICE ROBERTS: Okay. And you have  
3 no problem with that.

4 MR. KELLOGG: I have no problem with that.  
5 And that's why this case is about the class action  
6 waiver.

7 JUSTICE KAGAN: And, Mr. Kellogg --

8 CHIEF JUSTICE ROBERTS: I'm sorry, I'm  
9 sorry. Just a follow-up one, briefly. Is the -- is  
10 there collateral estoppel effect in the arbitration that  
11 would be applied to subsequent --

12 MR. KELLOGG: That is unclear. I have tried  
13 to look at that issue. You know, even in court,  
14 non-mutual use of offensive collateral estoppel is  
15 sometimes at the discretion of court.

16 CHIEF JUSTICE ROBERTS: Okay.

17 MR. KELLOGG: I couldn't find anything in  
18 the arbitration contract.

19 JUSTICE KAGAN: Just to be sure I understand  
20 it, that you're saying that it does not violate the  
21 confidentiality agreement of this clause to -- to all  
22 get together and produce one report?

23 MR. KELLOGG: Correct.

24 JUSTICE KAGAN: Okay.

25 MR. KELLOGG: And if you look at actually

1 the affidavit put in by the plaintiff's expert and you  
2 look at all the things he says I need to study in my  
3 report, they're all issues in common. They're not  
4 specific to a --

5 JUSTICE KAGAN: And did -- did you say that  
6 below as well, that -- that the confidentiality clause  
7 does not sweep so widely as to prevent this? Because  
8 clearly, the court below thought that the  
9 confidentiality clause did sweep so widely as to prevent  
10 this.

11 MR. KELLOGG: The Second Circuit did say  
12 that after we suggested that they could pool resources.  
13 And we think that was an indication of the Court's,  
14 shall we say, urgency to strike down the class action  
15 waiver.

16 Nobody challenged the confidentiality  
17 provision below.

18 JUSTICE KAGAN: So but you're saying the  
19 confidentiality position would not apply in that  
20 circumstance.

21 MR. KELLOGG: It would not apply. We took  
22 that position below.

23 If I might reserve the remainder of my time?

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Clement?

1 ORAL ARGUMENT OF PAUL D. CLEMENT  
2 ON BEHALF OF THE RESPONDENTS

3 MR. CLEMENT: Mr. Chief Justice, and may it  
4 please the Court:

5 This case is about the scope and continuing  
6 existence of a doctrine that has been a feature of this  
7 Court's cases and a necessary corollary of its  
8 willingness to extend arbitration to Federal statutory  
9 claims, the vindication of rights doctrine.

10 Ever since this Court 30 years ago, roughly,  
11 got in the business of extending arbitration to Federal  
12 statutory claims, it's used the effective vindication  
13 doctrine as an assurance that Federal statutory claims  
14 would not go unvindicated just because of the arbitral  
15 forum.

16 And so, if you look at this Court's cases,  
17 they stand for a simple proposition. When the choice is  
18 arbitration or litigation, surely the FAA favors  
19 arbitration and it's no threat to the underlying  
20 statute because the underlying statutory claim is  
21 vindicated in the arbitral forum.

22 JUSTICE SCALIA: I don't see -- I don't see  
23 how a Federal statute is frustrated or is unable to be  
24 vindicated if it's too expensive to bring a Federal  
25 suit. That happened for years before there was such a



1     thing as class action in Federal courts. Nobody thought  
2     the Sherman Act was a dead letter, that it couldn't be  
3     vindicated.

4                     MR. CLEMENT: Well, Justice Scalia, let me  
5     take --

6                     JUSTICE SCALIA: And I don't see why it's  
7     any different when you transpose the situation to the --  
8     to the arbitration situation.

9                     MR. CLEMENT: Justice Scalia, let me take on  
10    the premise and then we get -- then also say where  
11    really the concern comes in for the differential  
12    treatment.

13                    I would take issue with the premise, which  
14    is, sure, there wasn't a Sherman Act -- there wasn't a  
15    class action Rule 23 back when the Sherman Act was first  
16    passed. But there were procedures in like joinder that  
17    allowed for multiple claims to be litigated together;  
18    there were not confidentiality agreements that came in  
19    and limited your ability to share information from one  
20    claim to another, and, of course, back in the good old  
21    days, you didn't necessarily need a \$300,000 expert to  
22    bring a Sherman Act claim.

23                    But what I think is the problem is when you  
24    have a difference, and that is the assumption on which  
25    this case comes to the Court, where you could vindicate

1    this claim in court because there are mechanisms to  
2    share or shift costs and you cannot vindicate them in  
3    the arbitration because of a combination of features of  
4    the arbitration agreement that prevent any sharing or  
5    shifting of costs.

6                   JUSTICE BREYER:   Before you get to that, I  
7    have two questions.   One is on the point you've just  
8    made because I -- I agree, I understand it is fairly  
9    well established, this doctrine, but I don't see quite  
10   how it works.

11                   Suppose there's a Tyler claim, a Truth in  
12   Lending Act -- you know, something like that, and the  
13   claim is a fairly -- it's worth about \$10,000 or so.  
14   And so the plaintiff says you violated the act, pay me  
15   the \$10,000.   Now, he happens to come up with a theory  
16   that is really far out; and the more far out the theory,  
17   the harder it is to prove.   And the harder it is to  
18   prove, the more you need expensive experts.

19                   And do we go case by case, saying -- you  
20   know, where you have a really weird theory that's going to  
21   require 17 experts and endless studies, you don't have  
22   to have an arbitration claim, or you don't have to  
23   follow it in this instance, but everybody else does.

24                   Now -- now, is -- is that something, in  
25   other words, we're supposed to look at case by case,

1    which would produce the odd result I suggested? Or do  
2    we do it by categories? How does the doctrine work?

3                   MR. CLEMENT: Well, you could do it by  
4    category, and I suppose you could treat antitrust claims  
5    differently, but I think there's an answer that's  
6    already built into the Court's cases, which is Randolph,  
7    and it's putting the burden on the plaintiff to make a  
8    nonspeculative showing.

9                   And in the case you've described, I would  
10   think you would say, boy, that's speculative. I mean --  
11   you know, you don't need that --

12                  JUSTICE BREYER: No, what I'll do because I  
13   work with my own hypothetical, I'll have a far-out case,  
14   but yet not quite speculative. In other words, what I'm  
15   trying to suggest is it's an odd doctrine that just  
16   says, plaintiff by plaintiff, you can ignore an  
17   arbitration clause if you can get a case that's  
18   expensive enough, and there we are.

19                  I haven't seen it work, and I haven't seen  
20   enough to know how it does work. And I guess you  
21   haven't either, but -- but I'm concerned about that.

22                  MR. CLEMENT: Well -- well, don't be too  
23   concerned, Justice Breyer. First of all, if you look at  
24   the cases where the doctrine's been applied, it's  
25   largely been in antitrust cases. The First Circuit

1 Kristian case is an antitrust case. And I don't think  
2 that's an accident.

3 I mean, if you look at the Hovenkamp amicus  
4 brief, it make clear that you just can't bring this type  
5 of claim without an expert --

6 JUSTICE BREYER: Well, that doesn't seem right to  
7 me. Now, Hovenkamp would be the person I would hire as  
8 the arbitrator. So surely he does know -- or Phil  
9 Arita -- a blessed memory. And they're under the  
10 instruction to get this done cheap. Well, I think that  
11 might be possible.

12 That might be possible because it's only the  
13 question of damages that's tough here because if you  
14 don't have the double -- there's only one monopoly  
15 profit at the two levels, da, da, da, and we don't need  
16 to go through that.

17 But I can think of a way of getting it done  
18 pretty cheap. But regardless, your expert here didn't  
19 talk about the cost of arbitration. He did use the word  
20 once. But as I read pages 88 through 92, it seemed to  
21 me he was talking about the cost of litigation, not the  
22 cost of arbitration. And -- and I wouldn't proceed  
23 necessarily with all those reports he does to impress to  
24 the jury, or even the judge.

25 This is Phil Arita. You don't need to

1     impress him. And -- so, so, so -- hasn't the Second  
2     Circuit looked, assuming your doctrine's in place, to  
3     the wrong set of costs: The cost of litigation? Even  
4     though they use the word "arbitration," that isn't what  
5     your expert told me.

6                     MR. CLEMENT: Well, I mean, Justice Breyer,  
7     none of us can know for sure what Professor Arita would  
8     say. But we know what Professor Hovenkamp says, and he  
9     says to bring these claims you need an expert. Now,  
10    in --

11                    JUSTICE BREYER: In arbitration or in court?

12                    MR. CLEMENT: He says in arbitration or  
13    anywhere. He assumes that anywhere you bring these  
14    claims, you're going to need a market power expert.

15                    JUSTICE BREYER: Does he take into account  
16    the fact that the arbitrator can be him? And moreover,  
17    could, in fact, work under an instruction keep these  
18    costs down?

19                    MR. CLEMENT: And what I would say,  
20    Justice Breyer, is the place for that debate, if it were  
21    going to take place, was in the district court. Because  
22    we made our case, as Randolph requires -- and it was a  
23    nonspeculative case. We said it's going to cost  
24    \$300,000 to \$500,000 or even a million dollars to get a  
25    market power expert. They didn't come back and say, no,

1 in arbitration, I think you can do it for 50,000.

2 JUSTICE BREYER: No, that isn't the point.

3 If I were doing this offhand, I would say everything is  
4 conceded, but for one thing: Since there is no double  
5 monopoly power, there is only one monopoly power at the  
6 two levels which can be exercised, the only way the  
7 person is damaged is if in fact you've raised entry  
8 barriers. So you'd say to the plaintiff, how are you  
9 going to prove that? And you'd read it and submit a  
10 report.

11 Now, I'm not saying this is the right way to  
12 go about it. All I'm saying is it's hard for me to  
13 figure out on the basis of that affidavit, which talks  
14 about courts, why this has to be so expensive. So what  
15 do I do?

16 MR. CLEMENT: I think what you do is you,  
17 with all due respect, fault Petitioners for that.  
18 Because we put in that report -- they could have  
19 criticized it exactly the way you are and we'd have a  
20 different case. But they argued before the district  
21 court and the court of appeals just what they argued to  
22 you, Justice Kennedy, it doesn't matter if you can do  
23 it.

24 It doesn't matter if it's too expensive. We  
25 don't think this doctrine exists, or we don't think it

1 extends to this kind of cases, and having put their --  
2 their money on that extreme position that the effective  
3 vindication doctrine doesn't exist, I think it's --

4 JUSTICE BREYER: One other thing which I  
5 didn't understand, and that's why I am asking. What  
6 they chose as the remedy here was sever the arbitration  
7 clause if you want, it seemed to be, and go to court.  
8 All right.

9 Now, I don't know where that power comes  
10 from. So if you were going to improve this contract in  
11 the direction that you would like, why couldn't you  
12 sever the part about the confidentiality, or why  
13 couldn't you require -- you have some awfully big  
14 merchants.

15 Like, I don't know -- probably, you have  
16 maybe Costco, maybe Walmart, maybe -- you know, these  
17 people are not without money. Though your client,  
18 may be. But -- go get these contributions. Go for --  
19 there are many ways you can treat this particular set of  
20 words in the arbitration clause, short of severing it  
21 entirely.

22 And -- and what about that? What's your  
23 view on that? What do you think?

24 MR. CLEMENT: Well, our -- our view on that  
25 is -- you know, the Court is balancing two things here.

1 It's trying to apply the effective vindication doctrine,  
2 but it's also trying to honor the principle of this  
3 Court that you treat the parties to the bargain that  
4 they have committed.

5 Now, if they would have come in and said in  
6 the district court -- which they didn't -- that we'll  
7 get rid of the confidentiality -- they said you could  
8 share costs, but they -- you know, the confidentiality  
9 was the problem.

10 It was the problem the Second Circuit saw.  
11 You can look at 92a of the Petition appendix. And they  
12 didn't petition on that issue, so I don't know how they  
13 get to say, well, the Second Circuit was wrong about  
14 that, but isn't that a shame. I mean, if they thought  
15 that was wrong, they should have petitioned.

16 And that just shows you, these issues were  
17 in front of the Court. Now --

18 JUSTICE SCALIA: You -- you -- I don't  
19 understand. You think they could have appealed on  
20 that -- on that issue?

21 MR. CLEMENT: Sure. I don't think this  
22 Court would have necessarily granted it because it's not  
23 very cert-worthy. But it's also -- I don't know how  
24 they can keep that issue in their back pocket and then  
25 say well, we got cert -- we got cert on the cert-worthy



1 issue and now we have this factual finding where the  
2 Second Circuit held that the confidentiality agreement  
3 precludes the sharing of this information from  
4 arbitration to arbitration.

5 JUSTICE SCALIA: Let me ask you. Your  
6 effective vindicability principle depends upon a  
7 comparison with what you could do in Court.

8 MR. CLEMENT: It doesn't, Justice Scalia.

9 JUSTICE SCALIA: It doesn't?

10 MR. CLEMENT: It doesn't. It's a simple  
11 comparison of the necessary unrecoupable costs of  
12 bringing the claim in arbitration compared to the  
13 maximum recovery.

14 JUSTICE SCALIA: Yes, but if you couldn't do  
15 it -- if you couldn't do it either -- even if there had  
16 been no arbitration agreement, how could the arbitration  
17 agreement be -- be harming you? I don't understand  
18 that.

19 MR. CLEMENT: If you have -- if you have a  
20 claim, Justice Scalia, that can't be vindicated in  
21 arbitration or in court, that claim's not going --

22 JUSTICE SCALIA: Or in court.

23 MR. CLEMENT: Right. But that's --

24 JUSTICE SCALIA: You have to compare it to  
25 court.

1 MR. CLEMENT: No you don't.

2 JUSTICE SCALIA: If you couldn't do it in  
3 court, you don't have to be able to do it in  
4 arbitration, it seems to me.

5 MR. CLEMENT: With respect, Justice Scalia,  
6 you don't have to make that comparison part of the  
7 test because the cases that can't be vindicated in  
8 either place won't show up at the courthouse door. So  
9 once you show up at the courthouse door, you've got a  
10 plaintiff's lawyer. They may be crazy, but you have a  
11 plaintiff's lawyer that thinks I can do this in the  
12 litigation system.

13 And so at that point, the only question is,  
14 all right, I think I can do this in the litigation  
15 system. If the only thing that's precluding me from  
16 doing it is this arbitration agreement -- so this  
17 arbitration agreement is not operating as a real  
18 arbitration agreement, it's operating as a de facto  
19 as-applied exculpatory clause. If they can make that  
20 showing, then -- and the option is not arbitration or  
21 litigation --

22 JUSTICE KENNEDY: No. No. It's saying that  
23 there's an alternate mechanism for resolving disputes.  
24 It's called arbitration. And arbitration does not  
25 necessarily or even as a matter of fact often as a

1 practical matter involve the costs and the formalities of  
2 litigation.

3 MR. CLEMENT: And -- and God bless it,  
4 Justice Kennedy -- when it does that, and it can  
5 effectively address claims that can't be addressed in  
6 the litigation system, that's exactly what we want  
7 arbitration to do.

8 But there are some cases where the  
9 arbitration system -- not generally -- I mean, if you  
10 have the kind of pro-vindication agreement you had in  
11 Concepcion, or that Sovereign Bank has that we mentioned  
12 in our brief, then you can vindicate these claims in  
13 arbitration.

14 But when you have a specific arbitration  
15 agreement that has a variety of clauses that don't allow  
16 for any mechanism to shift or share the costs, so you  
17 know it's not litigation versus arbitration, of course  
18 we'll go with arbitration. It's litigation or nothing.  
19 In those circumstances, this Court has always said that  
20 we'll have --

21 JUSTICE KENNEDY: Well, I mean maybe it is  
22 litigation if you need a \$300,000 report. But why do  
23 you need a \$300,000 report? That's what we're asking.  
24 And I just can't -- it seems to me that I have to engage  
25 in speculation about the limits of arbitration in order

1 to resolve in your favor.

2 Now, to be sure, they took a -- a more rigid  
3 view below, so we don't have much of a record.

4 MR. CLEMENT: Well -- and, Justice Kennedy,  
5 I would say that -- I mean, shame on them, with all due  
6 respect. Because there was an opportunity in the  
7 district court to make an apples to apples comparison,  
8 and they could have said, no, \$300,000 is way off; you  
9 can do this for \$25,000, and here's how. But they  
10 didn't make that showing. They said -- you know, we  
11 don't think the effective vindication doctrine applies  
12 in these circumstances at all.

13 CHIEF JUSTICE ROBERTS: It's a little much  
14 to expect them to come back and say, oh no, no, no, you  
15 don't have to prove all this. The only thing you've got  
16 to prove is it's going to cost you \$25,000. That's an  
17 odd position to put them in.

18 MR. CLEMENT: Well, I don't think it is,  
19 Mr. Chief Justice. I -- they don't have to say -- you  
20 know -- they don't have to tell us how to prove our case  
21 to the lowest possible price. They just have to show us  
22 something that will allow us to vindicate our claim --

23 JUSTICE BREYER: There is no authority that  
24 I could find for the prop -- I mean, if in fact it costs  
25 you \$10,000 to buy the arbitrator -- system -- you know,

1     you buy the system --

2                     (Laughter.)

3                     JUSTICE BREYER:   Sorry.   But I mean -- you  
4     know, hire -- whatever it is, if those are obstacles,  
5     it's pretty well established, I think, that that  
6     arbitration is not something that you can use to  
7     vindicate the Federal claim.   And the part that's  
8     bothering me about this, though, is that those aren't  
9     obstacles.

10                    It's just you brought a very expensive  
11    claim.   And the real problem here is the reason they can  
12    go into court is they can get a class action in court.  
13    And then this Court has said, you can't get the class  
14    action in arbitration.   There we have it.

15                    So -- so the -- the question in my mind is,  
16    well, is there a way that some of the beneficial aspects  
17    of class action can be used in an arbitration that does  
18    not formally have a class action?   And there it seems  
19    yours is a good case because a lot of them can.   You  
20    say, well, the one part that can't is getting this  
21    private information.

22                    So maybe we should send it back and say,  
23    well, why do you need the private information?   On a  
24    good theory of antitrust, you're going to show that the  
25    price of the Tide product was higher than what it would

1 have been had the entry barriers not been raised from  
2 the Tide. That's a general entry question, which I  
3 don't think you need private information from them to  
4 answer. But that's -- and now we're really into the  
5 depths of the merits.

6 So I thought of sending it back and saying,  
7 let's -- let them explore this kind of thing about other  
8 ways of trying to get some of these advantages of class  
9 action into your -- you're going to say I'm too far out  
10 on this.

11 MR. CLEMENT: Well, what I'm going to say,  
12 Justice --

13 JUSTICE SCALIA: They could write a treatise  
14 on it, maybe.

15 MR. CLEMENT: But -- but what I was going to  
16 say is look, I mean, take a step back. You know, one of  
17 the great things about the effective vindication  
18 doctrine is it gets the incentives rights. It gives  
19 companies incentives to draft clauses that will allow  
20 for the maximum vindication of Federal rights.

21 And so there are lots of clauses out there  
22 that would allow for even this claim because they have  
23 cost shifting of expert costs or they don't have  
24 confidentiality agreements or they'll waive the  
25 confidentiality --

1 JUSTICE SCALIA: Suppose this class could  
2 not -- could not qualify for certification in Federal  
3 court. Are you asserting that there is some arbitration  
4 principle that -- that allows you to create some new  
5 class?

6 MR. CLEMENT: No, Justice Scalia.

7 JUSTICE SCALIA: So you have to make -- you  
8 have to make a comparison to what can be done in Federal  
9 court, don't you?

10 MR. CLEMENT: No, it's not part of the  
11 inquiry because --

12 JUSTICE SCALIA: It isn't. So that any  
13 class that the arbitrator thinks is okay is required.

14 MR. CLEMENT: No, it's just that if by virtue  
15 of showing up in court and saying, I want to litigate my  
16 claim, the lawyer has already made a judgment that I can  
17 vindicate it in Federal court.

18 Maybe it's because of class action, maybe  
19 it's just because of joinder, maybe it's because there's  
20 no confidentiality rule in the Federal proceedings, so  
21 it can bring a lot of these claims, maybe it's a  
22 difference in collateral estoppel. Whatever it is, that  
23 lawyer has already spoken that I can make this claim  
24 work in litigation.

25 JUSTICE SCALIA: But he wants a class. What

1 he wants in the arbitration is the ability to sue on behalf  
2 of a class, doesn't he?

3 MR. CLEMENT: That might be what they most  
4 want, but they don't get that. They just get some way  
5 to vindicate the claim. And if this had a cost-shifting  
6 provisions that the expert costs were shifted, that  
7 would get the job done, that's the Sovereign Bank  
8 example we talked about in our brief. There are more  
9 than one way. We're not trying to get a guarantee for  
10 class treatment in one form or the other.

11 JUSTICE SCALIA: Is -- is that what you  
12 asked for below, anything, class action or compensation  
13 or whatever?

14 MR. CLEMENT: We -- in fairness, we focused  
15 below on the class action because that's --

16 JUSTICE SCALIA: That's what I thought.  
17 That's what I thought this case was about. What's the  
18 question presented anyway?

19 MR. CLEMENT: Well, don't just look at the  
20 question presented, look at the opinion below. And look  
21 at 91(A) and 92(A). The questions that the Second  
22 Circuit addressed --

23 JUSTICE SCALIA: Whether -- whether the  
24 Federal Arbitration Act permits courts invoking the  
25 Federal substantive law of arbitrability to invalidate



1 arbitration agreements on the ground that they do not  
2 permit class arbitration of a Federal law claim.

3 Now, you're saying that -- that whether they  
4 permit class arbitration is not going to be decided on  
5 the basis of whether you could certify a class under  
6 Rule 23, but just what?

7 And -- and -- and if it does depend on that,  
8 what is the Court supposed to do? Before it can -- it  
9 can give you your claim, it has to -- it has to decide  
10 whether this class would be certifiable, wouldn't it?  
11 My goodness --

12 MR. CLEMENT: No, it would not --

13 JUSTICE SCALIA: -- this is a very  
14 complicated procedure.

15 MR. CLEMENT: -- Your Honor. You just have  
16 to answer the question, is there a problem with the  
17 arbitration, is there something with this specific  
18 agreement that precludes this claim going forward. Here  
19 it's a combination of no class arbitration, no way to  
20 shift costs because they don't provide cost shifting,  
21 and no way to share costs because of the  
22 confidentiality.

23 Whatever they put in the question presented,  
24 they can't make the Second Circuit's holding that the  
25 confidentiality provision blocks the sharing of

1 information to go away. They're stuck with that.

2 CHIEF JUSTICE ROBERTS: What is -- tell me  
3 how the no -- no sharing of information and  
4 confidentiality, how does that work again? You can't,  
5 if you're a trade association, get together and say, I  
6 think we should have a study of Amex's whatever. And  
7 then you put together the study, and then one of your  
8 members says -- you know, that's a good study, I'm going  
9 to go -- go to arbitration. They can't do that?

10 MR. CLEMENT: They -- they could do that  
11 much, Mr. Chief Justice. The critical point at which  
12 the confidentiality provision creates a practical  
13 problem is you're trying to get all the information,  
14 you're trying to get a single expert report in order to  
15 share the costs, and you're trying to do not just the  
16 market survey, but do a damage calculation, have a  
17 damage formula.

18 Because when you have a market like this  
19 where the allegations are they've distorted the market,  
20 so we can't rely on the market price, we need to know  
21 the sales volumes of all the individual stores. Their  
22 confidentiality agreement protects that and doesn't  
23 allow that to be shared. That's not that unusual.

24 This Court in Nielsen and Concepcion both  
25 remarked that one of the features of arbitration is you

1 generally keep it confidential. And that's something  
2 that the Second Circuit said because of that --

3 CHIEF JUSTICE ROBERTS: Well, what if you  
4 do -- I mean, what if you do it, is that just part of  
5 your trade associations, they think this is -- you know,  
6 they're not talking about particular arbitration or  
7 anything. They just prepare a -- a report, and then  
8 once you see the report, you say, my gosh, I had no  
9 idea, and then you file your claim for arbitration.

10 MR. CLEMENT: With all due respect, Mr. --

11 CHIEF JUSTICE ROBERTS: It seems to me my  
12 point is simply that there's no sharing, confidence, it  
13 seems like an awfully amorphous provision that would be  
14 very difficult to enforce.

15 MR. CLEMENT: Well, I mean, I don't think  
16 it's that difficult, Mr. Chief Justice. Certainly, cost  
17 shifting is not difficult, and there are other ways to  
18 solve this problem. But the Amex agreement forecloses  
19 all of them.

20 And the question for this Court is, do you  
21 say, well, tough or do you say what you've said every  
22 time you've confronted this problem, the effective  
23 vindication doctrine provides the solution.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: We'll afford you

1 some rebuttal time.

2 Mr. Stewart?

3 Oh, no, we won't.

4 (Laughter.)

5 JUSTICE SCALIA: You should have said, "I  
6 accept," very quickly.

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: Just being generous  
9 this morning.

10 Mr. Stewart?

11 ORAL ARGUMENT OF MR. MALCOLM L. STEWART,  
12 ON BEHALF OF THE UNITED STATES,  
13 AS AMICUS CURIAE, SUPPORTING RESPONDENTS

14 MR. STEWART: Mr. Chief Justice, and may it  
15 please the Court:

16 At the beginning of the argument,  
17 Justice Kagan asked whether a pure exculpatory clause, a  
18 provision in a contract that simply said, we promise not  
19 to seek relief under the arbitration -- under the  
20 antitrust clause period would be enforceable, and  
21 Mr. Kellogg replied that it would not.

22 And I think the unenforceability of such a  
23 provision would not depend on any analysis of what was  
24 likely to happen if the suit was brought in court; that  
25 is, a pure exculpatory clause could be set aside and the

1 plaintiff could still lose for any number of reasons.  
2 The plaintiff could be denied class certification and  
3 decide it's uneconomical to proceed with an individual  
4 suit.

5 He could lose on a threshold ground like the  
6 statute of limitations or he could lose on the merits.  
7 But the unenforceability of the pure exculpatory clause  
8 wouldn't require the Court to make a comparison between  
9 being kicked out of court on that basis and what would  
10 likely happen if the suit were able to be brought.

11 And we would submit that the same mode of  
12 analysis applies when the arbitration agreement can be  
13 shown to have the same practical effect as an  
14 exculpatory clause; that is, if it is the case that  
15 given the amount of money at stake, the arbitration  
16 procedure specified in the contract and the modes of  
17 proof that would be necessary in arbitration, if it can  
18 be shown persuasively by the plaintiff who bears the  
19 burden that no reasonable plaintiff would find it  
20 economically feasible to proceed, then the arbitration  
21 agreement can't be enforced --

22 JUSTICE SCALIA: Would that be the case even  
23 before Rule 23 was -- was adopted?

24 MR. STEWART: Yes. And it would be --

25 JUSTICE SCALIA: Even though you couldn't

1 vindicate it in the Federal courts, you must be able to  
2 vindicate it in arbitration?

3 MR. STEWART: The question would be whether  
4 the arbitration agreement could be enforced.

5 And before Rule 23 was adopted, if there had  
6 been a pure exculpatory clause, it would have been  
7 unenforceable and --

8 JUSTICE SCALIA: I'm not even talking about  
9 a pure exculpatory clause. I'm talking about the mere  
10 fact that as a practical matter, it's impossible to  
11 bring it in arbitration. In a context in which it is  
12 also impossible to bring it in Federal court.

13 And you would say, still, you must permit it  
14 to be brought in arbitration, even though it can't be  
15 brought in Federal court.

16 MR. STEWART: In the same way that we would  
17 say a pure exculpatory clause would be invalid and  
18 unenforceable, even if it were clear from the  
19 plaintiff's complaint that he was not entitled to relief  
20 on the merits.

21 JUSTICE KAGAN: And, Mr. -- Mr. Stewart,  
22 isn't that also consistent with the way the Court  
23 addressed the issue in Randolph? Because what the Court  
24 said there was it might be that these arbitration fees  
25 are prohibitive. And if those arbitration fees are

1 prohibitive, then this doctrine kicks in.

2                   And it didn't look to say, well, let's  
3 compare how these fees relate to whatever costs you  
4 would wind up with in litigation. It just said, if the  
5 arbitration fees are prohibitive, in such -- in such a  
6 manner that it prevents you from vindicating your  
7 Federal claim in arbitration, that's enough.

8                   MR. STEWART: That's correct. And I would  
9 make two real world --

10                  JUSTICE SCALIA: What -- what are the  
11 arbitration fees? It's not -- not -- not lawyers' fees.  
12 Do they include lawyers' fees?

13                  MR. STEWART: No, the attorneys' fees would  
14 be recoupable under the substantive law.

15                  JUSTICE SCALIA: Okay. So I don't know,  
16 what do you --

17                  JUSTICE BREYER: Expert costs.

18                  JUSTICE SCALIA: So what are you comparing  
19 it to in court litigation?

20                  MR. STEWART: We are not really --

21                  JUSTICE SCALIA: A filing fee?

22                  MR. STEWART: No, I think we are not  
23 comparing it to anything. That is, our -- our position  
24 is in determining whether the arbitration agreement has  
25 the same practical effect as an exculpatory clause, we

1 asked could any reasonable plaintiff proceed under the  
2 terms and conditions that are set up? And if the answer  
3 to that is no, then the arbitration agreement is  
4 unenforceable.

5 Now, I would make two real-world points, one  
6 of which Mr. Clement has already alluded to. The first  
7 is the only cases that are going to wind up in court are  
8 those in which the plaintiff at least believes that it  
9 would be feasible to vindicate the claim in court, and  
10 so they are likely to be those in which there is at least a  
11 potential difference between the outcome in court and  
12 the outcome in arbitration.

13 The other is, even if a plaintiff believes  
14 wrongly that he can proceed in court through a class  
15 action mechanism and class action -- class certification  
16 is denied under Rule 23, presumably at that point the  
17 plaintiff is going to give up and the outcome at the end  
18 of the day is going to be the same as if the arbitration  
19 agreement had been enforced.

20 JUSTICE BREYER: This is exactly -- I found  
21 no authority for the proposition that what hinders --  
22 plenty of authority, you can't make the person go to  
23 arbitration if the fees involved are too high because  
24 he's blocked.

25 But you're quite an advance over that. You



1 are saying the thing that keeps him out is his own  
2 theory of wrong, which will involve hiring a lot of  
3 experts and others.

4 Now, once that's adopted, it seems to me in  
5 practice we have reversed in many, many cases the  
6 proposition that you can, in fact, require Federal  
7 causes of action to be arbitrated because all you have  
8 to do to get -- out of the arbitration is to allege a  
9 theory of your case which is hard and complicated to  
10 prove. Now, you are back in court.

11 Now, that's a significant erosion, it seems  
12 to me. So I want to know if you have any standard  
13 there, if we're just supposed to accept that, if in fact  
14 you are trying to reverse in practice what was the  
15 holding that you can arbitrate these Federal causes of  
16 action. What is going on here?

17 And an addendum to that is if you are going  
18 to convince me, which you might, that, well, that's  
19 okay, do it, do it, do it, is it a possible remedy to  
20 monkey with the arbitration clause and provide for a  
21 sharing of costs, say if you win, the loser will pay the  
22 expert fees, which is of course a much more  
23 pro-arbitration way than just throwing it out entirely?

24 MR. STEWART: Well, let me start --

25 JUSTICE BREYER: That's a long question, but

1 do you see what I'm driving at?

2 MR. STEWART: Let me start with your last  
3 question and work backwards. It is possible and it  
4 sometimes has happened in the lower court cases that a  
5 plaintiff will come into court and say, I can't proceed  
6 through arbitration because the arbitral fees are too  
7 high in relation to my likely recovery.

8 And the defendant at that point will say, we  
9 offer to waive the fees or we offer to pay your share of  
10 the arbitral fees, and a court will be persuaded that,  
11 given that consensual modification of the contract, it  
12 is feasible for the claims to be brought in arbitration  
13 and the plaintiff is kicked out of court.

14 Now, this is consensual. This is something  
15 that the court has -- that the court has done at the  
16 company's behest, and it would be different question of  
17 whether the court could do that over the company's  
18 objection. But another thing that the company could do  
19 is put in a severability clause in the contract that  
20 would specify what results should obtain if one  
21 provision of the contract were held to be invalid.

22 I guess another thing I would say in  
23 response to your question is we do have one data point,  
24 the First Circuit's decision in Kristian, which I  
25 believe Mr. Clement referred to, in 2006, which

1 essentially held on facts similar to these that the  
2 arbitration clause as written was not enforceable  
3 because the cost of the expert fees in an antitrust case  
4 would dwarf any potential recovery, and we haven't seen  
5 the floodgates opened.

6           The last thing I would say is if this is the  
7 concern, Petitioner's proposed rule really doesn't match  
8 the argument in its favor. That is, Petitioner is not  
9 just arguing for a rule that would cover cases in which  
10 the relevant costs are those of experts or similar  
11 authorities.

12           Petitioner's rule would say even if the  
13 contract provides for a non-recoupable \$500 filing fee  
14 and the amount of the claim at stake is \$200, so it's  
15 absolutely apparent on the face of the contract that the  
16 claim can't be brought, the agreement is still  
17 enforceable and the plaintiff is deprived of his day in  
18 court.

19           The other thing I would say about  
20 Petitioner's argument is the challenge to the Second  
21 Circuit's decision has really changed drastically since  
22 the cert petition was filed; that is, the Second Circuit  
23 took it as essentially undisputed that the costs of the  
24 expert report would render it economically infeasible to  
25 proceed in arbitration, and it took the further step of

1 saying, therefore the arbitration agreement is  
2 unenforceable.

3 Now, the cert petition challenged only the  
4 "therefore" part of the Second Circuit's analysis.  
5 There wasn't a suggestion that the Petitioner intended  
6 to challenge the antecedent determination that these  
7 claims couldn't feasibly have been brought in  
8 individualized proceedings.

9 And I think as Paul -- Mr. Clement said, the  
10 likely reason is that wouldn't look like a cert-worthy  
11 issue. That sort of fact-specific inquiry wouldn't seem  
12 like a wise use of this Court's resources.

13 So having gotten cert granted on the  
14 important legal question whether the inefficacy of  
15 arbitration procedures is a basis for invalidating the  
16 agreement, Petitioners are now spending a great deal of  
17 time arguing that it would in fact have been feasible to  
18 pursue these claims through individualized arbitration.

19 And one thing we would say in response, as  
20 Mr. Clement said --

21 JUSTICE SCALIA: Excuse me. They didn't get  
22 cert granted on that question at all. As I pointed out  
23 before, they got it granted on whether the mere fact  
24 that the arbitration agreement did not permit class  
25 arbitration renders it invalid.

1 MR. STEWART: But they did get cert --

2 JUSTICE SCALIA: That's what I thought the  
3 question before us.

4 MR. STEWART: They got cert granted on that  
5 question, but neither the question as so framed or the  
6 body of the cert petition suggests any challenge to the  
7 Second Circuit's factual determination that these claims  
8 could not feasibly have been brought in individualized  
9 arbitration.

10 JUSTICE GINSBURG: Mr. Stewart, is it -- the  
11 arbitration agreement is a one-on-one, right? They  
12 can't, or can they have -- they have the 12 similarly  
13 situated people, not a class, join in the arbitration,  
14 or is it one on one?

15 MR. STEWART: That's correct.

16 CHIEF JUSTICE ROBERTS: Which is correct?

17 MR. STEWART: It is correct that it has to  
18 be one on one, that the agreement requires only --

19 JUSTICE GINSBURG: And even in the days  
20 before we had Rule 23, when you were bringing a suit in  
21 Federal court you could have multiple plaintiffs joining  
22 together.

23 MR. STEWART: That's correct. The agreement  
24 prohibits even the types of joinder mechanisms that  
25 might have been available when the Sherman Act was

1 passed.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Kellogg, you have rebuttal time, 6

4 minutes.

5 REBUTTAL ARGUMENT OF MICHAEL KELLOGG

6 ON BEHALF OF PETITIONERS

7 MR. KELLOGG: Thank you, Mr. Chief Justice.

8 Let me focus on what the court of appeals

9 held below. At 3a of our appendix, the court said.

10 "The only issue before us is the narrow question of

11 whether the class action waiver provision contained in

12 the contract between the parties should be enforced."

13 That is the question on which we sought certiorari.

14 That is the question that the Court granted.

15 It is Respondents who have now tried to

16 rewrite that question by talking about other possible

17 ways of vindicating their rights that they claim are

18 foreclosed, that they claim wrongly are foreclosed by

19 the contract at issue here.

20 This is not --

21 JUSTICE KENNEDY: Well, do we have a factual

22 record? Suppose, I think, based in substantial part on

23 Justice Breyer's suggestion, that we could have an

24 arbitration that's effective and we could have a trade

25 association prepare a report, and we could do one

1 arbitration and then see if it applies to others.

2 Suppose I think that.

3 Do I -- doesn't that bear on this question?

4 And if it does, I don't have a factual record to support  
5 my assumptions.

6 MR. KELLOGG: I don't think you need a  
7 factual record because as Respondents acknowledge the  
8 burden is on them to show that the arbitration-specific  
9 costs would preclude them from pursuing their claim.

10 And they have not done that by putting in an  
11 affidavit saying, well, in litigation we have to do --  
12 get 5 million documents and spend \$300,000 processing  
13 them and get an expert report which could cost up to \$1  
14 million.

15 JUSTICE BREYER: But suppose we answer --

16 MR. KELLOGG: That is not --

17 JUSTICE BREYER: -- the question -- the  
18 answer is yes, a class action waiver can be enforced.

19 MR. KELLOGG: Correct.

20 JUSTICE BREYER: Now, what are the  
21 circumstances here? The record leaves us uncertain, we  
22 remand it for further consideration of what they are.

23 MR. KELLOGG: Well, the court could  
24 certainly --

25 JUSTICE BREYER: Because that isn't the

1 issue they decided, whether it could be enforced. They  
2 decided whether you can -- whether the whole arbitration  
3 agreement could be enforced.

4 MR. KELLOGG: The holding of the court of  
5 appeals is the arbitration agreement cannot be enforced  
6 because it has a class action waiver. That is clearly  
7 reversible error. I don't even hear --

8 JUSTICE GINSBURG: It was because -- it was  
9 because Judge Pooler said, "I have been instructed by  
10 the Supreme Court that I may not require class  
11 arbitration." That's -- and she was bound by our  
12 decision that a court can't order class arbitration,  
13 isn't that correct? So that was not an option for her.

14 MR. KELLOGG: But the Court also in  
15 Concepcion said you can condition the enforceability of  
16 an arbitration agreement on the availability of class  
17 procedures, and that is what the Court below violated.  
18 So the decision below has to be vacated.

19 I do not think you should remand for a  
20 detailed factual showing on just how they are going to  
21 vindicate their rights in arbitration because most of  
22 those questions, what evidence is required, et cetera,  
23 are for the arbitrator in the first instance.

24 That said, we made -- we did respond to  
25 their showing below. We did not put in a dueling



1 affidavit saying, no, in litigation, it only requires a  
2 \$200,000 report or a \$25,000 report. We said, that's  
3 irrelevant because we're talking about  
4 arbitration-specific costs. And there's lots of ways  
5 that they can proceed with their claims.

6 One is by sharing the costs of an expert,  
7 and they specifically rejected that. They said, even if  
8 we could shift the costs of the experts to the other  
9 side, that wouldn't be good enough because then all we'd  
10 be doing is expending much money to get it back.

11 We need aggregated damages of the sort  
12 available in class suit --

13 JUSTICE BREYER: Or you have to do without.  
14 I -- you just said what -- I thought that the expert  
15 talked about litigation costs, not about arbitration  
16 costs.

17 So how is that handled?

18 MR. KELLOGG: That is how I read -- that is  
19 how I read the report. And certainly with an expert  
20 arbitrator --

21 JUSTICE BREYER: You said you waived that  
22 point, whatever -- however it is. You waived it. Never  
23 raised it. The Court of Appeals took it as if it were  
24 arbitration costs.

25 MR. KELLOGG: No, we raised -- we've argued

1     that all along. In fact, I can refer the Court to page  
2     27 of our -- the --

3                 JUSTICE GINSBURG: The Second Circuit never  
4     said anything about, this is what it would cost in  
5     court. The court -- the Court of Appeals said, this is  
6     what it would cost to prove this kind of tying, right?

7                 It didn't say one word distinguishing what  
8     it would cost in litigation from what it would cost in  
9     arbitration. It was simply what it was going to cost.

10                MR. KELLOGG: We did, in fact. But let me  
11     answer Justice Breyer's question first, at page 27 of  
12     our Court of Appeals --

13                JUSTICE BREYER: I believe you.

14                JUSTICE SCALIA: I'd like to hear the  
15     answer, if nobody --

16                (Laughter.)

17                MR. KELLOGG: We specifically said, "The  
18     declaration of merchant's expert is similarly  
19     un-illuminating, as he too studiously avoided projecting  
20     the costs for an individual arbitration of these  
21     disputes."

22                So we did argue against that point. This is  
23     not an exculpatory clause. The Court has made clear  
24     that a class action waiver is not an exculpatory clause.  
25     This Court has also made clear that you cannot assume

1     that the arbitral forum will be inadequate to vindicate  
2     Federal substantive rights.

3             And they cannot now change the nature of the  
4     question presented by arguing that well, there should  
5     have been another provision to allow -- specifically  
6     allow cost-sharing, or specifically allow cost-shifting.

7             JUSTICE KAGAN: Well, Mr. Kellogg, it does  
8     seem like both of the parties have changed what they're  
9     saying a bit. And -- you know, if this case as  
10    presented to us was presented to us in the first  
11    instance that the premise was that if you go into  
12    arbitration, it would not provide an effective way to  
13    vindicate the claim.

14            And, now, people are saying different things  
15    about the confidentiality clause, and people may be  
16    saying different things about the necessity of an  
17    expert. It suggests that the premise on which this case  
18    was presented to us was not quite right.

19            MR. KELLOGG: Well, I -- I don't believe  
20    that's the case. The premise on which the Court  
21    accepted the case, presumably, is that the decision  
22    below which conditioned the enforceability of the  
23    arbitration agreement on a -- on the availability of  
24    class procedures, was wrong under Concepcion.

25            Therefore --

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 The case is submitted.

3 (Whereupon, at 12:33 p.m., the case in the

4 above-entitled matter was submitted.)

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