
Class Actions — Class Arbitration Waivers —
American Express Co. v. Italian Colors Restaurant

The Supreme Court has interpreted the policies underlying the Federal Arbitration Act¹ (FAA) to be in conflict with class procedure, and has therefore determined that the FAA expresses a clear federal policy in favor of enforcing class waivers contained in arbitration agreements.² Given this presumption of enforceability, the class action waiver has become a favorite tool of corporate counsel³ who, by including class waivers in arbitration agreements contained in form contracts, seek to insulate their clients from aggregate — and often any — liability for contractually based actions that create small harm to large groups of people.⁴ Prior to last Term, the effective vindication principle, which provided that “[a]n arbitration clause will not be enforced if it prevents the effective vindication of federal statutory rights, however it achieves that result,”⁵ remained a plausible means for invalidating a class waiver that would prevent a plaintiff from protecting her federal rights.

Last Term, in *American Express Co. v. Italian Colors Restaurant*⁶ (*Italian Colors*), the Supreme Court held that a class action waiver contained in an arbitration agreement was enforceable, even though the plaintiffs showed that the waiver effectively prevented them from bringing their federal antitrust claims because litigating the claims individually would be prohibitively expensive.⁷ This decision continued the Court’s pattern of enforcing arbitration agreements according to their terms, and it virtually eliminated one of the last plausible judicial limits on the enforcement of class waivers in arbitration agreements. The Court’s decision makes it likely that many federal statutes will no longer be enforced privately in certain contexts, further weakening a judicially created principle that was already difficult to apply. Thus, it is now up to Congress to determine whether, and in what contexts, it favors contractual freedom in arbitration agreements over private enforcement of federal statutes.

American Express (AmEx) derives revenue by withholding a “merchant discount fee” from each transaction in which an AmEx card is

¹ 9 U.S.C. §§ 1–16 (2012).

² See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750–51 (2011).

³ Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 645–46 (2012).

⁴ See David L. Noll, *Rethinking Anti-Aggregation Doctrine*, 88 NOTRE DAME L. REV. 649, 650 (2012).

⁵ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2314 (2013) (Kagan, J., dissenting).

⁶ 133 S. Ct. 2304 (2013).

⁷ *Id.* at 2315.

used, and requires merchants who wish to accept AmEx cards to sign a form contract that sets this fee and contains an “Honor All Cards” provision, which provides that retailers must accept both AmEx’s charge and credit cards.⁸ These contracts also contain an arbitration clause that mandates arbitration of all claims “arising from or relating to . . . the relationship resulting from this Agreement,” and provides that the merchants do not have the right to use class procedure for any claim subject to arbitration.⁹

A group of merchants brought a class action against AmEx, claiming that AmEx violates section 1 of the Sherman Act¹⁰ by charging a supracompetitive merchant discount fee and sustaining this fee via an unlawful tying arrangement — accomplished by the “Honor All Cards” provision.¹¹ AmEx moved to compel these claims to bilateral arbitration, and the plaintiffs argued in response that bilateral arbitration “would impose such punishing costs as to preclude vindication in that forum.”¹² To support this claim, the plaintiffs provided an affidavit from economics expert Gary L. French, Ph.D., who stated that it would not be worthwhile for the plaintiffs to pursue individual arbitration because it would cost several hundred thousand dollars just to generate an expert economic report.¹³ By comparison, the most that any plaintiff could expect to recover was \$38,549.¹⁴ District Judge Daniels rejected this argument and granted AmEx’s motion to compel arbitration,¹⁵ reasoning that the plaintiffs were “actually challenging the enforcement of the collective action waivers,” which was a claim for the arbitrator to resolve.¹⁶

The Second Circuit reversed.¹⁷ Writing for the court, Judge Pooler¹⁸ explained that in *Green Tree Financial Corp.-Alabama v. Randolph*,¹⁹ the Supreme Court stated that a party could invalidate an arbitration agreement by showing that it will incur prohibitive costs under the agreement.²⁰ Based on Dr. French’s affidavit, Judge Pooler determined that the plaintiffs met the showing required by *Randolph*, proving that their antitrust claims could only be pursued by aggregating

⁸ *In re Am. Express Merchs. Litig.*, No. 03 CV 9592, 2006 WL 662341, at *1 (S.D.N.Y. Mar. 16, 2006).

⁹ *Id.* at *2.

¹⁰ 15 U.S.C. § 1 (2006).

¹¹ *Am. Express Merchs. Litig.*, 2006 WL 662341, at *1.

¹² *Id.* at *3.

¹³ *Id.* at *5.

¹⁴ *In re Am. Express Merchs. Litig.*, 554 F.3d 300, 317 (2d Cir. 2009).

¹⁵ *Am. Express Merchs. Litig.*, 2006 WL 662341, at *10.

¹⁶ *Id.* at *6.

¹⁷ *Am. Express Merchs. Litig.*, 554 F.3d at 304.

¹⁸ Judge Pooler was joined by Judges Sack and Sotomayor.

¹⁹ 531 U.S. 79 (2000).

²⁰ *Am. Express Merchs. Litig.*, 554 F.3d at 314–15 (citing *Randolph*, 531 U.S. at 92).

their individual claims.²¹ Thus, Judge Pooler concluded that the class action waiver provision was unenforceable.²²

The Supreme Court granted certiorari, vacated, and remanded for reconsideration in light of its opinion in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,²³ which held that a party cannot be forced to submit to class arbitration unless it has consented to do so.²⁴ Because the prior Second Circuit opinion had not ordered class arbitration, Judge Pooler reaffirmed the panel's decision.²⁵ Shortly thereafter, the Supreme Court decided *AT&T Mobility LLC v. Concepcion*,²⁶ in which it struck down a California common law rule that invalidated class waivers in consumer arbitration agreements as unconscionable because the rule conflicted with the pro-arbitration policy of the FAA.²⁷ The Second Circuit reconsidered its earlier *AmEx* decision sua sponte in light of *Concepcion*, and Judge Pooler again affirmed the court's decision, explaining that *Concepcion* did not alter the analysis in that case because *Concepcion* involved the preemption of state contract law by the FAA, whereas the Second Circuit's holding concerned federal statutory claims.²⁸ Finally, the Second Circuit denied a rehearing en banc over the dissents of several judges.²⁹

The Supreme Court reversed the Second Circuit.³⁰ Writing for the Court, Justice Scalia noted that the FAA requires courts to enforce arbitration agreements according to their terms unless Congress has evinced an intent to preclude arbitration of the statutory right at issue.³¹ Observing that there is no such congressional command in the Sherman Act, he rejected the plaintiffs' claim that requiring individual, prohibitively expensive arbitration would contravene the policies of the antitrust laws.³² Justice Scalia also noted that the antitrust laws make no mention of class actions, and that congressional approval of

²¹ *Id.* at 316–17.

²² *Id.* at 320.

²³ 130 S. Ct. 1758 (2010); see also *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010) (citing *Stolt-Nielsen*, 130 S. Ct. 1758 (2010)).

²⁴ *Stolt-Nielsen*, 130 S. Ct. at 1775.

²⁵ *In re Am. Express Merchs. Litig.*, 634 F.3d 187, 200 (2d Cir. 2011). Judge Pooler was joined by Judge Sack. Justice Sotomayor, having been elevated to the Supreme Court in August 2009, did not participate.

²⁶ 131 S. Ct. 1740 (2011).

²⁷ *Id.* at 1753.

²⁸ *In re Am. Express Merchs. Litig.*, 667 F.3d 204, 219 (2d Cir. 2012). Judge Pooler was joined by Judge Sack. Justice Sotomayor, having been elevated to the Supreme Court in August 2009, did not participate.

²⁹ *In re Am. Express Merchs. Litig.*, 681 F.3d 139 (2d Cir. 2012). Chief Judge Jacobs dissented, joined by Judges Cabranes and Livingston.

³⁰ *Italian Colors*, 133 S. Ct. at 2312.

³¹ *Id.* at 2309. Justice Scalia was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito.

³² *Id.*

Rule 23 of the Federal Rules of Civil Procedure (FRCP) does not establish an entitlement to class proceedings because the FRCP cannot establish or modify any substantive right.³³

The majority then addressed the “effective vindication” exception to the enforcement of arbitration agreements, which is a “judge-made exception to the FAA” that the plaintiffs contended enables a court to invalidate, “on ‘public policy’ grounds, arbitration agreements that ‘operat[e] . . . as a prospective waiver of a party’s *right to pursue* statutory remedies.’”³⁴ Justice Scalia explained that this exception would cover an arbitration provision that forbids the assertion of certain statutory rights, and possibly also high filing and administrative fees attached to arbitration.³⁵ However, noting that this exception had never actually been used by the Court to strike down an arbitration agreement,³⁶ he declined to do so here because “the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”³⁷

Finally, Justice Scalia explained, the Court’s decision in *Concepcion* “all but resolves this case.”³⁸ In *Concepcion*, the Court invalidated a state law that conditioned enforcement of arbitration on the availability of class procedure because that law mitigated arbitration’s primary advantage — “its informality” — by making the process “slower, more costly, and more likely to generate procedural morass than final judgment.”³⁹ Justice Scalia concluded that a broad effective vindication exception would similarly thwart the policies of the FAA because it would require extensive litigation to determine the enforceability of a bilateral arbitration agreement, which would “destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure.”⁴⁰

Justice Kagan penned a sharply worded dissent, stating that the Court’s decision means that “[t]he monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse,” and that the majority “flaunted” its answer of “[t]oo darn

³³ *Id.* at 2309–10.

³⁴ *Id.* at 2310 (alterations in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

³⁵ *Id.* at 2310–11 (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000)).

³⁶ *Id.* at 2310.

³⁷ *Id.* at 2311.

³⁸ *Id.* at 2312.

³⁹ *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011)) (internal quotation mark omitted).

⁴⁰ *Id.* Justice Thomas concurred, writing separately to explain that because Italian Colors had not challenged the formation of its arbitration agreement, “[i]t cannot now escape its obligations merely because the claim it wishes to bring might be economically infeasible.” *Id.* at 2313 (Thomas, J., concurring).

bad” with “barely” an explanation.⁴¹ She first observed that the Court would not “enforce an exculpatory clause insulating a company from antitrust liability . . . even if that clause were contained in an arbitration agreement.”⁴² However, she contended, such a rule could not be limited to “baldly exculpatory provisions” because corporations could easily devise ways around them.⁴³

Justice Kagan then argued that Supreme Court precedent establishes exactly this proposition: “An arbitration clause will not be enforced if it prevents the effective vindication of federal statutory rights, however it achieves that result.”⁴⁴ This principle, according to Justice Kagan, furthers the purposes of the FAA by encouraging companies to adopt efficient arbitration procedures, instead of attempting to “extract backdoor waivers of statutory rights.”⁴⁵ And the effective vindication principle has limits that protect arbitration’s benefits because it only applies when an agreement “forecloses (not diminishes) a plaintiff’s opportunity to gain relief for a statutory violation,” which the plaintiff must show by concrete proof.⁴⁶

Turning to the case at bar, Justice Kagan observed that the record showed that Italian Colors would have to expend ten times its highest possible award to be able to pursue its case individually, which must count as “‘prohibitive’ cost . . . if anything does.”⁴⁷ She then observed that the arbitration agreement at issue eschewed many possible means of managing the mismatch between cost and reward, thereby not only preventing class actions but also barring all mechanisms “for joinder or consolidation of claims, informal coordination among individual claimants, or amelioration of arbitral expenses,” and therefore eliminating any means for plaintiffs to effectively vindicate their federal rights.⁴⁸

Finally, Justice Kagan argued that *Concepcion* was not controlling for two reasons. First, *Concepcion* did not concern effective vindication, as the state law in question invalidated class action waivers regardless of the feasibility of vindicating one’s claims in bilateral arbitration. Second, *Concepcion* involved state law, which implicates standard preemption principles and not the effective vindication rule.⁴⁹ Admonishing readers not to be “fooled” by the majority’s assertion that the FAA requires this result, she concluded that the Court, “bent on diminishing the usefulness of Rule 23” in general, had undermined

⁴¹ *Id.* at 2313 (Kagan, J., dissenting). Justice Kagan was joined by Justices Ginsburg and Breyer.

⁴² *Id.*

⁴³ *Id.* at 2314.

⁴⁴ *Id.*

⁴⁵ *Id.* at 2315.

⁴⁶ *Id.*

⁴⁷ *Id.* at 2316.

⁴⁸ *Id.* at 2318.

⁴⁹ *See id.* at 2319–20.

both the FAA and the Sherman Act by enforcing AmEx's arbitration clause.⁵⁰

The *Italian Colors* decision is an unsurprising extension of the Court's FAA precedent, which had created a general presumption in favor of enforcing class waivers contained in arbitration agreements. However, in rejecting the plaintiffs' effective vindication challenge, the Court foreclosed one of the last limits on the enforcement of anti-aggregation rules in arbitration agreements. The effect of this decision will be to make many low-value statutory claims unpursuable, thereby undermining the private enforcement of federal statutes. Congress must now determine how and in what contexts it values private enforcement of federal rights over freedom in arbitration agreements, as Justice Kagan's doctrinal approach to this problem — the effective vindication principle — is judicially unadministrable.

The majority's decision is a continuation of the Court's pattern of "enforc[ing] . . . arbitration agreements according to their terms so as to facilitate streamlined proceedings."⁵¹ The Court has long stated that federal statutory rights are arbitrable absent a clear contrary signal from Congress,⁵² and has created a well-established policy of "rigorously enforc[ing]" arbitration agreements.⁵³ The Court has also made clear that class action waivers are enforceable even when a federal statute expressly allows for collective action, reasoning that the availability of the class action does not evince an intent to eschew bilateral claim resolution.⁵⁴ *Stolt-Nielsen* established the principle that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."⁵⁵ *Concepcion* similarly held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration," as "[a]rbitration is a matter of contract, and the FAA requires courts to honor parties' expectations."⁵⁶ Thus, Supreme Court precedent established that courts should rigorously enforce arbitration agreements and cannot compel class arbitration unless the parties have consented to it. The *Italian Colors* majority extended the *Concepcion* holding, which concerned a conflict between state contract law and the FAA, to a conflict between the FAA and other federal statutes.⁵⁷

⁵⁰ *Id.* at 2320.

⁵¹ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

⁵² *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

⁵³ *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

⁵⁴ *See Gilmer*, 500 U.S. at 32.

⁵⁵ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010).

⁵⁶ *Concepcion*, 131 S. Ct. at 1748, 1752.

⁵⁷ This extension was not surprising because of the broad wording of the *Concepcion* decision. *See, e.g., Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1050 (N.D. Cal. 2011).

Justice Kagan argued that the effective vindication principle should have applied to invalidate AmEx's arbitration clause.⁵⁸ While previous decisions had left open the possibility that the prohibitive cost of arbitration or other factors impeding the pursuit of statutory causes of action could be used to invalidate an arbitration agreement or class waiver,⁵⁹ that principle had never been invoked by the Court to do so.⁶⁰ The majority read the opinions creating this possible exception to the enforcement of class waivers narrowly, limiting the effective vindication principle to cases where arbitration-specific attributes render the vindication of plaintiffs' claims impossible or their pursuit extremely impracticable.⁶¹

By rejecting Justice Kagan's broader definition of the effective vindication principle, the Court definitively foreclosed one of the last plausible judicial limits on the enforceability of class waivers. This will significantly impede the private enforcement of many federal statutes, a regulatory tool that is "deeply embedded in our politics and culture."⁶² Congress depends on private citizens to aid in enforcing many statutes,⁶³ and the efficacy of any such private enforcement regime depends on the ability of plaintiffs to deter violations of the statute by forcing defendants to internalize the social costs of such violations.⁶⁴

The primary problem with class action waivers is that they interfere with this deterrent function by allowing defendants to insulate themselves from liability for low-value claims.⁶⁵ This problem occurs for two reasons. First, the private enforcement regime is largely driven by plaintiffs' attorneys, who "advance their time and fees, and they are not going to do that unless they can recover from sufficiently large numbers of people to make it worthwhile."⁶⁶ Second is the fact that there are significant, stake-driven asymmetries that place plaintiffs at a disadvantage when it comes to bilaterally litigating common-question claims.⁶⁷ If the plaintiffs are unable to aggregate claims arising from a common harm, there is a significant structural bias favoring the common defendant, usually a corporation that is able to "fully centralize its

⁵⁸ *Italian Colors*, 133 S. Ct. at 2315 (Kagan, J., dissenting).

⁵⁹ See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90-91 (2000); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985).

⁶⁰ See *Italian Colors*, 133 S. Ct. at 2310.

⁶¹ See *id.* at 2310-11.

⁶² Gilles & Friedman, *supra* note 3, at 626.

⁶³ See, e.g., *id.*

⁶⁴ See Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 105 (2006).

⁶⁵ *Id.* at 155.

⁶⁶ Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825, 867 (2012).

⁶⁷ See generally David Rosenberg & Kathryn E. Spier, *On Structural Bias in the Litigation of Common Question Claims* (Harvard Pub. Law Working Paper No. 11-28, 2012).

investment decisions to optimize its common question defense across all claims.”⁶⁸ Class procedure mitigates this problem by enabling individual plaintiffs to aggregate their claims and turn control over to class counsel, thereby centralizing their decisionmaking with an individual who has a stake in the entire litigation.⁶⁹ Thus, any solution that seeks to properly harmonize the FAA with effective private enforcement of a given statute must provide for aggregation of claims,⁷⁰ as without aggregation it is exceedingly likely that no small-value claims, like those at issue in *Italian Colors* and *Concepcion*, will be brought.⁷¹

The decision of how best to harmonize the competing policy interests behind the FAA — which support freedom of contract in arbitration agreements — and other federal statutes — many of which support other, often competing principles — is properly left to Congress, as a robust effective vindication principle would be judicially unworkable for three related reasons. First of all, Justice Kagan’s effective vindication principle would enable plaintiffs to challenge virtually every arbitration agreement with a class waiver, as plaintiffs’ costs in disputes arising from the form contracts containing these agreements are usually significantly higher than the low per-plaintiff damages.⁷² The evidentiary burden that the effective vindication rule imposes on plaintiffs⁷³ likely would not deter frequent invocation, as plaintiffs’ attorneys will almost always be able to find an expert to state that plaintiffs’ costs exceed their expected recovery.⁷⁴

Secondly, a trial court engaged in such an inquiry would be aiming at a moving target, as any inquiry into whether the plaintiff will incur “prohibitive costs” will necessarily be a highly indeterminate variable-cost analysis. The limiting principle that Justice Kagan placed on the effective vindication rule — “‘prohibitive’ (not high, excessive, or extravagant)” cost⁷⁵ — seeks to stabilize this target, and suggests that the effective vindication principle would only be invoked when the

⁶⁸ *Id.* at 1 (emphasis omitted).

⁶⁹ *See id.* at 2.

⁷⁰ *See* David Korn & David Rosenberg, *Concepcion’s Pro-Defendant Biasing of the Arbitration Process: The Class Counsel Solution*, 46 U. MICH. J.L. REFORM 1152, 1155 (2013).

⁷¹ “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.” *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1761 (2011) (Breyer, J., dissenting) (quoting *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (internal quotation marks omitted)).

⁷² *See In re Am. Express Merchs. Litig.*, 681 F.3d 139, 143 (2d Cir. 2012) (Jacobs, C.J., dissenting); Gilles & Friedman, *supra* note 64, at 132.

⁷³ *See Italian Colors*, 133 S. Ct. at 2315 (Kagan, J., dissenting).

⁷⁴ *Am. Express Merchs. Litig.*, 681 F.3d at 144 (Jacobs, C.J., dissenting).

⁷⁵ *Italian Colors*, 133 S. Ct. at 2315 (Kagan, J., dissenting) (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000)).

plaintiff's costs exceed its prospective recovery.⁷⁶ But this simply raises the question — which costs are included in this analysis? Rejecting the notion that these costs must be arbitration-specific, Justice Kagan claimed that the *Italian Colors* plaintiffs satisfied their effective vindication burden by presenting an expert affidavit stating that, in order to pursue their claims, they would have to spend at least several hundred thousand dollars to prepare an expert report.⁷⁷ This expert affidavit could not seriously be based on the above narrow definition of prohibitive cost, but rather had to entail some assumption about what the plaintiff would need to spend to have some reasonable chance of prevailing. It cannot reasonably be argued that the plaintiff could not at least *pursue* its claim without spending less.⁷⁸ And therefore, under Justice Kagan's rule, courts would be back to performing an extraordinarily difficult analysis about how different levels of spending by each party might affect the plaintiffs' expected outcome at trial.

Third, a robust effective vindication principle would greatly increase the cost of enforcing arbitration agreements. In order to reach a reasonably accurate estimate of costs and recovery as required under the principle, courts would have to inquire into the merits of the case to determine what types of expert testimony or discovery would be needed.⁷⁹ This in-depth, fact-specific inquiry would almost certainly be challenged by the defendant, further compounding the costs and delay.⁸⁰ The end result of such an effective vindication inquiry would be to “displace[] arbitration with a trial court proceeding whenever lawyers assert a class claim,” potentially causing “the party seeking to arbitrate [to spend] many times the cost of an arbitral proceeding just enforcing the arbitration clause.”⁸¹ As the *Italian Colors* majority concluded, “[t]he FAA does not sanction such a judicially created superstructure.”⁸²

⁷⁶ If “prohibitive cost” means anything above Justice Kagan’s minimalistic version, courts will have to determine what level of spending would give a plaintiff some predetermined chance of winning, as well as what the appropriate chance of winning should be.

⁷⁷ *Italian Colors*, 133 S. Ct. at 2316–18 (Kagan, J., dissenting).

⁷⁸ During oral argument in the Supreme Court, counsel for AmEx conceded that the plaintiffs would likely need *some* form of expert antitrust report to prevail in arbitration, but argued, in agreement with Justice Breyer, that such a report would not have to be as large and expensive as Dr. French claimed. See Transcript of Oral Argument at 15–16, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (No. 12-133), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-133.pdf.

⁷⁹ *Am. Express Merchs. Litig.*, 681 F.3d at 144–45 (Jacobs, C.J., dissenting); see also *Italian Colors*, 133 S. Ct. at 2312.

⁸⁰ See *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1049 (N.D. Cal. 2011). At oral argument, counsel for *Italian Colors* implied that this sort of back-and-forth in district court would be the norm under the effective vindication rule. See Transcript of Oral Argument, *supra* note 78, at 26–27.

⁸¹ *Am. Express Merchs. Litig.*, 681 F.3d at 145 (Jacobs, C.J., dissenting).

⁸² *Italian Colors*, 133 S. Ct. at 2312.

It is now therefore up to Congress to determine the future of federal arbitration policy vis-à-vis the rest of the federal statutory regime. The Court has spoken clearly: absent a clear textual signal from Congress, class waivers are enforceable even if plaintiffs' federal statutory claims are too expensive to bring individually.⁸³ Given the perceived clash between the two federal policies — the FAA favors honoring parties' expectation of expedient, inexpensive arbitration, and Rule 23 favors aggregating claims to provide the proper tools and incentives for individuals to enforce their own federal statutory rights — Congress must step in and determine which federal statutory rights should continue to be enforced privately via class actions.⁸⁴ It may determine, on economic efficiency grounds, that companies should be able to shield themselves from liability for certain statutory violations by preventing class litigation.⁸⁵ Or it may conclude that certain claims should not be subject to predispute arbitration or class waivers at all.⁸⁶ And it may adjust its desired level of government enforcement of these statutes based on these determinations.⁸⁷ However, for those statutes that Congress does determine should be enforced via private actions, if it chooses to do so, class waivers should be outlawed or significantly restrained to ensure that private attorneys general have the proper incentives to optimally enforce these statutes.

⁸³ A textual signal is precisely what the *Italian Colors* majority was calling for: "The antitrust laws do not 'evin[c]e an intention to preclude a waiver' of class-action procedure." *Id.* at 2309 (alteration in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

⁸⁴ The Court already gave a clear statement rule for arbitration generally in *Gilmer*, and Congress has made it clear that certain federal statutory rights are not arbitrable. See Gilles & Friedman, *supra* note 3, at 639 n.77 (listing statutes where Congress has made such a clear statement of nonarbitrability). *Italian Colors* extended this clear statement rule to class waivers.

⁸⁵ See Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. ILL. L. REV. 695, 765.

⁸⁶ For example, Congress considered the Arbitration Fairness Act, which would have "prohibit[ed] provisions in employment, consumer, and franchise agreements that obligate a party to arbitrate claims that arise out of those relationships." Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 289 (2012).

⁸⁷ Government agencies, such as the SEC, FTC, and DOJ, already take into account the claims of class action plaintiffs when determining what corrective action to take. See Gilles & Friedman, *supra* note 64, at 157–58; see also *id.* at 157 n.203 (citing empirical evidence supporting this claim). Thus, while private enforcement via class actions saves federal funds by outsourcing some of the policing for statutory violations, Congress could decide that government agencies should simply increase their sanctions to make up for the deterrence lost by the unavailability of class actions in certain contexts.