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IN THE SUPREME COURT OF THE UNITED STATES

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AMERICAN EXPRESS COMPANY, ET AL., :

Petitioners : No. 12-133

v. :

ITALIAN COLORS RESTAURANT, ET AL. :

- - - - - x

Washington, D.C.

Wednesday, February 27, 2013

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

APPEARANCES:

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

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

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

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P R O C E E D I N G S

(11:31 a.m.)

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

ORAL ARGUMENT OF MICHAEL KELLOGG
ON BEHALF OF THE PETITIONERS

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

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

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

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

1 these sections -- the way these kinds of cases have gone
2 is to get an expert. And I don't see that you can prove
3 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 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. The -- 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. So
8 what happens then, the case ends, and it's not
9 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. This
14 Court held in Eisen, for example, even though the Court
15 acknowledged that it was a \$70 claim, it could only be
16 brought as a class action, but the plaintiff in that
17 case said, I can't afford to do the notice costs, and
18 the Court said well, then, the class is decertified,
19 because the plaintiff has to put up the notice.

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

23 JUSTICE KAGAN: Mr. Kellogg, do you think
24 that if in your arbitration agreement you had a clause
25 which just said, I hereby agree not to bring any Sherman

1 Act claim against American Express, could -- could your
2 arbitration agreement do that?

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

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

9 MR. KELLOGG: Correct.

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

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

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

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

6 JUSTICE KAGAN: So you think -- I'm sorry.
7 Go ahead.

8 MR. KELLOGG: I'm sorry. Mitsubishi dealt
9 with the very specific question of a waiver, a
10 substantive waiver of your rights, not with the
11 procedures to vindicate those rights. As, for example,
12 in the Vimar Seguros case, where the Court said, well,
13 you might have to go to Japan, but we're not going to
14 get into the business of weighing the costs and
15 benefits.

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

23 MR. KELLOGG: You know, I think the better
24 place to handle that would be State unconscionability
25 law. Whether the Court would want to expand the ports

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

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

13 MR. KELLOGG: Correct.

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

19 MR. KELLOGG: I have no doubt that such a
20 provision would be struck down. I think the proper way
21 to do that would be under State unconscionability law,
22 which Section 2 specifically preserves. But if the
23 Court felt the need to expand Mitsubishi in that narrow
24 respect, that would still not help the Respondents here,
25 who are saying that you should condition the enforcement

1 of the arbitration clause on the availability of class
2 procedures, which this Court held in *Concepcion* is
3 fundamentally inconsistent with the purposes of the FAA.

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

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

18 MR. KELLOGG: Well, I think -- I think not
19 true. And I think we have to return to the fact that
20 the only provision at issue here was the class action
21 waiver. That was the only issue that they raised below.
22 It was the issue decided by the Court. It was the issue
23 on which this Court granted certiorari, and it's
24 directly contrary to this Court's decision in
25 *Concepcion*.

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

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

18 JUSTICE GINSBURG: I thought the only thing
19 that the court of appeals said is, you have to pay
20 300,000 minimum for the expert, the most you can get in
21 treble damages is 5,000. It didn't go into all the
22 other things that you were saying. It said nobody in
23 his right mind will bring such a lawsuit to pay \$300,000
24 to get \$5,000.

25 MR. KELLOGG: And nobody in their right mind

1 in Eisen would pay a million dollars in notice costs to
2 get \$70 on --

3 JUSTICE SCALIA: I guess you could have said
4 the same thing under the Sherman Act before Rule 23
5 existed, right?

6 MR. KELLOGG: You could have.

7 JUSTICE SCALIA: Before there was such as
8 thing as class actions.

9 MR. KELLOGG: Under that position --

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

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

19 Even today, in court, as I noted, only
20 20 percent of cases actually get the class certified.
21 The whole point of arbitration, as I noted, is to expand
22 the scope of claims, small consumer claims, that can be
23 brought in an efficient and cost-effective manner.

24 JUSTICE ALITO: Do you think the nature of
25 their underlying -- their antitrust claim is relevant to

1 this? They are claiming that they were unlawfully
2 compelled to enter into the contract that they say, as a
3 practical matter, precludes them from raising the
4 antitrust issue. Does that -- does it matter?

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

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

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

23 JUSTICE GINSBURG: Yes, where not some other
24 consumer in another arbitration, not that sharing of the
25 costs, but wasn't AT&T Mobility going to pick up a good

1 part of the tab of the cost of the arbitration?

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

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

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

25 MR. KELLOGG: I did not mean to imply that,

1 Your Honor. The key point is that it's up to the
2 arbitrator in the first instance to find the most
3 efficient and cost effective way to resolve a particular
4 claim.

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

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

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

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

22 JUSTICE BREYER: Why? I mean, I could be
23 your arbitrator. I know exactly what I would do. I
24 would ask for five things, which will be admitted, and
25 one thing that's going to be difficult for them to

1 prove. I don't see why an expert in antitrust would
2 have to have this enormous report.

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

4 JUSTICE BREYER: Do you want to concede --

5 MR. KELLOGG: -- conceded too much to
6 Justice Kagan.

7 JUSTICE BREYER: Yes, maybe.

8 (Laughter.)

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

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

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

22 And in addition, to the extent that there
23 does need to be some sort of safety valve, of course
24 Congress can deal with that question. Congress recently
25 in the Dodd-Frank Act said, in certain circumstances

1 we're going to allow the Consumer Financial Protection
2 Board to determine whether class action waivers will be
3 permitted. But obviously there's nothing either in the
4 FAA or in the Sherman Act that would justify such an
5 inquiry here.

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

18 And why shouldn't we understand this problem
19 as connected to the very allegation that's being
20 brought? That, you know, how is it, how is it going to
21 be possible in a case where there's a monopoly power
22 able -- able to impose contracts terms that -- that you
23 can create an arbitration clause which essentially
24 prevents that from being challenged?

25 MR. KELLOGG: Well, there is a separate

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

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

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

22 MR. KELLOGG: Well, Your Honor, we took the
23 position even in district court that they could pool
24 their resources --

25 JUSTICE GINSBURG: No, I'm not

1 talking about --

2 MR. KELLOGG: -- and share the cost of the
3 claim.

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

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

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

24 JUSTICE SCALIA: I suppose that American
25 Express wouldn't have had to agree to arbitration at

1 all, right? They could have just said, you know, you --
2 you have a cause of action, you sue us in court, right?
3 They could say that, legally, couldn't they?

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

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

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

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

17 MR. KELLOGG: Our position is that multiple
18 claimants in arbitration could share the costs of an
19 expert for preparation of a report.

20 CHIEF JUSTICE ROBERTS: Well, it seems to
21 me -- I don't see how that concession is at all needed
22 by the other side. I mean, let's just say they have a
23 trade association or something. They -- they can all
24 get together and say we want to prepare an antitrust
25 expert report about what American Express is doing, and

1 they do, and then presumably, one of them can use it in
2 the arbitration. Any problem with that?

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

9 JUSTICE SCALIA: But they could borrow the
10 money from a lawyer instead of from the trade
11 association, right?

12 MR. KELLOGG: Well, or from a hedge fund,
13 which increasingly finances litigation.

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

23 MR. KELLOGG: Absolutely right.

24 CHIEF JUSTICE ROBERTS: Okay. And you have
25 no problem with that.

1 MR. KELLOGG: I have no problem with that.
2 And that's why this case is about the class action
3 waiver.

4 JUSTICE KAGAN: And, Mr. Kellogg --

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

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

13 CHIEF JUSTICE ROBERTS: Okay.

14 MR. KELLOGG: I couldn't find anything in
15 the arbitration contract.

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

20 MR. KELLOGG: Correct.

21 JUSTICE KAGAN: Okay.

22 MR. KELLOGG: And if you look at actually
23 the affidavit put in by the plaintiff's expert and you
24 look at all the things he says I need to study in my
25 report, they're all issues in common. They're not

1 specific to a --

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

8 MR. KELLOGG: The Second Circuit did say
9 that after we suggested that they could pool resources.
10 And we think that was an indication of the Court's,
11 shall we say, urgency to strike down the class action
12 waiver. Nobody challenged the confidentiality provision
13 below.

14 JUSTICE KAGAN: So but you're saying the
15 confidentiality position would not apply in that
16 circumstance.

17 MR. KELLOGG: It would not apply. We took
18 that position below.

19 If I might reserve the remainder of my time?

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 Mr. Clement.

22 ORAL ARGUMENT OF PAUL D. CLEMENT

23 ON BEHALF OF THE RESPONDENTS

24 MR. CLEMENT: Mr. Chief Justice, and may it
25 please the Court:

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

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

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

18 JUSTICE SCALIA: I don't see -- I don't see
19 how a Federal statute is frustrated or is unable to be
20 vindicated if it's too expensive to bring a Federal
21 suit. That happened for years before there was such a
22 thing as class action in Federal courts. Nobody thought
23 the Sherman Act was a dead letter, that it couldn't be
24 vindicated.

25 MR. CLEMENT: Well, Justice Scalia, let me

1 take --

2 JUSTICE SCALIA: And I don't see why it's
3 any different when you transpose the situation to the --
4 to the arbitration situation.

5 MR. CLEMENT: Justice Scalia, let me take on
6 the premise and then we get -- then also say where
7 really the concern comes in for the differential
8 treatment.

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

19 But what I think is the problem is when you
20 have a difference, and that is the assumption on which
21 this case comes to the Court, where you could vindicate
22 this claim in court, because there are mechanisms to
23 share or shift costs and you cannot vindicate them in
24 the arbitration because of a combination of features of
25 the arbitration agreement that prevent any sharing or

1 shifting of costs.

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

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

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

20 Now -- now, is -- is that something, in
21 other words, we're supposed to look at case by case,
22 which would produce the odd result I suggested? Or do
23 we do it by categories? How does the doctrine work?

24 MR. CLEMENT: Well, you could do it by
25 category, and I suppose you could treat antitrust claims

1 differently, but I think there's an answer that's
2 already built into the Court's cases, which is Randolph,
3 and it's putting the burden on the plaintiff to make a
4 nonspeculative showing.

5 And in the case you've described, I would
6 think you would say: Boy, that's speculative. I mean,
7 you know, you don't need that --

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

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

18 MR. CLEMENT: Well -- well, don't be too
19 concerned, Justice Breyer. First of all, if you look at
20 the cases where the doctrine's been applied, it's
21 largely been in antitrust cases. The First Circuit
22 Kristian case is an antitrust case. And I don't think
23 that's an accident.

24 I mean, if you look at the Hovenkamp amicus
25 brief, it make clear that you just can't bring this type

1 of claim --

2 JUSTICE BREYER: Well, that sounds expert to
3 me. Now, Hovenkamp would be the person I would hire as
4 the arbitrator. So surely he does know -- or Phil
5 Arita -- a blessed memory. And they're under the
6 instruction to get this done cheap. Well, I think that
7 might be possible.

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

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

21 This is Phil Arita. You don't need to
22 impress him. And -- so, so, so -- hasn't the Second
23 Circuit looked, assuming your doctrine's in place, to
24 the wrong set of costs: The cost of litigation? Even
25 though they use the word "arbitration," that isn't what

1 your expert told me.

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

7 JUSTICE BREYER: In arbitration or in court?

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

11 JUSTICE BREYER: Does he take into account
12 the fact that the arbitrator can be him? And moreover,
13 could in fact work under an instruction to keep these
14 costs down?

15 MR. CLEMENT: And what I would say,
16 Justice Breyer, is the place for that debate, if it were
17 going to take place, was in the district court. Because
18 we made our case, as Randolph requires -- and it was a
19 nonspeculative case. We said it's going to cost
20 \$300,000 to \$500,000 or even a million dollars to get a
21 market power expert. They didn't come back and say:
22 No, in arbitration, I think you can do it for 50,000.

23 JUSTICE BREYER: No, that isn't the point.
24 If I were doing this offhand, I would say everything is
25 conceded but for one thing: Since there is no double

1 monopoly power, there is only one monopoly power at the
2 two levels which can be exercised, the only way the
3 person is damaged is if in fact you've raised entry
4 barriers. So you'd say to the plaintiff, how are you
5 going to prove that? And you'd read it and submit a
6 report.

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

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

20 It doesn't matter if it's too expensive. We
21 don't think this doctrine exists, or we don't think it
22 extends to this kind of cases, and having put their --
23 their money on that extreme position that the effective
24 vindication doctrine doesn't exist, I think it's --

25 JUSTICE BREYER: One other thing which I

1 didn't understand, and that's why I am asking. What
2 they chose as the remedy here was sever the arbitration
3 clause if you want, it seemed to be, and go to court.

4 All right.

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

11 Like, I don't know -- probably, you have
12 maybe Costco, maybe Walmart, maybe -- you know, these
13 people are not without money. They're your client,
14 maybe. But -- go get these contributions. Go for --
15 there are many ways you can treat this particular set of
16 words in the arbitration clause, short of severing it
17 entirely.

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

20 MR. CLEMENT: Well, our -- our view on that
21 is -- you know, the Court is balancing two things here.
22 It's trying to apply the effective vindication doctrine,
23 but it's also trying to honor the principle of this
24 Court that you treat the parties to the bargain that
25 they have committed.

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

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

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

14 JUSTICE SCALIA: You -- you -- I don't
15 understand. You think they could have appealed on
16 that -- on that issue?

17 MR. CLEMENT: Sure. I don't think this
18 Court would have necessarily granted it, because it's
19 not very cert-worthy. But it's also -- I don't know how
20 they can keep that issue in their back pocket and then
21 say well, we got cert -- we got cert on the cert-worthy
22 issue and now we have this factual finding where the
23 Second Circuit held that the confidentiality agreement
24 precludes the sharing of this information from
25 arbitration to arbitration.

1 JUSTICE SCALIA: Let me ask you. Your
2 effective vindicability principle depends upon a
3 comparison with what you could do in Court.

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

5 JUSTICE SCALIA: It doesn't?

6 MR. CLEMENT: It doesn't. It's a simple
7 comparison of the necessary unrecoupable costs of
8 bringing the claim in arbitration compared to the
9 maximum recovery.

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

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

18 JUSTICE SCALIA: Or in court.

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

20 JUSTICE SCALIA: You have to compare it to
21 court. If you couldn't do it in court, you don't have
22 to be able to do it in arbitration, it seems to me.

23 MR. CLEMENT: With respect, Justice Scalia,
24 you don't have to make that comparison part of the test,
25 because the cases that can't be vindicated in either

1 place won't show up at the courthouse door. So once you
2 show up at the courthouse door, you've got a plaintiff's
3 lawyer. They may be crazy, but you have a plaintiff's
4 lawyer that thinks I can do this in the litigation
5 system.

6 And so at that point, the only question is,
7 all right, I think I can do this in the litigation
8 system. If the only thing that's precluding me from
9 doing it is this arbitration agreement -- so this
10 arbitration agreement is not operating as a real
11 arbitration agreement, it's operating as a de facto
12 as-applied exculpatory clause. If they can make that
13 showing, then -- and the option is not arbitration or
14 litigation --

15 JUSTICE KENNEDY: No. No. It's saying that
16 there's an alternate mechanism for resolving disputes.
17 It's called arbitration. And arbitration does not
18 necessarily or even as a matter of fact often as a
19 practical matter involve the costs and formalities of
20 litigation.

21 MR. CLEMENT: And -- and God bless it,
22 Justice Kennedy -- when it does that, and it can
23 effectively address claims that can't be addressed in
24 the litigation system, that's exactly what we want
25 arbitration to do.

1 But there are some cases where the
2 arbitration system -- not generally -- I mean, if you
3 have the kind of pro-vindication agreement you had in
4 Concepcion, or that Sovereign Bank had that we mentioned
5 in our brief, then you can vindicate these claims in
6 arbitration.

7 But when you have a specific arbitration
8 agreement that has a variety of clauses that don't allow
9 for any mechanism to shift or share the costs, so you
10 know it's not litigation versus arbitration, of course
11 we'll go with arbitration. It's litigation or nothing.
12 In those circumstances, this Court has always said that
13 we'll have --

14 JUSTICE KENNEDY: Well, I mean maybe it is
15 litigation if you need a \$300,000 report. But why do
16 you need a \$300,000 report? That's what we're asking.
17 And I just can't -- it seems to me that I have to engage
18 in speculation about the limits of arbitration in order
19 to resolve in your favor.

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

22 MR. CLEMENT: Well -- and, Justice Kennedy,
23 I would say that -- I mean, shame on them, with all due
24 respect. Because there was an opportunity in the
25 district court to make an apples to apples comparison,

1 and they could have said: No, \$300,000 is way off; you
2 can do this for \$25,000, and here's how. But they
3 didn't make that showing. They said: You know, we
4 don't think the effective vindication doctrine applies
5 in these circumstances at all.

6 CHIEF JUSTICE ROBERTS: It's a little much
7 to expect them to come back and say: Oh no, no, no, you
8 don't have to prove all this. The only thing you've got
9 to prove is it's going to cost you \$25,000. That's an
10 odd position to put them in.

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

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

20 (Laughter.)

21 JUSTICE BREYER: Sorry. But I mean, you
22 know, hire -- whatever it is, if those are obstacles,
23 it's pretty well established, I think, that that
24 arbitration is not something that you can use to
25 vindicate the Federal claim. And the part that's

1 bothering me about this, though, is that those aren't
2 obstacles.

3 It's just you brought a very expensive
4 claim. And the real problem here is the reason they can
5 go into court is they can get a class action in court.
6 And then this Court has said, you can't get the class
7 action in arbitration. There we have it.

8 So -- so the -- the question in my mind is,
9 well, is there a way that some of the beneficial aspects
10 of class action can be used in an arbitration that does
11 not formally have a class action? And there it seems
12 yours is a good case, because a lot of them can. You
13 say, well, the one part that can't is getting this
14 private information.

15 So maybe we should send it back and say,
16 well, why do you need the private information? On a
17 good theory of antitrust, you're going to show that the
18 price of the Tide product was higher than what it would
19 have been had the entry barriers not been raised from
20 the Tide. That's a general entry question which I don't
21 think you need private information from them to answer.
22 But that's -- and now we're really into the depths of
23 the merits.

24 So I thought of sending it back and saying,
25 let's -- let them explore this kind of thing about other

1 ways of trying to get some of these advantages of class
2 action into your -- you're going to say I'm too far out
3 on this.

4 MR. CLEMENT: Well, what I'm going to say,
5 Justice --

6 JUSTICE SCALIA: They could write a treatise
7 on it, maybe.

8 MR. CLEMENT: But -- but what I was going to
9 say is look, I mean, take a step back. You know, one of
10 the great things about the effective vindication
11 doctrine is it gets the incentives rights. It gives
12 companies incentives to draft clauses that will allow
13 for the maximum vindication of Federal rights.

14 And so there are lots of clauses out there
15 that would allow for even this claim, because they have
16 cost shifting of expert costs or they don't have
17 confidentiality agreements or they'll waive the
18 confidentiality --

19 JUSTICE SCALIA: Suppose this class could
20 not -- could not qualify for certification in Federal
21 court. Are you asserting that there is some arbitration
22 principle that -- that allows you to create some new
23 class?

24 MR. CLEMENT: No, Justice Scalia.

25 JUSTICE SCALIA: So you have to make -- you

1 have to make a comparison to what can be done in Federal
2 court, don't you?

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

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

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

11 Maybe it's because of class action, maybe
12 it's just because of joinder, maybe it's because there's
13 no confidentiality rule in the Federal proceedings, so
14 it can bring a lot of these claims, maybe it's a
15 difference in collateral estoppel. Whatever it is, that
16 lawyer has already spoken that I can make this claim
17 work in litigation.

18 JUSTICE SCALIA: But he wants a class. What
19 he wants in arbitration is the ability to sue on behalf
20 of a class, doesn't he?

21 MR. CLEMENT: That might be what they most
22 want, but they don't get that. They just get some way
23 to vindicate the claim. And if this had a cost-shifting
24 provisions that the expert costs were shifted, that
25 would get the job done, that's the Sovereign Bank

1 example we talked about in our brief. There are more
2 than one way. We're not trying to get a guarantee for
3 class treatment in one form or the other.

4 JUSTICE SCALIA: Is -- is that what you
5 asked for below, anything, class action or compensation
6 or whatever?

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

9 JUSTICE SCALIA: That's what I thought.
10 That's what I thought this case was about. What's the
11 question presented anyway?

12 MR. CLEMENT: Well, don't just look at the
13 question presented, look at the opinion below. And look
14 at 91(A) and 92(A). The questions that the Second
15 Circuit addressed --

16 JUSTICE SCALIA: Whether -- whether the
17 Federal Arbitration Act permits courts invoking the
18 Federal substantive law of arbitrability to invalidate
19 arbitration agreements on the ground that they do not
20 permit class arbitration of a Federal law claim.

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

25 And -- and -- and if it does depend on that,

1 what is the Court supposed to do? Before it can -- it
2 can give you your claim, it has to -- it has to decide
3 whether this class would be certifiable, wouldn't it?

4 My goodness --

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

6 JUSTICE SCALIA: -- this is a very
7 complicated procedure.

8 MR. CLEMENT: -- Your Honor. You just have
9 to answer the question, is there a problem with the
10 arbitration, is there something with this specific
11 agreement that precludes this claim going forward. Here
12 it's a combination of no class arbitration, no way to
13 shift costs, because they don't provide cost shifting,
14 and no way to share costs because of the
15 confidentiality.

16 Whatever they put in the question presented,
17 they can't make the Second Circuit's holding that the
18 confidentiality provision blocks the sharing of
19 information to go away. They're stuck with that.

20 CHIEF JUSTICE ROBERTS: What is -- tell me
21 how the no -- no sharing of information and
22 confidentiality, how does that work again? You can't,
23 if you're a trade association, get together and say, I
24 think we should have a study of Amex's whatever. And
25 then you put together the study, and then one of your

1 members says, you know, that's a good study, I'm going
2 to go -- go to arbitration. They can't do that?

3 MR. CLEMENT: They -- they could do that
4 much, Mr. Chief Justice. The critical point at which
5 the confidentiality provision creates a practical
6 problem is you're trying to get all the information,
7 you're trying to get a single expert report in order to
8 share the costs, and you're trying to do not just the
9 market survey, but do a damage calculation, have a
10 damage formula.

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

17 This Court in Nielsen and Concepcion both
18 remarked that one of the features of arbitration is you
19 generally keep it confidential. And that's something
20 that the Second Circuit said, because of that --

21 CHIEF JUSTICE ROBERTS: Well, what if you
22 do -- I mean, what if you do it, is that just part of
23 your trade associations, they think this is -- you know,
24 they're not talking about particular arbitration or
25 anything. They just prepare a -- a report, and then

1 once you see the report, you say, my gosh, I had no
2 idea, and then you file your claim for arbitration.

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

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

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

13 And the question for this Court is, do you
14 say, well, tough or do you say what you've said every
15 time you've confronted this problem, the effective
16 vindication doctrine provides the solution.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: We'll afford you
19 some rebuttal time.

20 Mr. Stewart?

21 Oh, no, we won't.

22 (Laughter.)

23 JUSTICE SCALIA: You should have said, "I
24 accept," very quickly.

25 (Laughter.)

1 CHIEF JUSTICE ROBERTS: Just being generous
2 this morning.

3 Mr. Stewart?

4 ORAL ARGUMENT OF MR. MALCOLM L. STEWART,
5 ON BEHALF OF THE UNITED STATES,
6 AS AMICUS CURIAE, SUPPORTING RESPONDENTS

7 MR. STEWART: Mr. Chief Justice, and may it
8 please the Court:

9 At the beginning of the argument,
10 Justice Kagan asked whether a pure exculpatory clause, a
11 provision in a contract that simply said, we promise not
12 to seek relief under the arbitration -- under the
13 antitrust clause period would be enforceable, and
14 Mr. Kellogg replied that it would not.

15 And I think the unenforceability of such a
16 provision would not depend on any analysis of what was
17 likely to happen if the suit was brought in court; that
18 is, a pure exculpatory clause could be set aside and the
19 plaintiff could still lose for any number of reasons.
20 The plaintiff could be denied class certification and
21 decide it's uneconomical to proceed with an individual
22 suit.

23 He could lose on a threshold ground like the
24 statute of limitations or he could lose on the merits.
25 But the unenforceability of the pure exculpatory clause

1 wouldn't require the Court to make a comparison between
2 being kicked out of court on that basis and what would
3 likely happen if the suit were able to be brought.

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

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

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

18 JUSTICE SCALIA: Even though you couldn't
19 vindicate it in the Federal courts, you must be able to
20 vindicate it in arbitration?

21 MR. STEWART: The question would be whether
22 the arbitration agreement could be enforced. And before
23 Rule 23 was adopted, if there had been a pure
24 exculpatory clause, it would have been unenforceable
25 and --

1 JUSTICE SCALIA: I'm not even talking about
2 a pure exculpatory clause. I'm talking about the mere
3 fact that as a practical matter, it's impossible to
4 bring it in arbitration. In a context in which it is
5 also impossible to bring it in Federal court. And you
6 would say, still, you must permit it to be brought in
7 arbitration, even though it can't be brought in Federal
8 court.

9 MR. STEWART: In the same way that we would
10 say a pure exculpatory clause would be invalid and
11 unenforceable, even if it were clear from the
12 plaintiff's complaint that he was not entitled to relief
13 on the merits.

14 JUSTICE KAGAN: And, Mr. -- Mr. Stewart,
15 isn't that also consistent with the way the Court
16 addressed the issue in Randolph? Because what the Court
17 said there was it might be that these arbitration fees
18 are prohibitive. And if those arbitration fees are
19 prohibitive, then this doctrine kicks in.

20 And it didn't look to say, well, let's
21 compare how these fees relate to whatever costs you
22 would wind up with in litigation. It just said, if the
23 arbitration fees are prohibitive in such -- in such a
24 manner that it prevents you from vindicating your
25 Federal claim in arbitration, that's enough.

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

3 JUSTICE SCALIA: What -- what are the
4 arbitration fees? It's not -- not -- not lawyers' fees.
5 Do they include lawyers' fees?

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

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

10 JUSTICE BREYER: Expert costs.

11 JUSTICE SCALIA: So what are you comparing
12 it to in court litigation?

13 MR. STEWART: We are not really --

14 JUSTICE SCALIA: A filing fee?

15 MR. STEWART: No, I think we are not
16 comparing it to anything. That is, our -- our position
17 is in determining whether the arbitration agreement has
18 the same practical effect as an exculpatory clause, we
19 asked could any reasonable plaintiff proceed under the
20 terms and conditions that are set up? And if the answer
21 to that is no, then the arbitration agreement is
22 unenforceable.

23 Now, I would make two real-world points, one
24 of which Mr. Clement has already alluded to. The first
25 is the only cases that are going to wind up in court are

1 those in which the plaintiff at least believes that it
2 would be feasible to vindicate the claim in court, and
3 so they are likely to be those in which there is a
4 potential difference between the outcome in court and
5 the outcome in arbitration.

6 The other is, even if a plaintiff believes
7 wrongly that he can proceed in court through a class
8 action mechanism and class action -- class certification
9 is denied under Rule 23, presumably at that point the
10 plaintiff is going to give up and the outcome at the end
11 of the day is going to be the same as if the arbitration
12 agreement had been enforced.

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

18 But you're quite an advance over that. You
19 are saying the thing that keeps him out is his own
20 theory of wrong, which will involve hiring a lot of
21 experts and others. Now, once that's adopted, it seems
22 to me in practice we have reversed in many, many cases
23 the proposition that you can in fact require Federal
24 causes of action to be arbitrated, because all you have
25 to do to get out of the arbitration is to allege a

1 theory of your case which is hard and complicated to
2 prove. Now you are back in court.

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

9 And an addendum to that is if you are going
10 to convince me, which you might, that, well, that's
11 okay, do it, do it, do it, is it a possible remedy to
12 monkey with the arbitration clause and provide for a
13 sharing of costs, say if you win the loser will pay the
14 expert fees, which is of course a much more
15 pro-arbitration way than just throwing it out entirely?

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

17 JUSTICE BREYER: That's a long question, but
18 do you see what I'm driving at?

19 MR. STEWART: Let me start with your last
20 question and work backwards. It is possible and it
21 sometimes has happened in the lower court cases that a
22 plaintiff will come into court and say: I can't proceed
23 through arbitration because the arbitral fees are too
24 high in relation to my likely recovery.

25 And the defendant at that point will say, we

1 offer to waive the fees or we offer to pay your share of
2 the arbitral fees, and a court will be persuaded that,
3 given that consensual modification of the contract, it
4 is feasible for the claims to be brought in arbitration
5 and the plaintiff is kicked out of court.

6 Now, this is consensual. This is something
7 that the court has -- that the court has done at the
8 company's behest, and it would be different question of
9 whether the court could do that over the company's
10 objection. But another thing that the company could do
11 is put in a severability clause in the contract that
12 would specify what results should obtain if one
13 provision of the contract were held to be invalid.

14 I guess another thing I would say in
15 response to your question is we do have one data point,
16 the First Circuit's decision in Kristian, which I
17 believe Mr. Clement referred to, in 2006, which
18 essentially held on facts similar to these that the
19 arbitration clause as written was not enforceable
20 because the cost of the expert fees in an antitrust case
21 would dwarf any potential recovery, and we haven't seen
22 the floodgates opened.

23 The last thing I would say is if this is the
24 concern, Petitioner's proposed rule really doesn't match
25 the argument in its favor. That is, Petitioner is not

1 just arguing for a rule that would cover cases in which
2 the relevant costs are those of experts or similar
3 authorities.

4 Petitioner's rule would say even if the
5 contract provides for a non-recoupable \$500 filing fee
6 and the amount of the claim at stake is \$200, so it's
7 absolutely apparent on the face of the contract that the
8 claim can't be brought, the agreement is still
9 enforceable and the plaintiff is deprived of his day in
10 court.

11 The other thing I would say about
12 Petitioner's argument is the challenge to the Second
13 Circuit's decision has really changed drastically since
14 the cert petition was filed. That, is the Second
15 Circuit took it as essentially undisputed that the costs
16 of the expert report would render it economically
17 infeasible to proceed in arbitration, and it took the
18 further step of saying, therefore the arbitration
19 agreement is unenforceable.

20 Now, the cert petition challenged only the
21 "therefore" part of the Second Circuit's analysis.
22 There wasn't a suggestion that the Petitioner intended
23 to challenge the antecedent determination that these
24 claims couldn't feasibly have been brought in
25 individualized proceedings.

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

5 So having gotten cert granted on the
6 important legal question whether the inefficacy of
7 arbitration procedures is a basis for invalidating the
8 agreement, Petitioners are now spending a great deal of
9 time arguing that it would in fact have been feasible to
10 pursue these claims through individualized arbitration.
11 And one thing we would say in response, as Mr. Clement
12 said --

13 JUSTICE SCALIA: Excuse me. They didn't get
14 cert granted on that question at all. As I pointed out
15 before, they got it granted on whether the mere fact
16 that the arbitration agreement did not permit class
17 arbitration renders it invalid.

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

19 JUSTICE SCALIA: That's what I thought the
20 question before us.

21 MR. STEWART: They got cert granted on that
22 question, but neither the question as so framed or the
23 body of the cert petition suggests any challenge to the
24 Second Circuit's factual determination that these claims
25 could not feasibly have been brought in individualized

1 arbitration.

2 JUSTICE GINSBURG: Mr. Stewart, is it -- the
3 arbitration agreement is a one-on-one, right? They
4 can't, or can they have -- they have the 12 similarly
5 situated people, not a class, showing in the
6 arbitration, or is it one on one?

7 MR. STEWART: That's correct.

8 CHIEF JUSTICE ROBERTS: Which is correct?

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

11 JUSTICE GINSBURG: And even in the days
12 before we had Rule 23, when you were bringing a suit in
13 Federal court you could have multiple plaintiffs joining
14 together.

15 MR. STEWART: That's correct. The agreement
16 prohibits even the types of joinder mechanisms that
17 might have been available when the Sherman Act was
18 passed.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Kellogg, you have rebuttal time, 6
21 minutes.

22 REBUTTAL ARGUMENT OF MICHAEL KELLOGG

23 ON BEHALF OF PETITIONERS

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

25 Let me focus on what the court of appeals

1 held below. At 3a of our appendix, the court said:
2 "The only issue before us is the narrow question of
3 whether the class action waiver provision contained in
4 the contract between the parties should be enforced."
5 That is the question on which we sought certiorari.
6 That is the question that the Court granted.

7 It is Respondents who have now tried to
8 rewrite that question by talking about other possible
9 ways of vindicating their rights that they claim are
10 foreclosed, that they claim wrongly are foreclosed by
11 the contract at issue here.

12 This is not --

13 JUSTICE KENNEDY: Well, do we have a factual
14 record? Suppose I think, based in substantial part on
15 Justice Breyer's suggestion, that we could have an
16 arbitration that's effective and we could have a trade
17 association prepare a report, and we could do one
18 arbitration and then see if it applies to others.
19 Suppose I think that. Do I -- doesn't that bear on this
20 question? And if it does, I don't have a factual record
21 to support my assumptions.

22 MR. KELLOGG: I don't think you need a
23 factual record, because Respondents acknowledge the
24 burden is on them to show that the arbitration-specific
25 costs would preclude them from pursuing their claim.

1 And they have not done that by putting in an affidavit
2 saying, well, in litigation we have to do -- get 5
3 million documents and spend \$300,000 prosecuting them
4 and get an expert report which could cost up to \$1
5 million.

6 JUSTICE BREYER: But suppose we answer --

7 MR. KELLOGG: That is not --

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

10 MR. KELLOGG: Correct.

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

14 MR. KELLOGG: Well, the court could
15 certainly --

16 JUSTICE BREYER: Because that isn't the
17 issue they decided, whether it could be enforced. They
18 decided whether you can -- whether the whole arbitration
19 agreement could be enforced.

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

24 JUSTICE GINSBURG: It was because -- it was
25 because Judge Pooler said: "I have been instructed by

1 the Supreme Court that I may not require class
2 arbitration." That's -- and she was bound by our
3 decision that a court can't order class arbitration;
4 isn't that correct? So that was not an option for her.

5 MR. KELLOGG: But the Court also in
6 Concepcion said you can condition the enforceability of
7 an arbitration agreement on the availability of class
8 procedures, and that is what the Court below violated.
9 So the decision below has to be vacated.

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

15 That said, we made -- we did respond to
16 their showing below. We did not put in a dueling
17 affidavit saying, no, in litigation, it only requires a
18 \$200,000 report or a \$25,000 report. We said, that's
19 irrelevant, because we're talking about
20 arbitration-specific costs. And there's lots of ways
21 that they can proceed with their claims.

22 One is by sharing the costs of an expert,
23 and they specifically rejected that. They said, even if
24 we could shift the costs of the experts to the other
25 side, that wouldn't be good enough, because then all

1 we'd be doing is expending much money to get it back.
2 We need aggregated damages of the sort available in
3 class suit --

4 JUSTICE BREYER: Or you have to do without.
5 I -- you just said what -- I thought that the expert
6 talked about litigation costs, not about arbitration
7 costs.

8 So how is that handled?

9 MR. KELLOGG: That is how I read -- that is
10 how I read the report. And certainly with an expert
11 arbitrator --

12 JUSTICE BREYER: You said you waived that
13 point, whatever -- however it is. You waived it. Never
14 raised it. The Court of Appeals took it as if it were
15 arbitration costs.

16 MR. KELLOGG: No, we raised -- we've argued
17 that all along. In fact, I can refer the Court to page
18 27 of our -- the --

19 JUSTICE GINSBURG: The Second Circuit never
20 said anything about, this is what it would cost in
21 court. The court -- the Court of Appeals said, this is
22 what it would cost to prove this kind of tying, right?
23 It didn't say one word distinguishing what it would cost
24 in litigation from what it would cost in arbitration.
25 It was simply what it was going to cost.

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

4 JUSTICE BREYER: I believe you.

5 JUSTICE SCALIA: I'd like to hear the
6 answer, if nobody --

7 (Laughter.)

8 MR. KELLOGG: We specifically said, "The
9 declaration of merchant's expert is similarly
10 un-illuminating, as he too studiously avoided projecting
11 the costs for an individual arbitration of these
12 disputes."

13 So we did argue against that point. This is
14 not an exculpatory clause. The Court has made clear
15 that a class action waiver is not an exculpatory clause.
16 This Court has also made clear that you cannot assume
17 that the arbitral forum will be inadequate to vindicate
18 Federal substantive rights.

19 And they cannot now change the nature of the
20 question presented by arguing that well, there should
21 have been another provision to allow -- specifically
22 allow cost-sharing, or specifically allow cost-shifting.

23 JUSTICE KAGAN: Well, Mr. Kellogg, it does
24 seem like both of the parties have changed what they're
25 saying a bit. And, you know, if this case as presented

1 to us was presented to us in the first instance that the
2 premise was that if you go into arbitration, it would
3 not provide an effective way to vindicate the claim.

4 And, now, people are saying different things
5 about the confidentiality clause, and people may be
6 saying different things about the necessity of an
7 expert. It suggests that the premise on which this case
8 was presented to us was not quite right.

9 MR. KELLOGG: Well, I -- I don't believe
10 that's the case. The premise on which the Court
11 accepted the case, presumably, is that the decision
12 below which conditioned the enforceability of the
13 arbitration agreement on a -- on the availability of
14 class procedures, was wrong under *Concepcion*.

15 Therefore --

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 The case is submitted.

18 (Whereupon, at 12:33 p.m., the case in the
19 above-entitled matter was submitted.)

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