No. 11-3600

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

G.R. HOMA, individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

AMERICAN EXPRESS COMPANY and AMERICAN EXPRESS CENTURION BANK,
Defendants-Appellees.

Appeal from the U.S. District Court for the District of New Jersey
No. 06-cv-02985

APPELLANT'S REPLY BRIEF

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INTRODUCTION

There is no question that the U.S. Supreme Court in *Concepcion* held that the FAA preempts state laws that would (1) "requir[e] the availability of classwide arbitration" and would (2) invalidate class action bans in arbitration clauses where the claims at issue are "most unlikely to go unresolved" in individual arbitration. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748, 1753 (2011). But if American Express ("AmEx") is to be believed, the Court went much further. According to AmEx, *Concepcion* not only decreed that any company's particular class action ban is *always* enforceable—even if enforcement means the corporation escapes liability for violations of law—but also created a new rule of federal law whereby corporations can rewrite longstanding state consumer protection laws to eliminate the substantive statutory rights of consumers.

As explained below, *Concepcion* did neither of these drastic things. To do so, the Court would have needed to overrule decades of precedent holding that arbitration clauses are only enforceable where they permit the parties to vindicate their substantive statutory rights. It did not. Instead, *Concepcion* merely held that a rule of state law that would categorically bar the enforcement of class action bans in consumer agreements was inconsistent with the FAA because it would force parties—against their will—to arbitrate disputes in a classwide arbitration.

To see how critical this distinction is, one need only look at the differences between AT&T's arbitration provision at issue in *Concepcion* and AmEx's arbitration agreement here. In *Concepcion*, AT&T's arbitration clause promised to pay all of the costs of arbitration. 131 S. Ct. 1744. In this case, AmEx's clause

requires the consumer to pay the arbitration filing fees. A186. As the record reflects, those begin at $125. The difference between a free arbitration system and one where a consumer must pay $125 up front in order to pursue claims on an individual basis that are not substantially larger than the actual filing fee is self-evidently enormous, and *Concepcion* did not eliminate a potential litigant's opportunity to make this argument to a court.

AmEx's reading of *Concepcion*, if sanctioned by this Court, would erect a categorical rule that class action bans are per se enforceable and would foreclose the possibility that a plaintiff could ever demonstrate that enforcing a company's class action ban in an arbitration agreement would have the practical effect of precluding him from effectively vindicating his statutory rights. Such a rule cannot be squared with either the FAA or the Supreme Court's teachings, and it should not be endorsed here.

ARGUMENT

I. NEITHER *CONCEPCION* NOR *LITMAN II* ERECTED A RULE MANDATING THE CATEGORICAL ENFORCEMENT OF CLASS ACTION BANS.

Reading AmEx's Brief in Opposition, its chief argument to this Court is that *Concepcion* "definitively" holds that class action bans are per se enforceable. *See, e.g.,* Opp. Br. at 10 ("As explained in *Concepcion*, class-arbitration waivers are enforceable as a matter of federal law."). Indeed, AmEx's entire theory of this case hinges on convincing this Court that *Concepcion* erected a bright-line rule of federal law that class action bans must categorically be enforced, and that any exception to that rule was either overruled by *Concepcion* or is preempted by the

FAA. *See, e.g.,* Opp. Br. at 8. But this theory is fundamentally flawed for two reasons: first, it dramatically over-reads *Concepcion* and second, it ignores critical limiting principles embedded in the FAA, as interpreted by the Supreme Court.

As the Second Circuit just recently explained, although it is "tempting" to give *Concepcion* the "facile reading" that AmEx urges here, a careful reading demonstrates that it did not address the issue presented in this case, namely whether a class-action arbitration waiver clause is enforceable even if the plaintiffs are able to demonstrate that the "practical effect of enforcement" would be to "preclude their ability to vindicate" their substantive statutory rights. *In re American Exp. Merchants Litig.*, __ F.3d __, 2012 WL 284518, at *7 (2d Cir. Feb. 1, 2012) (hereinafter "*In re AmEx III*"). Because that question, as applied to New Jersey law, remains unanswered after *Concepcion*, this Court should certify its resolution in the first instance to the New Jersey Supreme Court.

A. THE SUPREME COURT'S EARLIER PRECEDENT HAS NOT BEEN OVERRULED.

As explained in Appellant's Opening Brief, if the Supreme Court in *Concepcion* had wanted to overrule the *Mitsubishi Motors* line of cases, it could have done so explicitly. *See* Appellant's Br. at 26. But it did not, and the Court does not overrule itself by implication. In fact, a close reading of the *Mitsubishi Motors* line of cases makes clear that (1) they are completely consistent with the holding of *Concepcion*, if *Concepcion* is read in harmony with them as Appellant suggests rather than as overturning them as AmEx suggests, (2) they establish that the FAA preserves the right of plaintiffs to demonstrate, through admissible

evidence, that the existence of a particular arbitration provision—including a class action ban—would effectively preclude their ability to vindicate their substantive statutory rights, and (3) in cases in which a plaintiff successfully makes such a showing, they permit a court to invalidate the arbitration agreement. *See* Appellant's Br. at 24-28.

Under AmEx's theory, however, *Concepcion* effectively overrules these cases because it requires—as a matter of federal law—that courts must *always* enforce a class action ban, even if that would mean that consumers are unable to vindicate their substantive statutory rights. *See* Opp. Br. at 16. AmEx block quotes much of the majority's opinion, *see* Opp. Br. at 12, but its argument in support of its expansive reading of *Concepcion* appears to boil down to the statement in *Concepcion* that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." Opp. Br. at 13. According to AmEx, this statement must be read to reject the possibility that a state could ever adopt a rule that would allow a court to invalidate a class action ban even in the limited circumstance where record evidence established that the clause precluded a plaintiff from vindicating their substantive rights under a statute. In AmEx's view, even this type of rule would be preempted because it is "inconsistent with the FAA." Opp. Br. at 16.

But the "procedure" that the Supreme Court had in mind when it explained that a state cannot impose rules that are inconsistent with the FAA was California's *Discover Bank* rule. This categorical rule that would have allowed courts to mechanically invalidate a class action ban in an arbitration clause and, as Justice

Scalia explained, therefore would have *forced* AT&T to proceed—against its contractual will—in classwide arbitration. 131 S. Ct. at 1750. But this concern about a state-law rule that would impose certain procedures (classwide arbitration—a feature of California law which greatly troubled the Court) does not apply where a state law allows a company the choice of having a putative class action in court (instead of imposing classwide arbitration on a party against its consent).

It is true that, because the panel in *Litman v. Cellco P'ship*, 655 F.3d 225 (3d Cir. 2011) ("*Litman II*") viewed the New Jersey rule in *Muhammad* as similarly categorical—imposing classwide arbitration "despite a contractual agreement for individualized arbitration"—the panel likewise found that state law rule could not be squared with the FAA. *Id.* at 231. But, because that rule is no longer in effect, the question remains whether New Jersey law would apply a more narrowly-tailored rule that does not impose on parties a similarly mandatory and nonconsensual procedure like classwide arbitration.

Nevertheless, AmEx contends that these statements erect a bright-line rule of federal law that class action bans are per se enforceable because the Supreme Court was responding to (and rejecting) the concern that small dollar claims might go unresolved. Opp. Br. at 17. This contention, however, denies the statement's context in the opinion. This language must be viewed in concert with the Court's remark in the following sentence that the plaintiffs' claims were "most unlikely to go *unresolved*." *Concepcion*, 131 S. Ct. at 1753 (emphasis added). While the Court did consider the possibility that some claims would go unaddressed, there

was no suggestion—much less an evidentiary showing—that all or nearly all of the plaintiffs would be precluded from effectively vindicating their substantive rights. *Id.* Thus, the Court was not addressing the type of factual circumstance presented by this case.

AmEx also suggests that this language creates a bright-line rule because allowing a plaintiff to successfully invalidate a class action ban would "drive up costs, delay the resolution of the dispute, and undermine" the FAA. Opp. Br. at 17. But this claim proves too much. If the rule set forth in *Concepcion* is that any state law that would drive up costs and delay the resolution of the dispute is preempted, not only would that rule literally apply to any basis for invalidating any arbitration provision, thus completely vitiating Section 2's savings clause, but it would also flatly contradict the Supreme Court's repeated lesson that fact-based challenges to the enforcement of arbitration agreements requires the resolution of disputed factual claims. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273-74 (2009) (instructing that the resolution of a claim that an arbitration agreement prevents a party "from effectively vindicating" their statutory rights, "require[s] the resolution of contested factual allegations"); *Green-Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000) (explaining that a claim that an arbitration agreement precludes a litigant from effectively vindicating her statutory rights requires the presentation and resolution of record evidence).

AmEx finally points to the Supreme Court's recent decision in *Compucredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012) as supporting its position by holding that the FAA requires arbitration agreements to be enforced according to their

terms "unless the FAA's mandate has been overridden by a contrary congressional command." Opp. Br. at 21. But the question in *Compucredit* was whether a separate statute had *expressly* precluded arbitration of claims arising under it, and the plaintiffs made no argument that they could not vindicate their rights under the statute. *See* 132 S. Ct. at 672-73. The *Compucredit* plaintiffs wanted a per se rule that arbitration could never be allowed under that statute, irrespective of any evidence that arbitration could or could not vindicate the parties' rights in a given case. In this case, the issue is not whether any particular statute contains an express statement regarding the arbitrability of statutory claims, but rather whether enforcement of a class action ban would effectively deprive a plaintiff of their ability to vindicate their rights arising under a statute, which, under *Mitsubishi Motors*, can be established by demonstrating that the statute's core objectives are undermined if a plaintiff is forced to pursue the claims in arbitration. *See In re AmEx III*, 2012 WL 284518 at *10 n.6.

But what to make of the "unrelated reasons" language in the same statement in *Concepcion*? This language refers to the fact that in the *Discover Bank* decision, the California Supreme Court made clear that its decision that class action bans were per se unenforceable was rooted in the tangible procedural benefits and advantages of class actions—*i.e.*, their greater efficiency and avoidance of duplicative efforts. *E.g.*, *Discover Bank v. Superior Ct.*, 113 P.3d 1100, 1105 (2005) (explaining that a benefit of class action's is the "avoidance to the judicial process of the burden of multiple litigation involving identical claims"). But these "unrelated reasons" for desiring a rule that conflicts with the FAA has nothing to

do with the question here, which is whether the FAA allows a court to invalidate an arbitration provision where it strips a party of their substantive statutory rights.

If AmEx's reading of this language is to be believed, a state-law rule requiring that parties be able to effectively vindicate their rights is merely an "unrelated reason," and not a basis within the FAA for invalidating a term in an arbitration clause. However, where AmEx goes badly astray is in suggesting that a court's power to invalidate arbitration provisions that deny a plaintiff the ability to vindicate his statutory rights falls outside the FAA. The core principle in *Mitsubishi Motors* and its progeny—that arbitration clauses are only enforceable when they permit parties to effectively vindicate their substantive statutory rights—is more than an ancillary concern "unrelated" to the FAA; it is, instead, one of *the* animating principles of Section 2 of the FAA, which ensures that the arbitral forum is a credible and legitimate alternative dispute resolution mechanism.

FAA Section 2 is the "primary substantive provision [of the Act.]" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). It provides:

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

9 U.S.C. § 2. Section 2 does not make arbitration clauses automatically valid and enforceable. Rather, it sets out three basic requirements that an arbitration clause

must satisfy if it is to be enforced. First, there must be a written agreement. Second, the clause must relate to a transaction involving interstate commerce. And third, the clause must not be subject to invalidation on ordinary contract-law grounds.

What the *Mitsubishi Motors* line of cases makes clear is that a court's power to invalidate an arbitration provision where that provision is demonstrated to preclude a party from effectively vindicating their substantive rights is embedded within the third requirement of Section 2. This is because "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Restated in the converse, this principle establishes that, in a case in which arbitration would force a party to forego those statutory rights, the FAA permits courts to refuse to enforce the clause. And, consistent with this premise, in cases after case the Supreme Court has explained that it is Section 2 that confers this power. *See Randolph*, 531 U.S. at 90 (pointing to Section 2 as the operative provision in permitting that "claims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum,' the statute serves its functions").

Mitsubishi Motors also explains why AmEx's asserted distinction between substantive and procedural rights misses the point. *See* Opp. Br. at 24 (claiming that AmEx's "arbitration clause does not limit any substantive rights (including

any such rights under the NJCFA)"). In *Mitsubishi Motors*, the Court made clear that determining whether a plaintiff *effectively* may vindicate his statutory cause of action in arbitration turns not on whether a specific right can be categorized as either "substantive" or "procedural," but rather whether, by forcing the plaintiff into arbitration, the statute "will continue to serve both its remedial and deterrent function." 473 U.S. at 637; *see also Randolph*, 531 U.S. at 90 (explaining that the imposition of fees—an obvious limitation on a procedural right—could, if prohibitive, preclude a litigant from effectively vindicating her statutory rights). Thus, an arbitration provision that, if enforced, would frustrate or eliminate a core statutory objective would not allow a plaintiff to effectively vindicate his statutory rights, and would therefore be unenforceable, irrespective of what type of right it attempts to curtail.[1]

In *Mitsubishi Motors*, the question presented to the Court was whether a plaintiff's antitrust claims could be resolved in international arbitration. *Mitsubishi Motors*, 473 U.S. at 616. The chief argument raised against allowing international

[1] It is for this reason that AmEx's focus on cases like *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000) are unavailing. *See* Opp. Br. at 23-24 (citing several additional cases). The fact that the court in *Johnson* held that an arbitration agreement containing a class action ban was enforceable in the context of a federal TILA claim, implies nothing about whether the class action ban in *this* case, as applied to *this* plaintiff, who seeks to vindicate his claims under *this* statute is enforceable. Indeed, even in *Johnson*, this court explicitly recognized that a plaintiff *could* challenge an arbitration agreement under the *Mitsubishi Motors* reasoning, *see* 225 F.3d at 373, but that the plaintiff in that case did "not argue that the arbitral forum selected in his agreement is somehow inadequate to vindicate any of his rights under the TILA." *Id.* at 373-74. Here, that is *exactly* what the plaintiff is arguing, and AmEx's position is that this argument is totally unavailable.

arbitrators to hear and resolve American antitrust claims was that it would undermine one of the core objectives of the antitrust laws—deterrence—by eliminating the right of plaintiffs to seek treble-damages. *See id.* at 634-35 (explaining that the treble-damages provision "wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators"). If this right to treble-damages was unavailable in the arbitral forum, the plaintiff argued, then forcing plaintiffs to pursue antitrust claims in arbitration would gut the antitrust enforcement scheme and allow companies to violate the law with impunity. *Id.* at 634-36.

The Court, however, rejected this argument, holding that American antitrust claims could be arbitrated. *Id.* at 636-38. Although it agreed with the "importance of the private damages remedy," as a deterrent tool, it held that there was no evidence to "compel the conclusion that it may not be sought outside of an American court." *Id.* at 635. The Court therefore concluded that there was "no reason to assume *at the outset* . . . that international arbitration will not provide an adequate mechanism [for resolving the dispute]." *Id.* at 636 (emphasis added).

Key to the Court's conclusion, however, was its belief that arbitration would provide an adequate mechanism *because* it would ensure that the statute's objectives would be preserved. Thus, the Court explained that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, *the statute will continue to serve both its remedial and deterrent function*." *Id.* at 637 (emphasis added). In other words, the Court concluded that, because the right to treble-damages would likely be available to a private litigant

forced to arbitrate his Sherman Act claims, the core objectives of the American antitrust laws—including deterrence—would be protected. *See id.* at 634-36. If, on the other hand, the plaintiff could demonstrate that, in fact, the right to treble damages would have been unavailable in international arbitration, the Court reserved the possibility that a court could refuse to require the parties to arbitrate their dispute. *See id.* at 637 n.19 (noting that should clauses in a contract operate "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy").

This principle—that where an arbitration provision would, in effect, undermine a core statutory objective, either be eliminating a remedial right or by frustrating a deterrence function, a court may refuse to enforce it—has been endorsed by the Supreme Court in no less than six separate cases, and it is in no way incompatible with *Concepcion*. *See* Appellant's Br. at 24-25. At base, these cases "demonstrate that even claims arising under a statute designed to further important social policies may be arbitrated because so long as a prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, *the statute serves its functions*," *Randolph*, 531 U.S. at 90 (emphasis added), but where the arbitration clause *precludes* the litigant from effectively vindicating his rights and thereby undermines the statute's functions, it will not be enforced. By urging a rule that would read this core principle out of the FAA jurisprudence, AmEx seeks to turn the central promise of the FAA—that arbitration become a credible and legitimate alternative dispute resolution mechanism—on its head.

In this case, the New Jersey Consumer Fraud Act, like the Sherman Act, embodies twin objectives: "deterren[ce] and protecti[on]." *Lettenmaier v. Lube Connection, Inc.*, 162 N.J. 134, 139 (N.J. 1999). One of the key purposes of the CFA, evidenced by the statute's fee-shifting provision, is to motivate consumers and counsel to undertake cases and "serve as private attorneys general," in order to "vindicate[e] the rights of defrauded consumers," and "advance the public interest through private enforcement of statutory rights." *Pinto v. Spectrum Chemicals and Lab. Prods.*, 200 N.J. 580, 593 (N.J. 2010). In this way, "[t]he poor and the powerless benefit from the guiding hand of counsel offered through the CFA." *Gonzalez v. Wilshire Credit Corp.*, 207 N.J. 557, 585 (N.J. 2011). In addition, the remedies available against violators of the CFA, including a provision for treble damages, serve "not only to make whole the victim's loss, but also to punish the wrongdoer and to deter others from engaging in similar fraudulent practices." *Id.*

Following the path set out in *Mitsubishi Motors*, the question here is whether Mr. Homa submitted evidence sufficient to demonstrate that, if he were forced to arbitrate his claims arising under the CFA in individual arbitration, he would be unable to effectively vindicate his substantive statutory claims and, by extension, that the statute's objectives would be defeated. On this, there can be little doubt. As detailed in Appellant's Opening Brief, AmEx's class action ban has been proven by the compelling evidentiary record in *this* case to prevent even Mr. Homa himself from effectively vindicating his rights under New Jersey's consumer protection statute. Appellant's Br. at 10-15. Mr. Homa submitted substantial evidence to the court demonstrating that AmEx's class action ban would

effectively exculpate AmEx from liability for the particular small-value, yet demonstrably complex consumer claims he has alleged in this case, thereby defeating both of the core objectives of the CFA. Under this set of circumstances, because individuals like Mr. Homa are unable to pursue their claims through individual arbitration, the statute cannot serve its core functions, and arbitration cannot be said to allow for the enforcement of a prospective litigant's statutory rights. Under Section 2 of the FAA, therefore, a court is permitted to invalidate the class action ban in AmEx's arbitration clause.

AmEx resists this conclusion, arguing that, even were this court to adopt the *Mitsubishi Motors* approach endorsed by the Supreme Court, the arbitration agreement here *by its terms* cannot be said to deprive a plaintiff of his ability to effectively vindicate his rights because the "costs of the arbitration" would not be "prohibitively expensive." Opp. Br. at 32. If a court's inquiry into whether the arbitration agreement precludes a plaintiff from vindicating his rights under a statute was limited to the four corners of the arbitration agreement, this view might make sense; but a court must do more than simply read the terms of the arbitration agreement—it must engage in a fact-based inquiry to determine whether the evidence supports the claim.

This is precisely the lesson of *Randolph*, where the Supreme Court declined to rule on the claim that the existence of large arbitration costs precluded the plaintiff from effectively vindicating her rights because the record included no evidence beyond the actual arbitration agreement itself. *See* 531 U.S. at 91-92. As the Court explained, although the record contained generic information about filing

fees and costs, the record did not contain any particularized evidence to afford a sufficient basis to determine the actual costs associated with the arbitration of the plaintiff's claims. *Id.* at 91 n.6. Thus, the Court agreed that "we lack information about how claimants fare under Green Tree's arbitration clause." *Id.* at 91. The Court made clear that the appropriate approach for resolving a claim that an arbitration agreement would preclude a litigant from vindicating his rights under a statute is for a court to allow the parties to submit extrinsic evidence relating to that claim, and for a court to makes findings of fact based on this evidence when resolving the claim. *Id.* at 92; *see also Pyett*, 556 U.S. at 273 (declining to rule on claim that arbitration agreement precluded the effective vindication of statutory rights because the question "require[d] resolution of contested factual allegations," and was not resolved by any lower court).

B. CONTRARY TO AMEX'S CONTENTION, LOWER COURTS HAVE ENDORSED AN APPROACH CONSISTENT WITH THE *MITSUBISHI MOTORS* LINE OF CASES EVEN AFTER *CONCEPCION*.

AmEx's attempt to paint a post-*Concepcion* landscape in which "[t]here is absolutely no support for the contention that the FAA permits courts to disregard class waivers in arbitration agreements" Opp. Br. at 20, badly mischaracterizes the state of the law. Contrary to AmEx's contention, lower courts are increasingly recognizing that, under Section 2 of the FAA and controlling Supreme Court precedent, *Concepcion* does not require the categorical enforcement of class action bans. Instead, these courts have held that where a plaintiff actually proves he could not effectively vindicate his substantive statutory rights under the arbitration

agreement because of the existence of a class action ban, a court may refuse to enforce the ban.

To begin, although not cited anywhere in AmEx's brief to this Court, in *In re AmEx III*, the Second Circuit squarely held that *Concepcion* does not alter the conclusion that a class action ban is unenforceable where "enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs." 2012 WL 284518 at *1.

The "key issue" in the *In re AmEx* series of cases was "whether the mandatory class action waiver in [AmEx's arbitration clause] is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement of the waiver would be to preclude their bringing [antitrust] claims against AmEx." *Id.* at *6. The court initially concluded that "enforcement of the class action waiver would indeed bar plaintiffs from pursuing their statutory claims," and that, consequently, the class action ban was unenforceable. *Id.* at *6. In reaching this conclusion, the court relied on "record evidence" submitted by the plaintiffs that demonstrated that "the cost of plaintiffs' individually arbitrating their dispute with AmEx would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." *Id.* This evidence included affidavit expert testimony concerning the cost of individually pursuing the type of claims at issue in the case and an explanation of why it was "not economically rational to pursue an individual action against AmEx." *Id.* at *7. The court found that this evidence demonstrated that "the only economically feasible means for enforcing [the plaintiffs'] statutory rights is via a class action." *Id.*

In the wake of *Concepcion*, AmEx argued to the Second Circuit—as it does here—that *Concepcion* required the Second Circuit to disavow its above conclusion and hold that any class action ban must categorically be enforced. *See id.* at *7. The court flatly rejected this argument, explaining that

> It is tempting to give both *Concepcion* and *Stolt–Nielsen* such a facile reading, and find that the cases render class action arbitration waivers per se enforceable. But a careful reading of the cases demonstrates that neither one addresses the issue presented here: whether a class-action arbitration waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights.

Id. at *7. Instead, the court held that *Concepcion* did not warrant reversal of its prior conclusion that the defendant's class action ban was unenforceable, because the record showed that the practical effect of enforcement would be to preclude the plaintiffs' ability to vindicate their statutory rights. *Id.* at *12-14.

Before reaching this conclusion, the court closely analyzed *Concepcion* and found that, although the decision stands "squarely for the principle that parties cannot be forced to arbitrate disputes in a class-action arbitration unless the parties agree to class action arbitration," what it "do[es] not do is require that all class-action waivers be deemed per se enforceable." *Id.* at *8. As a result, the court recognized that *Concepcion* left open the question of "whether a mandatory class action waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to bring federal antitrust claims." *Id.*

As to that question, the court looked to the *Mitsubishi Motors* line of cases, found that *Concepcion* did not overrule this authority, and held that its framework for resolving whether a mandatory class action ban is enforceable is controlling. *See id.* at *11 ("We continue to find *Green Tree* controlling here to the extent that it holds that when a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.") (internal quotations omitted). Under this framework, the court explained, plaintiffs may challenge class action bans "on the grounds that prosecuting such claims on an individual basis would be a cost prohibitive method of enforcing a statutory right." *Id.* at *11. But, the court cautioned, in most cases these attempts will fail because the "evidentiary record necessary to avoid a class-action arbitration waiver is not easily assembled." *Id.* Nevertheless, the court made clear that these "failures speak to the quality of the evidence presented, not the viability of the legal theory." *Id.*

Similarly, *Sutherland v. Ernst & Young LLP*, 2012 WL 130420 (S.D.N.Y. Jan. 17, 2012), provides another example of a court recognizing that the *Mitsubishi Motors* line of cases controls even after *Concepcion* and holding that *Concepcion* does not require enforcement of a class action ban where the factual record demonstrates that the plaintiffs would be unable to effectively vindicate their substantive statutory rights individually.

There, "[a]fter examining the evidence submitted, th[e] Court found that the particular Agreement in this case was unenforceable because it prevents Sutherland

from vindicating her statutory rights." *Id.* at *1. After *Concepcion*, Ernst & Young moved for reconsideration. The *Sutherland* court denied the motion, emphasizing that "the facts before this Court differ significantly from the facts in *Concepcion* because Sutherland, unlike the Concepcions, is not able to vindicate her rights absent a collective action." *Id.* at 5. The court further explained:

> [U]nlike the *Discover Bank* rule, which applied to class action waivers in almost all contracts of adhesion, [the Second Circuit's law governing the enforceability of arbitration clauses] applies only to the limited set of class action waivers that, after a case-by-case analysis, are found to meet the factors . . . that preclude an individual from being able to vindicate her statutory rights.

Id.

Likewise, in *Torrence v. Nationwide Budget Finance*, 2012 WL 335947 (N.C. Super. Ct. Jan. 25, 2012), the court invalidated a payday lender's class action ban on grounds that the plaintiffs would be unable to vindicate their state statutory rights individually "even if [they] are legally justified and correct." *Id.* at ¶ 75. This conclusion was based on an extensive factual record similar to the one in this case. *Id.* at ¶¶ 57-74. The court held that *Concepcion* "does not overrule or address the effectively vindicate standard," and that North Carolina law, unlike the preempted Discover Bank rule, does not "automatic[ally] invalidat[e]" class action bans but rather "involves consideration of all facts and circumstances." *Id.* at ¶ 15.

As discussed in Appellant's Opening Brief at 30-32, 36, these cases are not outliers, but are instead examples of the proper approach that a court must follow, under the FAA, in determining whether the existence of the class action ban would

prevent a plaintiff from being able to effectively vindicate his substantive statutory rights.

The cases AmEx cites are not to the contrary. Although it is undeniable that many courts have cited *Concepcion* in dismissing challenges to class action bans, the great majority of those courts have reflexively held that *Concepcion* requires enforcement of class action bans no matter what. For example, AmEx relies heavily on *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (11th Cir. 2011). In that case, the Eleventh Circuit held that even if only an "infinitesimal" percentage of the plaintiffs would be able to pursue their substantive statutory claims, that was not relevant because a challenge to AT&T's class action ban on this basis had been expressly rejected by *Concepcion*. *Cruz*, 648 F.3d at 1214. With respect, the Eleventh Circuit is wrong –*Concepcion* involved no evidentiary showing concerning the ability of the consumers to vindicate their substantive statutory rights. Instead, the only thing considered by the Supreme Court was the language of AT&T's arbitration clause, without any record evidence as to how that clause would play out under the facts of a particular case.

But even on its own terms, the Eleventh Circuit placed great emphasis on the special features of AT&T's clause in refusing to invalidate the arbitration agreement. "[T]he *Concepcion* Court examined *this very arbitration agreement* and concluded that it did not produce such a result." *Cruz*, 648 F.3d at 1215. *See also id.* at 1211 n.11 (comparing premiums offered to consumers by the AT&T arbitration clause at issue in *Cruz* with the premiums in *Concepcion*). The significance of the unique terms of AT&T's arbitration clause, which are

categorically different than AmEx's arbitration clause's terms, is evident. Under AT&T's clause, the corporation pays all costs of arbitration. Under AmEx's clause, by contrast, the customers who wish to pursue arbitration must pay filing fees of at least $125 per person, even though the damages per person are only trivially higher.

Other than *Cruz*, few if any of the other decisions AmEx cites involved factual records, and certainly none as extensive as the one in this case. Indeed, in many of the cases, the plaintiffs simply conceded that *Concepcion* barred them from challenging the validity of the class action ban at issue. For example, this is precisely what happened in *Litman II*. *See* Appellants' Supplemental Brief Regarding Effect of *AT&T Mobility LLC v. Concepcion*, *Litman v. Cellco P'ship*, No. 08-4103 at p. 14 (3d Cir., filed June 6, 2011) ("Appellants do not dispute that the holding of *Concepcion* with respect to contract unconscionability under California law applies to [New Jersey law]."). Unlike this case, the plaintiff in *Litman* – who had never sought to prove that the class action ban there would bar individuals from effectively vindicating their rights – did not even attempt to defend the state's basic rules of contract law. AmEx's other cases are inapplicable here for the same reason. *See, e.g.*, *Aneke v. American Express Travel Related Servs. Co., Inc.*, 2012 WL 266878 (D.D.C. Jan. 31, 2012) (no evidentiary record whatsoever); *Khanna v. American Express Co.*, 2011 WL 6382603 (S.D.N.Y. Dec. 14, 2011) (same); *Adams v. AT&T Mobility LLC*, 2011 WL 4720194, *12 (W.D. Wash. Sept. 20, 2011) ("No Plaintiff has shown that their arbitration agreement

deprives them of the opportunity to vindicate their statutory claims.").[2] In contrast, here, the plaintiff submitted an unparalleled evidentiary record that the he (and other plaintiffs like him) would *not* be able to effectively vindicate their statutory rights in individual arbitration. *See* Appellant's Br. 10-15.

C. THE "VINDICATION OF RIGHTS THEORY" APPLIES EQUALLY TO CLAIMS ARISING UNDER FEDERAL OR STATE STATUTES.

The rationale of the *Mitsubishi Motors* line of cases applies with equal force to claims arising under state statutes, as cases across the country have held. *See, e.g., Kristian v. Comcast Corp.*, 446 F.3d 25, 29 (1st Cir. 2006) (explaining that a class action ban would be unenforceable where it would "prevent the vindication of statutory rights under state and federal law"). AmEx halfheartedly argues that, because the *Mitsubishi Motors* line of cases involved *federal* statutes, their reasoning does not apply to claims arising under *state* statutes. *See* Opp. Br. at 32 (contending that *Randolph* "does not apply in this case as only a state law claim is involved"). But AmEx offers no support whatsoever for this contention, and it defies both the underlying logic of the Supreme Court's reasoning in these cases and the point of FAA Section 2.

[2] AmEx contends that these cases demonstrate that its arbitration clause is "enforceable in connection with consumer claims," Opp. Br. at 30, but on this generic statement, there is no dispute. The issue here is not whether the clause is generically enforceable, but rather whether, under a very particular set of facts and based on a specific type of claim arising under a specific statute, the clause operates to deprive plaintiffs of their ability to vindicate their statutory rights, and if so, whether a court remains free to refuse to enforce it under state law.

As explained *infra*, the basis for the Supreme Court's reasoning adopted in the *Mitsubishi Motors* line of cases is that Section 2 provides a fundamental safeguard to the enforcement of arbitration agreements. This provision ensures that only legally valid arbitration agreements are enforceable, and prevents parties from enforcing their agreements outside of judicial scrutiny.

For cases arising under state statutes, Section 2 operates no differently. A state may adopt (as many have) a rule of state contract law that prevents the enforcement of arbitration agreements where it can be shown that enforcing the agreement would preclude an individual from effectively vindicating their substantive rights under the particular state statute. And, where a state chooses to do so, such a rule, unlike the *Discover Bank* rule, is not preempted because it does not impose a regime that is "inconsistent with the FAA," *Concepcion*, 131 S. Ct. at 1751, as evidenced by the Supreme Court's own application of this theory, under Section 2 of the FAA, to federal statutes.

Indeed, even a cursory scan of how courts handle similar claims arising under state statutes demonstrates that the *Mitsubishi Motors* reasoning is alive and well as applied in the state context. For example, this Court itself has applied the *Mitsubishi Motors* reasoning to claims arising under state statutory law. In *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003), the court addressed a challenge to the enforcement of an arbitration agreement for claims arising under Virgin Islands law. *Id.* at 258. In the course of resolving this challenge, the court observed that "considerations of public policy and the loss of state statutory rights," are "relevant" to a court's unconscionability analysis under Section 2 of

the FAA. *Id.* at 264. The court went on to hold that, for claims arising under state statutes, the *Randolph* approach applies, and allows a plaintiff "the opportunity to prove, as required under [*Randolph*], that resort to arbitration would deny her a forum to vindicate her statutory rights." *Id.* at 268 (quoting *Blair v. Scott Specialty Gases*, 283 F.3d 595, 607-08 (3d Cir. 2002), which also held that the *Mitsubishi Motors* approach applied to claims arising under state statutes); *see also Antkowiak v. Taxmasters*, 2011 WL 6425567 (3d Cir. 2011) (applying *Randolph* approach to claims arising under both federal and state statutes); *Shapiro v. Baker & Taylor, Inc.*, 2009 WL 1617927 (D.N.J. June 9, 2009) (applying *Gilmer/Randolph* approach to state law claims).

Courts in other states have similarly applied this approach for claims arising under state statutes. *See, e.g., Brady v. Williams Capital Group, L.P.*, 14 N.Y.3d 459, 467 (N.Y. 2010) (holding that the "appropriate" approach for resolving claims arising under state statutes is the "case-by-case, fact-specific approach employed by the federal courts," and that the "principles set forth in *Gilmer* and [*Randolph*]" should govern); *In re Olshan Foundation Repair Co., LLC*, 328 S.W. 3d 883, 893 (Tex. 2010) (applying the vindication of statutory rights theory and explaining that where an arbitration provision could be shown to "deter individuals from bringing valid claims," the arbitration clause could be found to be unconscionable because it would "prevent a litigant from effectively vindicating his or her rights in the arbitral forum"); *see also Livingston v. Metro. Pediatrics, LLC*, 227 P.3d 796 (Or. 2010); *Dixon v. Perry & Slesnick*, 914 N.E.2d 97 (Mass. App. Ct. 2009); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio App. Ct. 2004).

At bottom, the overwhelming number of courts that have adopted this approach as applied to claims arising under state statutes highlights the importance of allowing the New Jersey Supreme Court to opine, in the first instance, whether its state unconscionability law does, or does not, embody this type of narrowly-tailored rule.

CONCLUSION

For the foregoing reasons, this Court should certify to the New Jersey Supreme Court the question of whether, under New Jersey law, if a plaintiff actually proves that he could not effectively vindicate his substantive statutory rights under the arbitration agreement, the arbitration agreement is unenforceable. In the alternative, the decision of the District Court granting AmEx's motion to compel arbitration and should be reversed.

Respectfully Submitted,

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1. With respect to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), this brief contains 6,868 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: March 5, 2012

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, this Reply Brief was filed electronically through the Third Circuit's CM/ECF system and served via CM/ECF system, and ten copies were mailed to:

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