No. 12-765

In The Supreme Court of the United States

G.R. HOMA, Individually and
On Behalf of All Others Similarly Situated,

Petitioner,

v.

AMERICAN EXPRESS COMPANY and
AMERICAN EXPRESS CENTURION BANK,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Arbitration Act ("FAA") requires enforcement of an arbitration agreement even when evidence conclusively establishes that doing so will deprive a party from effectively vindicating its statutory rights.

2. Whether this Court's effective-vindication-of-rights rule applies to state statutory claims.

PARTIES TO THE PROCEEDINGS

Petitioner G.R. Homa, individually and on behalf of all others similarly situated, was a plaintiff in the District Court proceedings and an appellant in the Court of Appeals decision below.

Respondents American Express Company and American Express Centurion Bank were defendants in the District Court and appellees in the Court of Appeals.

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INTRODUCTION

This case raises an issue of recurring importance that is closely related to a case in which this Court has already granted *certiorari*: *American Express Co. v. Italian Colors Restaurant (Merchants)*, No. 12-133. In the case at hand, the Third Circuit enforced an American Express arbitration agreement prohibiting class actions despite the court's determination that it would be "***impossible***" for Petitioner to effectively vindicate his substantive rights in individual arbitration and that any remedy available to him in that forum would be "***illusory***." A similar issue is presented in *Merchants*, where the Second Circuit, faced with a similar factual record, determined that enforcing an American Express arbitration agreement banning class actions was prohibited under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, and this Court's precedent.

For nearly three decades, this Court has recognized that agreements to arbitrate are enforceable under the FAA only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). The decision below failed to apply this effective-vindication-of-rights rule even though Petitioner met his burden by "creat[ing] an extensive record" that conclusively demonstrated to the court below that individual arbitration would preclude him, or anyone, from vindicating their statutory cause of action.

The court below based its holding on this Court's decision in *Concepcion*, which it read to foreclose the application of the effective-vindication-of-rights rule to Petitioner's claims. In *Merchants*, Petitioner American Express has advanced a nearly identical argument for why this Court should enforce the arbitration agreement in that case. Because this Court's resolution of *Merchants* is likely to provide guidance to the lower court on the issue of whether an arbitration agreement can be enforced even where it conclusively is shown to prevent a plaintiff from vindicating his statutory rights, this Court should hold the petition pending its decision in *Merchants* and then dispose of the petition as appropriate in light of that decision.

This petition also presents a question that is significant in its own right and warrants this Court's review irrespective of how it resolves *Merchants*. The below decision deepened the split amongst the circuits and the state high courts on the issue of whether the effective-vindication-of-rights rule applies to both state and federal claims. This split exists despite this Court's recent application of the effective-vindication-of-rights rule to state law claims in *Preston v. Ferrer*, 552 U.S. 346 (2008). This Court should grant review to resolve this disagreement amongst the courts.

OPINIONS BELOW

The District Court's initial opinion (Pet. App. 65-86) is reported at 496 F.Supp.2d 440 (D. N.J. 2007). The Third Circuit's initial opinion (Pet. App. 42-62) is reported at 558 F.3d 225 (3d Cir. 2009). The District Court memorandum opinion and order on remand from the Third Circuit staying the proceeding pending resolution of *AT&T Mobility v. Concepcion*, ___ U.S. ___, 131 S. Ct. 1740 (2011) (Pet. App. 20-41) is not reported (but is available at 2010 WL 4116481). The District Court order reinstating that court's 2007 order compelling arbitration (Pet. App. 18-19) is not reported. The Third Circuit's second opinion issued after this Court decided *Concepcion* (Pet. App. 1-15) is not reported (but is available at 2012 WL 3594231).

JURISDICTION

The Third Circuit entered judgment on August 22, 2012. Pet. App. 17. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Arbitration Act are reproduced at Pet. App. 89-91.

STATEMENT OF THE CASE

1. Petitioner G.R. Homa was the victim of a complex bait-and-switch scam administered by Respondents American Express Company and American Express Centurion Bank (collectively, "AmEx" or "Respondents") involving financial rebates for credit card purchases. *See* Pet. App. 2. Using its vast databank of existing and potential customers, AmEx engaged in a bait-and-switch solicitation, marketing, and advertising campaign in a variety of media that used splashy advertisements to present an offer to consumers for its "Blue Cash" credit card promising cash rebates of up to 5% of purchases and balances. Pet. App. 2, 66. Based on this offer, Mr. Homa obtained AmEx's card. *See* Pet. App. 67. When accepted, however, the offer resulted in the imposition of different and less favorable terms. *See* Pet. App. 69.

The bait-and-switch scheme was as complicated as the initial offer was clear. AmEx told potential cardholders like Mr. Homa that holders of the card could "earn up to 5% cash back" on their purchases and/or monthly balances and that the rebate would be applied at a flat rate based on the cardholder's annual spending. *See* Appellant's Opening Br. at 5-6, A43-44, *Homa v. Am. Express Co.*, No. 11-3600, 2012 WL 3594231 (3d Cir. Aug. 22, 2012), *available at* 2011 WL 6935544 ("Opening Br.").[1] This was not so.

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[1] All references to the appendix of Appellant's Opening Brief in the below proceeding will be designated as "A___".

The cash back program was not applied at a flat rate, but was based on a complex variable percentage system that was all but indecipherable to even the most discerning consumer. Opening Br. 6; Pet. App. 66. Moreover, the rebate was not calculated based on annual spending, but was instead calculated using a complex "tiered" system. Opening Br. 8, A99; Pet. App. 66. And the offer to receive "up to 5% cash back" was misleading, as there was no way Mr. Homa or other cardholders could ever receive a 5% total rebate. Opening Br. A6; Pet. App. 46.

2. After several failed attempts to understand the rebate program with, and obtain a corrected rebate from Respondents' own employees or representatives, Mr. Homa hired a lawyer and filed a putative class action lawsuit against Respondents in the United States District Court for the District of New Jersey. Pet. App. 65; Opening Br. 6-10. That lawsuit alleged that the bait-and-switch scheme violated the New Jersey Consumer Fraud Act and sought relief on behalf of a putative class of New Jersey residents. Pet. App. 2-3, 65. Respondents filed a motion to compel individual arbitration on the ground that its arbitration agreement banned class actions and required individual arbitration of all claims. Pet. App. 3. The District Court granted AmEx's motion to compel arbitration and dismissed Mr. Homa's case with prejudice. Pet. App. 87-88.

On appeal, the Third Circuit reversed the District Court decision, rejecting AmEx's argument that the FAA categorically required the enforcement of its

class action ban. Pet. App. 3-4, 59. The Third Circuit remanded the case to the District Court for fact-finding over whether the arbitration clause actually deprived Mr. Homa of the ability to effectively vindicate his statutory rights. Pet. App. 4, 59.

The Third Circuit instructed the District Court, on remand, to determine whether the claims at issue were such "as effectively to preclude relief if decided individually . . . ." Pet. App. 58. In an effort to provide guidance, the Third Circuit explained that a determination of the enforceability of an arbitration provision involves a multi-factored, fact-intensive, analysis. As observed by Judge Weis in his concurrence, relevant factors include (1) "the consumer's ability to obtain representation," (2) "counsel's incentive to undertake the litigation," (3) "the lawsuit's complexity," (4) "the amount of damages involved," and (5) "the availability of attorney's fees and statutory multipliers." Pet. App. 60. The Court of Appeals encouraged the District Court to "explore" all of these factors before deciding whether AmEx's class action ban is unenforceable. Pet. App. 60.

On remand, the District Court issued an order staying the proceeding pending this Court's resolution in *Concepcion*. *See* Pet. App. 20-41. Meanwhile, the Third Circuit's mandate still controlled, even after this Court decided *Concepcion*. Accordingly, Mr. Homa submitted substantial evidence to the District Court showing that, on the facts of this particular case, the relevant factors weighed strongly in favor of finding that AmEx's class action ban effectively precluded

relief if the claims were required to be decided individually, and therefore required that the clause be invalidated. Pet. App. 4-5.

Mr. Homa himself submitted a declaration supporting a number of the effective-vindication-of-rights elements. He attested that (1) because the amount of his damages was relatively small in relation to the costs of arbitration, (2) because AmEx refused to provide him with the information or documentation he requested which was necessary to establish his losses and the extent to which he had been cheated, and (3) because the cost of an individual legal action in relation to the amount of money at stake was prohibitive, the only way he could vindicate his rights or pursue his claim against AmEx was through the class action device. Opening Br. A176-77.

Mr. Homa also submitted expert testimony establishing that the claims in this case were too small, individually, and too complex, for attorneys to handle on an individual basis. Opening Br. 12, A133-34, A140-41. The expert testimony also explained that, because the claims for each cardholder are relatively small (less than $1,000, and in Mr. Homa's case approximately $350), but the claims against AmEx involve complicated legal theories arising under statutory law, few (if any) cardholders would have the desire or ability to expend the time and effort necessary to litigate or arbitrate their claims against Respondents on an individual basis. *Id.*

The evidence also established that incredibly few consumers would realize that they have claims raised

in this case, and thus the possibility of vindicating their rights, without a class action to inform them of their rights and the violation. Indeed, in order for Mr. Homa to determine that he was not receiving the promised 5% rebate, he had to perform hundreds of calculations of his individual transactions spanning years of purchase history and engage in protracted communications with Respondents' employees. Opening Br. 13, A110-22, A176. And Mr. Homa's expert testimony established that the nature of AmEx's alleged fraud, premised on a bait-and-switch scheme, means that "the unlawful conduct alleged by plaintiffs is hidden and unlikely to be discovered." Opening Br. 13, A141-42.

Mr. Homa also provided extensive evidence in the form of both his individual and expert testimony establishing that he would be unable to bring the claims in this case without legal representation and that finding an attorney to represent him on an individual basis would be highly difficult. Opening Br. 11, 14-15, A146, A177.

Finally, evidence also demonstrated that, as a practical matter, AmEx's arbitration clause was stifling claims by cardholders: while American Express has millions of cardholders, from April 1, 2006 to March 31, 2011, only fourteen arbitrations were filed with the American Arbitration Association by American Express consumers with claims against American Express (as opposed to debt collection claims filed by it against its customers) in the entire United States, and only nine were filed with JAMS in California. Opening Br. A155.

The factual record made clear that, as long as AmEx's arbitration clause continued to prohibit class action in court or in arbitration, it would operate to effectively preclude individual consumers like Mr. Homa from vindicating their substantive statutory rights under New Jersey consumer protection laws.

In contrast, AmEx offered no evidence that any of the factors weighed in its favor and, instead, chose merely to rely on *Concepcion* for the proposition that a company's class action ban must always be enforced no matter what factual showing a party makes.

Following this Court's decision in *Concepcion*, AmEx moved the District Court for an order reinstating the original order compelling arbitration. Pet. App. 7. Mr. Homa opposed the motion, arguing that, because the record evidence established as a factual matter that the arbitration agreement was unenforceable, even a post-*Concepcion* court still had the authority to refuse enforcement of the agreement under the FAA. Pet. App. 7. Without discussion of the record placed before it by Mr. Homa, however, the District Court granted the motion and reinstated its original order compelling arbitration. Pet. App. 18-19. Mr. Homa once again appealed the District Court decision to the Third Circuit. *See* Pet. App. 8.

This time, the Third Circuit upheld the District Court's decision to compel individual arbitration of Mr. Homa's claim, even though it determined that doing so would make it "***impossible***" for Mr. Homa to effectively vindicate his substantive statutory rights because any remedy he could obtain in individual

arbitration would be purely "***illusory***." Pet. App. 4, 11 (emphasis added).

In reaching this conclusion, the Court of Appeals explained that the "extensive record" in the case "demonstrate[d]" that: (1) "the significant costs of arbitrating Homa's claim" combined with (2) "the complexity of the issues pertaining to the merits," and (3) the "likelihood that there would be a limited recovery even if his arbitration was successful," made it both "unlikely that an attorney would take his case" and "very difficult for him to prosecute the case without the aid of an attorney whether in a judicial proceeding or arbitration." Pet. App. 4-5. The court based these conclusions on extensive evidence that demonstrated that, among other things, Mr. Homa's arbitration filing fees alone may have exceeded the value of his individual claims, lawyers would not accept Mr. Homa's case on an individual basis, and that the practical effect of the AmEx arbitration clause was to all but eliminate consumer claims against the company whatsoever. *See* Opening Br. A133-34, A140-41, A155, A176-77.

Despite this "particularized factual showing" supporting Mr. Homa's claims, the court below concluded that this Court's decision in *Concepcion* required that the arbitration agreement be enforced, even if it meant that Mr. Homa himself could not "effectively prosecute his claims in an individual arbitration." Pet. App. 11. The court explained that under *Concepcion*, "that procedure is his only remedy, illusory or not." Pet. App. 11 (commenting that, "[t]hough

some persons might regard our result as unfair, 9 U.S.C. § 2 requires that we reach it"). This petition followed.

REASONS FOR GRANTING THE WRIT

I. This Case Raises Many of the Same Important Issues as *Merchants* Regarding Whether, Under the FAA, an Arbitration Agreement Can Deprive a Party of Effectively Vindicating Its Statutory Rights.

This Court should grant review of this case because it overlaps substantially with *Merchants*, No. 12-133,[2] in which this Court has granted *certiorari*. These cases both involve the same core issue: does the FAA require a court to enforce an arbitration agreement that renders a party's only remedy illusory? In each case, the court of appeals acknowledged that the evidence conclusively established that the actual named plaintiff or plaintiffs had no realistic or

[2] *Merchants* was extensively litigated in the Second Circuit. This brief will refer to the various Second Circuit decisions as follows: *Merchants I* will refer to the first Second Circuit opinion, published at 554 F.3d 300 (2d Cir. 2009); *Merchants II* will refer to the Second Circuit opinion on remand for reconsideration in light of this Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, ___ U.S. ___, 130 S. Ct. 1758 (2010), published at 634 F.3d 187 (2d Cir. 2011); and *Merchants III* will refer to the Second Circuit's reconsideration of the decision on its own initiative in light of this Court's decision in *Concepcion*, published at 667 F.3d 204 (2d Cir. 2012).

meaningful remedy if an American Express arbitration agreement precluding class actions was enforced. Faced with this record, one case – *Merchants* – holds that the FAA and this Court's own precedent permit a court to refuse enforcement of an arbitration agreement. *Merchants III*, 667 F.3d at 212, 219 (refusing to give *Concepcion* "such a facile reading" to "render class action arbitration waivers per se enforceable" and instead "find[ing] the arbitration provision unenforceable" because it "precludes plaintiffs from enforcing their statutory rights"). In the other – the decision below – the Court of Appeals held that a court must nevertheless still enforce the arbitration agreement. Pet. App. 11 ("Even if Homa cannot effectively prosecute his claim in an individual arbitration that procedure is his only remedy, illusory or not."). How this Court answers this question in *Merchants* will directly affect the Court of Appeals' decision here. The Court should hold the petition pending its decision in *Merchants* and then dispose of the petition as appropriate in light of that decision.

This case, like *Merchants*, involved a substantial evidentiary record conclusively establishing that enforcement of an American Express arbitration agreement would preclude plaintiffs from effectively vindicating their substantive statutory rights. Both circuit courts found that evidence offered by the plaintiffs conclusively established that each of the American Express class action bans prohibited the plaintiffs from effectively vindicating their statutory rights. In the case below, the Third Circuit accepted Petitioner

Homa's contention that "the uncontradicted evidentiary record in this case establishe[d] that enforcing [American Express's] arbitration clause would make it ***impossible*** for any person . . . to effectively vindicate his substantive statutory rights." Pet. App. 4 (emphasis added). The court further explained that any remedy Homa could obtain in individual arbitration was merely "***illusory***." Pet. App. 11 (emphasis added). Likewise, in *Merchants III*, the Second Circuit found that "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action." 667 F.3d at 218. In each case, the circuit courts concluded that the plaintiffs had met their burden of showing that enforcement of the American Express class action bans would effectively preclude them from vindicating their statutory rights. Pet. App. 4-5; *Merchants III*, 667 F.3d at 219.

Both the court below and the Second Circuit based their conclusion that the plaintiffs would be *unable to effectively vindicate their substantive statutory* right in individual arbitration on evidence specifically showing that the costs of litigating each case on an individual basis would dwarf the recovery of any plaintiff. *See* Pet. App. 4-5; *Merchants III*, 667 F.3d at 217-18. In this case, Mr. Homa provided evidence that the arbitration filing fees alone may well have exceeded the value of his individual claims, which were approximately $354. Opening Br. A17. Further, the particular type of action in this case was shown to "require a substantial investment in attorney time and resources." Opening Br. A133.

Merchants involved a similarly compelling evidentiary record establishing a disparity between the costs of litigation and potential individual claims. In that case, there was uncontroverted evidence that conducting an economic study necessary to support the plaintiffs' claims would, at a minimum, cost "several hundred thousand dollars" and could "easily exceed $1 million," *Merchants III*, 667 F.3d at 212, and the highest recovery that any claimant could receive would average $5,252 and could not exceed $38,549, Respondent's Brief in Opposition at *5, *Merchants*, No. 12-133 (U.S. Oct. 12, 2012), 2012 WL 4960369. In addition to the factual similarities, both cases followed virtually identical procedural chronologies, culminating in the circuit court's application of this Court's holding in *Concepcion*. Both the case below and *Merchants* were initially heard by the Third and Second Circuits, respectively, prior to this Court's ruling in *Concepcion*. *See* Pet. App. 42-62; *Merchants I*, 554 F.3d 300 (2d Cir. 2009). Both circuit courts initially refused to enforce American Express's arbitration clause on the grounds that those bans prevented the plaintiffs from effectively vindicating their statutory rights. *See* Pet. App. 58-59; *Merchants I*, 554 F.3d 300 (2d Cir. 2009). And both the case below and *Merchants* were brought before the circuit courts once again to determine whether the holding remained proper in light of *Concepcion*. Pet. App. 7-8, 14; *Merchants III*, 667 F.3d at 206.

Both cases present this Court with the same overarching federal question: whether, under the

FAA, an arbitration agreement can be enforced even if it precludes a party from effectively vindicating its substantive statutory rights.[3] In petitioning this Court for review in *Merchants*, American Express did not challenge the Second Circuit's findings that class action bans would prevent the plaintiffs from effectively vindicating their statutory rights. *See generally* Petition for Writ of Certiorari, *Merchants*, No. 12-133 (U.S. July 30, 2012), 2012 WL 3091064. Instead, American Express argued that this Court should adopt the same holding as the court below: that it does not matter if a party is unable to effectively vindicate its statutory rights because *Concepcion* stands for the proposition that a class action ban in an arbitration agreement must always be enforced no matter what factual showing a plaintiff makes. *Id.* Stated another way, both cases involve the specific federal question of whether a class action ban in a mandatory arbitration agreement is enforceable even if the plaintiffs are able to demonstrate that the

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[3] The Third Circuit believed that a key distinction between this case and *Merchants* is that this case involves vindication of a state statutory right under a state statute, whereas *Merchants* involves the vindication of a federal statutory right. Pet. App. 10-11 n.2. However, this distinction is not significant under this Court's precedent. As discussed in sections II and III, *infra*, both this Court and a number of lower courts have applied an effective-vindication-of-rights analysis to both federal and state laws and *Concepcion* does not affect this long line of precedent. Therefore, any ruling by this Court in *Merchants* concerning the survival of the effective-vindication-of-rights rule post-*Concepcion* should apply equally to this case.

practical effect of the waiver would be to preclude their bringing statutory claims against American Express in either an individual or collective capacity.

Review is clearly warranted in this case because all of the concerns raised in *Merchants* apply with equal force here. Because this Court granted review in *Merchants* to determine whether a class action waiver in an arbitration clause is enforceable even if uncontroverted evidence demonstrates that the clause would effectively preclude plaintiffs from vindicating their statutory rights, it would be wrong to deny review of a case presenting the identical question of law while *Merchants* is still pending. Instead, the Court should hold this case pending the outcome of *Merchants*, thereby preserving the possibility of granting the petition to remand the case to the lower court for consideration in the wake of *Merchants* or, to the extent appropriate, scheduling the case for briefing on the merits.

II. Review is Warranted Because the Decision Below is Contrary to Prior Rulings of this Court Which Were Not Affected by *Concepcion*.

Review is also warranted because the Third Circuit's holding is contradictory to the longstanding rule established by this Court that agreements to arbitrate are enforceable under the FAA only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum."

Mitsubishi Motors, 473 U.S. at 637. This rule takes its meaning from the principle that arbitration is merely a choice of forum, not a waiver of claims. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002) (explaining that statutory claims "may be the subject of arbitration agreements that are enforceable pursuant to the FAA because the agreement only determines the choice of forum"). *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 482-83 (1989) (arbitration agreements "are in effect, a specialized kind of forum-selection clause") (internal quotations and citation omitted). And this Court's ruling in *Concepcion* – a case where the plaintiffs' claims were "most unlikely to go unresolved" in individual arbitration – did not change this long-standing rule. By holding that even an arbitration agreement that is conclusively shown to strip a party of substantive statutory rights must nevertheless be enforced, the court below ran afoul of this basic safeguard embedded in the FAA and adopted by this Court.

A. This Court Has Consistently Precluded Enforcement of Arbitration Clauses Where Doing So Would Prevent a Party From Effectively Vindicating Its Substantive Statutory Rights.

In *Mitsubishi Motors*, the seminal case on this point, this Court considered whether enforcement of an arbitration clause could eliminate the plaintiff's substantive right to pursue treble damages under

federal antitrust law. 473 U.S. at 616. Although this Court upheld the clause, it did so only because it found "no reason to assume" that the remedy of treble damages – which this Court explained was an important means of deterrence – would be unavailable in arbitration. *Id.* at 635-36. And this Court emphasized that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.* at 628. This Court made clear, however, that if the arbitration clause had acted as a "prospective waiver" of the party's statutory right to obtain treble damages, "it would have little hesitation in condemning the agreement as against public policy." *Id.* at 637 n.19.

This Court has continually endorsed this key principle of *Mitsubishi Motors*, holding repeatedly that where an arbitration provision would eliminate a substantive statutory right, a court must not enforce it. In its most recent statement on the FAA, this Court reaffirmed that arbitration clauses can be enforced only so long as any right that is statutorily "guarantee[d] . . . is preserved." *CompuCredit v. Greenwood*, ___ U.S. ___, 132 S. Ct. 665, 671 (2012); *see also Preston v. Ferrer*, 552 U.S. 346, 352 (2008) (enforcing an agreement to arbitrate based on a finding that, by agreeing to arbitrate, the parties would "relinquish[ ] no substantive rights"); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (in arbitration, "a party does not forgo the substantive

rights" afforded by statute); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (if an arbitration provision required a "'prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy'") (quoting *Mitsubishi Motors*, 473 U.S. at 637, n.19); *cf. 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273-74 (2009) (arbitration clause not enforceable if it "prevent[ed] respondents from effectively vindicating their federal statutory rights") (quotations and citation omitted); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (parties to arbitration do not "forgo the substantive rights afforded by the statute") (quoting *Mitsubishi Motors*, 473 U.S. at 678); *Waffle House*, 534 U.S. at 295 n.10 (same).

B. The Effective-Vindication-of-Rights Rule Applies Equally to State and Federal Substantive Statutory Claims.

This Court's effective-vindication-of-rights rule is not limited to claims arising under federal law, but rather requires that litigants be able to vindicate substantive statutory rights under state law as well. Thus, in *Preston v. Ferrer*, this Court applied its effective-vindication-of-rights rule to claims arising under a California state statute. 552 U.S. 346 (2008). In that case, Preston, a lawyer, sought to arbitrate against his client, Ferrer, seeking fees allegedly due under a contract for his services. *Id.* at 350-52. Ferrer argued that a California statute called the Talent

Agencies Act ("TAA") precluded an arbitrator from hearing the breach of contract claim because the TAA granted exclusive jurisdiction to a labor commissioner. *Id.* at 352.

This Court rejected Ferrer's argument, but only because it found that the case involved "precisely and only a question concerning the forum in which the parties' dispute will be heard," and that having the parties' dispute heard in an arbitral forum did not cause Ferrer to "relinquish[ ] [any] substantive right the TAA or other California law may accord him." *Id.* at 359 (emphasis added). In so ruling, this Court specifically noted *Mitsubishi Motors*' admonition that parties cannot be forced to forgo substantive rights by agreeing to arbitrate. *Id.* This Court emphasized that the "FAA [does not] preempt[ ] the TAA wholesale" because "[t]he FAA plainly has no such destructive aim or effect." *Id.* at 352.

The Third Circuit flatly rejected *Preston*'s teaching that the effective-vindication-of-rights rule applies to state law claims, but gave no reason why. Indeed, it failed to cite any authority supporting its view, and did not even mention *Preston*. That out-of-hand dismissal was error. The FAA safeguards the right of parties to demonstrate that the existence of a particular arbitration provision – including a class action ban – would effectively preclude them from vindicating their substantive rights, regardless of whether their rights stem from federal or state law. By adopting a holding that reads this core principle out of the FAA jurisprudence, the court below turned

the central promise of the FAA – that arbitration is a credible and legitimate alternative dispute resolution mechanism – on its head.

C. *Concepcion* is Consistent with the Effective-Vindication-of-Rights Rule.

Nothing in *Concepcion* disrupts this Court's long line of precedent applying an effective-vindication-of-rights rule to substantive state and federal statutory claims. In fact, this Court relied on *Mitsubishi Motors*, *Pyett*, and *Gilmer* in rendering its decision in *Concepcion*. *Concepcion*, 131 S. Ct. at 1748, 1749, n. 5. And in the subsequently decided *CompuCredit*, this Court reaffirmed that an arbitration clause is enforceable only "so long as" parties could preserve their rights under the statute at issue. 132 S. Ct. at 671.

Further, this Court emphasized in *Concepcion* that the substantive claims at issue were "most unlikely to go unresolved" in individual arbitration. 131 S. Ct. at 1753. This observation is inapplicable to the case at hand where the Third Circuit concluded that the plaintiffs' substantive statutory claims would be "impossible" to resolve in individual arbitration. *See* Pet. App. 4.

This Court should grant review because the court below erred in holding that *Concepcion* precludes arbitration notwithstanding this Court's rule that an arbitration agreement cannot be enforced when it

prevents a party from vindicating its substantive statutory rights.

III. There is a Split of Authority on the Question of Whether the Effective-Vindication-of-Rights Rule Applies to State Law Claims.

Review of the below decision is also warranted to resolve the split amongst the circuits and state high courts on the issue of whether this Court's effective-vindication-of-rights rule applies to state law claims. The court below refused to follow the Second Circuit's holding in *Merchants*, summarily observing that *Merchants* "was in a context different from that before this Court, as it was concerned with the assertion of substantive federal statutory rights under the Sherman and Clayton Acts whereas here we are dealing with a substantive claim under the New Jersey Consumer Fraud Act." Pet. App. 10-11 n.2. Citing no authority to support this proposition, the court sharply departed from those other circuits and state high courts that have held that the effective-vindication-of-rights rule applies to both state and federal law claims and, in so doing, deepened a pre-existing split amongst the courts on this question.

The below decision cannot be reconciled with other circuit court decisions that have applied the effective-vindication-of-rights rule to substantive state statutory claims. The First Circuit applied this Court's effective-vindication-of-rights rule in a case where the plaintiffs alleged violations of both state and federal

antitrust laws by their cable provider. *Kristian v. Comcast Corp.*, 446 F.3d 25, 63 (1st Cir. 2006) ("[W]e have chosen to apply a vindication of statutory rights analysis . . . to the question of whether Plaintiffs' federal and state antitrust claims are arbitrable under the [arbitration agreement]."). And the D.C. Circuit applied the same rule in a case involving claims under the District of Columbia Human Rights Act. *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2006).

State high courts have also applied an effective-vindication-of-rights analysis to state law claims. *See Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 989-99 (Cal. 2003) (rejecting the argument that, under the FAA, an effective-vindication-of-rights analysis applies only to federal claims); *see also Brewer v. Mo. Title Loans*, 364 S.W.3d 486 (Mo. 2012) (post-*Concepcion* opinion finding arbitration agreement unenforceable where record established that it would not be viable for plaintiffs to arbitrate state merchandising practices act claims on an individual basis); *Falco v. Arakelian Enters., Inc.*, No. B232583, 2012 WL 5898063 (Cal. App. Dec. 4, 2012) (post-*Concepcion* opinion discussing the circuit split on this issue and applying the effective-vindication-of-rights rule to state law claims).

On the other side, several circuit courts have held that the effective-vindication-of-rights rule is limited to federal statutory rights. In *Coneff v. AT&T Corp.*, for example, the Ninth Circuit refused to apply the effective-vindication-of-rights rule to claims brought by plaintiffs under a number of Washington State

statutes. 673 F.3d 1155, 1158 n.2 (9th Cir. 2012) (limiting effective-vindication-of-rights rule to federal statutory claims, but acknowledging the disagreement amongst courts on this issue).[4] Similarly, in *Stutler v. T.K. Constructors Inc.*, the Sixth Circuit refused to apply the effective-vindication-of-rights rule to breach of contracts and common-law tort claims that arose under state law. 448 F.3d 343, 346 (6th Cir. 2006).

By refusing to apply the effective-vindication-of-rights rule because the plaintiffs' claims arose under state, rather than federal, law the court below departed from the holding of two of its sister circuits and two state high courts and, in so doing, deepened the preexisting split amongst the courts. Indeed, because the plaintiffs in this case conclusively showed that they would be unable to effectively vindicate their substantive rights in individual arbitration, the arbitration clause in this case would not have been enforced by the First or D.C. Circuit or by state courts in Missouri or California. This acknowledged

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[4] Notably, the principle case upon which the Ninth Circuit relied for the proposition that the effective-vindication-of-rights rule is limited to federal claims, *Kilgore v. KeyBank, National Association*, 673 F.3d 947 (9th Cir. 2012), was recently reheard *en banc*, and the panel decision is no longer binding precedent. *Kilgore v. KeyBank, Nat'l Ass'n*, Nos. 09-16703, 10-15934, 2012 WL 4327662 (Sept. 21, 2012). Also notable is that the Ninth Circuit made no mention of this Court's decision of *Preston v. Ferrer*, 552 U.S. 346 (2008), which applied the effective-vindication-of-rights rule to state law claims. *See* part II.B., *supra*.

disagreement among the circuits and state high courts further supports this Court's review.

CONCLUSION

For the foregoing reasons, this petition for a writ of *certiorari* should be held pending the Court's decision in *Merchants*, after which the Court should grant the petition, vacate the judgment below, and remand for consideration in light of *Merchants*. In the alternative, the Court should grant the petition and schedule the case for briefing and hearing on the merits.

Respectfully submitted,

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