No. 08-1473

IN THE

Supreme Court of the United States

AMERICAN EXPRESS COMPANY, *et al.*,
Petitioners,

v.

ITALIAN COLORS RESTAURANT, on behalf of itself and all similarly situated persons, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR VERIZON COMMUNICATIONS INC. AND NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

JOHN THORNE
GAIL F. LEVINE
VERIZON COMMUNICATIONS INC.
1320 North Courthouse Road
Arlington, VA 22201
(703) 351-3900

QUENTIN RIEGEL
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Suite 600
Washington, D.C. 20004
(202) 637-3058

H. BARTOW FARR, III
Counsel of Record
RICHARD G. TARANTO
FARR & TARANTO
1150 18th Street, N.W.
Suite 1030
Washington, D.C. 20036
(202) 775-0184

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INTEREST OF *AMICI CURIAE* [1]

Amicus Verizon Communications Inc. is a national telecommunications company that offers a range of

[1] All parties received timely notice of, and have consented to, the filing of this brief. The parties' blanket letters of consent are on file with the Clerk.

No counsel for a party has written this brief in whole or in part, and no person or entity other than amici curiae or their counsel has made a monetary contribution to the preparation or submission of this brief.

consumer and business services such as telephone, internet and video programming. Amicus National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and all 50 states. As part of their business dealings, Verizon and various members of the NAM have entered into contractual agreements in which the parties agree to arbitrate any disputes arising between them and further agree that the arbitration will proceed on an individual, rather than a class, basis. In addition, Verizon and members of the NAM have been defendants in large-scale class actions, including actions asserting claims under the federal antitrust laws. *See, e.g., Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (nationwide class of local telephone and internet customers). Thus, Verizon and the NAM have a direct interest in whether the antitrust laws mandate that certain agreed-upon class action waivers be deemed unenforceable.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners have demonstrated that the decision below is contrary to the language and purposes of the Federal Arbitration Act and thus merits further review. *See* American Express Petition 11-33. In addition, however, this case presents important related questions about whether, and to what extent, the federal antitrust laws preclude contractual class action waivers. The Second Circuit refused to enforce a class action waiver agreed to by American Express and certain merchants "because to do so would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery." Pet. App. 39a. But

the Second Circuit's analysis is flawed on several grounds: *first*, it gives too little weight to the presumption that parties to an agreement may freely waive procedural rights, even those granted by a federal statute or rule; and, *second*, in finding a waiver of class actions to be incompatible with the antitrust laws, it failed to look in detail at the relationship between class actions and antitrust standards, including the substantial threat that class actions can pose to antitrust goals and the availability of other remedial mechanisms. Review by this Court is warranted to consider those issues as well.

I. The well-established general rule is that parties to an agreement are free to waive their constitutional and statutory rights. *See, e.g., New York v. Hill*, 528 U.S. 110, 114 (2000). This Court has repeatedly enforced voluntary waivers—despite later attempts to disavow them—both in criminal cases, *see, e.g., Peretz v. United* States, 501 U.S. 923, 936 (1991) (citing cases), and in civil cases. *See, e.g., Evans v. Jeff D.*, 475 U.S. 717 (1986). Indeed, arbitration agreements, like the one in this case, could not be formed in the first place if the parties were disabled from waiving procedural rights like the right to trial by jury or the right to proceed in a judicial forum. Thus, "absent some affirmative indication of Congress' intent to preclude waiver, [the Court has] presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." *See United States v. Mezzanatto*, 513 U.S. 196, 201 (1995).

As the above quotation indicates, the presumption is not irrebutable: a waiver may be held invalid if "it is inconsistent with the provision creating the right sought to be secured." *Hill*, 528 U.S. at 116. But inconsistency is not to be lightly found. Before a

court nullifies a contractual promise as incompatible with a particular policy, "the interest in its enforcement [must be] outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987), citing *Restatement (Second) of Contracts* § 178. Furthermore, the "public policy . . . must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *W. R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 766 (1983) (internal quotation marks omitted).

II. The Second Circuit should have enforced the agreed-upon class action waiver in this case. Although the court found that the waiver agreement was in conflict with the policies—though not any specific text—of the federal antitrust laws, it made no attempt to assess all of the relevant statutory interests. To the contrary, it steadfastly looked at just one side of the equation, finding only that class actions could serve a beneficial purpose by allowing private prosecution of otherwise non-viable antitrust claims. It thus ended its analysis of antitrust policy without weighing, or even considering, the potential negative effects of class actions on antitrust objectives.

That omission is a critical one, because the negative effects can be significant. As this Court has observed, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 772 (2008). That risk of extorted settlements is

exponentially magnified in situations, like the one here, where the plaintiffs, rather than proceeding individually, are assembled into a class numbering thousands (or sometimes even millions) of members. The effect of such aggregation—indeed, in many cases, its purpose—is to inflate the possible damage award into a potentially ruinous figure. Faced with such stakes, businesses may ultimately choose to acquiesce in a forced settlement "at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merits of the claims." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002).

This magnification of litigation risk is a serious concern in any case. But businesses are especially vulnerable to the coercive effects of class actions in circumstances where the grounds for liability are difficult to predict in advance. Tying law—the basis of respondents' claim here—presents a ready example. The practice of combining products into a single sale is an extremely common one, even in fully competitive industries, yet the standards for determining which combinations are lawful remain uncertain. As matters now stand, tying arrangements may be judged under a per se rule, a quasi per se rule, or a rule of reason. *See, e.g., Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). Moreover, the relevant analysis requires difficult inquiries into whether the business has tied together separate products and whether it possesses market power in the tying product market. Businesses thus must make educated guesses about when tying will be permitted, with class actions greatly increasing the penalty for guessing incorrectly.

Antitrust goals are plainly impeded, not fostered, if businesses choose to avoid desirable product combinations out of fears about potentially calamitous judgments. Numerous commentators have pointed out that tying can offer considerable benefits to consumers. *See, e.g.*, Evans & Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. Chi. L. Rev. 73 (2005). For example, offering two products only in combination can provide customer convenience and can lower marginal costs of production, packaging costs, delivery and other transaction costs, and costs of dealing with product complexity. *See id.* at 90-91. Other benefits can include efficient quality control and economies of scale easing entry into a tied product market. *See* 10 P. Areeda, H. Hovenkamp & E. Elhauge, *Antitrust Law* ¶¶ 1761-1764e, at 357-98 (2d ed. 2004). Yet, those benefits are necessarily diminished whenever businesses alter their decision-making in an attempt to minimize exposure to large unpredictable judgments.

The Second Circuit rested its decision primarily on a concern that, if class action waivers are honored, some low-recovery, high-cost private antitrust claims will not be brought at all. But the antitrust laws do not embody a determination that private suits should proceed regardless of the potential benefits and costs. Indeed, unlike many federal statutes, the antitrust laws make no provision for reimbursement of expert costs, an omission that necessarily reflects congressional acceptance that the pursuit of some claims will be financially impractical. Furthermore, an individual's decision to forgo an antitrust lawsuit because of its possible expense does not mean that the conduct at issue acquires immunity from regulation. Federal and state officials are free to seek civil and criminal

remedies if they regard the behavior as unlawful, and the antitrust laws specifically authorize state Attorneys General to bring *parens patriae* suits for treble damages. *See* 15 U.S.C. § 15e. There is thus no sound basis for concluding, as the Second Circuit did, that the antitrust laws embody so dominant a policy favoring class actions that competing interests in enforcing private agreements must give way.

III. The Second Circuit also should have paid more heed to the important role that class action waivers play in assuring the viability of arbitration as an alternative forum for resolution of small disputes. As the court of appeals correctly observed, federal law generally requires that arbitration agreements be enforced. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985). Yet, without the parties' ability to agree on class action waivers, at least two impediments to traditional arbitration will arise. First, if the parties nonetheless proceed to arbitration on a class basis, arbitration proceedings will inevitably become more costly and complex, thereby losing much of their essential character as relatively simple mechanisms for disposing of claims. Second, the absence of class action waivers will often prompt businesses to abandon arbitration entirely, given the possibility of enormous financial exposure and the more limited judicial review afforded to arbitration awards. Whichever course is followed, the "national policy favoring arbitration" will be frustrated. *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

ARGUMENT

I. CONTRACTUAL WAIVERS OF PROCEDURAL RIGHTS ARE PRESUMPTIVELY VALID.

More than a century ago, this Court set forth the basic principle that "[a] party may waive any provision, either of a contract or of a statute, intended for his benefit." *Shutte v. Thompson*, 82 U.S. (15 Wall.) 151, 159 (1872). Since then, the Court has, "in the context of a broad array of constitutional and statutory provisions," articulated a general rule that presumes the enforceability of waivers. *See Mezzanatto*, 513 U.S. at 200-01. "[A]bsent some affirmative indication of Congress' intent to preclude waiver, [the Court has] presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." *Id*. at 201. As a result, a party seeking to avoid the consequences of a contractual waiver bears the burden of establishing its invalidity. *See id*. at 200-01 ("[r]ather than deeming waiver presumptively unavailable absent some sort of express enabling clause, we instead have adhered to the opposite presumption").

This general rule, like most general rules, has an exception: "waiver is not appropriate when it is inconsistent with the provision creating the right sought to be secured." *Hill*, 528 U.S. at 116. But the standard for satisfying the exception is a demanding one. Under traditional common law principles, a contractual agreement is properly set aside only "if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Town of Newton*, 480 U.S. at 392, citing *Restatement (Second) of Contracts* § 178. That determination, in turn, requires "a careful

balancing, in the light of all the circumstances, of the interest in the enforcement of the particular promise against the policy against the enforcement of such terms." *Restatement (Second) of Contracts* § 178, Comment b. "Enforcement will be denied only if the factors that argue against enforcement clearly outweigh the law's traditional interest in protecting the expectations of the parties, its abhorrence of any unjust enrichment, and any public interest in the enforcement of the particular term." *Id*.

This Court has also made clear that, before a contractual promise can be invalidated on policy grounds, the "public policy . . . must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *W.R. Grace*, 461 U.S. at 766, quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945). In particular, a court may not disregard the parties' agreement just because the right being waived may, in some sense, serve a "public interest." Although the societal interest in enforcement of the right is properly considered as part of the balancing process, "[i]t is *not* true that any private right that also benefits society cannot be waived." *Hill*, 528 U.S. at 117. To the contrary, it is assumed that individual parties, by deciding whether or not to assert their rights, are well-positioned to reflect "broader social interests," *id.*, unless Congress has clearly indicated otherwise. *See, e.g., Cange v. Stotler and Co., Inc.*, 826 F.2d 581, 596 (7th Cir. 1987) (Easterbrook, J., concurring) ("[c]ontracts rarely defeat the function of a statute so utterly that they may be set aside"). This is especially so when the public's interest may be vindicated through other mechanisms, such as public enforcement. *See* page 18 *infra*.

Against this background, the Court has repeatedly enforced waivers of procedural rights, whether the rights were based in the Constitution or in a federal statute. *See, e.g., Mezzanatto*, 513 U.S. at 201 (citing cases). And it has done so even though the waived rights were of the highest order. Thus, in the criminal context, the Court has recognized that "[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." *Id*. Similarly, it has held that waivers of statutory procedural rights are fully valid. *See, e.g.*, *Hill*, 528 U.S. at 114-18 (waiver of time limits under the Interstate Agreement on Detainers). And, it has followed the same broad pro-waiver principle in civil cases, including, of course, cases involving the validity of arbitration agreements themselves. *See, e.g., Gilmer v. Interstate/Johnson Corp.*, 500 U.S. 20, 24-35 (1991) (party may waive right to judicial forum under the Age Discrimination in Employment Act); *Jeff D.*, 475 U.S. at 730-38 (party may waive statutory entitlement to attorneys' fees); *D.H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 175, 185 (1972) (party may waive right to statutory notice); *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964) ("parties to a contract may agree in advance" to waive various procedural rights).

II. THE ANTITRUST LAWS DO NOT AFFIRMATIVELY PRECLUDE WAIVERS OF CLASS ACTIONS.

A. The federal antitrust laws[2] do not contain an "affirmative indication of Congress' intent to preclude

[2] The Second Circuit did not distinguish among the various antitrust statutes, evidently assuming that a waiver of class

waiver" of antitrust class actions, *see Mezzanatto*, 513 U.S. at 201, even for otherwise non-viable private claims. To begin with, nothing in the text of the relevant antitrust laws forbids waiver of rights granted by those statutes.[3] Furthermore, the language of the antitrust laws is silent with respect to class actions, neither endorsing them nor prohibiting them. In fact, as petitioners have pointed out, *see* Pet. 16-17, Congress, in enacting the Sherman Act, specifically rejected a proposal to supplement its substantive prohibitions with a provision authorizing consumers to bring class actions for damages. *See also Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

It is true, of course, that, decades after Congress decided against providing for class actions in the Sherman Act, Rule 23 of the Federal Rules of Civil Procedure specifically authorized broad damages class actions, thereby allowing many plaintiffs the opportunity to pursue low-value claims. *See* Fed. R. Civ. P. 23(b)(3). But Rule 23 only allows for class actions: it does not bar agreements to forgo that procedural device. Furthermore, it is a considerable leap for a court to conclude, as the Second Circuit implicitly did, that an individual's agreement to waive a procedural right set forth in one law so

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actions would present the same concerns under the Sherman Act, Clayton Act, or the Federal Trade Commission Act. Unless otherwise indicated, we likewise use the term "antitrust laws" to refer to those laws collectively.

[3] This lack of express prohibition, while not by itself determinative, stands in marked contrast to the treatment of waivers under the securities laws, which explicitly bar them. *See* 15 U.S.C. § 77n (1982); 15 U.S.C. § 78cc(a) (1982). *See also Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 230 (1987).

undermines the substantive policy of an entirely different set of laws that the agreement must be deemed unenforceable. At a minimum, the court must take pains to assure that the substantive interests served by preserving the procedural right definitively outweigh the interests served by respecting its waiver. When that burden is not met—and it is not here, *see* pages 12-19 *infra*—then the usual rule permitting waiver should apply.

B. The Second Circuit struck down the class action waiver in this case because it treated the waiver as functionally equivalent to a waiver of the right to remedy antitrust violations at all. *See* Pet. App. 39a (enforcement of the waiver "would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery"). Following that line of analysis, it then placed great weight on decisions of this Court that have indicated that a prospective waiver of substantive rights (*e.g.*, the right to seek any redress for violation of a particular law) is contrary to statutory policy. *See* Pet. App. 37a-39a; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985); *Lawlor v. Nat'l Screen Service Corp.*, 349 U.S. 322, 329 (1955).[4] But the two situations are not the same. It may well be that a prospective waiver of the right to sue at all would be "inconsistent with the provision creating the right[s] sought to

[4] The agreement in *Mitsubishi* did not expressly waive the right to sue under the federal antitrust laws. But the Court considered the possibility that the agreement's choice of forum and choice of law provisions might operate "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations . . . .," finding that such a waiver would be "against public policy." 473 U.S. at 637 n.19.

be secured," *Hill*, 528 U.S. at 116, given that Congress had authorized private suits in the statute. It does not necessarily follow, however, that Congress, merely by providing for a cause of action, also intended to preserve an unwaivable "right" to pursue that cause of action by all possible means, even if those means are not mentioned in the relevant statutes, did not exist (in the form now authorized by Rule 23(b)(3)), and might, in fact, prove harmful to the statutory aims. The latter situation brings fundamentally different policy choices into play.

The Second Circuit, however, gave only a cursory look at the overall impact of class actions on antitrust policy. Although it acknowledged that the right to bring a class action might be regarded as "'a procedural right only, ancillary to the litigation of substantive claims,'" Pet. App. 22a, quoting *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980), it went on to emphasize that this Court had "repeatedly recognized the utility of the class action as a vehicle for vindicating statutory rights." Pet. App. 23a. But that observation, by itself, proves little: the fact that a procedural right has "utility" for vindicating other rights clearly does not mean that parties are unable to waive it. For example, no one doubts that the right to counsel is enormously helpful to criminal defendants in vindicating a number of other statutory and constitutional rights—indeed, may make the difference between a defendant's conviction or acquittal—but it has long been accepted that defendants may elect to waive the right to counsel. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458, 465 (1938).

It is thus incorrect to conclude that class actions are critical to antitrust policy, and not subject to waiver, simply because class actions would allow some

antitrust plaintiffs to bring otherwise financially-barred claims. After all, as this Court has recently pointed out, private lawsuits against businesses have costs as well as benefits: while they may provide redress for injured parties with meritorious claims, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Investment Partners*, 128 S. Ct. at 772, citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975). Even some individual suits, therefore, can exact a price that is out of keeping with overall statutory goals.

This potential for exploitation of weak claims, of course, increases dramatically in large-scale class actions. The Fifth Circuit has stated, in the context of mass tort cases, that "class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. . . . The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). *See* Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits*, 71 Colum. L. Rev. 1, 8-9 (1971). Likewise, the Seventh Circuit has expressed concern that enormous class claims may induce settlement "at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merits of the claims." *In re Bridgestone/Firestone, Inc.*, 288 F.3d at 1015-16. The Third Circuit, too, has emphasized the significant distortion that class actions may cause with respect to business decision-making. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2002) (class suits "place[] inordinate or hydraulic pressure on defen-

dants to settle, avoiding the risk, however small, of potentially ruinous liability"). In the end, many of these costs imposed on businesses will be borne by consumers in the form of higher prices. *See* Handler, at 10.

The exposure to potentially crushing liability increases still further when the standards for liability are unclear or in flux. This Court has observed that "the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct," *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 440-41 (1978), a wide-ranging observation that is particularly apt when applied to tying law. *See* 9 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1701d, at 24 (2d ed. 2004) ("[t]ying law remains in a confused state"). Indeed, it is not even clear ex ante what test will be employed to determine the legality of particular tying arrangements, with the choices ranging from a strict per se rule to a quasi per se rule to a rule of reason, depending on the circumstances. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984) ("[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se'"); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 592 n.2 (1st Cir. 1993) (Boudin, J.) ("Tying is sometimes described as a per se offense but, since some element of power must be shown and defenses are effectively available, 'quasi' per se might be a better label"); *Microsoft Corp.*, 253 F.3d at 94 ("We remand the case for evaluation of Microsoft's tying arrangements under the rule of reason").

Even putting aside questions about the applicable standard, it can be difficult for businesses to identify where the line between lawful and unlawful tying arrangements might be drawn. For example, it is generally accepted that, regardless of what standard is ultimately used, a business is not subject to liability unless it has tied together separate products. *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 461-62 (1992). But "[w]hen a bundle constitutes separate products rather than a single product is often unclear . . . . The problem is pervasive because just about any product could be described as a tie of its components." 10 P. Areeda, H. Hovenkamp & E. Elhauge, *Antitrust Law* Ch. 17D-1, at 151 (2d ed. 2004). Moreover, tying analysis calls for an evaluation of whether the business offering two products in combination has power in the market for the tying product. *See Illinois Tool Works*, 547 U.S. at 35. Yet, the dual tasks of defining the relevant market, and determining the extent of power over it, present their own considerable uncertainties. *See, e.g., Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 486 n.24 (3d Cir. 1992) ("in practice, although economists use indices, market power is difficult to measure with precision"); *see also Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir. 2000).

It is no comfort that businesses might avoid liability simply by not combining products in the first place. Apart from the fact that this would be an impossible practice to follow—cars come with windows, etc. (*see* Evans & Padilla at 90)—that kind of overly cautious conduct would impede, not promote, antitrust policy. The fact that "tying is common in competitive markets," Evans & Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive*

Markets and Implications for Tying Law, 22 Yale J. Reg. 37, 40, 83 (2005), demonstrates that tying, far from routinely harming consumers, widely carries efficiency benefits. *See* R. Posner, *Antitrust Law* 253 (2d ed. 2001) ("widespread use [of a practice] implies that it has significant economizing properties"). For example, the practice of offering two or more products only in combination may provide convenience for consumers and lower costs for producers. *See* Evans & Salinger, at 43, 52; Evans & Padilla, at 90-91; Hylton & Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 Antitrust L.J. 469 (2001). It may also allow more efficient quality control and economies of scale easing entry into a tied product market. *See* 10 *Antitrust Law* ¶¶ 1761-1764e, at 357-98.

These efficiency benefits will be forfeited if businesses—fearing massive, unpredictable judgments—choose to avoid otherwise advantageous product combinations. As this Court has noted with respect to antitrust criminal liability, overdeterrence comes at a significant cost: "salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment." *U.S. Gypsum*, 438 U.S. at 441. That concern, applicable to a broad range of antitrust claims, applies with full force here.

C. Despite the Second Circuit's worry about respondents' practical inability to bring their claims, the antitrust laws do not embody an overriding policy that favors the private prosecution of all damage claims regardless of cost. While the Clayton Act

authorizes private suits, *see* 15 U.S.C. § 15(a), and provides for an award of attorneys' fees, *see id.*, it does not—unlike many other federal statutes, *see West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 88-89 (1991)—make any allowance for reimbursement of expert fees. Thus, notwithstanding the fact that proving an antitrust violation typically involves reliance on expert testimony, Congress, by declining to authorize reimbursement, necessarily has accepted that some potential litigants will be deterred by the prospect of incurring unrecoverable expert fees. In that regard, of course, antitrust plaintiffs are simply treated in the same manner as most litigants, who must weigh the potential rewards of bringing suit against the foreseeable expense of going forward.

Furthermore, it is not the case that a decision to forgo certain means of private enforcement results in de facto immunity for unlawful conduct. The Justice Department, of course, not only may secure injunctive and other relief for violations of the Sherman Act, *see* 15 U.S.C. § 4, but may seek criminal sanctions as well. *See* 15 U.S.C. §§ 1-3. Likewise, the Federal Trade Commission has authority to proceed against "unfair methods of competition." *See* 15 U.S.C. § 45. And, as an alternative to private class actions, Congress has expressly provided that state Attorneys General may bring suits, in their *parens patriae* capacity, on behalf of "natural persons" and obtain "as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15c(a)(2).

All in all, therefore, the Second Circuit was wrong to conclude that a waiver of class actions is antithetical to the substantive policies of the federal

antitrust laws. Judicial respect for voluntary waivers ultimately rests on an understanding that waivers do not simply result in a "loss" of rights, but rather can advance important positive objectives. Here, a more complete examination of class actions' effects on antitrust policy shows that, while class actions may sometimes promote antitrust goals, they also may threaten, and thereby inhibit, lawful, economically beneficial conduct. Given that mixed picture, it cannot be said that antitrust policy affirmatively requires that plaintiffs be allowed to bring class actions, despite their express agreements not to do so. The presumption in favor of honoring waiver agreements should apply. *See Mezzanatto*, 513 U.S. at 201.

III. A JUDICIAL REFUSAL TO ENFORCE CLASS ACTION WAIVERS WILL IMPEDE THE FEDERAL POLICY FAVORING ARBITRATION.

The Second Circuit's decision also places significant practical limitations on the availability of arbitration as an alternative forum for dispute resolution. This Court has recognized that "Congress enacted the [Federal Arbitration Act] '[t]o overcome judicial resistance to arbitration,' *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), and to declare '"a national policy favoring arbitration" of claims that parties contract to settle in that manner,' *Preston v. Ferrer*, 128 S. Ct. 978, 983 (2008) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984))." *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1271 (2009). Thus, federal law generally requires enforcement of voluntary arbitration agreements. *See Dean Witter Reynolds*, 470 U.S. at 220. Here, although the court of appeals did not invalidate the

underlying agreement to arbitrate, its holding that class action waivers in such agreements are unenforceable, at least for low-value, high-cost antitrust claims, will nonetheless have several negative effects on federal arbitration policy.

First of all, even if parties to an arbitration agreement decide to proceed with arbitration on a class basis, many of the anticipated benefits of arbitration as a convenient forum will be lost, both for businesses and for their customers. *See Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 280 (1995) ("Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind"). In *Allied-Bruce Terminix*, this Court noted that "'[t]he advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices . . . .'" 513 U.S. at 280 (quoting H.R. Rep. No. 97-542, 97 Cong., 2d Sess. 13 (1982)). Class actions inevitably will eliminate many of those stated advantages, turning simple arbitration into something far more complicated and adversarial. The informality of dealing with individual customers to resolve concrete disputes will be supplanted by the complexity of addressing the aggregated grievances of a class with thousands of unseen members.

Even more serious is the prospect that, absent enforceable class action waivers, many otherwise arbitrable claims will simply wind up in court. One recognized advantage of arbitration is that it is more likely to achieve a final resolution of the particular

dispute between the parties, because of strict statutory limitations on the scope of subsequent judicial review. *See* 9 U.S.C. §§ 10-11. Indeed, this Court recently reaffirmed that the Federal Arbitration Act reflects "a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Hall Street Assoc. v. Mattel, Inc.*, 128 S. Ct. 1396, 1405 (2008). In keeping with that policy, the Court made clear that the statutory grounds for review of arbitration awards are both narrow and exclusive. *See id.*

That circumscribed review of arbitration awards is entirely appropriate when the arbitration is an individual one, with reasonably quantifiable risks. But the normal calculus is severely distorted if the outcome of arbitration may be a potentially enormous class judgment. As we have discussed, *see* pages 14-15 *supra*, the pressure on businesses to settle class actions is already out of proportion to the likely worth of the claims—meritorious or not—and that pressure can only be increased by the possibility of huge, yet largely unreviewable, awards. For many businesses, therefore, the safer course will be to bypass arbitration altogether. In fact, it is now common for arbitration agreements to specify that, if the class action waiver is deemed unenforceable, then the arbitration agreement itself must be considered void. *See, e.g., Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 986 (9th Cir. 2007).

Given that agreements to arbitrate may stand or fall depending upon the enforceability of class action waivers, it seems unavoidable that questions about the validity of such waivers will produce great uncertainty and delay. First of all, the parties may need to

litigate whether the plaintiff's claim could feasibly be brought on a non-class basis, in which case the Second Circuit's rule against enforceability of the class action waiver would not apply. Moreover, the fact that certain plaintiffs wish to proceed as a class does not mean that they have an automatic "right" to do so: to be certified, a class must meet applicable standards, such as those in Rule 23. As a result, parties to an arbitration agreement will have to argue over the plaintiffs' entitlement to class status—an often drawn-out determination that is, in any event, not final, but subject to later amendment (*see* Fed. R. Civ. P. 23(d)(2))—before learning whether the substantive claims are arbitrable in the first place. If the case is eventually found unsuitable for class treatment, the parties then will wind up before an arbitrator just as they had originally agreed, but only after the expenditure of considerable time and resources, all resulting from resolution of an ancillary issue that has nothing to do with the merits of the dispute between them.

Attacks on class action waivers thus present a challenge to the effectiveness of arbitration agreements themselves. If class action waivers are routinely held unenforceable, it may be expected that plaintiffs' lawyers will seek, where possible, to frustrate the purpose of arbitration agreements by bringing claims on a class basis. The decision below, therefore, not only reflects a serious overreading of the antitrust laws' preclusive effect on contractual waivers, but also poses a substantial threat to the "national policy favoring arbitration." *Southland Corp.*, 465 U.S. at 10. The Court should grant certiorari to review it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN THORNE
GAIL F. LEVINE
VERIZON COMMUNICATIONS INC.
1320 North Courthouse Road
Arlington, VA 22201
(703) 351-3900

QUENTIN RIEGEL
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Suite 600
Washington, D.C. 20004
(202) 637-3058

H. BARTOW FARR, III
Counsel of Record
RICHARD G. TARANTO
FARR & TARANTO
1150 18th Street, N.W.
Suite 1030
Washington, D.C. 20036
(202) 775-0184