

ARBITRATION, CLASS WAIVERS, AND STATUTORY RIGHTS

Congress passed the Federal Arbitration Act (FAA) in 1925 to counter widespread judicial refusal to enforce arbitration agreements.¹ The courts were not necessarily hostile to arbitration or driven by ideology. Often, they considered themselves bound by longstanding anti-arbitration precedent, which would need to be overturned legislatively.² Last year, in *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that the FAA prohibited states from refusing to enforce arbitration agreements merely because they did not allow class arbitration procedures.³ In the past year, dozens of courts have enforced arbitration agreements containing class waivers.⁴ Nonetheless, an administrative body and a growing handful of courts have struck down arbitration agreements, finding them unenforceable where they contained a waiver purporting to prevent the signatory from bringing class proceedings either in arbitration or in court. In particular, many of these courts have reasoned that arbitration agreements with class waivers are unenforceable where they would effectively prevent plaintiffs from vindicating their statutory rights.

These lower courts have refused to enforce arbitration agreements based on their reading of Supreme Court precedent. In several cases, the Court held that federal statutory claims were subject to arbitration so long as federal substantive remedies were available in the arbitral forum.⁵ In another case,

1. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011).

2. See H.R. REP. NO. 68-96, at 1-2 (1924) (noting that “the jealousy of the English courts for their own jurisdiction” had been adopted by American courts, who believed that the anti-arbitration precedents would have to be overturned legislatively); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 283-84 (1926) (“[C]ourts, while declaring that arbitration agreements were unenforceable, have been most insistent that the policy of arbitration was wise and that it should be encouraged and extended.”).

3. See 131 S. Ct. at 1747-48.

4. See David Segal, *A Rising Tide Against Class-Action Suits*, N. Y. TIMES, May 6, 2012, at BU4 (reporting that 76 courts have cited *Concepcion* while enforcing arbitration agreements that waive class proceedings).

5. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636-37 (1985) (explaining that where arbitrator could award treble damages,

the Court held that the plaintiff had the burden of proving that prohibitively expensive arbitration-specific costs would prevent her from vindicating her federal statutory rights.⁶ But the Court has never struck down an agreement for interfering with a plaintiff's statutory rights, nor has it clarified what sort of arbitration agreement would meet that standard. This Note describes when, if ever, class waivers render otherwise valid arbitration agreements unenforceable because they would prevent plaintiffs from effectively vindicating their statutory rights.

Part I describes the doctrinal framework established by the Court in *Concepcion*, *Green Tree*, and *Mitsubishi Motors*. Part II argues that claims that class action waivers nullify state statutory rights cannot invalidate arbitration agreements after *Concepcion*. Part III considers several different arguments that class waivers undermine federal statutory rights in certain contexts. It argues that, although most such arguments should fail after *Concepcion*, there are two that might succeed. First, some federal statutes might establish a substantive right to class proceedings. Second, there is a difficult issue of whether proof that class proceedings are the only economically feasible means of vindicating statutory rights should invalidate an arbitration agreement. Even here, any exception to *Concepcion* is narrow and likely to become narrower still. Finally, this Note concludes that a very narrow subset, at most, of arbitration agreements undermine statutory rights merely by waiving class proceedings.

I. DOCTRINAL FRAMEWORK

The FAA mandates that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."⁷ The Act embodies a "liberal federal policy favoring arbitration,"⁸ and requires courts to "place arbitration agreements on an equal footing with other contracts . . ."⁹ The Act's saving

plaintiff could vindicate statutory right and Clayton Act would serve remedial and deterrent functions).

6. See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 82 (2000).

7. Federal Arbitration Act, 9 U.S.C. § 2 (1925).

8. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

9. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

clause instructs courts to invalidate arbitration agreements for the same reasons—fraud, duress, or unconscionability—as they would any other contract but forbids them to invalidate arbitration agreements based on reasons “that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”¹⁰ In *Concepcion*, the Supreme Court held that the FAA preempted California’s *Discover Bank* rule, which conditioned the enforceability of most arbitration agreements on the availability of class procedures. Although California prohibited class litigation waivers as well as class arbitration waivers,¹¹ its preference for class actions placed arbitration agreements, in practice, on a worse footing than other contracts.¹²

A. *Concepcion and Discover Bank*

The arbitration agreement at issue in *Concepcion* was carefully drafted to avoid lower court rulings striking down other arbitration agreements.¹³ AT&T’s agreement required the parties to arbitrate all claims in an individual capacity; made dispute resolution, initiating arbitration, and the arbitration process itself consumer friendly; stipulated that AT&T would pay arbitration costs of all non-frivolous claims; and awarded a bonus of \$7500 and double attorney’s fees in the event that the arbitrator awarded more than AT&T’s last settlement offer.¹⁴

10. *Id.* at 1746 (citing *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (FAA preempted state statute which required “first-page notice” for arbitration agreement, but not any other contract)).

11. *Id.*

12. *See id.* at 1753.

13. *See* Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1115–16 & n.203 (2011) (describing the AT&T arbitration agreement’s responsiveness to concerns about previous arbitration agreements).

14. *Concepcion*, 131 S. Ct. at 1744. The Court assumed that consumers would be better off arbitrating disputes individually rather than bringing class actions and asserted that AT&T’s agreement made potential claims “most unlikely to go unresolved,” *id.* at 1753, but did not base its holding on the quality of the arbitration agreement. *See id.* (“States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”). Nonetheless, the pro-claimant nature of the agreement probably had something to do with the Court’s decision to grant cert. *See* Nagareda, *supra* note 13, at 1106 (noting that the Court had “bypassed numerous opportunities to opine on class waivers in second-generation” arbitration agreements, which waived class proceedings but did not offer comparable protection to claimants); *see also, e.g.*, Respondents’ Brief in Opposition at 1,

Both the district court and the Ninth Circuit Court of Appeals conceded that AT&T's arbitration provision was consumer friendly. The district court called it "'quick, easy to use' and likely to 'prompt[t] full or . . . even excess payment to the customer without the need to arbitrate or litigate'"¹⁵ and noted that aggrieved consumers would generally be better off in individual arbitration than in a class action, which would take a long time for little reward.¹⁶ The Ninth Circuit "admitted that aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole."¹⁷

Nevertheless, the district court denied AT&T's motion to compel arbitration, holding that the arbitration agreement was invalid under California's *Discover Bank* rule.¹⁸ The Ninth Circuit affirmed and "held that the *Discover Bank* rule was not preempted by the FAA because that rule was simply 'a refinement of the unconscionability analysis applicable to contracts generally in California.'"¹⁹

Under the *Discover Bank* rule:

[W]hen [a class action waiver] is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party from responsibility for [its] own fraud, or willful injury to the person or property of another. Under these circumstances, such waivers are unconscionable under California law and should not be enforced.²⁰

Concepcion, 131 S. Ct. 1740 (No. 09-893) (citing cases). At the very least, AT&T's agreement—because it made consumers better off under individual arbitration—indicated that its class waiver was rational for consumers and that its purpose really was to streamline the legal process, rather than exculpate AT&T.

15. *Concepcion*, 131 S. Ct. at 1745 (citing *Laster v. T-Mobile USA, Inc.*, 2008 WL 5216255, at *11–12 (S.D. Cal. Aug. 11, 2008)).

16. *See id.*

17. *Id.* at 1753 (citing *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 n.9 (9th Cir. 2009)).

18. *Id.* at 1745 (citing *Laster*, 2008 WL 5216255, at *11–12).

19. *Id.* (quoting *Laster*, 584 F.3d at 857).

20. *Id.* at 1746 (quoting *Discover Bank v. Superior Court*, 113 P.3d 1000, 1110 (Cal. 2005) (internal quotation marks omitted)).

When a California court found a class waiver in an arbitration agreement unconscionable under California law, the court was to strike the waiver and compel class arbitration.²¹ In the event that the court compelled class arbitration, a party would still be free to “waive the arbitration agreement and have the matter brought in court.”²²

The Supreme Court reversed.²³ Class arbitration, it held, is an unwieldy procedure incompatible with the purposes of the FAA, at least where it is not the specific choice of the parties to a contract.²⁴ Therefore, state rules that condition the enforceability of arbitration agreements on the availability of class proceedings are preempted, even when they purport to be applying general unconscionability rules.²⁵ This is because the specific application of those rules would disproportionately affect arbitration agreements and thus would violate the primary purpose of the FAA, which is to place arbitration agreements on an equal footing with any other contract.²⁶

Concepcion was broadly written. To understand just how broad the Court’s reasoning was, it is useful to consider a narrower approach the Court might have taken.

In his article on litigation, arbitration, and class action written before *Concepcion* was decided, the late Professor Richard Nagareda argued that the Court should enforce AT&T’s arbitration agreement.²⁷ His argument rested on two major points: First, the agreement was designed to prompt AT&T to quickly pay claims, even those of dubious merit, in

21. *Discover Bank*, 113 P.3d at 1116. Some have suggested that *Discover Bank*’s crucial flaw was that it imposed class arbitration on unwilling parties or at least “allow[ed] any party to a consumer contract to demand it ex post.” See, e.g., Alexander H. Schmidt, *AT&T Mobility Case May Have Limited Application*, LAW 360 (June 21, 2011), <http://www.law360.com/articles/252142>. This reading of *Concepcion* is far too narrow. The Court had decided in its previous Term that parties could not be subjected to class arbitration proceedings without their consent. See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010). There was no reason to hold, again, that parties cannot be forced into class arbitration unwillingly. Were that *Discover Bank*’s fatal flaw, the Court could have summarily reversed the Ninth Circuit.

22. *Discover Bank*, 113 P.3d at 1117 n.8.

23. *Concepcion*, 131 S. Ct. at 1753.

24. See *id.* at 1752.

25. See *id.* at 1746–47.

26. See *id.* at 1745.

27. See Nagareda, *supra* note 13, at 1129.

full.²⁸ The lower courts' refused to enforce the agreement, not because it was exculpatory, but because its class waiver prevented optimal deterrence, violating California's public policy.²⁹ Second, in light of *Shady Grove Orthopedic Associates. v. Allstate Insurance Co.*,³⁰ state public policy concerning class-wide deterrence, whether in favor or against, could not overcome federal law.³¹ Therefore, the lower courts should not have struck down AT&T's agreement because of California's policy on class actions.³²

Instead, he argued, courts considering the enforceability of arbitration agreements should conduct a "nuanced, circumstantial analysis" of whether a particular arbitration agreement would be exculpatory.³³ The court should decide whether the provisions of the agreement would, functionally, make arbitration prohibitively expensive.³⁴ He expressed particular skepticism about second generation class waivers in arbitration agreements, which provided nothing like AT&T's "bonus."³⁵

The Court in *Concepcion* did not hint that lower courts in the future should perform a functional, case-by-case analysis to determine whether a particular class waiver would render an arbitration agreement exculpatory. Nor did its decision turn on the consumer-friendly nature of AT&T's arbitration agreement. Responding to the dissent's argument "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," the Court emphatically held that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."³⁶ The Court's reasoning about class proceedings and the purposes of the FAA was broad indeed.

28. *See id.* at 1115–18.

29. *See id.* at 1118–19.

30. 130 S. Ct. 1431 (2010).

31. *See* Nagareda, *supra* note 13, at 1120–22.

32. *See id.*

33. *See id.* at 1124–26.

34. *See id.* at 1124–25.

35. *See id.* at 1124 ("A decision regarding the particular third-generation arbitration clause in *Concepcion* along the lines sketched here would not operate as anything like an undifferentiated green light for class waivers—much less, in their more common, second-generation form.").

36. AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740, 1753 (2011).

B. *Effective Vindication of Statutory Rights*

Since *Concepcion*, a number of courts have refused to enforce class-waiving arbitration agreements, holding that they would effectively bar plaintiffs from vindicating their statutory rights.³⁷ To be clear, the courts have not held that arbitration per se undermines statutory rights, nor could they. Over the past few decades the Supreme Court has made clear that arbitration agreements must be enforced, “even when the claims at issue are federal statutory claims, unless the FAA’s mandate has been ‘overridden by a contrary congressional command.’”³⁸ Instead, these courts have held that class waivers invalidate otherwise enforceable arbitration agreements because they obstruct vindication of the plaintiffs’ statutory rights.

The Supreme Court has indicated that arbitration agreements must allow plaintiffs to vindicate their federal statutory rights, but it has never struck down an agreement on that ground nor has it clarified the limits of that doctrine. In *Mitsubishi* and *McMahon*, the Court confronted statutes with treble-damages provisions, which served a remedial function and highlighted “the public interest in [their] enforcement”³⁹ The remedial and deterrent functions of the statutes would be served “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.”⁴⁰ In *Green Tree Financial Corp.-Alabama v. Randolph*, the Court held that mere silence regarding filing fees and arbitration costs did not render an arbitration agreement unenforceable.⁴¹ Instead, the burden of showing that ar-

37. See, e.g., *In re American Express Merchants’ Litig.* III, 667 F.3d 204, 218 (2d Cir. 2012) (*Amex III*); *Chen-Oster v. Goldman, Sachs & Co.* II, No. 10 Civ. 6950(LBS)(JCF), 2011 WL 2671813 (S.D.N.Y. July 7, 2011); *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854, 863 (Cal Ct. App. 2011); accord *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, 2012 WL 36274 (Jan. 3, 2012).

38. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (holding that agreements to arbitrate claims under the Credit Repair Organizations Act are enforceable)); see also, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (Age Discrimination in Employment Act of 1967); *McMahon*, 482 U.S. 220 (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act (RICO)); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act).

39. *McMahon*, 482 U.S. at 240; *Mitsubishi*, 473 U.S. at 653.

40. See *McMahon*, 482 U.S. at 240 (quoting *Mitsubishi*, 473 U.S. at 637).

41. 531 U.S. 79, 82 (2000).

bitration would be “prohibitively expensive” and would therefore “preclude a litigant . . . from effectively vindicating her federal statutory rights” falls on the litigant herself.⁴² The Court requires proof that federal statutory rights would be nullified by an arbitral forum, it will not accept mere “suspicion of arbitration as a method of weakening the protections afforded in the substantive law”⁴³

Regardless of whether they contain class waivers, arbitration agreements purporting to waive federal statutory remedies, like the treble-damages provisions of the Clayton Act⁴⁴ or the RICO statute,⁴⁵ would be void as a matter of public policy.⁴⁶ For example, then-Judge Roberts, writing for the D.C. Circuit Court of Appeals, found that a clause in an arbitration agreement purporting to waive punitive damages for racial discrimination was unenforceable where those damages were specifically allowed under the relevant statute.⁴⁷ Less clear is what would make arbitration “prohibitively expensive” such that it would undermine federal statutory rights. Most likely, the prohibitively expensive costs must be those imposed by arbitration.⁴⁸

AT&T Mobility LLC v. Concepcion raises the question and helps clarify when, if ever, a class waiver can invalidate an otherwise enforceable arbitration agreement because the waiver would prevent litigants from effectively vindicating their statu-

42. *Id.* at 90–92.

43. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989).

44. § 4, 15 U.S.C. § 15 (1982).

45. 18 U.S.C. § 1964(c) (1985); *cf.* *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401, 406–07 (2003) (ambiguity about availability of treble damages did not render arbitration agreement unenforceable).

46. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (“[If] choice-of-forum and choice-of-law clauses operated in tandem 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.”).

47. *Booker v. Robert Half Int’l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005).

48. *Green Tree* mentions filing and arbitration fees, but not attorney’s fees, for example. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 82 (2000). Professor Nagareda suggested that the relevant question is “whether the difference between litigation and arbitration . . . makes the latter forum cost ‘prohibitive’” Nagareda, *supra* note 13, at 1124 (emphasis added). For a descriptive and empirical analysis of cost-based challenges after *Green Tree*, see Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 747–50, 752–56 (2006).

tory rights. Part II considers whether a class waiver can ever do so where the right at issue is a state statutory right.

II. STATE STATUTORY RIGHTS

A. *States Cannot Require Class Actions, Even to Vindicate Statutory Rights*

All of the Supreme Court cases from which vindication analysis is derived focus on the vindication of *federal* statutory rights.⁴⁹ In *McMahon*, the Court emphasized not only that “nothing in RICO’s text or legislative history . . . demonstrates congressional intent to make an exception to the Arbitration Act” but also that, so long as the litigant could “effectively vindicate their RICO claim in an arbitral forum . . . there is no inherent conflict between arbitration and the purposes underlying” RICO’s treble-damages provision.⁵⁰ This analysis, showing that RICO’s substantive provisions could be effectively vindicated in an arbitral forum, demonstrates that the two federal statutes can be harmonized and that the FAA’s mandate does not inherently conflict with another federal statute’s purposes. Therefore, the Court need not determine which statute trumps. Where the FAA really does conflict with a *state* statute, however, the analysis is much simpler: the state law is preempted.⁵¹

That is not to say that all arbitration provisions are per se enforceable in the face of claims advancing state statutory rights. Arbitration is a matter of forum selection, not remedies, and the purpose of the FAA is to make an arbitral forum available, not to favor some remedies over others. Arbitration clauses purporting to waive statutory remedies do not fall within the purposes of the FAA. Therefore, insofar as a state refuses to enforce contracts that waive statutory remedies as uncon-

49. See, e.g., *Green Tree*, 531 U.S. at 79 (Truth in Lending Act); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) (Carriage of Goods by Sea Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (Age Discrimination in Employment Act); *Mitsubishi*, 473 U.S. at 614 (Sherman Act).

50. *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 242 (1987).

51. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011) (“When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” (citing *Preston v. Ferrer*, 552 U.S. 346, 353 (2008))).

scionably exculpatory, that state and courts applying its law also can refuse to enforce arbitration agreements that purport to do so.⁵² Nothing in *Concepcion* alters these traditional contract law precepts.

For federal purposes, however, class actions are a procedural mechanism, not a substantive remedy.⁵³ States cannot condition the enforceability of arbitration agreements on the availability of a particular procedural mechanism, even to serve desirable policy goals, where that mechanism would undercut the FAA's purposes.⁵⁴ The purposes of the FAA are to promote arbitration, to streamline the process of dispute resolution, and to enforce private agreements, none of which are consistent with class proceedings.⁵⁵ Therefore, even if a state were to declare that class proceedings are necessary to enforce a statutory right, or even to create a right to class actions in a statute, the FAA would preempt the state statute outright.⁵⁶

B. *Application to State Statutory Rights*

1. *Gentry and Scott: Discover Bank by a Different Name*

Some pre-*Concepcion* cases, which struck down class waiving arbitration provisions on statutory vindication grounds, mirror California's *Discover Bank* rule and certainly do not survive *Concepcion*.⁵⁷ Nonetheless, they demonstrate that *Discover*

52. Or, alternatively, courts could strike the particular clause of the agreement purporting to waive the remedy, assuming the arbitration agreement contains a severability provision. See, e.g., *Booker*, 413 F.3d at 79 (D.C. Cir. 2005) (severing unenforceable waiver of punitive damages and compelling arbitration).

53. See Nagareda, *supra* note 13, at 1086–87, 1120–22 (describing Rule 23's class action mechanism, per *Shady Grove*, as “a procedural mechanism whose effect on substantive rights remains incidental” rather than “something . . . like a component of available remedies in substantive law”); see also *Shady Grove Orthopedic Assocs v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442–43 (2010) (plurality opinion) (Rule 23 regulates procedure under the Rules Enabling Act because it “merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. . . . [I]t leaves the parties' legal rights and duties intact and the rules of decision unchanged.”).

54. See *supra* Part I.A.

55. See *Concepcion*, 131 S. Ct. at 1748–49.

56. Cf. *supra* note 51.

57. See, e.g., *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159–61 (9th Cir. 2012) (holding that *Concepcion* overruled *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007), which was indistinguishable from *Discover Bank*, even though based on a statute).

Bank's problems are not solved simply by adding a statutory claim.⁵⁸

Consider California's *Gentry* rule, which invalidated arbitration agreements with class waivers when class actions were deemed necessary to vindicate unwaivable statutory rights.⁵⁹ For claimed violations of statutory rights, "if [a court] concludes . . . that a class arbitration is likely to be a significantly more effective practical means of vindicating the [statutory] rights . . . than individual litigation or arbitration . . . it must invalidate the class arbitration waiver"⁶⁰

Applying the rule to a claimed violation of California's overtime pay law, the court in *Gentry* reasoned that: (1) the case concerned an unwaivable statutory right;⁶¹ (2) awards under the statute tended to be modest (with an average award more than \$6000), cases could be complicated to prove, and, even with reasonable attorney's fees awarded by statute, arbitration was less efficient;⁶² (3) class actions shielded workers from retaliation;⁶³ and (4) class actions functioned as a notice system—few people would otherwise know their rights had been violated.⁶⁴

Similarly, in *Scott v. Cingular Wireless*, the Washington Supreme Court held that Cingular's arbitration clause, which contained a class action waiver, was unenforceable because it undermined Washington's Consumer Protection Act (CPA).⁶⁵ According to the court, consumers who bring class action suits under the CPA protect the interests of others, as well as their own rights, thus vindicating the public's statutory interests.⁶⁶

58. *Cf. Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1215 (11th Cir. 2011) (declining to reach vindication of state statutory rights claim because same arbitration agreement had been upheld in *Concepcion*).

59. *See Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007). The *Gentry* rule mirrors and was announced shortly after the *Discover Bank* rule.

60. *Id.* at 568.

61. *Id.* at 563.

62. *Id.* at 564–65.

63. *Id.* at 565.

64. *Id.* at 566–67.

65. 161 P.3d 1000, 1005–06 (Wash. 2007) (en banc). The court also held that the waiver was unenforceable because it was exculpatory. *See id.* at 1008. That holding, which relied to some extent on *Discover Bank*, *see id.*, was clearly overruled by *Concepcion*.

66. *See id.* at 1006.

Just like *Discover Bank*, *Gentry* and *Scott* purport to be applying a general doctrine—where necessary to effectively vindicate statutory rights, states may condition the enforcement of arbitration agreements on the availability of class proceedings. Just like *Discover Bank*, those rules, in practice, would treat arbitration agreements worse than other contracts.

The courts' analyses demonstrate particular hostility to arbitration agreements. The *Discover Bank* rule required that claims be "predictably small," which the Supreme Court called a "toothless and malleable" standard that allowed courts to conclude that a claim for \$4000, for example, was "sufficiently small."⁶⁷ The average claim of the type at issue in *Gentry* was more than \$6000.⁶⁸ Still, the court accepted the possibility that it would be unrecoverable absent class proceedings. Furthermore, the court cited with approval a California appellate decision that even \$37,000 would not provide enough incentive for an individual to pursue a claim absent a class action.⁶⁹

Likewise, the court's argument in *Scott* is identical to the argument rejected by the Court in *Concepcion*.⁷⁰ Without the benefits of class action, the *Scott* court argued, "many meritorious claims would never be brought" and "consumers would have far less ability to vindicate the CPA."⁷¹ The *Concepcion* majority rejected the same argument—that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system."⁷² Regardless, "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."⁷³ That the procedure is desirable to vindicate a statutory interest, rather than to conform to a judge-made rule, should make no difference.

67. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011) (citing *Oestreicher v. Alienware Corp.*, 322 Fed. Appx. 489, 492 (2009)).

68. 165 P.3d at 564.

69. *Id.* (citing *Bell v. Farmers Ins. Exch.*, 9 Cal. Rptr. 3d 544 (Cal. Ct. App. 2004)).

70. *See Coneff v. AT&T Corp.*, 673 F.3d at 1155, 1159–60 (9th Cir. 2012) (holding *Scott* overruled by implication).

71. 161 P.3d at 1006; *see also Coneff*, 673 F.3d at 1159.

72. *Concepcion*, 131 S. Ct. at 1753; *see also Coneff*, 673 F.3d at 1159.

73. *Concepcion*, 131 S. Ct. at 1753; *see also Coneff*, 673 F.3d at 1159; *Kilgore v. Key-Bank, Nat'l Ass'n*, 673 F.3d 947, 965 (9th Cir. 2012) (holding that the FAA pre-empted California's rule that claims for public injunctive relief were not subject to arbitration).

That rule applies even to strong policy reasons for states to adopt anti-arbitration rules. The court in *Gentry* was concerned that individual arbitration subjected plaintiffs to greater risk of retaliation than would a class action. Unquestionably a desirable reason, but just as certainly preempted by the FAA.

Fundamentally, *Concepcion* stands for the proposition that courts may not strike down arbitration agreements based on facially neutral rules that disproportionately impact arbitration. *Discover Bank* purported to be enforcing a neutral policy against exculpatory contracts. But, whether an arbitration agreement is exculpatory is, in practice, in the eye of the beholder. The neutral rule, therefore, specifically harmed arbitration agreements.

Vindication analysis has been equally in the eye of the beholder, and inappropriately used to strike arbitration agreements. *Scott*, for example, held that an arbitration agreement was unconscionable under vindication analysis because of concern that the plaintiffs could not find a lawyer.⁷⁴ But the arbitration agreement stipulated that Cingular would pay not only for arbitration, but also for attorney's fees if the consumer received at least the demand amount.⁷⁵

In these types of cases, where the courts simply mirror *Discover Bank's* analysis, vindication analysis cannot survive *Concepcion*.

2. State Statutory Class Actions

The previous Section concerned cases where states rules required class proceedings to vindicate independent statutory rights. But the statutes at issue, like Washington's Consumer Protection Act, did not explicitly provide for class proceedings. Even where a state statute does provide for class proceedings, making class actions (arguably) a substantive statutory right, that statute is preempted by the FAA.

For instance, California's Private Attorney General Act (PAGA), passed in 2004, authorizes employees to sue employers for any breach of California's labor laws, on behalf of themselves "and other current or former employees."⁷⁶ In *Franco v. Athens Disposal Co.*, a California appellate court ruled that an arbitration agreement, which prohibited employees from enter-

74. 161 P.3d at 1007.

75. *Id.*

76. Cal. Lab. Code § 2699(a).

ing class actions or acting as private attorneys general, was unconscionable.⁷⁷ The court held that the arbitration agreement was unconscionable because it sought to preclude the plaintiff “from seeking civil penalties on behalf of other current and former employees, contrary to the PAGA”⁷⁸ Although courts are split over whether *Franco* survived *Concepcion*,⁷⁹ the better view is that it did not.

First, the FAA requires that an employee’s PAGA claims be subject to arbitration where the parties have signed an arbitration agreement.⁸⁰ Second, class proceedings are not necessary to ensure that individual claimants pursue their own remedies under PAGA. PAGA provides that employees receive a quarter of all civil penalties in addition to “damages, reinstatement, and other appropriate relief” for every violation of their statutory rights.⁸¹ Furthermore, successful employees are entitled to “reasonable attorney’s fees and costs.”⁸²

The purpose of class proceedings under PAGA is not to ensure that plaintiffs receive restitution for violations of their statutory rights. PAGA class actions serve California’s law enforcement goals by deputizing employees to enforce California labor law.⁸³ But California cannot condition the enforceability of arbitration agreements on the availability of class proceedings, even to serve desirable state goals. Inasmuch as PAGA requires California to do so, it should be preempted by the FAA.

77. 90 Cal. Rptr. 3d 539, 542 (Cal. Ct. App. 2009).

78. *Id.* at 558–59. The court also held that the class waiver was a de facto waiver of an unwaivable statutory right and thus unenforceable under *Gentry*. *See id.* That holding falls with *Gentry* and *Discover Bank*.

79. Compare *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854, 863 (Cal. Ct. App. 2011) (holding that *Concepcion* does not apply to PAGA, a mechanism to enforce state labor laws), with, e.g., *id.* at 865 (Kriegler, J., concurring and dissenting) (arguing that *Concepcion* requires enforcement of PAGA waiving arbitration clause), *Grabowski v. Robinson*, 817 F. Supp. 2d 1159, 1181 (S.D. Cal. 2011) (same), *Quevedo v. Macy’s, Inc.*, 798 F. Supp. 2d 1122, 1140–42 (C.D. Cal. 2011) (same).

80. *See Perry v. Thomas*, 482 U.S. 483 (1987) (holding that provision of California Labor code invalidating arbitration agreements is preempted under FAA).

81. *See Franco*, 90 Cal. Rptr. 3d at 556.

82. PAGA § 2699(g)(1).

83. *See Franco*, 90 Cal. Rptr. 3d at 556.

III. VINDICATION OF FEDERAL STATUTORY RIGHTS

Because the FAA must be harmonized, if possible, with other federal statutes,⁸⁴ arbitration agreements that purport to preclude federal statutory rights are not enforceable. That means federal statutory remedies must be available in the arbitral forum and that arbitration agreements cannot impose prohibitively expensive arbitration specific costs.⁸⁵ *Concepcion* clarified that the purpose of the FAA was to ensure access to a particular type of forum, characterized by speed, efficiency, and relatively informal procedures.⁸⁶ It also clarified that class proceedings were not compatible with arbitration, at least where the parties did not choose them, and therefore requiring class proceedings undermined the purposes of the FAA.⁸⁷ It did not settle, however, how that purpose of the FAA interacted with other federal statutes. That is to say, it is a somewhat open question whether class waivers in arbitration agreements can be said to effectively prevent the vindication of other federal statutory rights.⁸⁸

A. *Clear Conflict Between Statutes*

Congress can override the FAA by clearly mandating that particular federal statutory claims are not arbitrable or that particular contracts may not include arbitration provisions.⁸⁹

84. See *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent clearly expressed congressional intention to the contrary, to regard each as effective.”).

85. See *supra* Part I.B.

86. See 131 S. Ct. 1740, 1749 (2011).

87. See *id.*

88. The Second Circuit recently suggested that because *Concepcion* was an obstacle preemption case about state common law claims, it does not apply where a court strikes down an arbitration agreement under “federal substantive law of arbitrability.” See *Amex III*, 667 F.3d 204, 213 (2d Cir. 2012) (emphasis added). But *Concepcion* clarified that substantive law. The FAA applies to federal courts as well as state courts. See Andrew Pincus, *Concepcion and the Arbitration of Federal Claims*, BLOOMBERG L., Feb. 29, 2012, www.bloomberglaw.com/document/X7TJ98O. Although *Concepcion* arose from a state law dispute, its holding was about the purposes of the FAA. Those purposes must be harmonized with other federal statutes.

89. See *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (“[The FAA] requires courts to enforce agreements to arbitrate according to their terms . . . even when the claims at issue are federal statutory claims, unless the

Similarly, Congress could override the FAA by clearly requiring that class proceedings to enforce particular statutory rights be unwaivable or that arbitration agreements could not waive class proceedings for particular claims. In such a hypothetical case, the other federal statute would trump the FAA and an arbitration agreement purporting to allow what Congress prohibited would not be unenforceable, notwithstanding *Concepcion*.

In *CompuCredit Corp. v. Greenwood*, the Court appeared to apply a clear statement rule for interpreting whether Congress had overridden the FAA.⁹⁰ Rejecting the contention that Congress meant to prohibit arbitration of Credit Report Organizations Act (CROA) claims, the Court argued that, had Congress meant to do so, “it would have done so in a manner less obtuse than what [plaintiffs] suggest.”⁹¹ Furthermore, when Congress “has restricted the use of arbitration in other contexts, it has done so with a clarity that far exceeds the claimed indications in the CROA.”⁹²

Although Congress can condition the enforceability of arbitration agreements on the availability of class actions, *CompuCredit* suggests that Congress would need to do so clearly.

FAA’s mandate has been ‘overridden by a contrary congressional command.’” (quoting *Shearson/American Express v. McMahon*, 482 U.S. 220, 226 (1987) (internal citation omitted)); see also, e.g., 15 U.S.C. § 1639c(e)(1) (“No residential mortgage loan . . . under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration . . .”).

90. See *CompuCredit*, 132 S. Ct. at 669, 672–73 (holding that the Credit Repair Organizations Act (CROA) was “silent on whether claims under the Act can proceed in an arbitral forum” even though the Act required disclosure of a “right to sue” and voided “[a]ny waiver by any consumer of any protection provided by or any right of the consumer under this subchapter”).

91. *Id.* at 672.

92. *Id.* (citing 7 U.S.C. § 26(n)(2) (2006 ed., Supp. IV) (“No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.”); 15 U.S.C. § 1226(a)(2) (2006 ed.) (“Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy.”)).

B. *When are Class Proceedings Required by Other Federal Statutes?*

1. *Class Proceedings Required by Courts: Chen-Oster II*

In *Chen-Oster v. Goldman, Sachs & Co. II*, one of the first opinions to apply *Concepcion*, the district court concluded that it would not reconsider its earlier ruling that an arbitration agreement with a class action waiver was unenforceable in the context of Title VII pattern and practice discrimination.⁹³ *Concepcion* did not control the case, the court held, because it concerned federal preemption of state law, not an arbitration agreement that infringed on the “rights created by a competing federal statute.”⁹⁴ The arbitration agreement at issue would have required the plaintiff to individually arbitrate her pattern and practice discrimination suit, but “the substantive law of Title VII as applied by the federal courts prohibits individuals from bringing pattern or practice claims”⁹⁵ Under *Mitsubishi*, the court reasoned, such an arbitration agreement could not be enforced.⁹⁶

Chen-Oster seems unlikely to be upheld on appeal and demonstrates how slippery vindication analysis can be. To begin with, “Title VII initially envisioned that pattern or practice claims would be made by the government;” the private right to bring pattern or practice claims was “granted” by courts.⁹⁷ Whether the Court was right to find an implied private right of action for pattern and practice discrimination is beyond the scope of this Note and ultimately irrelevant. It would be anomalous for the FAA’s mandate to dissolve, not before a clear statement of Congress, but before an implication.

Furthermore, the district court acknowledged that the rule preventing individuals from bringing pattern or practice claims was not mandated by the Supreme Court nor the Second Circuit Court of Appeals, but was merely the “consensus” within the Southern District of New York.⁹⁸ Courts must harmonize

93. No. 10 Civ 6950 (LBS) (UCF), 2011 WL 2671813, at *1 (S.D.N.Y. July 7, 2011).

94. *Id.* at *3.

95. *Id.*

96. *Id.* at *4

97. *Chen-Oster v. Goldman, Sachs & Co. I*, 785 F. Supp. 2d 394, 408 (S.D.N.Y. 2011).

98. *Id.*; see also *Garrett v. Mazza*, No. 97 Civ. 9148, 2010 WL 653489, at *11 n.8 (S.D.N.Y. Feb. 22, 2010) (“[N]either the Supreme Court nor the Second Circuit

federal statutes and should not be quick to undermine the purposes of the FAA. When the conflict is not between a clear statement of Congress in one statute and FAA's mandate, but between a judge-made rule for enforcing implied statutory rights, the FAA should trump.

2. *Class Proceedings as Concerted Action:
National Labor Relations Act*

The National Labor Relations Board recently ruled that an arbitration agreement purporting to waive class action proceedings could not be enforced because it violated the employees' statutory right to engage in concerted action.⁹⁹ The employees, according to the Board, had a substantive right under Section 7 of the National Labor Relations Act (NLRA) to bring class proceeding, either in litigation or arbitration, against their employer.¹⁰⁰ Their employer "interfere[d] with" their rights by requiring them to sign, as a condition of employment, a binding, class-waiving arbitration agreement.¹⁰¹ Therefore, the Board refused to enforce the arbitration agreement, notwithstanding *Concepcion*, because it would prevent the employees from effectively vindicating their statutory rights.¹⁰²

Whether the Board properly interpreted the NLRA is far beyond the scope of this Note. Assuming, *arguendo*, that class proceedings are protected "concerted action" within the scope of the statute, it is not clear that the Board properly harmonized the NLRA with the FAA in light of *Concepcion*.

First, the Board argued that its decision interpreting the NLRA did not conflict with the purpose of the FAA—to place arbitration agreements on equal footing with any other con-

ha[s] specifically addressed the question of whether an individual plaintiff can maintain a private, non-class action pattern or practice claim, [but] district courts within [the Second Circuit] have suggested that they cannot.").

99. See *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, 2012 WL 36274 (Jan. 3, 2012). To be clear, although the employees' claims arose under the Fair Labor Standards Act (FLSA), the board did not question "whether employees can effectively vindicate their rights under the FLSA in arbitration despite a prohibition against class or collective proceedings . . ." *Id.* at *12 & n.23.

100. See *id.* at *2–3.

101. See *id.* at *5–7. This was so even though the employees could "still discuss their claims with one another, pool their resources to hire a lawyer, seek advice and litigation support from a union, solicit support from other employees, and file similar or coordinated individual claims." *Id.* at *8.

102. See *id.* *11.

tract. The class waiver provision, said the Board, “would equally violate the NLRA if it said nothing about arbitration, but merely required employees, as a condition of employment, to agree to pursue claims in court against [their employer] solely on an individual basis.”¹⁰³ The *Concepcions*, though, made the same argument. California law “prohibits waivers of class litigation” just as it prohibited some waivers of class arbitration.¹⁰⁴ Superficial equality of treatment between arbitration agreements and other contracts was not enough to save the *Discover Bank* rule, which required complex procedures inconsistent with the purposes of the FAA.¹⁰⁵ The Board’s formally equal treatment of class waivers in litigation and arbitration similarly conflicts with the purposes of the FAA. That is not to say, of course, that the FAA necessarily trumps to NLRA.

Second, the Board argued that the FAA does not require courts to enforce arbitration agreements that compel the signatory to forgo substantive rights. Since the NLRA provides a substantive right to bring class proceedings, the FAA and the NLRA do not conflict.¹⁰⁶ The rights addressed in cases like *Mitsubishi* (statutory treble damage)¹⁰⁷ and *Booker* (statutory punitive damages)¹⁰⁸ were substantive remedies. Nothing in the FAA addresses particular remedies. A right to class proceedings, however, undercuts the FAA’s promotion of streamlined procedures. Calling it a substantive right does not necessarily remove the conflict between the FAA and the NLRA.

Third, the Board balanced the FAA’s “interest in favor of enforcing” the arbitration agreement against the NLRA’s “public policy against enforcement” and concluded that the NLRA trumped.¹⁰⁹ The Board recognized that one purpose of the FAA was to streamline proceedings and that switching from “bilateral to class arbitration” would sacrifice “the principal advantage of arbitration—its informality.”¹¹⁰ That consideration

103. *Id.*

104. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746–47 (2011).

105. See *id.* at 1748.

106. See *Horton*, 2012 WL 36274, at *12.

107. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634–35 (1985).

108. *Booker v. Robert Half Int’l, Inc.*, 413 F.3d 77, 79 (D.C. Cir. 2005).

109. See *Horton*, 2012 WL 36274, at *14–15.

110. See *id.* at *15 (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011)).

weighed less heavily in the employment context, where the “average number of employees employed by a single employer . . . is 20,” than in *Concepcion*, where contracts “might cover ‘tens of thousands of potential claimants.’”¹¹¹

Although the smaller size of the average employment dispute might render class proceedings closer to bilateral proceedings, large disputes would present the same difficulties. Also, the Court objected not only to the cost, speed, and procedural problems inherent in class arbitration, but also to requiring procedural formality and to the increased risk born by defendants without the possibility of judicial review.¹¹² It is not clear that the Board gave sufficient weight to those interests.

Finally, the Board concluded that even if the NLRA and FAA conflicted, the FAA would most likely have to yield under the terms of the Norris-LaGuardia Act.¹¹³ That Act, as interpreted by the Board, provided that “a private agreement that seeks to prohibit a lawful means [of] aiding any person participating or interested in a lawsuit” in the labor context “is unenforceable, as contrary to the public policy protecting employees’ concerted activities for . . . mutual aid and protection.”¹¹⁴ Interpreting that language to conflict with the FAA seems inconsistent with the Court’s clear statement approach in *CompuCredit*.¹¹⁵

The Board’s approach would sharply limit *Concepcion*’s reach in the employment context. Its inconsistencies with *Concepcion* make it unlikely to be left unchanged by the courts.

C. *Proof that Class Waiver Would Preclude Claim from Going Forward*

The cases discussed thus far have not focused on when a class waiver would make individual arbitration “prohibitively expensive” such that a plaintiff’s statutory rights could not be vindicated. Recently, in an antitrust case, the Second Circuit held that a class waiver in an arbitration agreement was unenforceable where the plaintiffs presented un rebutted proof “that the only economically feasible means for plaintiffs enforcing

111. *See id.* (quoting *Concepcion*, 131 S. Ct. at 1752).

112. *See Concepcion*, 131 S. Ct. at 1751–52.

113. *See Horton*, 2012 WL 36274, at *16.

114. *See id.* (internal quotation marks omitted) (alteration in original).

115. *See supra* Part I.A.

their statutory rights is via a class action.”¹¹⁶ The plaintiffs thus met their burden to prove, under *Green Tree*, that arbitrating without class aggregation would be prohibitively expensive.¹¹⁷

The central question in the case was whether class proceedings were necessary to bring an antitrust action for a small claim in a complicated case. Even though the Clayton Act provides for fee shifting and treble damages, the court concluded that class actions were necessary because the plaintiffs offered un rebutted evidence that the costs of bringing an antitrust action, which could reach millions of dollars for expert economic analysis, were too much for any individual plaintiff to bear.¹¹⁸ Without the lure of class action damages, the plaintiffs and their lawyers would not be willing to bring their antitrust claim against American Express.¹¹⁹ The court did not hold that class waivers in arbitration agreements, even in the antitrust context, were unenforceable *per se*, but rather “that each waiver must be considered on its own merits” to determine if it would make pursuing federal statutory claims prohibitively expensive.¹²⁰

As the Court held in *Mitsubishi*, antitrust claims are arbitrable, so long as the arbitrator can award the full statutory remedies—treble damages. The Second Circuit did not disagree. Nor did it hold that the Clayton Act requires class action proceedings. Instead, the Circuit held, under *Green Tree*, that plaintiffs could not be forced to individually arbitrate negative value claims for relief under federal statutes. It is not obvious that the Circuit’s interpretations of *Concepcion* and *Green Tree* are correct.¹²¹ Even if they are, the long running American Express litigation might turn out to be anomalous, limiting the reach of the court’s holding.

116. *Amex III*, 667 F.3d 204, 218 (2d Cir. 2012). The Second Circuit decided the case initially in 2009, see *In re American Express Merchants’ Litigation*, 554 F.3d 300 (2d Cir. 2009), but its decision was vacated and remanded for reconsideration in light of *Stolt-Nielson S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010). The Circuit reaffirmed its decision, see *In re American Express Merchants’ Litigation II*, 634 F.3d 187 (2d Cir. 2011), shortly before *Concepcion*. The third time made no difference for the court.

117. See *Amex III*, 667 F.3d at 217.

118. See *id.* at 217–18.

119. See *id.*

120. *Id.* at 219; cf. *supra* notes 27–35 and accompanying text.

121. See, e.g., *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 & n.3 (9th Cir. 2012) (“To the extent that the Second Circuit’s opinion is not distinguishable, we disagree with it . . .”).

The relationship between *Concepcion* and *Green Tree* is unclear. Neither the majority nor the dissent in *Concepcion* mentioned *Green Tree*, which is not surprising, given that *Concepcion* was not about federal statutory rights. Even so, Justice Breyer's dissent focused on the question of economic incentives. Even if the claimants were guaranteed to be made whole, few people would bother bringing claims for insignificant sums and no "rational lawyer" would represent them absent class proceedings.¹²² That policy rationale, replied the majority, could not undermine the FAA.¹²³

Also, *Green Tree* might not apply where the "prohibitively expensive" costs are imposed, not by arbitration-specific expenses, but by the claim itself.¹²⁴ The Court in *Green Tree* was specifically concerned with "arbitration costs and fees," not with attorney's fees or discovery expenses.¹²⁵ One district court, expressly disagreeing with the Second Circuit, argued that if *Green Tree* is to have "any continuing applicability, it must be confined to circumstances in which a plaintiff argues that costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent her from vindicating her claims."¹²⁶ The steep costs of economic experts in antitrust cases are imposed by the nature of the claim itself, not by arbitration. Nonetheless, antitrust laws are of "fundamental importance to American democratic capitalism . . ." ¹²⁷ The private treble-damages remedy "wielded by the private litigant is a chief tool in the antitrust enforcement scheme . . ." ¹²⁸ Although the FAA cannot be undermined by state policies, no matter how important,

122. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1760–61 (2011) (Breyer, J., dissenting).

123. See *id.* at 1753 (majority opinion). Of course, the majority's reply depends in large part on the Supremacy Clause. See U.S. CONST. art VI. State laws that are inconsistent with federal statutes are preempted, no matter how compelling the reason for the inconsistency. Nevertheless, "*Concepcion* is broadly written." *Coneff*, 673 F.3d at 1158. No court should lightly require procedures inconsistent with the FAA.

124. See *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1048–49 (N.D. Cal 2011); see also Pincus, *supra* note 88.

125. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 82 (2000).

126. *Kaltwasser*, 812 F. Supp. 2d at 1050. *Kaltwasser* concerned state law claims, not federal statutes. See *id.* at 1043.

127. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634–35 (1985).

128. *Id.* at 635.

significant federal policies, embodied in statutes, should be harmonized with the FAA.

Even if the Second Circuit's interpretation of *Green Tree* holds up, the specific facts of the litigation are unlikely to be repeated. First, the arbitration agreement at issue was a second generation agreement, which waived class proceedings without including alternative incentives. As Professor Nagareda points out, a well-drafted arbitration agreement that gives companies incentive to settle meritorious claims is not exculpatory.¹²⁹ Just as AT&T's agreement awarded attorney's fees to prevailing plaintiffs, future antitrust agreements could award expert fees to prevailing plaintiffs or to those who win more than the last settlement offer.

More importantly, it seems extremely unlikely that future defendants will fail to rebut or attempt to rebut evidence that class actions are the only economically feasible means of proceeding. At a minimum, this would entail providing evidence that competent experts cost far less than the plaintiffs assume. Additionally, defendants could illustrate other economically feasible means of proceeding. For example, defendants could show that similarly-situated plaintiffs could agree to split the costs of expert witnesses.¹³⁰ The burden of proof, of course, is on the plaintiffs. Therefore, even if *Green Tree* establishes an exception to *Concepcion*, its scope is likely to be narrow.

CONCLUSION

After *AT&T Mobility LLC v. Concepcion*, courts have used a relatively narrow Supreme Court doctrine, never fleshed out by the Court, to invalidate a wide range of arbitration agreements. The FAA was enacted to prevent precisely this judicial tendency. In *Concepcion's* wake, arbitration agreements should be invalidated, because they preclude claimants from vindicating their statutory rights, in only a few contexts. Arbitration is a matter of forum choice, not remedies. Provisions of arbitration agreements purporting to waive statutory remedies are invalid, whether the remedies are state or federal. Similarly, agreements mandating prohibitive, arbitration-specific costs

129. See Nagareda, *supra* note 13, at 1115–19.

130. See Pincus, *supra* note 88. It is important to note that, in the antitrust context, claimants are likely to be “organized businesses,” not individuals. *Id.*

cannot be enforced. But neither of those principles depends on whether the agreement waives class proceedings or not.

Arbitration agreements with class waivers should be struck where a federal statute specifically requires class proceedings. The only other context where class waivers might invalidate arbitration agreements is where the plaintiffs can prove that class proceedings are the only economically feasible means of vindicating federal rights. Even here, the FAA might require the agreements to be enforced, although it seems likely that third generation arbitration agreements will limit the reach of the doctrine.

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