

DIVIDE & CONQUER: HOW THE SUPREME COURT USED THE FEDERAL ARBITRATION ACT TO THREATEN STATUTORY RIGHTS AND THE NEED TO CODIFY THE EFFECTIVE VINDICATION RULE

*Robert Ward**

I.	INTRODUCTION.....	150
II.	BACKGROUND OVERVIEW	152
	A. Statutory Background.....	152
	B. Mitsubishi Motors and the Emergence of the Effective Vindication Rule	154
	C. Green Tree Financial Corp. v. Randolph: Clarifying the Burden of Proof for Invoking the Effective Vindication Rule	156
	D. Waxing and Waning of Class Action Waivers from Discover Bank v. Superior Court to AT&T Mobility LLC v. Concepcion and Stolt-Nielsen S.A. v. AnimalFeeds International Corp.	158
	E. American Express Co. v. Italian Colors Restaurant: A Chance for Clarity	161
III.	THE EFFECTIVE VINDICATION RULE NEEDS TO BE REVISITED, CLARIFIED, AND CODIFIED	165
	A. The Majority’s Approach to the Entirety of the Contract in the Context of the Effective Vindication Rule	165
	B. The Majority’s Approach to Ancillary Provisions in the Contract	170
	C. The Majority’s Application of Concepcion.....	171
	D. The Majority’s Interpretation of the Ability to Effectively Vindicate Federal Statutory Rights.....	175
	E. Revisiting, Clarifying, and Codifying the Effective Vindication Rule to Provide Guidance, Reel in Business Entities, and Bring Predictability to Courts’ Opinions	177
IV.	CONCLUSION	178

* J.D. Candidate 2015, Seton Hall University School of Law; B.A., Economics and Business Administration, McDaniel College, 2012. The author would like to thank Professor Adam Steinman for his guidance in writing this note and his family for their constant support.

I. INTRODUCTION

Section 2 of the Federal Arbitration Act (“FAA”) provides that arbitration agreements in maritime transactions or contracts evidencing transactions involving commerce are valid, irrevocable, and enforceable.¹ The text of the FAA, however, does not address the friction that arises when the FAA applies to binding arbitration agreements that affect federal statutory rights.² As a result of this tension, courts developed the effective vindication rule.³ Under this rule, courts inquire into whether the arbitration provision at issue leaves a party unable to effectively vindicate its federal statutory rights through arbitration.⁴ If so, courts will not enforce the arbitration provision.

Because class actions are more integral for modern aggregate party proceedings, since the amendments to the Federal Rules of Civil Procedure 23 (“FRCP 23”) in 1966, the FAA’s relationship with class actions is becoming increasingly relevant.⁵ The FAA’s text is silent, however, with regard to class actions.⁶ The Supreme Court’s 2013 decision in *American Express Company v. Italian Colors Restaurant* (“*Italian Colors*”)⁷ illustrates the need for courts to revisit and clarify the effective vindication rule to provide a more informative standard and process for evaluating arbitration agreements that prohibit aggregate

¹ 9 U.S.C. § 2 (2012); see 9 U.S.C. § 1 (2012) (defining “maritime transactions”). Additionally, similar provisions are prevalent in state arbitration codes. William M. Howard, Annotation, *The Validity of Arbitration Clause Precluding Class Actions*, 13 A.L.R. 6TH 145 (2014) (“A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

² 9 U.S.C. § 2.

³ The effective vindication rule is a more fact specific, modern approach to the previously applied doctrine of nonarbitrability, which rejected the use of pre-dispute arbitration agreements in causes of action under various federal laws including securities laws. See, e.g., *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (“[W]e decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid . . . an agreement for arbitration of issues arising under the [Securities] Act.”), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

⁴ See *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000).

⁵ FED. R. CIV. P. 23.

⁶ Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 774 (2012).

⁷ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

2015]

DIVIDE & CONQUER

151

party proceedings.⁸ As a result of these pre-dispute arbitration agreements becoming more prevalent in areas such as employment and commercial contracts, there is a need for further guidance regarding judicial evaluation of these agreements.⁹

The majority in *Italian Colors* failed to provide adequate guidance. First, the majority did not consider the entirety of the contract at issue and consequently blurred the meaning of the effective vindication rule.¹⁰ Second, because the majority did not address multiple ancillary provisions in the contract, commercial entities are left without guidance as to how courts will view them and whether courts will consistently enforce them.¹¹ Third, the majority mistakenly applied its own recent precedent.¹² Fourth, the majority mistakes the *right* to pursue claims with the *ability* to pursue claims, which will often have the same practical effect of parties foregoing a claim because it is prohibitively expensive.¹³ Through these errors, the possibility for abuse in adhesion contracts is seemingly limitless, as a multitude of potential claimants may be left without avenues to vindicate their rights, and commercial entities may effectively insulate themselves from liability through creatively constructed agreements.

Accordingly, the effective vindication rule must be revisited, clarified, and codified in the FAA to specify that the rule applies exclusively to the interaction between the FAA and federal statutory rights and that the totality of the parties' contract requires consideration when evaluating whether an arbitration agreement leaves claimants with no possible avenue to vindicate their rights. This entails: (1) providing that all potential costs associated with pursuing a claim may be considered; (2) emphasizing the cost-shifting nature and the ability of an aggrieved party to spread costs under the agreement; (3) prohibiting

⁸ *Id.*

⁹ See Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 458 (2011) (discussing data showing that businesses entities are increasing their use of arbitration agreements in both consumer and employment settings).

¹⁰ See *infra* Part III.A.

¹¹ See *infra* Part III.B.

¹² *Am. Express Co.*, 133 S. Ct. at 2304. Specifically, the majority mistook the principles developed in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). *Concepcion* is discussed in Part II.D.

¹³ See *Am. Express Co.*, 133 S. Ct. at 2318 (Kagan, J., dissenting) ("Our decision [*Green Tree*] made clear that a provision raising a plaintiff's costs could foreclose consideration of federal claims, and so run afoul of the effective-vindication rule.").

baldly exculpatory clauses and prohibitive fees; and (4) providing that an avenue for effective vindication is foreclosed when the provisions function to make pursuit of the claim reasonably certain to be either financially imprudent or expressly barred.¹⁴

Part II provides an overview of several developments and influential cases addressing and giving rise to the application of the effective vindication rule. Part III explains in further detail the reasons that the effective vindication rule must be revisited, clarified, and codified. Part IV concludes by suggesting a way in which the standard for the effective vindication rule should be codified in the text of the FAA.

II. BACKGROUND OVERVIEW

A. Statutory Background

Congress enacted the FAA in an effort to combat judicial hostility to arbitration.¹⁵ The regulatory framework for arbitration in the United States is set forth in the Federal Arbitration Act of 1925.¹⁶ The FAA provides, in part:

A written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.¹⁷

The first part of this rule represents the motive behind the enactment of the FAA—arbitration agreements are a matter of contract and a demonstration of the movement towards favoring freedom of contract in this realm.¹⁸ Although the FAA’s text provides that valid arbitration

¹⁴ Even the majority in *Italian Colors* would refuse to enforce a baldly exculpatory clause that “forbid[s] the assertion of certain statutory rights.” *Am. Express Co.*, 133 S. Ct. at 2310.

¹⁵ *Id.* at 2308–09 (citing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011)).

¹⁶ *Weston*, *supra* note 6, at 771 (citing 9 U.S.C. §§ 1–16 (2006)).

¹⁷ 9 U.S.C. § 2 (2012).

¹⁸ *See, e.g., Am. Express Co.*, 133 S. Ct. at 2309 (“[The FAA] reflects the overarching principle that arbitration is a matter of contract.”); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (stating that terms of arbitration agreements must be adhered to even when alleged violation of a federal statute is at issue, unless the FAA was “overridden by a contrary congressional command”); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (quoting 9 U.S.C. § 2) (“States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause ‘upon such grounds as exist at law or in equity for the revocation of any contract.’”); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (explaining that courts must “rigorously enforce” arbitration agreements pursuant to their terms); *Weston*, *supra* note 6, at

agreements ought to be enforced, it is silent with regard to a party's right to proceed in aggregate form.¹⁹ Because aggregate party proceedings, particularly in the realm of class arbitration, are becoming increasingly common, this issue is becoming increasingly relevant.²⁰

For decades, courts rescued federal statutory rights from the FAA.²¹ Courts took the approach known as the nonarbitrability doctrine, which was premised on the reasoning that Congress intended that such claims should not be addressed through arbitration that "cannot provide an adequate substitute for a judicial proceeding."²² However, as arbitration became more prevalent, this rigid approach was tested.²³ The Supreme Court eventually disposed of the doctrine of nonarbitrability in favor of the effective vindication rule.²⁴

The familiar contract law concept of unconscionability also plays a major role in binding arbitration provisions.²⁵ Consequently, a party could challenge an arbitration provision through the effective vindication rule or the unconscionability defense.²⁶ On the surface, such an approach makes intuitive sense because both doctrines are very similar and typically apply to one-sided arbitration provisions.²⁷ Specifically, the two approaches overlap because substantive unconscionability evaluates the fairness of a contractual provision.²⁸ Therefore, if a party successfully

772 (explaining that freedom of contract is a fundamental purpose of the FAA).

¹⁹ See 9 U.S.C. § 2.

²⁰ Cole, *supra* note 9, at 499–505.

²¹ See, e.g., *Wilko v. Swan*, 346 U.S. 427, 438 (1953) ("[W]e decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid . . . an agreement for arbitration of issues arising under the [Securities] Act."), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

²² *Byrd*, 470 U.S. at 223. For a brief historical overview of the development of the nonarbitrability doctrine and a related doctrine, the separability doctrine, see Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. & PUB. POL'Y 549, 552–54 (2008).

²³ See, e.g., *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000) ("[W]e have recognized that federal statutory claims can be appropriately resolved through arbitration . . .").

²⁴ See *id.* at 90.

²⁵ See, e.g., *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1092 (9th Cir. 2009) ("As we have repeatedly recognized, unconscionability is a generally applicable contract defense that may render an agreement to arbitrate unenforceable.").

²⁶ See *Kristian v. Comcast Corp.*, 446 F.3d 25, 63 (1st Cir. 2006) (explaining how both the effective vindication rule and the unconscionability defense can be applied to claims challenging one-sided arbitration provisions).

²⁷ *Id.* at 63 ("As a practical matter, there are striking similarities between the vindication of statutory rights analysis and the unconscionability analysis.").

²⁸ See *A&M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 122–23 (Cal. Ct. App. 1982).

demonstrates that a contractual provision denied it of its federal statutory rights, courts could deem that provision either unconscionable due to unfairness, invalid pursuant to the effective vindication rule, or both.²⁹

Although the effective vindication rule has taken the place of the stricter doctrine of nonarbitrability, the concern remains the same wherein parties do not find themselves precluded from pursuing federal statutory rights as a result of adhesion contracts.³⁰

B. *Mitsubishi Motors and the Emergence of the Effective Vindication Rule*

The emergence of the effective vindication rule is illustrated in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (“*Mitsubishi*”).³¹ The case arose after an automobile manufacturer brought suit against an automobile dealer for failing to pay for 966 ordered vehicles and various other breaches of the sales procedure agreement.³² The dealer counterclaimed for multiple statutory violations regarding unfair competition, including alleged violations of the Sherman Antitrust Act.³³

In concluding that claims under federal statutes, including the Sherman Antitrust Act, are generally subject to arbitration pursuant to a pre-dispute agreement, the Supreme Court warned that such claims might not always be properly sent to arbitration according to the pre-dispute agreements.³⁴ The Court emphasized the purpose of the FAA by explaining that courts must “shake off the old judicial hostility to

In *A&M Produce*, the court discussed California’s substantive unconscionability jurisprudence and explained that substantive unconscionability concerns the actual content of the contract at issue and a court may deem a contract unconscionable “if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner.” *Id.* For further discussion on unconscionability, see Craig Horowitz, *Reviving the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts*, 33 UCLA L. REV. 940, 946–51 (1986).

²⁹ See *Kristian*, 446 F.3d at 63–64 (finding several arbitration provisions prevented the vindication of plaintiffs’ federal statutory rights and discussing the two methods of analysis).

³⁰ See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (noting that when “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, [the court] would have little hesitation in condemning the agreement as against public policy”).

³¹ See generally *id.*

³² *Id.* at 616, 619–20.

³³ *Id.* at 619–20.

³⁴ *Id.* at 627. The Sherman Antitrust Act is found at 15 U.S.C. §§ 1–7 (2012).

arbitration,” but cautioned that this did not mean that parties are left without recourse for their statutory claims; rather, they are properly arbitrated as long as such claims can be adequately addressed.³⁵

The Court, by explaining that an arbitration agreement will be enforced “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum,” introduced the foundation of the effective vindication rule as a mechanism to ensure that statutory rights are not foreclosed through an arbitration agreement.³⁶ Furthermore, the Court opined that if an arbitration agreement effectively foreclosed “a party’s right to pursue statutory remedies,” it would be invalidated.³⁷ The Court then explained several common contract defenses to enforcing an arbitration agreement and concluded that the agreement ought to be set aside if the proceedings “in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court.”³⁸ The effective vindication rule, however, will only be applied in extreme circumstances when the agreement forecloses—as opposed to merely lessens or complicates—a party’s ability to pursue a federal statutory claim.³⁹

The Court explained that arbitration, in general, could serve as a legitimate substitute for judicial proceedings.⁴⁰ Although the Court demonstrated a trend towards accepting arbitration, it did not give organizations a license to override federal statutory rights through their

³⁵ *Id.* at 638 (quoting *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)). Specifically, the court explained that “a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” *Id.* at 628.

³⁶ *Mitsubishi Motors Corp.*, 473 U.S. at 637.

³⁷ *Id.* at 637 n.19 (“[I]n the event . . . 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.”) (internal citations omitted).

³⁸ *Id.* at 632–33 (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)) (alteration in original) (internal quotation marks omitted).

³⁹ *Id.* at 637 n.19.

⁴⁰ *Id.* at 628 (“By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”). The Court also noted the potential role of arbitration in international transactions. *Id.* at 629 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974)) (“[W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement . . .”).

arbitration contracts.⁴¹ The Court effectively reeled in the rigid nonarbitrability doctrine and replaced it with a more case-by-case, flexible approach to invalidate arbitration provisions as needed.⁴²

C. *Green Tree Financial Corp. v. Randolph: Clarifying the Burden of Proof for Invoking the Effective Vindication Rule*

The Supreme Court directly addressed the effective vindication rule in *Green Tree*.⁴³ Randolph, the plaintiffs, purchased a mobile home with the aid of financing through Green Tree.⁴⁴ Green Tree's contract with Randolph required that Randolph purchase Vendor's Single Interest insurance and mandated arbitration of all disputes arising out of the contract.⁴⁵ Although the loan contract between the two parties mandated arbitration, the agreement was silent as to arbitration costs and fees.⁴⁶

Randolph subsequently filed a class action against Green Tree pursuant to both the Truth in Lending Act, 15 U.S.C. § 1601 et seq., for failing to disclose the required insurance purchase as a finance charge, and the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f, for mandating that Randolph arbitrate her statutory causes of action.⁴⁷ Pursuant to the contract, Green Tree sought to compel arbitration, but Randolph argued that she did not possess the requisite finances to proceed in arbitration.⁴⁸ Specifically, Randolph alleged that “arbitration filing fees for claims below \$10,000 were generally \$500 and that the average arbitrator's fee per day is \$700.”⁴⁹ The District Court ordered arbitration pursuant to the contract, the Eleventh Circuit reversed, and the Supreme Court ultimately reversed the Circuit Court's ruling.⁵⁰

⁴¹ David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723, 734 (2012) (“Thus, although the Court paved the way for the arbitration of federal statutory claims, it declined to give companies carte blanche to rewrite the public laws through one-sided arbitration clauses.”).

⁴² *Mitsubishi Motors Corp.*, 473 U.S. at 637 n.19 (explaining that if an arbitration contract operated “as a prospective waiver of a party's right to pursue statutory remedies . . . we would have little hesitation in condemning the agreement as against public policy”).

⁴³ *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000).

⁴⁴ *Id.* at 82.

⁴⁵ *Id.* at 82–83. Vendor's Single Interest insurance “protects the vendor or lienholder against the costs of repossession in the event of default.” *Id.* at 82.

⁴⁶ *Id.* at 82–83.

⁴⁷ *Id.* at 83.

⁴⁸ *Green Tree Fin. Corp.*, 531 U.S. at 90 n.6.

⁴⁹ *Id.*

⁵⁰ *Id.* at 83–84.

The Supreme Court's reasoning hinged on the speculative nature of these allegedly prohibitive costs.⁵¹ Although the Court did not challenge the premise that high costs associated with an arbitration contract could provide the basis for invalidating the contract, the Court ultimately considered Randolph's allegation regarding her prospective costs as too speculative to warrant invocation of the effective vindication rule.⁵²

In reaching this conclusion, the Court clarified that the party arguing that the arbitration agreement as written is prohibitively expensive "bears the burden of showing the likelihood of incurring such costs."⁵³ However, the Court declined to precisely address the threshold level of that burden of proof, as the plaintiff in *Green Tree* presented only "speculative" costs.⁵⁴ Additionally, nothing in the Court's opinion indicates that such fees were in any way unique and therefore, the Court left open the possibility for various other costs to form the basis for finding a process prohibitively expensive.⁵⁵ Although dicta, if the Court had addressed this issue, the Court may have provided future guidance for similar issues and may have been influential in the *Italian Colors* decision.⁵⁶ Specifically, the *Green Tree* Court could have provided guidance for how courts

⁵¹ *Id.* at 91 ("The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.").

⁵² *Id.*

⁵³ *Id.* at 92 ("Similarly, we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. Randolph did not meet that burden.").

⁵⁴ *Green Tree Fin. Corp.*, 531 U.S. at 92 ("How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss; for in this case neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point.").

⁵⁵ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2318 (2013) (Kagan, J., dissenting) (explaining that "Randolph gave no hint of distinguishing among the different ways an arbitration agreement can make a claim too costly to bring" and that "[i]ts rationale applies whenever an agreement makes the vindication of federal claims impossibly expensive—whether by imposing fees or proscribing cost-sharing or adopting some other device").

⁵⁶ *See id.* (Kagan, J., dissenting) ("Our decision there made clear that a provision raising a plaintiff's costs could foreclose consideration of federal claims, and so run afoul of the effective-vindication rule. The expense at issue in *Randolph* came from a filing fee combined with a per-diem payment for the arbitrator. But nothing about those particular costs is distinctive; and indeed, a rule confined to them would be weirdly idiosyncratic. Not surprisingly, then, *Randolph* gave no hint of distinguishing among the different ways an arbitration agreement can make a claim too costly to bring. Its rationale applies whenever an agreement makes the vindication of federal claims impossibly expensive—whether by imposing fees or proscribing cost-sharing or adopting some other device.").

should “distinguish [] among the different ways an arbitration agreement can make a claim too costly to bring.”⁵⁷ Nonetheless, *Randolph* set forth the principle that the party seeking to set aside the agreement must present sufficiently certain evidence of such an effective prohibition.⁵⁸ Such a requirement should reduce the risk of frivolous claims and prevent increased costs for those entities seeking to avoid costly litigation through these agreements.

D. Waxing and Waning of Class Action Waivers from Discover Bank v. Superior Court to AT&T Mobility LLC v. Concepcion and Stolt-Nielsen S.A. v. AnimalFeeds International Corp.

In the years preceding *Italian Colors*, the Supreme Court halted a trend, largely spearheaded by California courts, disfavoring arbitration agreements containing class action waivers.⁵⁹ Nevertheless, the Supreme Court’s stance on the effective vindication rule remained murky before *Italian Colors* because the Supreme Court did not directly rely upon the effective vindication rule as applied to class action waivers with prohibitively expensive prospective costs.⁶⁰

In *Discover Bank v. Superior Court*,⁶¹ the California Supreme Court invalidated an arbitration agreement’s class action waiver for unconscionability.⁶² Specifically, this reasoning applied to claims of low value because such claims were only prudently pursued on a class action

⁵⁷ *Id.*

⁵⁸ *Green Tree Fin. Corp.*, 531 U.S. at 91 (explaining that to invalidate arbitration agreements based on the speculative risk of alleged costs “would undermine the ‘liberal federal policy favoring arbitration agreements’”) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

⁵⁹ Compare *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005) (invalidating a class action waiver provision in an arbitration agreement which made low value claims imprudent to pursue), with *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding that the FAA preempted the state case law rule derived from *Discover Bank* and compelling arbitration), and *Stolt-Nielsen S.A. v. AnimalFeeds Int’l. Corp.*, 559 U.S. 662 (2010) (holding that class wide arbitration was improper when the agreement at issue provided no guidance concerning the availability of class proceedings).

⁶⁰ The contract in *Stolt-Nielsen* did not provide for either the allowance or preclusion of class arbitration. *Stolt-Nielsen*, 559 U.S. at 684–85 (explaining there was no contractual basis for the party to submit to class arbitration). *Concepcion* was decided on the basis of preemption; specifically, that the rule derived from *Discover Bank* conflicted with the FAA. *Concepcion*, 131 S. Ct. at 1753 (“States cannot require a procedure that is inconsistent with the FAA.”).

⁶¹ 113 P.3d 1100 (Cal. 2005), abrogated by, *Concepcion*, 131 S. Ct. 1740.

⁶² *Id.* at 1110.

basis, if at all.⁶³ After *Discover Bank*, several other jurisdictions followed California's lead in this field of class action waivers applying to low value claims.⁶⁴

However, the Supreme Court halted this trend in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* and *AT&T Mobility LLC v. Concepcion*.⁶⁵ In *Stolt-Nielsen*, the Court held that class arbitration was not appropriate when the arbitration provision at issue was "silent" with regard to the availability of class arbitration.⁶⁶ The Court was wary of presuming mutual consent to class wide arbitration absent an explicit allowance for it.⁶⁷ Then, in *Concepcion*, the Court held that the FAA preempted the rule derived from *Discover Bank*.⁶⁸ Specifically, the rule derived from *Discover Bank* was deemed to be preempted by the FAA on the basis of implied conflict preemption, as the rule could potentially slow proceedings and the resolution of challenges.⁶⁹

In *Concepcion*, the Supreme Court held that the FAA preempted California's rule invalidating class action waivers as unconscionable.⁷⁰ Because the holding was premised on preemption, the effective vindication rule was inapplicable and therefore not addressed.⁷¹ As a

⁶³ *Id.* at 1107–08.

⁶⁴ *See, e.g.*, *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 978–79 n.1 (9th Cir. 2007) (citing ten California cases which also held various class arbitration waivers unconscionable).

⁶⁵ *See generally Concepcion*, 131 S. Ct. 1740; *Stolt-Nielsen S.A.*, 559 U.S. 662.

⁶⁶ *Stolt-Nielsen S.A.*, 559 U.S. at 684 (“[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.”).

⁶⁷ *Id.* at 685–86 (“[T]he relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties’ mutual consent to resolve disputes through class-wide arbitration.”).

⁶⁸ 131 S. Ct. at 1751 (“[C]lass arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.”).

⁶⁹ For a brief explanation of implied obstacle preemption, *see infra* note 160. The *Concepcion* Court explained that this could make “the process slower, more costly, and more likely to generate procedural morass than final judgment.” *Concepcion*, 131 S. Ct. at 1751. This was deemed to “interfere[] with fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA.” *Id.* at 1748.

⁷⁰ *See Weston, supra* note 6, at 769 (quoting *Concepcion*, 131 S. Ct. 1740) (“*Concepcion* Court stated that California’s judicial rule invalidating class action waivers as unconscionable ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [in the FAA].’ Therefore, according to the Court, the FAA preempted the California law.”). The rule that was preempted was derived from *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

⁷¹ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2319–20 (2013) (Kagan, J., dissenting) (“And just as this case is not about class actions, [*Concepcion*] was not—and could

result, the decision did little more than state an accepted rule that federal law preempts contrary state law under the Supremacy Clause.⁷²

Consequently, *Concepcion* provides little guidance as to the effective vindication rule's role between the FAA and federal statutory claims. Notably, Justice Antonin Scalia explained that even if class actions might be necessary for smaller claims, which entail a higher cost than the recovery is worth, a state cannot enact legislation contrary to the FAA.⁷³ The Court did not attempt to apply the effective vindication rule because this was a matter of state law preempted by the FAA, so the effective vindication rule, which applies when the claims are federal in nature, was inapplicable.⁷⁴

Justice Scalia explained the importance of the cost-shifting provisions that were available to induce litigation in the contract at issue.⁷⁵ The Court directly addressed the argument that aggregate proceedings were necessary to preserve the availability to pursue claims of low value.⁷⁶ Although the Court explained that proceedings pursuant to the cost-shifting mechanisms of the arbitration contract would be preferable to class action proceedings, it is important to note that the Court ultimately decided this issue on the fundamental doctrine of preemption.⁷⁷

not have been—about the effective-vindication rule. Here is a tip-off: [*Concepcion*] nowhere cited our effective-vindication precedents.”); see also *Concepcion*, 131 S. Ct. 1740.

⁷² *Id.* at 2320 (Kagan, J., dissenting) (“And if that is not enough, [*Concepcion*] involved a state law, and therefore could not possibly implicate the effective-vindication rule. When a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA’s purposes and objectives.”).

⁷³ *Concepcion*, 131 S. Ct. at 1753 (“States cannot require a procedure that is inconsistent with the FAA.”).

⁷⁴ In *American Express*, Justice Kagan explained that *Concepcion* “could not possibly implicate” the effective vindication rule because it involved a *state* law that was preempted by the FAA and rendered invalid through the Supremacy Clause. *Am. Express Co.*, 133 S. Ct. at 2320 (Kagan, J., dissenting). Justice Kagan further emphasized the distinction by explaining that the effective vindication rule is only applicable when it is alleged that the FAA conflicts with another *federal* law. *Id.* (emphasis added).

⁷⁵ See *id.* at 2320 (discussing the benefits of the contract’s cost-shifting provisions). Specifically, Justice Kagan emphasized that the complaint in *Concepcion* “was ‘most unlikely to go unresolved’ because AT&T’s agreement contained a host of features ensuring that ‘aggrieved customers who filed claims would be essentially guaranteed to be made whole.’” *Id.* (quoting *Concepcion*, 131 S. Ct. at 1753).

⁷⁶ See *Concepcion*, 131 S. Ct. at 1753 (rejecting the dissent’s argument that “class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system”).

⁷⁷ *Id.* (“But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”). For cost-sharing, see *id.* (“[T]he arbitration agreement provides that AT&T will pay claimants a minimum of \$7,500 and twice their attorney’s fees

At first glance, *Stolt-Nielsen* and *Concepcion* appear to severely diminish the availability of class actions.⁷⁸ However, the effective vindication rule balances the FAA with federal statutory rights and does not apply to these state law contract principles.⁷⁹ Therefore, *Stolt-Nielsen* and *Concepcion* left “considerable uncertainty surrounding the precise metes and bounds of the federal common law of arbitrability.”⁸⁰ As a result, *Italian Colors* provided an opportunity for the Supreme Court to resolve lingering uncertainties.

E. American Express Co. v. Italian Colors Restaurant: A Chance for Clarity

In *American Express Co. v. Italian Colors Restaurant*, the respondents were merchants who accepted American Express charge cards and credit cards.⁸¹ The agreement at issue was between the respondents, American Express, and a wholly owned subsidiary of American Express.⁸² The contract contained an arbitration provision, which foreclosed any availability of class proceedings.⁸³ The contract also contained a pre-dispute, binding arbitration clause.⁸⁴ This arbitration clause contained several restrictions that effectively foreclosed class proceedings, and consequently, any realistic possibility for the respondent to seek remedies for any alleged statutory violations.⁸⁵ The

if they obtain an arbitration award greater than AT&T’s last settlement offer.”). For preferring the agreement, *see id.* (“Moreover, the claim here was most unlikely to go unresolved The district court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be ‘essentially guarantee[d]’ to be made whole. Indeed, the district court concluded that the *Concepcions* were better off under their arbitration agreement with AT&T than they would have been as participants in a class action”) (citations omitted).

⁷⁸ *See generally* Ashby Jones, *After AT&T Ruling, Should We Say Goodbye to Consumer Class Actions?*, WALL ST. J. (Oct. 27, 2013, 8:49 PM), <http://blogs.wsj.com/law/2011/04/27/after-att-ruling-should-we-say-goodbye-to-consumer-class-actions/>.

⁷⁹ *See Concepcion*, 131 S. Ct. at 1750–51 (severing the claim of unconscionability from invocation of the effective vindication rule and explaining that the effective vindication rule is a matter of federal law).

⁸⁰ *D’Antuono v. Serv. Road Corp.*, 789 F. Supp. 2d 308, 331 (D. Conn. 2011).

⁸¹ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013).

⁸² *Id.*

⁸³ *Id.* (discussing the binding arbitration provision containing a clause that “[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis.”).

⁸⁴ *Id.* at 2313 (Kagan, J., dissenting).

⁸⁵ *Id.* (Kagan, J., dissenting) (“That term imposes a variety of procedural bars that would

binding arbitration and lack of cost-shifting provisions ensured that a party could not lessen the burden of pursuing a Sherman Antitrust Act claim because these costs greatly exceeded any possible recovery.⁸⁶

This created the possibility that an entity engaging in monopolistic behavior could encourage and strengthen such behavior by implementing a one-sided arbitration provision in its contracts with merchants and effectively insulating itself from the risk of any challenges.⁸⁷ Congress did not intend the FAA to permit corporations to disregard federal antitrust laws.⁸⁸

The respondents brought a class action alleging that American Express engaged in monopolistic practices by implementing a form contract that contained a tying arrangement in violation of the Sherman Antitrust Act.⁸⁹ Specifically, the respondents alleged that, through its monopoly power, American Express violated the Sherman Antitrust Act by compelling various merchants to accept American Express credit cards at interchange rates approximately thirty-percent greater than the rates for competing credit cards.⁹⁰

make pursuit of the antitrust claim a fool's errand.”).

⁸⁶ At the district court level, an economist provided a report that estimated the cost of the requisite expert analysis to support the antitrust claims would be at least several hundred thousand dollars and possibly over one million dollars but the maximum potential recovery for an individual party would be \$12,850 to \$38,549 when trebled. *Am. Express Co.*, 133 S. Ct. at 2308. For cost-shifting provisions, see Horton, *supra* note 41 (“One common problem is cost-splitting provisions, which usually require plaintiffs to pay half of the arbitral expenses.”).

⁸⁷ See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1761 (2011) (Breyer, J., dissenting) (explaining that *Discover Bank* recognized the “perfectly rational view” that “the terms of consumer contracts can be manipulated to insulate an agreement’s author from liability for its own frauds by ‘deliberately cheat[ing] large numbers of consumers out of individually small sums of money’”) (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005)). The logical result was illustrated by the Seventh Circuit explaining that aggregate proceedings must be exceedingly “unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all” because “[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30”). *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

⁸⁸ *Wilko v. Swan*, 346 U.S. 427, 432 (1953) (explaining that the reports of both Houses stressed that the purpose of the FAA is to “avoid[] the delay and expense of litigation”).

⁸⁹ The contract contained a binding arbitration provision for all disputes and provided that “[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis.” *Am. Express Co.*, 133 S. Ct. at 2308.

⁹⁰ *Id.* at 2308. The practical significance of this rate is that “[a] charge card requires its holder to pay the full outstanding balance at the end of a billing cycle; a credit card requires payment of only a portion, with the balance subject to interest.” *Id.* at n. 1.

American Express responded by moving for enforcement of the arbitration agreement compelling individual arbitration.⁹¹ The FAA was the premise of American Express' motion to compel individual arbitration.⁹² However, the respondents presented evidence of an economist's estimate that the necessary costs associated with proving the antitrust claims could exceed \$1,000,000, while the maximum recovery would be \$12,850, or \$38,549 if trebled.⁹³

The District Court granted the respondents' motion to dismiss the claims.⁹⁴ On appeal, the Court of Appeals concluded that the waiver was unenforceable, opining that the merchants successfully demonstrated that the class action waiver resulted in individual arbitration that would yield prohibitive costs.⁹⁵ The Supreme Court then granted certiorari, vacated the judgment, and remanded for further proceedings after *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*⁹⁶ On remand, the Court of Appeals maintained its reversal.⁹⁷ The Court of Appeals then, *sua sponte*, reconsidered the decision after *Concepcion* and reversed again after deeming *Concepcion* inapplicable because preemption was a separate issue.⁹⁸ The Court of Appeals denied rehearing *en banc*.⁹⁹ Once again, the Supreme Court then granted *certiorari*.¹⁰⁰

In its opinion, the majority stressed that arbitration is a matter of contract.¹⁰¹ Pursuant to this principle, the majority explained that the

⁹¹ *Id.* at 2308.

⁹² *Id.*

⁹³ Specifically, the economist estimated that the cost of the necessary expert report(s) would be "at least several hundred thousand dollars, and might exceed \$1 million," while the maximum recovery for an individual plaintiff would be \$12,850, or \$38,549 when trebled. *Id.* Treble damages are a form of multiplied-damages remedy that can facilitate antitrust litigation. See 15 U.S.C. § 15 (2012).

⁹⁴ *In re Am. Express Merchants' Litig.*, 2006 WL 662341, *10 (S.D.N.Y. Mar. 16, 2006).

⁹⁵ *In re Am. Express Merchants' Litig.*, 554 F.3d 300, 315–16 (2d Cir. 2009).

⁹⁶ *Am. Exp. Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010) (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (holding it improper to compel a party to submit to class arbitration when there was no agreement to do so)).

⁹⁷ *In re Am. Express Merchants' Litig.*, 634 F.3d 187, 200 (2d Cir. 2011).

⁹⁸ *Id.* at 213. It is important to note this distinction between the determinative issue of preemption in *Concepcion* and the issue of effective vindication presented in *Italian Colors*, where the tension was between federal statutory rights and the FAA.

⁹⁹ *In re Am. Express Merchants' Litig.*, 681 F.3d 139 (2d Cir. 2012).

¹⁰⁰ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012).

¹⁰¹ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) ("[The FAA's] text reflects the overarching principle that arbitration is a matter of contract.") (citing *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010)).

terms of arbitration agreements ought to be “rigorously enforce[d].”¹⁰² The majority further explained that antitrust laws do not “evinc[e] an intention to preclude a waiver” of class procedures.¹⁰³ The Court stated that arbitration agreements must be strictly enforced, even in claims regarding an alleged violation of federal statute, “unless the FAA’s mandate has been ‘overridden by a contrary congressional command.’”¹⁰⁴

The Court opined that “antitrust laws do not guarantee an affordable procedural path to the vindication of every claim” and cited treble damages as an example of Congress’s willingness to facilitate the litigation of antitrust claims.¹⁰⁵ Furthermore, the Court explained that FRCP 23 does not guarantee a party the right to class proceedings in order to pursue statutory rights.¹⁰⁶ Consequently, the Court relied on this reasoning to conclude that there was no “contrary congressional command” to override the FAA’s mandate and invalidate the provision.¹⁰⁷

Next, the Court turned to the effective vindication rule.¹⁰⁸ The majority took a narrow approach to the meaning of effective vindication and equated it to the right or ability to merely gain access to a forum for litigation, as opposed to the expenses of actually proving the necessary elements of the claim.¹⁰⁹ Specifically, the majority deemed “the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.”¹¹⁰ Additionally, the majority contended that the class action waiver was analogous to the limitations on parties before the advent of class actions

¹⁰² *Id.* at 2309 (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

¹⁰³ *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

¹⁰⁴ *Id.* (quoting *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668–69 (2012)).

¹⁰⁵ *Id.* However, by considering the sheer figures at stake, trebled damages are drastically inadequate in this case.

¹⁰⁶ *Id.* at 2309–10. The Court specifically explained that FRCP has rigorous requirements which exclude most claims and that such a guarantee overriding private arbitration agreements would be an “abridg[ment] or modif[ication] of a substantive right.” *Id.* (quoting 28 U.S.C. § 2072(b) (2012)).

¹⁰⁷ *Am. Express Co.*, 133 S. Ct. at 2309.

¹⁰⁸ *Id.* at 2310 (“Respondents invoke a judge-made exception to the FAA which, they say, serves to harmonize competing federal policies by allowing courts to invalidate agreements that prevent the ‘effective vindication’ of a federal statutory right.”).

¹⁰⁹ *Id.* at 2310–11 (citing *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000) (explaining that such a waiver would “cover a provision . . . forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.”).

¹¹⁰ *Id.* at 2311.

2015]

DIVIDE & CONQUER

165

in federal proceedings in 1938.¹¹¹

Lastly, the majority opined that *Concepcion* “all but resolve[d] th[e] case.”¹¹² The majority explained that, in *Concepcion*, the Court “specifically rejected the argument that class arbitration was necessary to prosecute claims ‘that might otherwise slip through the legal system.’”¹¹³ In a footnote, the majority explained that *Concepcion* was concerned with the effective vindication rule.¹¹⁴

III. THE EFFECTIVE VINDICATION RULE NEEDS TO BE REVISITED, CLARIFIED, AND CODIFIED

A. *The Majority’s Approach to the Entirety of the Contract in the Context of the Effective Vindication Rule*

A binding arbitration agreement prohibiting aggregate party proceedings may be valid. That is, the effective vindication rule may not operate to invalidate a pre-dispute arbitration agreement. Precedent has never explicitly limited the rule’s applicability to the scope of class actions alone. Rather, the effective vindication rule should be applied with regard to “prohibitive costs” of all forms.

The contract at issue in *Italian Colors* not only prohibited class actions, but also provided no other means by which any prohibitive costs could be shifted or allocated, such that a party might have a chance of pursuing its claims.¹¹⁵ Specifically, the contract contained a confidentiality provision that prevented Italian Colors from any out-of-court arrangement with other similarly situated merchants to collectively produce a common expert report.¹¹⁶ There is no rational reason behind

¹¹¹ *Id.* (citing FED. R. CIV. P. 23) (“[T]he individual suit that was considered adequate to assure ‘effective vindication’ of a federal right before adoption of class-action procedures did not suddenly become ‘ineffective vindication’ upon their adoption.”).

¹¹² *Am. Express Co.*, 133 S. Ct. at 2312 (citing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011)).

¹¹³ *Id.* (citing *Concepcion*, 131 S. Ct. at 1751).

¹¹⁴ The Court explained that *Concepcion* established that states cannot enforce rules inconsistent with the FAA, even for unrelated purposes. *Id.* at 2319 n. 5 (Kagan, J., dissenting) (citing *Concepcion*, 131 S. Ct. at 1752–53).

¹¹⁵ *Id.* at 2316 (Kagan, J., dissenting) (“As the Court makes clear, the contract expressly prohibits class arbitration. But that is only part of the problem.”). The provisions of the contract effectively ensured that no one rational party would bring suit alone. That is, because of the lack of cost-sharing options, a party would face the Hobson’s choice of either: (1) forgoing their statutory rights; or (2) incurring expenses far greater than any possible recovery could yield. Specifically, the contract prohibited any joinder of claims or parties. *Id.*

¹¹⁶ *Id.* (Kagan, J., dissenting) (“[The contract’s] confidentiality provision prevents Italian Colors from informally arranging with other merchants to produce a common expert report.”).

this provision, other than that it was designed primarily to keep costs high so individual parties would face prohibitively expensive litigation.¹¹⁷ Furthermore, the contract did not contain any provisions that might mitigate the need for such an economic analysis or expert report.¹¹⁸

Ancillary, cost-shifting, or cost-splitting provisions are not an anomaly.¹¹⁹ Federal courts have already faced issues concerning cost-splitting provisions. Notably, some of these circuits held that the lack of these provisions render an agreement invalid if they operate to make arbitration prohibitively expensive for an individual party.¹²⁰ Other circuits approached these provisions by evaluating their effect on a larger scale to other similar parties.¹²¹ Remedial cost-shifting provisions are also not new to arbitration clauses. Courts are not homogenous in their approach to provisions that preclude a fee-shifting mechanism for fees and expenses.¹²² The same is true for provisions that require an unsuccessful party to reimburse the expenses of the opposing party, though challenges to such provisions have proven less successful.¹²³

After *Randolph*, courts struggled to adopt a uniform and predictable approach to cost-shifting provisions. One approach was adopted by the Fourth Circuit in *Bradford*.¹²⁴ The Fourth Circuit interpreted *Randolph* as

¹¹⁷ *Id.* at 2315 (Kagan, J., dissenting) (“With the [effective vindication rule], companies have good reason to adopt arbitral procedures that facilitate efficient and accurate handling of complaints. Without it, companies have every incentive to draft their agreements to extract backdoor waivers of statutory rights, making arbitration unavailable or pointless.”).

¹¹⁸ *Am. Express Co.*, 133 S. Ct. at 2316 (Kagan, J., dissenting).

¹¹⁹ *See Horton*, *supra* note 41 (briefly discussing the differing approaches various circuits have taken when evaluating these cost provisions).

¹²⁰ *See, e.g., Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 555–57 (4th Cir. 2001).

¹²¹ *See, e.g., Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 663 (6th Cir. 2003).

¹²² *Compare Spinetti v. Serv. Corp. Int’l*, 324 F.3d 212, 216 (3d Cir. 2003) (striking down pay-your-way provision as contrary to fee-shifting options under Title VII and the ADEA), *with Metro East Ctr. for Conditioning & Health v. Qwest Comm. Int’l, Inc.*, 294 F.3d 924, 928 (7th Cir. 2002) (allowing arbitration provision to preclude fee-shifting system under a federal telecommunications statute).

¹²³ *See, e.g., Musnick v. King Motor Co.*, 325 F.3d 1255, 1260 (11th Cir. 2003) (explaining that because it was not necessarily proven that the party would ultimately be unsuccessful on the merits, this loss was deemed too speculative). However, note that the prospect of incurring such expenses without reimbursement may have a “chilling effect” on potential challenges. *See EEOC v. Rappaport, Hertz, Cherson & Rosenthal, P.C.*, 448 F. Supp. 2d 458, 463 (E.D.N.Y. 2006) (citing *Morrison*, 317 F.3d at 669) (analyzing whether “the cost of arbitration may have a ‘chilling effect’ on similarly situated litigants, as opposed to the particular effect on the plaintiff in the case”).

¹²⁴ *Bradford*, 238 F.3d 549.

2015]

DIVIDE & CONQUER

167

requiring “some showing of individualized prohibitive expense . . . to invalidate an arbitration agreement.”¹²⁵ Pursuant to this interpretation, the court implemented a fact-sensitive, analytical approach to assess the challenging party’s financial capacity.¹²⁶ This assessment was then used to determine whether binding arbitration would effectively prevent the party from bringing a claim.¹²⁷ Other circuits have adopted this approach but some have interpreted this threshold of hardship to be exceedingly high.¹²⁸

In contrast to the individualized approach in *Bradford*, some courts have applied a more generalized framework. The Sixth Circuit rejected the *Bradford* approach as only sufficient for an individual party.¹²⁹ This approach advocates looking beyond an individual party and evaluating “whether other similarly situated individuals would be deterred . . . as well.”¹³⁰ The Sixth Circuit’s conclusion illustrates this more general framework. Despite the fact that the challenging party was employed, the court invalidated a cost-splitting provision providing that the challenging party would pay over \$1,000 before proceedings.¹³¹ Other courts have greeted this framework with mixed opinions.¹³²

However, the majority in *American Express* ignored these issues and limited the scope of its analysis to include only the distinction between aggregate and bilateral proceedings. Importantly, the scope of the analysis should include the totality of the contract and relevant circumstances to determine whether there are prohibitively expensive

¹²⁵ *Id.* at 557.

¹²⁶ *Id.* Examples of this could include income, net worth, debt, etc. *Id.*

¹²⁷ *Id.* at 558. This approach looks to the surplus costs that arbitration would yield for that party greater than prospective costs of litigation instead. *Id.*

¹²⁸ See *Koridze v. Fannie Mae Corp.*, 593 F. Supp. 2d 863, 869 (E.D. Va. 2009) (concluding that even though challenging party had minimal financial resources and was unemployed, plaintiff’s educational and employment background suggested that she is only *presently* unable to pursue claim and *could* in future).

¹²⁹ *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 661 (6th Cir. 2003).

¹³⁰ *Id.*

¹³¹ *Id.* at 676–78.

¹³² The Second Circuit provides a microcosm for this issue. See, e.g., *EEOC v. Rappaport, Hertz, Cherson & Rosenthal, P.C.*, 448 F. Supp. 2d 458, 463 (E.D.N.Y. 2006) (citing *Morrison*, 317 F.3d at 669) (analyzing whether “the cost of arbitration may have a ‘chilling effect’ on similarly situated litigants, as opposed to the particular effect on the plaintiff in the case”); *Ball v. SFX Broad., Inc.*, 165 F. Supp. 2d 230, 239–40 (N.D.N.Y. 2001) (analyzing not whether a party can afford the arbitral costs, but whether the party will likely bear the burden of such costs). *But see In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 411 (S.D.N.Y. 2003) (applying the *Bradford* approach).

costs that necessitate implication of the effective vindication rule—and not simply minimize the analysis to the narrow issue of class arbitration versus bilateral arbitration.¹³³ Furthermore, the contract does not contain any cost-shifting provisions that would provide for costs to be shifted, even partially, to American Express in the event that Italian Colors’ claim was successful.¹³⁴

This all effectively ensures that, a party would not only need to undertake such an expensive study, but that a party would also be stuck with the bill for such a necessary study regardless of the outcome. That is, even if Italian Colors’ claim was successful and the Court held that American Express had indeed violated the Sherman Act, Italian Colors would still be left holding the bill with drastically little monetary recovery from the ruling.¹³⁵ Indeed, even after a judgment for Italian Colors, the company would likely have lost money because the litigation expenses would outweigh the damages awarded.¹³⁶

The majority in *American Express* did not thoroughly address the notion that the contract not only prohibited class arbitration, but also eliminated any possibility of “sharing, shifting, or shrinking necessary costs.”¹³⁷ Instead, the majority acknowledged the issue of cost-sharing provisions in a footnote, explaining that the “[p]etitioners denied that, and that is not what the Court of Appeals decision under review here held. It held that, because other forms of cost-sharing were not economically feasible (‘the *only economically feasible* means for . . . enforcing [respondents’] statutory rights is *via a class action*’), the class-action waiver was unenforceable.”¹³⁸ Dissenting, Justice Elena Kagan disputed that the class action waiver itself was all that needed to be considered.¹³⁹

¹³³ See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2318–19 (2013) (Kagan, J., dissenting) (explaining how a pre-dispute arbitration clause prohibiting class arbitration may still be valid if there are other avenues to overcome costs).

¹³⁴ *Id.* at 2316 (Kagan, J., dissenting).

¹³⁵ *Id.* (Kagan, J., dissenting) (“Amex has put Italian Colors to this choice: Spend way, way, way more money than your claim is worth, or relinquish your Sherman Act rights.”).

¹³⁶ The estimated cost of the necessary expert report(s) would be “at least several hundred thousand dollars, and might exceed \$1 million,” while the maximum recovery for an individual plaintiff would be \$12,850, or \$38,549 when trebled. *Id.* at 2308.

¹³⁷ *Id.* at 2308–12.

¹³⁸ *Id.* at 2311 n.4 (quoting *In re Am. Express Merchants’ Litig.*, 667 F.3d 204, 218 (2d Cir. 2012)).

¹³⁹ *Am. Express Co.*, 133 S. Ct. at 2318 (Kagan, J., dissenting) (“Our decision [in *Green Tree*] made clear that a provision raising a plaintiff’s costs could foreclose consideration of federal claims, and so run afoul of the effective-vindication rule.”).

Justice Kagan asserted that *Randolph* considered the entire scope of the contract including cost-sharing provisions, therefore the majority's analysis was too narrow.¹⁴⁰ Consequently, because the majority did not rely on cost-sharing provisions in the decision, the implications of such provisions remains unclear.

The key is cost effectiveness in the aggregate, and it is not simply one aspect of the agreement that should invoke the effective vindication rule or present an issue. Rather, it is for a court to decide whether the totality of the circumstances which—taken together—result in pursuing a claim “prohibitively expensive.”¹⁴¹ The *American Express* majority applied a very narrow focus to the issue, essentially including only the prohibition on class proceedings in the contract.¹⁴² However, the effective vindication rule's relationship to the FAA to ensure an equitable result should apply to the entirety of the contract, no matter how it manages to foreclose the possibility of pursuing meritorious federal claims.¹⁴³ The majority honed in on the class action waiver as the sole issue and made several legitimate and persuasive points, assuming it was the only aspect of this contract.¹⁴⁴

The Court contended that the class action waiver only limits the arbitration to two parties and therefore does not take away from a party's right to pursue its federal claims any more than federal law prior to the adoption of the class action process.¹⁴⁵ However, the landscape of litigation has certainly changed since 1938, and class actions are now

¹⁴⁰ *Id.* (“The expense at issue in *Randolph* came from a filing fee combined with a per-diem payment for the arbitrator. But nothing about those particular costs is distinctive; and indeed, a rule confined to them would be weirdly idiosyncratic.”).

¹⁴¹ For a sampling of possible cost-sharing mechanisms, *see id.* at 2318–19 (Kagan, J., dissenting).

¹⁴² *See id.* at 2319 (Kagan, J., dissenting) (explaining how the majority took a narrow approach and did not consider how the entire contract operates).

¹⁴³ *Id.* at 2313 (Kagan, J., dissenting) (“[The majority] concocts a special exemption for class-arbitration waivers—ignoring that this case concerns much more than that. Throughout, the majority disregards our decisions’ central tenet: An arbitration clause may not thwart federal law, irrespective of exactly how it does so.”).

¹⁴⁴ *Id.* at 2318–19 (Kagan, J., dissenting) (discussing how the majority limits their analysis to the waiver instead of evaluating the entire effect of the contract).

¹⁴⁵ *Am. Express Co.*, 133 S. Ct. at 2311 (“The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties’ right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938. Or, to put it differently, the individual suit that was considered adequate to assure ‘effective vindication’ of a federal right before adoption of class-action procedures did not suddenly become ‘ineffective vindication’ upon their adoption.”).

more commonplace. Therefore, the meaning of “effective vindication” should not apply so narrowly, such that it only addresses what was considered “effective” at the time of the FAA’s enactment. The benefit of certainty derived from a rigid rule allowing such an approach may not outweigh the harm done to those parties without any prudent means necessary to pursue their claims. A court’s analysis should consider the totality of the circumstances and should not be limited to what may have been “effective” decades ago.¹⁴⁶ The majority gave this issue little consideration through a footnote.¹⁴⁷

B. The Majority’s Approach to Ancillary Provisions in the Contract

The majority largely ignored ancillary provisions that prevented any form of cost-shifting whatsoever.¹⁴⁸ Consequently, the validity of these ancillary provisions remains unclear for future cases. The majority quickly brushed away this discussion in a footnote reasoning that the opinion from the decision on appeal before the Court had held that, because the other forms of cost-sharing were not economically feasible, “the *only economically feasible means* for . . . enforcing [respondents’] statutory rights is *via a class action*”¹⁴⁹ However, the Court would have been wise to simply address the ancillary provisions in dicta, at the least, to provide future guidance instead of summarily ignoring them.

As explained by Justice Kagan, the majority in *Italian Colors* failed to address any of the ancillary provisions of the agreement, which effectively prohibited the respondents from pursuing a claim.¹⁵⁰ Because the majority did not address these ancillary provisions, there is no process or standard in place by which lower courts can evaluate them. Rather, lower courts are left with a rigid and narrow application of the FAA and

¹⁴⁶ *Id.* at 2319 (Kagan, J., dissenting) (“[T]he effective-vindication rule asks about the world today, not the world as it might have looked when Congress passed a given statute.”).

¹⁴⁷ *See id.* at 2311 n. 4 (“Who can disagree with the dissent’s assertion that ‘the effective-vindication rule asks about the world today, not the world as it might have looked when Congress passed a given statute’? But time does not change the meaning of effectiveness, making ineffective vindication today what was effective vindication in the past.”) (citation omitted).

¹⁴⁸ *Id.* at 2319 (Kagan, J., dissenting) (explaining that “[i]t is only in this Court that the case has become strangely narrow, as the majority stares at a single provision rather than considering, in the way the effective-vindication rule demands, how the entire contract operates”).

¹⁴⁹ *Id.* at 2311 n. 4.

¹⁵⁰ *See id.* at 2316–20 (Kagan, J., dissenting).

the effective vindication rule.

Faced with another case, the Supreme Court can properly address the ancillary provisions. The *Italian Colors* opinion took a large bite out of the effective vindication rule as it allows a loophole for these entities to implement clever ancillary provisions, which work in concert to foreclose any possibility of a claim being brought because of exorbitant costs or unusual proceedings, such as a very brief statute of limitations to bring the claim.¹⁵¹ Therefore, the Supreme Court should address this issue.

C. *The Majority's Application of Concepcion*

The majority also claims that *Concepcion* “all but resolves the case.”¹⁵² However, there are several issues with this conclusion. First, the effective vindication rule applies to the FAA in relation to other federal statutory rights, whereas *Concepcion* concerned preemption between the FAA and a conflicting *state law*.¹⁵³ Second, the pre-dispute arbitration agreement in *Concepcion* allowed for more cost-shifting than did the contract at issue in *Italian Colors* and therefore differs in kind.¹⁵⁴ Third, *Concepcion* concluded that the FAA preempted a state rule requiring the availability of class procedures before arbitration would be enforced.¹⁵⁵ However, the issue is not as narrow as simply the availability

¹⁵¹ See *Am. Express Co.*, 133 S. Ct. at 2314 (Kagan, J., dissenting) (“If the rule were limited to baldly exculpatory provisions, however, a monopolist could devise numerous ways around it On the front end: The agreement might set outlandish filing fees or establish an absurd (e.g., one-day) statute of limitations, thus preventing a claimant from gaining access to the arbitral forum. On the back end: The agreement might remove the arbitrator's authority to grant meaningful relief, so that a judgment gets the claimant nothing worthwhile. And in the middle: The agreement might block the claimant from presenting the kind of proof that is necessary to establish the defendant's liability—say, by prohibiting any economic testimony Or else the agreement might appoint as an arbitrator an obviously biased person The possibilities are endless—all less direct than an express exculpatory clause, but no less fatal. So the rule against prospective waivers of federal rights can work only if it applies not just to a contract clause explicitly barring a claim, but to others that operate to do so.”).

¹⁵² *Id.* at 2312 (“Truth to tell, our decision in [*Concepcion*] all but resolves this case.”).

¹⁵³ The majority concluded that the “[b]ecause it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’ California's *Discover Bank* rule is preempted by the FAA.” *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹⁵⁴ *Am. Express Co.*, 133 S. Ct. at 2320 (Kagan, J., dissenting) (quoting *Concepcion*, 131 S. Ct. at 1753) (explaining that the claim in *Concepcion* was “‘most unlikely to go unresolved’ because AT&T's agreement contained a host of features ensuring that ‘aggrieved customers who filed claims would be essentially guaranteed to be made whole.’”).

¹⁵⁵ See *Concepcion*, 131 S. Ct. at 1755 (abrogating *Discover Bank v. Superior Court*, 113

of class procedure, but rather, is whether the party has any means of effectively vindicating a meritorious federal claim under the totality of the contract.¹⁵⁶

Concepcion boiled down to a simple issue of federal law preempting conflicting state law.¹⁵⁷ Nowhere in the opinion did the Court cite any precedent concerning the effective vindication rule; yet the majority in *Italian Colors* swiftly disposed of the issue by claiming that *Concepcion* “all but resolves” the case.¹⁵⁸ However, the preemption doctrine is an entirely distinct concern removed from the realm of the effective vindication rule. The Second Circuit properly recognized this important distinction on remand when the Court deemed *Concepcion* inapplicable because it addressed a matter of preemption.¹⁵⁹ Where preemption concerns federal law trumping conflicting state law, the effective vindication rule applies to the friction created when the FAA threatens to lessen the enforcement of federal statutory rights.¹⁶⁰

P.3d 1100 (Cal. 2005)).

¹⁵⁶ *Am. Express Co.*, 133 S. Ct. at 2318 (Kagan, J., dissenting) (“The effective-vindication rule asks whether an arbitration agreement *as a whole* precludes a claimant from enforcing federal statutory rights. No single provision is properly viewed in isolation, because an agreement can close off one avenue to pursue a claim while leaving others open. In this case, for example, the agreement could have prohibited class arbitration without offending the effective-vindication rule *if* it had provided an alternative mechanism to share, shift, or reduce the necessary costs. The agreement’s problem is that it bars not just class actions, but also all mechanisms—many existing long before the Sherman Act, if that matters—for joinder or consolidation of claims, informal coordination among individual claimants, or amelioration of arbitral expenses.”) (emphasis in original).

¹⁵⁷ *Id.* at 2320 (Kagan, J., dissenting) (“When a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA’s purposes and objectives. If the state rule does so—as the Court found in [*Concepcion*—the Supremacy Clause requires its invalidation. We have no earthly interest (quite the contrary) in vindicating that law. Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law, like the Sherman Act here.”). The preemption doctrine stems from the Supremacy Clause, which establishes federal law the “Supreme Law of the Land.” *See, e.g.*, U.S. CONST. art. VI, § 2; *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (explaining that the “preemption doctrine is derived” from the Supremacy Clause).

¹⁵⁸ *Am. Express Co.*, 133 S. Ct. at 2319–20 (Kagan, J., dissenting) (“[*Concepcion*] was not—and could not have been—about the effective-vindication rule. Here is a tip-off: [*Concepcion*] nowhere cited our effective-vindication precedents.”).

¹⁵⁹ Michael A. Rosenhouse, Annotation, *Construction and Application of Federal Arbitration Act—Supreme Court Cases*, 28 A.L.R. FED. 2d 1 (originally published in 2008) (“The Second Circuit panel found [*Concepcion*] inapplicable because it addressed preemption.”).

¹⁶⁰ Preemption issues are applied categorically to three situations. Express preemption occurs where the text of the statute facially expresses the intent to preempt state law. English

The premise that the FAA preempts conflicting state law was established well before *Concepcion* in *Southland Corp. v. Keating*.¹⁶¹ Relying on the legislative history behind the FAA, the Supreme Court majority held that “[i]n creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”¹⁶² Furthermore, as in *Concepcion*, the effective vindication rule was inapplicable. There, the tension between the majority and dissent was regarding basic federalism concerns.¹⁶³ Dissenting, Justice John Paul Stevens relied on the Savings Clause of Section 2 of the FAA, which provides that arbitration contracts are revocable upon “such grounds as exist at law or in equity for the revocation of any contract.”¹⁶⁴ Justice Stevens argued that there is a presumption against preemption in areas traditionally dominated by the states (in this case, contract law).¹⁶⁵ However, the majority rejected this argument and concluded that the FAA preempted California’s anti-waiver rule in the realm of arbitration contracts.¹⁶⁶ Notably, Justice Scalia resurrected this issue in *Italian Colors* even though the dispute did not concern preemption in the slightest.¹⁶⁷

v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990). Implied field preemption occurs where there is either pervasive federal regulation or a dominant federal interest in a field such that state law is preempted. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Implied conflict preemption occurs where state law makes it impossible for someone to comply with both federal law and state law or where state law effectively serves as an obstacle to the purpose of the federal legislation. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963) (discussing impossibility preemption); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (discussing obstacle preemption).

¹⁶¹ 465 U.S. 1 (1984).

¹⁶² *Id.* at 16.

¹⁶³ *Compare* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (explaining that “California’s *Discover Bank* rule is preempted by the FAA”), *with* *Concepcion*, 131 S. Ct. at 1762 (Breyer, J., dissenting) (“But federalism is as much a question of deeds as words. It often takes the form of a concrete decision by this Court that respects the legitimacy of a State’s action in an individual case. Here, recognition of that federalist ideal, embodied in specific language in this particular statute, should lead us to uphold California’s law, not to strike it down. We do not honor federalist principles in their breach.”).

¹⁶⁴ *Southland Corp.*, 465 U.S. at 18 (Stevens, J., concurring in part and dissenting in part) (quoting 9 U.S.C. § 2 (2000)).

¹⁶⁵ *Id.* at 18–19 (Stevens, J., dissenting).

¹⁶⁶ *Id.* at 16 n.10 (“[H]olding that the Arbitration Act preempts a state law that withdraws the power to enforce arbitration agreements . . .”).

¹⁶⁷ “Justice Scalia said the FAA reflects the overarching principle that arbitration is a matter of contract, and he cited the Court’s decision in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 181 L. Ed. 2d 586 (2012), as recognizing that this principle holds true for

It is important to note that the state law at issue in *Concepcion* prohibited class-action waivers even if a party could effectively vindicate its claim in individual arbitration.¹⁶⁸ Therefore, the waiver at issue in *Concepcion* had no occasion to be addressed via the effective vindication rule as it concerned the preemption of a state law.¹⁶⁹ The Court clarified that the waiver's ancillary provisions made it practically certain that a party would be able to vindicate its rights.¹⁷⁰ Thus, the majority incorrectly applied precedent that is not concerned with the effective vindication rule and should have properly applied the effective vindication precedent to address the tension between the FAA and federal statutory claims where the party may not be otherwise able to effectively vindicate its rights.¹⁷¹

The class action waiver at issue in *Concepcion* differed greatly from that in *Italian Colors* because of the ancillary provisions contained in each case. In *Italian Colors*, the ancillary provisions at issue completely foreclosed any possibility of cost-shifting, cost-sharing, or cost-recovery.¹⁷² However, the waiver at issue in *Concepcion* provided for significant cost-sharing—so much so, that the Court even explained the complaint was “most unlikely to go unresolved” because of the provisions providing that “aggrieved customers who filed claims would be essentially guaranteed to be made whole.”¹⁷³ Therefore, the Court

claims that allege a violation of a federal statute, unless the FAA's mandate has been overridden by a contrary congressional command.” Rosenhouse, *supra* note 159.

¹⁶⁸ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting) (citing *Concepcion*, 131 S. Ct. at 1745) (“[T]he state law in question made class-action waivers unenforceable even when a party *could* feasibly vindicate her claim in an individual arbitration. The state rule was designed to preserve the broad-scale ‘deterrent effects of class actions,’ not merely to protect a particular plaintiff’s right to assert her own claim.”).

¹⁶⁹ *Id.* at 2319–20 (Kagan, J., dissenting) (“[*Concepcion*] was not—and could not have been—about the effective-vindication rule. Here is a tip-off: [*Concepcion*] nowhere cited our effective-vindication precedents . . . [*Concepcion*] involved a state law, and therefore could not possibly implicate the effective-vindication rule. When a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA’s purposes and objectives.”).

¹⁷⁰ *Concepcion*, 131 S. Ct. at 1753.

¹⁷¹ *Am. Express Co.*, 133 S. Ct. at 2320 (Kagan, J., dissenting) (explaining that *Concepcion* does not apply and “[t]he relevant decisions are instead *Mitsubishi* and *Randolph*”).

¹⁷² *Id.* at 2316 (Kagan, J., dissenting) (explaining that the waiver also not only prohibits class arbitration, but also eliminates any possibility of “sharing, shifting, or shrinking necessary costs”).

¹⁷³ *Concepcion*, 131 S. Ct. at 1753 (“Moreover, the claim here was most unlikely to go

2015]

DIVIDE & CONQUER

175

expressly provided that the waiver posed no risk to the effective vindication of an aggrieved party's statutory rights and therefore could in no way apply to the issue in *Italian Colors*, or "a party's ability to vindicate a meritorious claim."¹⁷⁴ Surprisingly, Justice Scalia authored both opinions, and although emphasizing the cost-shifting provisions in *Concepcion*, Justice Scalia entirely ignored them in *Italian Colors* despite claiming that *Concepcion* resolved the issues.¹⁷⁵

The *Italian Colors* majority relied on the holding in *Concepcion* by stating that the Court "specifically rejected the argument that class arbitration was necessary" to resolve the issue.¹⁷⁶ Nowhere does *Italian Colors* argue solely that the prohibition on class proceedings *alone* deprives them of the ability to effectively vindicate their claim. However, the majority framed the issue in such a narrow manner that made this the only plausible way to apply *Concepcion* to this case at all.¹⁷⁷

D. The Majority's Interpretation of the Ability to Effectively Vindicate Federal Statutory Rights

The *Italian Colors* majority attempted to distinguish the costs at issue from those in *Randolph*.¹⁷⁸ In *Randolph*, the expenses were to be incurred at the onset of the claim.¹⁷⁹ In contrast, the issue in *Italian Colors* was that the plaintiffs' total cost of pursuing their claims would outweigh the potential recovery.¹⁸⁰ There is no practical difference between the

unresolved The Ninth Circuit admitted that aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole. Indeed, the district court concluded that the *Concepciones* were better off under their arbitration agreement with AT&T than they would have been as participants in a class action" (internal citations omitted).

¹⁷⁴ *Am. Express Co.*, 133 S. Ct. at 2320 (Kagan, J., dissenting) ("So the Court professed that [*Concepcion*] did not implicate the only thing . . . this case involves.").

¹⁷⁵ Compare *Concepcion*, 131 S. Ct. 1740 (explaining that the cost-shifting provisions practically ensured an aggrieved party's ability to vindicate their rights), with *Am. Express Co.*, 133 S. Ct. at 2308–12 (discussing the merits of the argument to the exclusion of the lack of cost-shifting provisions in the arbitration agreement).

¹⁷⁶ *Am. Express Co.*, 133 S. Ct. at 2312.

¹⁷⁷ *Id.* ("The idea that [*Concepcion*] controls here depends entirely on the majority's view that this case is 'class action or bust.' Were the majority to drop that pretense, it could make no claim for [*Concepcion*]'s relevance.").

¹⁷⁸ *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000).

¹⁷⁹ See *Green Tree Fin. Corp.*, 531 U.S. at 84 (explaining that the claimant faced potentially steep filing fees and arbitrators' costs).

¹⁸⁰ *Am. Express Co.*, 133 S. Ct. at 2318 (Kagan, J., dissenting) ("The expense at issue in *Green Tree Financial Corp* came from a filing fee combined with a per-diem payment for the arbitrator."). The prospective expenses in *Italian Colors* largely consisted of the cost to produce an expert report. *Id.* at 2316 (Kagan, J., dissenting) ("[T]hat expert report would cost

costs in *Randolph* and the costs in *Italian Colors* because the costs must necessarily exceed the maximum potential recovery, and there was no adequate cost-recovery or cost-shifting possible. In fact, the costs incurred by *Italian Colors* would likely outweigh the maximum potential recovery by ten to one in a best-case scenario.¹⁸¹ To make such fine distinctions between the filing fees in *Randolph* and necessary expert reports in *Italian Colors* is irrational because there is no practical difference in their effect on deterring claims.¹⁸² Therefore, there is no reason to treat them differently, as they both present the same issue and make pursuing a claim prohibitively expensive.¹⁸³ That is, both forms of expenses must necessarily be incurred in order to bring the challenge in the first place.¹⁸⁴

Furthermore, the *Italian Colors* majority asserted that *Mitsubishi* did not apply because *Italian Colors* was not explicitly prohibited from asserting the right and that *Randolph* did not apply because *Italian Colors* was not forced to incur filing and administrative fees, that effectively made “access to the forum impracticable.”¹⁸⁵ The majority distinguished the *Italian Colors* issue as being one of “proving a statutory remedy.”¹⁸⁶ However, no precedent expressly limits the scope of the effective vindication rule solely to “baldly exculpatory clauses” and “prohibitive fees” as the majority contends.¹⁸⁷ By imposing this restriction on the rule’s scope, the majority allowed entities to impose other more creative provisions that would effectively both insulate the entity from liability and place the provision outside of the baldly exculpatory clauses or

between several hundred thousand and one million dollars.”).

¹⁸¹ *Id.* at 2316 (Kagan, J., dissenting) (“So the expense involved in proving the claim in arbitration is ten times what *Italian Colors* could hope to gain, even in a best-case scenario. That counts as a “prohibitive” cost, in *Green Tree Financial Corp.*’s terminology, if anything does. No rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands.”).

¹⁸² *Id.* at 2318 (Kagan, J., dissenting) (“The expense at issue in *Randolph* came from a filing fee combined with a per-diem payment for the arbitrator. But nothing about those particular costs is distinctive; and indeed, a rule confined to them would be weirdly idiosyncratic.”).

¹⁸³ *Id.*

¹⁸⁴ Put simply: without paying the filing fees, there would be no access to the arbitral forum in *Randolph* and without paying for the expert reports, there would be no basis for the claim at all in *Italian Colors*. In either case, the costs operate as a prerequisite to the challenge.

¹⁸⁵ See *Am. Express Co.*, 133 S. Ct. at 2310–11.

¹⁸⁶ *Id.* at 2311.

¹⁸⁷ *Id.* at 2317 (Kagan, J., dissenting).

2015]

DIVIDE & CONQUER

177

prohibitive fees the majority limited the scope to.¹⁸⁸

E. Revisiting, Clarifying, and Codifying the Effective Vindication Rule to Provide Guidance, Reel in Business Entities, and Bring Predictability to Courts' Opinions

In *Italian Colors*, the majority framed the issue as “whether a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff’s cost of individually arbitrating a federal statutory claim exceeds the potential recovery.”¹⁸⁹ This approach is far too narrow. The effective vindication rule should be interpreted more flexibly to account for the totality of the contract and relevant surrounding circumstances at issue, as large-scale, pre-dispute arbitration contracts become more prevalent, creative, and controversial. Such a narrow and rigid approach is far too inadequate for the purposes of addressing future developments.

The standard for invoking the effective vindication rule should be clarified to apply whenever the FAA threatens to foreclose other federal statutory rights. In making this determination, courts should consider any and all provisions that function, individually or in combination, to prevent a party from effectively vindicating a party’s statutory rights. To *prevent* should include, but not be limited to: baldly exculpatory clauses, prohibitive fees, and a lack of cost-shifting or cost-recovery provisions, which function to make pursuit of the claim reasonably certain to be either financially imprudent or expressly barred.

It is evident from the disparity between the majority and dissent in *Italian Colors* as well as the opinions throughout the procedural history of *Italian Colors*, that case law interpreting the effective vindication rule does not provide clear guidance.¹⁹⁰ Chapter One of the FAA contains sixteen sections.¹⁹¹ Section 2 addresses the “[v]alidity, irrevocability, and

¹⁸⁸ See *id.* at 2317–18. (Kagan, J., dissenting) (providing examples of provisions which fall outside the scope of the decision but may still insulate the party from liability). See also *Discover Bank v. Superior Court*, 113 P.3d at 1110 (Cal. 2005) (“[I]n a consumer contract of adhesion [when] . . . disputes . . . involve small amounts of damages . . . the waiver [of a class action] becomes in practice the exemption of the party from responsibility for [its] own fraud.”) (internal quotations omitted).

¹⁸⁹ *Am. Express Co.*, 133 S. Ct. at 2307.

¹⁹⁰ Compare, *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010), with *In re Am. Exp. Merchs. Litig.*, 667 F.3d 204 (2d Cir. 2012), *rev’d sub nom.*, *Am. Exp. Co.*, 133 S. Ct. at 2304.

¹⁹¹ 9 U.S.C. §§ 1–16 (2012).

enforcement of agreements to arbitrate” and therefore the effective vindication rule fits this section.¹⁹² However, there is a danger that this section already provides for common law state contract defenses that have previously been mistakenly entangled with the effective vindication rule.¹⁹³ Thus, the text of the amendment must make clear that the effective vindication rule is a separate theory. Specifically, the text must make clear that this Section applies only when the FAA threatens to foreclose other federal statutory rights. This distinction can ensure that federalism issues are avoided.¹⁹⁴

IV. CONCLUSION

The effective vindication rule was developed as a tool for preserving federal statutory rights in the face of the FAA, but the rule has not been applied consistently.¹⁹⁵ As *Italian Colors* shows, there is considerable disagreement concerning the role of the effective vindication rule and how it should be applied to balance the relationship between the FAA and threatened federal statutory rights.¹⁹⁶ Consequently, the effective vindication rule must be revisited and clarified to provide for a more explicit standard or process to include an analysis of the totality of the contract. Furthermore, Chapter One of the FAA should be amended to codify the effective vindication rule. Because Section 2 of the FAA concerns “[v]alidity, irrevocability, and enforcement of agreements to arbitrate,” the effective vindication rule should be provided under this section.¹⁹⁷ The rule could be codified as follows:

¹⁹² 9 U.S.C. § 2 (2012).

¹⁹³ See 9 U.S.C. § 2 (“[A contract] shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”). See *supra* Part II.A (discussing unconscionability defense’s early relationship with the effective vindication rule). See also *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750–51 (2011) (severing the claim of unconscionability from invocation of the effective vindication rule and explaining that the effective vindication rule is a matter of federal law).

¹⁹⁴ Specifically, this is to eliminate any tension between state law issues and the FAA. For further discussion on federalism, see Judith Resnik, *Afterword: Federalism’s Options*, 14 *YALE J. ON REG.* 465 (1996).

¹⁹⁵ For an overview of the development of the effective vindication rule and its application, see *supra* Part II.

¹⁹⁶ Compare *supra* Part II (explaining the development of the effective vindication rule), with *supra* Part III (discussing both the majority’s and dissent’s application of the effective vindication to federal statutory rights).

¹⁹⁷ 9 U.S.C. § 2 (2012).

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable except:

- (A) Upon such grounds as exist at law or in equity for the revocation of any contract; or
- (B) If the contract operates to effectively foreclose the availability of a party's ability to prudently and effectively pursue the vindication of federal statutory rights, such a provision may be invalidated where necessary to preserve the effect of federal statutory rights and invalidate contracts which frustrate public policy. The party challenging the contract must bear the burden of presenting evidence that is beyond mere speculation.¹⁹⁸

Only through an express statement of this standard will contracting parties be able to conduct business with confidence regarding how courts will evaluate any arbitration clauses. By having a clear standard in place, courts will also be able to address these disputes with greater consistency. Until then, the effective vindication rule's role remains unresolved and in a state of flux that unnecessarily increases transaction costs to commercial entities and poses a substantial risk that future meritorious claims will be forgone.

¹⁹⁸ The language in Section A is presently codified. The language concerning the ability to effectively pursue statutory remedies is borrowed from *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (“[I]n the event . . . 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.”) (citing *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955); *Redel's Inc. v. Gen. Elec. Co.*, 498 F.2d 95, 98–99 (5th Cir. 1974); *Gaines v. Carrollton Tobacco Bd. of Trade, Inc.*, 386 F.2d 757, 759 (6th Cir. 1967); *Fox Midwest Theatres v. Means*, 221 F.2d 173, 180 (8th Cir. 1955); 15 S. WILLISTON *Contracts* § 1750A (3d ed. 1972)). Also, note that the language refers only to the tension between the FAA and federal statutory rights to distinguish the issue of preemption from *Concepcion*, 131 S. Ct. at 1753 (California's rule from *Discover Bank* was preempted by FAA). The addition of the challenging party bearing the burden of showing that the threat to the ability to pursue causes of action must be more than mere speculation is derived from *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90 (2000) (“The ‘risk’ that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.”).

