COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-11133

JOHN A. FEENEY and DEDHAM HEALTH AND ATHLETIC COMPLEX, individually and on behalf of persons similarly situated,

Plaintiffs/Counterclaim
Defendants/Appellees,

v.

DELL INC. f/k/a DELL COMPUTER CORPORATION, DELL CATALOG SALES LIMITED PARTNERSHIP, DELL MARKETING LIMITED PARTNERSHIP, QUALXSERV, LLC, and BANCTEC INC.,

Defendants/Third-Party
Plaintiffs/Counterclaim
Plaintiffs/Appellants

v.

AMY A. PITTER, in her official capacity as Commissioner of Revenue,

Third-Party Defendant.

BRIEF OF *AMICI CURIAE* PUBLIC JUSTICE, P.C. AND PUBLIC CITIZEN, INC., IN SUPPORT OF PLAINTIFFS-APPELLEES

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ISSUES PRESENTED

1. Whether the longstanding rule that agreements to arbitrate are enforceable under the FAA *only* "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*, 473 U.S. 614, 637 (1985), survives the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)?

2. Whether a state law rule that permits a court to invalidate an agreement to arbitrate that would, if enforced, prevent individual plaintiffs from effectively vindicating their state or federal substantive rights is consistent with, or preempted by, the FAA under the two-step preemption test established in *Concepcion*?

STATEMENT OF INTERESTS OF *AMICI CURIAE*

Public Justice, P.C. ("Public Justice") is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuse.

Public Justice prosecutes cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. To further its goal of defending access to justice for consumers, employees, and other persons harmed by corporate misconduct, Public Justice has initiated a special project devoted to fighting abuses of mandatory arbitration.

Public Citizen, Inc., a national consumer-advocacy and government-reform organization founded in 1971, appears on behalf of its approximately 250,000 members and supporters before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen works to foster an open, accountable, and responsive legal system and to protect consumers, workers, and the public. Among Public Citizen's longstanding concerns is the misuse of mandatory arbitration agreements with terms that obstruct the effective enforcement of the legal rights of consumers and employees.

INTRODUCTION AND SUMMARY OF ARGUMENT

There is no question that the U.S. Supreme Court in *Concepcion* held that the FAA preempts state laws that would (1) effectively "requir[e] the availability of classwide arbitration" and (2) invalidate class action bans in arbitration clauses where the claims at issue are "most unlikely to go unresolved" in individual arbitration. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748, 1753 (2011). *Concepcion* did *not* decide, however, that the FAA would invalidate a state-law rule allowing a court to find unenforceable a class action ban that would, if enforced, prevent individual plaintiffs from effectively vindicating their state or federal substantive rights. Rather, under the reasoning of *Concepcion*, because this type of provision would be contrary to the underlying purposes of the FAA, it cannot and should not be enforced.

But if Dell is to be believed, *Concepcion* not only decreed that any company's particular class action ban is *always* enforceable—even if enforcement means the corporation escapes liability for violations of law—but also created a new rule of federal law

whereby corporations can rewrite longstanding state consumer protection laws to eliminate the substantive rights of consumers.

As explained below, *Concepcion* did neither of these drastic things. To do so, the Court would have needed to overrule decades of precedent holding that arbitration clauses may not be enforced where they would strip the parties of their ability to vindicate their substantive rights. It did not. Instead, *Concepcion* merely held that a rule of state law that would bar the enforcement of a class action ban that, in the Court's view, *would not strip the parties of their ability to vindicate their rights* was inconsistent with the FAA because it would force parties—against their will—either to arbitrate disputes in a classwide arbitration or forgo arbitration altogether. That holding does not warrant invalidation of the state law at issue in this case, because—unlike in *Concepcion*—enforcing the class action ban at issue here would in fact make it impossible for plaintiffs to obtain any relief under state law. Thus, if anything, *Concepcion* mandates affirmance of the lower court's conclusion in this

case, because stripping the plaintiffs of their rights under state law would be flatly contrary to the fundamental purposes underlying the FAA.

At base, state courts—like federal courts—remain free to ensure that 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." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*, 473 U.S. 614, 628 (1985). This gatekeeping function, which is firmly embedded in Section 2 of the FAA, acts as a critical check on companies' use of arbitration agreements, to ensure that they alter only the forum in which a dispute is resolved, not the availability of relief that a party can obtain.

ARGUMENT

I. *CONCEPCION* HAS NO APPLICATION WHERE ENFORCEMENT OF AN AGREEMENT TO ARBITRATE WOULD EFFECTIVELY PRECLUDE THE VINDICATION OF SUBSTANTIVE RIGHTS.

Dell has urged this Court to adopt a radically broad rule that would strip plaintiffs here of their ability to vindicate their rights under state law. According to Dell, "*Concepcion* announced a rule of law

that *requires* enforcement of an arbitration agreement according to its terms." Dell Br. at 36 (emphasis added). Indeed, Dell's entire theory of this case hinges on convincing this Court that *Concepcion* erected a bright-line rule of federal law that class action bans must be enforced categorically, and that the FAA's preemptive effect on state law leaves no room for any limitation on the ability of defendants to avoid class actions through arbitration agreement. *See, e.g.*, Dell Br. at 36-38. But this theory is fundamentally flawed for two reasons: first, it dramatically over-reads *Concepcion*, by distorting the limited rule of FAA preemption into a categorical rule of contract enforcement, and second, it ignores critical limiting principles embedded in the FAA, as interpreted by the Supreme Court, that prohibit enforcement of agreements to arbitrate that would wipe away plaintiffs' ability to vindicate their substantive statutory rights.

As the Second Circuit just recently explained in rejecting the "facile reading" that Dell urges here, *Concepcion* does not apply where, as here, the plaintiffs are able to demonstrate, as a matter of

fact, that the "practical effect of enforcement" would be to "preclude their ability to vindicate" their substantive rights. *In re American Exp. Merchants Litig.*, 667 F.3d 204, 212 (2d Cir. 2012) (hereinafter "*In re AmEx III*"). Because Massachusetts law applies this same standard, the lower court was correct to reject Dell's claim to the contrary.

A. The U.S. Supreme Court Has Repeatedly Held That Agreements to Arbitrate Are Only Enforceable Where Parties Are Able to Vindicate Their Substantive Statutory Rights in the Arbitral Forum.

Dell asks this Court to ignore a longstanding limitation on the enforcement of arbitration clauses that *Concepcion* left undisturbed: agreements to arbitrate are enforceable under the FAA *only* "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi Motors*, 473 U.S. at 637.

This rule takes its meaning from the principle that arbitration is merely a choice of forums, not a waiver of claims. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002) (explaining that statutory claims "may be the subject of arbitration agreements that are enforceable pursuant to the FAA because the

agreement only determines the choice of forum"). In other words, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628.

The seminal case on this point is *Mitsubishi Motors*, where the question was whether a plaintiff's antitrust claims could be resolved in international arbitration. *Id.* at 616. The chief argument raised against allowing international arbitrators to resolve American antitrust claims was that it would undermine one of the core objectives of the antitrust laws—deterrence—by eliminating the right of plaintiffs to seek treble damages. *See id.* at 634-35 (explaining that the treble-damages provision "wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators"). Based on the assumption that treble damages would be unavailable in the arbitral forum, the plaintiff argued that forcing plaintiffs to pursue antitrust claims in arbitration would gut the

antitrust enforcement scheme and allow companies to violate the law with impunity. *Id.* at 634-36.

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

Key to the Court's conclusion was its belief that arbitration would provide an adequate mechanism *because* it would ensure that the statute's objectives would be preserved. The Court explained that, "*so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve*

both its remedial and deterrent function." Id. at 637 (emphasis added). In other words, the Court concluded that, because the right to treble-damages would likely be available to a private litigant forced to arbitrate his Sherman Act claims, the core objectives of the antitrust laws—including deterrence—would be protected. *See id.* at 634-36. If, on the other hand, the plaintiff could demonstrate that, in fact, the arbitration agreement would operate "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations," the Court stated that it "would have little hesitation in condemning the agreement as against public policy." *Id.* at 637 n.19.

This principle—that where an arbitration provision would, in effect, undermine a core statutory objective, either by eliminating a remedial right or by frustrating a deterrence function, a court may refuse to enforce it—has been endorsed by the Supreme Court in no less than six separate cases and is in no way incompatible with *Concepcion. See Green Tree Fin. Corp.-Alabama v. Randolph,* 531 U.S. 79, 90 (2000) ("[C]laims arising under a statute designed to further important social policies may be arbitrated . . . 'so

long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum' . . . ."); *Vimar Seguros y Reaseguros SA v. M/V Sky Reefer,* 515 U.S. 528, 540 (1995) (holding that, if an arbitration provision were to operate "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"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors*); *see also 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1474 (2009) (finding that arbitration agreement could be invalidated if it "prevent[s] respondents from 'effectively vindicating' their 'statutory rights in the arbitral forum'"); *Preston v. Ferrer*, 552 U.S. 346 (2008) (enforcing an agreement to arbitrate based on a finding that, by agreeing to arbitrate his claims, the plaintiff would "relinquish[] no substantive rights" under the statute); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002) (statutory claims may be arbitrated as long as a party can vindicate her substantive rights) (citation omitted).

This rule against enforcing arbitration clauses that would strip parties of substantive rights has also been widely adopted by lower courts. *See e.g.*, *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007) ("[W]e have acknowledged that if a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement."); *Kristian v. Comcast Corp.*, 446 F.3d 25, 54-55 (1st Cir. 2006) (noting that "the legitimacy of the arbitral forum rests on 'the presumption that arbitration provides a fair and adequate mechanism for enforcing statutory rights'") (citation omitted); *see also Shankle v. B-G Maint. Mgmt. of Colorado, Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999) ("As *Gilmer* emphasized, arbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. This supposition falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights."); *Walker v. Ryan's Family Steak*

Houses, Inc., 400 F.3d 370, 388 (6th Cir. 2005) ("[A] court cannot enforce [an arbitration] agreement as to a claim if the specific arbitral forum provided under the agreement does not 'allow for the effective vindication of that claim.'") (citation omitted); *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 205-06 (2d Cir. 1999) (finding "the substantive rights found in the statute are not in any way diminished by our holding that arbitration may be compelled in this case, since only the forum—an arbitral rather than a judicial one—is affected, and plaintiff's rights may be as fully vindicated in the former as in the latter").

In short, the U.S. Supreme Court and many other courts have consistently and repeatedly held that arbitration may only be compelled where doing so would not strip parties of their statutory rights. Dell is now asking this Court, however, to hold that *Concepcion* overruled all of this precedent *sub silentio*, and replaced it with a categorical rule requiring the enforcement of *all* agreements to arbitrate, even agreements including class action bans that would render consumers unable to vindicate their

substantive statutory rights. *See* Dell Br. at 37. As we now explain, however, *Concepcion* did no such thing.

B. *Concepcion* Did Not Overrule Longstanding Precedent by Holding That Agreements to Arbitrate Must Be Enforced Even When Doing So Would Effectively Prevent the Vindication of Substantive Rights.

Concepcion did not overrule or even undermine the time-honored precedents requiring that arbitration agreements must allow for vindication of substantive rights. Instead, the Court established a two-step test for determining whether a challenged state-law rule offends the FAA (and thus is preempted). Importantly, this test does not allow a court to enforce an agreement to arbitrate where it is demonstrated, as a matter of fact, that the practical effect of enforcement would be to preclude a litigant's ability to vindicate their substantive statutory rights.

Concepcion did not, in the Supreme Court's view, involve a circumstance in which the arbitration clause would have stripped plaintiffs of their ability to vindicate their rights. *Concepcion* rested on a key factual premise that is not present in this case: that the plaintiffs *could* effectively vindicate their

substantive statutory claims if the arbitration clause was enforced. *Concepcion*, 131 S. Ct. at 1753 (finding that "the claim here was most *unlikely* to go unresolved" because, inter alia, AT&T's arbitration agreement contained sufficient incentives "for the individual prosecution of meritorious claims that are not immediately settled") (emphasis added).[1]

Thus, *Concepcion* does not impact a rule that would allow a court to invalidate an arbitration agreement where it is demonstrated, as a matter of fact, that the practical effect of enforcement would be to preclude a litigant's ability to vindicate their substantive statutory rights. Indeed, the Supreme Court has itself repeatedly made clear that such a

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[1] The *Concepcion* Court's conclusion that the class action ban there was not exculpatory reflected the Court's acceptance of AT&T's argument that its arbitration clause had beneficial features that made it possible for consumers to vindicate rights. *Concepcion*, 131 S. Ct at 1753. Indeed, the district court there had opined that the incentives for individual arbitration in AT&T's clause would leave the Concepcions "better off . . . than they would have been as participants in a class action," and the court of appeals "admitted that aggrieved customers who filed claims would be 'essentially guaranteed' to be made whole." *Id.*

rule is firmly rooted within the FAA, and, *a fortiori*, perfectly consistent with the FAA's objectives.

1. *Concepcion*'s two-step preemption test is not a rule of categorical contract enforcement.

The first part of *Concepcion's* two-part FAA-preemption test is simple: "[W]hen state law prohibits outright the arbitration of a particular claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Concepcion*, 131 S. Ct. at 1747. A state law rule is preempted if it flatly prohibits arbitration of some category of claims. For instance, a rule prohibiting "predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes" is a "categorical rule prohibiting arbitration of a particular claim," that is contrary to, and therefore preempted by, the FAA. *Marmet Health Center, Inc. v. Brown*, 132 S. Ct. 1201, 1203-04 (2011). This part of the test has no application to this case—and Dell does not contend otherwise.

Instead, Dell looks to the second part of the *Concepcion* test, which applies where a state law doctrine "normally thought to be generally applicable"

to contract enforcement is "alleged to have been applied in a fashion that disfavors arbitration." *Id.* at 1747-48. Where such an allegation has been made, the analysis shifts to whether the challenged rule "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 1747-48.

This inquiry, the Court explained, involves a determination of whether an application of the rule leads to a result that is hostile to or incompatible with arbitration, or that "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748. As applied to California's *Discover Bank* rule, which allowed courts not only to invalidate class action bans, but also, effectively, to impose classwide arbitration procedures "*ex post*," the Court concluded that this second step resulted in a finding of preemption. *Id.* at 1750. The "overarching purpose of the FAA," the Court explained, "is to ensure the enforcement of arbitration agreement according to their terms so as to facilitate streamlined proceedings." *Id.* at 1748. The *Discover Bank* rule interfered with this objective because it "[r]equir[ed] the availability of classwide

arbitration" by allowing any party to "demand it *ex post*" as the price of enforcing the arbitration agreement. *Id.* at 1748, 1750. Thus, according to the Court, by imposing nonconsensual class procedures onto a bargained-for process that contemplated only bilateral arbitration, the rule would defeat the "principal advantage[s]" of arbitration—its informality and efficiency—and transform arbitration "as envisioned by the FAA" into an unwieldy mess. *See id.* at 1753 ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.").

Dell insists that *Concepcion*'s invalidation of the *Discover Bank* rule amounts to a blanket endorsement of class action bans in arbitration, even where enforcing such a ban would interfere with the vindication of statutory rights. This argument misreads *Concepcion*. The question under the second part of the *Concepcion* test is whether the state law at issue would stand as an obstacle to the accomplishment of the FAA's objectives. The crucial point that Dell fails to understand is that an

arbitration clause that would strip the parties of their ability to vindicate statutory rights *would itself* stand as an obstacle to the accomplishment of the FAA's objectives—*and thus would not be preempted under Concepcion*.

As explained above, the core principle in *Mitsubishi Motors* and its progeny is that arbitration clauses are only enforceable when they permit parties to effectively vindicate their substantive statutory rights. This is more than an ancillary concern "unrelated" to the FAA; it is, instead, one of *the* animating principles of Section 2 of the FAA, which ensures that the arbitral forum is a credible and legitimate alternative dispute resolution mechanism.

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

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

9 U.S.C. § 2. Section 2 does not make arbitration clauses automatically valid and enforceable. Rather, it sets out three basic requirements that an arbitration clause must satisfy if it is to be enforced. First, there must be a written agreement to resolve a particular dispute through arbitration. Second, the clause must relate to a transaction involving interstate commerce. And third, the clause must not be subject to invalidation on ordinary contract-law grounds.

What the *Mitsubishi Motors* line of cases makes clear is that a court's power to invalidate an arbitration provision that would preclude a party from effectively vindicating its substantive rights is embedded within the first and third requirements of Section 2. This is because "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 judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628. Put another way, Section 2 requires only enforcement of agreements to arbitrate claims, not agreements to waive claims altogether. Restated in

the converse, this principle establishes that, in a case in which arbitration would force a party to forgo statutory rights, Section 2 of the FAA authorizes courts to refuse to enforce the clause, as the Supreme Court has explained in case after case. *See, e.g.*, *Randolph*, 531 U.S. at 90 (pointing to Section 2 as the operative provision in permitting that "claims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum,' the statute serves its functions").

In short, contrary to Dell's theory, the test announced by the Court in *Concepcion* does not "require that all class-action waivers be deemed per se enforceable." *In re AmEx III*, 667 F.3d at 214.

2. Lower courts have endorsed an approach consistent with the *Mitsubishi Motors* line of cases even after *Concepcion*.

Consistent with this analysis, lower courts are increasingly recognizing that, under Section 2 of the FAA and controlling Supreme Court precedent, *Concepcion* does not require the categorical enforcement of class action bans. Instead, these

courts have held that where a plaintiff actually proves he could not effectively vindicate his substantive statutory rights under the arbitration agreement because of the existence of a class action ban, a court may refuse to enforce the ban.

For example, in *In re AmEx III*, the United States Court of Appeals for the Second Circuit recently held that *Concepcion* does not alter the conclusion that a class action ban is unenforceable where "enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs." 667 F.3d at 206.

The "key issue" in the *In re AmEx* series of cases was "whether the mandatory class action waiver in [AmEx's arbitration clause] is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement of the waiver would be to preclude their bringing [antitrust] claims against AmEx." *Id.* at 212. Before *Concepcion*, the court had concluded that "enforcement of the class action waiver would indeed bar plaintiffs from pursuing their statutory claims," and that, consequently, the class action ban was unenforceable. *Id.* In reaching this

conclusion, the court relied on "record evidence" submitted by the plaintiffs that demonstrated that "the cost of plaintiffs' individually arbitrating their dispute with AmEx would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." *Id.* This evidence included affidavit expert testimony concerning the cost of individually pursuing the type of claims at issue in the case and an explanation of why it was "not economically rational to pursue an individual action against AmEx." *Id.* The court found that this evidence demonstrated that "the only economically feasible means for enforcing [the plaintiffs'] statutory rights is via a class action." *Id.*

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

> It is tempting to give both Concepcion and Stolt-Nielsen such a facile reading, and find that the cases render class action arbitration waivers per se enforceable. But

> a careful reading of the cases demonstrates that neither one addresses the issue presented here: whether a class-action arbitration waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights.

Id. Instead, the court held that *Concepcion* did not warrant reversal of its prior conclusion that the defendant's class action ban was unenforceable, because the record showed that the practical effect of enforcement would be to preclude the plaintiffs' ability to vindicate their statutory rights. *Id.* at 217-19.

Before reaching this conclusion, the court closely analyzed *Concepcion* and found that, although the decision stands "squarely for the principle that parties cannot be forced to arbitrate disputes in a class-action arbitration unless the parties agree to class action arbitration," what it "do[es] not do is require that all class-action waivers be deemed per se enforceable." *Id.* at 213. As a result, the court recognized that *Concepcion* left open the question of "whether a mandatory class action waiver clause is enforceable even if the plaintiffs are able to

demonstrate that the practical effect of enforcement would be to preclude their ability to bring federal antitrust claims." *Id.*

As to that question, the court looked to the *Mitsubishi Motors-Randolph* line of cases, found that *Concepcion* did not overrule this authority, and held that its framework for resolving whether a mandatory class action ban is enforceable is controlling. *See id.* at 216 ("We continue to find [*Randolph*] controlling here to the extent that it holds that when a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.") (internal quotations omitted). Under this framework, the court explained, plaintiffs may challenge class action bans "on the grounds that prosecuting such claims on an individual basis would be a cost prohibitive method of enforcing a statutory right." *Id.* at 217.

Similarly, *Sutherland v. Ernst & Young LLP*, 2012 WL 130420 (S.D.N.Y. Jan. 17, 2012), provides another example of a court recognizing that the *Mitsubishi Motors* line of cases controls even after *Concepcion*

and holding that *Concepcion* does not require enforcement of a class action ban where the factual record demonstrates that the plaintiffs would be unable to effectively vindicate their substantive statutory rights individually. There, "[a]fter examining the evidence submitted, th[e] Court found that the particular Agreement in this case was unenforceable because it prevents Sutherland from vindicating her statutory rights." *Id.* at *1. After *Concepcion*, Ernst & Young moved for reconsideration. The court denied the motion, emphasizing that "the facts before this Court differ significantly from the facts in *Concepcion* because Sutherland, unlike the Concepcions, is not able to vindicate her rights absent a collective action." *Id.* at 5. The court further explained:

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

Id.

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

These cases are not outliers, but are instead examples of the proper approach that a court must follow, under the FAA, in determining whether the existence of the class action ban would prevent a plaintiff from being able to effectively vindicate his substantive statutory rights.

The cases Dell cites do not address this fundamental point. Although some courts have cited

Concepcion in dismissing challenges to class action bans, the great majority of those courts have reflexively held that *Concepcion* requires enforcement of class action bans no matter what, without considering the limitations imposed by Section 2 of the FAA. For example, Dell relies heavily on *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (11th Cir. 2011), which held that even if only an "infinitesimal" percentage of the plaintiffs would be able to pursue their substantive statutory claims, the agreement to arbitrate must be enforced because a challenge to AT&T's class action ban on this basis had been expressly rejected by *Concepcion*. *Cruz*, 648 F.3d at 1214. With respect, the Eleventh Circuit is wrong. Not only did the court of appeals fail to note the limitations imposed by the FAA's Section 2, but it did not consider that there was no record evidence in *Concepcion* that contradicted the Supreme Court's conclusion that the clause at issue would permit consumers to vindicate their statutory rights fully. (As explained below, ample record evidence to the contrary was submitted in this case.)

But even on its own terms, *Cruz* has no bearing here because the Eleventh Circuit placed great emphasis on the special features of AT&T's clause—the very same clause at issue in both that case and in Concepcion case—in refusing to invalidate the arbitration agreement. "[T]he *Concepcion* Court examined *this very arbitration agreement* and concluded that it did not produce such a result." *Cruz*, 648 F.3d at 1215. The significance of the unique terms of AT&T's arbitration clause, which are categorically different from those of Dell's arbitration clause terms, is evident. Under AT&T's clause, the corporation pays all costs of arbitration. Under Dell's clause, by contrast, the customers who wished to pursue claims in this case would have been required to pay fees of $350 and $3,764.52, to vindicate a damages claim of $13.65 and $215.55, respectively. RA VII:03479-80, ¶ 3; *id.* at 03480, ¶ 5.

Few, if any of the other decisions Dell cites involved factual records, and certainly none as powerful as the one in this case. Indeed, in many of the cases, the plaintiffs conceded that *Concepcion* barred them from challenging the validity of the class

action ban at issue. One example of such a case is *Litman v. Cellco P'ship*, 655 F.3d 225 (3d Cir. 2011). *See* Appellants' Supplemental Brief Regarding Effect of *AT&T Mobility LLC v. Concepcion*, *Litman v. Cellco P'ship*, No. 08-4103 at p. 14 (3d Cir., filed June 6, 2011) ("Appellants do not dispute that the holding of *Concepcion* with respect to contract unconscionability under California law applies to [New Jersey law]."). Unlike in this case, the plaintiff in *Litman*—who had never sought to prove that the class action ban there would bar individuals from effectively vindicating their rights—did not even attempt to defend the state's basic rules of contract law. Dell's other cases are inapplicable here for similar reasons. *See, e.g.*, *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042 (N.D. Cal. 2011) (no evidentiary record whatsoever); *In re Apple and AT&T iPad Unlimited Data Plan Litig.*, No. C-10-2553, 2011 WL 2886407 (N.D. Cal. Jul. 19, 2011) (same); *King v. Advance America*, Nos. 07-237, 07-3142, 2011 WL 3861898 (E.D Pa. Aug. 31, 2011) (same). In contrast, here, the plaintiffs submitted record evidence sufficient to establish that they (and other plaintiffs like them) would *not* be

able to effectively vindicate their statutory rights in individual arbitration.

II. THE PRINCIPLES ANNOUNCED IN *MITSUBISHI MOTORS* APPLY EQUALLY TO FEDERAL AND STATE STATUTES.

Shifting gears, Dell argues that even if the *Mitsubishi Motors* rule survives *Concepcion*, it does not apply to claims arising under state statutes. According to Dell, the rationale underlying *Mitsubishi Motors* is exclusively "the *federal* interest" in vindicating statutory rights. Dell Br. at 39 (emphasis added). Numerous courts have rejected this claim. *See, e.g., Kristian v. Comcast Corp.*, 446 F.3d 25, 29 (1st Cir. 2006) (explaining that a class action ban would be unenforceable where it would "prevent the vindication of statutory rights under state and federal law"); *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 81 (D.C. Cir. 2005) (holding that, under the *Mitsubishi Motors* line of cases, a party advancing state statutory claims may "resist[] arbitration on the ground that the terms of any arbitration agreement interfere with the effective vindication of statutory rights").

Contrary to Dell's suggestion, the core premise underlying the effective vindication of rights theory is that, by using an arbitral forum to resolve statutory disputes, a party may not defeat the core objectives of the statute. Thus, an arbitration provision that, if enforced, would frustrate or eliminate a core statutory objective would not allow a plaintiff to effectively vindicate his statutory rights, and would therefore be unenforceable, irrespective of what type of right it attempts to curtail. *See Mitsubishi Motors*, 473 U.S. at 637 (explaining that "so long as the prospective litigant may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function"); *Randolph*, 531 U.S. at 90 (same).

That this principle applies with no less force to claims arising under state statutes is well established. Dell's contrary assertion overlooks *Preston v. Ferrer*, 552 U.S. 346 (2008), in which the Supreme Court applied the *Mitsubishi Motors* rule to claims arising under a state statute. As the Court explained, the FAA "supplies not simply a procedural

framework applicable in federal courts; *it also calls for the application in state as well as federal courts, of federal substantive law regarding arbitration.*" *Id.* at 349 (emphasis added).

In *Preston*, the plaintiff had sought to obtain relief under the California Talent Agencies Act ("TAA"). *Id.* at 982. After the defendant moved to compel arbitration, the plaintiff challenged the enforceability of the arbitration agreement, arguing that, because the state statute vested exclusive jurisdiction with an administrative body, he should not be forced to resolve his claims before an arbitrator. The Supreme Court disagreed, holding that the FAA trumped a state law's attempt to vest adjudicatory authority in an administrative agency, and required the plaintiff to resolve his claims in an arbitral forum. *See id.* at 352. In reaching this conclusion, however, the Court made clear that the *Mitsubishi Motors* rule still governed the analysis: the Court explained that it was enforcing the agreement to arbitrate, but only because it determined that, by agreeing to arbitrate his claims, the plaintiff would "relinquish[] no substantive rights

the TAA or other California law may accord him." *Id.* (emphasis added). The Court emphasized that the case involved "precisely and only a question concerning the forum in which the parties' dispute will be heard," *id.*, and that, under *Mitsubishi Motors*, "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral . . . forum." *Id.* (quoting *Mitsubishi Motors*, 473 U.S. at 628). *Preston's* unambiguous application of the *Mitsubishi Motors* principle to claims arising under a state statute is fatal to Dell's position that the theory does not apply to claims arising under a Massachusetts state consumer protection statute.

But beyond *Preston*, the idea that the vindication-of-rights rule would apply to claims arising under federal statutes but not to claims arising under state statutes defies both the underlying logic of the Supreme Court's reasoning and the point of FAA Section 2. As explained above, the basis for the Supreme Court's reasoning in the *Mitsubishi Motors* line of cases is that Section 2 itself authorizes only arbitration agreements that

provide a meaningful forum for the resolution of claims, and hence cannot preempt a state-law principle that does no more than enforce that fundamental safeguard.

Thus, a state may adopt (as many have) a rule of state contract law that prevents the enforcement of arbitration agreements where it can be shown that enforcing the agreement would effectively preclude an individual from vindicating their substantive rights under a particular state statute. And, where a state chooses to do so, such a rule, unlike the *Discover Bank* rule, is not preempted because it does not impose a regime that is "inconsistent with the FAA," *Concepcion*, 131 S. Ct. at 1751, as evidenced by the Supreme Court's own application of this theory, under Section 2 of the FAA, to federal statutes. *Cf. Knepper v. Rite Aid Corp.*, __ F.3d __, 2012 WL 1003515, *9 (3d Cir. Mar. 27, 2012) (rejecting as "counterintuitive" the claim that state laws are impliedly preempted where they enforce standards that are identical with those established in a federal statute).

Indeed, a review of how courts have handled similar claims arising under state statutes demonstrates that the *Mitsubishi Motors* reasoning is alive and well as applied in the state context. For example, in *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003), the court addressed a challenge to the enforcement of an arbitration agreement for claims arising under Virgin Islands law. *Id.* at 258. In the course of resolving this challenge, the court observed that "considerations of public policy and the loss of state statutory rights," are "relevant" to a court's unconscionability analysis under Section 2 of the FAA. *Id.* at 264. The court went on to hold that, for claims arising under state statutes, the *Randolph* approach applies, and allows a plaintiff "the opportunity to prove, as required under [*Randolph*], that resort to arbitration would deny her a forum to vindicate her statutory rights." *Id.* at 268 (quoting *Blair v. Scott Specialty Gases*, 283 F.3d 595, 607-08 (3d Cir. 2002), which also held that the *Mitsubishi Motors* approach applied to claims arising under state statutes).

This Court in *Feeney v. Dell, Inc.*, 454 Mass. 192 (2009) ("*Feeney I*") relied on this exact approach in determining whether Dell's agreement to arbitrate effectively operated to prevent litigants from vindicating their substantive rights under Massachusetts' consumer protection regime. *See Feeney I*, 454 Mass. at 202-03 (explaining that, by undermining the policy of G.C. c. 93A, Dell's class action prohibition "defeats the presumption that arbitration provides a fair and adequate mechanism for enforcing statutory rights") (quoting *Kristian*, 446 F.3d at 54) (internal quotations omitted).

And courts in other states have adopted similar rules permitting a court to invalidate agreements to arbitrate where their provisions would effectively prevent a plaintiff from vindicating his state substantive rights. *See, e.g., Brady v. Williams Capital Group, L.P.*, 14 N.Y.3d 459, 467 (N.Y. 2010) (holding that the "appropriate" approach for resolving claims arising under state statutes is the "case-by-case, fact-specific approach employed by the federal courts," and that the "principles set forth in *Gilmer* and [*Randolph*]" should govern); *In re Olshan*

Foundation Repair Co., LLC, 328 S.W. 3d 883, 893 (Tex. 2010) (applying the vindication-of-rights theory and explaining that where an arbitration provision could be shown to "deter individuals from bringing valid claims," the arbitration clause could be found to be unconscionable because it would "prevent a litigant from effectively vindicating his or her rights in the arbitral forum"); *see also Livingston v. Metro. Pediatrics, LLC*, 227 P.3d 796 (Or. 2010); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio App. Ct. 2004).

At bottom, a state law rule that, for claims arising under state statutes, enforces the identical FAA standard applied by federal courts to claims arising under federal statutes is not preempted under the Court's preemption test set forth in *Concepcion*. Both rules take their meaning from the fact that the FAA preserves the right of plaintiffs to demonstrate that the existence of a particular arbitration provision—including a class action ban—would effectively preclude them from vindicating their substantive rights. And both allow a court to invalidate an arbitration agreement when a plaintiff

makes such a showing. By urging a rule that would read this core principle out of the FAA jurisprudence, Dell seeks to turn the central promise of the FAA—that arbitration is a credible and legitimate alternative dispute resolution mechanism—on its head.[2]

III. WHERE, AS HERE, A COMPANY'S USE OF AN AGREEMENT TO ARBITRATE EFFECTIVELY EVISCERATES A SUBSTANTIVE STATE-LAW RIGHT, IT IS UNENFORCEABLE.

Following the path set out in *Mitsubishi Motors*, the question here is whether the plaintiffs demonstrated that Dell, by eliminating the class action mechanism and forcing the plaintiffs to arbitrate their claims arising under G.L. c. 93A individually, has effectively deprived the plaintiffs

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[2] Perhaps Dell's best case—*Kilgore v. KeyBank Nat'l Assoc'n*, No. 09-16703, 2012 WL 718344 (9th Cir. Mar. 7, 2012)—was decided after it filed its opening brief. In that case, the panel found preempted a rule of state law that public injunctive claims were nonarbitrable. *See id.* at *1. In reaching this conclusion, the panel stated that the vindication-of-rights theory "applies only to federal statutory claims." *Id.* at *11. But the panel entirely failed to explain why that is so, and simply ignored the Supreme Court's clear direction in *Preston* that this rule applies equally to claims arising under state and federal statutes. Moreover, the statement was not central to the court's ruling, which rested primarily on the theory that the state-law rule was preempted under *Concepcion*'s first test because it excludes a particular class of claims from arbitration. In any event, a petition for rehearing in that case is pending, and the result is therefore still uncertain.

of the ability to vindicate their substantive claims and, in turn, defeated one of the statute's core objectives. On this point, there can be little doubt, as both the lower court and this Court have so found. *See Feeney I*, 454 Mass. at 202-03; *Feeney v. Dell Inc.*, 28 Mass. L. Rptr. 652, at *8-*9 (Sup. Ct. Mass. 2011) ("*Feeney II*").

Like the Sherman Act at issue in *Mitsubishi Motors*, G.L. c. 93A embodies twin objectives: deterrence and consumer protection. *See Baldassari v. Public Fin. Trust*, 369 Mass. 33, 40-41 (2004) ("[G.L. c. 93A] was designed to meet a pressing need for an effective private remedy"); *Commonwealth v. Fall River Motor Sales, Inc.*, 409 Mass. 302, 316, 565 N.E.2d 1205 (1991) ([T]he scheme of the statute and the Legislature's manifest purpose" is to "deter[] misconduct"). One of the key purposes of c. 93A, evidenced by several distinct statutory provisions, including the statute's fee-shifting provision and its explicit grant of the right to bring a representative action, is to motivate consumers and counsel to undertake cases and "pursue claims that otherwise might escape redress." *Aiello v. Aiello*, 829 N.E.2d

656, 658 (Mass. App. 2005). In this way, the statute seeks to advance the public interest through private enforcement of statutory rights. In addition, the remedies available against violators of the statute, including a provision for treble damages, serve to "provide an effective private consumer remedy by overcoming the hurdle of 'economic limitations to the litigation of an otherwise valid claim.'" *Feeney I*, 454 Mass. at 202 (quoting Rice, *New Private Remedies for Consumers: The Amendment of Chapter 93A*, 54 Mass. L.Q. 307, 307 (1969)).

Because eliminating the statutory right to bring representative actions in this case would result in "no realistic individual claim arbitration process," *Feeney II*, 28 Mass. L. Rptr. at *8, Dell's agreement to arbitrate defeats these core objectives, and prevents "the statute from serv[ing] its functions." *Randolph*, 531 U.S. at 90. As explained in the lower court's opinion, the record in this case demonstrated that Dell's class action ban effectively operates to eliminate the presentation of any claims under G.L. c. 93A for the allegedly injurious conduct. The lower court specifically found that "[h]ere, based upon

facts—not unsupported hypothesis—there is no realistic individual claim arbitration process that the FAA could promote," and that "as a matter of fact," individual arbitration under Dell's clause is "infeasible". *Feeney II*, 28 Mass. L. Rptr. at *8-*9. The lower court's conclusion is solidly grounded in several key facts: (1) Dell's arbitration agreement contains none of the "pro-consumer" incentives that AT&T's clause had in *Concepcion*; (2) the costs associated with arbitrating the claims at issues here are an order of magnitude greater than the available damages; and (3) uncontroverted testimony demonstrated that no competent lawyer would pursue these claims on an individual basis based on the claims' complexity, the costs of litigating them, and the potential damages. Under this set of circumstances, the statute cannot serve its core functions because individuals are unable to pursue their claims through individual arbitration, and arbitration does not allow for the enforcement of a prospective litigant's statutory rights.

As in *AmEx III*, this record is sufficient to permit a finding that the agreement to arbitrate

violates the core protections of the FAA and is therefore unenforceable. *See In re AmEx III*, 667 F.3d at 217-18. There, the plaintiffs submitted evidence that the costs of proceeding in individual arbitration would fall between $300,000 and $2 million, while the individual damages of a single claim could be estimated at "$12,850 or $38,549 when trebled." *Id.* And, given this costs vs. damages ratio, the plaintiffs' expert opined that it would not be "worthwhile for an individual plaintiff . . . to pursue individual arbitration." *Id.*

On this showing, the Second Circuit held that "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action." *Id.* at 218. Thus, according to the court, the plaintiffs had established "that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive," and therefore that AmEx's agreement to arbitrate, by including a class action ban, "effectively depriv[ed] the plaintiffs of the statutory protections of the antitrust laws." *Id.* at 217.

Both clauses—Dell's here and AmEx's in *In re AmEx III*—function the same way: they "eradicate[e] the private enforcement component" of the statute. *Id.* Under Section 2 of the FAA, where an agreement to arbitrate would have this effect, a court is permitted to invalidate it.

CONCLUSION

For the foregoing reasons, the decision of the lower court should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that on this 19th day of April, 2012, I caused two copies of the foregoing Brief of *Amici Curiae* in Support of Plaintiffs-Appellees to be served via first-class mail upon the following counsel of record for the parties:

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