No. 08-1473

In The Supreme Court of the United States

AMERICAN EXPRESS COMPANY, ET AL.,

Petitioners,

v.

ITALIAN COLORS RESTAURANT, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, ET AL.,

Respondents.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION AND CALIFORNIA BANKERS ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

BALLARD SPAHR
ANDREWS & INGERSOLL, LLP
ALAN S. KAPLINSKY, ESQ.
(I.D. No. 02446)
Counsel of Record for Amici Curiae
JEREMY T. ROSENBLUM, ESQ.
(I.D. No. 35413)
1735 Market Street, 51st Floor
Philadelphia, PA 19103
(215) 665-8500

Attorneys for Amici Curiae

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Amici Curiae American Bankers Association ("ABA"), American Financial Services Association ("AFSA"), Consumer Bankers Association ("CBA") and California Bankers Association ("CABA") (together, "*Amici*") respectfully submit this brief in support of the Petition for a Writ of *Certiorari* filed by Petitioners American Express Company and American Express Travel Related Services Company, Inc. (together, "AMEX").

AMICI'S INTEREST IN THIS CASE[1]

Many of *Amici's* members, constituent organizations and affiliates (collectively, "Members") have independently adopted as standard features of their business and consumer contracts provisions that in appropriate circumstances mandate the individual arbitration of disputes arising from or relating to those contracts. They use arbitration because it is a prompt, fair, inexpensive and effective method of resolving disputes and because arbitration minimizes the disruption and loss of good will that often results from litigation.

[1] All counsel of record received timely notice of *Amici's* intent to file this brief under Supreme Court Rule 37 and provided blanket consent to the filing. No counsel for any party authored this brief in whole or in part. No counsel, party or person other than *Amici* and their members made a monetary contribution intended to fund the preparation or submission of the brief.

The ABA is the principal national trade association of the banking industry in the United States. It represents banks and holding companies of all sizes in each of the fifty states and the District of Columbia, including community, regional and money center banks. The ABA also represents savings associations, trust companies and savings banks. ABA members hold an overwhelming majority – approximately 95% – of the domestic assets of the U.S. banking industry. The ABA frequently appears in litigation, either as a party or *amicus curiae*, in order to protect and promote the interests of the banking industry and its members.

AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA has a broad membership, ranging from large international financial services firms to single office, independently owned consumer finance companies. The association represents financial services companies that hold a leadership position in their markets and conform to the highest standards of customer service and ethical business practices. AFSA has provided services to its members for more than 90 years. The association's officers, board, and staff are dedicated to continuing this legacy of commitment through the addition of new members and programs, and increasing the quality of existing services.

The CBA is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer, auto, home

equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. The CBA represents over 750 federally-insured financial institutions that collectively hold more than 70% of all consumer credit held by federally-insured depository institutions in the United States.

The CABA is a non-profit trade association established in 1891. The CABA represents most depository institutions that operate in the State of California.

Unless it is reversed, the decision of the Panel below will adversely impact most arbitration agreements, which require individual arbitration and disallow class proceedings in arbitration. A finding that Amex' arbitration agreement is invalid due to its individual arbitration requirement would seriously undercut the value of arbitration to Members who use such agreements. The reality and threat of class action proceedings would predictably raise the cost of providing goods and services to their customers. Accordingly, *Amici* have a compelling interest in the issues at stake in this case and in this Court granting *certiorari* and reversing the Panel's erroneous decision.

SUMMARY OF ARGUMENT

Certiorari is warranted in this case because the Panel decision below fundamentally misapplied this Court's teachings under the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1, *et seq.,* and created a split with decisions of other Circuits bearing on the enforceability of provisions requiring individual arbitration and the construction of arbitration agreements. Specifically, this Court should review the decision below because:

- In conflict with the FAA, this Court's precedents, and the decisions of other Circuits, the Panel elevated class action procedures – applied in an arbitration context for which they were never intended – over the federal policy in favor of arbitration. It insisted upon class proceedings even though Congress crafted strong government enforcement mechanisms and consciously *declined* to provide for class enforcement of the antitrust laws.
- In disregard of *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000), the Panel treated costs that would arise either in *litigation* or arbitration as justifying invalidation of the arbitration agreement's individual arbitration requirement and then made an unwarranted and premature *assumption* that the arbitrator would apply a confidentiality provision in the parties'

arbitration agreements in a manner that would impede the ability of merchants to share expert witness fees.

- The Panel refused to apply the arbitration agreement as written and instead adopted a mode of contract analysis wholly at odds with the approach applied to non-arbitration agreements.

In all of these respects, the Panel adopted a hostile approach to arbitration requiring correction by this Court.

ARGUMENT

I. The Panel Improperly Substituted Its Policy Preferences For Congress' Judgment.

A. The FAA Establishes A Strong Federal Policy Favoring Arbitration.

The law recognizes a strong interest in the enforceability of contracts in accordance with their terms. *See Sander v. Alexander Richardson Investments*, 334 F.3d 712, 721 (8th Cir. 2003) ("Public policy demands enforcing contracts as written and recognizing the parties' freedom to contract."). Prior to the adoption of the FAA, this public policy was circumvented with respect to arbitration agreements by state and federal courts alike, which refused to enforce such agreements. *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1274 (2009).

The FAA was designed specifically "'to reverse the longstanding judicial hostility to arbitration agreements. . . .'" *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 288 (2002) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)). It embodies a liberal federal policy favoring arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr.*, 460 U.S. 1, 24-25 (1983). Accordingly, Section 2 of the FAA provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 2 creates federal substantive law of arbitrability that is binding on state as well as federal courts. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). It "command[s] that an arbitration agreement is enforceable just as any other contract. . . ." *Vaden*, 129 S. Ct. at 1275.

"The advantages of arbitration are many: It is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing . . . dealings among the parties." H.R. Rep. No. 97-542, at 3 (1982). These "advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (citation omitted). Below, the Panel acknowledged that "an individual arbitration brought by a plaintiff will likely cost less than a trial in federal district court. . . ." App. to Pet. Cert. ("App.") 36a n.14.

The benefits of arbitration are not limited to parties who have disputes. Rather, *all* contracting parties benefit from the lower dispute resolution costs inherent in arbitration. This is because economic considerations force providers to pass on to their users, in whole or in part, the lower dispute resolution costs they incur as a result of arbitration. Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements,* 2001 J. Disp. Resol. 89, 91-93. Indeed, economic theory teaches that user costs will fall with producer costs even if the producer has a monopoly. Hal R. Varian, Intermediate Microeconomics 424-29 (7th ed. 2006) (setting forth monopolist's profit maximization formula under which decreases in marginal costs result in lower prices).

Moreover, published studies show significant additional benefits to arbitration, as well as high levels of satisfaction for parties who participate in arbitration. *See, e.g.,* Harris Interactive, *Arbitration: Simpler, Cheaper and Faster Than Litigation*, http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf (Apr. 2005) (strong satisfaction with arbitration results and process, including speed and simplicity); Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* 3, http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf (Dec. 2004) ("consumers find the arbitration process beneficial to resolving disputes"); Lewis L. Maltby, *Private Justice: Employment*

Arbitration and Civil Rights, 30 Colum. Hum. Rts. L. Rev. 29, 48, 63 (1998) (director of ACLU's National Task Force on Civil Liberties in the Workplace concludes that employees collectively receive *10.4%* of their demand in litigation, compared with *18%* in arbitration, and "arbitration holds the potential to make workplace justice truly available to rank-and-file employees for the first time in our history").

B. Imposition Of Class Procedures Fundamentally Alters The Parties' Arbitration Agreement.

As Amex has explained, when Congress enacted today's antitrust laws *prior* to the adoption of Rule 23, it provided strong government enforcement mechanisms in lieu of class actions. *See* Pet. Cert. 16-18. The existence of substantial problems with class actions cannot be disputed. *See* Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 401 (RAND Institute for Civil Justice 2000) (leaving open the "great big question" whether class actions, on balance, serve the public well); *Mirfashi v. Fleet Mortgage Corp.,* 356 F.3d 781, 785 (7th Cir. 2004) (rejecting settlement giving class counsel a "generous fee" because the settlement "sold . . . 1.4 million claimants down the river"); *In re Gen. Motors Corp.*, 55 F.3d 768, 778 (3d Cir. 1995) (noting that class actions can become a vehicle for collusive settlements); 151 Cong. Rec. H726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner, sponsor of Class Action Fairness Act) ("The class action judicial

system has become a joke, and no one is laughing except the trial lawyers . . . all the way to the bank."). Certainly, sophisticated Amex merchants could well prefer cost savings and other arbitration benefits to the speculative prospect of "relatively paltry potential recoveries" in class actions. *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

In light of the benefits that arbitration can provide, Congress has encouraged parties to arbitrate disputes in accordance with the contracts they have executed. *See* 9 U.S.C. § 2. However, "the FAA's legislative history indicates that Congress was opening the door to a particular *kind* of non-judicial dispute resolution proceeding, and class arbitration is a different kind of proceeding – apart from its non-judicial nature, it has little in common with what Congress approved in 1925." David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 57 (Nov. 2007) ("*An Uninvited Guest*") (emphasis in original). In this regard, proponents of the FAA who testified before Congress described arbitration as: (1) purely voluntary; (2) "face to face" in nature; and (3) prompt, inexpensive and procedurally streamlined. *Id.* at 59-60.

One leading arbitration advocate characterized arbitration as "something so much cheaper than litigation that . . . its use would reduce the price of

consumer goods. . . .'" *Id.* at 59 n.16 (citations omitted). Another leading advocate advised Congress that arbitration would avoid long delays resulting from court congestion, preliminary motions and other steps taken by litigants. *Id.* at 59. Accordingly, Congressional reports recommending adoption of the FAA made clear that, "when it enacted the FAA, Congress understood arbitration to be something inherently prompt, inexpensive, and streamlined – in other words, just the type of proceeding that had been described by the witnesses during the pre-enactment hearings." *Id.* at 61.

Class arbitration, of course, shares *none* of the attributes of the arbitration contemplated by Congress. *Id.* at 62-66. Opt-out class arbitration conducted roughly in accordance with Fed. R. Civ. P. 23, as some arbitrator may choose to apply it, is certainly *not* voluntary and does not provide a company with an opportunity to meet "face-to-face" with putative class members who may (or may not) feel aggrieved. And class-action procedures inherently conflict with the speed, simplicity, cost savings, informality and reduction in adversarial behavior arbitration was designed to achieve. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

In effect, superimposing class-action procedures on arbitration "brings the burdens of litigation into the arbitral forum. . . . [T]he greatest advantages of arbitration are in many instances the greatest disadvantages of litigation, yet class-wide arbitration . . . lessens the distinction between the two

processes." Jonathan R. Bunch, Note, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration*, 2004 J. Disp. Resol. 259, 272; *accord* Lindsay R. Androski, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 U. Chi. Legal F. 631, 649 (class procedure "subjects arbitration to the very judicial burden that the contracting parties sought to avoid through arbitration"). Thus, class arbitration, which attempts to combine two separate and distinct forms of dispute resolution, creates an unworkable tangle inferior to *both* a true judicial or arbitral forum.

Not only is class arbitration inconsistent with the streamlined procedures that are the *sine qua non* of the individual arbitration contemplated by the FAA, class arbitration generates unique costs. For example, the "clause construction" determination, which addresses whether a particular agreement permits class arbitration, has no counterpart in the courts. Clause construction disputes can be time-consuming and costly. *See An Uninvited Guest*, at 63-64. *See also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 2009 U.S. LEXIS 4345, 77 U.S.L.W. 3678 (June 15, 2009) (granting *certiorari* in case where parties have disputed availability of class arbitration since 2004). Thus, class arbitration creates delays and costs incompatible with the expectations of parties who bargained for individual arbitration.

The cost disadvantages of class arbitration are hardly the only (or worst) ones. Any class-wide arbitral award would be reviewable only for fraud, bias or gross misbehavior of the arbitrator. *See* 9 U.S.C. § 10; *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008) (holding that parties may not contractually expand the grounds for appealing arbitration awards). Many companies are willing to risk an erroneous decision in an *individual* arbitration because of the cost savings inherent in arbitration and the desire to pursue a less adversarial way of resolving customer disputes. However, the calculus changes dramatically if the arbitration provision must allow for class proceedings. As one member of this Court commented in referring to class arbitration proceedings: "You might not want to put your company's entire future in the hands of one arbitrator." *See* Tr. of Oral Argument*, Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), *available at* 2003 WL 1989562, at *29.

Of course, Amex and its merchants agreed to *individual* arbitration of their disputes; they did *not* agree to class arbitration. "The arbitrator has no authority, *sua sponte*, to assert jurisdiction over a contracting party who has never appeared or agreed to an arbitration proceeding or a modification of his or her contract." Edward C. Anderson & Kirk D. Knutson, "*Class" Arbitration? What About the Rights of Absent "Class" Members?,* 7 Engage 148, 151 (2006), http://www.fed-soc.org/doclib/20080214_LitAndreson.pdf ("*Class Arbitration*"). And the lack of judicial

involvement and oversight of classwide arbitration raises significant due process concerns about the protection of absent class members. *See An Uninvited Guest* at 75-78. In enacting the FAA in 1925, well before Rule 23 was added to the Federal Rules in 1966, Congress clearly did not contemplate classwide arbitration.[2]

In short, the inevitable consequence of permitting the Panel decision to stand would be to substitute a Rule 23 class action in court for the individual arbitration to which the parties agreed. This is why Amex declared at oral argument that it would "reconsider" its intention to proceed to arbitration should the Panel refuse to enforce the class action waiver and why the Panel remanded the case to allow Amex the opportunity to withdraw its motion to compel arbitration. App. 42a-43a.

C. Compelling Individual Arbitration Will Not Serve To Exculpate Amex.

Notwithstanding Congress' considered decision *not* to provide for class actions under the antitrust

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[2] This Court has warned that courts should be "mindful that Rule 23's requirements must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" *Amchem*, 521 U.S. at 612 (citing 28 U.S.C. § 2072(b)). This Court recently granted *certiorari* in *Stolt-Nielsen S.A.* to decide whether imposing class arbitration without express contractual authority is consistent with the FAA.

laws, the Panel below suggested that "[c]orporations should not be permitted to use class action waivers as a means to exculpate themselves from liability for small value claims." App. 39a (quoting *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007)). However, even putting aside the fact that Respondents *can* vindicate their rights in individual proceedings against Amex (*see* Section II, *infra*), the threat and reality of government enforcement provide a powerful brake on improper conduct and an effective remedy for any wrongdoing that does occur.[3]

The U.S. Department of Justice (the "DOJ"), the Federal Trade Commission (the "FTC") and state attorneys general all play an aggressive role in enforcing the antitrust laws. Section 4 of the Sherman Act, 15 U.S.C. § 4, and Section 15 of the Clayton Act, 15 U.S.C. § 25, give the DOJ authority to

[3] A number of courts have relied upon government enforcement mechanisms in upholding the validity of arbitration agreements with class action prohibitions. *See, e.g., Johnson v. West Suburban Bank*, 225 F.3d 366, 375-76 (3d Cir. 2000) (even if class actions are not available in arbitration, numerous administrative mechanisms exist to enforce TILA); *accord, Gay v. CreditInform*, 511 F.3d 369, 381 (3d Cir. 2007), *reh'g denied* (Jan. 29, 2008); *Randolph v. Green Tree Fin. Corp.-Ala.*, 244 F.3d 814, 818 (11th Cir. 2001). *See also Pitchford v. AmSouth Bank*, 285 F. Supp. 2d 1286, 1292 (M.D. Ala. 2003) (sustaining class action waiver in arbitration agreement in view of administrative enforcement mechanisms for ECOA violations and the federal policy favoring arbitration); *In re Universal Service Fund Tel. Billing Practices Lit.*, 300 F. Supp. 2d 1107, 1137-38 (D. Kan. 2003).

obtain preliminary and permanent injunctions, divestitures, rescission and forfeitures. The DOJ has been particularly aggressive in enforcing antitrust laws in the payment cards industry. In litigation culminating in 2004, the DOJ forced VISA and MasterCard, the two leading card networks, to discontinue enforcing rules prohibiting member institutions from issuing Amex and Discover cards. *U.S. v. VISA U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 543 U.S. 811 (2004). Thereafter, the DOJ forced VISA to abandon plans to require merchants to treat VISA debit cards differently for PIN and signature transactions. *See* Press Release, Dept. of Justice, *Visa Inc. Rescinds Debit Card Rule as a Result of Department of Justice Antitrust Investigation* (July 1, 2008) (http://www.justice.gov/opa/pr/2008/July/08-at-582.html).

Additionally, the DOJ frequently brings criminal prosecutions under the Sherman Act. Section 1 of the Sherman Act, 15 U.S.C. § 1, the most commonly used criminal antitrust provision, establishes imprisonment and fines for individuals of up to ten years and $1 million and fines for corporations of up to $100 million for each count. The DOJ has the authority to seek greater fines under 18 U.S.C. § 3571, equal to twice the gross financial loss or gain resulting from a violation.

Section 5 of the FTC Act, 15 U.S.C. § 45, gives the FTC authority to seek remedies that include: (1) penalties up to $16,000 per violation, 15 U.S.C. § 45(m); (2) injunctions and ancillary relief, 15 U.S.C.

§ 53(b); and/or (3) "such relief as the court finds necessary to redress injury to consumers . . . [including] rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages. . . ." 15 U.S.C. § 57b(b). *See also FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) (holding that, in an injunction proceeding, a court has the authority to grant any ancillary relief that is "necessary to accomplish complete justice," including the power to grant rescission); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (asset freeze).

In sum, even accepting for the sake of argument that the unavailability of class proceedings lessens to some extent the efficacy of private proceedings to deter and redress antitrust violations, the array of government enforcement mechanisms ensure that a provision requiring individual arbitration does not serve as an exculpatory clause.

II. The Panel Departed From Guiding Precedents In Assuming The Arbitration Agreement Would Be Misapplied And In Failing To Apply Established And Pro-Arbitration Contract Interpretation Principles To The Arbitration Agreement's Confidentiality Provision.

The Panel invalidated the individual arbitration requirement in the Amex arbitration agreement for the sole reason that, in the Court's view, the waiver would effectively preclude Respondents from pursuing

their antitrust claims. Amex explained in its Petition that the Panel misconstrued this Court's decision in *Randolph* when it: (1) concluded that costs Respondents would necessarily incur either in litigation or arbitration could justify invalidation of the individual arbitration requirement of the Amex arbitration agreement; and (2) prejudged in advance of arbitration the costs that Respondents would necessarily bear in arbitration. Pet. Cert. 18-20. By contrast, *Randolph* teaches that the party opposing arbitration must prove that arbitration costs will prevent it from vindicating its rights and prior cases establish that arbitration agreements must be enforced as written, like other agreements, but with a healthy regard to the pro-arbitration policies at the heart of the FAA. *Randolph*, 531 U.S. at 92. In ignoring this Court's guidance, the Panel produced an improper result profoundly hostile to arbitration.

A. The Panel Decision Rests On An Inappropriate *Assumption* How The Arbitration Agreement's Confidentiality Provision Would Be Applied.

The decision below relied on expert testimony that it would cost in excess of $200,000, and perhaps $1 million or more, for an Amex merchant to commission an expert report that would be needed to litigate an antitrust claim against Amex. *See* App.

29a-37a.[4] The Panel thought it obvious that no Respondent would bring an individual arbitration against Amex, for estimated treble damages ranging from approximately $9,000 to approximately $39,000, when the Respondent's expert report would cost in excess of $200,000. *Id.* at 32a-33a (citing affidavit of Respondent's expert).

In comparing Respondents' potential monetary recovery to the expert witness fees Respondents would need to incur, the Panel did not seem to weigh the value of any injunctive relief Respondents might obtain. More fundamentally, Amex argued below that Respondents "could reach an agreement as to how the experts' cost of preparation could be shared." *Id.* at 36a (internal quotation marks omitted); *see also* Pet. Cert. 20-21 (criticizing Panel's treatment of this issue). While the record does not specify the number of Amex merchants, it is clear that a very small percentage could share the cost of a single expert in their individual proceedings for a manageable if not *de minimis* outlay, even if the total cost for the expert would approximate $1 million, an amount towards the high end of the range estimated by Respondents' expert.

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[4] The Panel acknowledged that "an individual arbitration brought by a plaintiff will likely cost less than a trial in federal district court" but did not regard this likelihood as being significant. App. 36a n.14.

The Panel, however, dismissed Amex' argument out of hand:

> This is an intriguing proposition, but we do not believe it can survive the application of the following provision of the arbitration clause in the Card Acceptance Agreement: "The arbitration proceeding and all testimony, filings, documents and any information relating to or presented during the arbitration proceedings shall be deemed to be confidential information not to be disclosed to any other party." Thus, any proposal that the plaintiffs share the services of expert witnesses employed in the *Marcus* action runs aground on the fact that the individual plaintiffs have contracted with Amex not to share such information with *anyone*.

App. 36a (emphasis in original). The Court's conclusion that merchants could not share an expert (or the costs of an expert) was an essential link in the chain of argument leading to the Court's invalidation of the class action waiver (and, effectively, the arbitration agreement in its entirety – *see* Section I-B, *supra*).

Randolph makes clear that courts may not refuse to enforce arbitration agreements as written based on rank speculation as to arbitration costs. *Randolph*, 531 U.S. at 91 (holding that, where an arbitration agreement was silent as to costs, the "risk" that the plaintiff would "be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement"). Nevertheless, the Panel

assumed that Amex would seek to apply the confidentiality provision to interfere with effective cost-sharing arrangements by its merchants and that an arbitrator would allow Amex to get away with this kind of stratagem. There is absolutely no basis for this speculation.

B. The Panel Failed To Apply The Arbitration Agreement's Confidentiality Provision As Written, In Violation Of The FAA's Policy Favoring Arbitration And Contract Construction Principles Established Outside The Arbitration Context.

Under this Court's precedents, the Panel was required to construe the arbitration agreement and its confidentiality provision from a pro-arbitration stance. *See Mitsubishi Motors Corp.,* 473 U.S. at 626; *Moses H. Cone*, 460 U.S. at 24-25. Instead, the Panel fundamentally departed from prevailing contract construction principles in order to *invalidate* a core part of the arbitration agreement.

The Panel cited *no* authority and provided *no* explanation for its *ipse dixit* conclusion that the confidentiality clause was fundamentally incompatible with a cost-sharing regimen for a single expert who could provide the testimony needed for merchants to contest the Honor all Cards Rule in individual arbitration proceedings. Certainly, the confidentiality provision does not preclude a single attorney or law firm from representing multiple

plaintiffs in separate proceedings. By the same token, it does not prevent a single expert from assisting counsel in its work. An extreme prohibition of this type would need to be articulated in the clearest possible language and not through a logical leap from a provision that says nothing about either experts or costs.

Potentially, an expert might need to submit a "new" report or provide "new" testimony for each individual arbitration. However, once the expert has climbed the learning curve on his or her first report and first visit to the witness stand, the cost of further assistance is not likely to be great. There is no reason at all to believe that the potential costs or inconveniences created by the agreement's confidentiality provision – all of which are entirely speculative – would prevent a determined group of merchants from vindicating their rights under the antitrust laws.[5]

The Panel's treatment of the confidentiality provision violates several fundamental contract interpretation principles. *First*, in equating a restriction on sharing *confidential information* (which appears in the arbitration agreement) with a prohibition against sharing *costs* (which is absent from the agreement),

[5] Even if Respondents could show that the arbitration agreement creates some measure of inconvenience to them, such a showing would be irrelevant. *See Moses H. Cone*, 460 U.S. at 20 (FAA requires piecemeal dispute resolution when necessary to give effect to an arbitration agreement); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (same).

the Court disregarded the principle that contracts should be interpreted in accordance with their plain language. *Norfolk Southern Ry. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 31 (2004) (giving effect to plain language of maritime contract); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (providing that the "arbitrator may not ignore the plain language of the contract"). It also violated Sections 2 and 3 of the FAA, 9 U.S.C. §§ 2-3, which command that arbitration agreements shall be enforced in accordance with their terms. *See Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (stating that FAA § 2 was crafted to "ensur[e] that private arbitration agreements are enforced according to their terms").

Second, the Court failed to give the confidentiality provision a construction that would have validated the entire arbitration agreement. Instead of affording the provision a reasonably straightforward, narrow construction, it stretched the contract language beyond the breaking point in order to *invalidate* the agreement's critical individual arbitration requirement.

The Second Circuit outside the arbitration context – but not the Panel here –has applied the universally applicable principle favoring reasonable contract constructions that validate an agreement. *See Venizelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461, 465-66 (2nd Cir. 1970) ("A construction that will sustain an instrument will be preferred to one that will defeat it; *Ga Nun v. Palmer*, 216 N.Y. 603,

111 N.E. 223 (1916); *accord: Silverman v. Alpart*, 282 App.Div. 631, 125 N.Y.S.2d 602 (1953); if an agreement is fairly capable of a construction that will make it valid and enforceable, that construction will be given it. *M. O'Neil Supply Co., Inc. v. Petroleum Heat & Power Co.*, 280 N.Y. 50, 19 N.E.2d 676 (1939) . . . Where a letter of credit is fairly susceptible of two constructions, one of which makes it fair, customary and one which prudent men would naturally enter into, while the other makes it inequitable, the former interpretation must be preferred to the latter, and a construction rendering the contract possible of performance will be preferred to one which renders its performance impossible or meaningless. *See Liberty Nat'l Bank & Trust Co. v. Bank of American Nat'l Trust & Savings Ass'n*, 218 F.2d 831, 840 (10 Cir. 1955).").

By interpreting the confidentiality clause in a manner that created problems, the Panel not only ignored its own precedent, it departed from the mode of analysis employed by the D.C. Circuit in *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997) (giving validating construction to an ambiguous cost allocation provision in an arbitration agreement). *See also* 11 Richard A. Lord, Williston on Contracts § 32:11, at 453-54 (4th ed. 1999) ("Consonant with the principle that all parts of a contract be given effect where possible, an interpretation which renders a contract lawful is preferred to those which render it unlawful. Similarly, interpretations which render the contract valid or its performance possible are

preferred to those which render it invalid or its performance impossible.") (footnotes and citations omitted). The Panel afforded the confidentiality provision this construction even though it knew that its action was likely to result in effective invalidation of the *entire* arbitration agreement (including, of course, its individual arbitration requirement *and* confidentiality provision). *See* App. 42a (acknowledging "Amex' declar[ation] at oral argument that it would reconsider its intention to proceed to arbitration should this Court not enforce the class action waiver").

In sum, the Panel turned prevailing contract construction principles on their head: Instead of giving the confidentiality clause a normal construction that would have validated the entire arbitration agreement in accordance with its terms, the Panel twisted the language of the provision to effectively invalidate the entire agreement. Of course, a mode of analysis that singles out arbitration for special treatment conflicts with the FAA. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Southland Corp.*, 465 U.S. 1. This Court should grant *certiorari* to resolve the split in authority created by the Panel decision and assure that the lower courts follow their mandate to liberally enforce arbitration agreements in keeping with their terms.

CONCLUSION

For the foregoing reasons and the reasons set forth in Amex' Petition for a Writ of *Certiorari*, *Amici* respectfully request that this Court grant the Petition.

Respectfully submitted,

BALLARD SPAHR ANDREWS
& INGERSOLL, LLP

ALAN S. KAPLINSKY, ESQ.
(I.D. No. 02446)
Counsel of Record for
Amici Curiae
JEREMY T. ROSENBLUM, ESQ.
(I.D. No. 35413)
1735 Market Street, 51st Floor
Philadelphia, PA 19103
(215) 665-8500

Attorneys for Amici Curiae
American Bankers Association,
American Financial Services
Association, Consumer Bankers
Association and California
Bankers Association