But the Second Circuit again would not enforce the arbitration agreement. The court held that a mandatory class action waiver clause is not enforceable if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to prevent them from vindicating their federal statutory rights. The court relied on a single affidavit from an expert witness as evidence that it would not be economically rational to bring an individual action in antitrust against American Express because out-of-pocket costs for expert fees incurred to make a case in antitrust would exceed an individual’s damages award. On that basis, the court concluded that the practical effect of enforcing the agreement would be to prevent plaintiffs from vindicating their federal statutory rights under the Sherman Act.

Argument:

At a high level, we propose that the amicus brief present a few points. First, the Second Circuit’s “vindication of federal statutory rights” rationale rests upon a fundamental misunderstanding of *Green Tree Financial Corp. v. Randolph*. *Green Tree* focused on whether costs unique to arbitration might foreclose a claimant from relief, and the Second Circuit declined to enforce the arbitration agreement upon finding that litigation expenses (expert fees and of course attorneys’ fees) would interfere with plaintiffs’ ability to vindicate their federal statutory rights. Second, reading *Green Tree*’s rationale more broadly to require class procedures to ensure that would-be plaintiffs’ have sufficient financial incentive to advance their claims conflicts with the rule of law announced in Concepcion. At bottom, the Second Circuit declared the arbitration agreement unenforceable because it does not make class procedures available. *Concepcion* prohibits this result. Third, adopting an overly broad view of the *Green Tree* “vindication of statutory rights” rationale would permit courts to engage in a free-wheeling inquiry to look for reasons to invalidate arbitration agreements, contrary to the entire purpose of the Federal Arbitration Act—ending the judicial hostility to arbitration agreements and enforcing arbitration agreements as written.