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Senate Judiciary Committee Hearing
"The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?"

Responses to Questions for the Record Submitted by Senator Al Franken

> **Question 1:** In recent years, we've seen changes that make it harder and harder for ordinary people to enforce their rights: *Iqbal* and *Twombley* made it harder to get into court in the first place; *Dukes* and *Symczyk* and *Concepcion* made it a lot harder for workers to band together as a class. How does the *Italian Colors* decision fit within the broader context of diminishing access to justice?

The Supreme Court's decision in *American Express v. Italian Colors*[1] rejected the vindication of rights challenge to a forced arbitration clause, and in doing so, denied plaintiffs the ability to enforce congressionally-created rights. Prior to *Italian Colors*, it had been universally recognized that arbitration clauses were enforceable only so long as they allowed claimants to vindicate their federal statutory rights. This "vindication of rights" doctrine, which originated in the Supreme Court's 1985 decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, underscored a fundamental and uncontroversial idea – that an arbitration clause which operates as "a prospective waiver of a party's right to pursue statutory remedies" is unenforceable "as against public policy."[2]

Since *Mitsubishi*, the Supreme Court has repeatedly recognized the vindication-of-rights doctrine. Indeed, in 2000, a pragmatic Court declared in *Green Tree Financial v. Randolph*, that

[1] 133 S.Ct. 2304 (2013).
[2] 473 U.S . 614, 637 (1985).

where the high costs of arbitrating a claim "preclude[s] a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum," the forced arbitration clause may be unenforceable. The *Randolph* Court established a simple case-by-case framework for determining when prohibitive costs might stand as an obstacle to rights-claiming, placing upon the "party seek[ing] to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive" the "burden of showing the likelihood if incurring such costs."[3]

In the years since *Mitsubishi* and *Randolph,* the Supreme Court has repeatedly reaffirmed the vindication-of-rights doctrine as an essential safety valve to preserve federal rights.[4] Further, the federal lower courts have been uniform in setting a high bar for proving that prohibitively-high costs threatened to impede a plaintiff's ability to effectively assert her legal rights.[5] Indeed, despite many efforts, few plaintiffs have ever cleared this fact-based, evidentiary hurdle.[6]

The *Italian Colors* plaintiffs sought to prove that high arbitral costs prevented them from vindicating their rights under the federal antitrust laws. First, these plaintiffs offered as evidence the American Express arbitration clause, which was forced upon every small merchant as a non-negotiable provision of the Card Acceptance Agreement. This arbitration clause explicitly prohibited any merchant from bringing or participating in class actions in court or in an arbitral forum, barred any joinder of claims, prohibited the sharing of "any information relating to" any claim, and prevented claimants from seeking relief "on behalf of … other [merchants]."[7]

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[3] 531 U.S. 79, 90-1 (2000). In *Randolph*, the Court found that the consumer had not carried her burden to prove the costs of arbitration were prohibitive: "[T]he record does not show that [the consumer in this case] will bear such costs if she goes to arbitration. . . . The 'risk' that [the consumer] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." *Id.*

[4] *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989) (proof that federal statutory rights would be nullified by an arbitral forum is required, as mere "suspicion of arbitration as a method of weakening the protections afforded in the substantive law" is insufficient); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (recognizing that arbitration agreements may not prevent claimants "from effectively vindicating their 'federal statutory rights in the arbitral forum").

[5] *See, e.g., Booker v. Robert Half Int'l, Inc*., 413 F.3d 77, 81 (D.C. Cir. 2005) (Roberts, J.) (finding that a party may "resist[] arbitration on the ground that the terms of an arbitration agreement interfere with the effective vindication of statutory rights," but that party "bears the burden of showing the likelihood of such interference," which "cannot be carried by 'mere speculation'").

[6] *See, e.g., Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006) (concluding that an arbitration agreement which placed significant limitations on treble damages, attorney's fees and costs, and aggregate procedures otherwise available under federal law "would prevent the vindication of statutory rights" and thus could not be enforced in an antitrust action against cable company under state and federal law); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1223–24 (11th Cir. 2007) (holding arbitration agreements unenforceable in a putative class action under federal Cable Communications Policy Act).

[7] *See In re American Express Merchants' Litigation*, 554 F.3d 300, 307-8 (2009) (*Amex* I) ("There shall be no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving

Second, plaintiffs introduced undisputed evidence showing that an economic antitrust study necessary to prove that American Express had violated the Sherman Act would cost somewhere between "several hundred thousand dollars [to] $1 million."[8] Meanwhile, the median plaintiff could only hope to recover $5,252 in trebled damages. Applying a common-sense cost-benefit analysis, plaintiffs showed that "it would not be worthwhile for an individual plaintiff ... to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services," would dwarf any individual claimant's recovery.[9]

In three separate decisions, the Second Circuit ruled that the *Italian Colors* plaintiffs had met the heavy burden established in *Randolph* with evidence they "would incur prohibitive costs if compelled to arbitrate" because the non-recoverable, per-claimant costs of bringing their claims in arbitration (as opposed to aggregate proceedings in court) would exceed their expected individual recoveries many times over.[10]

But in the stroke of a pen, the Supreme Court's decision in *American Express v. Italian Colors* undid decades of important law, essentially rejecting cost-based vindication of rights challenges to forced arbitration clauses. No longer does it matter whether an arbitration clause is designed to suppress rather than effectuate claims, or whether an arbitration procedure would strip plaintiffs of the ability to vindicate their statutory rights. Instead, the Supreme Court's decision permits corporate defendants to draft arbitration clauses that effectively provide de facto immunity from all sorts of federal statutes.

And, lest anyone take comfort in the possibility that other legal challenges to forced arbitration clauses are possible – recall that the Court's 2011 decision in *AT&T Mobility v.*

Claims brought in a purported representative capacity on behalf of the general public, other establishments which accept the Card (Service Establishments), or other persons or entities similarly situated. Furthermore, Claims brought by or against a Service Establishment may not be joined or consolidated in the arbitration with Claims brought by or against any other Service Establishment(s), unless otherwise agreed to in writing by all parties.").

[8] *Id.*, 554 F.3d at 316 (describing affidavit of Dr. Gary French).

[9] *Id*., 554 F.3d at 317.

[10] *Id.* at 316 (stressing the significant outlay of expert fees -- estimated at over $1 million -- and the fact that such fees are not recoupable by successful litigants under the cost-shifting provisions applicable in either court or arbitration). *See also In re Am. Express Merchs.' Litig.* (*Amex II*), 634 F.3d 187 (2nd Cir. 2011) ("the record evidence before us establishes, as a matter of law, 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"); *In re Am. Express Merchs.' Litig*. (*Amex III*), 667 F.3d 204 (2d Cir. 2012) (observing that *Concepcion* did not mention or cite *Randolph*, nor did that case address whether an arbitration 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").

Concepcion[11] essentially rejected any challenge based on how unfair these clauses can be. Taken together, *Concepcion* and *Amex* leave plaintiffs today with no viable means to challenge arbitration clauses, and allow businesses and employers to prevent those with less economic power from ever having access to court to hold them accountable. Claims alleging violations of all sorts of federal statutes will no longer be brought – neither in court nor in arbitration – because no rational individual would ever expend the tremendous amount of money and time required to prove such a claim, given the individual stakes. Violations of the Sherman Act, the Civil Rights Act of 1964,[12] the Consumer Credit Protection Act, and other vital federal statutes will never see the light of day. Under *Amex* and *Concepcion*, corporate entities are now free to craft agreements whose practical effect is to confer prospective immunity from liability under a wide range of federal statutes, undermining the remedial and deterrent effects of numerous federal statutes. And none of this furthers the policies of the FAA: while the FAA reflects a decidedly pro-arbitration policy, what it favors is the *resolution* of claims in arbitration, not the complete *elimination* of claims resulting from the terms of a forced arbitration agreement.

It is vital that Congress enact the proposed S. 878, "The Arbitration Fairness Act," and restore the vindication of rights doctrine to ensure that federal judicial enforcement of forced arbitration agreements will not result in the wholesale foreclosure of federal statutory rights.

> **Question 2:** In his opinion in the *Italian Colors* case, Justice Scalia wrote, in effect, that enforcing arbitration agreements is more important than giving workers, consumers, and small businesses an opportunity to vindicate their federal rights. It is difficult to imagine that the drafters of the Federal Arbitration Act ever would have envisioned the law being interpreted that way. Can you provide some historical perspective about the FAA's intended purpose and scope and explain how we've strayed from that?

As nearly every legal historian researching and writing on the subject has concluded, the meaning and intent of the 1925 Federal Arbitration Act has been radically distorted by the

[11] 131 S.Ct. 1740 (2011).

[12] This includes claims filed under Title VII, the Age Discrimination Act, the Rehabilitation Act, the Americans with Disabilities Act, the Fair Labor Standards Act, and the Family and Medical Leave Act. *See, e.g.*, Civil Rights Procedures Protection Act of 1996, H.R. 3748, 104th Cong., 2d Sess. (1996); Civil Rights Procedures Protection Act of 1997, S. 63, 105th Cong., 1st Sess. (1997); Civil Rights Procedures Protection Act of 1999, S. 121, 106th Cong., 1st Sess. (1999); Civil Rights Procedures Protection Act of 2001, H.R. 1489, 107th Cong., 1st Sess. (2001).

current Supreme Court – such that its drafters and those who voted for the bill would be stunned by its current interpretation and operation.[13]

The Federal Arbitration Act was enacted in 1925 to promote arbitration among equally sophisticated parties in commercial and maritime contracts, and to counteract the 'ancient judicial hostility' to arbitration through its injunction that an arbitration provision "written in any maritime transaction or contract evidencing a transaction involving commerce" was enforceable, subject to "such grounds as exist at law or equity for the revocation of any contract."[14] The legislative history reveals that the Act's drafters were focused exclusively on opponents of "roughly equivalent bargaining power," and the primary purpose of the statute was to encourage arbitration for purposes of preserving business relationships.[15] Time and again, legislators voiced their view that the FAA would promote voluntary arbitration between business entities seeking fast and inexpensive resolution of disputes.[16]

At the time of enactment and for many decades after, the universal understanding was that the FAA did not apply to ordinary consumer contracts, nor to employment agreements.[17] Indeed, when legislators worried the FAA might be applied to standard-form adhesion contracts with consumers,[18] they were assured that "the primary end of [the Act] is a contract between merchants, one with another, buying and selling goods."[19] Further, supporters of the bill believed that arbitration should be purely voluntary, and that the FAA was "not intended to

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[13] *See, e.g.*, Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FL. S. U. L. REV. 99 (2006) (examining "how a simple procedural statute enacted to require enforcement of arbitration agreements in federal court has become unrecognizable as the law Congress enacted in 1925"); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 381 (criticizing the Supreme Court's "bogus legislative history" of the FAA).

[14] Federal Arbitration Act, 9 U.S.C. § 2.

[15] *See* Moses, *supra* note 13, at 102 (quoting Charles Bernheimer's testimony at the Joint Hearings of the Senate and House Subcommittees that arbitration "preserves business friendships…it raises business standards, it maintains business honor") (internal citations omitted).

[16] *Id*. at 111-112 (explaining that the legislative history clearly reveals that supporters of the FAA believed the Act would enable "merchants to resolve their disputes more cheaply and easily," and that it was a "bill of limited scope, intended to apply in disputes between merchants of approximately equal economic strength to questions arising out of their daily relations").

[17] *Id.* at 105-106 ("[T]he supporters of the legislation did not believe that it would apply to any workers at all."); *id.* ("The hearings make clear that the focus of the Act was merchant-to-merchant arbitrations, never merchant-to-consumer arbitrations.").

[18] *Id*. at 107 (quoting Senator Sterling, who asked at the Joint Hearings on the Act whether, "if you let people sign away their rights, the powerful people will come in and take away the rights of the weaker ones").

[19] *Id*. at 107 (quoting W.H.H. Piatt's testimony at Joint Hearings; Piatt was chairman of the Committee of Commerce Trade and Commercial Law of the American Bar Association).

permit a party with greater economic strength to compel a weaker party to arbitrate."[20] And finally, the 1925 Congress understood that the lack of transparency in arbitration made it ill-suited for the adjudication of public-regarding disputes.[21] Questions regarding complex statutory interpretation and constitutional law were deemed beyond the jurisdiction of arbitrators, and best left to public courts of law.

This was the original understanding of the purpose FAA – to encourage and promote arbitration of disputes between relatively equal and sophisticated business interests. But by the mid-1980's, "new majorities" of the Supreme Court reread the FAA to "permit arbitration for various legal claims and between parties of different bargaining capacities."[22] Over time, with the backing of conservative, corporate interests, the FAA took on a life of its own. In 1984, the Supreme Court decided in *Southland Corp. v. Keating* that the FAA applied to state courts, essentially displacing state authority and ignoring clear legislative intent that the statute apply only to federal proceedings.[23] In 1991, the Court in *Gilmer v. Interstate/Johnson Lane Corp.* held that an employee alleging violations of the federal antidiscrimination laws could be forced to arbitrate his claims, again disregarding that the FAA was never intended to apply to contracts of adhesion nor to employment agreements.[24] And, in a series of cases, the Supreme Court has asserted that federally-created statutory rights – rights under the securities acts, antitrust statutes, and antidiscrimination laws – can be subject to forced arbitration.[25] This, despite unambiguous legislative history (and common sense) indicating that the 1925 Congress never intended to undermine its own power or the force of its laws by handing over enforcement of federal statutes to private arbitrators.

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[20] *Id*. at 108.

[21] *Id*. at 111 (quoting Julius Cohen, proponent of the Act, that arbitration was "not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes" because these kinds of questions were not within the particular experience of arbitrators and thus were "better left to the determination of skilled judges with a background of legal experience and established systems of law").

[22] Judith Resnik, Comment, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 115 (2011).

[23] 465 U.S. 1 (1984); *see also* Kenneth F. Dunham, Southland Corp. v. Keating *Revisited: Twenty Five Years in Which Direction?*, 4 CHARLESTON L. REV. 331, 369 (2010) (asserting that, under *Southland*, "[s]tates are ordered by federal courts to enforce a federal act in state courts even though that act may be contrary to the public policy of the state").

[24] 500 U.S. 20 (1991). *See also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 119-24 (2001).

[25] *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624-30 (1985); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480-84 (1989); *Gilmer*, 500 U.S. 20, 24-35 (1991).

In sum, the Supreme Court, often in 5-4 decisions, has slowly and steadily enlarged the FAA's scope in the face of serious public policy challenges, and often based on not much more than the Court's own assessment of arbitration as preferable to adjudication. Ignoring obvious problems with forced arbitration of public-regarding disputes – including the pragmatic concern that arbitration decisions are generally non-appealable, are secret and unpublished, and do not become a binding precedent – a slim majority of the Court has stretched the FAA beyond its original and intended goals.

At this point, given that Justices have now repeatedly asserted that they will continue to "rigorously enforce" the mandates of the FAA unless and until Congress acts, it is time to bring the FAA back into line with the original intent of the legislation – to enforce arbitration amongst and between sophisticated business entities that specifically negotiate and contract for private, sequestered forms of adjudication to protect their trade secrets or other business interests. The proposed S. 878, "The Arbitration Fairness Act," would do just this – and it is not a radical overhaul of the statute. What is radical is the Supreme Court's reinterpretation of the 1925 Act to cover all sorts of contracts and disputes that were never intended by the original drafters.

> **Question 3:** The Arbitration Fairness Act would prohibit mandatory, pre-dispute arbitration agreements in certain cases. If corporations knew that people had a choice to go to court after a dispute arose, would the corporations change their arbitration agreements? If so, how?

Enacting S. 878, "The Arbitration Fairness Act," would prevent companies from using mandatory pre-dispute arbitration clauses to insulate themselves from liability. As I and many others have long argued, it is obvious that this liability-avoiding effect is the reason why companies use mandatory arbitration in their contracts with consumers and employees.[26] If this function were no longer available – if corporations knew that people had a choice to go to court

[26] *See, e.g.*, Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373(2005); Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 883 (2008) (finding that less than 10% of companies which imposed arbitration on consumers also used arbitration in negotiated, non-consumer, non-employment contracts and concluding that the "absence of arbitration provisions in the great majority of negotiated business contracts suggests that companies value, even prefer, litigation as the means for resolving disputes with peers . . . [and] casts doubt on the corporations' asserted beliefs in the superior fairness and efficiency of arbitration clauses")

after a dispute arose one would expect companies to make their arbitration processes more consumer-friendly to encourage continued use of the arbitral fora.

What will these consumer-friendly clauses look like? It is not clear. For a brief time, between the Supreme Court's decisions in *AT&T Mobility v. Concepcion* in 2011 and *American Express v. Italian Colors* in 2013, corporations had strong incentives to draft arbitration clauses to include consumer-friendly provisions – such as offering to pay arbitration filing fees, providing for attorney and expert fee-shifting where the consumer won in arbitration, and promising premium payments to claimants who achieve a better outcome in arbitration than the company's last-best offer.[27] But these companies were using nominally "consumer friendly" clauses to convince courts that they did not run afoul of the vindication-of-rights doctrine, rather than as part of an effort to induce an employee or consumer to actually choose arbitration.[28]

Separate and apart from any incentives for companies to draft more consumer-friendly arbitration clauses, the proposed AFA would surely deter corporate defendants from engaging in wrongdoing that could result in class action liability. If companies knew they could be held accountable in court for widely-dispersed, small-dollar harms – as they have been for many decades before the advent of the Supreme Court's arbitration jurisprudence – they would presumably engage in less wrongdoing. Deterrence is, and has always been, the best justification for the class action device.[29] Companies tempted to skirt fair credit reporting requirements, or

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[27] *See, e.g.*, Myriam Gilles, *Killing Them With Kindness: Examining "Consumer-Friendly" Arbitration Clauses After* AT&T Mobility v. Concepcion, 88 NOTRE DAME L. REV. 825 (2012) (reviewing recent amendments to arbitration clauses by 37 consumer-oriented companies and finding significantly "friendlier" offers to arbitrate).

[28] All that ended, of course, when Justice Scalia and his brethren in *Amex* rejected the plaintiffs' vindication of rights challenge. The *Amex* decision eliminated any corporate incentive to include more consumer-friendly terms in arbitration clauses. Instead, Amex provides companies (especially those with market power) with clear incentives to draft unfair and unfriendly clauses, which will ensure that federal statutory claims are never actually arbitrated. The irony is lost on no one: *Amex* defeats the purpose of the antitrust laws by allowing the defendant to use the very market power these laws were aimed at to require its customers to waive the protection of those laws.

[29] *See, e.g.*, Harry Kalven, Jr., & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941) (warning against restricting the availability of class actions lest we "impair the deterrent effect of the sanctions which underlie much con-temporary law"); RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW 349-50 (1972) (observing of class actions that "the most important point, from an economic perspective, is that the violator be confronted with the costs of his violation -- this achieves the allocative purpose of the suit--not that he pays them to his victims); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 73 (1975) (concluding that the class action serves the deterrence purpose when "the individual claims are too small to make actual compensation of the class members financially feasible"); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV.

impose hidden and illegal fees, or engage in anticompetitive conduct are far more "concerned with ruinous liability at the hands of the class action bar than they are with the corrective measures and fines that might be meted out following" federal or state regulatory agency investigation.[30]

The Supreme Court's decisions in *Concepcion* and *Amex* reject the "private attorney general" role undertaken by class action lawyers over the past fifty years, radically restricting the ability of private actors to vindicate public rights via the class action mechanism.[31] These decisions leave, in their wake, an enforcement gap that will be difficult for budget-strapped public agencies to fill.[32] Consumers, employees and others are left without recourse for violations of federal statutory law, while corporate actors are made invulnerable to the legislative will. The only viable solution is to return to a system where corporate actors are properly deterred from violating federal law by restoring private actors as frontline enforcers in actions redressing broad-scale consumer fraud and deceptive practices, antitrust violations, and civil rights violations.

> **Question 4:** Some people have argued that corporations will refuse to submit post-dispute claims to arbitration unless mandatory, pre-dispute arbitration clauses are enforceable. In other words, people have argued that the Arbitration Fairness Act would remove corporations' incentive to submit any claims to arbitration. How would you respond to this argument?

Nothing in the proposed legislation would bar a company and a consumer (or employee) from agreeing to arbitrate their disputes, once those disputes arise. The legislation only bars, or renders unenforceable, "pre-dispute" clauses – *i.e.*, mandatory arbitration clauses that companies insert in boilerplate agreement forms with their consumers and employees.

L. REV. 664, 666 (1979) (asserting that empirical evidence suggests that the 1966 amendments to Rule 23 resulted in some deterrence).

[30] Myriam Gilles & Gary Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PENN. L. REV. 103, 106 (2007).

[31] *See generally* William B. Rubenstein, *On What A "Private Attorney General" Is -- And Why It Matters*, 57 VAND. L. REV. 2129 (2004).

[32] *See, e.g.*, Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623 (2012).

It may well be that some companies will have little interest in agreeing to arbitrate consumer and employment claims after they arise.[33] At that point, arbitration will no longer serve a liability-avoiding purpose; it will simply provide an alternative forum for the resolution of claims. Companies will then rationally make a cost-benefit determination of whether their interests are best served resolving disputes in these alternative fora; and for some, arbitration will continue to provide important benefits and savings.[34] Certainly, for claims that require collective action to be viable, we can expect plaintiffs to prefer the court system – at least until the arbitral bodies develop reliable processes for dealing with mass or class claims.[35]

Question 5: What is your initial assessment of the Consumer Financial Protection Board's preliminary study on the use of mandatory pre-dispute arbitration agreements in the consumer financial services industry?

The preliminary results of the two-year CFPB study, released on December 12, 2013, provide positive, empirical proof of two important points relating to forced arbitration clauses.

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[33] *See, e.g.*, Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 883 (2008) (finding that less than 10% of companies which imposed arbitration on consumers also used arbitration in negotiated, non-consumer, non-employment contracts and concluding that the "absence of arbitration provisions in the great majority of negotiated business contracts suggests that companies value, even prefer, litigation as the means for resolving disputes with peers . . . [and] casts doubt on the corporations' asserted beliefs in the superior fairness and efficiency of arbitration clauses").

[34] *See, e.g.*, Alexander J.S. Colvin, *Employment Arbitration: Empirical Findings and Research Needs*, DISP. RESOL. L.J. Aug.–Oct. 2009 (in a study comparing thousands of employment disputes handled in arbitration and in court, author finds (1) employees win substantially less often in arbitration than they do in court; and (2) when employees do win cases in arbitration, their awards are smaller than than they would typically be in court; concludes that arbitration tends to favor large corporations over individuals).

[35] *See* Myriam Gilles & Tony Sebok, *Crowd-classing Individual Arbitrations in a Post-Class Action Era*, __ DEPAUL. L. REV. __ (forthcoming 2014) (finding that "the rules governing the dominant arbitral bodies do not provide for consolidation of related cases before a single arbitrator, nor is there any intra-arbitration *res judicata* effect awarded to prior victories") (internal citations omitted); *id.* ("[N]either AAA nor JAMs currently have any discernible rules on how to obtain a single arbitrator for a set of related arbitrations, how to schedule related arbitrations in a compressed timeframe, or how to use a single expert report across multiple arbitrations. There are no 'best practices' governing damages calculations or the alignment of awards across arbitrations. Nor do the major arbitral associations currently offer volume discounts on arbitral costs or neutrals' fees for those seeking to arbitrate a mass of related claims.").[36] CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS (Dec. 12, 2013) at p. 12, available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf. The study finds that over 50% of outstanding credit card debt is subject to forced arbitration clauses – and that, once a 3-year moratorium on imposing such clauses comes to an end in 2014, 94% of credit card debt will be subject to these clauses. *Id.* Further, 44% of checking account contracts and 81% of prepaid cards contain forced arbitration clauses. *Id.*

First, the study makes clear that these clauses have become standard in the contracts of the biggest credit card companies, banks, and payday lenders.[36] Moreover, nearly all the forced arbitration clauses the agency studied contain class action bans.[37] This key finding confirms prior studies, which have similarly found that forced arbitration clauses containing class action bans are becoming ubiquitous in all sorts of consumer contracts,[38] including contracts with nursing homes, assisted living facilities, and long-term-care providers[39]; as well as in employment contracts.[40]

Second, the CFPB study confirms what many observers and academics have long suspected: that arbitration clauses work to suppress rather than effectuate dispute resolution. The CFPB study found that between 2010 and 2012, more than 13 million consumers made claims or received payments in roughly four hundred class actions brought against credit card companies, payday lenders, and other specified types of financial service providers. During that same time frame, the study found that only 900 consumers initiated claims directly against such defendants in arbitrations under their contracts. 13 million versus 900.

This is incontrovertible evidence that forced arbitration clauses do not result in the fair and efficient resolution of claims, but rather, in burying claims and denying rights guaranteed under federal statutes.

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[36] CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS (Dec. 12, 2013) at p. 12, available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf. The study finds that over 50% of outstanding credit card debt is subject to forced arbitration clauses – and that, once a 3-year moratorium on imposing such clauses comes to an end in 2014, 94% of credit card debt will be subject to these clauses. *Id*. Further, 44% of checking account contracts and 81% of prepaid cards contain forced arbitration clauses. *Id.*

[37] *Id*. at p. 13 ("Around 90% of the contracts with arbitration clauses -- covering close to 100% of credit card loans outstanding, insured deposits, or prepaid card loads subject to arbitration -- include such no-class arbitration provisions.").

[38] *See, e.g.,* Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 64 (2004) (finding 69.2% of consumer contracts studied contained forced arbitration clauses); Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REFORM 871, 883-884 (2008) (76.9% of consumer contracts studied contained forced arbitration clauses and "every consumer contract with an arbitration clause also included a waiver of classwide arbitration.").

[39] *See, e.g.,* Lisa Tripp, *Arbitration Agreements Used by Nursing Homes: An Empirical Study and Critique of* AT&T Mobility v. Concepcion (draft on file with the author) (finding that 43% of North Carolina nursing homes use arbitration clauses in their admissions contracts).

[40] *See, e.g.,* Alexander J.S. Colvin, *Employment Arbitration: Empirical Findings and Research Needs*, DISP. RESOL. L.J. Aug.–Oct. 2009.

Question 6: Mr. Parasharami attached to his written testimony a document titled, "Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions" by Mayer Brown LLP. What is your assessment of that document?

This memo, drafted by lawyers at the defense firm, Mayer Brown LLP, purports to examine class actions filed or removed to federal court in 2009, and concludes that none of these proceedings produced any real value to class members. The memo finds that only plaintiffs' attorneys were benefited by class and aggregate litigation. This is a shop-worn narrative repeatedly invoked by acolytes of the Chamber of Commerce: the basic idea is to focus attention on the large fees awarded to class action lawyers, rather than the many hundreds of millions extracted from citizens by corporate malfeasance.

This memo was produced by lawyers whose clients include AT&T Mobility, American Express, and other Fortune 500 companies – all of which have a strong interest in retaining the immunity from class action liability secured in the Supreme Court's recent arbitration decisions. One potential threat to this de facto immunity from federal antitrust, antidiscrimination and consumer protection laws is the Consumer Financial Protection Bureau, which has the authority under the Dodd-Frank Consumer Protection Act to enact regulations that would restrict or even prohibit the use of forced arbitration clauses.[41] Not surprisingly, the Mayer Brown memo was released on the same day that the CFPB issued the preliminary results of its two-year study of arbitration clauses in consumer financial contracts. This shrewd timing ensured the Mayer Brown memo would receive some media coverage (whereas, ordinarily, this type of document barely gets read by lawyers within the firm, much less those on the outside). In all likelihood, the timing was also intended to detract from the rigorous, careful, and conclusive study done by the agency, and to start coalescing opposition against its possible regulatory efforts in this area.

In addition, there are a number of glaring methodological concerns with a result-driven memo of this sort. For example, the memo's authors chose to examine 148 class actions, but acknowledge that this number does not represent all the class actions filed or removed in 2009,

[41] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) § 1028, Pub. L. No. 111-203, 124 Stat. 1376, 2003–04 (2010), codified in relevant part at 12 USC § 5518.

nor what percentage it does represent.[42] Without context, it is impossible to know whether these cases are a representative sample, or were simply chosen because they advance the corporations' claims that class action serve no purpose. Further, in analyzing awards to class members, the memo focuses on only 6 of the aforementioned 148 class actions – and again, without explanation or qualification. One could go on and on pointing out errors and omissions, but suffice to say that this document is not a "study," but rather, a white paper drafted by and for corporate interests which is solely intended to distract attention away from the real policy debate over S. 878 and the perils of forced abitration.

Question 7: Professor Rutledge attached to his written testimony a document titled, "Sticky Arbitration Clauses: The Use of Arbitration Clauses after *Concepcion* and *Amex*". What is your assessment of that document?

Professors Rutledge and Drahozal have written an article, *Sticky Arbitration Clauses*, which purports to examine changes to franchise agreements immediately before and after the Supreme Court's decision in *Concepcion* to determine whether there has been an increase in the use of arbitration clauses. The authors conclude that, in this quite limited arena of contracts between relatively sophisticated business entities, "the predicted tsunami of arbitral class waivers" has not yet occurred."[43] But the franchisor-franchisee relationship is so different from typical business-to-consumer or business-to-employee relationships that this study seems entirely irrelevant to the policy debate surrounding forced arbitration. Indeed, the authors may be right in their assessments as to why some franchisors may not wish to add arbitration clauses with class action bans to contracts with equally sophisticated franchisees with whom they hope to maintain lasting business relations. But this analysis tells us little about consumer and employment contracts, where businesses have few reasons to refrain from adopting liability-reducing arbitration provisions.[44]

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[42] *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* at __ ("the sample is undoubtedly smaller than the total number of class actions filed in 2009. Attempting to estimate that number reliably -- let alone to examine those cases -- would have exceeded the scope of our review... it would not be useful to calculate a margin of error or otherwise attempt to quantify the extent to which the sample differs randomly from the population of all class actions filed in 2009").

[43] Peter Rutledge & Christopher Drahozal, *Sticky Arbitration Clauses: The Use of Arbitration Clauses After* Concepcion *and* Amex, __ VAND. L. REV. __ (2013)

[44] *See, e.g.*, Eisenberg, et al., *supra* note __ (finding that less than 10% of companies which imposed arbitration on consumers also used arbitration in negotiated, non-consumer, non-employment contracts and concluding that the "absence of arbitration provisions in the great majority of negotiated business

In addition, somewhere between 50-66% of franchisors were already using arbitration clauses long before *Concepcion* was decided. Therefore, while the authors conclude that few franchisors have *added* arbitration provisions to their contracts since 2011, this merely obscures the reality that many franchisors have relied on these liability-avoiding provisions for many years before *Concepcion* was decided.

More fundamentally, I disagree with an underlying premise of the article – that standard-form contracts can be "sticky," or resistant to change that is in the defendant corporation's best interests. This sort of claim has been refuted by many scholars in various contexts, but is especially weak in the context of arbitration and class action bans. For example, back in 2008, Professor Aaron-Andrew Bruhl demonstrated that, "given the recent successes of unconscionability challenges, the most aggressive arbitration clauses are now being scaled back."[45] In other words, at the height of unconscionability's success in beating back arbitration clauses, companies responded by redrafting their provisions to make them less vulnerable to that challenge.

Moreover, in the four-year period between *Buckeye Check Cashing, Inc. v. Cardegna*[46] and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[47] some arbitrators were interpreting contracts that were silent on collective dispute resolution to nonetheless provide for class arbitration. As a result, "[b]usinesses moved quickly to block the possibility of collective redress in any forum, judicial or arbitral" by adding severability and no-class-arbitration language to their contracts.[48] In my view, standard-form contractual provisions are not at all "sticky" or

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contracts suggests that companies value, even prefer, litigation as the means for resolving disputes with peers . . . [and] casts doubt on the corporations' asserted beliefs in the superior fairness and efficiency of arbitration clauses").

[45] Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1457, n. 141 (2008). Bruhl continues: "Some business advocates provide such an account, admitting that some early arbitration provisions were unduly burdensome but contending that the clauses have now improved to become more attractive to consumers." *Id.* (citing Brief of AT&T Mobility LLC as Amicus Curiae in Support of Neither Party, T-Mobile USA, Inc. v. Laster, 128 S. Ct. 2500 (2008) ("[C]onsumer arbitration provisions have been evolving. At first, many provisions plainly favored the business that drafted them. Invoking state unconscionability principles, several courts struck down these clauses . . . .")).

[46] 546 U.S. 440, 449 (2006).

[47] 130 S. Ct. 1758 (2010).

[48] *See* Ann Marie Tracey & Shelley McGill, *Seeking a Rational Lawyer for Consumer Claims After the Supreme Court Disconnects Consumers in* AT&T Mobility LLC v. Concepcion, 45 LOY. L. A. L. REV. 435, 440 & 448 (2012) ("It will take only seconds for businesses to amend unilaterally their online contracts of adhesion and remove class actions from existence, assuming they have not already done so.").

resistant to change where that change is in the best interests of the defendant-contract drafter. Whether the current number of contracts containing arbitration clauses is 50% or 99% seems of little significance when it is clear that, at some point soon, *all* businesses which believe it is in their best interests to avoid potential class action liabilities will incorporate arbitration provisions barring class and aggregate litigation in court or in the arbitral fora.

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Myriam Gilles, Professor of Law
January 13, 2014

Senate Judiciary Committee Hearing
"The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?"

Responses to Questions for the Record Submitted by Senator Orrin Hatch

Question: Professor Gilles, I'm wondering whether the case against arbitration is really so complete that we should prohibit arbitration clauses altogether. For example, have you considered whether arbitration might facilitate dispute resolution for borrowers pursuing their own cases or borrowers in remote areas? Or have you studied the improvements that have been made in how arbitrations are conducted?

The purpose of S.878, "The Arbitration Fairness Act," is not to prohibit arbitration clauses altogether. Rather, the proposed legislation would only prohibit "pre-dispute" clauses – *i.e.*, mandatory arbitration clauses that companies insert in boilerplate forms with their consumers and employees. Further, the proposed legislation does not undermine the institution of arbitration. Indeed, the AFA specifically provides for arbitration in situations where both parties agree to this form of alternative dispute resolution.

But to be clear: the Supreme Court's decisions in cases such as *AT&T Mobility v. Concepcion* and *American Express v. Italian Colors* are not about the efficacy or desirability of

arbitration. These decisions deny claimants the right to challenge a forced arbitration clause banning class actions. And in doing so, *Concepcion* and *Amex* ensure that no consumer, employee or small business will be able to vindicate their federal statutory rights -- not in court or in the arbitral fora – and that businesses will be effectively immune from liability under these statutes. These decisions are about claim suppression, not claim facilitation.

As such, it matters little whether arbitration may, on occasion and in specific instances, facilitate dispute resolution for borrowers in remote places, or whether arbitration procedures have improved in recent years. The relevant questions, to my mind, are (1) whether forced arbitration suppresses claims overall; (2) whether this claim suppression results in under-enforcement of federal statutory law; and finally, (3) whether the ultimate result is de facto immunity from federal law for the corporations which have used their market power to impose these arbitration clauses upon consumers, employees and small businesses. I think the answer to all three questions is clearly yes.