Testimony of

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Mr. Chairman and Members of the Committee: Thank you for inviting me to testify today on the Supreme Court's recent decisions concerning corporate regulation and corporate misconduct. I should note at the outset that, while the law firm of which I am a partner represents a number of clients interested in this topic, I was invited to appear and am appearing in my personal capacity and not on behalf of my law firm or any client. Indeed, I have only been in private practice for less than a year. The vast majority of my experience as an observer of Supreme Court decisionmaking occurred while I worked in the Office of the Solicitor General under both the Clinton and Bush administrations.

My understanding is that the Committee is most interested in the Supreme Court's recent decisions in the areas of arbitration and punitive damages, and I am happy to address those issues. But, just as Congress's focus cannot be accurately measured by looking at just one or two laws passed in a Session, likewise the Supreme Court's approach to issues of corporate regulation cannot be accurately measured by looking at only a few cases in isolation. With that in mind, I would like to begin with an overview of the Supreme Court's business decisions in its latest Term.

A. Overview

Whether viewed from the corporate or non-corporate vantage point, this Term was a decidedly mixed bag. The Supreme Court decided 24 cases involving business concerns, which represented approximately one-third of the Court's docket. In those decisions, the Court split almost evenly, ruling in ways that could be described as pro-business in thirteen of the cases, and ruling against business interests in eleven cases.

Overall, a comprehensive survey of the Court's business decisions from this Term reveals two themes. First, the Court's decisions have reflected broad deference to the Congress. The Court hewed to stare decisis principles that have long-recognized the primacy of Congress in correcting the Court's misconstruction of congressional intent in a statute and that reflect a judicially deferential practice of staying the course in the absence of congressional direction. The Court also continued its practice of focusing on the enacted statutory text as the most accurate embodiment of what the full Congress intended.

Second, the Court exhibited broad consensus in its business cases, issuing only two 5 to 4 decisions in cases of fairly limited impact. One involved the Article III standing of assignees of claims for collection, Sprint v. APCC Services, 128 S. Ct. 2531 (2008), and the second involved tribal court jurisdiction over a non-Indian bank's sale of land that it holds in fee simple, Plains Commerce Bank v. Long Island Family Land & Cattle, 128 S. Ct. 2709 (2008). The Court also issued a 5 to 3 decision in Stoneridge Investment Partners v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008), in which Justice Breyer was recused. That case addressed the availability of socalled "scheme liability" under the private right of action in Section 10(b) of the Securities Exchange Act, and rejected the existence of such liability in the absence of reliance by the investors, based in large part on Congress's express limitation of aiding and abetting liability in the 1995 Private Securities Litigation Reform Act.

In short, the Supreme Court's decisionmaking in business cases reflects broad consensus

- a consensus that crosses traditional liberal/conservative lines - on deference to the laws that Congress writes and the policy judgments that the statutory text and Congress's actions and inaction reflect.

B. Employment Cases

In a series of employment rights cases, the Supreme Court consistently came down in favor of the employee or on middle ground between employers and employees. In CBOCS v. Humphries, 128 S. Ct. 1951 (2008), the Court held by a vote of 7 to 2 that 42 U.S.C. § 1981 - an important and longstanding civil rights statute protecting against racial discrimination in contracting - prohibits not only direct racial discrimination, but also retaliation against those who assert their rights under the law.1 Importantly, for Congress's perspective, in so holding, the Court relied heavily on principles of stare decisis, explaining that a series of earlier decisions under other civil rights laws had recognized that retaliation is an aspect of prohibited discrimination.2 The Court hewed to that principle of stare decisis, which recognizes that, in statutory cases, the Court should be loathe to reverse precedent because the Congress can better speak to whether the Court's decision departed from congressional intent.3 The Court, in other words, reaffirmed that it will follow Congress's lead in establishing and maintaining the scope and coverage of employment discrimination laws.

In Gomez-Perez v. Potter, 128 S. Ct. 1931 (2008), the Court likewise held, by a 6 to 3 vote, that the Age Discrimination in Employment Act protects government employees against retaliation.4 Even though that statute already included an express protection against retaliation for private sector employees, the Court held - again based on stare decisis principles - that public sector employees enjoy similar protection. The decision, like the Humphries case, was a strong reaffirmation of protection for employees who assert their statutory rights against workplace discrimination.

In Meacham v. Knolls Atomic Power Laboratory, 128 S. Ct. 2395 (2008), a combination of stare decisis principles and close adherence to Congress's statutory design of the Age

Discrimination in Employment Act led the Court to rule almost unanimously in favor of age discrimination plaintiffs by relieving them of the obligation to prove that discrimination was not based on a "reasonable factor other than age," 29 U.S.C. § 623(f)(1), and putting that burden squarely on employers.5

In Federal Express Corporation v. Holowecki, 128 S. Ct. 1147 (2008), the Court ruled - again by a 7 to 2 vote - in favor of an employee asserting age discrimination, adopting a generous interpretation of the steps needed to file a charge triggering that statute's procedural protections. In so holding, the Court gave substantial weight to the Equal Employment Opportunity Commission's position on the flexibility needed for employees in such matters.6

Finally, in Sprint/United Management Company v. Mendelsohn, 128 S. Ct. 1140 (2008), the Court ruled unanimously that the admission of so-called "me too" evidence in discrimination cases - evidence that other employees had been subjected to discriminatory treatment by other supervisors who were not involved in the plaintiff's claim - should be treated like any ordinary evidentiary issue, without a categorical rule either in favor or against such evidence.

Those cases are notable not only for their consistently employee-favorable outcomes, but more importantly for (i) the respect they demonstrate for Congress's leadership role in making the difficult yet critically important policy choices and balances that inhere in the regulation of workplace relationships, and (ii) the broad consensus on the Court in these cases. Those decisions provide an important counter-balance to any claim that the Roberts Court is somehow innately hostile to employees or supportive of business at the expense of workers. Instead, this Term reflects, in my view, the Court's substantial deference to Congress and its greater expertise in understanding and regulating the dynamics of employment discrimination.

C. Preemption

The Court's other area of emphasis in the business arena this Term was preemption. The

Court heard three central preemption cases and one case implicating both preemption and arbitration, which I will address below.7 Two of the three cases were resolved in favor of preemption, while the third was resolved without opinion due to an even division on the Court (and the recusal of Chief Justice Roberts).

In Riegel v. Medtronic, 128 S. Ct. 999 (2008), the Court ruled by a vote of 8 to 1 that the preemption clause of the Medical Device Amendments of 1976, 21 U.S.C. § 360k(a), preempts common-law claims challenging the safety or effectiveness of medical devices that received pre-market approval by the Food and Drug Administration.8 I understand that decision has already been the subject of a hearing before this Committee, so I will not elaborate further other than to note that the Court's decision relied heavily on the broad language enacted by Congress, was consistent with the view provided to the Court by the Food and Drug Administration, over which the Senate has oversight authority, and left open alternative channels for state regulation that comports with federal standards.

In Rowe v. New Hampshire Motor Transport Association, 128 S. Ct. 989 (2008), the Supreme Court ruled unanimously that a state-law regulation of tobacco shipments was preempted by the Federal Aviation Authorization Act's broad preemption of laws "related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1). The Court followed earlier precedent that had broadly construed the statute's preemption provision and, at bottom, concluded that its provisions apply even if the state law is animated more by social policy - here, combating underage smoking - than pure economic policy.

Finally, as noted earlier, the Court found itself evenly divided (due to the recusal of Chief Justice Roberts) on the question whether state laws pertaining to fraud in the approval of drugs by the Food and Drug Administration are preempted. The Court thus left standing a ruling against preemption by the Vermont Supreme Court. The Court will revisit the preemption issue in the context of FDA-approved drugs next Term in Wyeth v. Levine, No. 06-1249.

Like the employment cases, the preemption cases are telling both for their reliance on textual direction from Congress and for the even broader consensus among the Justices that the decisions reflected.

D. Arbitration

I understand that the Committee has a particular interest in the Supreme Court's arbitration decisions. This Term, the Court decided two arbitration cases, neither of which reflected any surprising development in the law. Rather, both of them built on a longstanding body of precedent enforcing the terms of the Federal Arbitration Act and both of which reflected broad consensus among the Justices.

In Preston v. Ferrer, 128 S. Ct. 978 (2008), the Court held by a vote of 8 to 1 that, when parties agree to arbitrate all questions arising under a contract, the Federal Arbitration Act

preempts a state law that lodges primary jurisdiction in a state administrative agency.9 In so holding, the Court followed earlier decisions that had already recognized the preemptive force of the Federal Arbitration Act generally,10 and that had held, more specifically, that the validity of a contract as a

whole is to be decided by the arbitrator in the first instance.11 In Preston, the Court held that state administrative (just like state judicial) procedures could not be interposed as a prearbitration hurdle to or substitute for the arbitration of a contract's validity. The Court thus simply held that its prior preemption decisions controlled and found no basis for adopting a different rule for state administrative rather than judicial proceedings. In so holding, the Court underscored that its decision did not affect any of Ferrer's substantive rights. Preemption only affected which forum would resolve those rights. The Court also rejected Ferrer's argument that precedent should be overruled, hewing once again to stare decisis principles, leaving the decisions about statutory change and statutory redirection to Congress.

In the second case, Hall Street Associates v. Mattel, Inc., 128 S. Ct. 1396 (2008), the

Court held by a vote of 6 to 3 that the Federal Arbitration Act's standards governing expedited judicial review of arbitral awards cannot be contractually expanded.12 The Federal Arbitration Act provides that a party can seek prompt judicial review of an arbitral award through a motion in federal court. Upon receiving such a motion, the Act directs that a court "must" confirm the award unless one of the specific statutory grounds for vacatur or modification listed in Sections 10 and 11 of the Act is established. In Hall Street, the Supreme Court held that Congress meant what it said when it limited the grounds for judicial invalidation or modification of an award, and held that parties cannot contract around those statutory limitations. The Court's decision rested heavily on what it described as "textual features" at odds with the malleable judicial review approach advanced by Hall Street, noting in particular the statutory emphasis on egregious misconduct (rather than routine error) to invalidate an award and the statutory directive that enforcement "must" be granted unless a listed exemption is established. The Court noted that the parties presented competing policy arguments for their positions, but concluded that the Court was bound by statutory text, and thereby left those policy arguments for the Legislative Branch. The Court also noted that it was addressing only the meaning of the Federal Arbitration Act and expressly left open whether other sources of authority might permit enhanced judicial review of such awards.

The arbitration cases this Term thus exhibited broad consensus and incremental decisionmaking that simply built on longstanding precedent and established principles of statutory construction in this area of the law, with the Court once again applying interpretive rules that allow Congress to lead and the courts to follow.

E. Punitive Damages

The Court decided just one case this Term involving punitive damages. And, while the issue arose in the volatile context of the Exxon Valdez shipping accident, the issues decided by the Court were discrete and narrow. The issues before the Court in Exxon Shipping Company v. Baker, 128 S. Ct. 2605 (2008), did not concern constitutional limitations on punitive damages - which is an area in which the Court has been

active in recent years.13 Instead, the Court confronted the common-law question of the extent to which admiralty law permits punitive damages for non-intentional conduct.

At the outset, the Court (with Justice Alito recused) unanimously agreed with the Alaskan plaintiffs that punitive damages were available and were not preempted by the Clean Water Act. The Court was equally divided on the separate question of whether maritime law allows corporate liability for punitive damages based on the acts of managerial agents and, on that basis, left the Ninth Circuit's ruling in favor of the plaintiffs intact.

Then, in a 5 to 3 ruling, the Court held that, as matter of maritime common law, the amount of punitive damages should be limited in a one-to-one ratio to compensatory damages.14 There are three aspects of that decision that are important to keep in mind.

First, the rule that the Court formulated was entirely the product of judge-made common law and, accordingly, is subject to legislative alteration. Indeed, the Supreme Court expressly and repeatedly noted that its decision was "subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result." Exxon Shipping Company v. Baker, No.07-219, slip op. at 16; see id. at 34, 35 n.21 (2008).

Second, that decision is unlikely to translate into a general rule under the Constitution that would limit punitive damages in an equivalent manner. That is because two of the five votes came from Justices Scalia and Thomas, who have traditionally resisted constitutional limitations on state-law punitive damages awards.15 The voting alignment in this case thus was quite unique for punitive damages cases and it is unlikely that it would be reproduced in support of any general rule of constitutional law.16

Third, the decision was limited to the peculiarities of the case before the Court. The Court explained that its decision involved a case of reckless, non-intentional conduct. The Court thus did not determine whether a similar or different cap would be warranted in a case where the tortfeasor acted willfully or the harm was the calculated result of unchecked profit motivation. The Court also explained that its one-to-one ratio applied, in part, because there were additional tools of deterrence available, such as the imposition of criminal fines, and because the compensatory damages were so high.

In short, the Court's punitive damages decision in the Exxon case arose in a narrow and distinctive context that may well limit the impact of the decision on a forward-going basis and that is fully susceptible to legislative redirection.

F. Conclusion

While the focus of the Committee's hearing is on business cases, I would like to close by noting that the pattern of broad consensus supporting narrow decisionmaking this Term went beyond the business area. In two areas that are traditionally wrought with controversy and partisanship - the death penalty and voter identification requirements - the Court this Term issued decisions that bridged the usual divide and showed the conservative and liberal members of the Court coming together to restrain challenges to the constitutionality of duly enacted legislation. In both of those cases, the Court reached levels of consensus that defied the predictions of Court watchers. In Baze v. Rees, 128 S. Ct. 1520 (2008), the Court held by a vote of 7 to 2 that the plaintiffs in that case had failed to demonstrate the unconstitutionality of the specific drug protocol used in lethal injection cases.17 Likewise, in Crawford v. Marion County Election Board, 128 S. Ct. 1610 (2008), the Court upheld voter identification laws by a vote of 6 to 3, in a decision authored by Justice Stevens.18

Taken together, the Supreme Court's decisions this Term highlight that, in the business area as well as elsewhere, there has not been a seismic shift in the Court's decisionmaking. The decisions this Term also reveal broader consensus among the Justices in support of narrow decisionmaking, strict adherence to stare decisis principles in statutory cases, and increased deference to the legislative process.

1 Justice Breyer delivered the opinion of the Court, which was joined by Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, and Alito. Justices Scalia and Thomas dissented.

2 See, e.g., Jackson v. Birmingham Bd. of Education, 544 U.S. 167 (2005) (Title IX); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (42 U.S.C. § 1982).

3 See Patterson v. McLean Credit Union, 491 U.S. 164, 172-173 (1989) ("We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

4 Justice Alito delivered the opinion of the Court, which was joined by Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer. Chief Justice Roberts, and Justices Scalia and Thomas dissented.

5 Justice Thomas dissented only in part. Justice Breyer was recused from the case.

6 Justice Kennedy delivered the opinion of the Court, which was joined by Chief Justice Roberts and Justices Stevens, Souter, Ginsburg, Breyer, and Alito. Justices Scalia and Thomas dissented.

7 A preemption question was also presented in the Exxon punitive damages case, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008), which is discussed separately below.

8 Justice Scalia delivered the opinion of the Court, which was joined by Chief Justice Roberts and Justices Kennedy, Souter, Thomas, Breyer, Alito, and Stevens. Justice Ginsburg dissented.

9 Justice Ginsburg delivered the opinion of the Court, which was joined by Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Souter, Breyer, and Alito. Justice Thomas dissented. Justice Thomas has long taken the view that the Federal Arbitration Act should have no application to state court proceedings. See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 285-297 (1995) (Thomas, J., dissenting).

10 Section 2 of the Act provides quite unqualifiedly that contracts to arbitrate are "valid, irrevocable, and enforceable."

11 See Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) (state court); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (federal court). Claims concerning the validity of just the arbitration clause, by contrast, can be adjudicated by a court in the first instance.

12 Justice Souter delivered the opinion of the Court, which was joined by Chief Justice Roberts and Justices Scalia, Thomas, Ginsburg, and Alito. Justices Stevens, Kennedy, and Breyer dissented.

13 See Philip Morris USA v. Williams, 549 U.S. 346 (2007); State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003); Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424 (2001); BMW of N. Am. v. Gore, 517 U.S. 559 (1996); Honda Motor Co. v. Oberg, 512 U.S. 415 (1994); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

14 Justice Souter delivered the opinion of the Court, which, in this aspect, was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas. Justices Stevens, Ginsburg, and Breyer dissented from that portion of the ruling capping punitive damages in the case. Justice Alito was recused.

15 See, e.g., Philip Morris, 127 S. Ct. at 1067-1068 (Thomas, J., dissenting); id. at 1068 (Ginsburg, J., Scalia, J., and Thomas, J., dissenting); State Farm, 538 U.S. at 429 (Scalia, J., dissenting); id. at 429-430 (Thomas, J., dissenting); Gore, 517 U.S. at 598 (Scalia, J., and Thomas, J., dissenting).

16 The Court did suggest, but did not decide, that the constitutional limit in this case might be a one-to-one ratio, particularly in light of the enormous compensatory award. See Exxon, slip op. at 42 n.28.

17 Only Justices Ginsburg and Souter dissented.

18 Justices Souter, Ginsburg, and Breyer dissented.