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Before the
Judiciary Committee
of the
United States Senate

Workplace Fairness: Has the Supreme Court Been Misinterpreting Laws
Designed to Protect Workers from Employment Discrimination?

Chairman Leahy, Ranking Member Sessions and Members of the Committee, I am pleased and honored to be here today. Thank you for your kind invitation.

By way of introduction, unlike many witnesses who appear before Congressional committees, I am truly from outside the Beltway. I am a trial lawyer from Texas. For more than 30 years I have represented employers in labor and employment law matters. In my career I have handled thousands of adversarial disputes between employees and employers, including a substantial number which were not resolved until they had been tried to a jury verdict, an arbitrator's ruling or a judge's decision after a bench trial. Many, in fact most, of those actions have involved discrimination claims under both federal and state law.

I am a Fellow in the College of Labor and Employment Lawyers, and have been listed for many years in the Best Lawyers in America in Labor and Employment Law. I have been Board certified in Labor and Employment Law by the Texas Board of Legal Specialization for more than 25 years and have been selected as a "Super Lawyer" in employment litigation by the Texas Monthly. Finally, I have been honored to be selected as one of America's Leading Lawyers for Business by Chambers, U.S.A. Since 2002, I have been the author of Jottings By an Employer's Lawyer, the first labor and employment law-related blog where I comment on employment law-related matters.

I am fortunate to be a member of one of the largest firms in the United States that devotes its practice to labor and employment law matters. Ogletree, Deakins has more than 450 lawyers in 35 offices, from Los Angeles to Miami. We are honored to represent a broad range of America's diverse employers in their labor and employment law matters, from small family businesses to over one-half the Fortune 50.

I would like to acknowledge the assistance of one of my colleagues, Richard L. Hurford, of the Bloomington Hills, Michigan office of Ogletree, Deakins who prepared the section of this written testimony dealing with *Circuit City v. Adams* and the arbitration of employment matters.

My professional career has provided me a ring side seat to the changing American work place. There is no question that the work place has not only changed, but is significantly better, particularly for women and minorities than it was when I was licensed to practice law in 1975. There also can be no question that the Civil Rights Act of 1964, passed by Congress and signed by my fellow Texan, President Johnson, and the other federal legislation that followed have been significant and positive factors in that change. More germane to today's discussion, there should also be no question that the law which has provided the base for the improved workplace has developed and flourished under the interpretation and guidance of the Supreme Court, in its many combinations that have existed since the first Title VII case, *Griggs v. Duke Energy* was decided in 1971.

Answering the question posed by today's hearing topic —Has the Supreme Court Been Misinterpreting Laws Designed to Protect Workers from Employment Discrimination? — my answer is, clearly not. The judicial branch, headed by the Supreme Court, has been faced with a monumental challenge, ensuring that Congress' purpose as set forth in Title VII, the Age Discrimination in Employment Act and the Americans with Disabilities Act to ensure a

workplace free of discrimination because of an employees' race, color, national origin, religion, sex, age or disability, is met. Doing so requires a careful balancing act of congressional intent, the facts of the case, and the legitimate rights of business to run its business in compliance with all applicable laws. There must be forceful actions to ensure compliance, while being careful to avoid unnecessarily and improperly interfere with the myriad of lawful personnel decisions that must be made by all employers to ensure a successful business. Courts have repeatedly, and wisely, disclaimed any desire to serve as "super HR departments." It should also be remembered that there are three constitutiences affected by the interpretation of these laws. Not only are there employees who claim that their rights under federal law have been violated and their employers as an entity, but there are also those individuals, supervisors and managers in businesses of all sizes, who may feel that they have been wrongfully accused of intentional racial, sexual or some other form of prohibited discrimination. Fairness requires that all their interests must be protected.

Finding the proper balance is no easy task For the courts or the Congress. Much as the common law develops over time, through experimentation and adjustment, the law of the workplace has been and continues to develop under the direction given by the courts, in the context of the framework created by Congress. Interference with that incremental process by legislative actions, which once made will, realistically, not be changed, should come only after a convincing case that such a correction is necessary for the overall good, rather than in response to one seemingly "wrong" outcome orr anecdotal evidence of abuse. It is the overall trajectory that should dictate legislative action, not one decision. To do otherwise endangers the experimentation and natural development of the very complex organism that is today's system of workplace regulation.

In my view, two recent actions of Congress illustrate the difference of approach. Regardless of one's view on the merits of the Supreme Court's decisions interpreting the Americans with Disabilities Act, it is clear that a substantial difference of opinion existed between Congress and the Court over the proper course. The Court's opinions had drawn a narrower view of the reach of legislation than that of Congress. It was not one opinion by the Court, but a number of cases highlighted by a trio of decisions in June, 1999[1] and the 2002 decision in Toyota Motor Manufacturing[2]. Still, before acting Congress had not only the Supreme Court's interpretation but the subsequent actions of the lower courts in applying those decisions, before enacting major statutory changes late last year. Although it is too soon to predict exactly how those amendments will play out, it is at least fair to say that Congress did not act precipitously to amend the statute.

By contrast, the Lilly Ledbetter Fair Pay Act, taken up as a perceived political football in this past year's Presidential campaign and passed within the first weeks of this Congressional term, was a response and reaction to one decision.[3] Rather than adopting more limited measures, some of which were even suggested by the Supreme Court itself, Congress has revived claims made for the first time of alleged discrimination that occurred many years ago, claims that are likely to be far beyond the ability of many employers to even know the full circumstances in which such discrimination was alleged to have occurred based on an absence of records and personnel. Although as with the ADA amendments it is till too soon to determine the outcome, already claims have been raised which not only test the supposed limits of the statute but raise the specter of stale charges.

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[1] *Sutton v. United Air Lines, 527 U.S. 471 (1999)*; *Albertsons Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999).
[2] *Toyota Motor Manufacturing v. Williams, 534 U.S. 184 (2002).*
[3] *Ledbetter v. Goodyear Tire & Rubber Co.* 550 U.S. 618 (2007).

Before turning to the two specific decisions that are central to today's hearing, I think it is important to consider the role the Supreme Court has played in the development of Title VII and other non-discrimination laws.

I. The Supreme Court has been a positive force for employment law and protecting the rights of employees.

The very wording of today's hearing topic could be seen as implying the Supreme Court has been biased in its approach to discrimination cases. If any one or two decisions are viewed through that prism, it could lead to a very different conclusion as to the need for legislative action. However, if the Supreme Court's record on discrimination cases as a whole is fairly considered, a much different conclusion is required. In my view, from its very first decision interpreting Title VII, where it recognized that discrimination could occur through disparate impact as well as disparate treatment, the Supreme Court has used its powers to constructively shape the development of workplace discrimination law and implement Congressional intent. Although undoubtedly the better workplace I earlier described is unlikely to have developed if Congress had not passed Title VII and other non-discrimination laws, it is equally true that it would not have done so, if the judiciary, led by the Supreme Court had not taken an active role in shaping the employment law system that exists today.

Given that traditionally the Supreme Court takes a very small number of employment cases for review each year, just a brief summary of some of the Court's decisions over its last ten terms dispels any argument that the Supreme Court is an unfavorable forum for employees, including those bringing claims of discrimination.

Among the decisions which have advanced the rights of employees are:

- *Arbaugh v. Y & H Corp., d/b/a The Moonlight Café,* 546 U.S. 500 (2006).

  The 15 employee requirement of Title VII is not jurisdictional.

- *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006). Reversed a decision affirming summary judgment for the employer in a racial discrimination case involving racial comments, holding that the standard used was improper.
- *Burlington Northern* Railway *v. White*, 548 U.S. 53 (2006). Lowered the standard for retaliation claims.
- *CBOCS West, Inc. v.* Humphries, 128 S. Ct. 1951 (2008) Found an implied cause of action for retaliation under 42 USC § 1981.
- *Crawford v. Metropolitan Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846 (2009). Held that participation even in an internal sexual harassment investigation is engaging in protected activity under the participation provision of Title VII.
- *Desert* Palace, *Inc. v. Costa*, 539 U.S. 90 (2003). Held direct evidence is not required in order to obtain a mixed motive instruction.
- *Edelman v. Lynchburg College*, 535 U.S. 106 (2002). Upheld the Equal Employment Opportunity Commission's long standing rule that a later verified charge relates back to perfect an otherwise untimely charge.
- *EEOC v. Waffle* House, *Inc.*, 534 U.S. 279 (2002). Held that an arbitration agreement between an employer and an employee is not binding on the Equal Employment Opportunity Commission.
- *Federal Express* Corp. *v. Holowecki*, 552 U.S. 389 (2008). Held that submitting an "intake questionnaire" and a detailed affidavit to the Equal Employment Opportunity Commission is equivalent to filing a charge for

purposes of the exhaustion of administrative remedies requirement under the ADEA.

- *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008). Held that federal employees who claim age discrimination are also protected against retaliation.
- *IBP, Inc. v.* Alvarez*, et al*, 546 U.S. 21 (2005) and *Barber Foods, Inc. v. Tum*, 543 U.S. 1146 (2005). Held that doffing and donning safety equipment was compensable and all time after that activity was begun was compensable under the continuous workday rule.
- *Jackson v. Birmingham Board of Education* 544 U.S. 167 (2005). Held that there was an implied cause of action for retaliation in Title IX.
- *Jones v. R.R.* Donnelley *& Sons Co.*, 541 U.S. 369 (2004). Adopted a standard four year period of limitations for § 1981 claims.
- *LaRue v. DeWolff, Boberg & Associates, Inc., et al*, 552 U.S. 248 (2008). Disagreed with the Fourth Circuit Court of Appeals' decision that a participant in a 401(k) plan is prohibited from using Section 502(a)(2) of ERISA to recover losses allegedly caused by his employer's failure to carry out investment instructions.
- *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001). Held that front pay damages are not compensatory damages and are thus not subject to the damage caps of Title VII.

- *Smith v. City of* Jackson, *Miss.*, 544 U.S. 228 (2005). Held that disparate impact cases are available under the Age Discrimination in Employment Act.
- *Swierkiewicz v.* Sorema *N.A*, 534 U.S. 506 (2002). Rejected a lower court holding that there was a heightened pleading requirement for civil rights cases.

Clearly, in the same period there have also been cases where a view of the law arguably favorable to the employer has been the decision of the Court. Rather than cause for alarm, the Court's approach has been even handed, consistent with Congressional intent, and what one would expect of a court that is considering each case on its own merit, as opposed to a court where an outcome based on a one-sided view was pre-ordained or "result" oriented.

Even beyond its even handed approach, which should disabuse any fair minded observer of the view that the Supreme Court is biased against enforcement of anti-discrimination laws, the Court has been sensitive and astute in trying to improve the workplace. A prime example were the decisions in the two sexual harassment cases that created the Faragher/Ellerth affirmative defense.[4] Although the approach of those two cases could be viewed as a compromise between advocates for plaintiffs who wanted strict liability for employers and those who argued for a negligence standard, the real import of the decision was to influence the behavior of both employers and employees in ways that would work toward the elimination of harassment in the workplace, clearly in keeping with the desire of Congress. In cases where hostile environment was coupled with a tangible employment action, employers would be strictly liable. However, in those cases where there was no tangible employment action, the Court created an affirmative defense for employers charged with hostile environments caused by supervisor behavior. The

[4] *Faragher* v. City of Boca Raton, 524 *U.S.* 775 (1998); Burlington Indus., Inc. v. *Ellerth*, 524 *U.S.* 742 (1998).

defense provided incentives for employers to implement comprehensive anti-harassment policies and for employees who had been harassed to take advantage of those policies. The goal, not just to set standards for sorting out blame after an event, but to incentivize behaviors to change with the hope of actually lessening the likelihood that harassment will occur.

Even if one were unconvinced the Supreme Court had been an unbiased forum for the development of employment law, including enforcing statutes prohibiting discrimination as reflected by the above, clearly the Court's action as a leader in enforcing retaliation laws should make that role clear. The Court has taken the lead in protecting employee rights by vigorously enforcing retaliation provisions of various discrimination statutes. In today's world of employment litigation, retaliation cases have become even more prominent than discrimination claims. In this area, the Supreme Court can clearly be said to be a champion of employee rights and Congressional intent.

In *Jackson v.* Birmingham *Board of Education* 544 U.S. 167 (2005), most observers were surprised when the Court created a cause of action for retaliation in an employment case brought under Title IX, although there is no statutory provision. But in strong language, the Court wrote: "[w]e agree with the United States that [these objectives] "would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation." .... If recipients were permitted to retaliate freely, individuals who witness discrimination would be loathe to report it, and all manner of Title IX violations might go unremedied as a result." Three years later, the Court did the same when it again found that protection against retaliation was implied, this time under 42 U.S.C. § 1981, *CBOCS West, Inc. v. Humphries,* 128 S. Ct. 1951 (2008). In *Burlington Northern Railway v. White*, 548 U.S. 53 (2006), the Court not only lowered the generally applied standard for what constituted an adverse

employment action, but also went to great pains to indicate that retaliation was not limited to actions taken in the workplace. Just last term, the Court unanimously extended protection against retaliation to individuals who are participants in an internal investigation, even though they had not independently asserted any personal claims.. *Crawford v. Metropolitan Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846 (2009).

II. *Gross v. FBL Financial Services, Inc.* was properly decided and Congress should not take action to reverse it.

Although much has been written about the Supreme Court's holding this summer that there is no mixed motive instruction available in cases brought under the Age Discrimination in Employment Act, almost all of the criticism fails to acknowledge the significance of the differences between ADEA and Title VII and the spotty history of the mixed motive theory.. Setting that context is important to understand why the Court decided the way it did and why it is unnecessary and unwise for Congress to take any action to reverse it.

When Congress enacted the Age Discrimination in Employment Act, rather than include age as a protected category under Title VII, the ADEA was passed as an amendment to the Fair Labor Standards Act of 1938. Among other things, that Congressional decision based in part on the conclusion that the problems addressed by the two statutes were not identical, meant from the beginning the enforcement mechanisms of the two statutes were dramatically different.

Although some differences have been resolved over the years, others intended by Congress remain. For example, Title VII has a capped system of damages, that allows a successful plaintiff to recover not only back pay, but compensatory and punitive damages up to a certain level determined by the employer's size. Successful plaintiffs under the ADEA, however, are not entitled to compensatory and punitive damages. Instead if they establish that a violation is willful, age discrimination plaintiffs are entitled to liquidated damages in the amount equal to the

loss that they have established. In yet another difference, a group action under Title VII is governed by Rule 23 of the Federal Rules of Civil Procedure while such actions under the ADEA are collective actions, that rely on an opt-in rather than opt-out method. In short, that there should be a difference between they way Title VII plaintiffs and ADEA plaintiffs are treated not only occurs with some frequency, but is mandated by the initial Congressional choice.

The possibility of a mixed motive method for proving discrimination first received Supreme Court recognition in the context of a Title VII decision, *Price Waterhouse v. Hopkins*[5]. The facts of *Price Waterhouse* raised the issue of what happens where an employer has both legitimate and improper reasons for an employment decision. When Hopkins was considered for admission into a professional partnership some of the partners who voted on her membership expressed views about her admission that were seen as business related and appropriate, while others who also participated in the decision had views tainted with sexual stereotyping that were not appropriate under Title VII. Faced with that unique situation, the Court issued four opinions, with no majority opinion, although Justice O'Connor's opinion has generally been considered the opinion of the Court. Out of this muddled circumstance the mixed motive method of proving discrimination was 'adopted.'

As perceived by Justice O'Connor, the mixed motive analysis would be available only in those supposedly rare cases where a plaintiff could provide both direct and substantial evidence that an improper motive had played a role in the employer's decision. In that limited case, the burden of persuasion would, for the first time in a discrimination case, pass to the employer. The employer could still prevail even where an improper motive was a part of the decision, if it could show that it would have taken the same action notwithstanding that the employee was a member

[5] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

of a protected group. Under *Price Waterhouse,* if the employer successfully carried its burden of establishing the affirmative defense, it prevailed entirely.

In hindsight, the most discerning members of the *Price Waterhouse* Court were those who wrote in dissent foreseeing the problems of implementation that would follow the introduction of the mixed motive method. Justice Kennedy wrote, " [t]oday the Court manipulates existing and complex rules for employment discrimination cases in a way certain to result in confusion. Continued adherence to the evidentiary scheme established in *McDonnell Douglas Corp. v. Green,* 411 U. S. 792 (1973), and *Texas Dept. of Community Affairs v. Burdine,* 450 U. S. 248 (1981), is a wiser course than creation of more disarray in an area of the law already difficult for the bench and bar, and so I must dissent,"; while Justice Blackmun succinctly summed up: "I do not believe the minor refinement in Title VII procedures accomplished by today's holding can justify the difficulties that will accompany it."

Even if there had been nothing other than *Price Waterhouse* it is certain there would have been considerable difficulty in implementing the mixed motive method of discrimination analysis. Normally a new judicial interpretation would be viewed and applied in a broad variety of contexts, including through the crucible that is the trial process, which inevitably produces refinements and subtle adjustments to make the principle more workable. In the case of the mixed motive analysis that process was truncated by Congress' action two years later in adopting the Civil Rights Act of 1991, which unfortunately resulted not in simplification, but further complexity.

Even more problematic, when the mixed motive analysis was adopted, Title VII trials were all non-jury, so that such technical areas as the burden of proof, sub-divided into the burden of production versus the burden of persuasion, and the times in which each would shift, while

difficult, were at least the province of trained jurists. With the passage of the Civil Rights Act of 1991 that would of course change, making the warnings of the dissenting judges of the difficulties in adopting the mixed motive analysis that would be visited upon the lower courts even more compelling.

Not only did the fact finder change, but Congress also changed the affirmative defense itself. According to the leading employment discrimination treatise Congress "partly clarified, partly affirmed and partly overruled *Price Waterhouse*."[6] Congress codified the creation of the mixed motive method of establishing discrimination but clarified a point that could not be agreed to by a majority of the Court, setting the burden plaintiff must meet to qualify for a mixed motive application as a *motivating factor*, affirming that there was an affirmative defense that shifted the burden of persuasion to the employer, but significantly modifying the effect of the defense for the employer. Under Congress' mandate if the employer were able to meet the burden of persuasion on the affirmative defense, the employee would still be entitled to declaratory relief and attorneys fees, but no damages could be awarded.

Significantly, although in the Civil Rights Act of 1991 which included the *Price Waterhouse* revisions Congress specifically amended the ADEA in other ways, it did not include it in the section adopting the mixed motive method or affirmative defense.

The real world consequences of the confusing amalgam created in this two year period were mooted by a dozen years of strict observance by the courts to the admonition in Justice O'Connor's opinion that a mixed motive analysis was only applicable in cases of direct evidence. Still, enough issues were presented to prove just how prescient the dissenting Justices in *Price Waterhouse* were in predicting difficulties on behalf of the courts in applying the mixed motive analysis.

[6] B. Lindemann & P. Grossman, Employment Discrimination Law 99 (4th ed. 2007)

Just one footnote[7] in Respondent's Brief in *Gross* amply points out the concerns that the Circuit Courts have had in providing guidance on the application of the mixed motive instruction in the context of a jury trial:

> *See, e.g.*, *Watson v. Se. Pa. Transp. Auth.*, 207 F.3d 207, 220 (3d Cir. 2000) (recognizing the challenge of trying to instruct jurors on the mixed-motive instruction while noting it would be uncommon for a plaintiff to make the demonstration demanded under Justice O'Connor's *Price Waterhouse* concurrence); *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 186 (2d Cir. 1992) (discussion of confusion *Price Waterhouse* caused in the ADEA jury trial context because *Price Waterhouse* involved a bench trial under Title VII); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1179 (2d Cir. 1992) (describing the task of devising a *Price Waterhouse* jury instruction as "the murky water" of shifting burden in discrimination cases); *Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 661 (7th Cir. 1991) (Flaum, J., dissenting) ("As Justice Kennedy observed in his *Price Waterhouse* dissent, formulating a jury instruction that explains the burden shifting analysis applicable to mixed motive cases in the wake of that decision is no mean feat.").

And of course problems for the district court judges, those actually charged with converting such theories into practical instructions to be read to actual juries are even more acute.

One reason that problems did not multiply even more was that the mixed motive analysis was not only difficult for courts to apply, but was not seen as necessarily beneficial by employment plaintiffs' attorneys. For example, while still arguing that the *Gross* case was wrongly decided and advocating that it be overturned legislatively, one plaintiff's employment lawyer noted the limits of its real world impact:

- As far as the loss of getting a mixed motive instruction in an age discrimination case, most plaintiff's lawyers don't care. It's too confusing to the jury. So until it's fixed legislatively, it really doesn't matter;
- Most experienced employment lawyers know that the "but for" language will have little effect on a jury; and

[7] Brief for Respondent, Footnote 25 at pp.33-34, *Gross v. FBL Financial Group, Inc.* _ U.S._ (2009).

- Age discrimination plaintiffs will still have the opportunity, through the use of direct and circumstantial evidence, to prove that they were discriminated against because of their age — and this decision does not change that fact.[8]

Such feelings reflect my experience, where lawyers representing plaintiffs rely much more on established pretext doctrines under *McDonnell Douglas*, rather than try for a mixed motive analysis. In short, in many respects the dispute engendered by *Gross* is more academic than real world.

When, in its 2003 decision in *Desert Palace v. Costa*, the Supreme Court refused to infer Justice O'Connor's judicial gloss that the mixed motive analysis was available only upon the showing of direct evidence onto the wording of Congress, the stage was set for even more concerns and issues to be raised.

One issue that now demanded an answer was what standard was to be applied to non-Title VII cases. That issue with respect to the ADEA was squarely presented in *Gross v. FBL Services.* The Court addressing the above history and taking into account both Congressional action which had modified its initial decision in *Price Waterhouse* in substantial ways and specifically not changed the ADEA, had only three general options:

1. apply *Price Waterhouse*, a plurality opinion which left many unanswered questions, garnered much justifiable criticism and been substantially modified by Congress;

[8] Ellen Simon, *New Supreme Court Age Discrimination Decision Will Be Gone In A Flash*, Employee Rights Post, http://www.employeerightspost.com/2009/06/articles/supreme-court/new-supreme-court-age-discrimination-decision-will-be-gone-in-a-flash/ (June 22, 2009).

2. apply the Congressional modification, notwithstanding the differences between the ADEA and Title VII and Congress' specific failure to include the ADEA within the amendment adopting the mixed motive analysis for Title VII cases, or

3. adopt a more common sense rule, that in reality does little to alter the real world of age discrimination litigation.

Fortunately, the Supreme Court chose the last course by adopting a common sense rule.

In doing so, the Supreme Court brought certainty out of confusion. It also resolved questions posed by the mixed motive analysis about the propriety of undermining the traditional notion underlying all civil litigation that plaintiffs should always have the burden of persuasion. Congressional action to reverse *Gross*, particularly without waiting to determine if in fact there is any real world impact would be short sighted And potentially provide a "cure" with adverse consequences that would far outweigh the alleged evils being remedied.

Although the Supreme Court's efforts in *Price Waterhouse v. Hopkins* are certainly not a model of clarity or an example that should be highlighted for providing clear cut direction on procedural matters which are important in litigation, as a whole the courts are much better suited to resolving such questions than Congress. And in fairness to the Supreme Court, without the Congressional intervention that took the development of the mixed motive doctrine largely out of its hands, it is quite possible that in time, the Supreme Court itself would have self-corrected and brought order to the issue.[9] It is the ability to see how its guidance plays out in actual cases that provides the inherent advantage to the courts in providing the detailed guidance on the precise legal details.

Congressional action should only be invoked when over a period of time the path that the Court has taken proves to be different from the direction Congress intended. It should also be

[9] In fact that is what the Court did in its *Gross* decision.

done with the knowledge that Congressional actions are much more unlikely to be undone than court decisions. I am not aware of any Congressional action that could be construed as rolling back a pro-employee action since the passage in 1947 of the Taft-Hartley Act and the Portal to Portal Act, more than sixty years ago. While it may take time for the judiciary to self-correct a problem, its ability to do so is much more robust than that of Congress. The *Gross* decision alone is far from sufficient to justify such an action.

III. *Circuit City v. Adams* Was Correctly Decided and It Is Important to Maintain Arbitration Agreements for the Just, Speedy and Inexpensive Resolution of Employment Disputes

A. Introduction

The most significant criticism of the Court's decision in Circuit City v. Adams[10] has not focused on whether it was correctly decided but rather the feared adverse impact the decision would have on the enforcement of Title VII and other federal anti-discrimination statutes.[11] These criticisms have not been based upon empirical data but rather the visceral reactions of interest groups and how they might have interpreted the law to reach their own sense of "correct public policy." Thus, rather than an esoteric discussion of the Circuit City decision and whether it was a correct interpretation and application of the Federal Arbitration Act (which the authors believe it was), it may be more instructive to evaluate the longer term policy implications of that decision and how it is most consistent with the continued trajectory discussed above. The authors submit the potential congressional reaction to this decision, in the form of the Arbitration Fairness Act of 2009, underscores the concerns that result from a narrow reaction to a specific decision that, if interfered with, will have potential adverse consequences on the desired

[10] 532 U.S. 105 (2001).

[11] See, e.g., Circuit City v. Adams: Making the Foxes the Guardians of the Chickens, 24 Berkeley J. Emp. 7 Lab. L. (2003).

trajectory of continuous improvement in the work place that is beneficial for both employees and employers.

The prime directive for any dispute resolution mechanism should ideally be that required by the Federal Rules of Civil Procedure. Fed. Rule Civ. Pro. 1 mandates all the Rules of Civil Procedure should be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." The ultimate question, therefore, is whether the use of alternative dispute resolution mechanisms, such as agreements to arbitrate employment disputes (whether promulgated plans, pre-dispute, post-dispute, or otherwise), are inherently susceptible to greater abuse or frustration of this prime directive than recourse to traditional litigation in state and federal courts. Even without regard to the question of whether or not alternative dispute resolution mechanisms are inherently laudable, maintain the data and other objective evidence do not support a claim that arbitration frustrates the goal of securing the just, speedy, and inexpensive resolution of disputes whether these disputes implicate Title VII or other statutory protections. To the contrary, the data and objective evidence endorses the continued use of all forms of arbitration in the employment context as a viable supplement to the protections afforded by state and federal courts in the enforcement of civil rights. The wholesale prohibition of particular forms of arbitrations, as one mechanism in the dispute resolution arsenal, will in all likelihood have undesirable consequences and a detrimental impact upon the administration of justice for both employees and employers, as well as the economic business climate in the United States.

We have nothing but the utmost respect for the quality and integrity of the dispute resolution systems provided by state and federal courts. That is not to suggest, however, these dispute resolution systems, like others, cannot be improved. For example, it is not controversial

to claim certain aspects of the state and federal court legal system are perceived by business decision makers both nationally and internationally as an impediment to investment, innovation, predictability, and profitability.

The literature is replete with examples and analyses documenting the increasingly burdensome cost of traditional litigation and risk in the United States and the fact those costs are much greater than in other countries. For example, even a cursory review of the literature and supporting studies underscore the very real issues that commend appropriate evaluation, potential reform, and fine tuning. In the current environment no dispute resolution system is immune from principles of continuous improvement:

- The U.S. tort system costs every man, woman and child in the U.S. a yearly "tax" of $835 – that is $3,340 for a family of four.[12]
- American litigation costs the nation almost 2% of gross domestic product annually.[13]
- In the past 50 years, direct U.S. litigation costs have risen more than 100-fold while population has not doubled and economic output has risen only 37-fold.[14]
- Litigation costs amount to about $589,000,000,000.00 – equivalent to a 7% tax on consumption or a 10% tax on wages.[15]
- A majority of senior attorneys (63%) report that the litigation environment in a state is likely to impact important business decisions.[16]

[12] The 2008 Update on U.S. Tort Cost Trends, Tilinghast-Tower Perrin, December 2008.
[13] The 2008 Update on U.S. Tort Cost Trends, Tilinghast-Tower Perrin, December 2008.
[14] U.S. Tort Liability Index 2008 Report, Pacific Research Institute, 2008.
[15] U.S. Tort Liability Index 2008 Report, Pacific Research Institute, 2008.
[16] State Liability Systems Ranking Survey, Harris Interactive, March 19, 2008.

- Fear of litigation is among the top issues listed by senior executives who manage internationally owned U.S. businesses whereas U.S. owned companies that operate in other advanced economies do not express a similar concern.[17]
- There is the perception that, at least in some contexts, other countries' legal systems are more predictable and that the legal costs of doing business are substantially less. These perceptions exist even though the overall quality of the U.S. legal system is otherwise well recognized internationally.[18]
- Small businesses bear 69% of business liability costs but take in only 19% of business revenues.[19]
- The cost of the traditional judicial litigation system to individual small business is $20 per $1,000 of revenues. A small company with $1,000,000 in revenues will pay, on average, $20,000 in annual litigation related costs.[20]
- Very small businesses, those with less than $1,000,000 in revenues, pay $31,000,000,000 in litigation costs, but take in only 6% of business revenues.[21]
- Small businesses are responsible for 75% of all new jobs created in the U.S. economy. More employee benefits could be provided or jobs created

[17] The U.S. Litigation Environment and Foreign Direct Investment, U.S. Department of Commerce, October 28, 2008.
[18] The U.S. Litigation Environment and Foreign Direct Investment, U.S. Department of Commerce, October 28, 2008.
[19] Tort Liability Costs for Small Business, Institute for Legal Reform, May 17, 2007.
[20] Tort Liability Costs for Small Business, Institute for Legal Reform, May 17, 2007.
[21] Tort Liability Costs for Small Business, Institute for Legal Reform, May 17, 2007.

if the average small business did not have to spend over $17,000 per year for litigation costs.[22]

- Lawsuits and liability insurance cost American business an estimated $128,800,000,000 each year. It is estimated the approximate 4.4 million of small businesses pay more than half of these costs but account for only 25% of all business revenues. These small businesses pay on average 44% of tort liability costs out of their own pocket.[23]
- Foreign companies are shunning the United States in large part due to the U.S. culture of litigation. A survey of chief executive officers cited in a study by McKinsey and Company found that fully 85% of chief executives preferred the litigation environment in London to New York.[24]
- Litigation and tort costs have reportedly increased in relation to the U.S. gross domestic product (GDP) three fold since 1950 (0.62 percent to 1.87 percent).[25]
- Interestingly, this mirrors information that U.S. costs as a percentage of GDP are triple that of France and the United Kingdom and at least double that of Germany, Japan, and Switzerland.[26]

Certainly the spiraling litigation costs in the United States, of which employment related litigation is not an insignificant portion, are perceived as an impediment to attracting business investment and conducting business in the United States. This fact is well documented and

[22] ILR/NERA Report "Tort Liability Costs for Small Business," June, 2004.
[23] ILR/NERA Report "Tort Liability Costs for Small Business," June, 2004.
[24] "Blocking Markets," New York Sun, April 19,2007; "Litigation Puts Wall Street's World Status at Tipping Point," Financial Times, April 6, 2007.
[25] Tillinghast Insurance Consulting, "2007 Update on U.S. Tort Cost Trends," Towers Perrin, Stamford, Conn., p. 5
[26] Tillinghast Insurance Consulting, "2007 Update on U.S. Tort Cost Trends," Towers Perrin, Stamford, Conn., p. 12.

evaluated in a study commissioned by the U.S. Department of Commerce entitled "The U.S. Litigation Environment and Foreign Direct Investment; Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty." This study reaches two critical conclusions: foreign business investment in the United States is decreasing and a significant factor in this decrease is the cost and uncertainty of the traditional U.S. court system.

Some commentators also claim "the current system for adjudicating work place disputes is so…inefficient [and] expensive…that it is unfair to both employers and employees."[27] The arguments of these commentators include the fact that before an employee may file a discrimination lawsuit against an employer, an employee must first file a charge of discrimination with the Equal Employment Opportunity Commission. The agency will then investigate and attempt to resolve the charge. By establishing these procedures, Congress was attempting "to develop a system that would [curb] employment discrimination by providing…an agency that would investigate and resolve charges, no matter the potential amount of damages, without exposing employers to the high costs of litigation."[28] Instead, these commentators maintain what has actually developed is a system where "employee claims are not investigated in a thorough or timely manner and employers accused of discrimination face increasing and unjustified defense costs.[29] Moreover, a reduced workforce and an increasing backlog of pending cases is posing a challenge for the EEOC to accomplish its mission of promoting equal opportunity in the work force and enforcing the Federal laws prohibiting unlawful discrimination.[30] At the end of 2006, the EEOC faced a backlog of nearly 40,000 private-sector

[27] See David Sherwyn, Mandatory Arbitration: Why Alternative Dispute Resolution May Be the Most Equitable Way to Resolve Discrimination Claims, 6 CHR Reports 4, p.7 (July 2006).
[28] Id. at 7-8.
[29] Id. at 8
[30] Office of Inspector General Semiannual Report to Congress April 1, 2007—September 30, 2007, Agents Igniting Change and Fostering Accountability, Effectiveness, and Efficiency in Government available at www.eeocgov/about eeoc/plan/oig/oig-4-2007.

charges, an approximate 19% increase over the previous year and this trend would continue.[31] This prediction has, in fact, been realized in spite of the increasing efforts of the EEOC to address this backlog.

Of course, we are not suggesting this research, data, or for that matter anecdotal stories that bemoan the failure of the state and federal judicial systems to deliver just, speedy and inexpensive results in particular egregious circumstances, form the basis for any rational argument that the court systems in the United States should be dismantled or that certain types of disputes should not be within the domain of these courts. No dispute resolution system is perfect, or will necessarily be perceived as perfect by all parties who participate as long as there are "winners" and "losers." Similarly, any defect that may exist with arbitration, or other alternative dispute resolutions systems, do not suggest the efficacy of those dispute resolution processes should be totally abandoned or deemed unlawful without compelling supporting data. The consequences of such an approach, as the dismantling of any fair, efficient and inexpensive dispute resolution system, would have inappropriate, undesirable and unintended consequences.

B. Are Arbitrations Just; the Data and Due Process Protections Indicate Yes

1. Arbitrations is not a "Lesser Form" of Dispute Resolution System

Congress enacted the Federal Arbitration Act in 1925 with the specific intent of establishing that "arbitration agreements [are] on the same legal footing as other contracts.[32] The Federal Arbitration Act required the judicial enforcement of arbitration agreements in any contracts involving commerce and arbitration became a frequently used method to resolve business disputes.

[31] Id.
[32] Employment Arbitration a Closer Look, 64 J. Mo. B. 173 (August 2008).

The FAA did not immediately lead to the widespread use of arbitration for employment disputes. This was because, prior to 1991, the risks and costs of employment litigation were generally viewed as great; there was uncertainly as to whether arbitration agreements were enforceable for statutory claims; and there was uncertainty whether the FAA even applied to most employment relationships.

In 1991, Congress and the U.S. Supreme Court sent a clear message that arbitration was not a "lesser form" of dispute resolution when compared to the courts in vindicating the civil rights of employees. In *Gilmer v. Interstate/Johnson Lane*[33] the Supreme Court endorsed the use of binding arbitration for employment claims, including statutory employment discrimination claims and, in many respects, the Court's decision in *Circuit City v. Adams* only continued the trajectory of the *Gilmer* decision. Second Congress passed the Civil Rights Act of 1991, which gave plaintiffs the right to jury trials in employment discrimination cases and increased the potential damages available. In the Civil Rights Act Congress also endorsed the use of alternative dispute resolution mechanisms, including arbitration, to resolve employment disputes arising under the Act and the federal law amended by the Act.

The next step in the evolution occurred in the Supreme Court's decision in *Circuit City Stores v. Adams*[34] where the Court held the FAA does apply "to contracts signed by most employees, and excluded from its coverage only the employment contracts of seamen, railroad workers, or other transportation workers." The Court also continued to endorse the congressional intent and public policy underpinnings of the FAA by praising the "real benefits" that arbitration provides including the avoidance of litigation costs—a real benefit of particular importance in employment litigation. Thus, as of 2001, arbitration was recognized as a valid

[33] 500 U.S. 20 (1991).
[34] 532 U.S. 105 (2001).

forum for the adjudication of employment statutory claims that effectively supplemented the courts in the just, speedy, and inexpensive administration of justice. The focus of the courts then focused on whether arbitration agreements provided procedural and substantive due process and were fair and balanced to the contracting parties.

2. Substantive and Procedural Due Process

Over the past 80 years since the passage of the F.A.A., and the adoption of the Uniform Arbitration Act in some form by every state legislature, a significant body of law has developed in the state and federal courts that ensure not every arbitration agreement will be enforced.[35] Since 2001, these courts have developed a significant body of case law dealing with issues of when and under what circumstances these agreements will be enforced in the employment context.[36] Only those agreements that are in writing, and meet the panoply of substantive and procedural due process requirements, will be enforced by the courts.[37] Thus, whether the arbitration agreement is contained within a promulgated plan, pre-dispute agreements, post dispute agreements, or otherwise, only those agreements that meet certain fairness requirements, i.e., substantive and procedural due process, will be enforced by the courts. We know of no empirical studies that suggest the courts have failed to address these concerns in an appropriate fashion.

One could argue that an implicit message in the Arbitration Fairness Act of 2009 is that the state and federal courts have so failed to ensure procedural and substantive due process in the enforcement of arbitration agreements, an ironic comment as these very same courts are the only forum that would be permitted to ensure substantive and procedural due process and fairness in

[35] See generally, Alternative Dispute Resolution in the Workplace, ADR Work § 3.05 (Law Journal Press 2009)
[36] While a survey of all the cases that address the mandatory substantive and due process requirements these agreements must satisfy is beyond the scope of this presentation, an illustrative example can be found in *Armendarez v. Foundation Health Psychare Services, Inc.*, 24 Cal 4th 83 (2000).
[37] Id.

the resolution of employment disputes. Clearly such a message would be suspect at best particularly if there is minimal or no objective supporting data or studies to suggest the courts have failed in their essential mission: ensuring only those arbitration agreements that meet substantive and due process requirements are enforced.

The body of case law requiring substantive and procedural due process is so well developed, that virtually all third party administrators of promulgated plans have developed their own rules to ensure the fairness of these plans. Examples of third party administrators that have issued mandatory due process protocols as a condition precedent to the administration of promulgated plans are JAMS[38] and the American Arbitration Association.[39]

Indeed, one of the most comprehensive empirical studies known to the authors concluded that arbitrations provided due process at a low cost.[40] As stated, we know of no comparable empirical studies that substantiate a different conclusion.

3. Results: What Does the Data Show

While perceptions can become their own reality, suffice it to state the Arbitration Fairness Act of 2009 is very controversial and has numerous detractors and advocates. Proponents of the Act suggest that arbitrations are "stacked" against the employee and that arbitrators are generally "biased" in favor of employers. The National Employment Lawyers Association (an organization for attorneys who represent plaintiffs' in employment law matters) compares employment arbitration to the kangaroo courts of the Soviet Union. The Equal Employment Advisory Council (an employer group) calls employment arbitration fair, efficient and less costly. In this controversial context, perceptions, anecdotal "evidence," and the like can give rise to unfounded hyperbole and argument. Regardless of whether one is an advocate for or

[38] The due process protocol of JAMS can be found at www.jamsadr.com/employment-minimum-standards/
[39] The due process protocol of the American Arbitration Association can be found at www.adr.org/sp.asp?id
[40] *See* Due Process at Low Cost, 18 Ohio St. J. on Disp. Resol. 777 (2003).

against the Act, one should attempt to objectively identify and evaluate the data that would tend to provide statistical verification of these disparate perceptions.

Very few studies in this area are perfect and without flaws. However, there exist well conceived studies that suggest there is no significant statistical difference in the percentage of cases that result in a favorable decision for employees regardless of whether the forum is court or arbitration.[41] In fact, based upon these studies an argument exists that arbitration is a friendlier forum for the adjudication of employment disputes in general, and Title VII rights in particular, especially those involving lower income earning employees. As stated in one newspaper article, one empirical study indicated that individuals who resolve legal disputes through arbitration fare better in terms of monetary awards and time–savings than individuals who go to federal court, according to a recently-published study. The research studied outcomes from 125 employment discrimination cases filed in the Southern District of New Your federal court versus 186 employment arbitrations in the securities industry between 1997 and 2001 and concluded there was "no statistical support" of bias against individual claimants in arbitration resulting from pre-dispute agreements when compared to federal courts. The study was conducted by Professor Morris Kleiner from the University of Minnesota and attorney Michael Delikat. Prof. Kleiner is the AFL-CIO Professor of Labor Policy and director of the Humphrey Institute's Center for Labor Policy at the University of Minnesota.

Highlights of the analysis comparing arbitration to federal lawsuits:

[41]*See*, e.g., Employment Arbitration and Litigation: An Empirical Comparison (2003)(available at papers.ssrn.comm/sol3/[a[ers/cpr,?abstract; The Myth of Second-Class Justice: Resolving Employment Disputes in Arbitration, How ADR Works 915 (Norman Brand, 2002)Employment Arbitration and Workplace Justice, 38 U.S.F.L. Rev 105 (2003); Arbitrating Claims of Employment Discrimination, Dis. Resol. J. (Oct. 1995); Due Process at Low Cost , 18 Ohio St. J. on Disp. Res. 777 b(2003); Northwestern University, Searle Civil Justice Institute Study (March 2005), executive summary at www.searlearbitration.org/report/exec_summary.php

- Claimants/Plaintiffs prevailed 46% of the time in arbitration versus 34% in court;
- Median monetary awards for successful claimants/plaintiffs were approximately the same:
  - $100,000 in arbitration versus $95,554 in litigation;
- Arbitration results were 33% faster than litigation. The median time from filing to judgment was 16.5 months in arbitration while lawsuits took 25 months to conclude;
- Few individual ever get a jury trial in federal court. Only 3.8% of the federal court cases were concluded by a jury trial, proving a significant counter point to the critique that arbitration keeps individuals from having their claims resolved by a jury.[42]

It would be most difficult, given current data and studies, to objectively maintain that arbitrations are not "just" or "as just" as proceedings in state and federal courts. If nothing else, the current data suggests that advocates of any position to the contrary must support this claim with objective data and empirical studies. To date, we are not aware of any such studies.

C. Arbitrations are Speedy

Following the delay in the processing of charges filed with the Equal Employment Opportunity Commission, court cases typically take years rather than months to wind through the court system to a trial. Arbitration on the other hand, is usually completed within a matter of months. Of course, there can be protracted arbitration where, for example, the parties agree to an

[42] Insurance/Times, Vol. XXIII (April 29, 2003). See also, The Metropolitan Corporate Counsel, The Same Results as In Court, More Efficiently: Comparing Arbitration and Court Outcomes (July 1, 2006).

arbitrator with limited availability.[43] However, on average, the studies support that arbitration is speedier than the courts in resolving disputes. For example, in one study the average duration of an arbitrated claim was 8.6 months compared to 2.5 years in litigation.[44]

D. Arbitrations are Comparatively Less Expensive

A study by the Institute for Civil Justice of the Rand Corporation concluded that arbitration resulted in a 20% cost savings to the parties in transactional costs.[45] In employment cases the cost savings may be even more dramatic than indicated by the Rand Study. Arbitration often results in a 50% reduction of litigation costs. The defense costs for a typical employment case can range from $75,000 to $200,000 while the average cost of arbitrating an employment case is much less.[46] Clearly, there are no broad based studies that demonstrate arbitration is a more expensive form than the courts in the resolution of rights protected by anti-discrimination statutes.

E. Potential Adverse and Unintended Consequences of the Arbitration Fairness Act of 2009

1. Confusion and Litigation Regarding the Meaning and Impact of the Proposed Amendments to Chapter 1 of the FAA

Since its enactment in 1925, Chapter 1 of the Federal Arbitration Act has provided a stable and consistent legal framework for arbitration in the United States. Chapter 1 has benefitted from judicial construction, scholarly analysis, and practical application and sets out the United States' fundamental policy regarding arbitration. The courts have consistently reaffirmed a strong national policy under Chapter 1 that favors arbitration to resolve disputes, and this policy could be diluted with the insertion of carve-outs in Chapter 1 such as that

[43] Shea, id.; see also n. 31, above.
[44] Id. Insurance/Times.
[45] Garry G. Mathiason, Achieving Workplace Justice Through Binding Arbitration, SHRM Legal Report (Spring 1994) available at www.shrm.org/hrreources report
[46] Shea, id.

contemplated by the Arbitration Fairness Act of 2009. Altering that Chapter, with the adoption of the Arbitration Fairness Act, has the potential to unravel the reliability and predictability of arbitration in this country and to create confusion and unnecessary litigation regarding the interpretation of the FAA. Moreover, when presented to a court, the legislative findings that now preface the Arbitration Fairness Act could undermine the rationale and deference accorded to arbitration generally and could be argued in a way that calls into questions the underpinning of established judicial precedents for all arbitrations.[47]

Under well accepted current law, courts determine whether there is an enforceable agreement to arbitrate (i.e., substantive and procedural due process requirements are met), and arbitrators determine if a specific dispute falls within the scope of the arbitration agreement. Section 2 c of the Act could turn this entire body of case law on its head in all arbitration contexts by mandating "the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such an agreement." As this section encompasses all agreements to arbitrate, even business to business arbitration agreements, international agreements, etc., the proposed legislation could be viewed as an invitation to interminable litigation over issues that had previously been within the sole province of the arbitrator. Thus, all arbitration proceedings would have to come to a halt if any party to the arbitration claimed the arbitration agreement was invalid or unenforceable for any reason. Such reasons could clearly include the parties did not intend to arbitrate the specific dispute that is subject matter of the arbitration. Such a result would frustrate the public policy set forth in the Federal Rules of Civil Procedure: the just, speedy and inexpensive resolution of disputes.

[47] See, for example, 56 May Fed. Law. 48, p. 49 (May, 2009).

2. The Prohibition in Chapter 1 is Subject to Expansion that May Be Far Too Broad

It is not uncommon for highly compensated and sophisticated individuals to execute employment agreements prior to hire that contain arbitration agreements; it is not unusual for companies, which acquire closely held businesses, to require the business owners of the selling businesses to execute employment agreements with pre-dispute arbitration agreements; employers who hire highly sophisticated and specialized foreign workers, and fund the entire cost of the visa and relocation process, often enter into employment agreements that contain arbitration agreements; most companies and independent contractors enter into agreements at the outset of their relationship that require the resolution of disputes by arbitration; most franchise agreements, in an attempt to contain the cost of the franchise and reduce risk, call upon arbitration to be the mechanism for resolving any disputes; many companies provide severance programs to employees that provide substantial severance benefits in return for a release and the resolution of all future disputes through binding arbitration; businesses, both domestic and international, will often enter into joint venture, as well as a whole host of other types of agreements, that call for the arbitration of all disputes; partnership and closely held family businesses will typically require the resolution of disputes through binding arbitration. All such agreements, and a whole host of others, would now be deemed unenforceable as a matter of law particularly if they arguably implicated the resolution of any "civil right" (which is undefined in the statute). The potential negative impact of such far sweeping legislation is virtually impossible to predict. It will be dependent, in part, on how a court might define a "civil right" and whether a "civil right" is defined by recourse to state, federal, international, or the law of a

foreign jurisdiction.[48] Moreover, we have been unable to identify any competent data that quantifies the evils the proposed legislation will remedy and provides any cost-benefit analysis that quantifies the negative consequences of the proposed legislation and compares how those negative consequences will be outweighed by the benefits that will be realized through the passage of the Arbitration Fairness Act.

3. The Act Could Disadvantage the Ability of Lower Compensated Employees to Seek Redress for a Violation of Their Rights

The United States Department of Labor and Commerce Commission on the Future of Worker-Management Relations, better known as the Dunlop Commission, found that it is primarily highly-compensated employees that pursue employment discrimination claims in the courts. Commission on the Future of Worker-Management Relations at p. 50. A survey by William Howard of plaintiff's lawyers' standards for accepting employment discrimination cases shows that it is probably only highly compensated employees who are able to obtain counsel to pursue employment discrimination claims in court. William Howard, Arbitrating Claims of Employment Discrimination, Disp. Resol. J. (Oct., 1995) p. 40. The same survey indicated that it is probable that only highly-compensated employees pursue all other employment-related claims in the courts, as well.

The survey of 321 plaintiff's attorneys found that these lawyers accepted only 5% of the employment discrimination cases offered to them by prospective plaintiffs. The results of the survey also described the minimum parameters of an acceptable employment discrimination case. Lawyers required, on average, provable damages of $60,000.00 to $65,000.00, a retainer of $3,000.00 to $3,600.00 and a 35% contingency fee.

[48] Some commentators have suggested the Arbitration Fairness Act of 2009 will result in the violation of U.S. Treaty Obligations. *See, eg.*, 56 May Fed. Law. 48, p. 51 (May 2009).

Other employment-related claims would arguably be less attractive to the plaintiff's bar. The minimum parameters would most likely be higher for non-discrimination cases because discrimination statutes typically provide for an award of the plaintiff's attorney's fees to plaintiff's counsel in the event the plaintiff wins the case. Thus, an employment discrimination case intrinsically offers plaintiff's attorneys greater rewards. Since "provable damages" in an employment-related case are correlated with salary, higher minimum provable damages usually require plaintiffs of higher incomes.

Thus, a dispute resolution system that is faster and less expensive for plaintiff's counsel to prosecute, particularly if the promulgated plan has a first step mediation,[49] would clearly result in a lowering of the "provable damages" bar. While there is no empirical data that directly supports the conclusion that passage of the Arbitration Fairness Act would disadvantage middle and lower income employees, there is sufficient data and empirical evidence to suggest this could well be an unintended consequence. Certainly, the potential is worthy of further evaluation prior to the passage of the Act.

4. The Act Could be Viewed as Inherently Inconsistent and Disadvantageous to Employers in Union Campaigns

It is clear that the mandatory pre-dispute arbitration agreements found in virtually all collective bargaining agreements are exempt from the substantive and procedural due process requirements imposed by state and federal courts on non-collectively bargained for plans. Yet, the proposed legislation would exempt arbitration agreements found in collective bargaining agreements and sanction the use of this dispute resolution mechanism in the union setting. We know of no empirical or objective data that suggests pre-dispute arbitration agreements contained

[49] Increasingly, promulgated plans require a two step process: mediation and, if unsuccessful, binding arbitration. The mediation is typically conducted with a trained facilitative mediator whose goal is to resolve the dispute on terms that are acceptable to both parties.

in collective bargaining agreements are any more just, speedy or inexpensive than promulgated plans developed for non-unionized employees. In fact, one could fashion an argument that such agreements for non-unionized employees are far less expensive for those employees as they do not come with the cost of union dues.[50] In addition, one could argue that promulgated plans provide the employee with a whole host of substantive and procedural due process safeguards that cannot be negotiated away during the collective bargaining process. Based upon these facts, one might argue the proposed legislation is inherently inconsistent and imposes an inappropriate and unjustified double standard. So there is no confusion, we are not suggesting that mandatory, pre-dispute arbitration agreements found in collective bargaining agreements also be prohibited by the Arbitration Fairness Act of 2009. We are simply unaware of any studies or data that suggest there should be any difference in the treatment of the two types of arbitration. That is, there is no data that suggests there is any difference between the justice, speed, or expense provided by these two different types of arbitration agreements.

In most organizing campaigns, unions assert that one of the benefits of unionization to employees is that unions protect employees by securing cost effective, speedy and fair resolution of disputes. The dispute resolution provision found in virtually all collective bargaining agreements culminate in final and binding arbitration. Most employers, who have developed promulgated plans that are fair and satisfy the substantive and procedural due process requirements of state and federal courts, use these promulgated plans to counter the claimed benefits relied upon by union organizers.[51] The Arbitration Fairness Act of 2009 would

[50] In fact, to meet the requirements of substantive due process developed by the courts, the employee under these plans cannot be required to bear any of the administrative costs in the resolution of the dispute. These are costs the employer must solely bear.

[51] Certainly, if the promulgated plan is not fair or fails to satisfy the substantive and procedural due process requirements imposed by the courts, that fact is used against the employer during the organizing campaign.

obviously deprive employers of using such promulgated plans in organizing campaigns. While we are not suggesting the proposed legislation is intentionally pro-union, one of the unintended consequences of the Act will be to disadvantage businesses that desire to implement promulgated plans that are fair and provide procedural and substantive due process.

5. Arbitration as a Dispute Resolution Mechanism will be Drastically Reduced and the Courts will be Increasingly Burdened and Forum Shopping will Exacerbate this Burden for the Federal Judiciary

Some proponents of the Arbitration Fairness Act of 2009 have no criticism of the salutary effect of arbitration in resolving workplace disputes and, in fact, view arbitrations as a necessary dispute resolution mechanism in reducing the work load of an already over burdened judiciary. The main thrust of the position of these proponents is that the parties are free to enter into agreements to arbitrate after the dispute has arisen. Presumably, the belief of these proponents is that pre-dispute agreements are in some manner inherently unfair.[52] The unintended consequence of the Act will, in all likelihood, be to significantly reduce the number or matters that are arbitrated. As a result, there will be a significant increase in the dockets of an already over burdened judiciary and forum shopping will exacerbate this burden on the federal courts[53].

Promulgated plans of all forms have grown significantly over the years. As of 2007 it was estimated that 15% to 25% of non unionized employers nationally have adopted some form of mandatory arbitration procedures. Out of a non-union work force of 121 million employees, more than 30 million employees are covered by such procedures. Thus, there are a very

[52] We are at somewhat of a loss to fully understand this position as the due process requirements, both substantive and procedural, imposed by the courts are identical whether the agreement to arbitrate is based upon a promulgated plan or is pre or post dispute. Moreover, we are not aware of any empirical studies that suggest there is any difference in the terms of pre-dispute and post-dispute arbitration agreements or that post-dispute arbitration agreements result in more just, speedy or inexpensive dispute resolution than pre-dispute agreements or promulgated plans.

[53] Data Points: Prevalence of Mandatory Arbitration Systems Imposed on Employees, NELA, October 2007.

significant number of cases in arbitration that would otherwise be in court in the absence of these plans.

Moreover, in our experience it is not realistic to expect that any significant number of these cases will be diverted into arbitration by post-dispute agreements.[54] The dynamics, the analyses, and the motivations are very different for the employer, the employee, and their attorneys post dispute than pre-dispute.

From the employer's perspective, the incentives regarding an unknown dispute and a present dispute are quite different. When considering future disputes, the employer must consider a wide range of financial risks that are difficult to quantify and often times unpredictable. In this context, many employers are willing to participate in promulgated plans. From the employee's perspective, there is little down side risk to voluntarily entering into a promulgated plan. The employee is not anticipating any dispute with the employer, and, in most instances, the plan may be perceived as a significant benefit as a quick, easy and effective way of resolving any dispute that might arise in the future. That is particularly true where the promulgated plan contains progressive steps in the resolution of disputes such as informal discussions, mediation, and ultimately arbitration. Finally, speed and cost efficiency may not be prime motivators for some plaintiffs' counsel who, under anti-discrimination statutes, are entitled to the payment of attorney fees if the plaintiff ultimately prevails on the merits of the case. One might argue that plaintiffs counsel have a financial stake in escalating the costs of a discrimination action.

[54] See generally, Lewis L. Maltby, Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreement, 30 WM. Mitchell, L. Rev. 313 (2003).

After the dispute arises, the dynamics are entirely different. From the employer's perspective, the nature of the dispute is now known and the exposure can be quantified with the assistance of competent counsel. If the employee is not highly compensated, consideration may be given to the "staying power" of the employee and the tactical advantages that can be gained in litigating in courts. Also, defense counsel may not strenuously advocate the use of arbitration due to issues involving economic self interest.

From the employee's perspective, there is now a dispute and emotions are running high, and counsel for the employee will typically not be motivated to recommend alternative dispute resolution mechanisms at the outset of the case. There is a perception by many in the plaintiffs' employment bar that the likelihood of a "runaway" jury award is far greater than the likelihood of a "runaway" arbitrator's award. Also, there is a perception among the plaintiffs' bar that the "settlement value" of a case, regardless of the merits of the case, may be higher in a judicial rather than an arbitration forum. Defense costs in the form of attorney fees are unquestionably greater in court than in arbitration. There is little doubt that the exposures to defense costs increasingly drive settlement decisions.

Given the above, it is not realistic to expect that any significant percentage of the disputes involving the approximately 30,000,000 employees subject to promulgated plans will find their way into arbitration following the passage of the Arbitration Fairness Act of 2009. That will result in a significant burden to the courts and the federal courts in particular.

If an employee is subject to the terms of a promulgated plan, and the Arbitration Fairness Act is passed in its present form, the attorney for that employee will confront a choice. Either assert a claim under state law and proceed with the pursuit of that claim in accordance with the terms of the promulgated plan, or assert a federal claim and bypass the plan altogether. For the

reason described above, the outcome of this forum shopping is self evident.The federal courts will receive the brunt of the increased work load as it is unlikely that all the states will pass comparable legislation outlawing promulgated plans for the processing of state employment claims.

6. The Right to Jury Trial

Critics of promulgated plans and pre-dispute arbitration agreements maintain these dispute resolution mechanisms deprive individuals of one of the most sacred of constitutional rights: a trial by jury. Such a position, however, assumes the right to a jury trial by jury cannot be intelligently and strategically waived (which under current law is not the case) and also assumes that all other interests (such as the right to a "just, speedy and inexpensive" dispute resolution system) are subordinate to the right to a jury trial.

Regardless of whether an employment lawsuit is filed in state or federal court, the data is quite clear: on average less than 2% of those cases are resolved by a jury trial. The vast majority of cases are disposed of by summary disposition or voluntary settlement. If, in fact, the goal of the civil justice system is to protect the right to jury trial above all else, one might argue the current judicial system is not effectively achieving its prime objective. Certainly, there are no studies or empirical data to suggest the passage of the Arbitration Fairness Act of 2009 will result in an increase in the percentage of jury trials in the United States. Indeed, some commentators suggest the passage of the Act, with the increase in court dockets, will actually reduce the amount of time for courts to preside over jury trials. Other commentators note that more cases go to a contested hearing in the arbitration context than in the courts.

Certainly, if the advocates of the Act believe doing so will in some manner increase the number of jury trials, although there is no empirical data that will support such a cause and effect, there are certainly more direct ways of accomplishing this objective. For example, the

Fed. Rules of Civil Procedure. could easily be amended to either limit or eliminate the ability of federal judges to grant summary disposition. Similarly, and in the context that you become what you incentivize, an increase in jury trials could be expected if legal fees were limited or capped (to 10% or less of any settlement) while contingency fees of 30% or more could be realized if a case proceeded to trial. Similar caps and incentives would also be placed on counsel for defendants. Such an action would certainly provide incentives for defense and plaintiff counsel to proceed to a jury trial and, in all likelihood, result in more jury trials than the passage of the Arbitration Fairness Act ever would.

While these suggestions may appear to be tongue in cheek, they do focus attention on the law of unintended consequences. Adopting the measures suggested above (to simply increase the number of jury trials) would certainly have short term and long term consequences that would far outweigh the benefits of increasing the number of jury trials. Thus, as is true with the law of physics, any action will give rise to reactions. The issue is whether there are unintended consequences that will result from the action (here the passage of the Act) that will far outweigh any benefits that might be derived from the passage of the Act. As the discussion above suggests, there may not be sufficient empirical data to support the intended benefits will be achieved. As discussed below, we suggest that the unanticipated adverse consequences of this action should also be evaluated to ensure there is not a net decrease in the "just, speedy, and inexpensive" resolution of disputes.

7. Impact on Investment

As indicated in the Introduction, there is ample empirical data to support the conclusion that aspects of the U. S. civil justice system have had an adverse impact upon investment in the United States. One aspect is clearly the perception among potential business investors that the "cost" of justice is escalating at a significant pace. Clearly, any legislation that is perceived or

has the impact of increasing those costs would be counterproductive in the attraction of business investment in the United States. While this adverse impact would be justified, as long as a greater public good is being served (i.e., an overall increase in the just, speedy and inexpensive resolution of disputes), the data does not support the conclusion the Arbitration Fairness Act will result in an increase in justice, speed or cost savings in the resolution of disputes. Indeed, the empirical data suggests the contrary.

IV. Conclusion on Arbitration Agreements as a Method of "Just, Speedy and Inexpensive" Resolution of Employment Disputes.

If there is agreement that the U. S. civil system should achieve certain objectives, evaluating and generating the necessary empirical data to determine the steps and reforms best designed to achieve those goals would be most appropriate. We would suggest there is very little disagreement as to the ultimate goal: the civil justice system should provide for the just, speedy and inexpensive resolution of disputes. Any steps or reforms that result in a diminishment of justice, increased delays, and added expense would be inimical to the attainment of the desired goals.

For example, the discovery process is certainly perceived as assisting courts in the laudable goal of providing "just" results. However, there are ample studies that have demonstrated that discovery can be abused by counsel to needlessly escalate the cost and delays of litigation and can undermine the goals of the civil justice system.[55] As stated in one highly respected report:

> [T]here are serious problems in the civil justice system generally and that the discovery system, though not broken, is badly in need of attention…. From the outside, the system is often perceived as cumbersome and inefficient. The

[55] Final Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System (March 11, 2009)

emergence of various forms of alternative dispute resolution emphasized this point. [56]

As no commentators are seriously suggesting the total elimination of discovery to address the flaws in the current discovery process, before there is the wholesale elimination of any forms of alternative dispute resolution (which have arisen in part to ameliorate the barriers to justice caused by the increase in expense associated with traditional litigation), there needs to be an evaluation of the impact of such an action on the goal of achieving the just, speedy, and inexpensive dispute resolution. The data suggests that passage of the Arbitration Fairness Act of 2009 may potentially be a step backward rather than a step forward in the attainment of the ultimate goal.

As stated by one respected commentator, increased congressional attention to consumer and employment arbitration can be valuable for it promotes discussion and study about this valuable dispute resolution tool; it can also be dangerous if the terms of the debate focus too much on anecdote and too little on systemic study.[57] We welcome the opportunity to participate in this very important discussion and systemic study.

Conclusion

Rather than being adverse to employee interests, the Supreme Court even in its most recent configuration has been a supporter of Congress's goal in ensuring as much as possible a workplace free of discrimination. Any view that either of the two decisions under study were a result of some bias is unfounded. Reversal by Congressional action of either of the two decisions is neither warranted and would ultimately work to the detriment of the law of the workplace.

I look forward to answering the Committee's questions and again appreciate the opportunity to participate in this important discussion.

[56] Id. at 2.
[57] Peter B. Rutledge, Whither Arbitration?, 6 Geo.J.L.Puh. Pol. 549 2008.