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S. HRG. 112–108

BARRIERS TO JUSTICE AND ACCOUNTABILITY: HOW THE SUPREME COURT'S RECENT RULINGS WILL AFFECT CORPORATE BEHAVIOR

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

JUNE 29, 2011

Serial No. J–112–31

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

68–273 PDF WASHINGTON : 2012

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

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BARRIERS TO JUSTICE AND ACCOUNTABILITY: HOW THE SUPREME COURT'S RECENT RULINGS WILL AFFECT CORPORATE BEHAVIOR

WEDNESDAY, JUNE 29, 2011

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, pursuant to notice, at 10:19 a.m., Room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Feinstein, Whitehouse, Franken, Blumenthal, and Grassley.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning. This morning we are going to highlight several recent Supreme Court decisions, one, to examine the impact on the lives of hardworking Americans.

In my view, each of these decisions give corporations additional power to act in their own self-interests and each limits the ability of Americans to have their day in court.

In the tough economic times we are facing around the country, it is of particular interest because American consumers and employees rely on the law to protect them from both fraud and discrimination, and they rely on the courts to enforce those laws intended to protect them.

But, unfortunately, I believe these protections are being eroded by an activist court and, actually, the most business-friendly Supreme Court in the last 75 years.

Last week, in *Wal-Mart* v. *Dukes*, five men on the Supreme Court disqualified the claims of 1.5 million women who spent nearly a decade seeking justice for sex discrimination by their employer, Wal-Mart. They ruled the women did not share enough in common to support bringing a class action.

Perhaps more troubling, they told those women that Wal-Mart could not have had a discriminatory policy against all of them because it left its payment decisions in the local branches of its stores.

Through this decision, a narrow majority of five justices have, again, made it harder to hold corporations accountable under our historic civil rights laws.

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Earlier this month, in *Janus Capital* v. *First Derivative Traders*, the same five justices gave corporations another victory by shielding them from accountability even when they knowingly lied to their investors. Some have said the *Janus* decision provides Wall Street companies with a license to lie. Others have said it is a roadmap for fraud.

If you lie to your investors, as long as you follow the guidelines of the Supreme Court *Janus* decision, apparently, you can get away with it.

Whichever phrase you use, the decision allows Wall Street companies to design new ways to evade accountability from the horror inflicted on hardworking Americans who have seen their life savings ravaged over the past few years by fraudulent investment schemes and corporate misconduct.

Two months go, in *AT&T* v. *Concepcion*, the Supreme Court, in another 5–4 opinion, held that companies can take advantage of the fine print on telephone bills in other contracts to bar customers from bringing class action lawsuits.

Now, binding arbitration, binding mandatory arbitration makes a farce of the American people's constitutional right to a jury trial and the due process our Constitution guarantees to all Americans, because the arbitration had no transparency, no juries, and, of course, what is worse, no appellate review.

So these cases we are discussing a few examples of how the Court's recent decisions are going to hurt individual Americans and benefit those who engage in misconduct.

Over the past few years, the American people have grown frustrated with the notion that regardless of their conduct, some corporations are considered too big to fail. The Supreme Court's recent decisions may make some wonder whether the Court has now decided that some corporations are too big to be held accountable.

We have a situation where they are too big to fail, too big to be held accountable, and we have a real concern in this country. In fact, the unfortunate feeling is that many of the justices view plaintiffs as a mere nuisance to corporations.

I believe that the ability of Americans to band together to hold corporations accountable when these things occur has been seriously undermined by the Supreme Court. Decisions have been praised on Wall Street, but they are hurting hardworking Americans on Main Street.

So I thank the witnesses for being here today.

Before we start with the witnesses, of course, I would yield to my friend, the distinguished Ranking Member, Senator Grassley of Iowa.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you very much. Everyone should agree that all Americans, whether you are an individual or a business entity, must have confidence that when they appear before a judge they will receive a fair and unbiased adjudication of their claims and defenses.

Everyone knows how strongly I believe in Congress' constitutional duty to conduct oversight of the other branches of the government, even including reviewing the Federal judiciary, but that review must be fair and objective.

So I am concerned, given the less than objective title of this hearing, and I know the title does not make up the testimony, but some might ask whether certain conclusions have been reached before this hearing has even started.

What businesses, just like all litigants, deserve from the judiciary and from Congress is a fair hearing, the protection of their rights, and a measure of predictability of the law.

The United States was founded on the principle that all persons should receive equal justice under the law. Americans believe that the most fundamental requirement for a legitimate legal system is that it be staffed by judges and by justices who are fully committed to impartially adjudicating the cases that come before them, regardless of the identify or the status of the litigants.

This belief should be of no surprise to anyone. A solemn pledge of impartiality is mandated by the oath taken by Federal judges and justices. And lest we forget, the phrase "equal justice under law" is engraved above the United States Supreme Court Building. Those are more than just pleasant-sounding words.

The fundamental principle of equal justice under the law has its origins in the foundations of Western civilization and the birth of the concept of representative government.

Today, the concept of equal justice under the law and a truly impartial judiciary are at the heart of our legal system and our democratic system of government. Contrary to this fundamental principle, it would seem that those who accuse the Supreme Court of being biased and pro-business want justices and judges appointed who will decide cases based on the empathy that they have for certain groups or litigants or certain causes.

The appointment of an individual as a Federal judge or a Supreme Court justice because he or she possess empathy or sympathy for certain categories of litigants over others is misguided, it is unwise, and it is very contrary to the fundamental principles upon which our governmental and judicial systems are based.

Under the ethical rules governing Federal judges, judges are required to consider the controversies before them impartially and must disqualify themselves if their impartiality can be reasonably questioned.

A judge whose rulings are influenced by empathy violates his or her oath and the ethical canons governing the conduct of judges.

When it comes to judging, empathy is only good if you are the person or the group that the judge has empathy for. In those cases, it is the judge, not the law, that determines the outcome, and that is a dangerous road to go down if you truly believe in the rule of law.

Individuals with legitimate claims should have a chance to make them, but not all individuals have legitimate claims. It appears that those who attack the Supreme Court for supposed bias in favor of business want to change our system. Under their view, it would seem that legal disputes are nothing more than political popularity contests where the side with the loudest voice or the loudest

advocacy groups, wins, notwithstanding what the law actually provides.

Our founders predicted this. They knew that judges and justices would be subjected to these kinds of attacks. That is why our founders created the system that they did and provided for life tenure for Federal judges and justices in Article III of the Constitution.

Under our Constitution and statutes, judges and justices must apply the law impartially and call cases as they see them, without regard for the status or political views of the litigants.

That is our system, it works, and it is the best that mankind has ever known.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Chairman LEAHY. Thank you.

Our first witness this morning will be Betty Dukes. As many of us know, she is the lead plaintiff in a class action case alleging discrimination in pay and promotions, *Dukes* v. *Wal-Mart*. When the company opened a store in her hometown of Pittsburg, California, Ms. Dukes anticipated many opportunities on her horizon. She was hired by Wal-Mart in 1994, was very happy about working for the company.

She had learned about the Walton family and their vast business empire in a community college class in the mid 1980's. Los Medanos Community College, she was placed on the dean's list, obviously made Ms. Dukes and her family quite proud.

When Wal-Mart hired her, she had nearly 25 years of retail experience, including work as a head cashier and then as a department manager.

This May 25 marked her 17th year of working at the Pittsburg Wal-Mart store. She still feels positive about her work environment, believes in the strength of her case. She wants to go to trial and have her voice heard.

I was struck by what somebody told me was your favorite quote, which I think you may hear me using later on. It is, "Don't let fear get under your feet for it will carry you where you don't want to go." That is a great quote.

We will start with you, Ms. Dukes. We will put your full statement in the record, of course, but please go ahead.

STATEMENT OF BETTY DUKES, SAN FRANCISCO, CALIFORNIA

Ms. DUKES. Good morning, Mr. Chairman and members of the committee. I am Betty Dukes. I am honored to have been invited to speak to you this morning.

The Supreme Court's ruling in the *Wal-Mart* v. *Dukes* has brought me before this Committee today. I would like to share a little of my history as a Wal-Mart employee.

I grew up in the city of Pittsburg, California and have worked at the Wal-Mart store there for 17 years. I had worked in the retail industry for nearly 25 years before coming to Wal-Mart. Most of my working career has been in the retail business.

From the start of my career with Wal-Mart, I sought opportunities for advancement. But during my 17 years at Wal-Mart, I have received only one promotion. While working at Wal-Mart, I re-

ceived numerous awards for outstanding customer service and other duties performed well.

Prior to filing this lawsuit in 2001, there was never any posting for management positions in my store. For the first 9 years that I worked at Wal-Mart, I never saw nor heard of any system for applying to get into management.

After the lawsuit was filed, I learned that my experience was typical of what other women had experienced at other Wal-Mart stores. Once this lawsuit began, I also learned through the Wal-Mart workforce database that women were paid less than men for doing the same work in Wal-Mart stores.

Rather than bring a claim just on my behalf, I brought this lawsuit on behalf of women who worked at Wal-Mart stores in this country. We have evidence that countless numbers of us have been subject to the same working conditions and the same practice which favored men.

I had hoped this suit would permit us to get an order from the court to stop Wal-Mart from treating women unfairly compared to men. I was disappointed last week when the Supreme Court blocked us from bringing these claims together in one single case.

We have collected a lot of evidence that women consistently receive unequal pay and unequal promotion supporting our efforts to try their claims together. Unfortunately, the Supreme Court, in a sharply divided decision, did not allow this case to go forward.

Women will now have to pursue smaller class cases or individual actions. We will continue to proceed on behalf of as many women as possible who are part of the class. But many women will give up because it is too hard to sue Wal-Mart on their own. It is not easy to take on your own employer. It is even more difficult when that employer is the biggest company in the world.

In this country, there are many Betty Dukes who want their voices to be heard when they are denied equal pay and equal promotions. For many of these women, I am afraid that the Court's ruling will leave them without having their due day in court.

Thank you.

[The prepared statement of Ms. Dukes appears as a submission for the record.]

Chairman LEAHY. Thank you very much. And I am sure that a number of those women are watching you and your testimony.

Our next witness is Andrew Pincus, who is well known to this committee. He is a partner at the firm Mayer Brown. He frequently argues before the Supreme Court, is well known to the Court. He previously served in the Department of Justice as an assistant attorney general, and, of course, as general counsel of the Commerce Department.

Mr. Pincus, glad to have you here.

STATEMENT OF ANDREW J. PINCUS, PARTNER, MAYER BROWN, LLP, WASHINGTON, DC

Mr. PINCUS. Thank you very much, Mr. Chairman, Ranking Member Grassley, and members of the committee. It is an honor to appear before the Committee today.

To assess the impact on corporate behavior of the Court's recent decisions, I looked at the outcomes in all of the Court's cases in-

volving private plaintiffs seeking damages from businesses, and this year there was a tie.

Business parties lost just as many times as they won in such cases this year, nine wins for business parties, nine wins for plaintiffs suing businesses.

Indeed, in the cases involving substantive interpretations of employment law, business parties lost every case decided by the Court.

I know that some will say business won the most important cases, but I wonder if their perception of the importance of the cases is not colored by their outcome. If, for example, the Court, in the *Kasten* case, had said in retaliation claims under the Federal anti-discrimination laws, complaints must always be in writing, I think the reaction would have been, and quite justifiably, this is an outrage, it is a process requirement that will chill retaliation claims and open the door for companies to intimidate workers; or if the Court, in the *Staub* case, had said as long as the actual decisionmaker in an employment case did not act with discriminatory intent, even if a supervisor had exhibited discrimination, then a discrimination claim cannot be brought, I think there, too, there would be great concern about that.

So I do think, in looking at the Court's cases, it is important to look at the whole range.

Turning to some of the cases that have already been these subject of discussion, I think it is also important to distinguish between legal analysis and policy decisions. All of the cases that we are talking about today presented questions of statutory interpretation either of laws passed by Congress or of the Federal rules governing court procedures. And the Supreme Court, of course, does not ask what policy outcome is best. Rather, its role is to ascertain the intent of Congress using legal principles that have general acceptance by all of the members of the Court, although, as the Committee knows, they vary somewhat in the emphasis that they give to some of those principles.

Of course, it is possible to have a vigorous policy debate regarding the best way to resolve these issues, but the policy debate is separate from the legal question before the Court, and I think that separation is important.

In *Wal-Mart*, *Concepcion*, and *Janus*, in my view, the legal positions of the plaintiffs that were asserted in those cases departed substantially from existing law, and I do not think it is that surprising that the Court refused to embark on the quite radical courses that were being urged by the plaintiff and instead adhere to the principles that had been recognized in the Court's prior cases in those three areas.

In *Wal-Mart*, for example, the Court confronted an unprecedented class action with what the majority found to be a failure of proof that there really was a common legal question in the case, and the decision very much rested on the particular facts that had been adduced in support of the commonality issue.

In *Janus*, the Court has previously twice rejected aiding and abetting claims under Section 10(b) of the Securities and Exchange Act, and this case seemed to be a pretty clear attempt to avoid

those rulings by seeking to impose aiding and abetting liability with a different label.

Again, someone who was alleged to have helped another commit a securities violation should be liable is the argument and the Court said, "Well, we have really dealt with that issue twice before and reached a decision on it. We are going to reach that same decision again today."

And, finally, in *AT&T* v. *Concepcion*, California, in what was really another outlier decision, had applied a state law rule different from that of 22 other states to invalidate the arbitration clause in this case, and the Court said a state can condition the enforcement of an arbitration clause on compliance with conditions that will effectively turn arbitration into litigation.

And so just as a state could not say we are happy to enforce arbitration clauses as long as the arbitrators are 12 people picked off the street, sort of just like a jury, because that would turn arbitration into a court proceeding, the Court said insisting on class action procedures would do exactly the same thing.

The scope of the Court's rulings are going to be debated in dozens, if not hundreds of cases in the lower courts, and impossible to predict now how they are going to come out.

But I think one thing is certain. The predictions that are being made now about their reach are likely to be incorrect. Two years ago, many asserted that the Court's ruling in *Ashcroft* v. *Iqbal*, which involved the standard for determining whether a complaint is sufficient to allow a case to go forward in Federal court, was claimed to dramatically restrict access to the courts and Congressional action was needed, it said, to overturn that decision.

The Federal Judicial Center just released a decision—an analysis 3 months ago finding that, in fact, in those 2 years, there has not been any increase in the rates of motions to dismiss in cases generally and especially in civil rights and employment discrimination cases, which were a particular focus of the concern about *Iqbal*.

So, again, just a cautionary word. We do not really know what these decisions are going to mean until we see how the lower courts will interpret them.

Thank you.

[The prepared statement of Mr. Pincus appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

The next witness is Professor Melissa Hart. She teaches at the University of Colorado School of Law. She specializes in employment discrimination and Supreme Court decisionmaking. After graduating from Harvard Law School, she clerked for Justice John Paul Stevens on the United States Supreme Court.

Professor, it is good to have you here. Please go ahead.

STATEMENT OF MELISSA HART, ASSOCIATE PROFESSOR AND DIRECTOR, THE BYRON WHITE CENTER FOR THE STUDY OF AMERICAN CONSTITUTIONAL LAW, UNIVERSITY OF COLORADO LAW SCHOOL, BOULDER, COLORADO

Ms. HART. Chairman Leahy, thank you. Members of the committee, I appreciate the opportunity to talk with you today.

I have been asked to focus particularly on two cases, *Wal-Mart* v. *Dukes* and *AT&T* v. *Concepcion*, and the impacts they might have on both access to justice and, consequently, on corporate accountability and corporate behavior.

These cases are very different in the context in which they arise. *Concepcion* is a consumer case involving a cell phone agreement. *Wal-Mart* v. *Dukes* is a case involving systemwide allegations of pay and promotion discrimination in the workplace.

But while the substantive law underlying these two cases is very different, they have important similarities that I think are relevant to the conversation here today.

First and most significantly, both of the cases, in 5–4 decisions, reflect tremendous skepticism—I think it is fair to call it hostility—to class action resolution of disputes by the current Supreme Court.

The erosion of the effectiveness of the class action device has moved us very far from the intent of the drafters of Rule 23 in 1966, the current version of the rule. And because the class action is the only way to reach many kinds of systemic misconduct, the erosion of this tool insulates companies from any serious risk of litigation for many kinds of potentially illegal behavior.

So this change, this re-interpretation of Rule 23 that has occurred, in particular, in *Wal-Mart*, has very serious consequences potentially for cases outside of the employment area, as well as within the employment area.

A second similarity between these two cases is that they both involve what is really part of a trend of Supreme Court cases over the past few years that have re-interpreted procedural rules in ways that limit the likelihood that the substantive merits of the underlying case will ever be heard by a decisionmaker.

One of things I think it is important to keep in mind in thinking about these cases is these were not rulings on the merits of the plaintiffs' claim. Nobody has said that Betty Dukes and the class in *Wal-Mart* was not discriminated against. Nobody has said yet that they were.

The question was can they put these claims before a decisionmaker. And so the procedural devices are being put ahead of the substantive law and interpreted in ways that make it hard to get to the substantive questions.

I think, again, looking at *Wal-Mart*, it is easy to see how Rule 23(a), the rule that governs class actions in Federal courts by private litigants, has, from 1966 really until last week, been understood by lower courts, by the Supreme Court, certainly by the rule's drafters, as a threshold inquiry that was not supposed to be a high barrier to pursuing a class action.

It was supposed to consider not the merits of the claims again, but whether this group of people could put the merits of the claims before the Court.

In the *Wal-Mart* decision, these five justices interpreted Rule 23(a) in a way that actually sets the standards for Rule 23(a) at higher, more difficult to meet than the standards than the Court had already established in earlier cases for the substantive law underlying these claims.

So a class cannot be certified, but if it were certified, it would meet the standards set in *Watson* or in *Teamsters* for winning on

the merits, and that is a very troubling turning on its head of the relationship between procedural rules and substantive rules.

I think that that is a policy judgment. These judgments about how the procedural rules should be used to effect how much and what kinds of litigation gets before decision-makers—and this is true in the arbitration context, as well—that is much better made in state legislatures or in this body than by courts re-interpreting rules that have not themselves been rewritten.

A final similarity that I think it is important to note in thinking about these cases is that, while they are very different from each other, they are similar in being very typical of the modern world. Every single person sitting in this room has signed dozens of contracts like the contract that the Concepcions signed. We all agree every day to arbitration agreements that we do not know we are agreeing to, and we are all going to be bound by these agreements in litigation. And the question of how the courts interpret those agreements is something that will affect us all.

Similarly, Wal-Mart, although people love to call it unprecedented and focus on the size of the company, Wal-Mart, as a type of workplace, is, in fact, the type of workplace that more and more workers are working in.

It is a multi-facility, multinational corporation, with decisions made in subjective ways that involve assessment by one supervisor of the workers working for him or by one regional manager of the workers, without a lot of objective standard to that evaluation.

I think that in light of the ways that these decisions might affect people all over the country, it may well be time for this Congress to start thinking about changing the law, responding to these judicial re-interpretations with new standards that return the original intent of Rule 23 and of the Federal Arbitration Act.

Thank you very much.

[The prepared statement of Melissa Hart appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Professor Hart.

Our next witness is Robert Alt. He is the senior legal fellow and deputy director of the Center for Legal and Judicial Studies at the Heritage Foundation, where he specializes in constitutional law.

Mr. Alt received his law degree from the University of Chicago Law School.

Mr. Alt, we are glad to have you here. Please go ahead. And, again, as with all witnesses, the full statement will be placed in the record, but please go ahead.

STATEMENT OF ROBERT ALT, SENIOR LEGAL FELLOW AND DEPUTY DIRECTOR, CENTER FOR LEGAL AND JUDICIAL STUDIES, THE HERITAGE FOUNDATION, WASHINGTON, DC

Mr. ALT. Thank you, Chairman Leahy and Ranking Member Grassley, for inviting me to testify before your Committee once again.

I share with Senator Grassley the concern that the title of this hearing suggests something of a predetermined conclusion, that the recent decisions of the Supreme Court will somehow create barriers to justice and accountability and will somehow create adverse incentives for corporate behavior.

I do not believe that the facts support that conclusion.

Reviewing the business cases from recent terms of the Court leads to several important conclusions. One, the Court frequently speaks in business cases not in the fractured voice characterized by the Court's critics, but in a unanimous or super-majoratarian voice.

Two, far from creating new barriers to justice or accountability, the Court's decisions assailed in today's hearing reject new, novel, and frequently unsupported theories advanced by trial lawyers to circumvent reasonable existing requirements—requirements which were designed to prevent frivolous litigation and to assure due process to all parties. And, three, the designer of many of these requirements was none other than Congress.

With this in mind, it is worth exploring a couple of the cases that have been highlighted so far at today's hearings. First, *Wal-Mart* v. *Dukes*. Largely ignored so far in this hearing has been the unanimity of the Court's determination that the action could not be brought under Rule 23(b)(2), a section addressing injunctive relief, but was more appropriate, if appropriate at all, under (b)(3), which permits broader claims of monetary damages.

It is obvious why it is that the claim was brought under (b)(2). (b)(3) is—the certification for monetary damages under (b)(3) is harder and more costly than under the injunctive relief section of (b)(2), and thus the lawyers attempted to shoehorn what were predominantly claims for monetary relief into the (b)(2) setting.

But the use of (b)(2) was really, at best, a (b)(3) claim—as tedious as the (b)(2)/(b)(3) repetition may be—creates very real due process concerns for members of the plaintiffs' class who are not required under Rule (b)(2) to get adequate notice or to have the option to opt out of the litigation.

It also creates serious due process concerns for *Wal-Mart*, as defendant, which would have been forced to litigate in what the Supreme Court correctly recognized to be trial by formula. While this might have been convenient for the plaintiffs, it creates gross unfairness for the defendant, who is entitled to raise statutory defenses to individual claims.

But perhaps most importantly, in the wake of this decision, there are ample opportunities for justice and incentives for good corporate behavior. Smaller and better defined class actions can be filed, perhaps ones in which the absurdities of members of the plaintiffs' class not also being accused of discrimination—keep in mind that a number of the supervisors in the case were also women, but would have been plaintiffs, as the class defined all women who were employees of Wal-Mart—would be a good place to start.

Additionally, individual actions supported by Title VIIs offer of attorney's fees for prevailing parties would also be available. Those who believe they have been injured by Wal-Mart will have their day in court.

The only party who may claim substantial injury in this case is the trial bar.

Then we move to the *Janus Capital* cases. This case is yet another attempt to expand the implied private right of action under Rule 10(b)(5), but the Court has already answered that question repeatedly, in *Central Bank* in 1994 and in *Stoneridge* in 2008, find-

ing that it was not appropriate to expand the implied right of action under 10(b).

Equally important, the Court does not operate on a blank slate in this area, but on a statutory regime modified by the Private Securities Litigation Reform Act. *Central Bank* was decided prior to Congress's consideration of the PSLRA and Congress was urged at the time of the PSLRA to extend the private right of action to aiders and abetters. You refused to do so.

Instead, under Section 104 of the Act, you directed prosecution of aiders and abetters to the SEC in what is now Section 78(t)(e). There are ample incentives—once again, within the context of *Janus*, there are ample incentives and mechanisms to assure justice.

Secondary actors are subject to criminal penalties, civil enforcement, and add to this that some state securities laws permit state authorities to seek fines and restitution from aiders and abetters. These mechanisms are hardly toothless. The SEC's tools to enforce include obtaining injunctive relief, issuing administrative orders, imposing large civil penalties, including disgorgement remedies on any companies aiding or abetting fraud.

Contrary to the chairman's statement earlier on, the conclusion after Janus is not that if you commit fraud as a corporation, you get away with it. As evidence, look at SEC enforcement actions between 2002 and 2008, in which it collected in excess of $10 billion in disgorgement and penalties, much of it distributed to injured investors.

Chairman LEAHY. These were the actions prior to *Janus*.

Mr. ALT [continuing]. Yes. This was 2002 to 2008. So there is already existing—there is already——

Chairman LEAHY. They were prior to *Janus*, prior to the roadmap in *Janus*.

Mr. ALT [continuing]. Once again, the authority——

Chairman LEAHY. I appreciate—well.

Mr. ALT.—of the SEC to enforce exists after *Janus*. And, in fact, Congress——

Chairman LEAHY. I would appreciate, Mr. Alt, if I might, because your time has expired, I appreciate your sarcasm and your continuing sarcasm in your testimony, but there are——

Mr. ALT. Well, I appreciate Congress' determination as to who should be enforcing these actions.

Chairman LEAHY. There are those who differ. But I appreciate it, and your whole testimony will be placed in the record and I thank you for being here, and I mean that sincerely, the sarcasm notwithstanding in your testimony.

[The prepared statement of Mr. Alt appears as a submission for the record.]

Chairman LEAHY. Professor Cox joined the faculty of Duke Law School in 1979, where he specializes in the area of corporate securities law. He has advised the New York Stock Exchange, the National Association of Securities Dealers. He received his law degree from UC-Hastings, his LLM from Harvard University.

Professor Cox, please go ahead, sir.

Also, each of you, your full statement will be placed in the record. And I should note we may start a series of roll calls and

we will work around the time so that each will have a chance to answer questions and to expand on their testimony any way they want.

I would also note, for each of you, the record will be kept open so that if there are things that come up afterwards that you have agreed or disagreed with anything I say or anybody else says, you will have a chance to respond in the record.

Professor Cox, go ahead, sir.

STATEMENT OF JAMES D. COX, BRAINERD CURRIE PROFESSOR OF LAW, DUKE UNIVERSITY SCHOOL OF LAW, DURHAM, NORTH CAROLINA

Mr. COX. Thank you very much. No principle in Western civilization is more well established than the principle that individuals who cause harm to another proximately should bear responsibility for that.

A quick perusal of the case law of securities laws would show that this is not the principle that applies in the securities areas. Let me just review quickly a few cases here.

The *Stoneridge* Supreme Court decision held the following: that corporations whose executives knowingly prepared false documents to conceal from their customers' auditors that $17 million in the customers' revenues were fraudulent round-trip transactions and did so to retain the customer as a client are not responsible to the investors who purchased the customers' shares at inflated prices due to the round-trip transactions; or the seventh circuit decisions which applied *Stoneridge* and the *Central Bank* decision: the president of a newspaper subsidiary who fraudulently inflates the numbers of subscribers and revenues of its subsidiary that he was the CEO of is not liable for those who purchased the parent company shares at prices inflated as a consequence of the president's reporting chicanery, having been incorporated into the consolidated financial statements issued by the parent.

And my favorite is a district court case from the Federal court in Utah in which the CEO falsely represented, in a letter to the auditor, to prevent the auditor from pursuing confirmations that would have uncovered a chain of defalcations that were carried out by the CEO and that the auditor, in reliance on the CEO's letter, issued an unqualified statement only to find out in a few months later the massive fraud, the firm collapsed and investors lost their money. The CEO was not responsible because of *Central Bank* and because of *Stoneridge*.

Now, the above cases are hardly aberrations, as we have to look at what happened in *Janus Capital*. The issue in *Janus Capital* was whether an investment advisor who prepared a prospectus issued by Janus Investment Funds was responsible for misstatements contained in the prospectus.

A divided 5–4 Court held that the advisor did not make any statement in the Janus Investment Fund and, therefore, got a pass.

The Court's reasoning for the majority was the following: that even when a speech-writer drafts a speech, the content is entirely within the control of the person who delivers it and it is the speaker who takes credit or blame for what is ultimately said.

However, the analogy fails. When a speech is delivered by a human being, then it is one thing to identify who the speaker is. But a corporation is not such a being. A corporation can only act through individuals and then can act only through the symbiosis of the entity structure and structures in which the corporation operates.

Thus, financial reports pass through multiple individuals, each of which provides a voice to the inanimate entity.

The reasoning of *Janus Capital* is that none of these actors makes the statement, because in the eyes of the Court's majority, the statement can only be made by the entity. But, of course, entities do not speak. Individuals do.

So let me just point out something else here. It was not part of my prepared statement. I have now published 10 papers, empirical studies of securities class action frauds. One thing we do in our studies is look at how many times we saw any evidence of an SEC prosecution, through Nexus, et cetera, like that.

Only in 17 percent of our cases, which are now 900 settlements, did we find any evidence of an SEC involvement, not an enforcement action, but just a report that maybe they were carrying out an investigation, 17 percent of those cases.

We also took a look at what gets recovered in those SEC suits—those $10 billion. And let me tell you, that is one horse, one rabbit. That is the private plaintiff recover much move—and even the SEC admits that they are seriously constrained on what they can recover by way of a disgorgement and a fine recovery versus what happens in private suits. So this is not a fair comparison.

Let me tell you something else here. The *Janus Capital* case was not an aiding and abetting case. If you go back prior to *Central Bank*, that would have been a classic primary participant case. I could give you chapter and verse on that.

What is happening with the Supreme Court is they are perversely interpreting what is aiding and abetting as to exclude individuals from responsibility. We can have an interesting argument about whether the entity ought to pay money in a settlement, but we can have no argument over the fact that a person whose chicanery defrauds investors should be responsible. And the result of what we see in *Central Bank*, *Stoneridge*, and now *Janus Capital* is we give the fraudster a pass.

I see my time is up, but my testimony points out that this leads to all kinds of perverse results, with the result that we are never holding individuals responsible who ought to be held responsible.

And I believe everybody, regardless of what side of the aisle you are on, would agree to the fact that those who engineer and carry out the fraud and, by even the most basic formulation of primary participant liability should be responsible, and the case law does not lead to that result.

Thank you.

[The prepared statement of Mr. Cox appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

In both my time in the Senate and previous career as a prosecutor, I always felt people who did the wrongdoing should be held responsible.

Ms. Dukes, we can speak about the legal theory of these things, but you are the person who is actually involved.

Can you tell us what united you and other women employees at Wal-Mart? How did you come together? What was it that happened, because I think about when Justice Ginsberg referred to Justice Scalia's opinion, she said it focuses its attention on what distinguishes individual class members rather than what unites them.

What were the things that united you?

Ms. DUKES. An opportunity to have a voice and our complaint addressed. As you know, Wal-Mart is a vast corporation. There are many Wal-Marts, but we are virtually spread apart.

It is not that we can come together socially. We come together under these premises that we work in an environment that is very unfair in the treatment of its employees.

We have many complaints, but this is just two that have come forth. We are trying to untie without having to be under the intimidation of losing your job just because you speak out. We are in a very intimidating environment.

So this avenue was one that would have allowed us, without the fear of retribution, to come forth and have our complaint addressed.

Chairman LEAHY. Are you going to give up now?

Ms. DUKES. Absolutely not. The best is yet to come.

Chairman LEAHY. Thank you.

Ms. DUKES. You are welcome.

Chairman LEAHY. Professor Hart, the *Wal-Mart* decision that we just discussed with Ms. Dukes, is it going to make it more difficult for victims of discrimination to bring and prove their cases when they involve disparate impact of policy or is this a one-of-a-kind case?

Ms. HART. Well, it is certainly not a one-of-a-kind case. Again, I think one of the interesting things that has happened both in court and in the majority opinion, and, also, in the press following the case is that people have emphasized the ways that Wal-Mart is different from other companies, in particular, that it is so big.

And it has been suggested that this case was somehow unique. In fact, these kinds of cases, cases challenging the excessively subjective decisionmaking, unguided discretion given to managers, have been in the lower courts for decades.

The idea of a claim of excessively subjective decisionmaking leading to discrimination was endorsed by the Supreme Court in 1988 in the *Watson* case.

These kinds of cases have been around for a long time. It is true that they are, by their nature, class action cases. First, because you have got a systemwide policy that is being challenged, not an individual decision, but a systemwide policy, and because what you are looking at is the range of decisions and the consequences of these decisions, you need the class action device to be able to pursue these claims, for a couple of reasons, not to get too much into the weeds.

But the way that these cases can—the important thing that these cases does is it opens up discovery for plaintiffs to really have a better understanding of how the policy is structuring these deci-

sions and what awareness it had, as Wal-Mart had quite a great deal of awareness, of the consequences of these decisions, the kinds of discrimination that were going on.

In an individual case, that kind of discovery would not be available to an individual plaintiff. And the threat of individual litigation, also, does not lead to self-monitoring by a company.

One of, I think, the most important things about this *Wal-Mart* case is that after this suit was filed in 2001, Wal-Mart started changing it policies. It recognized that it was making bad choices, choices that, in fact, were hurting women, and it started changing its policies itself.

That is one of the good consequences of litigation that you lose when you make it impossible to bring suits through this procedural technique as class actions.

Chairman LEAHY. But we also hear and some would say that there is not a trend here in this Court, but we have held hearings on the *Lilly Ledbetter* sex discrimination case. We held hearings on Jack Rouse's age discrimination case.

In each of these, it seemed that five justices made it more difficult for victims of discrimination to hold their corporate employers accountable.

Is there a threat going through this or am I reading too much into them?

Ms. HART. I fear that you are not reading too much into it. I think that it is true that if you look at employment discrimination cases in the past few years, although many are quick to point out that businesses have won some and lost some, plaintiffs have won some and lost some, the general trend has been to interpret the substantive law to make it more difficult to bring the underlying claims.

Wal-Mart was a procedural case. Again, nobody has ever reached the merits of these claims, but I think there is a fair cause for concern that because the very high procedural threshold the Court set seems at odds with the substantive legal standards that have preexisted this case, the Court may, in the future, interpret the substantive law similarly tightly. And so that this may very well be at another case in which the intent of the Congress that enacted Title 7 and that enacted the Civil Rights Act of 1991 is being ignored in these cramped interpretations of the substantive law.

Chairman LEAHY. I have a lot more questions, but I run the clock on myself, too.

So I will yield to Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman. And thanks to each of you for your testimony.

I am going to just ask two of the panel for answers to a couple of questions. I would like to have Mr. Pincus first and then Mr. Alt to provide your reaction to Professor Hart's testimony, and I want you to be very specific.

Mr. PINCUS. It seems to me, Senator Grassley, that a key part of Professor Hart's testimony is where she says about the *Wal-Mart* case, and I am quoting, "It's hard to tell precisely what the contours of the decision will turn out to be as it's interpreted in other cases," and, to me, that is a key question, as I mentioned in my statement, with all of these cases.

We just do not know how they are going to be interpreted. I think *Wal-Mart* is perceived by many as an extreme case because of the size of the class and the nature of the evidence relative to the large number of decision-makers that were involved, and I think there is just a real question about how it is going to play out as the lower courts get a hold of it.

Senator GRASSLEY. Mr. Alt.

Mr. ALT. I would build on Mr. Pincus' statement and simply say I think part of the difficulty associated with determining what impact it will have is recognizing that it does not foreclose class actions against Wal-Mart. It simply foreclosed this single omnibus class action, if you will.

And so you can continue to have class actions, perhaps better defined, in which you can raise these sorts of claims, you can bring in the sort of evidence that I think Professor Hart was talking about that might be necessary to establish the sorts of claims that plaintiffs were seeking to make.

But in these particular cases, if it is brought, appropriately, for instance, under (b)(3), it permits Wal-Mart the opportunity to raise the sorts of defenses that you would expect in an employment discrimination case with regard to the particular damages.

So in terms of that, I am not sure that I would endorse the doom and gloom. I think meritorious claims will still be able to go forward.

Senator GRASSLEY. And in the same order for the same two panelists, I would like your reaction to Professor Cox's testimony and I would ask you to be as specific as possible, as well.

Mr. PINCUS. Again, I think it is important to separate legal analysis and public policy. As to legal analysis, I think Professor Cox and I have a disagreement, just as the majority on the Court and the dissenters did about the impact of the *Stoneridge* and *Central Bank* decisions on the particular issue before the Court there.

But I do think that what the Court ruled in those cases was we are going to be very focused on defining who can be liable under this implied cause of action, and I think that was especially true, as Mr. Alt mentioned, after Congress rejected private aiding and abetting liability in 1994 and instead gave the SEC authority and then, again, in the Dodd-Frank bill, rejected arguments that there should be expanded private liability under Section 10(b) and instead further expanded from what it had done in 1994, the SEC's power to both bring enforcement actions against aiders and abetters and, also, to obtain money to deposit fair funds accounts for the benefit of people who could prove injury.

As to policy, I think we also have a disagreement about whether the law says that there is a private right of action for every wrong. I think it is quite clear that the law does not say that there is a private right of action for every wrong.

And especially in the context of aiding and abetting, the courts have been very leery, both in the statutory context and in the common law context, to create those things because they recognize that once you move away from—once you say anyone who helps someone do something wrong, even thought that conduct is legal, we are going to hold them liable because they had a bad intent, their intent was to help the wrongdoer.

You are opening up private liability very broadly because that is an issue that can only be determined after trial. And so there is a very significant policy question about whether, especially in the class action context, expanding liability that broadly is a sensible thing to do rather than make sure you have cops on the beat in terms of expanding the SEC's enforcement authority, as Congress did.

Senator GRASSLEY. Mr. Alt.

Mr. ALT. Just briefly. I would say I think it goes, in part, to sort of the understanding of the proper function, my disagreement of the Court.

I think the Court was attempting to adhere to what it is that Congress had told them to do. They believed that, in fact, Congress considered the question of expanding liability, expressly chose not to do it, thought that the best enforcement agency was the SEC, and there are good reasons to think that.

There is ample literature that suggests that securities class action litigation actually causes as much harm as good, that it actually constitutes, in large measure, a wealth transfer from one set of shareholders to another, with the true beneficiary being those who create the transaction costs in the form of the lawyers.

And with regard to his evidence that only 17 percent of settlements studied had any sort of SEC involvement, well, you can go back all the way to Judge Friendly, who talked about the problem of blackmail settlements; that, quite, frankly, in a lot of class action litigation, the costs associated with simply complying with discovery are so high that it is more cost-effective for companies to settle.

That does not necessarily mean that in those cases, there is even particularized wrongdoing. So that would be—I will wrap it up there.

Senator GRASSLEY. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you. And the vote has started, but Senator Feinstein and I will stay here and we will try to work our way around it.

Senator Feinstein.

Senator FEINSTEIN. Thank you very much. I am going to be very quick.

Professor Hart, because you speak sort of in a layman's language, which I like—I am a non-lawyer—what exactly does *Wal-Mart* say on two things: what a maximum sizes of a class should be and, No. 2, what does it do to individual supervisorial choice with respect to promotion?

Ms. HART. The *Wal-Mart* decision does not speak clearly to the question of what the maximum size of a case will be. There is much more in the *Wal-Mart* decision about what the five-justice majority disapproves of in this case than about what they would approve of in future cases.

I think some areas for concern include that Justice Scalia refers to the idea that perhaps a class would be limited to a single supervisor. That, again, ignores the fact that many of the kinds of policies being challenged in a case like *Wal-Mart* are systematic companywide policies, not the decisions of a single supervisor.

Under the class action rule——

Senator FEINSTEIN. Stop, stop, stop for a second. So what you are saying is—because this is where I am unclear. The company has a policy and a supervisor exercises that policy with respect to promotion.

How much freedom under this case does the supervisor have and what level of rights with respect to seniority and that kind of thing, if there are any rights, does an employee have?

Ms. HART. Again, it will depend very much on how the company's policy is structured. In the context of the *Wal-Mart* case, what the plaintiffs alleged—in this way, I think *Wal-Mart* is unique. It may not be the only company like this, but certainly the evidence of discrimination at Wal-Mart was significant. The evidence of gender disparities were really startling in terms of the very large number of hourly employees who were women, and then the absolutely flipped very small number of Wal-Mart managers who were women.

And the way that the decisionmaking system was structured to both give individual managers discretion to just pick their friends and, at the same time, create a series of corporate standards and a corporate culture that discouraged the advancement of women through a variety of policy decisions that were highlighted in the complaint.

Well, when the compliant was filed, for example, one of the things that Wal-Mart used to have as a policy was a requirement that to be a store manager, you had to be willing to relocate.

It is obvious to a layperson, I think, why that, in our society, discriminates quite significantly against women as compared to men.

Like the refusal, which, again, Wal-Mart has actually fixed in the wake of this litigation, but the refusal to post—Ms. Dukes talked about the absence of any posting of management opportunities, which meant that it was a tap-on-the-shoulder system, and there is lots of evidence that tends to favor the people who look like the people in charge.

So if you have men in charge, you are going to end up with men being tapped for promotions. And, again, there is lots of evidence of how that works.

So these choices that Wal-Mart was making about how to structure its employment policies were choices they were making even at the time that they saw the results that they were having, and, again, there is lots of evidence that Wal-Mart, in fact, had the information about the kinds of gender disparities that were happening all over the country, in all 41 regions that Wal-Mart operated, that this was not a random thing, and, yet, did not respond in any way, again, until this litigation was filed.

And so the benefit of being able to challenge this kind of employment practice through class action litigation is that it does force accountability. Even if the litigation does not proceed, as right now, it is going to have to change its form. It led to change just by bring brought and that is so important not to lose.

Senator FEINSTEIN. Thank you.

Ms. HART. Thank you.

Senator FEINSTEIN. Thank you very much, Mr. Chairman. That was really helpful. Thank you.

Chairman LEAHY. Thank you. Even those of us who are lawyers appreciate it in the——

Senator FEINSTEIN. In the plain talk.

Chairman LEAHY. Yes. I am going to leave for the vote, but Senator Whitehouse, as he has so many other times for me, is going to take over the chair, and I will be back. Thank you. Thank you all.

Ms. HART. Thank you, Chairman.

Senator WHITEHOUSE. [presiding.] Sort of like a flying change in a hockey game. You have to change while the puck is still active.

[Laughter.]

Senator WHITEHOUSE. Well, I am delighted to have all of you here. And reading the recent series of Supreme Court opinions, actually going back a few years now, reminds me of my law school days, when I was studying for a UCC exam. And as those of you who have had the misfortune of either going to law school or studying the Uniform Commercial Code know, it is about the most tedious and boring possible ordeal.

So I am plowing my way through this immense book and somebody who was a year ahead of me and immensely more knowledgeable said, "You don't need to worry too much about that. It's actually a lot simpler than it appears. Indeed, the entire UCC can be summarized in two words."

I badly wanted to know what that was. So I asked, "Well, what are the two words?" And the fellow looked down at me in my little study carrel and said, "Bank wins."

[Laughter.]

Senator WHITEHOUSE. And it is starting to seem a little bit as if a similar two-word prophecy could be applied to the United States Supreme Court's decisions, and that would be "corporation wins."

I have two questions that I would like to ask across the panel. The one is, at some point in human behavior, when an action results in a certain thing time after time after time after time after time, it becomes reasonable to presume that there is no longer a random effect happening and that there is, indeed, some intentionality to what is going on.

And so my first question would be to each of you. Do you think we have reached that point at this stage?

Let me start with Ms. Dukes.

Ms. DUKES. Let me get a little clarity of your question.

Senator WHITEHOUSE. Could you turn your microphone on?

Ms. DUKES. Let me get a little clarity as to the question that you asked. Would you make it just a little bit more clear for me, if you do not mind?

Senator WHITEHOUSE. No. I was just trying to determine if you think that the—if you were to plot the Supreme Court decisions on the "corporation wins" graph, are there enough of them that come down there that you think it has independent significance, it is beyond just a random variation?

There are going to be times when there will be three or four decisions in a row that come down in favor of corporate versus individual interests, just in the ordinary nature of things, just in the ordinary variation of life and the sort of random nature of things.

But after a while, it becomes increasingly statistically improbable that what is happening is random as the events pile up and pile up and pile up, and that is true whether you are talking about any area of human endeavor.

It is even true if you are talking about non-human events. You start to look for a cause once things no longer fit a pattern. And I am wondering if it is your observation—if you don't care to comment on it, I can happily go to another witness.

Are we at the point where you think it is reasonable for people to conclude that there is more going on than a random selection or that, in fact, there is a purpose or an intention in the Supreme Court's actions in these repeated decisions that favor the interests of corporations?

Ms. DUKES. Thank you for the clarity of that. I am beginning to get the impression, and I believe that many other Americans feel the same way, that the Supreme Court, as the makeup is now, that it is quite conservative in its opinion.

I feel that the Supreme Court, really concerning those five votes, that we have that dismantled the *Wal-Mart* v. *Dukes* case, they are definitely leaning on the side of the corporation. It is beginning to be obvious that if you can get your case before this sitting court, the chances are that the more liberal aspect will not survive.

Senator WHITEHOUSE. Professor Pincus, your view?

Mr. PINCUS. I do not think so, Senator. I think if you look at this term's decisions, I think it is really a draw, nine to nine.

Senator WHITEHOUSE. Well, go beyond the term.

Mr. PINCUS. I think if you look at last terms's decisions, there were some very significant cases. I think they are actually—if you look specifically at cases where individuals are seeking damages from corporations, the individuals actually won more than they lost.

So I do not think so. And Justice Breyer was interviewed at the beginning of this term in the fall and he was asked this very question and he said, "I really don't think so." He said he had gone back and looked at the cases from recent terms and compared them to prior terms and really did not see a difference in the percentage of cases decided either way.

Senator WHITEHOUSE. Professor Hart, your view?

Ms. HART. I think it is a little bit more complicated than "corporation wins all the time." Obviously, there are lots of examples where corporations lose cases.

I do think that if you look at the trend over the past few years, it is very clear that the majority on the Court—and it is consistently the same majority—is taking a very restrictive view about what it thinks—what kinds of cases it thinks should be permitted to go into the Court.

And I think that is the most disturbing thing, that procedural barriers are being set up that were not set up by the rules, were not set up by statute, that are being created as a policy judgment by this majority on the Court that limit the ability of people to bring their claims into court, and that really changes our legal system in ways that whether the corporation wins or loses in any given case, people are not being allowed to bring their cases forward, and that is a troubling trend.

Senator WHITEHOUSE. Professor Alt.

Mr. ALT. I do not think that the facts support that particular trend, and, in fact, if you take a look, there is a number of key losses for businesses in the last term, in the last several terms.

If you take a look, I think the Court is all over the map on preemption cases. It was all over the map this term in preemption cases. And if you take a look, as well, to make that sort of claim and to sort of smear, "it is just the Roberts court," you have to ignore the fact that a number of these pro-corporation cases involved super-majorities—they involved decisions written by the most liberal justices on the Court.

Are we really to believe that there——

Senator WHITEHOUSE. My time has expired. So let me jump to Professor Cox to give him a chance.

Very briefly, if you could, Professor. I am sorry.

Mr. COX. In my narrow world of securities laws, I agree with your statement, Senator. And I will tell you, the shrill rhetoric, where it used to be limited to the amicus briefs that they file over and over again, the Chamber of Commerce filed, is now very well found in cases like the *Bank of Australia* case, and, also, in *Stoneridge*, where the message is aggregate litigation is destroying America and destroying America's competitiveness, I think that is the theme that is coming through, the Supreme Court stating we do not like these suits.

Senator WHITEHOUSE. All right. My time has expired.

Senator Franken is here, and I yield to the good Senator from Minnesota.

Senator FRANKEN. Thank you, Mr. Chairman. I ran back to vote and ran back as fast as I could. So excuse me if I am a little out of breath.

First of all, as far as Mr. Alt's testimony, let me just say that I have always been a big fan of sarcasm. I have used it a lot myself.

[Laughter.]

Mr. ALT. And I have appreciated your sarcasm in the past.

Senator FRANKEN. Thank you.

[Laughter.]

Senator FRANKEN. But it does have its place and I am learning bit by bit exactly what that is as I go. So while I have some sympathy for you, I think you have been wise to tamp it down since you have been—and I do not mean this sarcastically.

[Laughter.]

Senator FRANKEN. Mr. Pincus, however, in a recent letter to the *New York Times*, you disparage, sarcastically, the class action lawyers who represent consumers, like the Concepcion, and I was really wondering why you did that, given that the average salary for partners at Mayer Brown is over $1 million. I do not think you are in the most credible position to make that kind of sarcastic critique.

Professor Hart, I have introduced the Arbitration Fairness Act, which would bar the use of mandatory arbitration clauses in consumer and employment contracts.

Mr. Pincus has testified that the Court's decision in *AT&T* was correctly decided because it is in line with prior decisions. Four other justices might disagree.

Now, while it is true that the case is in line with decisions dating back to the early 1990's, the legislative history of the Federal Arbitration Act enacted in 1925, I think, tells another story.

As the dissent in the 2001 *Circuit City* case points out, the decisions expanding the reach of the FAA ignore clear legislative intent, which is that this was meant to be business to business.

So, in fact, the Arbitration Fairness Act would merely restore the original legislative intent of the FAA.

These are all technical arguments about legislative history and precedent and court rulings and what not, but let us put all that aside for a moment and let us set this up for anyone listening today so they can get a handle on what *AT&T* really did in this case.

First, they did something that was just wrong. They advertised something as free, a free phone, and it was not. California law says you cannot advertise something as free and make people pay a sales tax on it unless you say so.

So they bought their cell phone, advertised as free. Then they get a $30 charge on it in their bill. They were not asked to pay the sales tax when they got the phone for free, that they thought they were getting for free.

Yet, now they have devised a scheme to prevent people from—I mean, no one is going to spend time getting 30 bucks back. The only way to do this is to do it through a class action suit.

What this does, what this decision does is incentivize corporations like AT&T to rip people off $30 at a time, hundreds of thousands of people—so they get their 100,000 people, that is $3 million, and maybe four people will try to get their money back, that is 120 bucks.

Are they not just incentivized to rip off customers? Is that not what is going on here?

Ms. HART. Is that a question to me or just——

Senator FRANKEN. Yes. That is a question to you.

Ms. HART. I think that decisions like *AT&T* definitely—they make it easier for businesses to set up deals like this and know that they really will not—as you said, only four out of however many customers is going to actually try to get their money back.

So they are not going to be responsible for their conduct. And I think it is particularly disturbing in this case—I just want to comment on something you said, which is the intent of the Congress in enacting the FAA.

The decision in *AT&T*, the Court focused on the idea that their interpretation was necessary because of what Congress meant in 1925. Well, in 1925, these kinds of contracts, these adhesion contracts in which millions of people are buying a free phone did not exist.

This is a different world. And, similarly, the kinds of employment discrimination claims that were at issue in *Circuit City* did not exist in 1925. The world has changed and the idea that the 1925 legislature meant to be binding employees and consumers is nonsense.

And so I think that this is one of the areas where we are really seeing a misuse of this idea of Congressional intent in order to insulate from liability companies that engage in wrongdoing, which is why a legislative response really is needed to address this problem.

Senator FRANKEN. Thank you. I have that legislative response. I have run out of time, Mr. Chairman.

Senator WHITEHOUSE. We will have one other round while it is, I guess, just the two of us, if you would like, because I do have another question that I would like to ask.

Senator FRANKEN. Sure.

Senator WHITEHOUSE. Which has to do with the fact that in a number of these cases, the interest or the institution that is on the other side from the corporate interest is the jury and the access of Americans to the jury to redress their grievances. And over and over again, as Professor Hart has pointed out, what have been erected are procedural obstacles, a little bit here, a little bit there, but always making it more difficult for Americans to get in front of a jury, particularly where, I should say, a big corporation is the defendant.

And I worry about that because my view is that the founders put the jury in the Constitution and in the Bill of Rights in three separate places for a reason. It was part of the structure of government that they were erecting.

I believe they understood that, as William Blackstone had explained, "the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right when he knows that the fact of his oppression must be examined and decided by 12 indifferent men."

Now, the term "indifferent" has achieved a slightly different meaning since then and it is men and women now, but the point is clear that the jury and the fact that the powerful may have to face a jury is an important part of our constitutional structure.

It is a particularly important part where money has such sway in the executive branch of government, where money has such sway in the legislative branch of government. But try bribing a juror. Tampering with a jury is a crime. It is protected in the American system of government as our last chance for a reason.

De Tocqueville observed, "The jury is, before everything, a political institution. One ought to consider it as a mode of the sovereignty of the people."

And in that context, I think there is an additional constitutional and structural worry in a country that prides itself on its operation of government when it is the jury that is being drawn further and further away from the ordinary American in favor more of the most powerful individuals in the state.

And I wonder if any of you have thoughts on the role of the jury. Do you believe that the jury was part of the plan of the founders as they set up our institutions of government, that it was not just judicial, executive and legislative branches, but actually having a jury in there was part of the plan, as Blackstone and De Tocqueville have suggested?

Professor Cox.

Mr. Cox. I think there is a lot of history that one of the benefits of a jury can be quite the opposite of what many would here think, and that is kind of a temporizing effect on overreaching by both aggressive plaintiffs, but, also, by the government.

So that there is a rich history of that in the literature about the temporizing effect of a jury.

Another thing is the idea of community standards, which are implicit in so much of the law, whether it be civil law or criminal law. Reasonable person; what is a reasonable person?

Again, in my own narrow part of the world, which is securities law, we find that the roles of juries historically have been taken over by the trial judge. So we do not have the jury being involved in a lot of crucial factual determinations; not just questions about whether something is material, but whether there has been truth on the market, whether there have been sufficiently cautionary statements, whether the complaint alleged a strong inference. It goes on ad infinitum.

That these are now no longer viewed—while they are questions of fact, they are entirely appropriate for a question for the judge, and that gets into something with the opening statement by the Chairman and that is the question about are we a country ruled by law or are we ruled by individual biases, and the jury system is designed to make it more toward the law side and less by the individual standard side.

Senator WHITEHOUSE. Echoing what you have said, if I remember my De Tocqueville correctly, the chapter in which the quote about the jury being a political institution and a mode of the sovereignty of the people occurs is the chapter headed something like "On Tempering the Tyranny of the Majority." So I think it really is built into that.

My time is expiring. So I will yield back to Senator Franken.

Senator FRANKEN. Thank you.

In Mr. Pincus' testimony, he states that "Businesses that engage in wrongdoing will remain fully accountable for their actions because government enforcement, not private litigation, deters corporate wrongdoing."

Professor Cox, I want to ask you about this. As an example, he mentions that the *Wal-Mart* litigants are now filing with the EEOC. The last time I checked, the EEOC had a backlog of 86,000 private sector charges and the EEOC has stated that, quote, "The private right of access to the judicial forum to adjudicate claims is an essential part of the statutory enforcement scheme."

And relative to the *AT&T* case, a GAO report found that the FCC does not regulate carriers' contract terms. It has few rules that address services consumers receive from wireless phone carriers. It conducts little monitoring of consumer complaints and does not enforce its billing rules for wireless carriers.

Professor Cox, what is your understanding of the role that suits by American citizens play in our civil justice system? Are they redundant because there are already government enforcement mechanisms?

Mr. COX. They are hardly redundant. They are necessary. This has been something that has been recognized repeatedly by the

courts, particularly the Supreme Court. We have found that Congress has tightened up the ability of private litigants.

And so whatever Judge Friendly may have said 5 decades ago no longer applies after the PSLRA. The idea of the spurious strike suits, I think, died more than a decade ago.

So we do need private litigation. We do not fund our government regulators at the level they need to be, and there is a lot of institutional creak. Again, our own studies and the studies of others have shown the importance of private litigation.

And you find—if I may just go into this just one moment. So we have studied the parallel. What are the heuristics of the case that is brought by the SEC? And these are all published studies.

We find that the SEC systematically goes after smaller capital firms with smaller losses, experiencing financial distress, than we find with private litigants.

So those studies are published, they are out there. The SEC picks on the weaklings, not on the strong. So we need the private litigants, particularly in the securities area, and I have no reason to believe that it would be any different in employment areas, consumer areas, et cetera.

Private litigation is a hallmark for providing access to justice in America and that is a wonderful expression and we should all get behind it.

Senator FRANKEN. Thank you. I do not have much time. So, Mr. Pincus, just a quick question.

I know that you said that *AT&T* has a very friendly, consumer-friendly and fair arbitration system that has been said to do that.

How long would it have taken the Concepcions to go through the process and get their 30 bucks back?

Mr. PINCUS. It could take them a matter of months to do that.

Senator FRANKEN. Matter of months.

Mr. PINCUS. Yes. Much quicker than the judicial system.

Senator FRANKEN. So this would be a couple that would, for $30, go through a couple of months.

Mr. PINCUS. All it takes, Senator, is there is a form on the Website. You make a complaint. The record—because the economic disincentives for AT&T, because it has to pay a very large bonus if the case is litigated and loses, $10,000 minimum plus double attorney's fees, AT&T——

Senator FRANKEN. No, they do not—if they say we will give you your 30 bucks back, they do not have to pay the $10,000. Right?

Mr. PINCUS. No. But if the case—if they refuse to do it and the case——

Senator FRANKEN. I know, but they are not going to refuse——

Mr. PINCUS. If they wrongfully refuse——

Senator FRANKEN [continuing.] To do it and pay $10,000. They are going to give the $30 back.

Mr. PINCUS. Exactly. Exactly, Senator, and that is why this is a perfect system, as the lower courts found in this very case. As the district court in the ninth circuit said——

Senator FRANKEN. All right. But when you say——

Mr. PINCUS [continuing.] This is a perfect system for getting—for compensating——

Senator FRANKEN. But they would get their 30——

Mr. PINCUS.—anyone who complains.

Senator FRANKEN. But they would get their 30 bucks back.

Mr. PINCUS. If 10,000 people complain, 10,000 people would get their $30 back.

Senator FRANKEN. So you would get your 30 bucks back, is that what you are saying, after, what, a month or two or three?

Mr. PINCUS. I think you would file a form and it could take as quickly as a week. It depends on the——

Senator FRANKEN. You could get your $30 back as quickly as a week.

Mr. PINCUS. You would get your $30 back and the record shows you would also get reasonable fees. So they would get——

Senator FRANKEN. The Concepcions would have gotten their 30 bucks back in a number of weeks.

Mr. PINCUS. Yes.

Senator FRANKEN. All right. Well, then, why—then I do not understand that, because you said in your letter that they were within their rights to charge the 30 bucks.

Mr. PINCUS. Well, if the Concepcions——

Senator FRANKEN. So why would they get their 30 bucks back? You just testified to the Senate that they would get their 30 bucks back. Why would they get their 30 bucks back if you wrote the *New York Times* that *AT&T* had the right to charge them 30 bucks?

Mr. PINCUS. Well, there is——

Senator FRANKEN. I mean, I do not understand that. It seems to contradict what you said in your letter. What you testify here in the Senate contradicts exactly what you wrote in the *New York Times*.

Let me see what you wrote. You wrote, "It's my understanding that if this charge was, indeed, a sales tax, California law allows merchants to pass the cost of sales tax on to consumers only"—all right.

So what I am saying is that you are contradicting yourself. You are saying that they—this was a sales tax. They had the right to do this. But you are saying that they would have paid the $30 back. Why?

Mr. PINCUS. Well——

Senator FRANKEN. Listen, I have run out of time. I am sorry.

Mr. PINCUS. Can I answer, Senator?

Senator WHITEHOUSE. Yes.

Mr. PINCUS. I apologize for using the example as the way the arbitration system works. AT&T settles a lot of——

Senator FRANKEN. I asked a direct question and you said that they would get their 30 bucks back.

Mr. PINCUS. Yes. And the reason for that is AT&T settles most claims that are brought in the arbitration—in the—most complaints that consumers bring, AT&T tries to work out a settlement, because its goal is to have happy customers.

Senator FRANKEN. I am sorry, but I have to go vote. I apologize.

Mr. PINCUS. May I finish my answer?

Senator FRANKEN. You can finish your answer to the chairman.

Mr. PINCUS. Thank you.

Senator WHITEHOUSE. Although I have to go vote, as well. So I am going to give you about 30 seconds.

Mr. PINCUS. AT&T settles a lot of cases that it believes, if it litigated, would not have merit because, A, it wants to have good customer relations, and, B, it wants to save its own cost of litigating settlements.

So most cases are settled. I do not know exactly what would have happened.

I misspoke by saying that the Concepcions would definitely get their money back. But the way the system works is that it gives AT&T a huge incentive to settle claims in order to avoid the risk that it will have to pay a lot of money later, and that is why the lower courts in this case found, both the district court and the court of appeals, that injured parties were much more likely to get compensated under AT&T's arbitration system than they would in a class action.

Senator WHITEHOUSE. If you would like to supplement that answer, the record of the hearing will stay open so that you may add more.

I am sorry to cut you off, but we really are up against a relatively hard deadline here.

I want to close by saying that I think it is regrettable that there appears to be this steady addition of troubles, toils and snares by the Supreme Court on Americans' road to a jury, which is a, to me, baseline constitutional American institution of government.

It is clearly something that is consistent with the interests of big corporations who wield disproportionate influence in other branches of government to stay away from juries, which is the one institution of government with which they may not tamper.

And so there is clearly a strong institutional incentive there, and you have also seen very strong institutional behavior from the big multinational corporations and others trying to deprecate as much as they can and make Americans believe that the jury system is not part of their constitutional legacy, but is instead a drag on the economy and a nuisance and a place where runaway juries entertain frivolous lawsuits.

Indeed, every American who hears the word "jury" and has the phrase "runaway jury" jump into their mind, every American who hears the word "lawsuit" and has the phrase "frivolous lawsuit" jump into their mind has been the successful subject of a long campaign of indoctrination about this and of public communication.

So it is happening out there and I think when the Supreme Court is making decisions that are consistent with that longstanding practice and pattern, it is worth our attention and I applaud Chairman Leahy for holding this hearing.

As I said, anybody who wishes to add any further information to the hearing has a week before we close it.

But without anything further, we will be adjourned. Thank you all very much. I appreciate it.

[Whereupon, at 11:44 a.m, the hearing was adjourned.]

[Questions and answers and submissions for the record follows.]

QUESTIONS AND ANSWERS

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July 21, 2011

The Honorable Charles Grassley
Senate Judiciary Committee
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Grassley:

Thank you for your questions for the record following my testimony at the June 29, 2011 hearing: "Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior."

In response to your first question, which provided me with the opportunity to expand my comments and respond to statements by the Committee members, I would like to expand upon and clarify a brief exchange with Chairman Leahy. In my opening statement, I noted that claims suggesting that *Janus Capital Group, Inc. v. First Derivative Traders* permitted corporate fraud or even provided a roadmap to fraud were erroneous because Congress granted the SEC authority in Section 104 of the Private Securities Litigation Reform Act to bring enforcement actions for fraud committed by aiders and abetters. As I was discussing the severity of the penalties at issue—the fact that the SEC procured more than $10 billion in disgorgement and penalties between 2002 and 2008—Chairman Leahy interjected to state that this timespan was before what he deemed the "roadmap" for fraud created by *Janus Capital*. Because the time for my prepared remarks was cut short by this exchange, I simply wish to clarify that *Janus Capital* did not create a roadmap, unless it is a roadmap to enforcement. Congress granted the SEC authority to bring enforcement actions against aiders and abetters, and that is true both before and after *Janus Capital* (which makes prior enforcement totals relevant). Accordingly, to claim that the *Janus Capital* decision creates a roadmap to fraud is an indictment of *Congress's* regulatory decisionmaking, and suggests that Congress somehow promoted corporate fraud in deciding that the proper way to regulate aiders and abetters was through SEC enforcement, not through a private cause of action. The suggestion is simply too incredible to be true, as are related claims against the Supreme Court.

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Your second question asked about how these accusations against the Court affect the legal system and how it is perceived. In my written and oral testimony, I provided evidence that there is no factual basis for the claim that the Court is unduly pro-business or anti-little guy. Indeed, in this term and in recent terms, the Court has ruled against business-interests in major cases; in those cases that it has ruled for businesses, it often does so by supermajority margins in decisions joined or written by some of the most liberal members of the Court. And so, it appears far more likely that rather than simply picking winners they like and losers that they dislike, the Justices are attempting to actually apply the law, regardless of the parties.

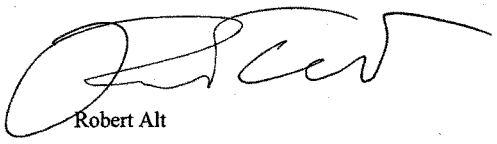
This kind of justice without regard to parties is how it should be and is what the American people expect. However, there is a drumbeat in Congress and among some activists that the Court is too pro-business. The fact that neither the merits nor the statistics bear this out has not diminished the hue and cry.

These accusations have the potential to do genuine harm. As Alexander Hamilton correctly stated in Federalist 78, the courts "have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of [their] judgments." Indeed, throughout our history, the courts, lacking the purse or the sword, rely in large measure for their authority on persuasion, not just of the other branches, but of the public. Accusations that the Supreme Court is playing favorites and that parties will not have a fair hearing undoubtedly undermines the very public confidence that the courts rely upon to carry out their vital functions effectively. It is all the more regrettable when the accusations are spurious, and appear to be motivated by little more than special and partisan interests.

Speaking out against judicial decisions with which you disagree is consistent with free speech and a vigorous democracy. But falsely maligning not only decisions but the integrity of the Court itself in such a way as to impair public confidence in impartial justice does a service to no one.

Thank you again for your questions, and for the opportunity to testify.

Very truly yours,



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July 21, 2011

The Honorable Herb Kohl
Senate Judiciary Committee
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Kohl:

Thank you for your questions following my testimony at the June 29, 2011 hearing: "Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior."

Your questions centered on the case of *AT&T Mobility LLC v. Concepcion*. You asked, "How is an individual consumer with a $30 complaint, like the plaintiff in *Concepcion*, going to find justice, let alone a lawyer to represent him?" The details of the *Concepcion* case suggest not only that plaintiffs like the Concepcions will find justice outside of the class action system, but, as both the District Court and the Supreme Court emphasized, they were in fact "*better off* under their arbitration agreement with AT&T than they would have been as participants in a class action, which could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." *AT&T Mobility LLC v. Concepcion,* 131 S.Ct. 1740, 1753 (2011) (internal citations and quotations omitted) (emphasis in original).

First, plaintiffs like the Concepcions would be unlikely to even need a lawyer to raise their claim—they could do so via a one-page form on AT&T's web site. *Id.* at 1744. This is far simpler than the filing necessary to begin litigation, let alone class action litigation.

Second, the terms of the agreement are sufficiently generous to encourage attorneys to represent potentially meritorious claims even if they are of de minimus value. As the Supreme Court noted, AT&T is required to pay a $10,000 minimum recovery and *double* the claimant's attorney's fees if the customer receives an arbitration award greater than AT&T's last written settlement offer. *Id.* at 1744 & 1753. Accordingly, AT&T has a very strong incentive to provide reasonable (perhaps even generous) settlements, and attorneys have incentives to bring even small claims that are meritorious.

Given these factors, the question is not how plaintiffs like the Concepcions will find justice absent class actions—the facts of the case suggest that they are not denied justice. Rather, the

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question is why plaintiffs would pursue their claims through the inferior vehicle of a class action lawsuit, where their claims are likely to languish for years, where they are likely to see only a small percentage of the few dollars of their respective claims, and where the majority of any settlement or award frequently redounds not to the individual plaintiffs, but to the trial lawyers.

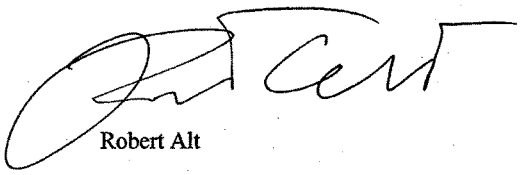
You asked two questions about *Concepcion* relative to the Class Action Fairness Act (CAFA), namely: "Does *Concepcion* create an end-run around the balance that the Class Action Fairness Act sought to achieve?", and "In light of *Concepcion*, what can Congress do to restore the balance that the Class Action Fairness Act achieved between individual plaintiffs and businesses, and maintain a viable path for class actions?"

The ends that the CAFA sought to achieve related to class action *litigation*, not arbitration. As such, the Court's decision in *Concepcion* is fully consistent with CAFA, and does not upset the balance struck regarding litigated claims. More importantly, it is also fully consistent with the Federal Arbitration Act (FAA), which reflects Congress's "liberal federal policy favoring arbitration . . . ." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The purpose of the FAA is "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 131 S.Ct. at 1748. As such, the Supreme Court correctly noted that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* There is no indication that in balancing the interests of plaintiffs and defendants in CAFA, that Congress sought to functionally eviscerate the streamlined proceedings of arbitration that Congress has vigorously defended in the FAA. Indeed given the lack of multilayer review inherent in arbitration, imposing class action procedures into the arbitration context would not create the balance sought in CAFA, but would tilt the tables significantly in favor of plaintiffs, because defendants would face the risk that an error involving tens of thousands of claims could go uncorrected. This would not be consistent with the balance that Congress sought in CAFA.

Finally, you asked whether *Concepcion* marks "the end of class actions." Rumors of the death of class actions are premature. But even if the case has a substantial impact on the number of class action suits, the fundamental question asked by this hearing is whether that would impose a barrier to justice. While some companies may avail themselves of arbitration agreements following this opinion, the facts of the *Concepcion* case suggest that this could in fact benefit consumers, who will be able to easier recoup small losses through simpler complaint mechanisms than those provided by litigation. Far from serving as barriers to justice, the streamlined procedures make justice more accessible—which explains why Congress has established strong federal policies supporting arbitration.

Thank you again for your questions, and for the opportunity to testify.

Very truly yours,



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July 16, 2011

Senator Amy Klobuchar
Committee on the Judiciary
United States Senate

Re: Response to Question Regarding Hearing, "Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior' on June 29, 2011

Dear Senator Klobuchar;

Please consider this my response to your thoughtful question "How important are the enforcement mechanisms implicated in the recent Supreme court decisions . . . in controlling how businesses behave." This is a profound question and the ultimate policy question when considering such issues that the Supreme Court has recently addressed: the contours of class actions in the face of an apparent nationwide employment discrimination against women by Wall Mart, the ability to business to eviscerate private remedies by disallowing class actions through coercive agreements to arbitrate, and narrowly defining who "makes" a false statement so that the only actors in the design and execution of a fraudulent scheme escape responsibility. These were the areas that were the subject of the June 29, 2011 hearing.

Unfortunately, the answer to your question is not something that can be easily observed and measured. That is, while I and my coauthors have published about ten empirical studies of securities class action litigation, it is not possible to link the ease or difficulty of private or SEC recoveries for fraud with the impact on business or individual behavior. What I can certify as accurate is that private suits provide the major means for addressing fraudulent reporting and providing relief to investors who are defrauded. Let me explain this statement. In one of our most recent studies, this one involving 773 securities class action settlements (1990-2004), we found that there is a report of SEC involvement in these cases of about 17 percent. In fact, this likely overstates the SEC involvement as we included within this group any news report of a complaint being filed with the SEC or the SEC making inquiry about as practice; thus, the actual instances in which the SEC launched a "formal" investigation is much smaller and smaller still would be the instances in which the SEC successfully concluded an enforcement action. *See* James D. Cox, Randall S. Thomas & Lynn Bai, There Are Plaintiffs and . . . There are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements, 61 Vand. L. Rev. 355 (2008). Thus, in 83 percent, or more, of the securities fraud class action settlements there is no evidence of any SEC action, or for that matter SEC interest, in the claims giving rise to the significant settlement.

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Thus, private remedies, not governmental enforcement, action is the medium by which investors hold wrongdoers accountable for false financial reporting. Moreover, our work also reports that much larger cases are pursued in private suits, with larger investor recoveries, than when the SEC proceeds. *See* James D. Cox, Randall S. Thomas & Donna Kiku, SEC Enforcement Heuristics: An Empirical Inquiry, 53 Duke L. J. 737 (2003).

As my testimony emphasized, holding wrongdoers accountable to those harmed by their misconduct is basic to western civilization. Recent Supreme Court decisions provide great insulation to those who by design, and with full knowledge execute, illegal conduct that harms others. While we cannot measure whether this insulation encourages misconduct, the well-informed intuition that you and I share should tell us that giving wrongdoers a pass can only encourage more wrongdoing. If so, then we can expect another well-recognized principle to apply, the principle captured in Gresham's Law. That is, just as bad money drives out good currency, so it will be that fraudulent practices will drive from the marketplace good practices. This can hardly advance the public interest or be good for the U.S. economy.

Sincerely,

James D. Cox
Brainerd Currie Professor of Law

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July 16, 2011

Senator Herb Kohl
Committee on the Judiciary
United States Senate

Re: Response to Question Regarding Hearing, "Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior' on June 29, 2011

Dear Senator Kohl;

Please consider this my response to your thoughtful question "What can Congress do to restore the balance that the Class Action Fairness Act achieved between individual plaintiffs and businesses, and maintain a viable path for class actions?" This is a profound question and the ultimate policy question when considering the issue the Supreme Court addressed in *AT&T Mobility v. Concepion.*

Unfortunately, the answer to your question is not clearly within my field of research and teaching. But I can shed some light on the question from my own field of expertise. I do feel that much has been achieved in rationalizing and introducing discipline to securities class actions by the enactment of the Private Securities Litigation Reform Act of 1995. This legislation is the securities law analog to the Class Action Fairness Act. It sought, much as the Class Action Fairness Act, to introduce uniform and fair treatment for all parties embroiled I securities litigation. On this topic I and my co-investigators have done a good deal of work that tangentially bears on your excellent question. Our work documents that private suits provide the major means for addressing fraudulent reporting and providing relief to investors who are defrauded. Let me explain this statement. In one of our most recent studies, this one involving 773 securities class action settlements (1990-2004), we found that there is a report of SEC involvement in these cases of about 17 percent. In fact, this likely overstates the SEC involvement as we included within this group any news report of a complaint being filed with the SEC or the SEC making inquiry about as practice; thus, the actual instances in which the SEC launched a "formal" investigation is much smaller and smaller still would be the instances in which the SEC successfully concluded an enforcement action. *See* James D. Cox, Randall S. Thomas & Lynn Bai, There Are Plaintiffs and . . . There are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements, 61 Vand. L. Rev. 355 (2008). Thus, in 83 percent, or more, of the securities fraud class action settlements there is no evidence of any SEC action, or for that matter SEC interest, in the claims giving rise to the significant settlement. Thus, private

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remedies, not governmental enforcement, action is the medium by which investors hold wrongdoers accountable for false financial reporting. Moreover, our work also reports that much larger cases are pursued in private suits, with larger investor recoveries, than when the SEC proceeds. *See* James D. Cox, Randall S. Thomas & Donna Kiku, SEC Enforcement Heuristics: An Empirical Inquiry, 53 Duke L. J. 737 (2003).

Thus, addressing directly any fears of abuse that flows from allowing small claims to be aggregated into a class action is a wise course. This was the course taken with the Class Action Fairness Act and before that the Private Securities Litigation Reform Act. Decisions such as *Concepcion,* you wisely conclude, eviscerate the consumer's rights by forcing them into a process where the expected benefits of asserting their right, individually, are dwarfed by the costs, real and imputed, of asserting their rights. A simple solution would be a neutral gatekeeper who could review the complaints and as a threshold matter determine that the individual claims not only appear non-spurious but also merit aggregation before an appropriate court of law. This mechanism would provide an escape from the harmful effects of *Concepcion* while preserving arbitration in other areas. That is, one resort to restoring the balance, without placing business at risk all individual claims being asserted as a class is through the introduction of a gatekeeper procedure.

As my testimony emphasized, holding wrongdoers accountable to those harmed by their misconduct is basic to western civilization. Recent Supreme Court decisions provide great insulation to those who by design, and with full knowledge execute, illegal conduct that harms others. While we cannot measure whether this insulation encourages misconduct, the well-informed intuition that you and I share should tell us that giving wrongdoers a pass can only encourage more wrongdoing. If so, then we can expect another well-recognized principle to apply, the principle captured in Gresham's Law. That is, just as bad money drives out good currency, so it will be that fraudulent practices will drive from the marketplace good practices. This can hardly advance the public interest or be good for the U.S. economy. The Class Action Fairness Act was enacted in part by the belief that balancing the interests of business and consumer, business and investor, and business and worker is the correct approach to a strong and fair economy. That approach should be taken as well toward modifying *Concepcion.*

Sincerely,

James D. Cox
Brainerd Currie Professor of Law

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Questions for the Record
Hearing on — "Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior"
June 29, 2011
Submitted by Senator Amy Klobuchar

Question for Melissa Hart

- In your June 21st column in the New York Times, you argued that the Supreme Court overreached in several important ways in the *Wal-Mart* decision. Can you elaborate on what you see as the impact of this decision as compared to what the impact would have been had the Court ruled on more limited grounds?

Response:

I think it will remain difficult to assess the full impact of this decision for some time, but the breadth of the majority's language has already led dozens of courts to ask for additional briefing as to whether the decision should significantly change the course of on-going litigation. I suspect that the next several months will see considerable litigation about how *Wal-Mart* has changed the landscape for class action law and for employment discrimination law.

If the Court had decided on the narrowest ground necessary to achieve a majority–which is a commonly held view of how court's should limit over-reaching—then the decision would have touched only on the appropriateness of certifying a class under the provision of Rule 23(b) that permits class actions seeking injunctive relief. All nine of the Justices concluded that the suit, which requested back pay for the women who were class members, did not fit into that provision of the Rule because of the individual back pay requests. If the decision had stopped there, the case would have been remanded to the lower courts to evaluate whether, for example, the class could be certified under any other provision of Rule 23(b). The decision would still have limited the use of class actions in significant ways.

The majority's decision to also conclude that the proposed class members' claims shared no common legal or factual questions expands the potential impact of the decision considerably. That part of the ruling could be read very broadly by lower courts to prohibit a wide range of employment discrimination claims as well as claims in other areas. The Court's definition of what might constitute a "common" sets an extremely high threshold that is very different from the relatively low bar intended by the drafters of Rule 23.

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Questions from Senator Kohl

"Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior" 06/29/11

My colleagues and I worked for many years on reform of the class action system, culminating in the passage of the Class Action Fairness Act in 2005. That law was a balanced approach to address the worst abuses in the class action system. It enabled individuals to collectively and efficiently seek redress for harm and ensuring them fair compensation when their claims had merit, while protecting businesses from being hauled into courts on frivolous claims and where the rules are stacked against them.

But the Supreme Court seems to have turned this careful balance on its head in its recent decision in *AT&T Mobility v. Concepcion*. Does *Concepcion* create an end-run around the balance that the Class Action Fairness Act sought to achieve?

As Supreme Court advocate Tom Goldstein said, "It's almost malpractice for a lawyer of a company now not to put an arbitration clause in any kind of document, whether it's a consumer contract or an employment agreement. All of those agreements will be enforced and the company [will] no longer face the prospect [of class action liability], if they write the agreement correctly." Is this the end of class actions?

How is an individual consumer with a $30 complaint, like the plaintiff in *Concepcion*, going to find justice, let alone a lawyer to represent him?

In light of *Concepcion*, what can Congress do to restore the balance that the Class Action Fairness Act achieved between individual plaintiffs and businesses, and maintain a viable path for class actions?

Response from Melissa Hart

The Supreme Court's decision certainly shows a hostility to class action dispute resolution that is inconsistent with legislative efforts to maintain a balance of interests in the Class Action Fairness Act. The *Concepcion* holding gives unchecked power to companies to require arbitration of disputes and to require that the arbitration be individual rather than collective. According to the Court, even a state's contrary common law cannot override that power. The incentives for companies to include such provisions in contracts are substantial, particularly in cases like that of the Concepcions, where the low-dollar value of the claim makes individual arbitration extremely unlikely. Since individuals will not regularly choose to pursue their own small claims, and they are barred from joining together to do so, a company will avoid most liability, even for clear violations of its contractual or other obligations.

The Court rested its decision in *Concepcion* on an assertion that the 1925 Congress that enacted the Federal Arbitration Act intended this result. Because the

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Court's decision was so focused on congressional intent, a legislative response may be appropriate. Such a response could come in a number of forms. One possibility would be an amendment to the Federal Arbitration Act to make it clear was kinds of arbitration agreements Congress wants to privilege. For example, contracts of adhesion—the typical consumer contract—or employment contracts, could be explicitly excluded from the FAA. I am sure there are other options, but that is the one that would most directly answer the concerns created by the *Concepcion* decision.

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July 21, 2011

The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Attn: Julia Gagne, Hearing Clerk

Dear Chairman Leahy:

Thank you for the opportunity to testify before the Committee concerning the Supreme Court's recent decisions in cases addressing claims involving businesses. I am enclosing my answers to the written follow-up questions from Committee Members that were transmitted to me on July 7, 2011.

I hope that my answers are of assistance to the Committee. If I can provide any further information that would be useful, I would be happy to do so.

Sincerely,

Andrew J. Pincus

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ANSWERS TO QUESTIONS FOR THE RECORD
FROM SENATOR CHARLES GRASSLEY
TO
ANDREW J. PINCUS
FOLLOWING THE SENATE JUDICIARY COMMITTEE HEARING:
"BARRIERS TO JUSTICE AND ACCOUNTABILITY: HOW THE SUPREME COURT'S RECENT RULINGS WILL AFFECT CORPORATE BEHAVIOR"
HELD ON JUNE 29, 2011

1. Please provide any additional thoughts that you might have on the issues raised by the hearing, including but not limited to expanding on your testimony, responding to the testimony of the other witnesses and/or responding to anything said by any Senator.

Although I did not testify before the Committee on behalf of AT&T (or any of my firm's other clients), I do represent AT&T in the *AT&T Mobility LLC v. Concepcion* matter. Senator Franken asked several questions relating to the case, and I want to be sure that the record includes the relevant facts.

The underlying issue in *Concepcion* is whether AT&T properly informed the Concepcions that it would charge California sales tax on the full value of their phones (as required under California law), even though the Concepcions obtained the phones at free or heavily discounted prices. In the hearing, Senator Franken indicated that the Concepcions were not aware of this charge until it later appeared on their bill. But the Complaint filed by the Concepcions to initiate their lawsuit acknowledges that they received and signed an in-store sales receipt displaying the tax charge that subsequently became the basis for their suit.[1] That fact, of course, substantially undermines the Concepcions' claim that they were misinformed about the facts *before* they entered into their transaction with AT&T.

Indeed, court rulings in other cases involving similar claims confirm the lack of merit of the Concepcions' lawsuit. As noted above, the sales tax at issue is required by California law,[2] and at least eight California state judges have held that lawsuits based on claims virtually identical to the Concepcions' lack merit (although one of the decisions is being reviewed by the California Supreme Court).[3] That is another reason why an objective and fair analysis of the Concepcions' claims shows them to be quite weak on the merits.

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[1] First Am. Compl. ¶ 8, Concepcion v. Cingular Wireless LLC, No. 3:06-cv-675-DMS-NLS (S.D. Cal. May 2, 2006).

[2] Cal. Code Regs. tit. 18, §§ 1585(a)(4), (b)(3).

[3] In *Yabsley v. Cingular Wireless, LLC*, 98 Cal. Rptr. 3d 657 (Ct. App. 2d Dist, Div. 3 2009), review granted, No. S176146 (Cal. Nov. 19, 2009), the Court of Appeal held that a class action on which the Concepcions' lawsuit was based had been properly dismissed because, among other things, California law bars lawsuits against retailers based on sales tax when the sales receipt "stated the amount of the sales tax imposed on the sale." *Id.* at 669. As noted above, the Concepcions have conceded that the sales tax was disclosed on their receipt. In *Bower v. AT&T Mobility, LLC*, No. B223364, 2011 WL 2557252 (Cal. Ct. App. 2d Dist., Div. 1 June 29, 2011), the California Court of Appeal held that California law permits ATTM to require consumers to pay these sales taxes.

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I would also like to expand upon my comments regarding AT&T's likely response in the event the Concepcions had chosen to invoke the arbitration process, notwithstanding the weakness of their claim on the merits. AT&T will rarely refuse to settle, even if it believes the customer's claim has little merit, because the company risks paying a self-imposed $10,000 penalty (plus double attorneys' fees) if its assessment of the merits of the claim turns out to be wrong. Indeed, as I explained at the hearing, that tremendous incentive to settle claims generously and expeditiously is entirely by design, and is one reason the District Court concluded that the Concepcions are "better off under their arbitration agreement with AT&T than they would have been as participants in a class action."[4] That is why it is very likely that the Concepcions would have received a settlement payment if they had initiated the arbitration process even though the company viewed their claim as unjustified on the merits.

2. The accusations that the Roberts Court is pro-business and anti-little guy are constantly repeated.

Do these accusations against the Supreme Court pose a larger or systemic danger to our legal system and how it is perceived?

Depicting the Supreme Court as "pro-business" or "against workers and consumers" is, I believe, not only entirely inconsistent with the facts but also quite damaging to the Court as an institution. I explained in detail in my written testimony the reasons why this Term's decisions cannot reasonably be characterized in this manner—in fact, parties seeking damages from businesses won as many cases as they lost. Justice Breyer also rejected that charge in an interview at the beginning of the Court Term just ended:

> "Justice Stephen Breyer rejected the notion that the U.S. Supreme Court has a pro-business slant and said the court doesn't rule in favor of companies any more frequently than it has historically. 'I looked back,' he said in a Bloomberg Television interview in which he discussed his new book. 'I couldn't find a tremendous difference in the percentage of cases. They've always done pretty well.'"[5]

More fundamentally, labeling the Court, or particular Justices, as "pro-business" in civil cases or "pro-prosecution" or "pro-defendant" in criminal cases creates the impression that the Court's decisions are based on policy choices or

[4] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).
[5] Greg Stohr, *Breyer Says Supreme Court Doesn't Have Pro-Business Slant* (Bloomberg, Oct. 7, 2010), *available at* http://www.bloomberg.com/news/2010-10-07/breyer-rejects-the-notion-that-u-s-supreme-court-has-a-pro-business-bias.html.

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prejudgments, not on the legal principles that govern interpretation of federal statutes or of the Constitution. Transforming the public's perception of the Court—from neutral decisionmaker into yet another political institution—could well undermine the Court's legitimacy over the long-term. If that occurs, it could reduce the willingness of the American people to accept intervention by the Court to protect critical Constitutional rights—free speech, equal protection, due process—in the difficult cases, when those decisions are politically unpopular but essential to the preservation of our Nation's fundamental values.

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Answers to Questions for the Record
Hearing on — "Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior"
June 29, 2011
Submitted by Senator Amy Klobuchar

Question for Andrew Pincus

- Given the *AT&T* decision, do you think corporations will change their behavior when drafting arbitration agreements? If so, how?

As I explained in my written testimony, it will take years to determine the impact of the Court's decisions, and for that reason I believe we must be cautious in our predictions. However, I do think that *Concepcion* is the most recent manifestation of the federal courts' consistent, ongoing efforts to ensure that arbitration agreements are fair to consumers and employees. Courts have not hesitated to strike down arbitration agreements that unfairly impair a consumer or employee's ability to vindicate his or her claim in arbitration by, for example, precluding awards of punitive damages or attorneys' fees, or requiring the consumer or employee to pay high filing fees or other charges, or mandating that the arbitration occur in a place inconvenient for the employee or consumer. Indeed, there are hundreds of decisions invalidating arbitration agreements on these or similar grounds.

Concepcion's emphasis on the fairness of the AT&T agreement fits squarely within this trend. Businesses reviewing the decision will notice that the Court specifically pointed to the uniquely beneficial aspects of AT&T's agreement, reiterating the Ninth Circuit's finding that aggrieved customers who filed claims under the agreement "would be 'essentially guarantee[d]' to be made whole."[6] Prudent businesses will react to that passage by reviewing the fairness of their arbitration agreements to see if they can match that high standard. Many businesses that participate in consumer arbitration are likely to adopt the AT&T model—or something similar—that goes above and beyond basic fairness standards to provide affirmative incentives for consumers to seek redress in arbitration.

[6] *Concepcion*, 131 S. Ct. at 1753.

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Answers to Questions from Senator Kohl
"Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior" 06/29/11
[For Andrew J. Pincus, Melissa Hart, James D. Cox, and Robert Alt]

My colleagues and I worked for many years on reform of the class action system, culminating in the passage of the Class Action Fairness Act in 2005. That law was a balanced approach to address the worst abuses in the class action system. It enabled individuals to collectively and efficiently seek redress for harm and ensuring them fair compensation when their claims had merit, while protecting businesses from being hauled into courts on frivolous claims and where the rules are stacked against them.

But the Supreme Court seems to have turned this careful balance on its head in its recent decision in *AT&T Mobility v. Concepcion.* Does *Concepcion* create an end-run around the balance that the Class Action Fairness Act sought to achieve?

> Not at all. As I stated in my testimony, it will take several years for the lower courts to render sufficient decisions for us to determine the impact of the *Concepcion* ruling. But the initial claims that the *Concepcion* decision would "end class actions" is already being rejected, even by plaintiffs' advocates.
>
> First, *Concepcion* is not relevant to entire categories of cases. Most class actions do not arise in the context of a contractual relationship; in the absence of a contractual relationship, there cannot be a preexisting arbitration agreement and *Concepcion* therefore cannot apply. For example, securities class actions and environmental class actions fall into this category.
>
> Second, I believe it unlikely that *Concepcion* will be interpreted to preclude courts from invalidating *any* arbitration agreement containing a class waiver. Arbitration agreements and class waivers can vary greatly in form, and the AT&T provision before the Court in *Concepcion* is considered an exceptionally consumer-friendly arbitration agreement. Nothing in the ruling disturbs the Court's prior cases holding that States may refuse to enforce arbitration provisions that run afoul of a state law principle that unconscionable contract provisions are invalid (so long as that principle is applied generally to a broad range of contract provisions).
>
> Finally, as I discuss in detail in my written testimony (at pages 18-20), lawyers opposed to arbitration are advancing a number of additional arguments that they contend limit the impact of the Court's ruling. Indeed, two of these lawyers, Public Justice attorneys Paul Bland and Arthur Bryant—both strong critics of arbitration—concur with my assessment that reports of the death of class actions have been greatly exaggerated.

As Supreme Court advocate Tom Goldstein said, "It's almost malpractice for a lawyer of a company now not to put an arbitration clause in any kind of document, whether it's a consumer

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contract or an employment agreement. All of those agreements will be enforced and the company [will] no longer face the prospect [of class action liability], if they write the agreement correctly." Is this the end of class actions?

> I believe this analysis greatly overstates the likely impact of the *Concepcion* decision.
>
> As I explained in my written testimony, more than 20 states had already recognized the enforceability of the AT&T arbitration provision, while most others had not yet addressed the question. In refusing to enforce the clause, California was a clear outlier. With that background, it becomes clear that *Concepcion* did not work any radical change in the law. Because the *Concepcion* rule was essentially already in place in many states, most businesses had essentially the same options with regard to arbitration, litigation, and class actions before the decision as they do now.
>
> When determining whether to enter into arbitration agreements with their customers or employees, individual businesses must weigh a variety of factors in light of their unique circumstances. For most businesses, I expect that *Concepcion* will serve as only one of many factors influencing their decisions.

How is an individual consumer with a $30 complaint, like the plaintiff in *Concepcion*, going to find justice, let alone a lawyer to represent him?

> The "premium award" features of AT&T's arbitration clause provide very strong incentives to the company to settle meritorious claims. And AT&T's arbitration program makes it very easy for consumers to pursue their claims. A customer can notify AT&T of his or her dispute by making use of a simple, one-page form available on AT&T's web site, and can use a similar, two-page form to initiate the arbitration process. A consumer need not show up to a hearing in person to arbitrate his or her claim; instead, the customer may proceed by telephone or mail if he or she prefers. For most consumer claims, an AT&T customer pays no fees to arbitrate. In addition, it has long been recognized that arbitration's procedures are far simpler and less complicated than court. Thus, a consumer may not even need a lawyer to obtain a fair resolution. He or she will not need to navigate our complex litigation procedures to gain relief, and the company has a strong incentive to fairly resolve the claim.
>
> That does not mean that consumers who wish to have an attorney pursue their claim will not be able to obtain one. Nothing prevents an enterprising lawyer from advertising for clients and then using the incentives created by the AT&T clause to obtain settlements that are close to—if not in excess of—the value of each client's claim.
>
> These characteristics of the AT&T agreement are the reasons why the Supreme Court rejected the argument that its ruling would preclude vindication of small claims:
>
>> "Moreover, the ***claim here was most unlikely to go unresolved***. . . . [T]he arbitration agreement provides that AT&T will pay claimants a minimum of $7,500 and twice their attorney's fees if they obtain an arbitration

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> award greater than AT&T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and ***the Ninth Circuit admitted that aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole.*** Indeed, the District Court concluded that the Concepcions were ***better off*** under their arbitration agreement with AT&T than they would have been as participants in a class action, which 'could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars.'"[7]

Moreover, it is important to remember that the vast majority of small consumer disputes are individualized—for example, an overcharge on a bill, or a faulty piece of merchandise. Class actions provide no help for these individualized disputes. And if left with a court solution as their only option, these consumers will be far worse off. They will be unable to obtain a lawyer to pursue litigation over a modest sum, yet unable to navigate our complex litigation procedures on their own. Even in small claims court, a consumer would typically have to take time from work to resolve the dispute. That tradeoff that is unlikely to leave the consumer better off.

With arbitration, consumers are provided a simplified, user-friendly means to resolve such disputes. Often, they have the option of choosing a telephone hearing or a decision on the papers alone. Arbitration allows these consumers to resolve their dispute without interruption to their workday, and oftentimes without even need of a lawyer.

If arbitration were eliminated in favor of class actions, the effect would be to leave most individuals—indeed, the vast majority of consumers—out in the cold.

In light of *Concepcion*, what can Congress do to restore the balance that the Class Action Fairness Act achieved between individual plaintiffs and businesses, and maintain a viable path for class actions?

In my view, there is no basis for Congressional action at this time, because there is no imbalance to redress. Simply put, there is no evidence at all that the Court's rulings will preclude injured individuals from vindicating their rights. Indeed, the instantaneous knee-jerk media reactions to the Court's decisions—dramatically declaring "the end of class actions"—have been replaced by more sober assessments, especially as the lower courts do their work to interpret and apply these decisions. For instance, *The New York Times* recently reported that as the lower courts issue their first post-*Dukes* rulings, it appears that the decision "has ***not*** spelled doom for employment lawsuits facing other big U.S. companies." In fact, some such lawsuits "have even been strengthened by the ruling."[8]

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[7] *Concepcion*, 131 S. Ct. at 1753.

[8] *Analysis: Wal-Mart Ruling No Knock-Out Blow for Class Actions*, N.Y. Times, July 12, 2011 (emphasis added).

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If, in the future, Congress does take up the question whether to reform class actions, however, it should consider the practicalities of how litigation impacts real people. Too often, the debate considers only an idealized version of class actions.

For example, Susan Beck (a Senior Writer for The American Lawyer) recently wrote that while "it's easy to see why workers' advocates were upset with" the *Dukes* ruling, "it's not as if the class actions landscape before *Dukes* was some plaintiffs' paradise."[9] Beck reminded readers that Betty Dukes' litigation has been ongoing for a decade, and yet has not come close to reaching the merits of her claim—and unfortunately Dukes' case is not simply an outlier. Beck concludes:

> It's not right to make people wait six or seven or ten years to have their employment claims decided. In light of all this, a simple arbitration that doesn't require much lawyering starts to look better. Class actions may scare corporations, and may provide big fees for plaintiffs lawyers, but they're often not a sensible solution for individual workers. And their interests often get lost in this debate.

I concur with Beck's conclusion. Both plaintiff and defense lawyers earn huge fees from class action lawsuits. But Congress' first and foremost consideration should be the real-world experiences of the individuals involved in these suits. Judged against that standard, I believe the Court's ruling in *Concepcion* will prove helpful to consumers and employees who will be afforded a realistic means of dispute resolution rather than left either to fend for themselves in court or to receive little if any benefit whatsoever from class actions.

Another important consideration must be the abuse of the class action process, something that has continued notwithstanding Congressional reform efforts. Class actions too frequently provide little or no benefit to consumers. Class members often receive exactly nothing from settlements and awards—because they do not know about them, fill out complicated claims forms incorrectly, or fail to fill out the forms at all.[10] Yet lawyers continue to walk away with outrageous fees.[11] If fees paid to defense lawyers are

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[9] Susan Beck, *Class Actions Before* Dukes *Weren't Always So Great For Workers*, The AmLaw Litigation Daily, July 06, 2011.

[10] *See, e.g.*, Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 103 (2003) ("in many situations individual plaintiffs are able to recover their awards only upon the filing of complex claim forms").

[11] For example, in a case currently pending in the Southern District of New York, attorneys are seeking $13 million in fees for their work in an antitrust class action—even though the class received nothing other than a promise by the defendant not to raise prices for five months. *See* Ted Frank, *CCAF objection in Blessing v. Sirius XM Radio*, PointofLaw.com (July 19, 2011). That example is not at all unique. *See* Daniel Fisher, *St. Louis Judge Hands Lawyers $21 Million For Coupons*, Forbes.com On the Docket (June 23, 2010), *available at* http://blogs.forbes.com/docket/2010/06/23/st-louis-judge-hands-lawyers-21-million-forcoupons; Daniel Fisher, *Lawyer Appeals Judge's Award of $21 Million in Fees, $8 Coupons for Clients*, Forbes.com (Jan. 10, 2011), *available at* http://blogs.forbes.com/danielfisher/2011/01/10/lawyer-appeals-judges-award-of-21-million-in-fees-8-coupons-for-clients ("The judge didn't even see fit to inquire into the lawyers' valuation of the coupon portion of the settlement, despite strong evidence that less than 10% of coupons in such cases are ever redeemed"). One study

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factored in as well—as they must be—the transaction costs of this dispute resolution system far outweigh the benefits provided to plaintiffs. It is the actual real-world impact of class actions on all parties, not the way class actions could operate in a theoretical transaction-cost free world, that should be the basis for any reform effort.

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found that lawyers representing consumer classes received an *average* of $1,270 per hour. *See* Stuart J. Logan, Jack Moshman & Beverly C. Moore, Jr., *Attorney Fee Awards in Common Fund Class Actions*, 24 CLASS ACTION RPTS. 167, 196 (2003).

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SUBMISSIONS FOR THE RECORD

STATEMENT OF AARP

AARP is a nonpartisan, nonprofit organization dedicated to representing the needs and interests of people age 50 and older. AARP is greatly concerned about fraudulent, deceptive, and unfair business practices that can disproportionately harm older people, as well as the rights of older workers. AARP thus supports laws and public policies designed to 1) protect older people from such business practices and employment discrimination and 2) preserve the legal means for them to seek redress for violations of these laws and policies. Among these activities, AARP advocates for access to the civil justice system and the availability of appropriate enforcement tools.

AARP has serious concerns with three Supreme Court decisions this term that effectively shield corporate misbehavior from legal challenge, and weaken statutory protections designed to protect the ability of investors, consumers and employees to vindicate their rights.

Together, the *Janus*, *Concepcion*, and *Wal-Mart* cases decisions create uncertainty regarding the prospects for enforcement of important rights, and undermine Congressional intentions to create appropriate recourse. Moreover, the Court's decisions impart a mixed message to industry about the accountability of corporate wrongdoers in areas that Congress has identified as requiring special protection.

On June 13, 2011, the Court held in *Janus Capital Group, Inc. v. First Derivative Traders*, 2011 U.S. LEXIS 4380, that even a party "significantly involved in preparing" an allegedly false statement in a mutual fund prospectus does not "make" that statement within the meaning of SEC Rule 10b-5. Retirees and active older employees saving for retirement comprise a significant portion of the investing public and those that rely upon statements made in a fund prospectus. As a result, older investors will bear much of the brunt of the Court's failure to extend the full measure of the protections that Congress enacted.

While AARP is very familiar with the Court's previous decisions in such cases as *Central Bank* and *Stoneridge*, which recognize and distinguish the legal status of secondary actors under SEC Rule 10b-5 on account of the different roles and responsibilities that such parties typically play in the financial reporting realm, AARP believes in *Janus* the Court essentially issued a free pass to mutual fund advisory firms to play fast and loose with the rules. The Court's handling of *Janus* poses the prospect of significant harm to mutual fund investors. AARP believes that the *Janus* decision not only ignores the business realities of the mutual fund industry, but is also unrealistically selective in its reading of the dictionary definition in regard to its interpretation of the concept of "making a statement." Even more troubling is the Court's disregard of the undisputed fact that mutual fund advisers are not only in total control of the day-to-day operations of a mutual fund, but that the funds themselves typically have no employees whatsoever. The Court itself recognized just two years ago that the investment adviser "creates the mutual fund, selects the fund's directors, manages the fund's investments, and provides other services." *Jones v. Harris Assocs., L.P.*, 130 S. Ct. 1418, 1422 (2010). In *Janus* the Court interpreted Rule 10b-5 as if it was intended to protect mutual fund advisers rather than investors.

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In short, the Court's unduly narrow and literal reading of the statutes regulating the securities markets ignores the realities of the markets and penalizes investors by depriving them of the protections that Congress provided by regulating the conduct of financial services providers. It is a matter of public record that Janus Capital Management (JCM) undertook to perform the registration functions of the Janus Funds involved in the litigation. JCM drafted and completed revisions of the pertinent statements. There was no question of the entity to which attribution for the statements would be publicly made. The Court's unfortunate unwillingness to give due weight to these factors does a great disservice to the integrity of the securities' anti-fraud rules and to all investors in mutual fund products.

On April 27, 2011, the Court decided *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). *Concepcion* held that the Federal Arbitration Act ("FAA") preempts California's "*Discover Bank* rule" which was adopted by the California Supreme Court in *Discover Bank v. Superior Court (Boehr)*, 113 P.3d 1100 (Cal. 2005). As interpreted by the Court, the *Discover Bank* rule would compel invalidation of a class action ban in an arbitration clause whenever the term is imposed in a consumer contract of adhesion, the plaintiffs' claims involve predictably individually small damages, and the defendant has allegedly engaged in a scheme to cheat consumers. Those conditions, however, are at the very heart of the consuming public's need for the class action mechanism as a means to confront oppressive market tactics.

Although it can be argued that the *Concepcion* decision should not be read as having eliminated all class action bans in arbitration agreements, many corporations will argue that *Concepcion* categorically prevents a court from invalidating a class action ban, regardless of the statute at issue or the strength of facts showing that enforcing the ban will prevent the vindication of important statutory rights. Indeed, many state and federal courts have already been asked to reexamine their prior decisions invalidating class action bans. As a result, it is likely that harmed consumers and employees will be unable to pursue class-wide relief even though their claims are legally valid. Businesses that are profiting through violation of law will largely be able to keep ill-gotten gains because few people will risk the time and expense of individual litigation to recover predictably small damages.

In its class action decision issued June 20, 2011, *Wal-Mart Stores, Inc. v. Dukes, et al.,* 2011 U.S. LEXIS 4567, the Court ruled that current and former female employees may not maintain a nationwide sex discrimination suit challenging allegedly biased pay and promotions practices. The Court overturned two lower court rulings that the plaintiffs' evidence – statistical, anecdotal, and sociological – was sufficient to create a "common question" whether corporate policies and conduct amounted to a "pattern or practice" of sex discrimination, declaring unpersuasive the plaintiffs' evidence of systemic gender bias. The Court dismissed plaintiffs' focus on the failure to take steps to avoid gender biased outcomes, and instead, found most significant official policies opposing gender bias.

The decision will make it difficult for employees to band together to challenge discriminatory corporate practices that affect large groups of employees. The Court's decision is especially

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troublesome for older workers relying on Federal Rule of Civil Procedure 23, which the Court construed restrictively. This includes workers bringing age discrimination claims under state laws, which generally follow federal rule 23. AARP attorneys have recently been involved in such cases in California, Michigan, Minnesota and Ohio. Rule 23 standards also apply to older workers challenging disability discrimination under the Americans with Disabilities Act and state laws following the ADA. Ironically, the *Wal-Mart* decision might have much less impact on older workers challenging age bias under the federal Age Discrimination in Employment Act (ADEA), which does not follow federal rule 23. Instead, the ADEA applies different rules, originally set forth in section 216(b) of the Fair Labor Standards Act (FLSA), which governs payment of minimum and overtime wages. ADEA plaintiffs who bring "collective actions" challenging systemic age bias must show they are "similarly situated." But it remains to be seen how federal courts will apply the *Wal-Mart* decision in ADEA (and FLSA) cases.

In summary, AARP recognizes that competing contentions must be considered by the Supreme Court in interpreting Congressional enactments. However, AARP believes that the Court's decisions in the three cases will seriously erode the rights of vulnerable populations that Congress legislatively sought to protect. AARP also has concerns that the Court's recent decisions, by creating a lax environment that fosters immunity for bad corporate actors, moves further away from congressional intent to protect consumers from violations of protective legal statutes.

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Testimony of Robert Alt
Before the United States Senate
Committee on the Judiciary

"Barriers to Justice and Accountability:
How the Supreme Court's Recent Rulings Will Affect Corporate Behavior."

My name is Robert Alt. I am the Deputy Director and Senior Legal Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation.[1]

Thank you, Chairman Leahy and Ranking Member Grassley, for inviting me to testify at this hearing on the topic of "Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior."

The title to this hearing suggests a predetermined conclusion—that recent decisions by the Supreme Court will create "barriers" to justice and accountability, and will somehow create adverse incentives for corporate behavior. The facts do not support this conclusion.

The suggestion that recent decisions create barriers to justice and corporate accountability appears to be an extension of the accusation bandied predominantly by partisan activists that the Roberts Court is a "pro-corporatist" court. The story of a conservative, activist, pro-corporatist Roberts Court may sound plausible at first blush, particularly with its repetition and regrettable distortion of the cases involved, but it is just a story—and a fictional one at that. This story applies a flawed definition of judicial activism, a deliberately skewed sample of the business decisions of the Roberts Court, and misrepresentations of key decisions of the Roberts Court.

In contrast to this rhetorical embellishment, reviewing the business cases from recent terms of the Court leads to several important conclusions: 1) the Court frequently speaks in business cases not in the fractured voice characterized by the Court's critics, but in a unanimous or super-majoritarian voice; 2) far from creating new "barriers" to justice or accountability, the Court's decisions assailed in today's hearing reject new, novel, and frequently unsupported theories advanced by trial lawyers to circumvent reasonable existing requirements, which requirements were designed to prevent frivolous litigation and to assure Due Process for all parties; and 3) the designer of many of these requirements enforced by the Courts is not the Court itself, but Congress.

In some cases, like those addressing personal jurisdiction, the Constitution dictates the outcome in order to assure Due Process to the parties. But most of the business decisions were questions of statutory interpretation, and as such, Congress, having established the rules applied in the cases, could modify the law if it felt that there were indeed barriers to justice and accountability.

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[1] The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

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While such congressional modification is possible, it is unwise. A review of a highly criticized case from this term—*Janus Capital Group, Inc. v. First Derivative Traders*—reveals that there is ample access to justice, accountability, and incentives for good corporate behavior. Modifying the law at issue in these cases would do little if anything to achieve greater justice, accountability, or proper business incentives—indeed in many cases it would create injustice by depriving parties of the traditional protections afforded parties in litigation. But it would unquestionably serve as a major boon to the trial bar, and would add substantial legal costs and uncertainty to U.S. markets at a time that those markets are sluggish at best. Congress should not reward special interests to the detriment of the U.S. economy, and it should not tilt the legal system so far in favor of plaintiffs so as to create fundamental unfairness.

I will address the general complaints of activism and pro-corporatism by the court before turning to the decision in *Janus Capital Group.*

Defining Activism Down

Judicial activism—real judicial activism—occurs when judges write subjective policy preferences into their legal decisions rather than apply the constitutional or statutory provisions according to their original meaning or plain text. Judicial activism may be either liberal or conservative; it is not a function of outcomes, but one of interpretation. Judicial activism does not necessarily involve striking down laws, but may occur when a judge applies his or her own policy preferences to uphold a statute or other government action which is clearly forbidden by the Constitution.

Dissatisfied with this accepted definition, critics of the Roberts Court (and the Rehnquist Court before that) have engaged in a concerted effort to redefine judicial activism downward. Under one formulation, judicial activism occurs any time that a statute is struck down.[2] While this may seem appealing given its seemingly objective, value-neutral approach, judicial activism has traditionally been understood as a term of reproach for judicial decisions which overreach proper judicial authority. However, the act of striking down clearly unconstitutional statutes is not only within proper judicial authority, but the failure to do so based upon policy preferences would itself fall into the traditional definition of activism. Accordingly, this definition distorts the traditional understanding of activism, and has been used in a concerted way to equate rightful acts of the Roberts Court with wrongful, genuinely activist acts of prior liberal courts.

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[2] *See, e.g.,* Cass Sunstein, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 42–43 (2005). It is worth noting that this formulation is frequently utilized in a highly skewed fashion—one which focuses exclusively on striking down federal legislation in order to permit the argument made by Sunstein and others that the Rehnquist and Roberts courts are more activist than prior courts. Leaving aside the obvious error in ascribing what is well-understood to be a pejorative to what may be a positive act—e.g., correctly striking down clearly unconstitutional laws—such a formulation lacks any basis for failing to include the striking down of *state* laws—acts which, to borrow Sunstein's words, similarly would "preempt the democratic process." The key distinction seems to be that the inclusion of such acts would force the true radicals in academia and elsewhere to confront that tens-of-state-laws swept aside in numerous decisions by the Warren Court—data which would upset their thesis that conservative courts are more activist

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In another popular version, judicial activism is all-but-meaningless—a term of derision that means little more than "I don't like the policy outcome of this decision." Critics of the Court's business decisions frequently apply little more than this standard. Thus, individuals who dislike the outcome in *Sorrell v. IMS Health Inc.*[3], which struck down a law restricting speech related to brand name pharmaceutical marketing based upon the First Amendment, are likely to call that case "activist," but many of these same people are likely to laud the Court's decision striking down California's restriction on selling violent video games to minors,[4] despite the fact that it also turns on Free Speech rights exercised by corporations. The key distinction between the criticism of one case and the praise of the other does not appear to be a conclusion of law, but a conclusion of policy preference.

In order to determine whether cases are truly activist, it is necessary to carefully review the cases and interpret the governing text in a legitimate manner, rather than simply assert whether one likes or dislikes the particular outcome. When this proper standard is applied to the Court's business docket, the activist moniker does not fit.

The "Pro-Corporatist" Distortion

The claim the Roberts Court is a pro-business or pro-corporatist court frequently turns on little more than a claim that the Court has decided cases in favor of particular business parties, or has sided with businesses more than non-business parties in recent cases. At the outset, it is worth noting that neither of these claims, if true, says anything about whether the judgments are *correct*. Given the small and discretionary docket that the Supreme Court hears, there is no empirical reason to believe that the winners and losers as between any set of opposing interest groups should be evenly distributed.

The allegation that the Court is too pro-business became fashionable following Jeffrey Rosen's 2008 article, *Supreme Court Inc.*[5] Even at the time of this article, however, legal scholars questioned whether the evidence offered was sufficient to support the premise of a pro-business Court.[6] For example, Rosen's observation that "the Roberts Court has heard seven [antitrust cases] in its first two terms—and all of them were decided in favor of the corporate defendants" seems much less impressive when you discover that five of those seven cases involved businesses suing other businesses.[7] So yes, a corporation won those cases, but another corporation *lost* those cases. Are we then to take it that the Roberts Court was simultaneously pro-business and anti-business? Similarly, Rosen's assertion that "[o]f the 30 business cases [in the 2006-07 term], 22 were decided unanimously, or with only one or two dissenting voices" is hard to square with the claim

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[3] ___ U.S. ___, 2011 WL 2472796 (June 23, 2011).
[4] Brown v. Entertainment Merchants Ass'n, ___ U.S. ___, 2011 WL 2518809 (June 27, 2011).
[5] Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAGAZINE, Mar. 16, 2008.
[6] *See, e.g.*, Eric Posner, *Is the Supreme Court Biased in Favor of Business*, SLATE (Mar. 17, 2008, 3:16 PM), http://www.slate.com/blogs/blogs/convictions/archive/2008/03/17/is-the-supreme-court-biased-in-favor-of-business.aspx (last visited June 29, 2010).
[7] *Id.*

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that there has been any significant pro-corporatist shift in the Roberts Court. After all, most of the justices, including the most liberal justices, remained the same when Roberts and Alito joined the Court. The frequent unanimity and near unanimity, with supermajorities comprising justices of both ends of the ideological spectrum, suggests that rather than a pro-business bias motivating the outcome, that the Court ruled in favor of businesses because those parties' legal positions were meritorious—as defined by what the law actually dictated. To suggest otherwise would require one to accept not only that the recent additions to the Court exercised pro-business activism, a claim that is not borne out by the facts, but that liberal Justices like Stevens, Ginsburg, Breyer, and Souter were frequently motivated by pro-business activist impulses.

By the end of even the Court's 2008-09 term, academics and the media increasingly acknowledged that the Roberts Court's pro-business label was meritless—a development perhaps typified by *The Washington Post* headline: Court Defies Pro-Business Label.[8] A string of decisions negative to business interests fueled this conclusion, and made clear that the pro-business allegation was either premature, overblown, or both.

A non-comprehensive list of the most important cases in which the Supreme Court ruled adversely to business interests includes notably:

- *Wyeth v. Levine,*[9] in which the Court held that plaintiffs may sue a drug manufacturer alleging inadequate warning of risk even when the warning label was approved as sufficient by the Food and Drug Administration;

- *Massachusetts v. EPA,*[10] in which the Court created a novel new rule for standing and opened the door for the EPA to regulate virtually every business (and non-business activity), including manufacturing, farming, and transportation, which produces carbon dioxide;

- *Federal Express v. Holowecki,*[11] in which the Court stretched the meaning of the word "charge" in order to allow an ADEA case to go forward where the plaintiff had not met the prerequisite of filing a formal charge with the EEOC as required by statute, but had filed an intake questionnaire;

- *Altria v. Good,*[12] in which the Court found that the Federal Cigarette Labeling and Advertising Act did not preempt lawsuits against tobacco companies based upon alleged misrepresentation under a state act which prohibits deceptive trade practices; and

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[8]Robert Barnes, *Court Defies Pro-Business Label*, WASHINGTON POST, Mar. 8, 2009, *avail at* http://www.washingtonpost.com/wp-dyn/content/article/2009/03/07/AR2009030701596.html. *See also* Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943 (2009).
[9]555 U.S. ___, 129 S.Ct. 1187 (2009).
[10]549 U.S. 497 (2007).
[11] 552 U.S. 389 (2008).
[12]555 U.S. ___, 129 S.Ct. 538 (2008).

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- *Burlington Northern and Santa Fe Ry. Co. v. White,*[13] in which the Court provided an expansive definition of the grounds for Title VII retaliation claims.

This term, the Court ruled adversely to business interests in significant cases, including:

- *Erica P. John Fund, Inc. v. Halliburton, Co.*, holding that class action securities plaintiffs need not prove loss causation to obtain class certification;

- *Williamson v. Mazda Motor of America, Inc.*, finding a state tort lawsuit was not preempted by federal auto safety standards;

- *Thompson v. North American Stainless,* holding that Title VII's anti-retaliation provision must be construed to cover a broad range of employer conduct, including firing the fiancée of an employee who complained about discrimination. This in a case in which four courts of appeals addressing the question went the other way.

- *Federal Communications Commission v. AT&T, Inc.,* finding that corporations do not have a right of personal privacy for purposes of Exemption 7(C) of the Freedom of Information Act, which protects from disclosure law enforcement records whose disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy"; and

- *Matrixx Initiatives, Inc. v. Siracusano*, finding that a drug company's failure to make public reports of adverse drug reactions can constitute securities fraud, even if the number of adverse reactions is not statistically significant.

Numerous other examples could easily be added to this list. Again, a simple counting game does not prove pro- or anti-corporate bias, but the listing of these cases demonstrates that it is simply not true to assert that the Roberts Court is consistently and blindly pro-corporation. And yet, even as additional cases adverse to business interests rolled in, the "story" of the conservative, activist, pro-business Roberts Court continued unabated—promulgated by liberal activists, trial lawyers, partisan agitators, gullible members of the press, and judging by these hearings, Members of this Committee.

To further this conservative, pro-corporatist fiction, in addition to cherry-picking cases, critics of the Roberts Court have also assiduously avoided revealing the fact that liberal members of the Court have been the authors of some of the very cases of which they complain, and of some of the more pro-business cases that they conveniently omit. These cases include notably the Court's recent decision by Justice Ginsburg disallowing an action under federal common law seeking to limit greenhouse gases,[14] limiting the scope of the honest services fraud statute[15] in *Skilling v. U.S.*,[16] in which Ginsburg wrote the

[13] 548 U.S. 53 (2006).
[14] American Elec. Power Co., Inc. v. Connecticut, ___ U.S. ___, 2011 WL 2437011 (June 20, 2011).
[15] It should be noted that given the broad application of this statute, its implications extend far beyond businesses.

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opinion of the Court, and in which three liberal justices on the Court (Sotomayor, Stevens, and Breyer) would have gone further, and granted the former Enron executive fair trial relief; the limitation of punitive damages in maritime law in *Exxon Shipping Co. v. Baker* [17] (authored by Justice Souter); the *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,*[18] decision (authored by Justice Ginsburg and joined by, *inter alia*, Justices Souter and Breyer), which raised the standard for pleading scienter in securities actions; and from the Rehnquist Court, *BMW v. Gore*[19]—an activist case finding a constitutional limitation on punitive damages in a decision authored by Stevens and joined by, *inter alia*, Souter and Breyer. Unless we are to believe that the most liberal members of the Court are in fact conservative, pro-business activists, this "story" quickly falls apart.

It is worth noting that the pro-corporatist myth is just a subspecies of the larger, "conservative activist" complaint leveled by some Members of the Committee and liberal activists against the Court—a phenomenon which, so the story goes, has intensified since *Bush v. Gore*. But as my colleague Todd Gaziano has persuasively argued, this too is a myth belied by the regrettable facts of the Court's string of liberal decisions.[20] In areas including national security law, the death penalty, the constitutionality of life sentences without parole for violent juvenile offenders, and the use of foreign law, this Court simply cannot be meaningfully dubbed "conservative," and certainly not in any reliable or predictable way.

No "Barrier" to Justice or Accountability: *Janus Capital Group*

Of the business cases decided this term, one that has been singled out for criticism is *Janus Capital Group, Inc. v. First Derivative Traders*. Contrary to the critiques, the decision is not a barrier to justice or accountability. Rather, it is an example in which creative trial lawyers advanced novel arguments in an attempt to push the boundaries of the law for their own advantage—hardly a case in which the Court reduced the availability of legal relief. Perhaps most importantly, current law is more than adequate to provide access to justice for meritorious claimants, and proper incentives for corporations.

In *Janus Capital Group, Inc. v. First Derivative Traders,* the Court held that a mutual fund investment advisor cannot be held liable in a private action for false statements made in prospectuses by an investment fund that operated as a separate legal entity. This case is yet another attempt to expand the implied private right of action under Rule 10b-5. If this sounds familiar, it should. The Court has consistently resisted attempts to expand the implied right of action under 10b-5.[21]

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[16] ___ U.S. ___, ___ S.Ct. ___, 2010 WL 2518587 (June 24, 2010).
[17] 554 U.S. ___, 128 S.Ct. 2605 (2008).
[18] 551 U.S. ___, 127 S. Ct. 2499 (2007).
[19] 517 U.S. 559 (1996).
[20] Todd Gaziano, *What Conservative Court?,* TOWNHALL 49 (July 2010).
[21] *See* Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) and Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008).

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This does not mean that there is no remedy for fraud committed by aiders and abetters: Congress has given that authority to the SEC.[22] In the Private Securities Litigation Reform Act, Congress sought to "remov[e] the plaintiffs' class action bar from the equation" by granting the SEC, but not private litigants, the authority to prosecute aiders and abetters who provide "substantial assistance" to those engaged in fraud.[23]

The critics' claims therefore appear to be reducible to the principle that in order to have proper incentives for corporate conduct and adequate compensation for victims of fraud, the proper enforcement mechanism must be private actions, not the SEC. But this is simply false. As Professor John Coffee has persuasively argued, securities class actions inevitably "produce wealth transfers among shareholders that neither compensate nor deter . . . ."[24] Furthermore, Congress made significant findings about the costs associated with class action securities litigation when passing the PSLRA—costs our economy can ill-afford. Thus, while Congress could expand the private cause of action to encompass the kind of claims at issue in *Janus*—in what would be an expansion previously not recognized—this would not accomplish the goals of increasing accountability or producing proper corporate incentives, but it would constitute a substantial benefit to a special interest—the trial bar.

Conclusion

This term, the Supreme Court once again issued a series of mixed decisions affecting corporations, and has continued to defy easy labels in areas of interest to business such as preemption. Claims that the Roberts Court is biased in favor of corporations are belied by the actual decisions of the Court. The real story of this term's criticized business cases is largely novel claims by trial lawyers that the Court was right to reject based upon the laws that Congress had written. If Congress disagrees on a question of statutory interpretation, it can modify the statutes. But it should not do so where, as in cases like *Janus*, the law operates effectively as written, and any modification would do little but aid special interests.

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[22] See 15 U.S.C. §§ 78u-3.
[23] 4 Bromberg & Lowenfels, Securities Fraud & Commodities Fraud § 7:308, at 7-506 (2d ed. 2006).
[24] John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 COLUM. L. REV. 1534, 1535-36 (2006).

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June 28, 2011

BY HAND DELIVERY

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senators Leahy and Grassley:

I understand that the Judiciary Committee will hold hearings this week entitled "Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior." I had the privilege of representing Walmart before the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, which was decided on June 20, 2011, and which is one of the decisions the Committee may address. Therefore I would like to share my perspective on the Court's decision and its implications.

The Supreme Court unanimously ruled that the *Dukes* class action was improperly certified under Federal Rule of Civil Procedure 23(b)(2). In an opinion by Justice Antonin Scalia, a majority of the Court also ruled that plaintiffs did not satisfy the commonality requirement of Rule 23(a) because Walmart's "policy forbids sex discrimination," slip op. 13, and plaintiffs' evidence was "worlds away" from showing that the company had any discriminatory practices. Slip op. 14. Justice Ruth Bader Ginsburg, joined by Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan, dissented only from that part of the Court's decision on grounds that she would have remanded to give plaintiffs the opportunity to attempt to certify the class under a stricter section of Rule 23.

Below, I will discuss the Court's unanimous decision rejecting class certification, as well as the majority's holding that plaintiffs failed to satisfy commonality. I will also explain the limited grounds for Justice Ginsburg's partial dissent. Finally, I will address the positive ramifications of the *Dukes* decision for companies with strong diversity programs, such as Walmart, and their employees. In particular, I will explain how the decision prevents class action abuses, protects the rights of all companies and their employees, and benefits the civil justice system.

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I. The Court Unanimously Reversed the Class Certification in *Dukes*

All nine Justices agreed that the rule used by plaintiffs to certify the mammoth class of 1.5 million women would "nullify" important protections for class members. Slip op. 24. Under that rule, all women who worked at Walmart stores since 1998 were forced into the class without notice, whether they wanted to be or not—including the many women who have thrived and succeeded at the company. The Court unanimously held that the approach advocated by the plaintiffs would create "perverse incentives" and jeopardizes the rights of absent class members. *Id.* The Court emphasized "the need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives' or go it alone—a choice [that the procedure advocated by the plaintiffs] does not ensure that they have." *Id. See also Class-Action Sanity*, Chicago Tribune, June 24, 2011 (The Court ruled that "a class-action judgment in [*Dukes*] would improperly lead to a one-size-fits-all remedy. If some women were seriously wronged, they might deserve significantly more compensation than others . . . . For the sake of expediency—and for a massive payday? —plaintiff's attorneys gave short shrift to those differences and pursued this mass class action.").

The unanimous portion of the Court's decision sounded the familiar themes of earlier class action decisions. Decades ago in *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979), Justice Harry Blackmun wrote for the Supreme Court that class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Since then, relatively few cases involving class action procedure have reached the Court. When they have, the Court has emphasized—in the words of Justice Ginsburg—the need for "crisp rules with sharp corners" to safeguard the due process rights of all parties. *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008). *See also Smith v. Bayer* (U.S. June 16, 2011) (unanimous decision regarding whether a federal court can enjoin a state court class action); *Erica P. John Fund Inc. v. Halliburton Co.* (U.S. June 6, 2011) (unanimously reversing 5th Circuit decision affirming district court's refusal to certify securities class action and remanding for further consideration under proper standards). The Court also has warned (again, in a decision by Justice Ginsburg) against "judicial inventiveness" in class-action procedure, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997), explaining that "the rulemakers' prescriptions for class actions may be endangered by those who embrace Rule 23 too enthusiastically just as they are by those who approach the Rule with distaste." *Id.* at 629 (internal quotation marks and alterations omitted).

Relying on these bedrock principles, the unanimous Supreme Court in *Dukes* once again clarified important class action rules to ensure that the rights of all parties are protected. All nine Justices rejected the "Trial by Formula" approach advocated by plaintiffs, denouncing it as a "novel project" that would rob Walmart of its right to defend itself. Slip op. 27. The

Court's decision also safeguards the rights of absent class members. Absent the Court's ruling, any women with potentially meritorious claims would forever lose their day in court if the plaintiffs gambled and lost the case. *See Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 824 (7th Cir. 2011) (Posner, J.) (class certification would "jeopardize the ability of unnamed class members to obtain relief in individual suits or in a subsequent class action"); Diana Furchtgott-Roth, *Trial Lawyers Waging War on Walmart*, S.F. Examiner, June 26, 2011 ("Two of the three Walmart employees who brought the class-action suit are unlikely to have won individual sex-discrimination suits."). The Court in *Dukes* rightfully—and unanimously—rejected plaintiffs' attempt to use this procedure to hijack the rights of millions of employees.

II. A Majority Held that Plaintiffs Could Not Satisfy Commonality

In the 5-4 portion of its decision, a majority of the Court also ruled that plaintiffs could not satisfy the commonality requirement of Rule 23. Relying on a unanimous Supreme Court decision authored by Justice John Paul Stevens almost 30 years ago, *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), a majority of the Court also held that the three plaintiffs in the case could not, under any circumstances, fairly represent the experiences of over 1.5 million women across the company. According to the majority, the putative class members "held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female)." Slip op. 19. Therefore, this case presented exactly the opposite of a common policy that affected everyone the same way, precluding class treatment.

The *Dukes* plaintiffs advanced a radical theory that finds no support in the civil rights law or the rules governing class actions. They argued that allowing local managers to use discretion in making employment decisions, together with a strong company-wide culture, made Walmart "vulnerable" to bias. But as the Supreme Court held, such individualized decisionmaking is "a very common and presumptively reasonable way of doing business," that "'should itself raise no inference of discriminatory conduct.'" Slip op. 14-15. In fact, Justice Sandra Day O'Connor recognized as much over 20 years ago in her decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). And the United States (which did not file a brief in the Supreme Court expressing the Administration's views in this case) has made precisely the same arguments when it has been sued as a defendant in class actions challenging individualized decisionmaking. Br. of Retail Litig. Ctr. as *Amicus Curiae* at 13-18.

In finding that plaintiffs failed to demonstrate a common discriminatory policy or practice that affected all women, the Court recognized that Walmart's "policy forbids sex

discrimination," and "the company imposes penalties for denials of equal employment opportunity." Slip op. 13. It also said that plaintiffs' evidence was "worlds away" from showing any discriminatory practice at the company. *Id.* at 14. In fact, the record included many examples of success stories involving women who began their careers at Walmart in positions similar to the plaintiffs in this case and rose into leadership roles. *See* Gisel Ruiz, Letter to the Editor, *'The Wal-Mart I Know': An Executive's Story*, N.Y. Times, June 27, 2011 ("The Wal-Mart I know has offered a world of opportunity to me and countless other women.").[1]

The supposed "glue" holding plaintiffs' theory together was the testimony of a sociologist, Dr. William Bielby, who claimed that subconscious stereotypes could potentially "seep" into decisionmaking processes at any large institution. But because Bielby could not say whether "0.5 percent or 95 percent of the employment decisions" at Walmart actually "might be determined by stereotyped thinking," the Court concluded that it could "disregard what he has to say." *Id. See also id.* n.8 ("Bielby's conclusions in this case have elicited criticism from the very scholars on whose conclusions he relies for his social-framework analysis.") (citing Monahan, Walker & Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 Va. L. Rev. 1715, 1747 (2008)). Justice Ginsburg's partial dissent did not defend Bielby's testimony.

The Court rightly rejected Bielby's faulty testimony, which exposed companies to an unacceptably high risk of class actions because his "opinion is perfectly transportable" to all large corporations and institutions. Adam Liptak, *Supreme Court to Weigh Sociology in Wal-Mart Discrimination Case*, N.Y. Times, Mar. 27, 2011. Acceptance of plaintiffs' theory would have left "employers with decentralized business models . . . with few avenues available to escape a Bielby-enabled certification order, other than resorting to surreptitious quotas." Br. of Costco Wholesale Corp. as *Amicus Curiae* at 20.

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[1] Walmart is often recognized as a great place for women to work. In February 2011, Latina Style selected Walmart as one of the best companies for Latin women and honored Walmart executive Gisel Ruiz as its Latina executive of the year. In 2010 and 2009, Walmart was chosen as one of the Best Companies for Multicultural Women by Working Mother Media. In 2010 and 2009, the National Association for Female Executives (NAFE) selected Wal-Mart as one of the Top Companies for Executive Women.

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In short, the majority explained, "[b]ecause [plaintiffs] provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question." Slip op. 19.

III. Ramifications of the *Dukes* Decision

Had the Court accepted plaintiffs' theory, the ramifications on American businesses and their workers would have been disastrous. As 20 of the nation's leading companies explained in a brief supporting Walmart, plaintiffs' theory would wreak havoc by exposing companies to massive class actions even where they adopted and enforced company-wide diversity policies in any case where the plaintiffs can hire an expert to critique their system. Br. of Altria Group, Inc., Bank of America Corp., Cigna Corp., et al. as *Amici Curiae* at 26-30 ("Leading Companies Brief"). This is true for companies of all sizes. Indeed, Judge Sandra Ikuta's dissenting opinion in the Ninth Circuit explained that the lower court's certification of the class opened the door "to Title VII lawsuits targeting national and international companies, regardless of size and diversity, based on nothing more than general and conclusory allegations, a handful of anecdotes, and statistical disparities that bear little relation to the alleged discriminatory decisions." *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 652 (9th Cir. 2010) (en banc) (Ikuta, J., dissenting).

Nonetheless, some critics have claimed that the sky is falling, and that *Dukes* will make it more difficult to enforce civil rights protections. Those critics are wrong.

Indeed, *all nine Justices*—including Justice Ginsburg, a pioneer for women's rights—agreed that this class action went too far and jeopardized the due process rights of millions of employees, who would have been powerless to determine their own fate if the Court had not stepped in to protect their rights.

Justice Ginsburg's partial dissent disagreed with only one part of the majority's opinion and argued that plaintiffs should have been given another chance to try to certify a class under stricter standards. But Justice Ginsburg's opinion for the Court in *Amchem* underscores the challenges of certifying a class under those stricter standards and underscores that plaintiffs could never satisfy them. Notably, Justice Ginsburg's partial dissent did not find that the plaintiffs could meet those standards, and the portion of the *Dukes* decision which she joined makes clear that individualized issues would preclude certification. Nor did she say the sky is falling, or that the majority's approach would jeopardize civil rights. And while dissenting opinions often explicitly call for congressional action, Justice Ginsburg did not do so here. At bottom, there is little practical difference between Justice Ginsburg's position and that of the majority.

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The *Dukes* decision serves many important interests. It reins in class action abuses, protects the rights of companies of all sizes and their employees, and benefits the entire civil justice system. Theodore J. Boutrous Jr. & Theane Evangelis Kapur, Op-Ed., *A Win for Wal-Mart, and All Workers*, L.A. Times, June 28, 2011.

Corporate America has vigorously embraced programs to enhance workforce diversity. As Mike Duke, the President and CEO of Walmart, has said: "We are a stronger team when we include different perspectives and ideas at every level and across all areas of our company. We unlock the full potential of our global workforce by giving every associate the opportunity to learn, grow and advance." As early as 1992, Sam Walton, the founder of Walmart, explained that "the industry has waked up to the fact that women make great retailers. So we at Wal-Mart . . . have to do everything we possibly can to recruit and attract women." This is not an imperative unique to Walmart. "Diversity programs serve as an 'essential component of [a firm's] overall business strategy—enabling [it] to tap into diverse labor markets, compete with more innovative products and services, and market to more diverse customers.'" Leading Companies Brief at 13 (quoting Jefferson P. Marquis et al., *Managing Diversity in Corporate America* 14 (2008)). Such programs are by now ubiquitous in corporate America. "By the end of the 1990s, three out of four Fortune 500 companies had launched diversity programs." Jefferson P. Marquis et al., *Managing Diversity in Corporate America* 1 (2008). Allowing certification of the *Dukes* class to stand would only have undermined the laudable diversity efforts undertaken by so many companies.

As the Washington Post has declared, the *Dukes* decision is "sensible." *A Sensible Call on the Wal-Mart Class-Action Suit*, Wash. Post, June 20, 2011. While the Supreme Court correctly rejected the novel class action theory advanced by the plaintiffs in that case, that does not mean that appropriate class action cases cannot proceed. Rather, the Court's decision will restrain excesses, avoid unfairness, and is thus "likely to lead to some welcome developments, including smaller (although not necessarily small) and more cohesive class-action suits." *Id.* "Class actions may no longer be the blunt instruments they once were, but they can and should remain an important, more focused tool that gives workers the strength in numbers often needed to combat discrimination." *Id.* Fidelity to the rules is important because "[d]isregarding them potentially violates not only the rights of a corporation like Wal-Mart to defend itself, but the rights of those nominally represented by the class." *Wal-Mart's Class Victory...*, Wall St. J., June 21, 2011. At the end of the day, the Court confirmed with a unanimous voice that lower courts "can't bend rules and undercut constitutional rights in order to make a class certification fit." *Id.* Its "ruling will restore the integrity of the class-action legal system, but it will not deny wronged workers their day in court." *Class-Action Sanity*, Chicago Tribune, June 24, 2011.

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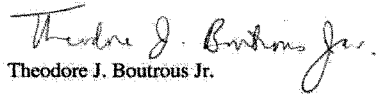
Finally, it bears noting that many historic cases vindicating civil rights have been brought by individual plaintiffs. In fact, during this Term alone, the Supreme Court expanded protections against discrimination and retaliation in three cases brought by individual employees: *Kasten v. Saint-Gobain Performance Plastics Corp.*, written by Justice Breyer, *Staub v. Proctor Hospital*, written by Justice Scalia, and *Thompson v. North American Stainless, LP*, also written by Justice Scalia.

Individual employees still can pursue their individual claims for hundreds of thousands of dollars—and attorneys' fees—and have those claims fairly resolved. *See* 42 U.S.C. § 1981a(b). In fact, they could have had those claims resolved long ago if they had not tried to transform their highly idiosyncratic individual claims into a mammoth class action.

The Supreme Court applied the law and got it right by unanimously rejecting certification of the *Dukes* class. "[T]he Court's decision upheld justice and reminded us that redressing injustice through unjust means creates as many problems as it solves." Brad Hirschfield, *Walmart Victory and Religious Values*, Wash. Post, June 23, 2011. The *Dukes* decision protects the rights of all those involved and helps ensure that class actions are used for the right reasons, under the right circumstances. This result is good for everyone.

Respectfully submitted,



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June 28, 2011

Honorable Patrick Leahy, Chair
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Honorable Charles Grassley, Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Grassley:

We write to thank the Committee for holding a hearing to address the important issues raised by recent Supreme Court decisions that make it increasingly difficult for Americans to hold powerful corporations accountable for serious misconduct, including widespread discrimination and fraud. In a trio of cases this Term, a sharply divided Supreme Court issued rulings that limit access to justice, impinge upon American ideals of equality, and threaten the integrity of our markets and workplaces.

I. *Wal-Mart v. Dukes*: Too Big to Be Sued?

In a blow to group claims of gender discrimination and class actions more generally, the Supreme Court rejected a class-action lawsuit, *Wal-Mart v. Dukes*, brought by female employees of Wal-Mart who claim they suffered discriminatory pay and promotion practices resulting from the company's alleged corporate culture of discrimination. The massive lawsuit could have involved up to 1.6 million women, with Wal-Mart, the nation's largest private employer, facing potentially billions of dollars in damages. But a divided Court blocked the class action, ruling that the women of Wal-Mart did not have enough in common to band together in a class-action suit. This has led some critics of the ruling to suggest that it sets out a blueprint for discrimination: delegate nearly unfettered discretion to lower level managers and do it on a massive scale; the bigger the company, the more varied and decentralized its job practices, the less likely it will have to face a class-action claim.

While the central question of whether the women had enough in common to press a class-based claim was the subject of sharp disagreement between the conservative majority and more liberal dissenters, the Court was unanimous in holding that the lower courts should not have allowed the case to move forward under Federal Rule of Civil Procedure 23(b)(2).[1] This Rule

[1] *Wal-Mart Stores, Inc. v. Dukes et al.*, No. 10-277 (June 20, 2011), Slip Op. at 20-27.

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allows litigants to proceed as a class when they are seeking primarily non-monetary relief, for example, an injunction against discriminatory hiring practices or a declaration from the court that a certain policy is discriminatory. Because the class action in *Wal-Mart* raised significant questions regarding backpay, all of the Justices agreed that it was not suited to Rule 23(b)(2).[2] Unfortunately, the majority, led by Justice Antonin Scalia, went further, shutting the courthouse doors to the women's class action altogether. Justice Ruth Bader Ginsburg, joined by Justices Stephen G. Breyer, Sonia Sotomayor and Elena Kagan, dissented from the majority's ruling on this point, arguing that the female employees should have been given the opportunity to try to make their case together under another part of the class-action rules (Fed. R. Civ. Pro. 23(b)(3)).

A fierce defender in the Supreme Court of the Constitution's guarantee of equal citizenship and equal treatment of the sexes, Justice Ginsburg noted in her *Wal-Mart* dissent substantial evidence that "gender bias suffused Wal-Mart's corporate culture."[3] For example, Justice Ginsburg observed that women fill 70 percent of the hourly jobs but only 33 percent of management positions and that "senior management often refer to female associates as 'little Janie Qs.'"[4] By leaving pay and promotion decisions in the hands of "a nearly all male managerial workforce" using "arbitrary and subjective criteria," the company, as Justice Ginsburg observed, arguably does little to prevent biases and stereotypes from tainting such decisions.[5] For instance, the company requires, "as a condition of promotion to management jobs, that employees be willing to relocate."[6] But as Justice Ginsburg noted in her opinion, citing a federal Labor Department report, "[a]bsent instruction otherwise, there is a risk that managers will act on the familiar assumption that women, because of their services to husband and children, are less mobile than men."[7] "The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects," Ginsburg wrote.[8] "Managers, like all humankind, may be prey to biases of which they are unaware."[9]

These are pretty powerful claims of a widespread, discriminatory corporate culture that Justice Scalia and his fellow Justices in the majority brushed aside. But however strong this evidence of discrimination may or may not be, it is important to recognize that the Supreme Court's ruling was *not* about whether Wal-Mart was guilty of discriminating against its female employees. The ruling was solely about whether the courthouse doors would remain open to the class action filed by the plaintiffs, past and present female employees of Wal-Mart, who had banded together to seek a company-wide solution to an alleged company-wide problem. While Justice Ginsburg and the three other Justices who joined her opinion would have allowed the female employees an opportunity to show that their claims could proceed under a more

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[2] *Id.*
[3] *Wal-Mart Stores, Inc. v. Dukes et al.*, No. 10-277 (June 20, 2011) (Ginsburg, J., concurring in part and dissenting in part), Slip Op. at 5.
[4] *Id.*
[5] *Id.* at 3.
[6] *Id.* at 3-4.
[7] *Id.* at 4.
[8] *Id.* at 6.
[9] *Id.*

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appropriate class-action rule, the five-Justice majority closed the courthouse door to the class altogether.

The majority's skepticism toward the Wal-Mart employees' ability to pursue their class action does not bode well for core American values of access to justice and equal employment opportunity. The Framers of the Equal Protection Clause and the very first civil rights statutes designed to enforce the guarantees of the Fourteenth Amendment recognized that they could not achieve their goal of rooting out discrimination without meaningful access to courts. Class actions are crucial for victims of discrimination who may not have the means to bring their own individual lawsuits—no doubt including many of the Wal-Mart employees who earn modest wages. The plaintiffs alleged that they and over a million-and-a-half other women of Wal-Mart experienced discrimination because of the corporate culture and practices of America's largest retailer. The experiences of these plaintiffs may be diverse in many ways, but as Justice Ginsburg explained, these female employees have in common their claims of pay and promotion discrimination. The majority failed to give a persuasive reason why these women should be prevented from banding together in court simply because Wal-Mart is a massive company and its corporate practices occur on a massive scale.

On Wall Street it might be all about "too big to fail," but with the *Wal-Mart* decision it appears that a majority on the Supreme Court believes that corporations can be too big to be held accountable.

II. *AT&T v. Concepcion*: Corporate Fraud a Few Dollars and One Consumer at a Time

The *Wal-Mart* case was merely the biggest-scale example of a disturbing trend in this year's Supreme Court Term. Justice Scalia, who wrote for the majority in *Wal-Mart*, also authored the pro-corporate, anti-consumer ruling in *AT&T v. Concepcion*. *Concepcion*, like *Wal-Mart*, will likely make it harder for Americans—consumers, injured people, employees, and those who have faced discrimination—to secure justice in the face of corporate misconduct.

In *Concepcion*, a sharply divided Supreme Court tossed out the lawsuit brought against AT&T by Vincent and Liza Concepcion on behalf of themselves and all others who were charged $30.32 in sales tax for a supposedly free mobile phone.[10] If successful, the class action could have yielded a remedy for all of AT&T's customers who allegedly had been improperly charged, and possibly served as a deterrent for the rest of corporate America. However, because Justice Scalia's majority opinion enforced an arbitration agreement containing a provision banning class actions, the Concepcions are now left with fighting just for their own $30—an amount over which it hardly makes sense to spend the time and expense of pressing a legal claim against a corporate giant like AT&T.

Asserting that state law was preempted by the Federal Arbitration Act (FAA), the Supreme Court in *Concepcion* blessed a contract provision—contained in the lengthy, legalese-heavy, fine print that many of us never read in our cell phone contracts (or employment contracts, health insurance agreements, or other contracts that consumers are effectively forced to sign these days in order to obtain goods and services)—that basically allows corporations to

[10] *AT&T Mobility LLC v. Concepcion*, No. 09-893 (April 27, 2011).

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get away with wrongdoing so long as they do it on an individually small scale, making individual claims too small to pursue. The fine-print of the Concepcions' contract with AT&T required that all disputes be resolved through arbitration, not through the court system, while banning class actions. The five-Justice majority upheld the contract provision and reversed the court of appeals' application of California law, which holds a contractual ban on class actions unconscionable—and thus unenforceable—if it serves to insulate one party to the contract from liability for wrongdoing. The four dissenting Justices would have found this general principle of state contract law applicable to the class-action arbitration ban in AT&T's cell phone contract because the FAA, which prohibits states from discriminating against arbitration contracts, specifically preserves generally applicable state contract law.[11]

Accordingly, not only does the ruling in *Concepcion* threaten access to justice, it also continues the Court's unfortunate line of precedent that attempts to re-write the Federal Arbitration Act to preempt state law. In enacting the FAA, Congress recognized that state courts are vital in protecting the rights of American consumers, and the federal law specifically preserves a critical role for state law. However, the Court's conservatives have been very aggressive in interpreting the Federal Arbitration Act to protect businesses from liability in both federal and state courts, reading a policy favoring arbitration into the Act. In *Concepcion*, the Court continued this trend, using the judicially-created pro-arbitration policy to trump the words of the Act itself, as well as the text and history of the Constitution.

The majority's opinion in *Concepcion* is blatant judicial policymaking. The Federal Arbitration Act is in no way hostile to class actions, and its text expressly preserves a critical role for state law. No plausible reading of the text and history of the Constitution's Supremacy Clause supports the Court's ruling in favor of broad preemption of state law in this case.[12]

III. *Janus Capital Group, Inc. v. First Derivative Traders*: Heads, Corporate Insiders Win, Tails, Consumers Lose

Continuing the Roberts Court's anti-access-to-justice rulings this Term, Justice Clarence Thomas wrote for a five-Justice majority to toss out a securities fraud lawsuit that sought to hold mutual fund managers liable for misleading shareholders. *Janus Capital Group v. First Derivative Traders*[13] is particularly troubling because it deals with allegedly false statements and misleading practices that work to the benefit of insider hedge-fund investors, while placing the retirement accounts and long-term investments of hard-working Americans at risk. The Court's ruling in *Janus* will make it harder for private lawsuits to succeed in holding corporate America responsible for fraud on the market.

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[11] *AT&T Mobility LLC v. Concepcion*, No. 09-893 (April 27, 2011) (Breyer, J., dissenting).
[12] *See generally* Brief of Constitutional Accountability Center as *Amicus Curiae* in Support of Respondents, available at http://theusconstitution.org/blog.history/wp-content/uploads/2010/10/ATTConcepcionBrief.pdf
[13] No. 09-525 (June 13, 2011).

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While the Court's ruling that the only entity that can be held liable in a private lawsuit under Securities and Exchange Commission (SEC) Rule 10b-5[14] for "any untrue statement of a material fact" is the entity that has ultimate control of the contents of the statement may seem unsurprising, a closer look at the case shows the ruling to be out of step with securities law and common sense.

Janus Capital Group, Inc. is the publicly-traded parent company of the investment adviser Janus Capital Management, LLC. Janus Capital Management managed a mutual fund called Janus Investment Fund, a third, technically separate, legal entity. Janus Capital Management (the investment adviser) is tasked with day-to-day operations of the Investment Fund, including drafting prospectuses that are disseminated to investors and the market. The Fund has no employees of its own.

The prospectus for one of Janus Investment Fund's mutual funds contained language giving the impression that Janus had adopted measures to curb "market-timing," a practice that allows hedge funds and other special investors to trade rapidly into and out of funds, to the detriment of long-term investors (including Americans saving for retirement). The prospectus's claims that the Fund would not be subject to market-timing made the fund more attractive to long-term investors, because market-timing dilutes the return on investment for long-term investors and can make a fund less stable.

In 2003, regulators uncovered several secret, rapid-trading deals between Janus and at least ten hedge funds, contrary to the prospectus's claims that the fund would not countenance market-timing. In 2004, Janus Capital Group admitted wrongdoing and paid $225 million to Fund investors to settle allegations made by New York Attorney General Eliot Spitzer, the SEC, and the Colorado Attorney General that Janus had failed to disclose the trading arrangements to long-term investors.[15] But Janus Capital Group's shareholders—who saw a precipitous drop in JCG's stock price after the market-timing arrangements were made public—had to turn to a private action under Securities Exchange Act Section 10(b) and SEC Rule 10b-5, which prohibit "mak[ing] any untrue statement of fact" in connection with the purchase or sale of securities.

Despite the fact that Janus Capital Group and Janus Capital Management prepared the prospectuses, Justice Thomas held for the Court that they didn't "make" the statements, so they can't be held liable.[16] Under the majority's ruling, only the business trust set up to hold the funds could be held liable, even though it has no assets of its own to compensate the plaintiffs in the lawsuit. Through careful structuring of legal business entities, Janus was thus able to evade liability for securities fraud and shirk responsibility for harm to Janus Capital Group's shareholders. Indeed, while the Fund investors, unlike JCG shareholders, were able to obtain some recovery because of the state and federal investigations, Justice Breyer's dissent raises the

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[14] 17 CFR §240.10b–5 (2010).

[15] Riva D. Atlas, *Janus Agrees to Lower Fees In $225 Million Settlement*, N.Y. TIMES, April 28, 2004, available at http://www.nytimes.com/2004/04/28/business/janus-agrees-to-lower-fees-in-225-million-settlement.html?scp=1&sq=Janus%20Agrees%20to%20Lower%20Fees%20April%2028,%202004&st=cse.

[16] *Janus Capital Group, Inc. v. First Derivative Traders*, No. 09-525 (June 13, 2011), Slip Op. at 5.

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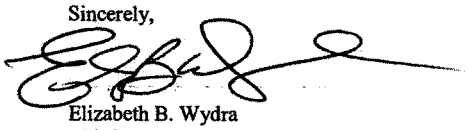
possibility that, under the majority's new rule, even the SEC might not be able to hold JCG liable for misleading statements in the Fund's prospectus.[17]

As a result of the conservative majority's ruling in *Janus*, Janus Capital Group's shareholders will likely never be able to recover for the injury caused to them by the fraudulent prospectus statements. They cannot recover from the Fund, even though the Supreme Court identifies the Fund as the "maker" of the misleading statements, because the Fund has no assets of its own and is essentially a shell corporation. After the Court's ruling in *Janus*, they cannot recover from Janus Capital Management, even though Management employees ran the Fund and wrote the prospectuses, because any misleading statement can only be attributed to the legally distinct, but ultimately hollow, Fund itself. Heads, corporate insiders win, tails, consumers lose.

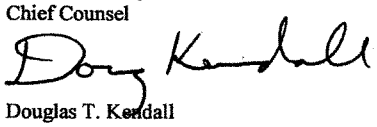
* * *

Keeping the courthouse doors open to legitimate claims of corporate misconduct is crucial to ensuring accountability and justice in our markets and workplaces. This is particularly true when individual Americans seek the protection of the courts against wealthy and powerful corporations. In the trio of rulings that are the focus of this Committee hearing—*Wal-Mart v. Dukes*, *AT&T v. Concepcion*, and *Janus Capital Group v. First Derivative Traders*—a sharply-divided Supreme Court closed the courthouse doors and took away important legal tools with which Americans have tried to hold corporations accountable for their actions. We thank the Committee for providing a forum to discuss these significant issues.

Sincerely,



Elizabeth B. Wydra
Chief Counsel



Douglas T. Kendall
President
CONSTITUTIONAL ACCOUNTABILITY CENTER

cc: Members of the Senate Judiciary Committee

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[17] Slip Op. at 10 ("[U]nder the majority's rule it seems unlikely that the SEC itself in such circumstances could exercise the authority Congress has granted it to pursue primary violators who 'make' false statements or the authority that Congress has specifically provided to prosecute aiders and abettors to securities violations . . . . because the managers, not having 'ma[d]e' the statement, would not be liable as principals and there would be no other primary violator they might have tried to 'aid' or 'abet.'")

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Testimony of
James D. Cox
Before
Committee on the Judiciary
United States Senate

June 29, 2011
on
Barriers to Justice and Accountability:
How the Supreme Court's Recent Rulings Will Affect Corporate Behavior

My name is James D. Cox. I am Brainerd Currie Professor of Law, School of Law, Duke University where my research and teaching focuses on securities and corporate law. Prior to joining the Duke faculty in 1979, I taught at Boston University, University of San Francisco, University of California, Hastings College of the Law, and Stanford University School of Law. I am currently a member of the Standing Advisory Group of the Public Company Accounting Oversight Board, the Committee of Corporate laws of the Business Law Section of the American Bar Association and, in the past, I was a member of the New York Stock Exchange Legal Advisory Committee and the National Association of Securities Dealers Legal Advisory Board. Among my publications are Securities Regulations: Cases and Materials (6th ed. Aspen 2009)(with Langevoort and Hillman), which has been adopted in approximately two-thirds of American law schools, and a multi-volume award winning treatise, The Law of Corporations (3d ed. 2010)(with Hazen).

I submit this statement and appear before the Senate Judiciary Committee on behalf of no organization and the costs incurred in connection with my appearing before this committee are

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being borne entirely by me. The views expressed in this statement and my testimony are my own and are not on behalf of any of the above-named organizations.

I. Perverse Consequences

No principle is more ingrained in western civil and criminal law than that individuals and entities that wrongfully and proximately harm another should bear the consequences of their misconduct. The principle of responsibility to others is drilled into first year law students in their standard courses of study- torts, property, criminal law and contracts. Thereafter, the link between duty and proximate harm is a linchpin for much of our daily applications of the law whether in private or public settings. However, a perusal of law reports reflects that this principle does not apply when the misconduct is securities fraud. A few cases (each influenced by *Central Bank* and *Stoneridge*) illustrate this outlier characteristic.

Corporations whose executives knowingly prepared false documents to conceal from their customer's auditors that $17 million dollars in the customer's revenues were fraudulent "roundtrip transactions" and did so to retain the customer as a client are not responsible to investors who purchased the customer's shares at prices inflated due to the fraudulent roundtrip transactions. *Stoneridge Investment Partners, LLC. v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008).

The president of a newspaper subsidiary who fraudulently inflates the number of subscribers and revenues for the subsidiary is not liable to those who purchased the

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parent company's shares at prices inflated as a consequence of the president's reporting chicanery having been incorporated into the consolidated financial statements issued by the parent. *Pugh v. Tribune Co.,* 521 F.3d 686 (7th Cir. 2008).

The outside lawyer who on 17 different occasions engineered on behalf of the client (Refco) fraudulent sham transactions for the purpose of concealing in various offering documents that the client firm had massive trading losses and was unable to repay millions of dollars due on margin was not liable as a primary participant to investors who suffered significant losses upon the ultimate bankruptcy of Refco. *Pacific Investment Management Company LLC v. Mayer Brown* LLP, 603 F.3d 144 (2010).

The CEO who falsely represents facts in a letter to the firm's auditor so as to prevent the auditor from pursuing confirmations that would have uncovered the chain of defalcations carried out by the CEO, so that the auditor, in reliance on the CEO's letter, issued an unqualified opinion, is not liable to the investors for their losses when the CEO's fraudulent acts were disclosed and the stock became worthless. *In re Nature's Sunshine Products Sec. Litig.,* [2008 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,846 (D. Utah 2008).

The above cases are leading cases in this area, but they are not aberrations. Indeed, each of the above cases is consistent with this month's Supreme Court decision, *Janus Capital Groups, Inc., v. First Derivative Traders,* 2011 WL 2297762 (S. Ct. 2011). The issue in *Janus Capital* was whether the investment advisor who prepared the prospectus issued by Janus

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Investment Fund was responsible for misstatements contained in the prospectus. The divided (5 to 4) court held that the advisor 'did not "make" any of the statements in the Janus Investment Fund prospectus.' The court supports its conclusion with the analogy to the relationship of speechwriter and a speaker where the court concludes that "[e]ven when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And, it is the speaker who takes credit – or blame – for what is ultimately said." However, the analogy fails. When a speech is delivered it is delivered by a human being; a corporation is not such a being and can only act through individuals and then can act only through the symbiosis of the entity structure or structures by which the entity operates. Thus, financial reports pass through multiple individuals, each of which provides the voice to the inanimate corporate entity. The reasoning of *Janus Capital* is that none of these actors makes a statement as the statement can only be understood to have been made by the entity, which, of course, is powerless to make any statement.

II. How Did We Get Here?

Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994), stunned the securities and litigation bar in holding that aiding and abetting liability did not exist under the securities law antifraud provision, section 10(b) and Rule 10b-5. Prior to *Central Bank* every circuit not only had recognized aiding and abetting liability, but had done so for decades! Indeed, the petition seeking Supreme Court review did so not on the broad question of whether there was aiding and abetting liability, but on the narrower question of whether there could be *reckless* aiding and abetting liability for *inaction.* In granting certiorari petition for review, the

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court asked the parties to brief the broader question, whether there was aiding and abetting liability.

Central Bank likely reflects the wisdom of the observation, "bad cases make bad law." *Central Bank* dealt with a complaint that a bond trustee was reckless in failing to provide an updated appraisal of real estate values securing the indenture. The plaintiffs alleged that, had the appraisal been undertaken earlier than it was, the indenture covenants would have prevented further issuances of the bonds, and the investors who purchased the bonds would not have suffered the loss that ultimately occurred when the commercial venture failed. *Central Bank* was therefore a case where the alleged "assistance" to the primary violator was through *inaction* not affirmative steps of assistance. Inaction aiding and abetting cases were always problematic and more so when the inaction was alleged to be reckless. *See e.g.,* David Ruder, Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, In Pari Delicto, Indemnification, and Contribution, 120 U. Pa. L. Rev. 597 (1972).

As decided, *Central Bank,* even though rejecting aiding and abetting, nonetheless appeared relatively open ended stating that the ultimate prohibition of the antifraud provision reached "the making of a material misstatement (or omission) or the commission of a manipulative act." One passage of *Central Bank* suggests some breadth to this inquiry by observing:

> The absence of §10(b) aiding and abetting does not mean that secondary actors in the securities markets are always free from liability under the securities acts. Any person or

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> entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable.

However, both *Stoneridge* and *Janus* relied on a passage of *Central Bank* where the court reasoned that a critical link to defining who is a primary participant under the antifraud provision is through the causation requirement of reliance, i.e., a central element of an antifraud case is an allegation of reliance on the statement made by the defendant. As applied in *Stoneridge* and *Janus*, as well as the other cases set forth in the cases summarized above, the major constraint for determining whether a party "makes" a false statement is not whether the statement is one relied on by the investor but rather whether the investor has relied on the *defendant as the maker* of that statement. If the false statement is conceived and drafted by the defendant, but does not bear the defendant's name or otherwise identify the defendant cleanly *as its maker*, the defendant is not a primary participant and, hence, has no responsibility to the defrauded investor.

III. What are the Consequences of *Stoneridge* and *Janus*?

In the wake of *Stoneridge* and *Janus,* executives and their counselors who cook the books and defraud investors avoid personal responsibility so long as the product of their chicanery does not bear their name (even though it bears their footprints). Vendors, such as those in *Stoneridge,* who cooperate in their client's fraud so as to retain the client's business escape responsibility for the losses their complicity caused investors. If they seek the advice of their counsel or others whether to participate in a fraudulent roundtrip scheme, such as occurred in *Stoneridge*, their

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advisors can correctly advise that the consequences of liability under the securities laws are nonexistent so long as their names are not directly linked to the falsely inflated revenues. This hardly adds to the deterrent effects of the antifraud provision. Similarly, the CEO or CFO who needs to "meet the street's expectations" or wishes to pump up her bonus or option's value has much less concern for retribution via private suits if the means to this end is cooking the books. Stated simply, but correctly, *Stoneridge* and *Janus* severely reduce the deterrent effects of the antifraud provision.

IV. Further Perverse Effects

By providing a pass to those who engineer and carryout the fraud, *Stoneridge* and *Janus Capital* create additional public policy concerns. First, there is the so-called "circularity problem" that is more prevalent when the defendant company enjoys a large institutional ownership. Circularity refers to the fear that when securities fraud settlements are paid entirely by the company itself that there is no net gain to the class members since the funds they receive in the settlement flows from the very company in which the institutions (and other investors) continue to maintain an ownership interest. Circularity does not arise, however, when funds flow from individuals, e.g., officers, directors, counselors, auditors, and other entities. However, to the extent (and it is substantial as we have seen) that *Stoneridge* and *Janus Capital* each make personal responsibility unavailable, this creates the concerns that securities class actions entail circularity and, therefore, are not optimal because these decisions enhance the risk of circularity by removing individuals from the scope of liability. A second concern arises from contribution claims. The corporation issuing the false report is the most entity most likely to be held liable

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under *Stoneridge* and *Janus Capital*. However, its ability to obtain contribution from the wrongful actors is compromised by the narrow definition of primary participant embraced by *Stoneridge* and *Janus Capital*. The party more likely to be aggrieved by this lack of contribution claim is the firm's accountants who cannot obtain contribution through the antifraud provision if the senior management is shielded by *Stoneridge* and *Janus Capital*. Again, we see that the unduly and unreasonable definition of primary participants leads to unacceptable results, namely *Stoneridge* and *Janus Capital* do not permit responsibility to be cleanly and logically placed upon those who are responsible for defrauding investors. The shield thus provided substantially weakens, if not totally eviscerates, the deterrent effect of the antifraud provision.

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STATEMENT OF BETTY DUKES, LEAD PLAINTIFF IN *WAL-MART, INC. V. DUKES*, BEFORE THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

BARRIERS TO JUSTICE: HOW THE SUPREME COURT'S RECENT RULINGS WILL AFFECT CORPORATE BEHAVIOR

JUNE 29, 2011

On June 20th, the United States Supreme Court ruled that the class action against Wal-Mart Stores, Inc., that I have led for the past decade, in which we allege widespread sex discrimination in pay and promotions, cannot go forward as a single case. We have an overwhelming amount of evidence that Wal-Mart's policy of letting its managers use their personal biases, rather than merit, to make pay and promotion decisions was the same in each store. But the Supreme Court said our claims were not sufficiently similar to be tried together. In the short run, this decision will force us to break up our case into pieces, bringing smaller class cases where we can do so while leaving tens of thousands of women to pursue their claims individually. Most of the women who were part of this class cannot afford their own lawyer or are just hesitant to sue the biggest company in America. If they don't fit within the smaller cases we plan to bring, then these women will never have their day in court. And this decision will also mean that, while this case is already 10 years old, we may have to wait several more years just to prove our case, much less to get the relief we deserve. Meanwhile, Wal-Mart can continue to discriminate against its women workers without being accountable to any court in this country.

I have been a Wal-Mart employee for over 17 years. I started working for Wal-Mart as a part-time cashier in the Pittsburg, California store. I came to Wal-Mart with nearly 25 years of retail experience. At Wal-Mart, I felt like there would be opportunities for me to advance upwardly in the company, especially in the area of management. From the very start, I told my store manager that I was interested in advancement and asked for additional training. My first obstacle that I had to overcome was a 90 day probationary period for new hires. My store manager explained to me that I was not eligible for any advancement until that time period had expired. But I did notice that that requirement did not hold back some of the male employees from getting a promotion.

I also noticed that as time went by, my store rarely posted any in-store opportunities for promotions. When management did post opportunities before this lawsuit was filed, I only saw postings for hourly positions, never for management positions. Yet, I was keenly aware how some of the men in my store were moving upwardly in various positions that would lead to management. In most cases, when management went through the motion of putting a signup sheet for hourly positions on the wall, by the time the sheet went up those positions normally had already been given away.

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After 17 years of working in the same place, I have encountered and seen many disparities and many ways in which women have been treated differently than men. I am aware of men who were hired in my store with little to no training who were making more per hour than women who had much more seniority and were fully trained to do the same job. In fact, after the lawsuit began, I found out that two men who had been hired long after I was were paid more as Greeters than I was. Wal-Mart allowed its managers broad discretion in making pay raise and promotion decisions based on their own personal biases.

In fact, the only promotion I ever received at Wal-Mart was to a position that hadn't been posted. After speaking frequently of my interest in advancement, I was promoted in June 1997 to the position of Customer Service Manager, an hourly, non-managerial job. Two years later, after suffering from discipline for actions which men were free to take without punishment, I was demoted to a cashier position and my pay was cut. In my nearly 25 years of working in retail before coming to Wal-Mart, I had never been disciplined even once. I remained a cashier for several years until I was reassigned to the position of Greeter.

Notwithstanding the many challenges I have faced personally at Wal-Mart, I am determined not to let Wal-Mart force me out of my job. As a result, I still work at a store in Pittsburg, California, where I have been my entire Wal-Mart career. I remain a Greeter today.

Because I was aware that the disparities in treatment that I saw affected many more women than just me, I decided to bring this lawsuit. I filed this class action lawsuit in June 2001. Through the lawsuit, we have found a lot of evidence that Wal-Mart managers and executives have viewed women as less valuable workers than men. Managers at stores around the country, for example, have openly explained they were paying men more than women because they believe men have families to support while women do not. Managers have also justified their preference for selecting men for management jobs by telling women that men make better managers in retail work and that women should stay home with their families.

In fact, when another of the plaintiffs who worked at a different store found out a male co-worker in the same position was making $10,000 a year more, she was told to bring in her household budget so her manager could decide

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whether she deserved to receive as much pay as the co-worker. Even then her salary remained far below his.

The fact gathering in this case also uncovered evidence that top executives said and did things that showed they held similar views of women. The executive who headed the SAMS Club division, that provides discount, bulk merchandise, repeatedly referred to the women employees as Janie Qs and girls. The program that all employees who become managers must complete tells them that the reason there have been so few women in top management is because men are more aggressive in seeking advancement. And the head of Wal-Mart's human resources department wrote to these top executives for years warning them that there were fewer women in management than expected, even saying one year that Wal-Mart was behind the rest of the world in its treatment of women.

I wasn't surprised when my attorneys shared with me that Wal-Mart's workforce data showed men were promoted into management much faster than women and that women were paid less than men with the same qualifications who were doing the same work at the same stores. As of 2004, when the court allowed the case to go forward as a class, this data showed that about 65% of all hourly employees in the stores were women but only 33% of the managers, and only 14% of the store managers, were women. It has taken women nearly twice as long to get promoted into management than men. This data also shows that women working at Wal-Mart stores were paid less than men in every one of the 41 regions in this country and that the pay gap has widened over time in favor of men.

Notwithstanding this evidence and mountains more like it, the Supreme Court ruled that our claims, challenging sex discrimination in pay and promotions, can't go to trial together. This case was brought to stop widespread discrimination at Wal-Mart, to change the company's culture, and to get paid the wages we lost because we were treated differently than men. The Supreme Court's decision will make it much harder and more expensive for us to achieve any of those goals. Instead of challenging these practices in a single case, we're going to have to bring multiple cases challenging the same practices in courts around the country. It's going to be much more expensive for us to try multiple cases, instead of one. And we won't be able to try our case in one place, before one court or jury and have a single determination made whether Wal-Mart has been discriminating against its women employees. Many women will have to file cases on their

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own, and there are tens of thousands or hundreds of thousands more who will never have their day in court. These women will never have an opportunity to determine whether they were subjected to discrimination during their employment with Wal-Mart.

I also believe our civil rights are only as valuable as the means exist to protect them. By making it much harder to bring civil rights class actions, I believe the Supreme Court has weakened our rights to be protected against sex discrimination altogether.

Justice Ginsburg was right that this decision has stopped this case, and others like it, at the starting gate. We just want our chance to prove our case and to bring together the claims of the women who want to challenge the same discriminatory practices. I certainly understood that when Congress passed the laws that ban job discrimination, it expected that those laws could, and often would, be enforced by groups of workers who claim to have been subject to the same kind of discrimination. I hope this Committee will look into whether legislation is needed to put the law back to where it permitted class actions that could challenge company-wide discrimination.

We will press on with our case against Wal-Mart for ourselves and for the women who have worked there and continue to work there, despite the roadblocks that the Supreme Court has erected. Our fight is not over. The Supreme Court did not rule on the merits of our case. But, there is no doubt in my mind, that the Supreme Court has made it much easier for companies like Wal-Mart to avoid accountability for their unlawful and discriminatory behavior.

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Daniel J. Popeo: What 'pro business' Supreme Court?

By: **Daniel J. Popeo** | *Examiner Contributor* | 05/20/10 3:00 AM

Over the past several months, some politicians and activists have intensified their campaign to label the U.S. Supreme Court under Chief Justice Roberts' leadership as reflexively "pro-business."

A close examination of these arguments reveals the claim to be little more than an inside-the-Beltway urban legend. But even more troubling than the misleading facts being presented is the broader, underlying message activists want to implant in the public's mind. They want Americans to see the judiciary as a political body whose business verdicts are biased and harmful to our well-being.

The notion of a pro-business Supreme Court has been a favorite "populist" refrain of politicians for some time. This spring, activist groups and sympathetic academics have produced "reports" on the Supreme Court and its business cases during Chief Justice Roberts' tenure.

The assertions of these studies have in turn been parroted in news stories, op-eds, and cable news shows. And on the day President Obama announced his nominee to replace Justice Stevens, three activist organizations sponsored a full page advocacy ad in *The Washington Post* accusing the Court of being a corporate subsidiary.

Court critics have especially focused their ire on the 2009 *Citizens United* campaign finance ruling, where five justices recognized the First Amendment rights of companies and other state-created entities.

But the labeling campaign has gone far beyond *Citizens United*, with activists citing decisions involving punitive damages, environmental and health regulations, and even procedural rules affecting civil litigation. The criticism of certain Court decisions solely on the basis that the business litigant prevailed represents one-dimensional advocacy in its most disingenuous form.

The Court's recent rulings on punitive damages, for instance, rely on a long line of cases which respect all civil litigation defendants' due process rights to be free from arbitrary and excessive punishment.

Instead of acknowledging that justices such as Breyer and Souter either authored or joined majority opinions in damages cases involving tobacco and oil defendants, activists instead dwell on these cases' factual underpinnings to demonize the outcomes.

Activists have also lambasted the Court for rulings that in effect limit litigation against FDA-approved medical products, but omit the detail that federal law explicitly permits such "federal preemption."

If the justices are in fact working on behalf of U.S. businesses, they probably should be fired: A more complete look at the Supreme Court's rulings in commercial cases reveals numerous instances where business interests lost, and lost big.

In its current term, for example, the Court unanimously held for the plaintiffs in a securities fraud class action case; unanimously upheld shareholder suits against investment advisors; and permitted federal class action lawsuits in a state which prohibits such suits.

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Last year, the justices rejected the preemption arguments of drug makers and allowed state tort suits against FDA-approved drugs. In 2008, the Court upheld state fraud suits against cigarette manufacturers. These are but a few examples.

But let's assume for argument's sake that one can fairly label a judicial decision "pro-business." Is there something inherently wrong with that? Those who have been accusing the Court of a corporate bias certainly think so.

Activists and their allies subtly imply that when businesses win in the courts, Americans lose. They have it exactly backwards. A business is created, run, and staffed by people, and it offers useful and needed products and services to the public.

Real people thus suffer when businesses are denied constitutional rights, or are threatened by abusive prosecutors or shackled with capricious regulations and lawsuits. Those enterprises will struggle to create new jobs, generate positive returns for shareholders, contribute to pension plans, and provide consumers with new innovations. Isn't that the opposite of what hard-working Americans need?

What businesses do seek from the judiciary is a fair hearing, protection of their rights, and a measure of predictability in the law. As Justice Breyer noted in an opinion this year involving a critical jurisdictional matter which had widely split the lower courts, "Predictability is valuable to corporations making business and investment decisions."

In other business-related cases, Supreme Court justices from across the ideological spectrum have embraced and noted this need for clarity and consistency.

The ultimate goal of this smear campaign seems to be convincing Americans that the judiciary is just another political body with an ideological ax to grind. Over the next month, the examination of a Supreme Court nominee and the Court's release of nearly 40 opinions will occur simultaneously.

Special interest legal activists will conflate the two and lecture us on how there's really no difference between the political and judicial processes. They'll label disfavored Court rulings as further proof of a pro-business agenda and demand that the nominee reject such opinions now in her hearings and on the bench if she's confirmed.

Hopefully, the public will view this charade skeptically and keep the basic principles taught in Civics 101, not to mention the U.S. Constitution, in mind – legislatures make the laws, and the judiciary interprets them.

Examiner contributor Daniel J. Popeo is chairman and general counsel of the Washington Legal Foundation.

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PREPARED CLOSING STATEMENT OF RANKING MEMBER CHARLES E. GRASSLEY FOR THE SENATE JUDICIARY COMMITTEE HEARING – "BARRIERS TO JUSTICE AND ACCOUNTABILITY: HOW THE SUPREME COURT'S RECENT RULINGS WILL AFFECT CORPORATE BEHAVIOR."

JUNE 29, 2011

As I said in my opening statement, I had concerns about whether this hearing was going to be objective and fair, in light of the less than objective title.

Unfortunately, my concerns were well-founded.

According to one member of the majority, the decisions of the United States Supreme Court could be summed up in two words: "corporation wins."

I strongly disagree with the claim that the current Supreme Court is biased in favor of businesses. The substantive analysis simply doesn't support the claim.

The attacks on the Supreme Court, and in particular, the Republican appointed members, are based on vague generalities and partisan talking points.

By sharp contrast, my conclusion is supported by analysis, not rhetoric.

In particular, my conclusion is supported by the significant analysis done by Andrew Pincus, who actually reviewed the Court's decisions for the last year and by Justice Stephen Breyer's analysis from October of last year.

Mr. Pincus is a well-respected member of the Supreme Court bar and has argued 22 cases before the Court. He was the General Counsel for the Department of Commerce during the Clinton administration. His testimony analyzed the Court's decisions from the last term in detail.

As Mr. Pincus explained in his written testimony:

> The logical way to assess the impact upon corporate behavior of the Court's recent decisions is to examine the outcomes in *all* of the cases involving private plaintiffs seeking damages from businesses. Business parties lost just as many times as they won such cases. Indeed, in the cases involving substantive interpretations of employment law, business parties lost *every* case decided by the Court.

Consequently, he concluded that there "simply is no basis for concluding that the Court's decisions, taken as a whole, favored business defendants over plaintiffs seeking damages."

I agree.

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In total, for the Supreme Court's October 2010 Term, plaintiffs prevailed in 9 cases and business parties prevailed in 9 cases.

More specifically, in his written testimony, Mr. Pincus identified all 18 cases by name and briefly summarized each one. In sum, employees prevailed in all three of the labor cases decided by the Supreme Court this past Term. Plaintiffs prevailed in two of the three securities cases. The results in tort preemption cases were also divided, with plaintiffs winning one and defendants winning two. The results in cases involving class action rules were evenly divided, as were the remaining business cases.

Mr. Pincus went even further with his analysis. He pointed out that the Supreme Court's rulings in disputes between business and government divided almost evenly, with four rulings for government and five for business parties. Again, he identified each case by name and provided a brief description of the subject matter of the dispute.

Robert Alt's testimony also supports my conclusion that the Supreme Court is not biased in favor of businesses.

In addition to actually examining some of the Court's decisions, Mr. Alt, who is a senior fellow at The Heritage Foundation, points out that "[g]iven the small and discretionary docket that the Supreme Court hears, there is no empirical reason to believe that the winners and losers as between any set of opposing interest groups should be evenly distributed."

Mr. Alt also made the following relevant observation about the inconsistencies with the attacks on the Supreme Court: "In addition to cherry-picking cases, critics of the Roberts Court have also assiduously avoid[ ] revealing the fact that liberal members of the Court have been the authors of some of the very cases of which they complain, and of some of the more pro-business cases that they conveniently omit."

Moreover, the majority completely ignores Justice Breyer's analysis from last year.

Now lest we forget, Justice Breyer has been on the Supreme Court since 1994, when President Clinton appointed him. And he was a former counsel to the Senate Judiciary Committee, advising the late Senator Ted Kennedy.

During an interview in October of last year, Justice Breyer rejected the accusation that the Supreme Court has a pro-business slant and said the Court doesn't rule in favor of companies any more frequently than it has historically.

"I looked back," Breyer said "I couldn't find a tremendous difference in the percentage of cases."

Breyer also said that partisan politics doesn't influence the Court's actions, even in cases with political ramifications, including the *Citizens United* decision, and the *Bush v. Gore* ruling.

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I too disagree with the claim that the Supreme Court is biased in favor of businesses.

So, what's the majority's substantive response to the actual analysis of the Supreme Court's decisions?

There is none.

I also have to disagree with another point made at the hearing.

Near the conclusion of the hearing, a member of the majority stated that "every American who hears the word 'jury' and has the phrase 'runaway jury' jump into their mind, every American who hears the word 'lawsuit' and has the phrase 'frivolous lawsuit' jump into their mind has been the successful subject of a long campaign of indoctrination [sponsored by corporations]... ."

I strongly disagree.

Individuals with legitimate claims should have a chance to make them. But not all individuals have legitimate claims.

Frivolous lawsuits are a very real problem. The billions of dollars wasted on frivolous lawsuits cost Americans jobs and severely damage our economy. The precise cost of America's lawsuit culture is staggering. The tort system's direct costs in 2002 were $233 billion, the equivalent of a 5% tax on wages. Today that number is even higher; the annual direct cost of American tort litigation exceeds $250 billion.

Indeed, frivolous lawsuits are helping to prevent the "innovation" that the Obama Administration is touting as the key to "job creation" and economic recovery.

For example, firms with recent initial public offerings are most at risk to be sued. In fact, companies are most likely to be sued in their second year of public trading. In other words, the very corporations most likely to be the source of significant new job creation are at the highest risk of being sued just when they are seeking expansion capital through public offerings.

In particular, frivolous lawsuits hurt small businesses. Small businesses rank the cost and availability of liability insurance as second only to the cost of health care as their top concerns, and both problems are fueled by frivolous lawsuits.

The front-line defense against frivolous lawsuits and the misuse of our legal system is Rule 11 of the Federal Rules of Civil Procedure. This rule is intended to deter frivolous lawsuits by sanctioning the offending party. The power of Rule 11 was diluted in 1993. This weakening is unacceptable to those of us who want to preserve courts as neutral forums for dispute resolution.

That is why I introduced the Lawsuit Abuse Reduction Act of 2011 ("LARA"), which amends Rule 11 to restore its strength and ability to truly deter frivolous lawsuits. Representative Lamar

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Smith, the Chairman of the House Judiciary Committee, introduced an identical bill in the House of Representatives.

Based on the majority's statements at the hearing, it would seem that in their view, businesses should lose every single case that they have before the Supreme Court and perhaps every court, regardless of what the law provides.

I disagree with this view.

What businesses, just like all litigants, deserve from the judiciary and from Congress is a fair hearing, protection of their rights, and a measure of predictability in the law. Nothing more and nothing less.

As demonstrated by the substantive analysis set forth in Mr. Pincus' and Mr. Alt's testimony and by Justice Breyer's analysis, there is no basis for the accusation that the Supreme Court is biased in favor of businesses.

I can only hope that these accusations will end. They are not helping anyone, and they may be hurting our legal system.

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**TESTIMONY OF MARCIA D. GREENBERGER,
CO-PRESIDENT, NATIONAL WOMEN'S LAW CENTER**

BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE

HEARING: BARRIERS TO JUSTICE AND ACCOUNTABILITY: HOW THE SUPREME COURT'S RECENT RULINGS WILL AFFECT CORPORATE BEHAVIOR

JUNE 29, 2011

The Supreme Court's Decision in *Wal-Mart Stores, Inc. v. Dukes*: No Justice for Women, No Accountability for Corporate Defendants

My name is Marcia Greenberger, and I am Co-President of the National Women's Law Center, which since 1972 has been involved in virtually every effort to secure and defend women's rights. I appreciate the opportunity to submit this written testimony on "Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior."

My testimony will focus on the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, which was issued just last Monday. I am also attaching an *amicus* brief submitted in *Wal-Mart* by the National Women's Law Center and the American Civil Liberties Union,[1] which sets out the importance of class actions in the employment discrimination context and illuminates how the decision could cause great injury for women in the workplace.

I. The Supreme Court In *Wal-Mart v. Dukes* Created New Hurdles for Plaintiffs Challenging Discrimination As A Class.

Last week, in *Wal-Mart Stores, Inc. v. Dukes*, in a 5-4 majority opinion on the central point in the case written by Justice Scalia, the Supreme Court created a series of new hurdles for women and other workers to overcome in challenging discrimination, and new incentives for employers to evade their responsibility to maintain a workplace free from discrimination.

In seeking class certification, the women at Wal-Mart described a corporate culture and structure that resulted in company-wide sex discrimination in pay and promotions and an overall employment record that was appalling. As described in Justice Ginsburg's dissent,[2] nationwide, women comprised 70 percent of Wal-Mart's hourly workers, but only 33 percent of managers.[3] And the higher up and better paid the management jobs, the fewer the women.[4] Women were paid less in every region, and the salary gap grew over time – even for men and women hired at

[1] Brief for American Civil Liberties Union and National Women's Law Center et al. as *Amici Curiae* in *Wal-Mart Stores, Inc. v. Dukes*, *available at* http://www.nwlc.org/sites/default/files/pdfs/2011_2_28_aclu_nwlc_wal-mart_amicus_brief_to_printer.pdf (last visited June 28, 2011).
[2] *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, slip op. at 4 (U.S. June 2011) (Ginsburg, J., concurring in part and dissenting in part) (hereinafter "Slip op.").
[3] *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 146 (N.D. Cal. 2004).
[4] *Id.* at 155.

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the same time for the same job.[5] Yet women employees overall had better job performance reviews and greater seniority than their male counterparts.[6]

Despite these dismal statistics and evidence of an unwelcoming and discriminatory corporate culture, Wal-Mart gave local managers wide discretion to set pay and make promotions without checks and balances from the central office. As Justice Ginsburg stated in her dissent, promotions were based on a "tap on the shoulder" process,[7] which allowed managers to favor employees "with characteristics similar to their own."[8]

The evidence in the case included statements that provided a window into the attitudes of many managers. Examples include statements that certain desirable positions were "a man's job;"[9] that men are breadwinners, but women work only "for the sake of working;"[10] and that women's family responsibilities interfere with work, so they "should be at home with a bun in the oven."[11]

The women plaintiffs argued that Wal-Mart's discriminatory culture, plus minimal monitoring of managers' subjective decision-making, inevitably led to widespread gender disparities in pay and promotions that they should be able to challenge in a nationwide class. This wasn't a novel theory — years of legal precedent have established that employees can band together and bring a class action to challenge a practice of subjective decisionmaking that leads to discriminatory results.[12] But, last week, the five-Justice majority held that the women of Wal-Mart cannot bring a nationwide class action to challenge the discriminatory, subjective practices they described.

The *Wal*-Mart decision changed the law. Now women and others facing discrimination have a major new hurdle to overcome to show "commonality" — that there are "questions of law or fact common to the class" — as required under Rule 23(a)(2) of the Federal Rules of Civil Procedure. Despite the wide range of statistical and anecdotal evidence of discrimination presented, the five-Justice majority held that the required proof was "entirely absent" in this case because "Wal-Mart's announced policy forbids sex discrimination." *Id.* But it is extremely difficult to imagine that any company would announce a policy that did otherwise. Justice Scalia went on to assert, without benefit of any citations or authority, that as long as a company has a boilerplate policy of non-discrimination, "left to their own devices most managers in any corporation – and surely most managers in a corporation that forbids sex discrimination – would select sex-neutral performance-based criteria for hiring and promotion that produce no actionable disparity at all."[13] The experiences of all too many women over all too many years tell a very different story.

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[5] *Id.*
[6] Joint Appendix to the Record in the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 483a-85a (hereafter "JA")
[7] 222 F.R.D. at 148
[8] Slip op. at 7 (Ginsburg, J., concurring in part and dissenting in part).
[9] JA 839-41a, 1110a.
[10] JA 1313-14a.
[11] JA 845a.
[12] *See, e.g., Brown v. Nucor Corp.*, 576 F.3d 149 (9th Cir. 2009); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999).
[13] Slip op. at 15.

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The Court's decision also leaves it unclear how the prerequisites for a class action can be satisfied in future cases. The Court rejected the statistical analyses of regional and national pay disparities between men and women as insufficient to "establish the uniform, store-by-store disparity" that the majority considered necessary to establish commonality for the class.[14] The anecdotal evidence proffered by the women of Wal-Mart was also not sufficient for the Court. Although the plaintiffs submitted about 120 affidavits, the Court discounted them because they made up only "about 1 for every 12,500 class members" and they only came from a small percentage of Wal-Mart's 3,400 stores.[15] In its decision, the majority cited an earlier case, *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977), in which there was about one anecdote for every eight class members. But, as Justice Ginsburg noted in her dissent, since *Teamsters* "instructs that statistical evidence alone may suffice, . . . that decision can hardly be said to establish a numerical floor before anecdotal evidence can be taken into account."[16] Moreover, Justice Ginsburg wrote that the plaintiffs' evidence, including the anecdotes, "suggests that gender bias suffused Wal-Mart's company culture."[17]

Finally, under another section of the opinion that was joined by all the Justices, it will be harder for employees to seek backpay in class actions.[18] They will have to proceed under Rule 23(b)(3) of the Federal Rules of Civil Procedure, which requires individual notice to prospective class members that gives them the chance to "opt out" of the class – a costly procedure.

II. The Increased Burden For Class Certification Will Affect Employees' Ability to Challenge Discrimination In The Workplace.

The *Wal-Mart* case has dramatically changed the landscape for employees who face discrimination on the job by undermining the class action enforcement mechanism. Class actions were designed to change system-wide discriminatory employment practices that can affect large numbers of people. And, in cases where, as here, large numbers of plaintiffs are challenging systemic discrimination, it is more efficient, and thus less expensive for individual plaintiffs in the class, to bring the case as a class action rather than in numerous separate lawsuits where both the legal pleadings and briefings and the discovery of evidence may be duplicative. Indeed, the scope and efficiency of the class action mechanism can overcome the many practical barriers that prevent individuals from bringing claims on their own, including fear of retaliation by an employer, the high costs of litigation compared to a low dollar value for one individual's claims (especially if the individual is a low-wage worker), lack of knowledge of how to find a lawyer, or lack of awareness that an individual may have suffered discrimination — especially in the context of pay discrimination, when employer rules often prohibit the discussion of wages.[19]

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[14] *Id.* at 16.
[15] *Id.* at 18.
[16] Slip op. at 5, n. 4 (Ginsburg, J., concurring in part and dissenting in part).
[17] *Id.* at 5.
[18] Slip op. at 20-27.
[19] *See, e.g.,* H. R. Rep. 110-237, at 7 (2007) (House Report on the Lilly Ledbetter Fair Pay Act of 2007); Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law,* 25 Berkeley J. Emp. & Labor L. 167, 168, 171 (2004).

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The *Wal-Mart* majority suggested that employment discrimination class actions are a frequent occurrence that imposes a significant burden on corporate employers. But in fact, class actions make up only a small fraction of employment discrimination lawsuits. One study found that, between 1987 and 2003, class certification was requested in only 3% of employment discrimination cases.[20] Another study concluded that, in 2010, employment discrimination cases made up only 1.9% of class action cases overall.[21] Between 2008 and 2010, in employment discrimination cases where certification was requested, courts certified only about 25%.[22] These figures demonstrate that the concern that employment discrimination class actions overburden employers is significantly overblown. And, after the Supreme Court's decision in *Wal-Mart*, it is likely that even fewer employment discrimination class actions will be certified.

The increased difficulty of class certification means that many employees facing discrimination will be forced to proceed on their own. But, unfortunately, individual employment discrimination plaintiffs have a difficult time securing legal representation, especially if their claims are low in value. A 2003 estimate found that "for a member of the private bar to accept a civil case against an employer, there must be provable economic damages (not including punitive damages) of at least $75,000"[23] — and that figure has surely increased with inflation. In fact, a study of five significant employment class actions concluded that individual employees would have experienced great difficulty securing legal representation given the small values of their claims and the cost of legal fees.[24] Pay discrimination claims of low-income workers, such as many of the women in the *Wal-Mart* case, are typically very small in value.

Because it is challenging to secure legal representation, many employment discrimination plaintiffs proceed pro se, representing themselves. One study found that one in five employment discrimination plaintiffs act pro se throughout the lawsuit, and another 8% of plaintiffs initially file pro se and obtain counsel later in the case.[25] Unfortunately, plaintiffs acting pro se generally fare poorly in court – compared to represented plaintiffs, "they are almost three times more likely to have their cases dismissed, are less likely to gain early settlement, and are twice as likely to lose on summary judgment."[26]

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[20] Laura Beth Nielsen, Robert L. Nelson, Ryon Lancaster & Nicholas Pedriana, American Bar Foundation, *Contesting Workplace Discrimination in Court: Characteristics and Outcomes of Federal Employment Discrimination Litigation 1987-2003* 3 (2008), *available at* http://www.americanbarfoundation.org/uploads/cms/documents/nielsen_abf_edl_report_08_final.pdf (last visited June 28, 2011).

[21] Brief for National Employment Lawyers Association et al. as *Amici Curiae* in *Wal-Mart Stores, Inc. v. Dukes* 32, *available at* http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/ 10-277_respondentamcunela-ejs-andlas-elc.authcheckdam.pdf (last visited June 28, 2011).

[22] *Id.*

[23] Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. R. 105, 106-107 (2003) (estimating the $75,000 figure in 2003, based on a 1995 study that concluded private attorneys would accept cases only if there were provable economic damages of at least $60,000).

[24] National Workrights Institute, *Class Actions – A Look at the Record* 7-8, *available at* http://workrights.us/wp-content/uploads/2011/02/Class-Action-PDF1.pdf (last visited June 28, 2011).

[25] Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. Empirical Legal Stud. 175, 188 (2010).

[26] *Id.*

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Finally, to understand *Wal-Mart*'s full effect on other employees — and women in particular — it is important to view the decision in the context of recent economic vicissitudes. The recession and the ongoing recovery only underscore the need for robust protections against unlawful employment practices for women in the workplace. The recession hurt women and men across the nation. Although women, especially those holding public sector jobs, initially were more likely to remain employed, women have not fared as well as men in the subsequent recovery.[27] For example, during the recovery, the unemployment rate for women actually increased from 7.7% to 8.0%, while for men it dropped from 9.8% to 8.9%.[28] The unemployment rate as of May 2011 continued to be particularly acute for African-American women (13.4%, increasing from 11.8% in July 2009) and single mothers (12.7%, increasing from 12.6%).[29] Women lost nearly 3 out of every 10 jobs in the recession, but have gained fewer than 2 in every 10 jobs since the recovery began to pick back up in 2010.[30] In the public sector, job loss for women has continued throughout the recovery, with women losing 68.8% of public sector jobs, although they make up 57% of the public workforce.[31] And, although the private sector has experienced growth during the recovery, women gained only 14% of the 1.267 million new jobs in the private sector. The impact of the recession and recovery on women's jobs has a real effect on families, especially given the fact that, today, about 4 in 10 mothers are the breadwinner for their families.[32]

Given the still-bleak economic picture and the effect on women's jobs, it is essential that women continue to have recourse to tools that enable them to fight against unlawful employment practices. Title VII and other civil rights laws guarantee that women in the workplace receive equal treatment – including equal pay – and that women who are currently looking for work have equal access to employment opportunities. In tough economic times, when every job and every dollar count, loss of wages due to pay discrimination, for example, has a particularly serious impact on women and their families. And, when women are unable to find work due to employer discrimination, the economic effect on their families is considerable. In this time of recession, therefore, it is essential that women, especially low-income women, do not lose the ability to enforce their workplace rights in the courts.

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[27] *See* National Women's Law Center, *Modest Recovery Largely Leaves Women Behind* (June 2011), *available at* http://www.nwlc.org/resource/modest-recovery-largely-leaves-women-behind (last visited June 28, 2011).

[28] NWLC calculations from U.S. Dep't of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, Table A-1: Employment status of the civilian population by sex and age, seasonally adjusted, *available at* http://bls.gov/ces/cesbtabs.htm (last visited June 28, 2011).

[29] NWLC calculations from *id.* at Table A-1: Employment status of the civilian population by sex and age, seasonally adjusted, Table A-3: Employment status of the Hispanic or Latino population by sex and age, not seasonally adjusted, and Table A-10: Selected Unemployment Indicators, seasonally adjusted.

[30] NWLC calculations from U.S. Dep't of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Employment Statistics Survey, Table B-5: Employment of women on nonfarm payrolls by industry sector, seasonally adjusted, *available at* http://bls.gov/ces/cesbtabs.htm (last visited June 28, 2011).

[31] NWLC calculations from *id.*

[32] Heather Boushey, *The New Breadwinners*, *in* THE SHRIVER REPORT: A WOMEN'S NATION CHANGES EVERYTHING, 32, 35 (2009) (reporting that in 2008, 4 out 10 mothers were breadwinners, compared with 1 out of 10 in 1967), *available at* http://www.americanprogress.org/issues/2009/10/womans_nation.html/#breadwinners.

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III. The *Wal-Mart* Decision Can Be Expected To Have A Significant Impact Upon The Federal Court System.

The immediate impact of the *Wal-Mart* decision is that more individuals will be forced to file their own lawsuits, rather than join with other plaintiffs. This means more cases will be filed, resulting in more motions, conferences, and trials on already overburdened judges' dockets. Moreover, limiting the class action mechanism means that plaintiffs who might otherwise have banded together must each separately conduct discovery and collect evidence for their cases, increasing time, litigation costs, and the potential for duplicative processes. Increased individual actions also result, eventually, in more appeals for the federal court system to absorb. Further, employers and corporate defendants more generally will likely seek to push the boundaries of this decision in the courts, and lower courts around the country will need to grapple with the troubling and unnecessary language in Justice Scalia's opinion.

Increasing litigation of this nature is particularly problematic given the current state of the federal court system. Currently, there are 87 vacancies on the federal district and appellate courts (16 on the courts of appeals and 71 on the district courts),[33] a vacancy rate of over ten percent. Moreover, court caseloads around the country have been rising over the past five years, especially in border states where the numbers of immigration-related cases have increased exponentially.[34] At present, 35 of the 87 vacant judgeships have been designated "judicial emergencies"[35] by the Administrative Office of the U.S. Courts. Courts around the country are already struggling to manage their caseloads, with judges routinely driving hundreds of miles to hear cases,[36] district courts sending cases to courts in other states,[37] and unprecedented reliance on senior judges to keep the courts functioning.[38] Unless the Senate takes steps to confirm more judicial nominees, including by voting expeditiously on nominees once they have been approved by this Committee, the federal courts, which are already strained to the breaking point, will be significantly and detrimentally impacted by litigation in the wake of *Wal-Mart*.

IV. Congress Must Take Steps To Address The Consequences Of The Decision In *Wal-Mart*.

While the women of Wal-Mart continue their fight, it is essential for women, and indeed for all employees across the country, no matter their employer, that the devastating consequences

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[33] U.S. Courts website, Judicial Vacancies, *available at* http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies.aspx.

[34] U.S. Courts, Filings in the Federal Judiciary Continued to Grow in Fiscal Year 2010 (March 15, 2011), *available at* http://www.uscourts.gov/News/NewsView/11-03-15/Filings_in_the_Federal_Judiciary_Continued_to_Grow_in_Fiscal_Year_2010.aspx.

[35] U.S. Courts website, Judicial Emergencies, *available at* http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx.

[36] Jerry Markon and Shailagh Murray, *Federal Judicial Vacancies Reaching Crisis Point*, WASH. POST, Feb. 8, 2011, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/02/07/AR2011020706032.html (last visited June 28, 2011).

[37] Ian MacDougall, *RI Judge Holdup Sends 2 Dozen Cases to NH, Mass.*, ASSOC. PRESS, Mar. 7, 2011, *available at* http://newsblog.projo.com/2011/03/ri-judge-holdup-sends-2.html (last visited June 28, 2011).

[38] Carol J. Williams, *Senior Judges Keep 9th Circuit Courthouses Open*, L.A. TIMES, March 14, 2011, *available at* http://www.latimes.com/news/local/la-me-senior-judges-20110314,0,1680937.story (last visited June 28, 2011).

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of this decision not be allowed to stand. The Senate should certainly pick up the pace in filling judicial vacancies, and Congress must step up to keep the courthouse door open and to counteract the perverse incentive employers now have to become less vigilant in reining in discriminatory practices by their managers. One essential way to do that is to pass the Paycheck Fairness Act, S.797/H.R. 1519, introduced in April by Senator Mikulski and Representative DeLauro, which establishes employer incentives to provide equal pay, as well as enhanced enforcement tools to secure it. In the last Congress, the House of Representatives had passed the Paycheck Fairness Act, and it fell only two votes short of overcoming a filibuster in the Senate. In these tough economic times, it is hardly asking too much for Congress to provide American women with a fair shot at a job, with equal pay, for their sake and the sake of their families.

The National Women's Law Center deeply appreciates this Committee's consideration of this important issue, as well as the opportunity to submit written testimony for this hearing.

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Testimony of Melissa Hart

Associate Professor and Director, Byron R. White Center for the Study
of American Constitutional Law
University of Colorado School of Law

"Barriers to Justice and Accountability: How the Supreme Court's
Recent Rulings Will Affect Corporate Behavior"

June 29, 2011

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Thank you for giving me the opportunity to join you at this hearing today. The testimony I am offering here draws on my work as a scholar and teacher of civil procedure, Supreme Court decisionmaking and employment discrimination.

This year, a narrow five-Justice majority on the United States Supreme Court continued its recent trend of interpreting the law in ways that limit people's access to the court system and close important avenues for holding corporations accountable for misconduct.

Last week in *Wal-Mart v. Dukes*, the Court's majority decided that women who alleged significant company-wide discrimination in pay and promotion decisions could not pursue their claims together in a class action suit.[1] Despite the obvious efficiencies of allowing the women to litigate discrimination claims in a collective action rather than in potentially millions of individual suits, the Court decided in effect that Wal-Mart was too big to sue.

Earlier this spring, the same five Justices concluded in *AT&T v. Concepcion* that a company could prohibit consumers from arbitrating small claims in a collective action despite state law finding such a prohibition to be unconscionable. Essentially the Court concluded that a company that had defrauded huge numbers of consumers through the same misconduct could avoid having to face those consumers as a group. And the Court held that states could not adopt rules to protect consumers from this barrier to redress.

Neither decision was compelled by any statute or rule. To the contrary, as the dissenting opinions in both cases observed, the Court's decisions in these cases are not supported by the language of the relevant rules. These two decisions show a remarkable willingness to close the doors to people seeking redress for substantial injuries. This denial of access means the people who have been harmed are highly unlikely to recover for those harms. And it means that those who caused those injuries will not be held accountable.

Wal-Mart v. Dukes

In a broadly written opinion, five Justices concluded that a class of female employees of big-box giant Wal-Mart who alleged systematic discrimination in pay and promotion decisions had failed to present a "common question" sufficient to permit them to bring their suit as a class action.[2] The decision presents real risks to effective enforcement of federal civil rights laws

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[1] While part of the Court's decision in *Wal-Mart* was unanimous, the portion of Justice Scalia's opinion that most significantly limited the ability of employees to pursue class action litigation was joined only by Chief Justice Roberts, Justice Alito, Justice Thomas and Justice Kennedy.

[2] Federal Rule of Civil Procedure 23(a) requires plaintiffs seeking to pursue a class action lawsuit to demonstrate that their proposed class meets the requirements of numerosity, commonality, typicality and adequacy of representation. All of these requirements are designed to help the district court evaluate whether the case should proceed as a class action. The commonality requirement has, since the passage of the modern Rule 23 in 1966, been understood as a "simple, low level" requirement that there be either one significant common issue or several common issues. It is a standard that has traditionally been understood as "relatively easy to satisfy." Arthur R. Miller, *Overview of Class Actions: Past, Present and Future* 25 (1977). The Court's opinion in *Wal-Mart* departs

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because it makes it difficult for employees suffering similar harms to proceed together in challenging workplace discrimination. By making class action litigation of employment discrimination claims less likely, the *Wal-Mart* decision also takes pressure off of employers to adopt the best internal practices for ensuring that workplace decisions are made fairly and without illegal stereotyping and bias.

The named plaintiffs had sued on behalf of current and former female employees of Wal-Mart, alleging that women at Wal-Mart stores had been paid less than their similarly situated male counterparts every year and in every Wal-Mart region.[3] The employees' evidence showed that women in hourly positions made, on average, $1,100 per year less than men in similar positions. In salaried management positions, the average difference was $14,500.[4] This inequity had developed even though the women had, on average, greater seniority and higher performance ratings.[5] The differences, moreover, were found in each of the 41 regions in which Wal-Mart does business and in a majority of the stores around the country. The plaintiffs had also alleged that Wal-Mart's female employees had been promoted to management less often than comparable male employees, and that those women who were promoted had to wait nearly twice as long for promotion as did their male peers.[6] The evidence they presented showed that, in 2001, 67 percent of all hourly workers and 78 percent of all hourly department managers were women.[7] By contrast, only 35.7 percent of assistant managers, 14.3 percent of store managers and 9.8 percent of district managers were female.[8] The explanation for these company-wide inequalities, plaintiffs argued, was that Wal-Mart had adopted a system for pay and promotion decisions that permitted bias to infect the process.

In addition to the statistical evidence of significant gender disparities at stores around the country, the plaintiffs presented numerous specific examples of sexist language and behavior at every level of the company and expert testimony showing that other large retail stores did not have the same gender disparities in pay and promotion. They also offered testimony from social psychologist Dr. William Bielby, who undertook an extensive review of Wal-Mart's policies, the statements of its managerial staff and statistical information about the company.[9] Professor

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from this settled understanding and breaks with earlier precedent characterizing the 23(a) inquiry as a "threshold" evaluation. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997).

[3] *See* Plaintiffs' Motion for Class Certification and Memorandum of Points and Authorities, at 1, *Dukes*, 222 F.R.D. 137 (Apr. 28, 2003) (No. C-01-2252 MJJ).

[4] *Id.* at 25.

[5] *See* Dukes, 222 F.R.D. at 141.

[6] *Id.* at 141, 146.

[7] Plaintiff's Motion for Certification at 7.

[8] *Dukes*, 222 F.R.D. at 146.

[9] *See* Melissa Hart and Paul Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37, 56-57 (2009). Justice Scalia is sharply critical of Professor Bielby's conclusions, but he misconstrues what they were offered to show. Social science testimony of the sort offered by Professor Bielby has been used in many class certification arguments to explain to a fact finder how corporate structures might permit or limit stereotyping and bias—not to demonstrate how much discrimination did operate in the workplace. *See generally* Brief for American Sociological Association and The Law and Society Association as Amici Curiae Supporting Respondents, *Wal-Mart Stores, Inc. v. Dukes*, 2011 WL 2437013 (2011) (No. 10-277), 2011 WL 757408.

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Bielby explained how Wal-Mart's policy of giving largely unguided discretion to lower-level managers for setting pay and promotion could very likely result in gender disparities in hiring and retention at the company.[10]

All of this evidence had been presented to the district court not so that the judge would conclude that Wal-Mart had in fact discriminated (that was a question for later in the proceedings), but solely to convince the court that the case should proceed as a class action. The plaintiffs argued that their case met the requirements of Federal Rule of Procedure 23 and that they should have the opportunity to litigate the merits of their discrimination claims together as a group rather than having to proceed in separate, repetitive suits brought in theory by the nearly 1.5 million individual female employees who suffered from these workplace disparities.

The district court evaluated this evidence and concluded that the plaintiffs' claims shared several common questions of law and fact. First, they shared the central common question as to whether a highly discretionary pay and promotion policy permitted gender stereotypes communicated through a strong corporate culture to influence pay and promotion decisions. Second, they shared the related question whether Wal-Mart's culture—the "Wal-Mart Way"—was indeed pervaded by stereotypes. The proposed class claims for pay discrimination presented the common question whether the company's pay decisions led to impermissible gender disparities. And their promotion claims raised the common question whether promotion opportunities at Wal-Mart were in fact distributed in a manner impermissibly tainted with discrimination.

The district court engaged in a careful and thorough review of the evidence and the requirements of Rule 23 and concluded that each of these questions was common to the class and could be litigated on the merits in a class proceeding. In reaching this conclusion, the judge was not taking an unusual step.[11] Many class actions with similar facts had been certified in the past.[12] But throughout the litigation the courts, the defendant and commentators focused on how big Wal-Mart was, and consequently how big the plaintiffs' class was. Essentially, they argued, Wal-Mart is too big to sue. The *Wal-Mart* majority seems to have accepted this argument.

But federal anti-discrimination laws do not include an exception for companies that are especially large. And Wal-Mart's multi-facility structure, which Justice Scalia suggested should insulate the company from systemic litigation, is in many ways quite typical of the modern

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[10] *Id.*

[11] One of the distressing elements of the Supreme Court's decision is its complete disregard for the appropriate standard of appellate review. A district court's decision on class certification is entitled to deference on appellate review. The Court never acknowledged this standard in reversing the lower courts' decisions. This dismissive attitude toward the procedural rules that operate to constrain appellate courts—including the Supreme Court—is not unique to *Wal-Mart*. *See generally* Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-2009 Labor and Employment Cases*, 13 EMPLOYEE RTS. & EMP. POL'Y J. 253 (2009).

[12] *See, e.g.*, Palmer v. Combined Ins. Co., 217 F.R.D. 430 (N.D. Ill. 2003); Beckmann v. CBS, 192 F.R.D. 608, 614 (D. Minn. 2000); Butler v. Home Depot, Inc., 70 Fair Empl. Prac. Cas. (BNA) 51 (N.D. Cal. 1996); Stender v. Lucky Stores, 803 F. Supp. 259 (N.D. Cal. 1992); Ellis v. Costco Wholesale Corp., No. 3:04cv03341 (N.D. Cal. Aug. 17, 2004); *see also* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 682-87 (2003) (describing a number of similar cases).

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workplace. As companies grow, and multi-state—even multi-national—service-industry businesses typify the workplaces that most Americans inhabit, the notion that class action suits cannot reach misconduct at precisely this type of workplace is especially troubling. Title VII and other antidiscrimination laws are written broadly to reach a broad range of discriminatory behavior. And yet *Wal-Mart* risks insulating these workplace structures from legal scrutiny.

The idea of class action litigation is in many respects precisely that it can provide efficient resolution of disputes like the one presented here. The class action is an indispensible procedural device because it facilitates access to the courts for large numbers of litigants with meritorious but low-value claims and avoids costly repetition and relitigation of issues that would be required in the absence of class litigation.

Not only is a class action efficient in a case like Wal-Mart, it is also more likely to vindicate the rights of employees than a hypothetical 1.5 million individual lawsuits. Class action suits have been a fundamental piece of employment discrimination law for nearly 40 years. Class litigation has long played an essential role in promoting Title VII's goal of eradicating discrimination in the workplace because cases brought by a class of workers present a more complete picture of the employer's conduct than individual suits. Class actions also enable better-informed and more effective company-wide reforms that can address company-wide problems of discrimination.

The Supreme Court's decision ignores both the efficiency and the fairness that class litigation can offer. In a break with past precedent and with the language of Rule 23(a), the Court requires not only that plaintiffs prove that they share a "common question of law or fact" (*i.e.*, what the Rule itself requires) but also that they provide evidence that whatever differences their stories might have are less than the similarities in their claims. As Justice Ginsburg's dissenting opinion observes,[13] this analysis effectively rewrites the language of Rule 23. The requirement that common questions "predominate" over individual questions is part of Rule 23(b)(3). That section of the class action rule was not at issue in *Wal-Mart*. The Court's analysis of the Rule 23(a) commonality requirement, however, effectively takes the higher 23(b)(3) standard and imposes it onto 23(a).

The Court's decision erects barriers for class certification that are actually more demanding than the hurdles plaintiffs must jump to prove liability under antidiscrimination laws. In *Teamsters v. United States*,[14] a case cited with approval by the Court in *Wal-Mart*, the employer was found liable for violating Title VII where the plaintiffs were challenging the use of subjective decisionmaking in a multi-facility company. That is precisely the type of challenge brought by the employees in *Wal-Mart*, but the Court in *Wal-Mart* threw the case out without any evaluation of the underlying merits of the claims. Similarly, in *Watson v. Fort Worth Bank & Trust* (another case cited with apparent approval by the majority), the Court held that Title VII liability could flow from the use of excessive subjectivity.[15] In *Wal-Mart*, however, the majority concluded that similar allegations of excessive subjectivity did not present a "common question" for the class. Class certification is supposed to be a low bar, a threshold question that precedes

[13] Dissenting opinion at pp. 8-10.
[14] 431 U.S. 324 (1977).
[15] 487 U.S. 977, 988 (1988).

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the higher bar set for the merits analysis. By setting a high bar for class certification, the *Wal-Mart* majority turns that notion on its head.

It is hard to tell precisely what the contours of this decision will turn out to be as it is interpreted in other cases. The majority is much clearer about what it disapproves in this particular case than it is about what it will permit going forward. What is clear is that in the future every employment discrimination class action will be evaluated in light of the current Court's hostility to class litigation. The decision will thus have a significant chilling effect on the collective adjudication of civil rights claims that has been an essential aspect of full enforcement of the law.

Moreover, by making class action employment challenges significantly harder to pursue, the Court's decision takes pressure off of employers to monitor their own employment practices. Laws prohibiting discrimination are only as effective as the means available to enforce those laws. If systemic discrimination claims of the sort presented in *Wal-Mart* are no longer permitted, employers' incentives to adopt strong internal systems for preventing discriminatory decisionmaking are considerably diminished. One of the important successes of the *Wal-Mart* case itself is instructive: in the years since the suit was first filed, Wal-Mart has changed many of the practices that the plaintiffs pointed to as causes of gender disparities at the company.[16] The litigation prompted Wal-Mart to better legal compliance.

The ultimate goal of federal antidiscrimination laws is arguably "not to provide redress but to avoid harm."[17] Without the possibility of redressing harm, however, the likelihood of avoiding harm is substantially diminished. For this reason, legislatures that enacted landmark civil rights legislation anticipated that collective suits—whether brought by the EEOC or by private litigants—would play an important role in enforcing the law. The *Wal-Mart* decision marks a break from that commitment.

AT&T v. Concepcion

When Vincent and Liza Concepcion signed up for cell phone service with AT&T, they were told that the phone came free with the service contract. Slip op. at 2. On receiving their first bill, they discovered that they had in fact been charged $30.22 in sales tax on the phone. The Concepcions were among the thousands of consumers who complained that AT&T had engaged in fraud and false advertising by marketing the phones as free while billing customers for significant sales tax.

The contract for service that all of these consumers had signed provided for arbitration of any claims arising out of the agreement and specified that any claim must be brought in a party's "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." Thus, consumers were barred from seeking redress through the court

[16] *See, e.g., Wal-Mart Didn't Act on Internal Sex-Bias Alert, Documents Show*, BLOOMBERG.COM, July 15, 2005, http://www.bloomberg.com/apps/news?pid=71000001&refer=us&sid=aGS8a.3TSjRQ.
[17] Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998); *see also* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999).

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system and, within the context of arbitration, each individual person would have to pursue his own claim for himself.

The Concepcions pointed out that this restrictive provision ran afoul of state law designed to protect consumers. Under California state law, a contract that forbids collective action without providing an equally effective alternative for vindicating consumer rights is unconscionable and therefore unenforceable. As the California Supreme Court explained the state rule:

> [W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are unconscionable under California law and should not be enforced.[18]

A cell phone service agreement is exactly the kind of adhesion contract that consumers sign without the opportunity to individually negotiate. Moreover, disputes under these contracts, like the one at issue here, are typically for low-dollar amounts. When a company violates consumer rights under these and similar agreements, few consumers will ever learn that their rights have been violated. Given the low sums involved, fewer still will seek redress.

If companies can get away with it, prohibiting collective arbitration is an easy way to avoid liability for misconduct. The economic realities of this type of litigation require that they proceed as class actions or not at all. Class actions create a procedural vehicle for vindicating the substantive rights of small-claims victims. Without class actions—whether in litigation or in arbitration—defendants face little risk of liability and thus weak deterrence from engaging in wrongdoing in the first place. The consequence is that the costs of misconduct are borne by the public, and not by the company that engaged in the bad behavior.

Brushing off the concern that small claims will go unprosecuted if collective arbitration is not an option, the *Concepcion* majority observes that "requiring consumer disputes to be arbitrated on a class-wide basis will have a substantial deterrent effect on incentives to arbitrate." Slip op at 17. The Court is obviously focused on the incentives of corporations, not of individuals. Companies may have less incentive to include arbitration agreements in their consumer contracts if class-wide arbitration must be permitted. But the incentives for the individuals are quite the opposite – where class arbitration can be prohibited, the likelihood that consumers will pursue valid claims against corporate wrongdoing goes down significantly.

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[18] *Discover Bank v. Superior Court,* 36 Cal. 4th 148, 162, 113 P. 3d 1100, 1110 (2005) (quoting Cal.Civ. Code Ann. §1668).

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These decisions follow on the heels of other recent limitations on access to the justice system. In particular, during the past several years, a slim majority on the Court has tightened pleading standards so that many plaintiffs will see their cases thrown out of court before they have an opportunity to engage in basic fact discovery.[19] As a result of these decisions, whether companies engaged in prohibited conduct that harmed the plaintiffs will never be known.

The same is true for the decisions in *Wal-Mart* and *Concepcion*. By erecting barriers to class-wide presentation of harms that are themselves class-wide, the Supreme Court has drastically curtailed the picture presented to a judge, an arbitrator or a jury. The Court's rulings inhibit the effectiveness of the legal system by allowing procedural rules to disrupt the truth-seeking function of litigation. Moreover, for many years, companies have known that class-wide misconduct can lead to class-wide liability. That knowledge has spurred many corporations to make company-wide policy changes that avoid these harms. If companies are insulated from class-wide litigation, their incentives to voluntarily undertake such reforms are diminished.

These recent decisions thus risk distorting our justice system's ability to encourage reform, ensure accountability and compensate those injured by illegal conduct.

[19] *See Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

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HR POLICY ASSOCIATION®
The Association of Chief Human Resource Officers

June 29, 2011

The Honorable Patrick J. Leahy
Chairman
United States Senate Committee on Judiciary
224 Senate Dirksen Office Building
Washington, DC 20510

The Honorable Charles E. Grassley
Ranking Member
United States Senate Committee on Judiciary
152 Senate Dirksen Office Building
Washington, DC 20510

RE: Committee Hearing on "Effect of Supreme Court Rulings on Corporate Behavior"

Dear Sirs:

HR Policy Association would like to express our support for the Supreme Court's recent decision in the *Wal-Mart v. Dukes* case. The proliferation of employment litigation is already having a damaging effect on large employers in this country and, as described in our amicus brief to the Court, this case threatened to escalate this problem to an unsustainable level. As the country struggles to regain its footing in a difficult economic climate, a decision allowing massive-class action cases with a very weak legal justification for class treatment would only hinder job growth and further complicate the recovery process.

HR Policy Association consists of more than 325 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively, their companies employ more than 10 million people in the United States, nearly 9 percent of the private sector workforce. The Association has followed this case closely because of the significant implications it has for large employers as the costs of defending employment lawsuits rapidly increase, particularly class action lawsuits.

In May, the Association issued a report—*Blueprint for Jobs in the 21st Century*—containing the comprehensive vision of America's top human resource officers to restore job growth and competitiveness in the United States through changes in public policy, education, and public perceptions. The 125 page report paints a detailed picture of the new global economic, social, legal, and demographic forces influencing job growth in the United States. One key point made by the report is that: "The proliferation of lawsuits has become a major economic drain, stifling economic and job growth. In addition to the direct costs of litigation, critical employment decisions are often driven as much by protecting the enterprise against costly litigation as by making sure the right person is in the right job, which, from a human resources perspective, is the key to the competitiveness of the enterprise and, ultimately, the entire U.S. economy." If the Court had ruled otherwise and followed the lower federal court's flawed reasoning, it would have driven up the costs of doing business and growing jobs in the United States even more.

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June 29, 2011
Page 2

In ruling that the plaintiffs failed to establish a "common" company-wide practice necessary for a class action to be certified under federal law, the Court simply applied common sense. The lower federal courts had improperly certified the case as a class action based on the employer's policy and practice of allowing local managers to make individualized pay and promotion decisions. However, the Supreme Court aptly recognized that a large employer allowing local supervisors to have discretion over employment matters, "is just the opposite of a uniform employment practice that would provide commonality needed for a class action" but is, in fact, a "policy against having uniform practices." Thus, a class action was not appropriate because the plaintiffs were trying "to sue about literally millions of different employment decisions at once" without any particular unlawful employment policy to tie all the claims together. In sum, a single class action was simply not appropriate for the adjudication of millions of employment decisions made by thousands of decision makers across the nation without any real common thread or "glue" to tie all of the decisions together.

Indeed, had the Supreme Court allowed the class action to go forward based on the flawed reasoning of the lower federal courts, large employers would have been subject to nation-wide class actions based on nothing more than allegations that a policy allowing discretion to local decision makers is unlawful. Such an allegation strains logic and is unsupported in the law. By contrast, as the Court correctly recognized decentralized local decision making in large companies is "a very common and presumptively reasonably way of doing business." In fact, far from being universally criticized, individualized decision-making is essential and virtually every organization in the United States relies heavily on the exercise of individual judgments by supervisors.

The Supreme Court got it right. The alternative would have subjected large employers to a flood of costly (and often baseless) class actions, significantly impacted how employers structure decision making in the workplace, and increase the cost of doing business in the United States, hindering job growth and complicate the economic recovery.

Thank you for your consideration.

Sincerely,

Michael D. Peterson
Associate General Counsel
Director, Labor & Employment Policy
HR Policy Association

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Statement of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On "Barriers to Justice and Accountability:
How the Supreme Court's Recent Rulings Will Affect Corporate Behavior."
June 29, 2011

This morning, we will highlight several recent Supreme Court decisions to examine the impact on the lives of hardworking Americans. Each of these decisions give corporations additional power to act in their own self-interest, and each limits the ability of Americans to have their day in court. This hearing is a continuation of previous hearings about how Supreme Court rulings affect Americans' access to their courts. Especially in these tough economic times, American consumers and employees rely on the law to protect them from fraud and discrimination. They rely on the courts to enforce those laws intended to protect them. Unfortunately, these protections are being eroded by what appears to be the most business-friendly Supreme Court in the last 75 years.

Last week, in *Wal-Mart v. Dukes*, five men on the Supreme Court disqualified the claims of 1.5 million women who had spent nearly a decade seeking justice for sex discrimination by their employer, Wal-Mart. They ruled that the women did not share enough in common to support bringing a class action. Perhaps more troubling, they told those women that Wal-Mart could not have had a discriminatory policy against *all* of them, because it left its payment decisions to the local branches of its stores.

The case gives Wal-Mart, and the rest of corporate America, a clear path to avoid company-wide sex discrimination suits: Have your lawyers write a non-discrimination policy, then allow your local branches to implement compensation decisions, and you can hide behind your policy regardless of what really happened to your employees across America. Through this decision, a narrow majority of five justices have, again, made it harder to hold corporations accountable under our historic civil rights laws.

Earlier this month, in *Janus Capital v. First Derivative Traders*, the same five justices gave corporations another victory by shielding them from accountability even when they knowingly lie to their investors. In that case, the Court held that investors have no remedy when a corporation knowingly issues false statements from a shell entity it created to "make" the false statement. Some have said that the *Janus* decision provides Wall Street companies with a "license to lie." Others have called the opinion "a roadmap for fraud." Whichever phrase you use, the decision allows Wall Street companies to design new ways to evade accountability from the harm inflicted on hardworking Americans who have seen their life savings ravaged over the past few years by fraudulent investment schemes and corporate misconduct.

This term, the Supreme Court also issued a devastating decision that will harm the ability of consumers to band together when their phone company or other corporations falsely charge them small, unjustified, and unfair fees. Two months ago, in *AT&T v. Concepcion*, the Supreme Court, in another 5-4 opinion, held that companies can take advantage of the fine print on telephone bills and other contracts to bar customers from bringing class action lawsuits. What's more, the Court held that states cannot prohibit such "mandatory arbitration clauses" -- even if the state legislatures vote to do so -- because such a law would be preempted by the Federal

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Arbitration Act. Justice Scalia and the four fellow conservatives on the Court, once again, misinterpreted Congress' intent; they favored corporations and further weakened protections for consumers. Binding mandatory arbitration makes a farce of the American people's constitutional right to a jury trial and the due process our Constitution guarantees to all Americans.. In arbitration, there is no transparency. There are no juries. There is no appellate review.

Like the *Wal-Mart* case, the *AT&T* case also denies consumers the right to bring their lawsuit as part of a class action. Class actions serve an important function in our justice system. If I have a claim for $50 or $100 against a company, the potential recovery is too small for me to hire a lawyer and seek redress. If I combine my claim with those of other people who also have a small claim, that would allow us to attain adequate representation and seek accountability. When consumers can band together, then corporations can be forced to account for their misconduct, even if the harm to each individual consumer is relatively small. Class actions are an essential way for everyday Americans to gain access to our courts.

The cases we are discussing today are just a few examples of how the Supreme Court's recent decisions will hurt individual Americans and benefit large corporations who engage in misconduct. A study by Lee Epstein, William Landes and Richard Posner, entitled "Is the Roberts Court Pro-Business?" illustrates this phenomenon. It found that the Supreme Court ruled in a pro-business fashion in 29 percent of cases under Chief Justice Earl Warren. Under Warren Burger the figure was 47 percent. Under Chief Justice Rehnquist, it was 51 percent. Now, under Chief Justice Roberts it has risen to 61 percent. The point of today's hearing is to put these statistics in context by examining some of the most troubling pro-business rulings from the Supreme Court's term and to consider the lasting effect of these divisive rulings.

Over the past few years, the American people have grown frustrated with the notion that regardless of their conduct some corporations are too big to fail. The Supreme Court's recent decisions may make some wonder whether the Supreme Court has now decided that some corporations are too big to be held accountable. You get the unfortunate feeling that many of the Justices view plaintiffs as a mere nuisance to corporations. We cannot ignore that sex discrimination in the workplace continues, that corporations continue to deceive consumers and that fraud continues on Wall Street. I believe that the ability of Americans to band together to hold corporations accountable when these things occur has been seriously undermined by the Supreme Court. These decisions have been praised on Wall Street, but will no doubt hurt hardworking Americans on Main Street.

I thank all of the witnesses for being with us today and look forward to their testimony.

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"Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior"

Ms. MIKULSKI. Mr. Chairman, thank you so much for holding this timely and relevant hearing today. The title of this hearing, "Barriers to Justice", accurately describes what the Supreme Court's ruling last week in *Wal-Mart v. Dukes* meant for ordinary Americans. This decision was an outrage to many, especially those of us who see the courts as a vital tool in addressing systemic discrimination. The courthouse door is closing quickly, and the impacts on the ability to seek justice are striking. I look forward to working with you as I pursue possible legislative solutions to address this misguided ruling.

The decision in *Wal-Mart* was a blow to the tenacious and courageous named plaintiffs in the case. It was a blow to the 1.5 million women that they stood for. And it was a great blow to the right to sue for equal treatment in the workplace. According to Justice Scalia, some employers are just too big to be held accountable for workplace discrimination. But this case is most problematic because of a repeated message that the Court is sending —-- one that gives preference to corporate policies and practices at the expense of the little guy or gal.

Since I entered the Senate, I have led the fight for equal pay for women. It is an issue that is dear to my heart, but it is also a matter of basic fairness. Women make 77 cents for each dollar a man makes, and regardless of what the Court may rule, pay discrimination is real, it is systemic, and it is not printed in the company policy. I led the fight on the Senate floor for the Lilly Ledbetter Fair Pay Act and am fighting to pass the Paycheck Fairness Act, which would ensure equal pay for equal work by making sure that we have the teeth in the law to combat pay discrimination. But until we get there, we must keep the courthouse door open to allow women to sue for pay discrimination – not make it even more difficult for them to get the money they deserve.

It is important to note that while the decision was a blow, it is not the end of the road. The women of Wal-Mart may pursue justice in smaller or individual suits, and I look forward to

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their pursuit of these cases on their merits. This fight is not over and as long as women earn less than men in the workplace there is progress to be made. Our courts should not be a refuge for discriminatory practices. I am reviewing the Court's decision closely to determine what legislative remedy is necessary to remedy this decision. It is time to restore the rights of workers and reopen the courthouse door.

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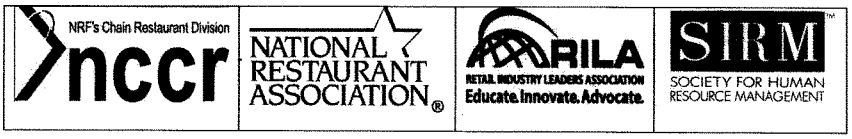

July 6, 2011

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Grassley:

We are writing in strong support of the U.S. Supreme Court's unanimous decision in the case *Wal-Mart v. Dukes*. We believe that, in the current difficult economic climate, permitting a massive-class action would not only have been based on weak legal grounds, but would have further slowed economic and employment growth.

Our associations represent employers and employees of all sizes in every industry. Each of our members is vulnerable to costly and imprudent litigation, which has become a major economic drain and deters employers from hiring new workers. While we believe it is always appropriate for Congress to review actions of the executive or judiciary branches of government, it is inconceivable to our members that lower federal courts asserted that every female Wal-Mart employee over the past decade had a common employment experience. The Supreme Court's unanimity reflects its common sense decision, and we believe that lower courts had improperly certified the case as a class action based on the employer's policy and practice of allowing local managers to make individualized pay and promotion decisions.

In *Wal-Mart v. Dukes*, the Supreme Court properly prevented private employers of all sizes from being subjected to a barrage of costly and unavoidable class actions. We look forward to working with both of you towards our mutual goals of promoting economic and employment growth across the U.S.

Thank you for your consideration of our views.

Sincerely,

National Council of Chain Restaurants
National Restaurant Association
Retail Industry Leaders Association
Society for Human Resource Management

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Senate Judiciary Committee

Written Testimony Submitted For

Barriers to Justice and Accountability:

How the Supreme Court's Recent Rulings Will Affect Corporate Behavior

By

The National Employment Lawyers Association

June 29, 2011

Contact:
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The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA provides assistance and support to lawyers in protecting the rights of employees against the greater resources of their employers and the defense bar. It is the country's largest professional organization exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination and other employment-related matters. NELA and its 68 state and local affiliates have more than 3,000 members around the country. Our membership includes private attorneys as well as staff attorneys of the U.S. Equal Employment Opportunity Commission (EEOC) and state anti-discrimination agencies.

Title VII of the Civil Rights Act of 1964 and other modern civil rights statutes are landmarks that declare the nation's commitment to eliminating exclusion and discrimination. In framing these measures, Congress made sure not only to recognize rights and protections but to create enforcement mechanisms to make those rights a practical reality. These laws guarantee to women, minorities, individuals with disabilities, older Americans and other protected groups prohibition of exclusion and discrimination in the nation's workplaces, places of public accommodations, housing markets, educational institutions, and other important areas of life.

These statutes provide for government administrative enforcement, such as the EEOC's conciliation process, and government prosecution of civil actions in federal court. Recognizing that government enforcement alone would not be adequate, these laws expressly and uniformly provide for prosecution of civil enforcement actions by the victims of discrimination through cases brought by private counsel. Recovery of costs and reasonable attorneys' fees are provided in order to facilitate private enforcement. The U.S. Supreme Court long ago recognized the important role that the federal courts play in the enforcement of civil rights guarantees in

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"private attorney general" actions. *Newman v. Piggy Park Enters, Inc.*, 390 U.S. 400, 400-02 (1968).

Federal enforcement agencies such as the Department of Justice and the EEOC have prosecuted significant employment discrimination lawsuits. However, small budgets, inadequate staffing, and the demands of other enforcement priorities have historically limited the ability of government prosecutors to carry the principal burden of enforcing the prohibition against employment discrimination.

Private attorney general actions prosecuted by public interest organizations and the private bar have been the driving force for federal civil rights enforcement since *Brown v. Board of Education*, 347 U.S. 483 (1954). From the seminal *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) that established the disparate impact standard[1] for proving employment discrimination to *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010) last term, most of the significant Title VII cases in which the Supreme Court and other federal courts have enforced civil rights acts were initiated by the victims of discrimination who donned the mantle of the sovereign to seek redress for civil rights violations through private civil actions.

Rule 23 class actions under the Federal Rules of Civil Procedure have been the engine of Title VII enforcement by private attorneys general. Rule 23 class actions where an employer "has acted or refused to act on grounds generally applicable to the class," Fed. R. Civ. P. 23(b)(2), were designed for "actions in the civil rights field where a party is charged with discriminating unlawfully against a class." *Amchem Prods., Inc. v. Windsor*, 521 U.S.591, 614

[1] Title VII prohibits employers from using practices that have the effect of disproportionately excluding persons based on race, color, religion, sex, or national origin, where the tests or selection procedures are not "job-related and consistent with business necessity." *Id.*

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(1997); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 359 (1967). Based on experience in early civil rights cases, the drafters of Rule 23 created Rule 23(b)(2) class actions because individual lawsuits were an "inadequate" and "inefficient" means to address discrimination encountered by victims of discrimination at the hands of employers and other large institutions. *Id.* at 389.

The drafters were proven right. Many of the landmark civil rights enforcement cases were prosecuted as private attorney general class actions, from *Newman v. Piggie Park Enterprises* to *Phillips v. Martin Marietta*, *Griggs v. Duke Power* to *Albermarle Paper Co.v. Moody*, 422 U.S. 405 (1975), to *Lewis v. City of Chicago*.

Progress has been uneven in the judicial enforcement of Congress' ban on employment discrimination. The Supreme Court and lower federal courts have sometimes erred in interpreting the will of Congress too narrowly or otherwise frustrating the essential purpose of providing for practical implementation of an important national objective. At such times Congress has had to step in to ensure that the national commitment to eliminate exclusion and discrimination from the workplace remains strong and effective. This includes enacting remedial legislation to correct judicial error and to clarify the language and purpose of Title VII. The most recent examples of such Congressional action are the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat.5, 5-6 codified as 42 U.S.C. § 2000e-5(e)(3), reproving the Supreme Court for its restrictive statute of limitations ruling for a disparate impact compensation claim, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), and the ADA Amendments Act of 2008, Pub. L. No. 93-112, 87 Stat. 355 codified throughout 29 U.S.C. and 42 U.S.C., overturning *Sutton v. United Airlines, Inc.*, 527 U.S. 471(1999), *Toyota Motor Mfg, Ky, Inc. v.*

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Williams, 534 U.S. 184 (2002) and numerous other related restrictive rulings on the definition of disability, *see* Maurice Wexler, *et al.*, *The Law of Employment Discrimination from 1985 to 2010*, 25 ABA J. of Labor & Employ. Law 349, 367, 371-75 (2010).

Congress passed the Civil Rights Act of 1991in order to overturn no fewer than seven Supreme Court decisions that, contrary to Congressional intent, erected jurisdictional and procedural obstacles to the enforcement of Title VII protections. *Wards Cove Co. v. Atonio*, 490 U.S. 642 (1989) (weakening *Griggs'* disparate impact standard of proof); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (limiting scope of 42 U.S.C. § 1981 to hiring claims); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (limiting liability in mixed motive cases); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) (limiting actions to challenges to discriminatory seniority systems); *Martin v. Wilks*, 490 U.S. 755 (1989) (permitting non-parties to challenge consent decrees); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (limiting exterritorial reach of Title VII); *West Virginia University Hospital, Inc. v. Casey*, 499 U.S. 83 (1991) (barring recovery of expert witness fees). *See* Maurice Wexler, *et al.*, *The Law of Employment Discrimination*, *supra*, at 352-55.

Congress must now again intercede to reverse the Supreme Court's decisions in *AT&T Mobility v. Concepcion* and *Wal-Mart v. Dukes*, which deny America's consumers and workers the right to band together to vindicate their rights when they are violated by our nation's largest corporations.

AT&T Mobility v. Concepcion: Barring the Courthouse Door

On April 27, 2011, the U.S. Supreme Court handed down its decision in *AT&T Mobility v. Concepcion*, ___ U.S. ___ (2011), ruling that arbitration agreements can bar class action

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lawsuits. In its 5-4 decision, the Court held that the Federal Arbitration Act (FAA) preempts California law on this issue. In *Concepcion*, AT&T customers alleged the company charged an undisclosed $30 for cell phones it advertised as "free." Customers sought a class action on behalf of millions who accepted the deal believing the cell phone was free. AT&T attempted to avoid the lawsuit arguing that the contract's forced arbitration clause contained a class action ban.

Employers are increasingly inserting arbitration clauses with class action bans into employment contracts, presenting them to employees on a take-it-or-leave-it basis. The *Concepcion* decision severely limits, if not eliminates, an important means for enforcing longstanding civil rights and employee protections for many of America's workers. This case presents a missed opportunity for the Supreme Court to protect America's workers from ad-hoc, arbitrary, and unexamined decisions by their employers.

NELA strongly supports all *voluntary* forms of alternative dispute resolution, including arbitration and mediation. In fact, NELA has been at the forefront nationally in encouraging mediation as a preferred method for resolving employment disputes. Our organization helped draft the Due Process Protocol for the Resolution of Statutory Disputes and worked closely with the American Arbitration Association in the development of its specialized employment arbitration rules and procedures – which we endorse when applied in voluntary arbitrations.

In *Concepcion*, the majority held under the FAA that arbitration "efficiency" trumps the right of consumers (and also employees) to take concerted action to remedy legal wrongs. Congress crafted the FAA to facilitate enforcement of arbitration agreements between consenting parties. By endorsing the presumptive right of corporations to bootstrap class action waivers

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onto such agreements, and to impose them unilaterally on consumers with minimal judicial scrutiny, the Court carries the FAA in an unanticipated, anti-consumer direction.

For these reasons, NELA has been a strong advocate for the passage of the Arbitration Fairness Act (AFA) of 2011. The AFA would ban forced arbitration in employment, consumer, and civil rights disputes.[2] A national study commissioned by The Employee Rights Advocacy Institute For Law & Policy, NELA's public interest arm, found that a solid majority of Americans (59%) opposes forced arbitration clauses in the fine print of employment and consumer contracts, including both men and women, as well as majorities of Democrats, Independents, and Republicans. Similarly, strong majorities (59%) support the AFA, which also cross traditional gender and political lines. The study can be found at www.employeeerightsadvocacy.org.

Wal-Mart v. Dukes: Preventing Access To Justice

In another blow to workers' rights, on June 20, 2011, a deeply divided U.S. Supreme Court in *Wal-Mart, Inc. v. Dukes*, ___ U.S. ___ (2011) reversed the U.S. Court of Appeals for the Ninth Circuit's decision to uphold the district court's certification of a class representing approximately 1.5 million female employees at Wal-Mart stores throughout the country. The workers sued the nation's largest private employer for sex discrimination in Wal-Mart's pay, promotions, and other employment practices, alleging that employer policies delegating authority to make subjective and discretionary employment decisions allowed for widespread discrimination against women. Though the Court's decision did not rule on the validity of the

[2] It is worth noting that the Civil Rights Act of 2008, which passed in the U.S. House of Representatives, would have provided that "any clause of any agreement between an employer and an employee that requires arbitration of a dispute arising under the Constitution or laws of the United States shall not be enforceable." H.R. 5129, 110th Cong., § 423 (2008).

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women's discrimination claims, significant barriers have now been erected that will make it much more difficult for America's workers to achieve justice.

The Court's majority eviscerates decades of jurisprudence by suggesting that highly subjective decision-making systems, such as those at Wal-Mart, are immune from scrutiny in cases involving multiple facilities. Led by Justice Ruth Bader Ginsburg, four justices dissented from these notions and asserted that "the practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards" was enough to present a common question that would allow the class to proceed.

The majority also ignores the reality of the workplace that individual workers are often unable to perceive a pattern or practice of discrimination beyond themselves. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977) (noting that companywide statistics may be the only way "'to uncover clandestine and covert discrimination by the employer or union involved'") (internal citation omitted). Even when they are able to identify such patterns, workers often are fearful of coming forward individually because employers, "by virtue of the employment relationship, may exercise intense leverage." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978). "Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases can be held up, and other more subtle forms of influence exerted." *Id.*; see also David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y J. 59, 83 (Fall 2005) (citing studies showing "being fired is widely perceived to be a consequence of exercising certain workplace rights").

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In addition, the majority embraces the premise that a written policy forbidding sex discrimination may be enough to immunize employers from accountability for discrimination that can affect personnel decisions. These five justices would bar many class actions because in their view most managers today truly and scrupulously observe anti-discrimination norms. In such a Pollyannaish world, isolated pockets of discrimination simply cannot be "common." Justice Antonin Scalia writes that "left to their own devices most managers in any corporation – and surely most managers in a corporation that forbids sex discrimination – would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all." The majority offers no support for this supposition, aside from the *ipse dixit* that managers as a class are enlightened and law-abiding. But experience and scholarly research tell us something quite different – that managers are indifferent to or unconscious of the factors that guide their managerial judgment, and that the pattern of employment decisions too often tilts in one direction – against female and minority employees. *See generally* Linda Hamilton Krieger and Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 Cal. L. Rev. 997 (2006) (Krieger and Fiske) and David L. Faigman, Nilanjana Dasgupta and Cecilia Ridgeway, *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 Hastings L.J. 1389 (2008). As The Institute For Women's Policy Research notes in its *amicus* brief submitted in the *Dukes* case, employers like Wal-Mart with a history of sex segregation in management are not apt to change voluntarily:

> Employers' propensity to resist changing personnel policies and practices perpetuates pre-existing corporate cultures and structures. As a result, organizations that had segregated the sexes into different (and unequal) jobs or failed to assign women to managerial roles in the past are unlikely to change without outside pressure. "[B]usiness as usual" in staffing patterns and intransigence of personnel policies and practices allows

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> discriminatory cultures within organizations to endure and results in barriers for equal advancement opportunities.

Amicus Brief of The Institute For Women's Policy Research, at 9, *citing* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659, 672 (Dec. 2003) ("employers are unlikely to undertake this task [of devising strategies to counteract discrimination] without some outside incentive to do so"). The Supreme Court has, however, apparently given Wal-Mart and other employers license to abrogate their workers' rights.

Conclusion

Both the *Concepcion* and *Dukes* cases represent the Court's continued erosion of workers' rights by effectively barring the courthouse door for a large segment of America's workforce. Class actions play a vital role in vindicating not just the rights of workers. Class actions also protect employees from the threat of retaliation, provide an incentive to employees and to private attorneys to prosecute small claims that would not be brought individually, and increase awareness of workplace violations. Additionally, class actions provide systemic relief, produce systemic change, and deter employers from violating the law. In enacting Title VII and other landmark civil rights statutes protecting workplace rights, Congress intended that workers would be able to join together to assert their rights. The Supreme Court's decisions in *Concepcion* and *Dukes* ignore the realities of today's workplace and will make discrimination more prevalent unless Congress acts to reverse yet another misguided set of opinions by the Court.

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Barriers to Justice and Accountability:
How the Supreme Court's Recent Rulings Will Affect Corporate Behavior

Senate Judiciary Committee
June 29, 2011
10:30 AM
Dirksen 226

On behalf of its hundreds of thousands of members across the country, People For the American Way Foundation commends the Senate Judiciary Committee for calling this hearing. The conservative Supreme Court's all too frequent rewriting of the law to favor large corporations endangers millions of Americans in a variety of ways.

An Ominous Time in American History: Giant Corporations' Ubiquity in Our Daily Lives

One of the daunting realities of modern life is that we as individuals are confronted in almost every facet of our life by corporations that are vastly more powerful than we are. When we wake up in the morning, it is likely in a house whose mortgage is held by a giant bank. We turn off the alarm clock made by an electronics giant and purchased from a giant consumer electronics store. We check news and mail through phone and Internet services provided by a telecommunications giant. We turn on the TV, where we pay one of a handful of giant telecommunications companies for access to hundreds of channels, most of which are owned by a small number of giant entertainment companies. Much of the TV news is provided by some of those same entertainment companies.

Perhaps we pick up some prescription drugs made by an enormous pharmaceutical company and purchased at an enormous nationwide chain store. We buy gas provided by one of a few enormous oil companies. We go to our job, where we may be one of thousands or even millions of employees of an enormous company run by people who live hundreds of miles away and who would not recognize our face or name in a million years. We look forward to retirement and think about our investments, tied up in gargantuan funds controlled by people whose compensation in just one year exceeds our entire retirement savings. Thinking about it all, we take a deep breath of air that may have been dangerously polluted by large companies we've never even heard of.

This is an ominous time in American history with so many Americans having so many facets of our lives controlled by our interactions with gigantic corporations that dwarf us in power.

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Corporation vs. Individual: Restoring the Power Balance

Unfortunately, when we want to buy a product, get a job, or hold a large corporation accountable for its misdeeds, our negotiating power is severely limited by the fact that we are individuals. In contrast, due to their many state-granted benefits, including perpetual life and limited liability, corporations have consolidated vast resources – and power – that dwarf those of individual Americans.

So when that corporation does wrong against individuals – when it engages in a pattern of invidious discrimination, sells defective products, or defrauds its customers – the victims would be powerless to hold the corporation accountable unless they, too, could consolidate their resources.

Perhaps the most important way that Americans consolidate our power and use our numbers to create fair rules for the road is through government, both state and federal. Indeed, the United States Constitution was designed with a variety of mechanisms and protections to ensure our ability to do just that. The American people have throughout our history harnessed the power of law to empower ourselves in ways that we could not accomplish as individuals.

As part of harnessing that power, individual litigants frequently turn to the procedural tool of class actions to correct for gross power imbalances. There are often times when a corporation causes millions of dollars of damages to people, but the amount of damages per person is so small that the cost of seeking justice would vastly outweigh the benefits, and no lawyer would ever take the case. But when the aggrieved can unify as a class, such disincentives disappear, allowing the entire universe of aggrieved individuals to collect damages and making possible the deterrent effect of a potentially significant financial loss to the corporation. Class action also helps inform people who would not otherwise know that they have been wronged in some way.

Unfortunately, during its 2010-2011 term, the Supreme Court has severely undermined individuals' ability to harness the power of law to rein in giant corporations' excesses. Indeed a small, ultra-conservative majority on the Court is rewriting our nation's laws in order to help elites game the system and create an uneven playing field. The four more progressive Justices in their dissents have quite frankly – and accurately – accused the conservatives of imposing a return to the discredited *Lochner* era. This term, the Roberts Court has, unfortunately, continued to earn its appellation as "the Corporate Court."

Highlighted below are some of the cases most exemplary of the Corporate Court trend this term.

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AT&T v. Concepcion:
The Corporate Court Undermines Class Action Consumer Protection Suits

Large corporations, with resources dwarfing those available to the average individual, clearly benefit when their victims are unable to pool resources through a class action. In several cases this term, the Supreme Court was asked to dismantle this vital tool, one that has proved time and again to be the only way to hold corporate wrongdoers accountable. In two cases, a sharply divided Court granted the request

AT&T Mobility v. Concepcion ranks among the most devastating of the Court's opinions in years, in terms of the breadth of its ruling, the commonality of the fact situation for average Americans, and the sheer amount of power it shifted to corporate interests. It also is a case where the Roberts Court took away substantive and procedural tools at our disposal.

In *AT&T Mobility v. Concepcion*, the telecommunications giant asked the Roberts Court to take a wrecking ball to state consumer protection laws. Unfortunately, the five conservative Justices were only too willing to do so, using a federal arbitration law in a way wholly alien to its intent.

At issue was whether states have the right to protect consumers from contracts that are so unfair as to be unconscionable - where one party has so much bargaining power over the other that the weaker one has little choice but to agree to highly disadvantageous terms.

This case started when AT&T offered phone purchasers a "free" second phone, then charged the consumers for the taxes on the undiscounted price of the "free" phone. AT&T allegedly pulled this scam on thousands of its customers. One of its victims, the Concepcion family, brought a class action suit against AT&T. However, AT&T had a service contract where consumers had to agree to resolve any future claims against the cell phone company through arbitration, rather than the courts. In addition, customers had to agree not to participate in any class action against AT&T. So AT&T asked the court to enforce the agreement it had imposed upon the Concepcions by throwing out the class action suit and forcing them into arbitration, one lone family against AT&T without the protections of courts of law or neutral judges.

Because the individual people of California were able to consolidate their own power through government, they have acted to prevent abusive contracts like the one forced upon the Concepcions. Under California law, the contractual prohibition against class action is so outrageous as to be illegal. California recognizes that such provisions effectively protect companies from being held liable for their transgressions, and that they are able to force them upon consumers only because of the corporations' vastly superior bargaining position.

Indeed, given the overwhelming power imbalance, a cell phone consumer has about as much chance of getting the class action arbitration provision removed as one of Joseph

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Lochner's bakery employees had a century ago of negotiating his work week down to 60 hours.

Unfortunately, consumers before the Roberts Court fare about as well as the bakers did in *Lochner*. By a 5-4 vote, the Court said that California's protection of consumers from contracts so outrageous as to be unconscionable is preempted by the Federal Arbitration Act, which generally encourages courts to compel arbitration in accordance with the terms of arbitration agreements.

As countless Americans can attest, it is not at all uncommon for a giant telecommunications service provider to provide extremely complex monthly bills that are nearly impossible for the average person to understand. It is certainly not unheard of for such bills to hide relatively small charges for services never ordered, or mysterious taxes or fees that the company should not be charging. Unfortunately, the vast majority of consumers who are victimized in these situations don't even realize it. Moreover, because the amounts at issue are relatively small, there is little incentive for consumers to undertake the significant expenses of recovering their loss. Even when the company pays out to the tiny percentage of defrauded customers who go to the trouble to engage in lone arbitration against the company, the overall practice remains profitable.

That is why class actions are so important. They allow the entire universe of defrauded consumers to recoup their losses, making possible the deterrent effect of a potentially significant financial loss to the corporation. In ruling for AT&T, the Roberts Court has devastated state-level consumer protections like California's and essentially given corporations an instruction manual on how to commit fraud against consumers.

Big Business surely recognizes the benefits this case may offer in providing insulation from accountability. Many large companies require new employees to sign, as a condition of employment, an agreement to resolve future conflicts through arbitration, with a ban on class action. When a potential employer and employee each has a reasonably strong bargaining position, such a demand would be quickly rejected by the job applicant. Unfortunately, powerful corporations are generally able to force aspiring job applicants to sign away their most important rights. As a result, the logic of *AT&T v. Concepcion* may enable such employers to easily cut off the most efficient method of anti-discrimination enforcement by simply refusing to hire anyone who does not agree to accept such an unconscionable demand.

There can be little doubt that the conservative majority, as in Lochner, was imposing its own policy choices upon the states. Indeed, in their brief to the Court, AT&T's attorneys made part of their argument one of pure policy rather than of law:

> "Accordingly, California's professed belief that class actions are necessary for deterrence boils down to the proposition that deterrence is served by imposing on all businesses -- without regard to culpability -- the massive costs of discovery that typically precede a class certification motion and the inevitable multimillion dollar fee award extracted by the class action attorneys as the price of peace. In

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> other words, because class actions *always* cost vast amounts to defend and eventually settle with a large transfer of wealth from the defendant to the class action lawyers no matter how guiltless the defendant may be, *all* businesses will be deterred from engaging in misconduct by the very existence of this externality producing procedure."[1]

David Arkush of Public Citizen called this "politically charged hyperbole." Soon after oral arguments, he wrote:

> AT&T's lawyers are not hacks. They are some of the nation's best Supreme Court litigators. It is a devastating indictment of the Roberts court that these lawyers think repeating myths about greedy trial lawyers is an effective way to argue. They must think the court is brazenly activist and political.[2]

Indeed, the majority opinion in *AT&T v. Concepcion* is unlikely to convince anyone otherwise.

Consumers in California and elsewhere retain the right not to be defrauded, but that right is increasingly a right without a remedy and, therefore, essentially meaningless. It remains illegal for a large corporation to defraud a million customers out of a paltry $5 apiece for a hefty profit of $5 million. Yet, with the blessing of the Roberts Court, Big Business now has an instruction manual on how to make sure that no one ever holds them accountable for that fraud.

Wal-Mart v. Dukes:
Class Action Ban Leads to Rules Without Remedies

The Supreme Court this term also turned federal anti-discrimination protections into a right without a remedy for millions of Americans employed by large corporations. In a result that, unfortunately, surprised no one, the Roberts Court struck out against women employees seeking to hold Wal-Mart accountable for illegal employment discrimination.

Wal-Mart is the nation's largest private employer. Several women sued the corporate giant on behalf of themselves and similarly situated women around the country - anywhere from 500,000 to 1.5 million employees. To sue as a class, they would have to show that they have claims typical of the whole group.

And that's exactly what they did. As Justice Ginsburg's dissent pointed out, the district court that had certified them as a class had identified systems for promoting in-store employees that were sufficiently similar across regions and stores to conclude that the manner in which these systems affect the class raises issues that are common to all class members. Vacancies are not regularly posted, and promotion to in-store management

[1] AT&T Mobility LLC, Brief for Petitioner, page 46, note 14 (emphasis in original).
[2] David Arkush, "Roberts Court: Unclear, Activist, and Pro-Corporate," *Huffington Post*, November 19, 2010, http://www.huffingtonpost.com/david-arkush/roberts-court-unclear-act_b_785849.html

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positions is an informal "tap on the shoulder" process. Across the nation, managers choose who to promote based on their own subjective impressions.

Wal-Mart also operates its compensation policies uniformly throughout the nation. For each position's hourly rate, it establishes a $2 band. The company does not provide standards or criteria for setting wages within that band, and, as the dissent pointed out, therefore does nothing to counter any unconscious bias on the part of supervisors.

And, although the conservative Justices did everything they could to find the fact differently, Wal-Mart clearly encouraged such a bias against women. The women showed that Wal-Mart has a national corporate climate infused with invidious bias against women. The record included instance after instance demonstrating disdain for women workers, as well as stereotypes about men vs. women. The plaintiffs showed that Wal-Mart executives refer to women employees as "Janie Qs," approve holding business meetings at Hooters restaurants, and attribute the absence of women in top positions to men being more aggressive in seeking advancement. They also presented evidence of the same kind of gender bias attributable to managers at all levels of the company.

In sum, Wal-Mart had a national policy to have personnel decisions made by local managers who are products of a toxic corporate climate. Expert testimony documented that pay and promotions disparities at Wal-Mart "can be explained only by gender discrimination and not by . . . neutral variables." This conclusion was based on reliable statistical analyses that controlled for factors including job performance, length of time with the company, and the store where an employee worked.

But none of that mattered to the conservative five-Justice majority. The opinion, authored by Justice Scalia, went out of its way to overlook the obvious commonality, focusing instead on the differences that will inevitably be present when a corporate giant targets so many people. The five conservatives of the Roberts Court accepted Wal-Mart's assertion that the women cannot be designated a class under Rule 23(a) because the representative plaintiffs do not have claims typical of the whole group.

What this 5-4 opinion states is that Wal-Mart is so large – and the discrimination it has allegedly engaged in is so great – that its victims cannot unify as one class to hold the company accountable. Unfortunately, individuals or small groups are much less likely to have the resources to seek justice, and any damages paid to them would be negligible for a company of Wal-Mart's size.

Certainly Wal-Mart itself now has much less incentive to change its behavior. The corporation has reaped millions of dollars in underpaying women, money that is unlikely to be exceeded by the payouts it would have to make to women with the resources to sue as individuals or in substantially smaller classes.

And other large corporations will realize as well the implications of this case for their own accountability -- that a rule without a remedy is no rule at all.

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Janus Capital Group v. First Derivative Traders:
An Instruction Manual for Getting Away With Fraud on the Market

Janus Capital Group v. First Derivative Traders was another 5-4 decision in the usual alignment. In this case, the conservative Justices played word games that took advantage of the fact that Janus officials created multiple entities to control different aspects of the Janus mutual funds' operations, resulting in a decision to protect corporate actors who had defrauded investors.

The Janus family of mutual funds is organized in a business trust called Janus Investment Funds (the Janus Fund). Critically, the Janus Fund's Board of Trustees may not have even been aware of the alleged fraud at the center of this case, and the Fund holds no assets other than those it holds for shareholders, meaning that if it were sued, it would not be able to pay damages.

Under the allegations in the case, the Fund's prospectuses contained materially false or misleading statements. The Janus Fund was created by Janus Capital Group (Janus Group), which is a publicly traded company. This company created a wholly-owned subsidiary, Janus Capital Management (Janus Management), which served as the mutual fund investment advisor and administrator. Janus Management developed the fraudulent material that the Janus Fund published. Technically, the Janus Fund was a client of Janus Management, which advised the Fund and administrated its funds.

Federal securities law makes it illegal for any person, directly or indirectly, "to **make** any untrue statement of a material fact" in connection with the buying or selling of securities. The case rests on the definition of the word "make."

Under any common sense understanding, Janus Management, which developed the allegedly fraudulent information disseminated by its "client" the Janus Funds, made untrue statements. Therefore, Janus Management and its parent company should be liable for violating the law, and it is perfectly logical for investors to sue them, knowing that these entities were the ones responsible for breaking the law and that they had the resources to compensate the investors for the damages they incurred.

The five ultra conservatives in the majority, however, proceeded to redefine the verb "make," bending it beyond all recognition, thereby permitting Janus Management and its parent company Janus Group to evade accountability. Out of thin air, the Roberts Court decided that the only ones who could "make" the fraudulent statements were the trustees of the Janus Fund itself, since only they had final authority to include the fraudulent information in the prospectuses.

Of course, this interpretation ignores our regular understanding that someone "makes a statement" regardless of whether the speaker is the "final authority" for the organization on whose behalf he speaks. The idea that the company that wrote a fraudulent document

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for its client to use didn't "make" the statements included in that document is simply ludicrous.

To make matters worse, the Corporate Court majority also ignored the obvious connections among all the Janus entities. Writing for the majority, Justice Thomas placed great emphasis on the fact that the Janus Fund is owned by investors and has a separate legal identity from that of the company that created it. But this defies the reality of the close relationships among all the entities here. As Justice Breyer pointed out in his dissent:

- Each of the Janus Fund's officers is a Janus Management employee;
- Janus Management, acting through those employees (and other of its employees), manages the purchase, sale, redemption, and distribution of the Janus Fund's investments;
- Janus Management prepares, modifies, and implements the Janus Fund's long-term strategies;
- Janus Management, acting through those employees, carries out the Janus Fund's daily activities;
- Janus Management disseminated its "client's" prospectuses through the website of its parent company (Janus Group);
- Janus Management employees drafted and reviewed the Janus Fund's prospectuses, including the deceptive language;
- Janus Management may have concealed the factual data is was hiding from the public from members of the Janus Fund's Board of Trustees as well.

To ignore the close interrelationships among these entities is to direct corporate officials on exactly how they can avoid being held liable for fraud on the market.

Sorrell v. IMS Health:
The Roberts Court Strikes Down a Medical Privacy Law in a Gift to Pharmaceutical Companies

In *Sorrell v. IMS Health*, a 6-3 Court (the five usual suspects joined by Justice Sotomayor) struck down a common-sense medical privacy law passed by Vermont. As part of its comprehensive regulation of pharmaceuticals, the state requires pharmacies to retain certain information about prescriptions and the doctors that order them. Knowing that the drug companies would no doubt want to take advantage of this information in order to target doctors to sell more of their product, Vermont protected medical privacy by prohibiting the sale to or use of this data by drug companies without the prescribing doctor's authorization.

According to the majority, since the law allowed others to use the data for other purposes, it could not be defended as protecting medical privacy. It therefore characterized the law as targeting speech based on the identity of the speaker and the content of the message,

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thereby triggering heightened First Amendment scrutiny, which, according to the majority, the privacy protection law failed to meet.

Justice Breyer's dissent on the other hand recognized the Vermont law as the standard, commonplace regulation of a commercial enterprise. It did not prohibit or require anyone to say anything, to engage in any form of symbolic speech, or to endorse any particular point of view. It simply addressed a problematic abuse of the prescription data. As the dissenters pointed out, federal and state governments routinely limit the use of information that is collected in areas subject to their regulation, as pharmaceuticals have been for over 100 years. Surely heightened First Amendment scrutiny should not be triggered by a law that, for instance, prohibits a car dealer from using credit scores it gets for one purpose (to determine if customer is credit-worthy) for another (to search for new customers).

The dissent stated that the Court had never before subjected standard, everyday regulation of this sort to heightened First Amendment scrutiny. Yet this was not the first time the Court had taken everyday economic regulation and struck it down on the basis of freedoms enumerated in the Bill of Rights. In fact, the dissenters specifically warned of a return to

> the bygone era of *Lochner v. New York*, in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies.

With *Lochner*, conservative, pro-corporate ideologues routinely struck down consumer and worker protection laws as violating the Due Process Clause replacing these laws with their own policy preferences. Simply replacing Due Process with Free Speech does not suddenly make this radicalism valid.

Proving that Big Business is paying attention to the opportunities afforded it by the Roberts Court, the morning after the medical privacy case was decided, NPR reported:

> [W]ithin hours of the decision, lawyers representing business and financial interests were contemplating new first amendment challenges to laws that restrict the way securities can be sold; and lawyers for the tobacco industry said they now have fresh ammunition for fighting the FDA's new requirement for graphic depictions of health risks on cigarette packages.

PLIVA v. Mensing:
The Roberts Court Lets Corporations Off the Hook For Failing to Warn of Their Dangerous Drugs

PLIVA v. Mensing involved a woman seriously injured by the generic drugs she took. She sued the manufacturer in state court over its failure to warn of risks the manufacturer

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knew were much greater than had been believed at the time the FDA approved its labeling. However, the five-justice conservative majority on the Court ruled that she had no right to file such a lawsuit.

All prescription drugs must have warning labels that are approved by the FDA. Under a recent precedent, if a brand-name drug manufacturer fails to warn consumers of a known risk not on the label, it cannot avoid being sued in state court simply by saying its label was approved by the FDA. *PLIVA v. Mensing* involved similar circumstances, except in this case it was a generic drug maker, calling into play a separate federal law that requires generics to use the same warning labels as brand-names.

Gladys Mensing developed a severe and irreversible neurological disorder as a result of her long-term use of a generic drug. At the time, the label indicated that the risk of a disorder of the type she developed was about one in 500 patients. However, according to Mensing, it turned out that the actual incidence was much higher, perhaps as high as one in five patients. Despite mounting evidence that the label greatly understated the risks, none of the companies that manufactured the drug proposed that the FDA modify the warning label.

Justice Thomas, writing for a 5-4 majority, twisted the doctrine of "impossibility" beyond recognition. In particular, Justice Thomas concluded that under federal law, the generic drug maker had no obligation to ask the FDA to update the brand name label and could not (under the "same label" law) have changed the label on its own without permission from the federal government. Therefore, according to this twisted logic, since compliance with both state and federal law is impossible, the federal law preempts the state law under the Supremacy Clause of the United States Constitution and Ms. Mensing is left without a remedy for failure to warn under state law.

Justice Sotomayor's blistering dissent (joined by Ginsburg, Breyer, and Kagan) harshly criticized Justice Thomas's reasoning. As Justice Sotomayor explained, we do not know if it would really have been impossible for the generic drug manufacturer to have complied with state law by getting the FDA to approve a label change in a timely manner, *because it did not even try*. Justice Sotomayor wrote:

> We have traditionally held defendants claiming impossibility to a demanding standard: Until today, the mere possibility of impossibility had not been enough to establish pre-emption.
>
> ...
>
> The Court strains to reach [its] conclusion. It invents new principles of pre-emption law out of thin air to justify its dilution of the impossibility standard. It effectively rewrites our [2009] decision in *Wyeth v. Levine*, which holds that federal law does not pre-empt failure-to-warn claims against brand-name drug manufacturers.

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As a result of the conservative majority's decision, therefore, the ability of a victim to collect under state law for failure to warn of a prescription drug's dangers depends on happenstance: whether the pharmacist happened to fill the prescription with a brand name or a generic. Congress has acted over the years to make low-cost generics more widely available to the American people. Surely a result like that mandated by the Roberts Court was not its intent.

Where This Leaves Us

What the conservative majority on the Roberts Court has done, as evidenced by these cases, is to provide a road map for those who want to escape accountability. Indeed, Justice Kagan frankly accused the conservative majority of doing just that in another context this term. In her dissent in *Arizona Christian Tuition v. Winn*, a case involving state funding of religion schools through tuition tax credits, Justice Kagan wrote:

> The Court opinion thus offers a roadmap – more truly, just a one-step instruction – to any government that wishes to insulate its financing of religious activity from legal challenge. Structure the funding as a tax expenditure, and *Flast* [the precedent recognizing taxpayers' standing to sue over Establishment Clause violations] will not stand in the way. No taxpayer will have standing to object. However blatantly the government may violate the Establishment Clause, taxpayers cannot gain access to the federal courts.

Conclusion

Time and again, the Roberts Court has removed substantive and procedural protections that are the only way that individuals can avoid becoming victimized by giant corporations that dwarf them in size, wealth, and power. Indeed, these decisions often provide road maps to corporate interests in how to avoid accountability for harm that they do. The constitutional design empowering individuals to consolidate their power against corporations is slowly being eroded by a fiercely ideological Court.

Today's hearing before the Senate Judiciary Committee is an important opportunity to further expose the harm that the Roberts Court is exposing all Americans to.

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Statement of

Andrew Pincus

Partner, Mayer Brown LLP

"Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior"

Hearing Before the Committee on the Judiciary, United States Senate

June 29, 2011

Mr. Chairman, Ranking Member Grassley, and members of the Committee.

My name is Andrew Pincus, and I am a partner in the law firm Mayer Brown LLP. I am honored to appear before the Committee today to discuss the Supreme Court's recent decisions in cases addressing claims involving businesses.

A significant part of my law practice focuses on the Supreme Court. In addition, I am co-director of the Yale Law School Supreme Court Clinic, which provides pro bono representation to parties in approximately a dozen cases each year. I was privileged to argue three cases before the Court in the just-concluded October 2010 Term; over the past 26 years, I have argued 22 cases in the Supreme Court and filed briefs in numerous other cases.[1]

My testimony makes four basic points:

- The logical way to assess the impact upon corporate behavior of the Court's recent decisions is to examine the outcomes in *all* of the cases involving private plaintiffs seeking damages from businesses. Business parties lost just as many times as they won such cases. Indeed, in the cases involving substantive interpretations of employment law, business parties lost *every* case decided by the Court. There simply is no basis for concluding that the Court's decisions, taken as a whole, favored business defendants over plaintiffs seeking damages.

- A review of the Court's decisions in which business parties prevailed reveals that the positions of the plaintiffs in those cases departed very substantially from existing law. It is not at all surprising that the Court refused to embark on the radical courses urged by the plaintiffs and instead adhered to the principles recognized in the Court's prior precedents.

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[1] My firm and I represented clients in a number of the cases discussed in my testimony and continue to represent clients with respect to the issues addressed in this testimony. However, my testimony today is not on behalf of any client or on behalf of my firm.

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- The scope of the Court's rulings will be debated in dozens, if not hundreds, of cases before the federal district courts and courts of appeals, and it will take several years for the lower courts to render a sufficient number of decisions to determine what the impact of the rulings will be. One thing is certain, however: predictions made today about the reach of the Court's decisions are highly likely to be incorrect. Two years ago, many asserted that the Court's ruling in *Ashcroft* v. *Iqbal*[2]—which addressed the standard for motions to dismiss in federal court—would dramatically restrict plaintiffs' access to court and that Congressional action was needed to overturn that decision. That speculation has been proven wrong: an independent study of the effects of the *Iqbal* ruling commissioned by the Federal Judicial Center—released just three months ago—found "no increase" in the rate at which motions to dismiss terminate a case and that "[t]here was, in particular, no increase in the rate of grants of motions to dismiss without leave to amend in civil rights cases and employment discrimination cases."[3]

- The Court's decisions will have significant positive effects on corporate behavior, avoiding an increase in the drain on companies' resources from unjustified litigation and leaving funds available for business expansion and job creation; preventing new disincentives to foreign investment in the United States; and preserving the availability of arbitration as a fair, efficient dispute resolution system that provides the only avenue of relief for the small injuries suffered by the vast majority of consumers and employees. Moreover, the Court's rulings leave undisturbed the principal deterrent of wrongdoing—the threat of government enforcement action.

Businesses Lost As Frequently As They Won In Cases Decided By The Court This Term

The impact of the decisions rendered by the Supreme Court cannot be assessed be examining only a subset of the relevant decisions. **A review of *all* the Supreme Court's cases involving disputes between businesses on the one hand and private plaintiffs seeking damages from businesses on the other, reveals that business parties lost just as many times as they won this year**:

- Employees prevailed in all three of the labor cases decided by the Court this Term—in *Kasten* v. *Saint-Gobain Performance Plastic Corp.*, the Court held that complaints under the Fair Labor Standards Act's anti-retaliation provision may be asserted either orally or in writing; in *Thompson* v. *North American Stainless, L.P.*, the Court held that Title VII's ban on retaliation against an employee who challenges discrimination extends to third parties and that those third parties have standing to sue under Title VII; and in *Staub* v. *Proctor Hospital*, it held that the bias of a supervisor can support a discrimination claim even if the adverse employment action is taken by another company official (thereby permitting discrimination claims on what has been termed the "cat's paw" theory).

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[2] 129 S. Ct. 1937 (2009).

[3] Joe S. Cecil, George W. Cort, Margaret S. Williams & Jared J. Bataillon, *Motions to Dismiss for Failure to State a Claim After* Iqbal at vii (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf.

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- Plaintiffs prevailed in two of the three securities cases decided by the Court—in *Matrixx Initiatives, Inc.* v. *Siracusano*, the Court refused to adopt bright-line rules for proving materiality and scienter (two of the elements of a cause of action for securities fraud); and in *Erica P. John Fund, Inc.* v. *Halliburton Co.*, it held that plaintiffs need not prove loss causation in order to obtain class certification. The business party won in *Janus Capital Group, Inc.* v. *First Derivative Traders* (discussed below).

- The results in tort preemption cases were also divided, with plaintiffs winning one case and defendants winning two. The Court rejected the claim of preemption in *Williamson* v. *Mazda Motor of America, Inc.*, holding that the plaintiffs there could bring a product liability suit claiming that a motor vehicle manufacturer should have installed lap-and-shoulder belts instead of lap belts; but it upheld the claims of preemption in *Pliva, Inc.* v. *Mensing*, concluding that generic drug manufacturers could not be held liable in failure-to-warn cases premised on a duty to alter the federally-required label, and in *Bruesewitz* v. *Wyeth*, a case involving the scope of the Vaccine Act's no-fault compensation regime.

- The results in cases involving class action rules were evenly divided—the Court ruled in favor of the defendant in *Wal-Mart Stores, Inc.* v. *Dukes* (discussed below), but in favor of the plaintiffs in *Smith* v. *Bayer Corp.*, which held that a federal court decision refusing to certify a class action could not be invoked to bar an attempt to obtain certification of the same class in an action in state court.

- The remaining business cases were also divided. Plaintiffs prevailed in *CSX Transportation Inc.* v. *McBride* (causation requirement in Federal Employers' Liability Act) and in *CIGNA Corp.* v. *Amara*, (relief available to ERISA plan beneficiaries and participants in a private action under the statute may include reformation of an ERISA plan); and business parties prevailed in *AT&T Mobility LLC* v. *Concepcion* (discussed below), *Chase Bank USA* v. *McCoy*, (addressing a since-superseded credit card regulation), *Schindler Elevator Corp.* v. *United States ex rel. Kirk* (scope of the public disclosure bar applicable to actions under the False Claims Act), and *J. McIntrye Machinery, Ltd.* v. *Nicastro* and *Goodyear Dunlop Tires Operations, S.A.* v. *Brown* (discussed below).

In total, plaintiffs prevailed in 9 cases and business parties prevailed in 9 cases.[4]

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[4] The Court's rulings in disputes between business and government divided almost evenly, with four rulings for government and five for business parties. Business party losses: *Chamber of Commerce* v. *Whiting* (preemption of state employment regulations); *Mayo Foundation for Medical Education and Research* v. *United States* (definition of employee for purposes of payment of payroll taxes); *Federal Communications Commission* v. *AT&T* (scope of exemption under Freedom of Information Act); *United States* v. *Tohono O'Odham Nation* (scope of Claims Court jurisdiction). Business party wins: *CSX Transportation, Inc.* v. *Alabama Department of Revenue* (preemption challenge to state taxes); *General Dynamics Corp.* v. *United States* (impact of state secrets privilege on contract claim); *Astra USA, Inc.* v. *Santa Clara County* (right of public hospitals to sue drug manufacturers under federal statute); *Sorrell* v. *IMS Health Inc.* (First Amendment challenge to Vermont law restricting access to prescription information); *American Electric Power Co.* v. *Connecticut* (federal common law claims brought by States to stop emissions on public nuisance theory).

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And it simply is not credible to argue that the cases in which plaintiffs prevailed were less significant than those in which business parties prevailed. As the Court explained in *Staub*, a ruling for the defendant in that case would have enabled employers to insulate themselves from liability by separating supervisory personnel from those responsible for personnel decisions.[5] Similarly, rulings for the defendants in *Kasten* and *Thompson* would have significantly curtailed protections against retaliation. And if the business parties had prevailed in *Matrixx* and *Halliburton*—the two securities cases that plaintiffs won—plaintiffs would have faced new hurdles in asserting such claims. Finally, a different outcome in *Smith* would have meant that a decision by a federal court not to certify a class action would have precluded any attempt to bring the same claim in state court; under the Court's decision in *Smith*, by contrast, plaintiffs are able to take a second bite at the class action apple.

The Supreme Court's Rulings In *Walmart*, *Concepcion*, *Janus Fund*, *McIntyre Machinery*, and *Goodyear* Overturned Lower Court Decisions That—If Upheld—Would Have Radically Changed The Law

Some observers contend that several of the Court's decisions this Term effected a dramatic change from prior precedent and have significantly changed the law so as to favor business defendants. In fact, **it was the positions of the plaintiffs in these cases that departed very substantially from existing law. It is not at all surprising that the Court refused to embark on the radical courses urged by the plaintiffs in these cases.**

Wal-Mart Stores, Inc. v. *Dukes*

The *Wal-Mart* case involved an attempt to certify under Federal Rule of Civil Procedure 23 a class action that was literally unprecedented in its size and in the nature and diversity of claims sought to be asserted—and very far from what the drafters of that Rule had in mind when it was promulgated in 1966 as well as beyond the contemplation of those who drafted the amendments to the Rule in subsequent years. The Court refused to endorse this broad expansion of the class action rule.

The class certified by the lower courts consisted of 1.5 million present and former Wal-Mart female employees who worked in 3,400 stores across the country—every woman who worked at a Wal-Mart store since December 26, 1998—who allegedly were subject to discrimination in pay or promotion decisions on the basis of their gender. This claim did not rest on any allegation of an express corporate policy discriminating against women. Rather, as the Court explained, the plaintiffs "claim that their local managers' discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees. And, [the plaintiffs] say, because Wal-Mart is aware of this effect, its refusal to cabin its managers' authority amounts to disparate treatment."[6] Thus, the plaintiffs' contention was that every female Wal-Mart employee was subject to discrimination, and they sought to

[5] Slip op. 8.

[6] Slip op. 4 (citation omitted).

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"litigate the Title VII claims of all female employees at Wal-Mart's stores in a nationwide class action."[7]

The Court addressed two legal issues related to the lower courts' decisions that the case could proceed as a class action. First, it held—unanimously—that the claims for backpay could not be litigated on a class-wide basis under Rule 23(b)(2), which allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

The Justices all agreed that the district court violated the plain language of Rule 23(b)(2) by certifying the class, because the monetary relief sought by the plaintiffs was based on "individualized" claims,[8] and was "not merely incidental to any injunctive or declaratory relief that might be available."[9] They explained that the scope of this part of Rule 23 is appropriately narrow because it authorizes "mandatory classes" that permit "no opportunity for . . . class members to opt out, and does not even oblige the District Court to afford them notice of the action."[10] The lower courts' expansion of the scope of Rule 23(b)(2), the Court found, "creates perverse incentives for class representatives to place at risk [the absent class members'] potentially valid claims for monetary relief."[11] Thus,

> "[i]n this case, for example, the named plaintiffs declined to include employees' claims for compensatory damages in their complaint. That strategy of including only backpay claims . . . . created the possibility . . . that individual class members' compensatory-damages claims would be *precluded* by litigation they had no power to hold themselves apart from. If it were determined, for example, that a particular class member is not entitled to backpay because her denial of increased pay or a promotion was *not* the product of discrimination, that employee might be collaterally estopped from independently seeking compensatory damages based on that same denial. That possibility underscores the need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives' or go it alone—a choice Rule 23(b)(2) does not ensure that they have."[12]

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[7] *Id.*

[8] *Id.* at 20.

[9] *Id.* at 1 (Ginsberg, J., dissenting).

[10] *Id.* at 22.

[11] *Id.* at 24.

[12] *Id.* (emphasis in original).

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The Court also rejected the Ninth Circuit's proposed "Trial by Formula," which would have involved extrapolation of the results of a handful of sample trials to create a class-wide damages fund. This "novel project" would have precluded the company from raising its individual defenses to the claims of each class member—a basic right under Title VII and due process principles. As the Court explained, Wal-Mart was entitled "to individualized determinations of each employee's eligibility for backpay."[13]

The second issue considered by the Court was whether the lower courts correctly applied Rule 23's requirement that in order to be certified as a class action, the plaintiff must show that "there are questions of law or fact common to the class." Rule 23(a)(2). Quoting an opinion for the Court authored by Justice Stevens nearly thirty years ago, also in a case involving alleged employment discrimination, the Court stated that "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'"[14]

Again quoting from Justice Stevens' opinion, the Court stated that in order to establish the requisite commonality in the employment discrimination context, the parties seeking to become class representatives must bridge the "'wide gap'" between those individuals' claims of discrimination and "'the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claim will share common questions of law or fact and that the individual's claim will be typical of the class claims.'"[15] In the absence of an allegedly biased testing procedure, "'[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class . . . if the discrimination manifested itself in hiring and promotion practices in the same general fashion.'"[16]

Here, the Court said, the necessary "significant proof" was lacking. To begin with, "[t]he only evidence of a 'general policy of discrimination' respondents produced was the testimony of Dr. William Bielby, their sociological expert." He testified

> "that Wal-Mart has a 'strong corporate culture,' that makes it '"vulnerable"' to 'gender bias.' He could not, however, 'determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart. At his deposition . . . Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.'"[17]

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[13] *Id.* at 26-27.

[14] *Id.* at 9 (quoting *General Telephone Co. of Southwest* v. *Falcon*, 457 U.S. 147, 157 (1982)).

[15] *Id.* at 12 (quoting *Falcon*, 457 U.S. at 157).

[16] *Id.* at 12-13 (quoting *Falcon*, 457 U.S. at 159 n.15).

[17] *Id.* at 13 (citation omitted).

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That wide range, the Court stated, "is worlds away from 'significant proof' that Wal-Mart 'operated under a general policy of discrimination.'"[18]

Next, the Court recognized that Wal-Mart's delegation of discretion to its store managers could provide the basis for a disparate impact claim under Title VII—"since 'an employer's undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.'"[19] But the plaintiffs could not satisfy the commonality requirement on this basis because they did not identify "a common mode of exercising discretion that pervades the entire company."[20]

The plaintiffs' statistical evidence was flawed because "'[i]nformation about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level.' A regional pay disparity, for example, may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends."[21] "Other than the bare existence of delegated discretion, [plaintiffs] have identified no 'specific employment practice'—much less one that ties all their 1.5 million claims together. Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice."[22]

The Court also found that the plaintiffs' anecdotal evidence was far weaker than that introduced in prior cases finding company-wide discrimination.[23] It concerned only 1 out of every 12,500 class members, and related to only some 235 out of Wal-Mart's 3,400 stores.[24] Moreover, as the Washington Post explained in an editorial supporting the Court's decision, the Court found that "[o]f the 120 or so affidavits submitted by women alleging to have been wronged, more than half came from six states; there were no claims of wrongdoing in 14 states where employees would nevertheless be included in the class action."[25]

Justice Ginsburg's dissenting opinion disagreed with the majority's assessment of the weight of the evidence of a policy of discrimination, and seemed to argue that Wal-Mart's system of permitting managers to exercise discretion was by itself sufficient to permit the case to move

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[18] *Id.* at 14.

[19] *Id.* at 15.

[20] *Id.*

[21] *Id.* at 16.

[22] *Id.* at 17.

[23] *Id.* at 17-18.

[24] *Id.*

[25] *A Sensible Call on the Wal-Mart Class Action Suit*, Wash. Post, June 21, 2011, at A16.

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forward.[26] If that were true, however, any company that delegates employment decisions to its local managers could be subjected to a class action on behalf of all present and former employees in a protected class as long as a disparate impact on a nationwide basis can be shown.

That would open the door to nationwide class actions against numerous employers without any evidence showing that individual managers are in fact exercising their discretion in a discriminatory manner. Some evidence establishing that discrimination is widespread, and related in some way at the corporate level, also must be required. And the Supreme Court majority was surely correct in concluding that the very slim body of evidence adduced by the plaintiffs simply was not sufficient to permit this gargantuan class action to move forward. As the *Oregonian* concluded in its editorial:

> "Precedent-setting court cases can't be decided based on loose impressions of discrimination, multiple anecdotes about sexist managers, or even statistical samples that suggest bias. Judges and juries need to have 'the goods' on a company, or courts of law devolve into courts of public opinion. In *Wal-Mart v. Dukes*, the plaintiffs' lawyers aimed for the largest possible payout from the nation's biggest retailer for the largest pool of sympathetic workers. Quite simply, the lawyers overreached and fell short."[27]

AT&T Mobility LLC v. *Concepcion*

Concepcion involved the enforceability of the arbitration provision in the contract between AT&T and its cell phone customers.

Arbitration has long been recognized as a fair, speedy, and efficient means of resolving disputes. Although the roots of arbitration lie in the resolution of disputes between businesses, the use of arbitration to resolve employment disputes has a long history as well. More recently, arbitration has been utilized as an effective and less costly means of resolving disputes between businesses and their customers.

Congress enacted the Federal Arbitration Act (FAA) in 1925 to addressthe courts' hostility to enforcing arbitration clauses. The statute permits the States to apply general contract principles to determine whether an arbitration agreement is valid and enforceable, but invalidates state law rules that target arbitration agreements for invalidation or special burdens or that otherwise conflict with the federal statute.

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[26] *See* slip op. 11 (Ginsburg, J., dissenting).

[27] *Wal-mart, the Supreme Court, and fair play*, Oregonian, June 21, 2011 (emphasis added). The *Chicago Tribune* reached the same conclusion: "The Supreme Court said, not so fast: Combining the disparate claims into one case would not do justice, either for the company or the allegedly wronged employees. The court ruled that a class-action case requires more evidence of systemic conduct that harmed a broad group of people. Moreover, a class-action judgment in this case would improperly lead to a one-size-fits-all remedy. If some women were seriously wronged, they might deserve significantly more compensation than others, the court said. For the sake of expediency — and for a massive payday? — plaintiff's attorneys gave short shrift to those differences and pursued this mass class action." *Class-action sanity Wal-Mart wins — and workers do, too* (June 24, 2011).

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State courts have used the authority permitted under the FAA to apply general contract principles—in particular the general principle invalidating unconscionable provisions in contracts of adhesion—to ensure that consumers and employees are not subjected to unfair arbitration clauses. There are literally hundreds of decisions invalidating on unfairness grounds arbitration provisions that, for example, subject customers or employees to high costs or burdensome travel requirements in order to pursue arbitration; limit punitive damages or other remedies to which an individual is entitled; or specify procedures for selecting the arbitrator or conditions that might create a biased decisionmaking process.[28]

The arbitration provision at issue in *Concepcion* was specially designed to provide AT&T's consumers with an efficient, fair, and low-cost dispute-resolution system. A federal district judge described AT&T's arbitration agreement as containing "perhaps the most fair and consumer-friendly provisions this Court has ever seen."[29] Under AT&T's provision,

- The customer pays no arbitration costs as long as the claim is not frivolous.
- Regardless of amount of the customer's claim, AT&T must pay the customer a minimum of $7,500 (now $10,000) plus double attorneys' fees if the arbitrator awards the customer more than AT&T's final settlement offer.
- The arbitrator may award the customer any form of individual relief (including punitive damages, statutory damages, attorneys' fees, and injunctions) that the customer could obtain in court. AT&T waives any right to obtain its own attorneys' fees if it wins the arbitration, even if it could have done so in court.
- The customer has the option of filing suit in small claims court rather than pursuing arbitration.
- Arbitration takes place in the customer's home county, and for claims under $10,000 the customer may choose whether the arbitration will be in person, by telephone, or by mail.
- Proceedings (including the process for selecting the arbitrator) are governed by consumer arbitration rules of the independent, non-profit American Arbitration Association—which has been recognized as a neutral and fair arbitration administrator.
- Consumers and their attorneys are not required to keep arbitration results confidential, and may bring issues to the attention of federal, state or local enforcement agencies or to other similarly-situated AT&T customers.

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[28] *See, e.g., Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003); *Carll v. Terminix Int'l Co.*, 793 A.2d 921 (Pa. Super. Ct. 2002); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (1997); *Philyaw v. Platinum Enters.*, 54 Va. Cir. 364 (Va. Cir. Ct. 2001); *Pinedo v. Premium Tobacco, Inc.*, 102 Cal. Rptr. 2d 435 (Cal. Ct. App. 2000); *Murray v. United Food & Commercial Workers Int'l Union*, 289 F.3d 297 (4th Cir. 2002); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999); *Missouri ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. 2006); *Murphy v. MidWest Nat'l Life Ins. Co. of Tenn.*, 78 P.3d 766 (Idaho 2003); *Phillips v. Assocs. Home Equity Servs., Inc.*, 179 F. Supp. 2d 840 (N.D. Ill. 2001); *Camacho v. Holiday Homes, Inc.*, 167 F. Supp. 2d 892 (W.D. Va. 2001); *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996); *Anderson v. Ashby*, 873 So. 2d 168 (Ala. 2003).

[29] *Makarowski v. AT&T Mobility, LLC*, 2009 WL 1765661 (C.D. Cal. June 18, 2009).

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The AT&T clause requires consumers to proceed individually, and prohibits class actions.

The enforceability of this arbitration provision has been recognized in court decisions applying the laws of at least 22 States—Alabama, Arkansas, Colorado, Delaware, Florida, Georgia, Illinois, Louisiana, Maryland, Michigan, Mississippi, Missouri, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia, and West Virginia—and the District of Columbia.[30] Courts in most of the other States have not addressed the question.

The *Concepcion* case arose in California, and the lower federal courts there held the arbitration provision unenforceable, despite its unique features, because of a California Supreme Court ruling barring the enforceability of arbitration provisions that do not permit class actions—one of the very few state courts to reach that result.

The Supreme Court held that this California rule declaring the AT&T clause unenforceable is preempted by the FAA. It rested its decision on a principle set forth in a 24-year-old decision written for the Court by Justice Thurgood Marshall, which stated that a State may not "'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.'"[31]

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[30] AT&T's arbitration clause has been enforced under the laws of seven States. **Alabama:** *Powell v. AT&T Mobility*, 742 F. Supp. 2d 1285 (N.D. Ala. 2010). **Arkansas:** *Davidson v. Cingular Wireless LLC*, 2007 WL 896349 (E.D. Ark. Mar. 23, 2007). **Florida:** *Cruz* v. *Cingular Wireless, LLC*, 2008 WL 4279690 (M.D. Fla. Sept. 15, 2008), *appeal pending*, No. 08-16080-C (11th Cir.). **Michigan:** *Francis v. AT&T Mobility LLC*, 2009 WL 416063 (E.D. Mich. Feb. 18, 2009). **Missouri:** *Fay v. New Cingular, Wireless, PCS, LLC*, 2010 WL 4905698 (E.D. Mo. Nov. 24, 2010), *appeal pending*, No. 10-3814 (8th Cir.). **Texas:** *Johnson v. AT&T Mobility, L.L.C.*, 2010 WL 5342825 (S.D. Tex. Dec. 21, 2010). **West Virginia**: *Wince v. Easterbrooke Cellular Corp.*, 681 F. Supp. 2d 679 (N.D. W. Va. 2010); *Strawn v. Cingular Wireless LLC*, 593 F. Supp. 2d 894 (S.D. W. Va. 2009); *see also State ex rel. AT&T Mobility, LLC v. Shorts*, 703 S.E.2d 543 (W. Va. 2010) (holding that AT&T's arbitration agreement cannot be deemed unenforceable under West Virginia law simply because it requires arbitration on an individual basis).

Courts applying the laws of 15 States and the District of Columbia have upheld class waivers in the context of arbitration provisions that lack some or all of the pro-consumer features of AT&T's provision. **Colorado:** *Ornelas v. Sonic Denver T, Inc.*, 2007 WL 274738 (D. Colo. Jan. 29, 2007). **Delaware:** *Edelist* v. *MBNA Am. Bank*, 790 A.2d 1249 (Del. Super. Ct. 2001). **District of Columbia:** *Szymkowicz v. DirecTV, Inc.*, 2007 WL 1424652 (D.D.C. May 9, 2007). **Georgia:** *Cappuccitti v. DirecTV, Inc.*, 623 F.3d 1118 (11th Cir. 2010); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005). **Illinois:** *Crandall v. AT&T Mobility LLC*, 2008 WL 2796752 (S.D. Ill. July 11, 2008). **Louisiana:** *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004). **Maryland:** *Walther v. Sovereign Bank*, 872 A.2d 735 (Md. 2005). **Mississippi**: *Anglin v. Tower Loan of Mississippi, Inc.*, 635 F. Supp. 2d 523 (S.D. Miss. 2009). **New York:** *Reid v. Supershuttle Int'l, Inc.*, 2010 WL 1049613 (E.D.N.Y. Mar. 22, 2010); *Hayes v. County Bank*, 811 N.Y.S.2d 741 (N.Y. App. Div. 2006). **South Dakota:** *Strand v. U.S. Bank Nat'l Ass'n ND*, 693 N.W.2d 918 (N.D. 2005). **Ohio:** *Stachurski v. DirecTV, Inc.*, 642 F. Supp. 2d 758 (N.D. Ohio 2009). **Oklahoma:** *Edwards v. Blockbuster, Inc.*, 400 F. Supp. 2d 1305 (E.D. Okla. 2005). **Pennsylvania:** *Cronin v. CitiFinancial Servs., Inc.*, 352 F. App'x 630, 635-36 (3d Cir. 2009). **Tennessee:** *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351 (Tenn. Ct. App. 2001). **Utah:** *Miller v. Corinthian Colleges, Inc.*, 2011 WL 652478 (D. Utah Feb. 15, 2011). **Virginia:** *Halprin v. Verizon Wireless Servs., LLC*, 2008 U.S. Dist. LEXIS 28840 (D.N.J. Apr. 8, 2008) (applying Virginia law).

[31] Slip op. 7 (quoting *Perry* v. *Thomas*, 482 U.S. 483, 493 n.9 (1987)).

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The Court cited several examples of state laws or judicial decisions that would impermissibly frustrate the federal goal of permitting arbitration agreements by imposing procedural requirements incompatible with the unique nature of arbitration:

- "a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery";
- "a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence";
- a rule invalidating arbitration clauses unless they permit "an ultimate disposition by a jury (perhaps termed 'a panel of twelve lay arbitrators' to help avoid preemption)."[32]

"Such examples are not fanciful," the Court said, "since the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy."[33]

The Court concluded that a state-law rule that "interferes with the fundamental attributes of arbitration . . . creates a scheme inconsistent with the FAA."[34] Significantly, the plaintiffs in *Concepcion* endorsed this conclusion in their brief, stating that a state law requiring "'procedures incompatible with arbitration . . . would be preempted by the FAA.'"[35]

The whole question in the case, therefore, was whether requiring class-action procedures is "incompatible with arbitration." The Court found that it was, for three basic reasons. *First*, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than finality. *Second*, class arbitration *requires* procedural formality, while the entire purpose of arbitration is to permit parties to dispense with formality, subject to supervision pursuant to legitimate application of state unconscionability law. *Third*, class arbitration greatly increases risks to defendants, and would lead to the elimination of arbitration as a means of redress for individual consumers.

The Court rejected the dissent's argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system."[36] It said: "States cannot

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[32] *Id.* at 8.

[33] *Id.*

[34] *Id.* at 9.

[35] *Id.* at 8 (quoting Respondents' Brief at 32).

[36] *Id.* at 17.

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require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[37] Moreover, the Court pointed out,

> "the ***claim here was most unlikely to go unresolved***. . . . [T]he arbitration agreement provides that AT&T will pay claimants a minimum of $7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and ***the Ninth Circuit admitted that aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole***. Indeed, the District Court concluded that the Concepcions were ***better off*** under their arbitration agreement with AT&T than they would have been as participants in a class action, which 'could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars.'"[38]

The Court's ruling thus invoked federal law to preclude California—which already had established itself as an outlier by invalidating an arbitration clause that more than 20 States would uphold—from fundamentally changing the nature of arbitration. And it made that decision in the context of an arbitration clause that the lower courts had determined (in this very case) would provide a better means of compensating aggrieved customers than the class action system. Far from a radical ruling by the Supreme Court, the decision in *Concepcion* rejected an erroneous interpretation of the Federal Arbitration Act that deviated significantly from the Court's precedents and would have had the practical effect of eliminating arbitration as a fair and economical alternative to the litigation system.

Janus Capital Group, Inc. v. *First Derivative Traders*

The Supreme Court's decision in *Janus Capital Group v. First Derivative Traders* reaffirms longstanding limits on the scope of the private action that courts have implied under Section 10(b) of the Securities Exchange Act of 1934. In a series of decisions stretching back to 1994, the Supreme Court has made clear that liability in these private actions is limited to persons who make a false statement to investors (or who omit a material fact necessary to make a statement made not misleading) and those who are liable under section 20(a) of the Act—the "control person" standard—for statements that are made by others.[39] In *Janus Capital Group*, the Court confirmed that this well-settled limitation cannot be circumvented by allegations that a defendant "caused" or "created"—but did not itself make—false statements by a third party.

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[37] *Id.*

[38] Slip op. 17-18 (emphasis added).

[39] Section 20(a) of the Act establishes liability for "[e]very person who, directly or indirectly, controls any person liable" for violations of the securities laws. 15 U.S.C.A. § 78t(a).

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The Court's first ruling in this line of cases came in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N. A.*, which held that Section 10(b)'s private right of action does not authorize suits against aiders and abettors.[40] The Court reaffirmed this principle in 2008 in *Stoneridge Investment Partners, LLC v. Scientific–Atlanta, Inc.*, upholding dismissal of a suit alleging that "entities who, acting both as customers and suppliers, agreed to arrangements that allowed the investors' company to mislead its auditor and issue a misleading financial statement."[41] The Court held that dismissal of the complaint was proper because the public could not have relied on the entities' undisclosed deceptive acts.[42]

Janus Capital Group presented a similar question. The plaintiffs, investors in a mutual fund holding company, sued the company and its subsidiary, the funds' investment advisor, alleging that they had "caused" the funds to issue allegedly misleading prospectuses. The prospectuses represented that the funds were not suitable for "market timing," a trading strategy that is legal but harms other fund investors, and that the adviser would curb the practice. The investors claimed that these representations were untrue and that they lost money when the existence of market timing became public.

As it did in *Central Bank* and *Stoneridge*, the Court adhered closely to the text of the statute and SEC rule in deciding the case. The SEC rule provides that a person is liable if he "makes" a false statement, and the Court observed that, as a grammatical matter, "[o]ne 'makes' a statement by stating it."[43] The "maker of a statement" is therefore "the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it."[44] The Court illustrated this common-sense approach by analogy to a speaker's control over, and responsibility for, the content of a speech—even a speech that someone else has drafted. Because the holding company and the adviser did not have "ultimate authority" over the statements in the funds' prospectuses (rather, the funds did), the Court ruled that they were not subject to private suit for the statements.

The practical effect of a contrary ruling would have been to eviscerate the clear line established in *Central Bank* and *Stoneridge*. Because a plaintiff would be able to assert a claim against an aider and abettor simply by changing the language used to describe his conduct—characterizing him not as an aider and abettor but as someone who "caused" the issuance of a false statement—acceptance of the plaintiffs' argument would have "substantially undermin[ed]" the Court's precedents rejecting such suits.[45]

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[40] 511 U.S. 164 (1994),

[41] 552 U.S. 148, 152-53 (2008).

[42] *Id.* at 165.

[43] Slip Op. at 6.

[44] *Id.*

[45] *Id.* at 7.

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That would have led to a flurry of litigation against companies for their ordinary business transactions, on the theory that a third party made a false statement incorporating information about the transaction, and against accountants and attorneys whose clients misuse their services. Plaintiffs would argue that the extent of these defendants' involvement in the allegedly false statement is a factual question that could only be resolved at trial. That is the precise result that the Court sought to preclude in *Stoneridge* and *Central Bank*, a vague liability standard that would allow plaintiffs to sweep innocent third parties into this expensive class action litigation.

Janus is a narrow decision. It does not affect the ability of investors to sue those who make false statements; nor does it necessarily foreclose suits under section 20(a) alleging that a defendant legally controlled a speaker. Rather, the Court adhered to its prior precedent refusing to expand liability beyond the actual maker of a false statement.

J. McIntyre Machinery, Ltd. v. Nicastro and *Goodyear Dunlop Tires Operations, S.A. v. Brown*

In this pair of decisions, the Supreme Court applied bedrock principles of personal jurisdiction and constitutional due process that are at least as old as its landmark ruling in *International Shoe Co. v. Washington* over half a century ago.[46]

Jurisdiction over foreign defendants can come in two forms: specific and general.[47] "A court may assert general jurisdiction over foreign . . . corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."[48] "Specific jurisdiction, on the other hand, is confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'"[49] *Goodyear* addresses the standard for general jurisdiction and *McIntyre* concerns specific jurisdiction.

In *Goodyear*, two children from North Carolina were killed in a bus accident that occurred near Paris, France. The children's parents filed suit in North Carolina state court against Goodyear and three of its foreign subsidiaries, claiming that defective tires manufactured by the subsidiaries had caused the accident. The U.S. parent did not contest jurisdiction, but the foreign subsidiaries did.[50]

Because the bus accident occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, there was no dispute that "North Carolina courts lacked specific

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[46] 326 U.S. 310 (1945).

[47] *Goodyear* slip op. at 2.

[48] *Id.* at 2 (quoting *International Shoe Co. v. Washington*, 326 U. S. 310, 317 (1945)).

[49] *Id.* (quoting von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1136 (1966)).

[50] *Goodyear* slip op. at 4.

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jurisdiction to adjudicate the controversy."[51] Moreover, the Supreme Court emphasized the lack of connections between the subsidiaries and the United States: they "are not registered to do business in North Carolina"; "have no place of business, employees, or bank accounts in North Carolina"; "do not design, manufacture, or advertise their products in North Carolina"; and "do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers."[52] Nonetheless, the North Carolina Court of Appeals concluded that general jurisdiction existed because other Goodyear affiliates had distributed a small percentage of the subsidiaries' tires—but not the type of tire involved in the accident—within North Carolina. The state court reasoned that jurisdiction therefore was permissible because "petitioners placed their tires 'in the stream of interstate commerce without any limitation on the extent to which those tires could be sold in North Carolina.'"[53]

Justice Ginsburg, writing for a unanimous Court, rejected this reasoning, holding that a "connection so limited between the forum and the foreign corporation" is "an inadequate basis for the exercise of general jurisdiction."[54] In particular, the Court explained, the "stream-of-commerce" doctrine relied on by the state court, while potentially relevant to the exercise of specific jurisdiction, cannot alone establish the type of "'continuous and systematic' affiliation" necessary to empower state courts "to entertain claims unrelated to the foreign corporation's contacts with the State."[55]

The Court rested this ruling on a straightforward application of its "textbook" 1952 decision in *Perkins v. Benguet Consolidated Mining Co.*,[56] and its equally well-established decision in *Helicopteros Nacionales de Colombia, S. A. v. Hall*.[57] All the Justices agreed that, "[m]easured against *Helicopteros* and *Perkins*, North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction."[58] The Court thus sensibly rejected "the sprawling view of general jurisdiction urged by respondents and embraced by the North Carolina Court of Appeals," which would have rendered "any substantial manufacturer or seller of goods . . . amenable to suit, on any claim for relief, wherever its products are distributed."[59]

In *McIntyre*, the plaintiff had seriously injured his hand in New Jersey while operating a machine manufactured in England by the defendant, a corporation that was incorporated and had its

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[51] *Id.* at 2-3.

[52] *Id.* at 4.

[53] *Id.* at 5.

[54] *Id.* at 3.

[55] *Id.* at 3, 10-11.

[56] 342 U. S. 437 (1952).

[57] 466 U. S. 408, 414 nn. 8, 9 (1984).

[58] *Goodyear* slip op. at 13.

[59] *Id.* at 12-13.

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operations in England. Although the defendant had not "advertised in, sent goods to, or in any relevant sense targeted the State," the Supreme Court of New Jersey nonetheless deemed the defendant subject to the jurisdiction of the New Jersey courts because it "knew or reasonably should have known 'that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states'" and because it "failed to 'take some reasonable step to prevent the distribution of its products in this State.'"[60]

Six justices voted to reverse that decision. Because the votes of Justices Breyer and Alito were critical to the Court's determination—and because their rationale is narrower than that of the four-Justice plurality (which joined an opinion written by Justice Kennedy)—Justice Breyer's opinion for himself and Justice Alito is the controlling ruling in the case.[61]

Justice Breyer explained that the Supreme Court of New Jersey had relied on three facts: that the defendant's American distributor had sold and shipped one machine to a New Jersey customer; that the defendant wanted to sell its machines in the United States; and that the defendant's representatives had attended trade shows in various U.S. cities. He pointed out that "none of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient" to permit an assertion of jurisdiction.[62] To emphasize the point, Justice Breyer pointed to separate opinions by Justices Brennan, Stevens, and O'Connor "strongly suggest[ing] that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place."[63]

The plaintiff might have been able to adduce other facts in support of jurisdiction, Justice Breyer stated, and he noted that Justice Ginsburg's dissent "considers some of those facts."[64] But Justice Breyer noted that "the plaintiff bears the burden of establishing jurisdiction" and "t[ook] the facts precisely as the New Jersey Supreme Court stated them."[65] He concluded that "on the record present here, resolving this case requires no more than adhering to our precedents."[66]

The four-Justice plurality took the view that the "principal inquiry" for establishing personal jurisdiction "is whether the defendant's activities manifest an intention to submit to the power of

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[60] *McIntyre* slip op. 2-4.

[61] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' " *Marks* v. *United States*, 430 U.S. 188, 193 (1977).

[62] Slip op. 2 (Breyer, J., concurring in the judgment).

[63] *Id.*

[64] *Id. at 3.*

[65] *Id. at 3-4.*

[66] *Id. at 4.*

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a sovereign."[67] As a "general rule," the plurality elaborated, quoting a 1958 precedent, this standard "requires some act by which the defendant 'purposefully avails itself of the privilege of conducting activities within the forum state.'"[68]

In rejecting the "foreseeability" rule that some justices had favored in a past case, the plurality noted the possible "undesirable consequences" of its adoption for small businesses: "The owner of a small Florida farm might sell crops to a large nearby distributor . . . who might then distribute them to grocers across the country. If foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States' courts without ever leaving town."[69]

Justice Ginsburg, writing on behalf of herself and Justices Sotomayor and Kagan, rejected the plurality's approach, stating that "reason and fairness"—not the defendant's consent to a sovereign's assertion of jurisdiction—are the critical factors for purposes of the due process inquiry.[70] In her view, the assertion of jurisdiction over the defendant complied with those principles.

But this debate between the plurality and dissent remains to be resolved by the Court in a future case, however. For now, it is Justice Breyer's ruling—which rests squarely on longstanding precedent—that must be applied by the lower courts.

The Committee Should Be Extremely Skeptical Of Speculation Concerning The Breadth Of *Walmart*, *Concepcion*, *Janus Fund*, *McIntyre Machinery*, and *Goodyear*

The breadth of these rulings will be debated in dozens, if not hundreds, of cases before the federal district courts and courts of appeals, and it will take several years for the lower courts to render a sufficient number of decisions to determine what the impact of the rulings will be. One thing is certain, however: predictions that the Court's decisions will dramatically narrow the ability of plaintiffs with legitimate claims to seek judicial redress are unlikely to be correct.

The example of the Court's decision two years ago in *Ashcroft* v. *Iqbal* demonstrates why. That case involved an interpretation of Federal Rule of Civil Procedure 8, which governs the specificity required for a complaint to withstand a motion to dismiss. The Supreme Court stated that a court assessing the sufficiency of a motion to dismiss should "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported

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[67] *Id.* at 7.

[68] *Id.* at 7 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

[69] *Id.* at 10.

[70] Slip op. at 11 (Ginsburg, J., dissenting).

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by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."[71]

Although the principles set forth in *Iqbal* rested on longstanding precedent of the Supreme Court and courts of appeals, the Supreme Court's decision was characterized by some observers as a dramatic change in the law that would significantly increase the burden on plaintiffs and lead to a much greater rate of dismissal for cases filed in federal court. Indeed, legislation was introduced to overturn the Court's decision and hearings were held in both the Senate and House, but the legislation was not enacted.

The Federal Judicial Center commissioned an independent study of the question (examining decisions during the period beginning three years before the decision and ending eighteen months after the ruling). That study concluded—notwithstanding the predictions at the time of the Court's decision—that *Iqbal* has had little if any impact on the rate at which motions to dismiss are granted. The Federal Judicial Center report summarized its findings as follows:

- "There was a general increase from 2006 to 2010 in the rate of filing of motions to dismiss for failure to state a claim";
- "In general, there was no increase in the rate of grants of motions to dismiss without leave to amend. There was, in particular, no increase in the rate of grants of motions to dismiss without leave to amend in civil rights cases and employment discrimination cases";
- "Only in cases challenging mortgage loans on both federal and state law grounds did we find an increase in the rate of grants of motions to dismiss without leave to amend. Many of these cases were removed from state to federal court. This category of cases tripled in number during the relevant period in response to events in the housing market . . . There is no reason to believe that the rate of dismissals without leave to amend would have been lower in 2006 had such cases existed then."
- "There was no increase from 2006 to 2010 in the rate at which a grant of a motion to dismiss terminated the case."[72]

Today's predictions about the impact of this Term's decisions are as unreliable as those regarding the effect of *Iqbal*. The plain fact is that no one knows how the lower courts will resolve the disputes between plaintiffs and defendants regarding these issues. Certainly, there is no consensus that the Court's decisions will dramatically alter pre-existing legal standards in a manner that will prevent vindication of legitimate claims. The reactions to the *Wal-Mart* and *Concepcion* decisions demonstrate the uncertainty about the ultimate impact of the rulings.

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[71] 129 S. Ct. 1937, 1950 (2009).

[72] Joe S. Cecil, George W. Cort, Margaret S. Williams & Jared J. Bataillon, *Motions to Dismiss for Failure to State a Claim After* Iqbal at vii (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf.

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Wal-Mart Stores, Inc. v. Dukes

Much of the early commentary on the *Wal-Mart* decision has taken the view that the Court's ruling will not affect traditional class actions, but rather is linked directly to the unprecedented size and scope of the class and the plaintiffs' failure to supply plausible evidence of a policy of discrimination:

- Professor John C. Coffee observed that *Wal-Mart* involves "an unusual set of facts"—alleged discrimination across almost 3500 stores based on the delegation of "subjective discretion over both employment and promotion decisions" to "the administrator of each."[73]

- According to one plaintiffs' class action lawyer, the Court's decision "is really a reflection of the fact that this case was several steps beyond what was possible under Rule 23. . . . I think in a lot of ways this is a unique situation. I don't know that you are going to see this referred to a lot, frankly, in other cases."[74]

- Another prominent class action litigator stated that the ruling's reach may "be limited to the facts in the . . . case," and it should not affect "cases arising in the normal business context."[75]

The attorneys representing the *Wal-Mart* plaintiffs have stated that the Court's decision will not preclude them from vindicating the interests of their clients. One of the plaintiffs' lawyers said that, "[t]his case is not over. Wal-Mart is not off the hook," because the plaintiffs plan to bring more focused class-action claims and seek intervention by government regulators.[76] Another explained, "[i]nstead of one case, this case will be splintered into many pieces"—"we could end up with some cases framed store by store or region by region."[77] As the *Washington Post* concluded in its editorial supporting the Court's ruling, the decision is "likely to lead to some welcome developments, including smaller (although not necessarily small) and more cohesive class-action suits."[78]

AT&T v. Concepcion

Although the Court's ruling in *Concepcion* was greeted initially by concerns that it would "end class actions," more sober analysis has led to a rejection of that hyperbolic conclusion.

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[73] *See* BNA, *Discrimination Suit Against Wal-Mart Not Appropriate for Class Certification* (June 20, 2011).

[74] *Id.*

[75] Tony Mauro, *Justices hand Wal-Mart big win in class action battle*, Nat'l L. J., June 20, 2011.

[76] *Id.*

[77] Stephanie Clifford, *Despite Setback, Plaintiffs Vow To Continue Pursuing Cases*, N.Y. Times, June 21, 2011, B1, B1, B4.

[78] Wash. Post, *supra*, at A16 (emphasis added).

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To begin with, most class actions do not arise in a context in which there is a contractual relationship between the plaintiff and defendant—for example, the myriad class actions filed against BP following the Gulf oil spill and virtually all class actions invoking the federal securities laws. In the absence of a contractual relationship, there cannot be an arbitration clause and *Concepcion* therefore cannot apply. Paul Bland—a lawyer at Public Justice (formerly Trial Lawyers for Public Justice) who is one of the leaders of the effort to invalidate arbitration clauses—wrote a memorandum to "class action attorneys" stating that "there are quite a few class actions where there is no written contract," such as "when a defective product is sold over-the-counter at a pharmacy," and that "[c]lass actions can certainly proceed in that kind of circumstance, notwithstanding *AT&T Mobility* [*v. Concepcion*]."[79]

Next, state courts retain authority to apply general principles of contract fairness to invalidate unjust arbitration provisions. In particular, nothing in the Supreme Court's ruling disturbs its prior cases holding that States may refuse to enforce arbitration provisions that run afoul of a state law principle that unconscionable contract provisions are invalid (so long as that principle is applied generally to a broad range of contract provisions). For example, the Court's decision would not preclude state courts from refusing to enforce arbitration clauses that impose high costs on consumers, require them to travel to inconvenient locations, or prohibit consumers from recovering punitive damages or attorneys' fees.

Plaintiffs' lawyers argue that there are other grounds for limiting *Concepcion*. Arthur Bryant, another lawyer at Public Justice, contends that the *Concepcion* ruling "has lots of limitations," and that "the reports of class actions' death are greatly exaggerated."[80]

- Bryant argues that *Concepcion*'s holding is limited to agreements to arbitrate on an individual basis that, like AT&T's clause, have affirmative incentives for consumers and their attorneys to arbitrate small claims. Thus, he contends, less consumer-friendly arbitration clauses may still be invalidated under state law, and restrictions under federal law remain valid. Public Justice also asserts that states may refuse to enforce an arbitration clause if the consumer were provided insufficient notice of the clause or was defrauded or coerced into or mistakenly agreed to it.

- Another attorney asserts in a recent article that the Supreme Court "was not presented with — and the five-justice majority did not reach — the issue of most importance to litigants throughout the country: whether state unconscionability laws can void an arbitration clause that allegedly works as a de facto exculpation clause because it makes individual arbitration too costly to incentivize small-dollar claimants to sue, thereby effectively preventing consumers from enforcing their contractual or statutory rights." He explained that the Court did not have to reach the issue because "because AT&T

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[79] Paul Bland, *The* AT&T Mobility v. Concepcion *Decision: Now What?* available at http://www.publicjustice.net/Repository/Files/ATTMobilityvConcepcionDecision-NowWhat.pdf.

[80] Arthur H. Bryant, *Class actions are not dead yet*, National Law Journal, June 20, 2011, available at http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202497707930&src=EMC-Email&et=editorial&bu=National%20Law%20Journal&pt=NLJ.com-%20Daily%20Headlines&cn=20110620NLJ&kw=Class%20actions%20are%20not%20dead%20yet&slreturn=1&hbxlogin=1.

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> Mobility's arbitration procedures gave the plaintiffs a viable arbitration option," but that "[t]here are good grounds under the decision to believe [that arbitration clauses that lack the characteristics of the AT&T provision] are still voidable under state law."[81]

To be sure, lawyers representing defendants will likely argue that the decision is not subject to these limitations. As with the *Wal-Mart* decision, there is simply no certainty about the scope of the Court's ruling in *Concepcion*. That question must await the outcome of the debate in the lower courts.

The Court's Decisions Will Benefit Employees, Consumers, Businesses, Investors, And The Entire Economy

The Court's reaffirmation of prior precedent in the five decisions that I have discussed in detail—*Walmart*, *Concepcion*, *Janus Fund*, *McIntyre Machinery*, and *Goodyear*—will have significant positive effects:

- Avoiding an increase in the drain on corporate resources from unjustified litigation, leaving funds available to expand businesses and create jobs;
- Preventing new disincentives to foreign investment in the U.S. and foreign company participation in U.S. capital markets due to the fear of unjustified litigation exposure; and
- Preserving the availability of arbitration as a fair, efficient dispute resolution system for the vast majority of injuries suffered by ordinary consumers and employees—which are too individualized to vindicate in a class action and too small to attract the services of a lawyer, and that therefore would go unremedied in the absence of an arbitration system.

Critics of these decisions, by contrast, are likely to argue that the Court's rulings will "leave corporations unaccountable" and "prevent injured parties from obtaining compensation." I disagree with those assertions.

First, businesses that engage in wrongdoing will remain fully accountable for their actions. Indeed, government enforcement, not private litigation, is the principal deterrent of wrongful conduct. And government authorities have broad power to take enforcement action:

- The plaintiffs' lawyers in *Wal-Mart* have already announced that they are filing numerous claims with the Equal Employment Opportunity Commission, which has authority to bring actions to remedy employment discrimination. State and local governments also have enforcement powers in this area.
- Most consumer-oriented companies are regulated by at least the FTC and/or one other federal agency, as well as by all 50 state attorneys general and a myriad of state agencies and commissions. These agencies routinely pursue allegations of corporate misconduct affecting consumers, especially the use of unfair and deceptive practices.

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[81] Alexander H. Schmidt, *AT&T Mobility Case May Have Limited Application*, Law360, New York (June 21, 2011).

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- The SEC has broad power under Section 20(e) of the Securities Exchange Act to proceed against persons and entities that aid and abet violations of Section 10(b) and other provisions of federal securities law, and that power was expanded by Dodd-Frank Act, which lowered the mental state standard the SEC must show to prove an aiding-and-abetting violation from knowledge to recklessness[82] and enhanced the Commission's ability to obtain civil penalties by making them available in administrative actions, thus relieving the Commission of the need to go to court.[83] The Commission has been vigorous in exercising its enforcement authority. In FY2010, the SEC brought 681 enforcement actions in total—a substantial increase over the number in FY2009—involving some $2.8 billion in penalties and disgorgement, and obtained 45 emergency restraining orders and 56 orders to freeze assets.[84] In the *Janus* case itself, government enforcement efforts caused the defendants to reduce their fees by $125 million and to pay investors $100 million.[85] And a spokesperson for the SEC emphasized that the Court's ruling in *Janus* "makes clear that the SEC has tools to pursue such cases."[86]

Moreover, the Court's decisions do not come anywhere close to eliminating all private liability for businesses in the position of the defendants in these cases. For example:

- The *Wal-Mart* lawyers have acknowledged that they plan to bring smaller, more focused class actions.

- AT&T remains subject to liability for claims asserted in arbitration, and nothing prevents an enterprising lawyer from advertising for clients and then using the incentives created by the AT&T clause to obtain settlements well in excess of the value of each client's claim.[87]

Second, although private lawsuits—and especially class actions—have been justified historically on the ground that they supplement the deterrent effect of government enforcement, there is little empirical evidence to support that belief. To the contrary, because virtually all class actions settle with no determination of liability, defendants typically view them as a "cost of doing business," not as a badge of wrongdoing. Most of those settlements, moreover, are a product of

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[82] *See* Pub. L. No. 111-203, § 929O.

[83] *See id.* § 929P.

[84] GAO, *Securities and Exchange Commission's Financial Statements for Fiscal Years 2010 and 2009*, GAO-11-202, at 17 (Nov. 15, 2010); *see also* Jan Larsen *et al.*, NERA Econ. Consulting, *SEC Settlement Trends: 2H10 Update* (Dec. 7, 2010).

[85] *See* Slip Op. at 3 n.2.

[86] Greg Stohr, *Mutual Fund Shareholder Suits Curbed by U.S. Supreme Court*, Bloomberg/Businessweek, June 27, 2011.

[87] One group of amici in *Concepcion* noted that after issuing a press release announcing a lawsuit against AT&T, they were contacted by 4,700 customers with similar complaints. See Coneff Amicus Brief at 10. They easily could have initiated arbitration proceedings for each of these 4,700 customers and either obtained acceptable settlements or had the opportunity to pursue the premiums in serial arbitrations.

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a business judgment that the costs of litigation and the downside risk of an erroneous verdict favor settlement even when a company believes that it has done nothing wrong.

As a result, the threat that a company might be faced with a class action does not deter any corporate behavior, because such lawsuits are perceived to be unrelated to the propriety of the company's actions. That perception is enhanced by the broad recognition that most class actions are driven by lawyers, rather than by the allegedly-injured class members.

Third, expanded liability in private litigation is not always—or even mostly—beneficial to the economy or even to private plaintiffs. Perhaps increased liability in private lawsuits could be justified if the private litigation system were perfectly efficient—so that only wrongdoers were sued, or at least only wrongdoers had to bear the costs associated with litigation. But the reality is that our litigation system imposes very significant transaction costs on innocent defendants—in the form of litigation costs, especially attorneys' fees and discovery costs, which in the era of electronic information can amount to millions of dollars in even routine cases.[88]

In addition, the litigation system is extremely costly and inefficient. Even when suit is brought against an actual wrongdoer, the transaction costs borne by both plaintiff and defendant may be very large in comparison to the benefits obtained by the injured party.

As a result, a decision whether to expand the scope of litigation must consider the costs—in terms of the burdens borne by innocent defendants and the transaction costs borne by all participants—as well as the benefits. And the extraordinary costs associated with class actions mean that the costs and benefits must be weighed especially carefully in that context—an assessment that must take into account the well-documented flaws of the class action system.[89]

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[88] Characterizing electronic discovery as "a nightmare and a morass," one recent report stated that electronic discovery is "enormously expensive and burdensome" and " has resulted in a disproportionate increase in the expense of discovery and thus an increase in total litigation expense." American College of Trial Lawyers & Institute for the Advancement of the American Legal System, *Final Report on Joint Project* at 14, 16 (2009).

[89] For example, few class members ever qualify to receive money from a class settlement, either because they don't know about them, fill out complicated claims forms incorrectly, or fail to fill out the forms at all. When the amount that a consumer can expect to receive is small, the percentage of class members who submit claim forms is very low, and many more claims forms are rejected as insufficient. *See, e.g.*, Francis E. McGovern, *Distribution of Funds in Class Actions—Claims Administration*, 35 J. Corp. L. 123 (2009); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 103 ("in many situations individual plaintiffs are able to recover their awards only upon the filing of complex claim forms"); *See, e.g.*, Deborah R. Hensler, *et al.*, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 184 (RAND Inst. for Civ. Justice 2000), *available at* http://www.rand.org/pubs/monograph_reports/MR969/ (noting that more than 40 percent of claims for one settlement were rejected for insufficient documentation or proof of loss).

Securities class actions are infected by a pervasive pay-to-play culture. As the late Judge Edward Becker of the U.S. Court of Appeals for the Third Circuit explained: "[P]ublic pension funds are in many cases controlled by politicians, and politicians get campaign contributions. The question arises then as to whether the lead plaintiff, a huge public pension fund, will select lead counsel on the basis of political contributions made by law firms to the public officers who control the pension funds and who, therefore, have a lot of say in selecting who counsel is." Edward R. Becker et al., *The Private Securities Law Reform Act: Is It Working?*, 71 Fordham L. Rev. 2363, 2369 (2003). The problem is well documented. See Drew T. Johnson-Skinner, Note, *Paying-to-Play in Securities Class*

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These problems are compounded in the case of securities class actions by the basic economic irrationality of the current system for awarding damages in suits involving after-market trading. In the traditional non-securities fraud situation, the wrongdoer is the person who profits from the victim's loss; thus, a successful fraud claim against the wrongdoer leads to a return of those illicit profits to the victim.

Securities class actions, by contrast, usually entail situations in which the "gains" from fraud are received not by the company officials who allegedly committed the fraud (except in insider trading cases), but rather by innocent investors who allegedly sold securities in the secondary market at inflated prices. Thus, "each loser—the buyer or seller disadvantaged by the fraud—is balanced by another winner: the person on the other side of the trade. . . . Yet for obvious reasons, the law makes no effort to force the winners to disgorge their profits in order to fund the losers' recovery."[90]

The consequence of authorizing private claims in this situation is "systematic overcompensation over time to many investors."[91] In particular, diversified, active traders—such as large institutional investors that engage in the lion's share of securities trades—who "lose" on one transaction (*i.e.*, from buying a security at what is alleged to be an artificially inflated price) are eligible to recover damages in a class action while they are, at the same time, permitted to keep gains received from separate "winning" transactions (*i.e.*, from selling a security at what is alleged to be an artificially inflated price).[92] In view of this fundamental flaw, it is difficult to imagine any justification for *expanding* the scope of securities class actions.

The Supreme Court's decisions of course turned on the specifics of the relevant legal principles, not on these policy considerations. But any criticism of those rulings on the ground that they may foreclose private lawsuits must take into account the costs and benefits of those new types

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Actions: A Look at Lawyers' Campaign Contributions, 84 N.Y.U. L. Rev. 1725, 1735-37, 1750-51 (2009); Brian C. Mooney, *Campaigns Funded by Firms Politicians Oversee*, Boston Globe, June 8, 2010; Review & Outlook, *Progress on Pay to Play*, Wall St. J., Feb. 12, 2010; Mark Maremont, Tom McGinty, & Nathan Koppel, *Trial Lawyers Contribute, Shareholder Suits Follow*, Wall. St. J., Feb. 3, 2010; Sydney P. Freedberg & Connie Humburg, *Law Firms Jockey for Plum State Board of Administration Job in Florida*, St. Petersburg Times, Dec. 13, 2009; Kenneth Lovett, *Pension Pay-to-Play: Law Firms Give Controllers Big Bucks, Then Got $518M in Fees from State Fund*, N.Y. Daily News, Oct. 8, 2009; Robert Iafolla, *SEC Skips Lawyers in Review of Pay-to-Play Pension Cases*, L.A. Daily J., July 21, 2009. As Professor John Coffee has observed, it is "the equivalent of hanging a 'for-rent' sign out over the pension fund." Joseph Tanfani & Craig R. McCoy, *Lawyers Find Gold Mine in Philadelphia Pension Cases*, Phila. Inquirer, Mar. 16, 2003 (quoting Professor Coffee). This means that lawyers, not clients are once again in charge of securities class actions—the very problem that Congress sought to remedy when it enacted the Private Securities Litigation Reform Act—which means that the filing of a class action may be in the lawyers' self-interest rather than in the interest of the putative plaintiffs. Also, a recent empirical study found that this type of pay-to-play "imposes a real cost on investors" in the form of "greater attorneys' fees." Stephen J. Choi, Drew T. Johnson-Skinner, & A.C. Pritchard, *The Price of Pay to Play in Securities Class Actions*, Univ. of Mich. L. Sch., John M. Olin Center for Law and Econ. Working Paper No. 09-025, at 37 (January 21, 2010 draft).

[90] Donald C. Langevoort, *Capping Damages for Open-Market Securities Fraud*, 38 Ariz. L. Rev. 639, 646 (1996) (hereinafter "*Capping Damages*").

[91] *Id.*

[92] *See* Anjan V. Thakor, *The Unintended Consequences of Securities Litigation* 1, U.S. Chamber Inst. For Legal Reform (2005).

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of litigation. There simply is no indication that the expansion of liability principles sought in the cases decided by the Court this Term could be justified by benefits that would exceed the certain costs that increased private litigation would produce.

Fourth, private lawsuits—and especially class actions—are not necessarily the best way to compensate injured parties.

The claims that potentially may be asserted by consumers and employees can be grouped in three general categories:

- Relatively small, individualized claims—a $200 overcharge on a bill, for example;
- Larger individualized claims; and
- Claims susceptible to assertion in a class action.

One of the virtues of arbitration is that it provides an easily-accessible and fair dispute resolution system that enables consumers, employees and others to seek redress for small, individualized claims, which is by far the largest category of potential disputes. Without arbitration, those claims simply could not be asserted—hiring a lawyer could not be justified economically, no lawyer would take such a case on a contingent-fee basis, and, because the claims turn on individual facts, they could not be asserted in a class action.[93]

Permitting arbitration agreements only if the parties were permitted to bring class claims—whether in arbitration or litigation—would be the death knell of arbitration programs. The American Arbitration Association requires businesses to pay all but $125 of the $1,700 cost of consumer arbitrations. Businesses would have little incentive to subsidize arbitration—much less provide the affirmative inducements contained in AT&T's arbitration provision—if, at the end of the day, they still would be required to litigate in court every claim pleaded as a class action. Instead, companies would give up on arbitration entirely, burdening the courts with additional cases and leaving customers and employees without any means of vindicating small, individualized claims.[94]

Moreover, studies demonstrate that consumers and employees fare well in arbitration—often much better than they would have done in court:

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[93] One analysis recently concluded that "only about 5% of the individuals with an employment claim who seek help from the private bar are able to obtain counsel," meaning that for 95% of employees seeking to remedy possible wrongdoing, "it looks like arbitration—or nothing." Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 792 (2008) (emphasis added).

[94] Indeed, there is no example of a voluntary arbitration program that permits the assertion of class claims. Critics of arbitration sometimes point to the securities industry arbitration program as a counter-example, but securities firms are forced by regulations to maintain an arbitration program and at the same time permitting the assertion of class actions. See FINRA Rules 12200 (requiring firms to arbitrate individual claims upon customer's request), 12204(d) (forbidding arbitration of claims pleaded as a class actions).

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- For example, the National Workrights Institute found that employees were almost 20 percent more likely to win employment cases in arbitration than those litigated in court.[95] Studies of consumer arbitration have also demonstrated positive outcomes for consumers.[96]

- Consumers frequently settle their arbitrations to their satisfaction. The NASD (now FINRA) reports that 62 percent of customers pursuing arbitration settled their arbitrations in 2010, and over 45 percent of the consumers who proceeded to an award received damages. That translates to over 70 percent of consumer-initiated securities arbitrations resolved with at least some recovery for consumers.[97] The most recent statistics provided by the American Arbitration Association show that approximately 60 percent of its consumer arbitrations settle or are withdrawn from administration, and consumers prevail in almost half (48 percent) of the remaining consumer-initiated arbitrations.[98]

Finally, as I have discussed, state courts use their authority to refuse to enforce arbitration clauses that are unconscionable under general principles of contract law. That authority ensures the fairness of arbitration procedures.

The effect of the Supreme Court's decision in *Concepcion* will be to maintain the availability of this important dispute-resolution alternative.

Fifth, numerous studies—including one conducted under the auspices of Senator Schumer and Mayor Bloomberg—have found that the risk of unjustified litigation is a key reason why foreign business shy away from the United States.[99] Expanding liability would increase this perception—and drive away the foreign investment and foreign participation in U.S. capital

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[95] National Workrights Institute, *Employment Arbitration: What Does the Data Show?* (2004). Another recent study confirmed this stark differential, finding that plaintiffs who pursue employment arbitration in the securities industry were 12% more likely to wintheir disputes than employees litigating in federal court in the Southern District of New York. Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where do Plaintiffs Better Vindicate Their Rights?*, DISP. RESOL. J. (Nov. 2003 - Jan. 2004); *see also* 23-9 INSURANCE TIMES (Apr. 29, 2003).

[96] *See* Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, DISP. RESOL. MAG. 34 (Fall 2008). *See also* Searle Center on Law, Regulation, and Economic Growth, *Consumer Arbitration Before the American Arbitration Association Preliminary Report* (finding that consumers win relief in 53% of the cases they file in arbitrations before the American Arbitration Association).

[97] NASD, Dispute Resolution Statistics, available at http://www.finra.org/ArbitrationMediation/AboutFINRADR/Statistics/.

[98] AAA, *Analysis of the American Arbitration Association's Consumer Arbitration Caseload*, available at http://www.adr.org/si.asp?id=5027.

[99] McKinsey & Co., Report Commissioned by Mayor Michael R. Bloomberg and Senator Charles E. Schumer, *Sustaining New York's and the U.S.' Global Financial Services Leadership* at ii, 75 (2007); Comm. on Capital Mkts. Regulation, *Interim Report* at ix, 2-3,11, 29-34, 71 (Nov. 2006); *see also* Financial Services Forum, *2007 Capital Markets Survey* at 6-8 (2007).

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markets that is essential to expand our economy and create jobs. The Court's rulings rejecting dramatically expanded liability will avoid this result.

Thank you again for the opportunity to testify before the Committee today. I look forward to answering your questions.

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The Roberts Court and Business Revisited

Jonathan H. Adler • June 29, 2011 2:30 am

Tomorrow morning the Senate Judiciary Committee will hold a hearing on "Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior." According to Committee Chairman Patrick Leahy (D-VT), the hearing is the latest in a series examining "how the Court has misinterpreted laws meant to protect consumers and employees, shielded corporations engaged in misconduct, and overturned well-settled precedent." The hearing will examine three of the Supreme Court's most recent decisions, *Wal-Mart v. Dukes*, *Janus Capital Group, Inc. v. First Derivative Traders*, and *AT&T Mobility v. Concepcion*, and will feature *Wal-Mart* plaintiff Betty Dukes.

The hearing is intended to reinforce the claim that the Roberts Court is "pro-business" and focuses on three cases in which business interests prevailed against plaintiffs lawyers. In two, *Wal-Mart* and *Janus Capital*, the Court turned away efforts to expand plaintiff litigation against corporate defendants, and in the third, *AT&T Mobility*, the Court created a potential opening for corporations to defend themselves against consumer litigation with binding arbitration. These cases were important victories for the business community, as were some others, but they are hardly representative of the Court's business-related docket

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this past term, nor are they representative of the Court's overall performance in business-related cases.

While business interests prevailed in the cases of concern to Senator Leahy, in other cases businesses took it on the chin. *Janus Capital* continued to read the private right of action under Section 10b-5 quite narrowly, but *Matrixx Initiatives v. Siracusano* and *Erica John Fund v. Halliburton Co.* green-lighted securities class-action suits the business community had hoped to stop, and in *Smith v. Bayer* rejected a corporation's effort to preclude class actions in state court after prevailing against a class organized by different plaintiffs in federal court. *Thompson v. North Americna Stainless* also expanded worker protection against retaliation for complaints of discrimination under Title VII in a way the business community feared.

In the preemption context, as we've seen in recent years, the Court did not establish a clear pattern. Whereas the Court found federal legislation preempted state tort suits against makers of generic drugs and vaccines, it rejected preemption of suits against automakers for failing to install shoulder belts and, perhaps more significantly, turned away the business community's arguments against an Arizona immigration law. This case was particularly important to the business community because the law authorizes the revocation of business licenses — in effect, capital punishment for a business — for the hiring of illegal immigrants, and is likely to be replicated in other states.

In *American Electric Power v. Connecticut*, the Court found that the Clean Air Act displaces suits alleging greenhouse gas emissions constitute a public nuisance under federal common law, yet the business community won on the narrowest grounds possible. The Court failed to preclude such suits on standing grounds and expressly left open the possibility of continued litigation under state law. The Court's displacement holding was clearly dictated by existing precedent and hardly makes up for the raft of regulation the business community faces as a consequence of *Massachusetts v. EPA*. For the business community, *AEP* was one step forward that came well after several steps back.

Analysts often look at the record of the U.S. Chamber of Commerce as a way to evaluate the Court's orientation toward the business community, but this is an imperfect measure. The Chamber often files amicus briefs in cases of high importance to the business community, but at times it stays its hand, either because its membership is divided or it has determined limited resources are better spent in other cases — perhaps because the likelihood of winning a given case is too remote. As a consequence, focusing solely on cases in which the Chamber participates may produce an incomplete picture, overlooking cases such as *Kasten v. Saint-Gobain Performance Plastics Corp.*, a Fair Labor Standards Act case in which the business community had a clear interest, but in which the Chamber did not file a brief and the business community did not prevail.

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As I hope this post illustrates, the rush to characterize the Court as "pro" or "anti" business based on a handful of cases or even a single term inevitably results in sweeping conclusions that obscure more than they illuminate. While the business community may win more often than not, many of the victories are quite small. This year, with the exception of *At&T Mobility v. Concepcion*, most of the business community's victories came on narrow grounds and largely preserved the status quo. In this regard, the Court largely followed the general pattern of the past few terms. Similarly, the Court did not erect new barriers to plaintiffs' suits so much as it refused to open new doors. The Court didn't overturn precedent and move the law in a pro-business direction so much as it refused to move it in an anti-business direction, and so on. And where existing law or precedent did not lead the Court in a pro-business direction, it had no hesitation in reaching an anti-business result.

So is it fair to call the Roberts Court "pro-business"? Looking at the broader pattern of cases, there is little evidence that the Court, or any of the justices, are motivated by a desire to help business, as such. There have been too many Roberts Court decisions in which the business community lost big to support such a claim. But there are many justices on the Court who have doctrinal or jurisprudential commitments — such as a suspicion of policy-making through litigation — that often work to the business community's advantage. It's no coincidence that those justices least likely to open doors for plaintiffs' attorneys in suits against business are also those who reject programmatic litigation against government agencies. As this terms First Amendment cases show, it's not that the Court has a particular fondness for corporate speech, so much as it is a Court with a highly speech-protective majority. This results in wins for business when corporate speech is at issue, but it also works to the advantage of offensive protesters and non-corporate speakers. And where business can't marshal arguments that appeal to the justices judicial philosophies, they are less likely to prevail. So rather than say this is a Court that is "pro-business," I think it is a Court that business often likes — except when it doesn't.

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Court Defies Pro-Business Label

Decisions Reveal More Nuanced Portrait

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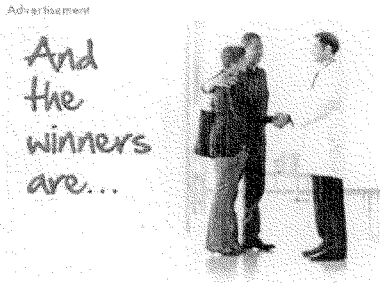

By Robert Barnes
Washington Post Staff Writer
Sunday, March 8, 2009

After the Supreme Court completed its first full term with both of President George W. Bush's appointees in place, business groups and those who represent them could hardly come up with the accolades to describe the new court.

One prominent practitioner said that if former Chief Justice William H. Rehnquist's court had created a good forum for business, the one headed by his protege and successor John G. Roberts Jr. would be even better.

Robin S. Conrad, executive vice president of the legal arm of the U.S. Chamber of Commerce, said the term that ended in June 2007 was "our best Supreme Court term ever," with the business lobby prevailing in 13 of the 15 cases in which it took a position.

But since then, a more nuanced portrait of the court has emerged. And after last week's decision flatly turning down the position of pharmaceutical companies that they were insulated from state lawsuits filed by injured patients, something of a reevaluation of the court is underway.

"I think the early view that the Roberts court was 'pro-business' was premature," said Jonathon Adler, head of the business law center at Case Western Reserve University law school. "People have been too quick to try to characterize this court one way or the other."

Its decisions can often seem contradictory. Last term, it ruled overwhelmingly in *Riegel v. Medtronic* that makers of medical devices approved by the Food and Drug Administration were protected from state lawsuits. But last week, in *Wyeth v. Levine,* the majority said the FDA's role in labeling drugs does not protect drug companies from suits alleging they should have done more in warning of dangerous side effects.

To Roy T. Englert Jr., who frequently represents business clients before the court, that is an indication that the court "calls them as they see 'em."

"The court that decided *Riegel* by an 8 to 1 vote in favor of manufacturers is the same court that voted 6 to 3 in *Wyeth* against the manufacturers," he said.

Georgetown University law professor David C. Vladeck, who filed a brief supporting Diana Levine, a musician from Vermont who lost an arm to gangrene because of the botched injection of a drug Wyeth produced, agrees with Englert to a point.

"I bet a fair amount of beer that we were going to win the case," he said, though he acknowledges that the two decisions "seem to point in opposite directions."

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But medical devices and drugs are regulated under different statutes. In the former, Congress was specific that states may not impose "any requirement" beyond what the federal agency required. But on the labeling of drugs, the "preemption" of state lawsuits was a relatively new position adopted by the Bush administration.

Justice John Paul Stevens wrote that it did not reflect Congress' will and was at odds with decades of FDA practice that recognized the power of lawsuits to ensure the safety of drugs.

Justice Ruth Bader Ginsburg was the lone justice who voted in favor of allowing the injured to sue in both cases. Roberts and Justices Antonin Scalia and Samuel A. Alito Jr. voted for the manufacturers in both cases, and Vladeck parts ways with Englert in saying he thinks those three justices make up a nucleus on the court "particularly sympathetic to the needs of regulated interests."

Those three were also in the minority earlier in the term when the court decided another preemption case in favor of plaintiffs. In a 5 to 4 opinion also written by Stevens, the court said federal regulation of cigarette labeling does not stand in the way of suits under state laws regulating fraudulent marketing practices by tobacco companies.

Those cases do stand in contrast with the court's previous decisions on preemption, and add to a portrait of the court that is building year by year as the justices decide a handful of important business cases each term.

There is no doubt that the court has sided with big business in important ways. The court has made it harder for investors to sue when they suspect securities fraud or unlawful actions. It has protected the lending arms of national banks from state regulation. It overturned a nearly 100-year-old precedent that had made it illegal for manufacturers and retailers to agree on minimum prices.

Last year, it slashed the punitive damages owed by Exxon as a result of the Exxon Valdez oil spill disaster from $2.5 billion to about $500 million. The court expressed doubt about a nearly $80 million award to a smoker's widow and sent it back to the Oregon Supreme Court. That court again said the award was proper, and the Supreme Court is again considering the issue.

"There's no doubt the court is concerned about lawyer-driven litigation," said Conrad of the Chamber of Commerce.

The court drew loud protests in 2007 when it ruled that Lilly Ledbetter, a tire-plant worker from Alabama, was not entitled to the award she won after suing Goodyear for paying her less money than the men she worked with. The court said her suit violated the time limitation set in the federal statute under which she sued.

But since then, the court has consistently sided with employees who have alleged discrimination, and ruled in all five cases it heard last term to allow lawsuits to go forward. It has continued the pattern in cases decided this term.

Liberal groups often express surprise when things go their way. People for the American Way President Kathryn Kolbert this week said the *Wyeth* decision was "a welcome, and rare, victory for the rights of American patients and consumers," while warning that "the Roberts court has slapped down many other wronged Americans who have faced off against powerful interests."

Conrad, meanwhile, is preparing a law review article on the myth of the pro-business court. She and

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Adler say that more important to the court than the individual justices' predilections is the importance it places on the role of Congress' expressed intent in the legislation it passes and the support of the federal government. Conrad points out that business does best when it has the support of the solicitor general, although that was not the case in the *Wyeth* decision.

If so, it will be another factor worth noting, with a new Congress dominated by Democrats and with President Obama appointing a new team of lawyers to represent the government's interest before the court.

Already, Congress has passed changes in the law that effectively nullifies the court's decision in Ledbetter's case. And Democratic leaders last week filed a bill that would do the same to the *Riegel* decision on medical devices.

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