MEMORANDUM

TO: File

FROM: Lourdes Gonzalez
Acting Co-Chief Counsel,
Division of Trading & Markets

DATE: April 4, 2011

SUBJECT: Meeting by telephone with Cliff Palefsky
McGuinn, Hillsman & Palefsky

On April 4, 2011, Lourdes Gonzalez, Acting Co-Chief Counsel, Division of Trading & Markets met by telephone with Cliff Palefsky, McGuinn, Hillsman & Palefsky.

They discussed Mr. Palefski's concerns related to Section 921 of the Dodd-Frank-Act, which authorizes the Commission to restrict mandatory pre-dispute arbitration. Mr. Palefsky also submitted the attached testimony.

House of Representatives Judiciary Committee

Sub-Committee on Commercial and Administrative Law

Prepared Testimony of

Cliff Palefsky

Co-Chair of the National Employment Lawyers Association's

Mandatory Arbitration Task Force

MANDATORY BINDING ARBITRATION:

IS IT FAIR AND VOLUNTARY?

September 15, 2009

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Prepared Testimony of

Cliff Palefsky

Co-Chair of the National Employment Lawyers Association's

Mandatory Arbitration Task Force

The National Employment Lawyers Association ("NELA") is an organization of over 3,000 of this country's leading civil rights and employment lawyers. NELA's members include not only attorneys in private practice but also lawyers on the staffs of the Equal Employment Opportunity Commission and various State anti-discrimination agencies. We are the attorneys to whom Congress looks for help in enforcing our nation's civil rights and labor laws.

I am a civil rights and employment lawyer. I am also a founding board member of the National Employment Lawyers Association. For the past twenty years I have coordinated NELA's activities with regard to mandatory arbitration. I have participated in the litigation of many of the leading cases involving mandatory arbitration of employment claims in the State and Federal courts.

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. We helped draft the Due Process Protocol for the Resolution of Statutory Disputes and worked closely with the American

Arbitration Association in the development of their specialized employment arbitration rules and procedures.

Because there appears to be such a great disparity between the public perception of arbitration and its day to day reality, both legal and factual, it is important to begin these comments by setting forth some basic facts about the process which are often misunderstood.

Unlike our constitutionally defined civil justice system, arbitration is not designed with the primary goal of achieving the legally correct result. Its primary objective is finality and economy in achieving that finality. Although most of the general public is unaware of the fact, arbitrators are not required to know or follow the law. Moreover, a legally incorrect ruling cannot be appealed or rectified. The law is clear that a decision reached through binding arbitration must be confirmed even if there is an error of fact or law on the face of the award that causes substantial injustice to the parties.

Litigants for whom a quick and final decision is of primary importance, who do not require much discovery to establish their cases, and who are willing to risk a decision that could impose a result contrary to law, are certainly entitled to opt for binding arbitration of their claims. But the requirement that all claims by employees, including civil rights, whistleblower and wage and hour claims, be submitted to arbitration as a condition of employment is another matter entirely. The problem is even more acute when the forum selection is controlled by the employers, the procedures are drafted by the employers' lawyers, and those procedures do not conform to consensus minimum standards of due process.

Simply put, you cannot allow the entity being regulated by your legislation to unilaterally opt out of the requirements of that legislation. But that is exactly what is occurring every day in the contemporary American workplace. The main push by employers for mandatory arbitration occurred immediately after Congress passed the Americans with Disabilities Act and the 1991 amendments to the Civil Rights Act of 1964, which added the right to trial by jury and general damage to the civil rights laws for the first time. In numerous public presentations to bar associations and employer groups, management attorneys publicly touted mandatory arbitration agreements as a way to avoid the new civil rights legislation. They literally cited to the success employers in the securities industry had in defeating sex harassment and discrimination claims as a reason to compel arbitration. Indeed, even the American Arbitration Association, a theoretically neutral organization, created marketing materials that pointed to the "proliferation" of new civil rights statutes such as Title VII, the Americans with Disabilities Act, and the Older Worker Benefit Protection Act as reasons why companies should compel arbitration of all employment claims. They went further and told employers that they could limit discovery, eliminate punitive damages, and keep all proceedings off limits to the public and press.

CONGRESS DID NOT INTEND THE FEDERAL ARBITRATION ACT TO APPLY TO EMPLOYMENT CONTRACTS

The historical and legislative record is very clear that Congress never intended the Federal Arbitration Act to apply to employment contracts at all. The original impetus for the Act came from the ABA's Committee on Commerce, Trade and Commercial Law. Its purpose was always to be a commercial arbitration act that would permit the Federal courts to enforce pre-dispute arbitration clauses between merchants. Shortly after the bill's introduction it came to the attention of Andrew Furuseth, the President of the International Seamen's Union of America.

Mr. Furuseth was very concerned about the bill's possible application to employees who would have no ability to negotiate or refuse to sign these clauses. Mr. Furuseth explained:

> "The bill provides for the re-introduction of *forced or compulsory labor* if the freeman through his necessities shall be induced to sign. Will such contracts be signed? Esau agreed, because he was hungry. It was the desire to live that caused slavery to begin and continue. With the growing hunger in modern society, there will be but few that will be able to resist. The personal hunger of the seaman and the hunger of the wife and children of the railroadman will surely tempt them to sign and so with sundry other workers in interstate and foreign commerce." Proceedings of the 26th Annual Convention of the International Seamen's Union of America 203-5 (1923).

In response to those objections, the Chair of the ABA Committee told Congress that it was "never the intention of this bill to make an industrial arbitration in any sense." To address any ambiguity or doubt he suggested adding language stating that "*nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce,*" which at the time represented the fullest extent of Federal jurisdiction over the employment relationship.

Similarly, Secretary of Commerce Herbert Hoover made the identical point. In fact, Secretary of Commerce Hoover wrote:

> "If objection appears to the inclusion of workers' contracts in the law's scheme, it might well be amended by stating 'but nothing herein shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in interstate or foreign commerce.'"

Secretary Hoover's proposed language, intended to make it clear that the FAA would have no application whatsoever to workers contracts, was added to the FAA *verbatim* as an amendment to Section 1.

Nevertheless, in 2001, the United States Supreme Court decided the case of *Circuit City Stores v. St. Clair Adams, 532 U.S. 105 (2001),* and determined for the first time that the FAA would in fact extend to all employment contracts except those of workers who literally carried goods across state lines. There is no real question that neither the drafters of the FAA nor Congress ever intended the FAA to apply to employment contracts at all because of the lack of voluntariness and the potential for the very abuses that are presently occurring. It is essential that you restore the FAA to its original intention of excluding employment contracts from its application.

FALSE JUSTIFICATIONS

Employers have tried to justify stripping their employees of their statutory and constitutional rights by the use of several demonstrably false justifications.

The most common is that they are motivated by trying to create access to justice for employees who otherwise couldn't hire a lawyer or afford access to court. It should be obvious that employers have no interest in creating more claims or making it easier for employees to bring claims. And indeed, the imposition of mandatory arbitration agreements has actually reduced the number of claims. Leading management lawyers openly state that the arbitration requirement actually deters claims because of the high costs of arbitration, the limited discovery, the repeat player advantages and the smaller damage awards in arbitration. And significantly, because of the reality that arbitration is a far inferior forum with a lower chance of success, an arbitration requirement makes it far less likely that an employee can get a lawyer to take his or her case on a contingency basis, which is the only way most employees can afford to hire a

private attorney. In reality, a mandatory arbitration agreement is intended to, and in fact does, reduce access to real justice for most employees.

All empirical evidence demonstrates that it is virtually always the employer that seeks to compel arbitration, and not the employee, which is the very best evidence as to employers' true motives. If arbitration truly provided better access to equal justice for employees, there would be no need to compel arbitration as a condition of employment. These rationalizations are simply dishonest.

STATISTICS

In 2002 the California legislature passed a statute requiring arbitration providers to post on the Internet statistics regarding the results of employment and consumer arbitrations. As a result we now have access to the statistical information that confirms just how unfair mandatory arbitration is to employees.

Professor Alexander Colvin of Cornell University has conducted the most comprehensive statistical analysis of the outcome of employment cases. A copy of his study is attached as Exhibit A. The results of his study confirm what practitioners have known to be true for years. Employees have a dramatically lower winning percentage in arbitration, the damages they receive when they win are significantly lower, and employers who are repeat players have a profound advantage in arbitration. According to Professor Colvin's study, employees win only 21.4% of the time in arbitration compared with 56.6% of the time in State courts. The mean damages award in arbitration was only 20% of the mean damage award in State court cases in which damages were awarded. And repeat player employers win 3 times as often as non-repeat

players. When Professor Colvin compared the mean award in all cases, the mean award for employees in arbitration was a shocking 9% of the mean award in State court trials. Professor Colvin also confirmed the same profound repeat player advantage that earlier studies had found. His study determined that the employee win rate where there was a repeat employer-arbitrator pairing was only 12%. There was a similar reduction in the amount of damages awarded against repeat players.

DO-IT-YOURSELF DEREGULATION

Employers are not content with just imposing arbitration on their employees. Many use their arbitration agreements and the courts' willingness to enforce them as a device to strip employees of substantive rights and remedies. What they are doing is, in every sense, "do-it-yourself deregulation." They are literally rewriting if not opting out of the laws passed by Congress and State legislatures. It is very common for arbitration clauses to shorten the statute of limitations periods set by Congress. They often limit the damages that are otherwise legally available. They prohibit or so severely restrict discovery that it becomes nearly impossible to sustain the burden of proof necessary to prevail on an employment claim because in the employment context almost all of the documents and witnesses are under the control of the employer. Many arbitration clauses prohibit the consolidation of claims in order to increase the employees' costs and avoid the presentation of compelling evidence of pattern and practices of illegal conduct. Many clauses prohibit class actions even though such "representative" actions are specifically authorized by the nation's wage and hour laws and are the only practical and effective way to enforce those laws.

PUBLIC JUSTICE

For years we mocked the Soviet Union and other nations for their secret civil justice systems. Justice is not dispensed in secret tribunals, off limits to the public and press. To this day we lecture other nations on the importance of the "rule of law." Indeed, our commitment to the rule of law is so great that we debate the right of accused terrorists to access a Federal court. Yet, we have relegated American employees to secret tribunals with no right of appeal—and force them to pay for the privilege. The public courthouse doors are shut to working Americans. Employees are forced to present their claims in private conference rooms, under rules drafted to give the employers every advantage, to arbitrators selected and paid by their employers, who have full knowledge that if they find against the employer they will not be selected again. What is at stake is the very integrity of our justice system, our constitutional values, and democracy itself.

VOLUNTARY v. MANDATORY ARBITRATION

NELA fully supports and encourages the use of all voluntary forms of alternative dispute resolution. We think mediation is an ideal way to resolve many if not most employment disputes. And indeed, in California, well over 90% of all employment cases get submitted to mediation or a similar process, and most are successfully resolved. Voluntary arbitration can also be a valuable alternative form of dispute resolution in many categories of cases. But mandatory arbitration and voluntary arbitration are very different processes. The only check and balance that was ever contemplated for arbitration was the knowing and voluntary consent of the users. When the process is voluntary, the parties themselves can ensure that they have the

procedures and discovery they need to prepare their case. They can jointly participate in the selection of the arbitrator and every arbitrator knows that they will need the consent of both parties to be selected for future cases. If arbitration was truly voluntary, the marketplace would be able to ensure fairness.

There is a lot more to a civil justice system than simply moving money around. There is a significant emotional component to the process. No system of justice can succeed without the confidence of its users. There is no question that mandatory arbitration does not have the confidence of employees or consumers. Indeed, the mere act of forcing the process on a party undermines the confidence that is required for it to be successful. If a party does not have confidence in the process going in, he or she will never have confidence in the result. In justice systems, the perception of fairness is just as important as the fact of fairness and there can be no real debate that mandatory arbitration does not have the perception of fairness. Additionally, the abuses and scandals that are occurring everyday in the mandatory arbitration context are generating so much bad publicity that the negative impression is spilling over and undermining the credibility of the very useful and effective other voluntary forms of ADR.

COSTS AS A DETERRENT

Contrary to the cynical pronouncements of defenders of mandatory arbitration, the process imposes huge costs on employees. American citizens already pay taxes to support a public justice system. An employee can access a Federal or State court for a filing fee of about $300. And in most jurisdictions, fee waivers are available for those who cannot afford to pay. At the American Arbitration Association, the filing fees alone can be as high as $13,000 just to get in the door. And after the filing fee is paid, the arbitrators often charge in excess of $400 per

hour per arbitrator. It is not uncommon for the fees in employment cases to exceed $40,000, $50,000 and sometimes even $80,000. Moreover, most providers require the fees to be paid up front. When they are not fully paid up front, the providers refuse to release the award until the fees are paid. Few employees can afford the cost of arbitration and the high cost serves as a significant deterrent to the bringing of valid claims. Even though several courts have said there is no precedent in American jurisprudence for the requirement that an employee pay for the cost of a tribunal to vindicate statutory rights, in most states it is still perfectly legal for the employer to bar the court house door and require employees to pay thousands of dollars they can't afford to vindicate their statutory claims.

PREEMPTION OF STATE ADMINISTRATIVE AGENCIES AND LABOR LAWS

States have traditionally exercised primary jurisdiction over the employment relationship. Most, if not all, States have created administrative agencies to assist workers in collecting owed wages or in dealing with unlawful discrimination and to help workers who cannot afford to hire attorneys. These State agencies are indispensible to low wage earners who need an expeditious resolution of their claims in order to put food on their tables. However, the U.S. Supreme Court recently ruled in *Preston v. Ferrer* that an arbitration agreement ousts these State agencies of jurisdiction and renders them useless. That means that an employer can essentially require employees to waive their access to these agencies as a condition of employment. The public policy implication of this practice is profound. It is a serious violation of States' rights and in effect a complete deregulation of the employment relationship.

At least 16 States have statutes on the books that prohibit or render unenforceable pre-dispute agreements to arbitrate employment claims similar to the original intention of the FAA.

A table of these State statutes is attached as Exhibit B. But these efforts at employee protection have all been rendered moot by the Supreme Court's decisions holding that these laws are preempted by the Federal Arbitration Act. The Court's jurisprudence in this area is directly contrary to its holdings in other areas limiting the scope of Federal preemption and respecting traditional areas of State regulation.

EEOC POLICY STATEMENT

The Equal Employment Opportunity Commission, the agency charged by Congress with responsibility for enforcing this nation's civil rights laws, has issued an extensive policy statement dealing with mandatory arbitration. While strongly supporting the utilization of voluntary ADR procedures, the EEOC stated that, "agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in the Federal anti-discrimination statutes," and are thus illegal and unenforceable. EEOC, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, 133 Daily Lab.Rep (BNA) E-4 (July 11, 1997), attached as Exhibit C. This EEOC policy was approved unanimously by the Republican and Democratic appointees to the Commission.

Among the EEOC's objections are that arbitration is not governed by the statutory requirements and standards of Title VII; it is conducted by arbitrators given no training and possessing no expertise in employment law; and it forces employees to pay exorbitant "forum fees" in the tens of thousands of dollars, greatly discouraging aggrieved employees from seeking relief.

NATIONAL ACADEMY OF ARBITRATORS RESOLUTION

The National Academy of Arbitrators, the leading and most respected national organization of professional labor-management arbitrators and the body which gave labor arbitration its credibility, has taken the historic step of passing a resolution condemning mandatory arbitration of statutory employment disputes. In 1997, the Academy stated that it, "opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights" (National Academy of Arbitrators Statement and Guidelines, 103 Daily Lab.Rep. (BNA) E-1 (May 29, 1997)). The Academy has expressed strong concern that mandatory arbitration often results in arbitral fora which do not provide elements of fundamental fairness to employees, and in which arbitrators are often not able or willing to enforce the claimed statutory rights. In fact, the Academy took the unprecedented step of filing a brief in the matter of *Duffield v. Robertson Stephens* (1998 USApp.Lexis 9284 (9th Cir. 1998)), stating:

> "The strength and justification for the enforcement of agreements to arbitrate, and for the limited judicial review of arbitration awards, rests on the foundation that agreements to arbitrate be voluntary . . . unless a party has agreed to arbitrate, it will not be compelled to do so. Likewise, the immunity from judicial review of an arbitrator's alleged error of law or fact is premised on the voluntary choice of the parties to submit to an arbitrator's judgment. Without the voluntariness of the arbitration agreement, the public policy favorable to arbitration lacks a foundation." (Academy *Amicus* Brief in *Duffield*, cited above.)

CONCLUSION OF THE COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS

The requirement of voluntariness was also supported by the recommendations of the "Commission on the Future of Worker-Management Relations" (The "Dunlop Commission"), a

Blue Ribbon Presidential Commission consisting of business and labor leaders, government officials and professional neutrals. In its December 1994 "Report and Recommendations," the Commission stated that, "binding arbitration agreements should not be enforceable as a condition of employment." Commission on the Future of Worker-Management Relations: Report and Recommendations (December 1994), The Commission also expressed concern that:

> "...the potential for abuse of ADR created by the imbalance of power between employer and employee, and the resulting unfairness to employees who, voluntarily or otherwise, submit their disputes to ADR. These concerns are obvious if the process is controlled unilaterally by employers, such as when employees are required to sign mandatory arbitration clauses as a condition of employment."

IMPACT ON THE COURTS

Mandatory arbitration is more than unfair. It is a scandal occurring in broad daylight. And the corrupting influence of for-profit justice is impacting the courts as well. The best and the brightest sitting judges are being recruited off the bench to join ADR firms at an alarming rate. There have been instances of bidding wars for certain sitting judges between various providers at the same time those judges are ruling on arbitration issues and declaring that public policy "favors arbitration." There are numerous reports of sitting judges hiring consultants to help make themselves more attractive to arbitration providers so that they too can enjoy the lucrative multiple six-figure salaries being earned in private judging. Judges are being told to keep synopses of their decisions and how to obtain the approval of the large firms with which they need to curry favor in order to obtain their business when they leave the bench. And all over the country, there are reports of judges declining assignments to criminal departments

because they know that the civil assignments give them more exposure to the people who will be hiring them when they leave the bench.

THE NEIMAN MARCUS PROGRAM

An excellent example of the abuse of mandatory arbitration agreements can be found in the Neiman Marcus Company's program. Two years ago, in response to wage and hour violations being redressed by class actions, Neiman Marcus sent an email to all of its employees notifying them that by merely continuing employment they would be bound by a new dispute resolution program. The company didn't even attempt to get the workers to sign an arbitration agreement. They simply announced that by not quitting and surrendering their job and health benefits they would be bound by the new program.

And quite a program it was. It required that all arbitrators be residents of Texas (where Neiman is headquartered) even if the cases were arbitrated in California under California law. It required that all arbitrators be members of the Texas bar. It shortened the statute of limitations on claims below the period provided by law. It prohibited the joinder of claims of more than one employee and, more significantly, the bringing of claims as class actions. This class action prohibition was so important to the company, and so obviously the primary purpose of the program, that Neiman Marcus actually provided that if the ban on class actions was struck down by a court, the entire arbitration agreement would be voided rather than having the illegal clause severed and the case proceed as a class action in arbitration. And perhaps the most audacious provision allowed the "respondent" to add two additional arbitrators to the panel at any time prior to the actual arbitration hearing if it didn't like the way the chosen arbitrator was conducting the pre-hearing proceedings.

I received several calls from low wage Neiman workers all over the country who did not want to sign the agreement but did not want to be fired. The first three employees contacted me for assistance but were too afraid to be identified out of a fear of retaliation. I was contacted by a fourth employee, Tayler Bayer, who wanted to challenge the agreement. Mr. Bayer had a pending EEOC charge for disability discrimination when the new illegal policy was rolled out. In July 2007 we filed a charge with the EEOC challenging the shortened statute of limitations because it so clearly violated the express terms of the ADA. We filed another complaint with the NLRB challenging the prohibition on consolidation of claims and class actions because it plainly violated the Section 7 right of employees to engage in concerted action for mutual protection.

Last month, the EEOC issued a "cause finding" determining that the shortened limitations period was illegal. The General Counsel of the NLRB has determined that the prohibition on consolidation of claims did indeed violate the NLRA. He is still considering whether to challenge the prohibition on class actions.

Despite these preliminary agency findings, Neiman Marcus is not only fighting the agencies, but has kept the oppressive plan in place during its recent round of layoffs. It will be several years before Neiman Marcus employees will even know if they may take their wage and hour and discrimination claims to court.

Unfortunately, the Neiman Marcus plan is not the exception. Companies all over the country are rewriting and opting out of the laws regulating the employment relationship and State courts are powerless to protect them. And it is not an adequate response to point to alleged "minimum standards of fairness" adopted by either the American Arbitration Association or JAMS. Both providers have what they call "minimum standards" which state that they will not

administer arbitrations where the employees do not have the same rights and remedies they would have in court and where they don't have a meaningful role in the selection of the arbitrator. But both of those national providers, clearly concerned about offending their corporate clients, have refused to apply and enforce their own minimum standards against the Neiman Marcus plan or other companies' plans that similarly reduce the statute of limitations and/or restrict the ability of employees to obtain the full scope of class-wide relief they could get in court. Even though two Federal agencies have now determined the Neiman Marcus plan to be violative of the laws passed by this Congress, these providers are still afraid to enforce their own policies. If they won't enforce their own policies, how can anyone have confidence that they will enforce the discrimination laws against a significant repeat customer?

NOT SEPARATE BUT EQUAL

The Supreme Court's jurisprudence on arbitration is the modern day version of "separate but equal." Courts often mistakenly assert that arbitration is just a change of forum with no impact on substantive rights. We know that isn't true because employees lose the right to have the law enforced – which is the ultimate substantive right. The Supreme Court has imposed on the nation not merely a legal fiction, but a factual fiction. Arbitration is not a separate but equal forum. Indeed, in every material defining respect, arbitration is the exact opposite of our constitutionally defined system: public versus private, free versus costly, discovery versus no discovery, follow the law versus not required to follow the law, and appeal versus no appeal. What we have is a judicially created "public policy in favor of docket clearing" that seems to foreclose any examination of the lack of true voluntariness or the standards actually required for the waiver of the constitutional rights.

Voluntary arbitration agreements can offer the parties all of the flexibility they need to design an arbitration process appropriate for that particular case. Or they could choose some other form of alternative dispute resolution like mediation which works extraordinarily well for employment cases. Mandatory arbitration on the other hand, drafted and then imposed on the weaker party by the repeat player, has now been shown to be what everyone always knew it was: a far inferior forum for the resolution of statutory claims that is undermining the enforcement of the nation's laws. It is negating both State and Federal legislative actions regulating the workplace. It is in every way an assault on the nation's civil rights, whistleblower and wage and hour laws.

Because of a series of Supreme Court decisions that have limited the ability of State courts and State legislatures to remedy this abuse, nothing short of Federal legislation can restore Congress' original intent in the passage of the Federal Arbitration Act and of the numerous civil rights, whistleblower and wage and hour laws.

There is a scandal in the house of justice. For-profit justice does not work, has never worked, and never will work. The implications of this subversion of our civil justice system are profound but not yet fully understood by most lay people. The laws of Congress have no meaning if they can't be enforced. Our constitutional democracy is undermined when our basic constitutional rights cannot be enforced. *Brown v. Board of Education* would never and could never have been decided by an arbitrator. If the laws that Congress passes are to have any meaning at all, it is essential that all Federal agencies and commissions recognize this scandal for what it is. Congress must pass the Arbitration Fairness Act, and the EEOC, the NLRB, the Department of Labor, and the SEC must step up and ensure full enforcement of the civil rights

and labor laws to the fullest extent of their authority. We are not seeking any new rights or remedies. We are merely talking about full enforcement of the laws that this Congress has already passed and the full protection of the First Amendment Right of Petition, the Fifth Amendment Right of Due Process, and the Seventh Amendment Right to Trial by Jury guaranteed to all Americans by the Bill of Rights.

We urge Congress to do everything in its power, as soon as possible, to ensure the full enforcement of the laws you passed. There is a scandal in the house of justice and people of good conscience can no longer pretend it isn't happening. You simply cannot support full enforcement of civil rights law and support mandatory arbitration.

Thank you very much for holding this hearing and for the opportunity to appear before you today.

EXHIBIT A

Conflict at Work in the Individual Rights Era: An Examination of Employment Arbitration[1]

LERA 61st Annual Meetings
San Francisco, CA
January 4, 2009

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[1] An earlier version of this paper was presented at: Research Conference on Access to Civil Justice: Empirical Perspectives, NYU Law School, November 14-15, 2008.

EXHIBIT A

Introduction

Employment arbitration has grown dramatically in the wake of the 1991 *Gilmer* decision[2]. The proportion of workers covered by nonunion employment arbitration procedures now likely exceeds those covered by union representation.[3] Indeed, recent estimates suggest that for perhaps a third or more of nonunion employees, arbitration not litigation is the primary mechanism of access to justice in the employment law realm.[4] Yet our empirical knowledge of the nature of this system remains minimal at best. Basic questions such as the typical characteristics and outcomes of cases in employment arbitration remain to be definitively answered.

Part of the reason for the limitations in the empirical research on employment arbitration is the private nature of this dispute resolution mechanism. Whereas decisions by the courts are a matter of public record, availability arbitration decisions are generally subject to the consent of the parties, limiting access to the public, including to researchers. As a result, much of the existing empirical research has of necessity been based on convenience samples of decisions that the parties have consented to be made public, typically through the collections of organizations such as the American Arbitration Association (AAA). This introduces natural concerns about selection bias in these samples. In an analogy to the well-known "bottom-drawer" effect where researchers tend to only publish successful research studies, it may be that publically

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[2] *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991).
[3] Alexander J.S. Colvin, "Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?" *Employee Rights and Employment Policy Journal*, Vol. 11, No. 2, pp. 405-447 (2008).
[4] David Lewin, "Employee Voice and Mutual Gains", Labor and Employment Relations Association (LERA) Proceedings (2008).

available collections of decisions suffer from a "top-drawer" effect where they over-represent the relatively well-reasoned, presentable decisions.

The present paper moves beyond past research by analyzing employment arbitration outcomes using a representative dataset of cases administered by the American Arbitration Association (AAA) that derive from employer-promulgated arbitration procedures. I present outcome statistics on key measures such as employee win rates, award amounts, arbitrator fees and length of time to process cases. I then turn to the issue of whether there are repeat player effects in arbitration and, if so, whether we can identify possible explanations for them. Lastly, I examine the issue of self-representation by employees in employment arbitration.

The Data

The data for this study are based on arbitrator service provider filings required under California state law. Under the California Civil Procedure Code, organizations that provide arbitration services within the state are required to make available to the public certain prescribed information on arbitration cases administered by the service provider that involve consumers.[5] This provision applies to employment arbitration cases that are initiated under employer promulgated agreements, i.e. as opposed to individually negotiated agreements. The effect of this law is to override contracts that protect the presumptively private nature of arbitration and allow public access to information on arbitration outcomes. The provision proscribes what types of information need to be filed, including the name of the employer, the arbitrator, filing and disposition dates, amounts

[5] Cal.Civ.Proc.Code SS 1281.96 (West 2007)

of claims, amounts awarded, and fees charged. At the same time, many other pieces of information, notably the name of the employee and the basis for the claim, are not included. More generally, the arbitration service providers are not required to provide the complete arbitration decision accompanying the award. Despite these significant limitations, the California Code filings provide a major new source of data on employment arbitration outcomes, which allows us to analyze a number of questions regarding this dispute resolution system.

In the present study I analyze cases administered by the American Arbitration Association (AAA). The reason for focusing on the AAA is that it is the largest of the arbitration service providers in the employment arbitration field and has provided the most complete filings in this area. An additional advantage is that to comply with the California Code requirements, the AAA has decided to include in its filings all employment arbitration cases under employer-promulgated procedures that it administers nationally. As a result, the AAA filings provide a much larger dataset that is not restricted to cases heard in California. Based on a comparison of arbitration service provider filings, those compiled by the AAA appear relatively comprehensive. A general problem with all filings in this area is that they contain some degree of missing data on particular variables. For example, although the California Code provision requires the service provider to include information on the employee's salary level, in many cases the parties decline to provide this information. Although some degree of missing data exists in all the service provider filings, the AAA filings include substantially fewer instances of missing data than those of other service providers.

The dataset analyzed in this paper includes all employment cases from the AAA California Code filings (what I will refer to henceforth as the AAA-CC filings) for the period January 1, 2003 through December 21, 2007. This produced a total of 5,592 cases. Of these, 1,647 were employment mediation cases administered by the AAA. For purposes of this analysis, I focused on the remaining 3,945 employment arbitration cases in the dataset. Data on the individual cases was compiled from the filings by a team of four graduate students working under my supervision. I also separately re-checked the data for typographical and other errors. For many of the analyses conducted in this study, I focus on the 1,213 of the cases which resulted in awards, with the remainder of the cases being settled or withdrawn prior to the award stage.

Arbitration Outcomes

Given the relative limited extent of existing information on employment arbitration, some of the most interesting questions still relate to the basic descriptive outcomes from arbitration. Knowing what the average and typical outcomes of arbitration are will allow us to develop a general portrait of how this dispute resolution system operates. They also provide an initial basis for moving towards comparisons of litigation and arbitration outcomes. Whereas there have been increasingly sophisticated analyses of litigation and its outcomes in recent years[6], our understanding of arbitration has lagged

[6] See e.g. David Benjamin Oppenheimer. Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities. 37 U.C. DAVIS LAW REVIEW 511 (2003); Kevin M. Clermont and Stewart J. Schwab, "How Employment Discrimination Plaintiffs Fare in Federal Court," 1(2) Journal of Empirical Legal Studies, 429-458 (2004); Eisenberg, T., and M. Schlanger. 2003. "The Reliability of the Administrative

behind. Although the present data does not allow a comparison of systematically matched cases in litigation and arbitration, to begin to compare across systems it is initially necessary to establish what the arbitration outcomes are.

Win Rates

One of the most basic questions in arbitration is who wins? Past research in this area has mostly used convenience samples of arbitration awards maintained by organizations like the AAA or the securities industry service providers. These studies tended to show relatively high employee win rates in arbitration. For example, early studies by Bingham, Maltby and Howard found employee win rates in the 65-75 percent range.[7] More recent studies, including those by Bingham and Sharaff, and by Hill found lower, though still substantial, employee win rates in the 40-45 percent range.[8] Examining securities industry employment arbitration cases, Delikat and Kleiner found a similarly high 46 percent employee win rate.[9] These employee win rates compare favorably to employee win rates found in litigation, ranging from the 33 and 36 percent

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Office of the U.S. Courts Database: An Initial Empirical Analysis." Notre Dame Law Review, Vol. 78 (August), 1455–96.

[7] Lisa B. Bingham. 1998. "An Overview of Employment Arbitration in the United States: Law, Public Policy and Data." *New Zealand Journal of Industrial Relations*, 23(2): 5-19 at 11; Lewis L. Maltby. 1998. "Private Justice: Employment Arbitration and Civil Rights." *Columbia Human Rights Law Review*, 30(29): 29-64; William M. Howard. 1995. "Arbitrating Claims of Employment Discrimination." *Dispute Resolution Journal*, 50 (Oct-Dec): 40-50.

[8] Lisa B. Bingham and Shimon Sarraf. 2000. "Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference."; Elizabeth Hill. 2003. "AAA Employment Arbitration: A Fair Forum at Low Cost." *Dispute Resolution Journal*, Vol. 58, no. 2 (May-Jul 2003), pp. 8-16.

[9] Michael Delikat and Morris M. Kleiner. 2003. "Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?" *Conflict Management*, Vol. V1, Issue 3, pp. 1-11.

employee win rates in federal court employment discrimination trials reported in studies by Delikat and Kleiner and by Eisenberg and Hill, to the employee win rates in the 50-60 percent range found in studies of state court trials.[10] A note of caution in interpreting these findings, however, is that studies by both Eisenberg and Hill and by Bingham and Sharaff found that employee win rates were lower in cases based on employer-promulgated procedures than in cases based on individually negotiated contracts.[11]

What are the employee win rates in the AAA-CC filings data? To answer this question, it is necessary to make decisions about how to classify an employee "win". Most generally, any case in which the employee receives some award represents a case in which the arbitrator has ruled in the employee's favor on at least some aspect of his or her claim. On the other hand, if the employee receives an award, but the amount is relatively small and/or the award is much lower than the amount claimed, the employee might view the outcome of the case as unsuccessful. Taking a narrow view of an employee win as cases in which the employee receives all or at least some substantial portion of the amount claimed would produce a lower estimate of the employee win rate in arbitration. By contrast, using a broader definition of an employee win will increase the estimated win rate. To take a conservative approach in this study, I use a broad definition of an employee win as including any case in which some award of damages, however small, is made in favor of the employee. Using this broad definition, the

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[10] See: Delikat and Kleiner (2003); Eisenberg and Hill (2003); Oppenheimer (2003).
[11] Lisa B. Bingham and Shimon Sarraf. 2000. "Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference."; Theodore Eisenberg and Elizabeth Hill. 2003. "Arbitration and Litigation of Employment Claims: An Empirical Comparison." *Dispute Resolution Journal*, (Nov. 2003-Jan. 2004), Vol. 58(4): pp. 44-54 at 50.

employees won 260 of the 1,213 cases in the AAA-CC filings which terminated in an award, corresponding to an employee win rate of 21.4 percent.

This employee win rate is substantially lower than that found in previous employment arbitration studies, which tended to use selective samples. It is also lower than employee win rates in litigation. However, it should be noted that we are not necessarily comparing apples and oranges here. The characteristics of cases in arbitration may differ systematically from those in litigation. For example, it could be that arbitration contains more low value cases than litigation. Different patterns of pre-hearing settlement may also affect the distribution of cases heard in each system. Some of these differences may serve to depress or to increase the arbitration win rate relative to litigation.[12] What this estimate tells us is the unadjusted employee win rate in arbitration. The difference between this win rate and the employee win rate in litigation indicates that there exists an arbitration-litigation gap. The task for future research is then to analyze what factors may explain this gap and whether or not it is problematic from a public policy perspective. A useful analogy can be drawn to the male-female wage gap. An initial task in labor economics is to identify the existence and size of a gap between average male and female wages. Once such a gap is identified, the task becomes to understand the factors leading to the gap and the degree to which they represent more general labor market forces (e.g. differences in education and skill levels) or discrimination based on gender. Similarly in employment dispute resolution research, the next task in analyzing the arbitration-litigation gap will be to determine the degree to

[12] For a good discussion of these issues and how they may tend to inflate or deflate arbitration-litigation differences, see: David Schwartz, "Mandatory Arbitration and Fairness" *Notre Dame Law Review* (forthcoming, 2009).

which it is due to factors such as greater access to low value claims or due to tendencies of arbitrators to favor employers in their decision-making.

Award Amounts

When we turn to award amounts, similar patterns emerge in employment arbitration outcomes. Earlier studies tended to find relatively high average awards, broadly similar to those found in litigation. For example, in Delikat and Kleiner's study of securities industry employment arbitration outcomes, they found a median damage award of $100,000 ($117,227 in 2005 dollars[13]) and a mean damage award of $236,292 ($276,998 in 2005 dollars) for the 186 awards in their sample where the employee received some type of monetary damage award.[14] These amounts were roughly comparable to the outcomes in a sample of federal court employment discrimination trials they examined, where the median damage award was $95,554 ($112,015 in 2005 dollars) and the mean award was $377,030 ($441,981 in 2005 dollars). Eisenberg and Hill find similar roughly results for employment arbitration outcomes overall using a selective sample of AAA awards, however again also find relatively less favorable outcomes for employees where arbitration is based on an employer-promulgated procedure.[15]

In the AAA-CC filings data, there were 260 awards in which the employee received some amount of monetary damages. Amongst these cases, the median amount of damages awarded was $36,500 and the mean award was $109,858, with a standard

[13] Dollar amounts from earlier studies are converted to constant 2005 dollars so as to allow easier comparability to the results from the AAA-CC filings data. The year 2005 is chosen as the midpoint of the date range in the AAA-CC filings data.
[14] Delikat and Kleiner, supra.
[15] Eisenberg and Hill, supra.

deviation of $238,227. The high mean compared to the median and relatively large standard deviation reflects the skewed nature of the distribution of arbitration awards, with a small number of large awards producing a high average outcome. Although average outcomes are commonly calculated based on cases in which an award is made, it is also informative to calculate the average outcome over all cases, including those in which zero damages are awarded. This provides an estimate of the expected outcome of the average case, including the chance of a zero recovery outcome. Calculated on this basis, the mean award amount for the 1,213 arbitration cases in the AAA-CC filings data where an award was made was $23,548, with a standard deviation of $119,003.

Although, as noted above, the data do not allow a standardized comparison of arbitration and litigation case outcomes, it is nonetheless informative to look at studies of employment litigation outcomes to get a sense of the relative level of outcomes in the two systems and whether or not a gap exists to be explained. Studies by Eisenberg and his co-authors find relatively higher damage awards in employment litigation than those found here for employment arbitration. For example, in a sample of 408 federal court employment discrimination trials, they found a median award of $150,500 ($176,426 in 2005 dollars) and a mean award of $336,291 ($394,223 in 2005 dollars). Similarly, in a study of California state court trial outcomes, Oppenheimer found a median award of $296,991 ($355,843 in 2005 dollars) for 69 common law discharge cases in 1998-99 and a median award of $200,000 ($239,632 in 2005 dollars) for 136 employment discrimination cases in 1998-99. While we cannot say what the difference would be if the same case were presented to an arbitral and a litigation forum, what we can say is that overall the median damage award in employment litigation is about 5-10 times as large as

the median award in employment arbitration. Being able to identify the rough order of magnitude of this gap does indicate the importance of taking future steps to identify the causes for it, both as a matter of academic research interest and from a public policy perspective. Explaining this arbitration-litigation gap is of particular importance given that a key element of the majority's reasoning in *Gilmer v. Interstate/Johnson Lane* relied on the presumption that arbitration was acceptable "[s]o long as the prospective litigant may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[16]

Time to Resolution

One area in which arbitration is widely considered to hold an advantage compared to litigation is in producing more timely resolution of claims. This is clearly a generally desirable feature of a dispute resolution procedure in that it reduces costs, provides sooner certainty in outcomes and reduces the detrimental effect of the passage of time on the ability to fairly try cases. For employment cases, concerns about the negative effects of time delays in dispute resolution are heightened. For employees, employment cases often involve disruption of their existing employment situation and difficulty in finding equivalent alternative job opportunities. For the employer, delay may also be detrimental in producing ongoing disruption to its operations and attendant uncertainty about the status of personnel policies and practices that are implicated in the claim. Although not unusual for the courts in general, times to disposition in employment litigation continue

[16] *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 at 28 (1991), quoting *Mitsubishi Motors v. Soler Chrysler-Plymouth* 473 U.S. 614 (1985).

to be substantial. Estimates indicate cases typically take around two to two-and-a-half years to reach trial in federal and state courts.[17]

Analysis of the AAA-CC filings data indicates that time to hearing in employment arbitration is substantially faster than in litigation. The mean time to disposition for an employment arbitration case that resulted in an award was 361.5 days. Put alternatively, the time it takes to obtain a resolution after a hearing is about half as long in arbitration as in litigation. This is a substantial advantage for arbitration. In a comparison, however, it is also important to recognize that most cases in both litigation and arbitration are settled before a final hearing. Although this reduces the typical time to resolution in litigation, this is also true in arbitration. Amongst employment arbitration cases that were settled prior to an award, the mean time to disposition was 284.4 days. Lastly, it is not obvious that even with its reduced time to disposition that arbitration is sufficiently expeditious as would be desirable for an employment dispute resolution procedure. A year to resolve cases is still a relatively long period for a dispute to be ongoing both for employees who rely on their jobs for their primary source of income and for employers needing to move forward with their operations. Labor arbitration procedures in unionized workplaces have come under increasing criticism for similar delays that also commonly result in periods of close to a year before a hearing and award. In the case of labor arbitration, these delays have been driven by the relatively small cadre of experienced arbitrators acceptable to both unions and management. The results found here indicate that similar delays before hearing are emerging in employment arbitration.

[17] Eisenberg and Hill, supra; Delikat and Kleiner, supra.

Arbitration Fees

A frequent criticism of employment arbitration is that arbitrators and service providers charge fees, which may be substantial, whereas filing fees for access to the courts are small by comparison. The concern is that arbitration fees imposed on employees through employer-promulgated arbitration agreements will create a barrier preventing employee access to a forum for enforcing their statutory rights. The AAA-CC filings include data on arbitrator fees charged in the cases. Amongst all employment arbitration cases, the median fee charged was $2,475 and the mean fee charged was $6340. However, this includes cases that were settled prior to a final hearing, where fees charged may only have related to the initial filings or any preliminary motions or requests. Amongst the cases that resulted in a final award following a hearing, the median fee charged was $7,138 and the mean fee charged was $11,070.

While the overall amount of arbitration fees is an important consideration, the specific concerns were directed primarily at the possibility of individual employees having to bear substantial arbitration fees in order to protect their statutory rights. In the instance of employment arbitration administered under the auspices of the AAA, these concerns are mitigated by that service provider's adoption of an organizational policy of requiring employers that utilize its services to bear the costs of arbitration fees. Although organizational policies are not always universally reflected in actual practices, the AAA-CC filings data include information on the allocation of fees that allow a check on this question. Amongst these cases, the employer paid all arbitration fees 97 percent of the time.

Plaintiff Salary Levels

Accessibility to low income plaintiffs is a problem that has plagued the civil justice system. One of the potential advantages offered by arbitration is that its relative simplicity and speediness could reduce costs to use the system and thereby enhance accessibility. The argument has been made that whereas employment litigation requires relatively high potential claim amounts to justify financing of cases, arbitration will allow lower value claims to reach a hearing.[18] Based on this reasoning, advocates for employment arbitration have argued that it will allow more low income plaintiffs to enforce statutory employment rights. Responding to this line of argument, critics of employment arbitration have noted that claim amounts in employment disputes do not always correspond to differences in income levels and more generally questioning the presumption of greater accessibility of arbitration.[19]

The AAA-CC filings data includes information on plaintiff salary levels. In accord with the California Code filing requirements, the AAA data classifies plaintiff salaries into three categories: $0-$100,000; $100,001-$250,000; and $250,001 or greater. Although there is a relatively high frequency of missing data on this variable due mostly to the failure of the parties to provide this information, plaintiff salary levels are included for 1,538 cases. For plaintiffs in these cases, 1,267 or 82.4 percent had salaries under

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[18] *See e.g.,* Samuel Estreicher. *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Pre-Dispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001).

[19] See Schwartz (forthcoming, 2009), supra. Professor Schwartz also advances a very interesting analysis of the relative incentives on the parties to choose between litigation and arbitration forums suggesting that many of the assumptions about the value of mandatory arbitration in obtaining a trade-off favoring accessibility for low value claims are incorrect.

$100,000, 214 or 13.9 percent had salaries between $100,001 and $250,000, and 57 or 3.7 percent had salaries over $250,001. This data indicates that the large majority of the plaintiffs in AAA employment arbitration cases had relatively modest salary levels.

Unfortunately, comparable data on salary levels in employment litigation is not yet readily available. There are frequent citations of anecdotal reports from plaintiff attorneys that potential claim amounts of as much as $60,000 may be necessary to justify bringing a case forward in litigation. However, there is a dearth of good systematic research on this issue in employment litigation.

One interesting comparison is to look at the claim amounts in employment arbitration. This provides one indication of the degree to which large potential claim amounts may also be necessary to finance cases in employment arbitration. Although there is also a relatively high frequency of missing data on this variable, the AAA-CC filings data includes reports of the amount claimed by the plaintiff. Overall, amongst 1,736 cases in which this was reported, the median amount claimed was $106,151 and the mean amount claimed was $844,814. The average in this instance is heavily skewed by some very large claim amounts. To get a better sense of the feasibility of low claim amounts in arbitration, it is useful to examine the left end of the distribution of claim amounts. The cut-off for the bottom quartile of the claim amount distribution (the 25th percentile) was $36,000, meaning that three-quarters of all cases involved claims greater than that amount. Ten percent of the cases did involve claims of $10,000 or less. However, overall most cases in employment arbitration appear to involve sizable claim amounts.

How does plaintiff salary level relate to prospects for success in employment arbitration? Both employee win rates and award amounts are positively related to salary levels in employment arbitration. Whereas the employee win rate was 22.7 percent amongst plaintiffs with salary levels below $100,000, this win rate rises to 31.4 percent for plaintiffs with salary levels between $100,001 and $250,000, and to a win rate of 42.9 percent for plaintiffs with salary levels over $250,001.[20] Similarly, whereas for plaintiffs with salary levels below $100,000 the mean award amount was $19,069 (including zero damage award cases), for plaintiffs with salary levels between $100,001 and $250,000 the mean award amount was $64,895, and for plaintiffs with salary levels over $250,001 the mean award amount was $165,671.

Repeat Player Issues

Issues related to repeat players have proven particularly controversial in studies of employment arbitration. In dispute resolution more generally, repeat players have long been identified as having advantages relative to one-shot participants in dispute resolution processes.[21] These concerns are heightened in regard to employment arbitration because employers are systematically much more likely to be repeat players in arbitration. By contrast, it will be very rare for an individual employee to participate in employment arbitration more than once. This can be contrasted with forums such as labor arbitration where both participants, union and management, are typically repeat players. A particular concern is that arbitrators might tend to favor employers in employment

[20] Albeit, we should exercise caution in over-interpreting the significance of the finding for the highest salary level group since it is based on a relatively small cell size of 14 observations.

[21] E.g. Galanter…

arbitration in hopes of securing future business from these repeat players. If employers do derive some unfair advantage from being repeat players in employment arbitration, this could undermine the legitimacy of this forum for resolving statutory employment rights.

A series of studies by Lisa Bingham in the 1990s first raised to prominence concerns that employers had an undue advantage as repeat players in employment arbitration. [22] Although Bingham used relatively small, samples of cases from AAA files, she found some evidence that employers who participated in multiple arbitration cases enjoyed greater success than those who only participated in a single case. Subsequently, Bingham's findings have come under criticism from some other researchers who note that her results showed only that regular participants in arbitration performed better, not that there was a bias by arbitrators seeking future business.[23]

There are a series of different possible reasons for an employer repeat player advantage in employment arbitration. In analyzing the empirical evidence in this area, it is useful to begin by identifying these different explanations:

1) Larger employers, who are more likely to be repeat players, may enjoy advantages from greater resources available to devote to cases. This could include the ability to hire

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[22] Bingham, Lisa B. 1995. "Is There a Bias in Arbitration of Non-Union Employment Disputes?" *International Journal of Conflict Management*, Vol. 6, no. 4 (October), pp. 369–97. Bingham. 1996. "Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases." *Labor Law Journal*, Vol. 47, no. 2, (February) pp. 108–26. Bingham. 1997. "Employment Arbitration: The Repeat Player Effect." *Employee Rights and Employment Policy Journal*, Vol. 1, pp. 189–22. Bingham. 1998. "On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards." *McGeorge Law Review,* Vol. 29, no. 2 (Winter), pp. 223–59.

[23] Elizabeth Hill. "AAA Employment Arbitration: A Fair Forum at Low Cost." *Dispute Resolution Journal*, Vol. 58, no. 2 (May-Jul 2003), pp. 8-16; David Sherwyn, Samuel Estreicher, and Michael Heise. "Assessing the Case for Employment Arbitration: A New Path for Empirical Research." *Stanford Law Review*, Vol. 57, pp. 1557-1591 (2004).

better defense counsel and more specialized in-house personnel devoted to dealing with legal claims.

2) Employers who are repeat players may develop greater expertise with the arbitral forum, which then works to their advantage in future arbitration cases.

3) Larger employers, who are more likely to be repeat players, they be more likely to adopt human resource policies that ensure greater fairness in employment decisions.

4) Larger employers, who are more likely to be repeat players, may be more likely to adopt internal grievance procedures that lead to the resolution of meritorious cases before they reach arbitration.

These first four explanations, all relate to the employers participation in multiple arbitration cases and/or general advantages accruing to size. They lead to a prediction of greater success for repeat employers in arbitration, but not a specific concern about repeat use of the same arbitrators to decide cases involving the same employer. By contrast, two other explanations relate specifically to repeat employer-arbitrator relationships:

5) Arbitrators may be biased in favor of employers out of hope of being selected in future cases. This bias may be heightened by the employer typically paying the entire arbitrator fee and by the limited experience of employees with arbitration.

6) Repeat employers may develop expertise in identifying, and then selecting, employment arbitrators who tend to favor employers in their decision-making. Lacking equivalent repeat player experience, employees will be less likely to be able to identify and then reject the pro-employer arbitrators.

These latter two explanations should lead to a greater employer degree of success in cases where there is a repeat employer-arbitrator pairing, even compared to repeat employer cases in general.

The large number of cases in the AAA-CC filings dataset and the availability now of four years worth of data allow an improved analysis of the potential for either repeat employer or repeat employer-arbitrator pairing effects. I begin by looking at repeat employer effects.

Overall in the AAA-CC filings dataset, 2,613 out of 3,941 or 66.3 percent of cases involved repeat employers, defined as any employer with more than one case in the dataset. This indicates that a repeat employer is in fact the typical situation in employment arbitrations administered by the AAA. As predicted by the above arguments, repeat employers faired better in arbitration than one-shot employers. Whereas employees won 31.6 percent of cases involving one-shot employers, they won only 16.9 percent of cases involving repeat employers, which was a statistically significant difference ($p<.01$). Similarly, whereas the mean damage award was $40,546 in cases involving one-shot employers, the mean damage award was only $16,134 in cases involving repeat employers, which was also a statistically significant difference ($p<.01$). These results confirm earlier research indicating a repeat employer effect in employment arbitration. However, they are also consistent with explanations 1-4 for the repeat employer effect, described above, which do not implicate employer-arbitrator repeat effect bias.

To test for a repeat employer-arbitrator pairing bias, I classified all cases where the same arbitrator heard more than one case involving the same arbitrator. Two different

approaches have been advocated in the literature for such classifications. In her research, Bingham used a classification scheme that coded each appearance of a multiple pairing as a repeat employer-arbitrator case.[24] Sherwyn, Estreicher and Heise, by contrast, argue that the first instance in which the pairing occurs should not be classified as a repeat employer-arbitrator case, only subsequent incidents of the same pairing.[25] Their reasoning is that arbitrator bias will only emerge as reciprocation in second and subsequent cases where the arbitrator is selected by the same employer. Although I think there is some plausibility to this argument, my view is that in selecting an arbitrator a second and subsequent times, the employer will take into consideration the arbitrator's decision in the initial case involving the employer. From the arbitrator's side, if there is a temptation to be biased towards an employer in hopes of obtaining future arbitration business, the arbitrator can signal this to the employer by more employer-favorable decision-making in the initial case on which the arbitrator is selected. Thus, if there is a repeat employer-arbitrator bias, it should be manifested in more favorable decisions towards employers on the first as well as subsequent cases involving a repeat employer-arbitrator pairing. Following an approach that I have also taken in earlier research in this area[26], I initially proceed by classifying all cases involving a repeat pairing as repeat employer-arbitrator cases. However, to explore the alternative approach advocated by Sherwyn, Eisenberg and Heise, I also test the repeat employer-arbitrator classification

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[24] Bingham, supra.
[25] David Sherwyn, Samuel Estreicher, and Michael Heise. "Assessing the Case for Employment Arbitration: A New Path for Empirical Research." *Stanford Law Review*, Vol. 57, pp. 1557-1591 (2005).
[26] Alexander J.S. Colvin, "Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?" *Employee Rights and Employment Policy Journal*, Vol. 11, No. 2, pp. 405-447 (2008).

suggested by those authors, which is restricted to second and subsequent instances of the pairing.

Overall in the AAA-CC filings dataset, 624 out of 3,934, or 15.9 percent of cases involved repeat employer-arbitrator pairings. This is a much larger group of repeat employer-arbitrator pairings than examined in previous studies, reflecting the size of the data available through the California Code filing requirements. Overall, employers were more successful in cases involving repeat employer-arbitrator pairings. Whereas the employee win rate was 23.4 percent in cases that did not involve a repeat employer-arbitrator pairing, the employee win rate was only 12.0 percent in cases involving a repeat pairing, which was a statistically significant difference. Similarly, whereas the average damage award was $27,039 in cases not involving a repeat pairing, it was only $7,451 in cases that involved a repeat employer-arbitrator pairing, also a statistically significant difference ($p<.05$). To more precisely identify possible explanations for the repeat player effect, it is useful to separately analyze the subset of cases involving repeat employers. To the degree that effects are due to a repeat employer-arbitrator pairing effect rather than the more general advantages of repeat employers, they should be identifiable in this subpopulation. When the analysis is restricted to this subsample, the employee win rate is 12.0 percent for cases involving a repeat employer-arbitrator pairing, compared to 18.6 percent for cases that do not involve a repeat pairing, which is a statistically significant difference ($p<.05$). In this subsample, the mean award amount is $7,451 for cases involving a repeat employer-arbitrator pairing, whereas the mean award

is $19,146 for cases that do not involve a repeat pairing, though this difference is only of marginal statistical significance.[27]

Do these results change when we take the alternative approach to classifying repeat employer-arbitrator pairings advocated by Sherwyn, Estreicher and Heise? Using their alternative classification approach, the employee win rate is 12.2 percent with versus 22.5 percent without a repeat employer-arbitrator pairing, which is a statistically significant difference ($p<.01$). Similarly, the mean award amount is $3,203 with versus $25,843 without a repeat employer-arbitrator pairing, which is also a statistically significant difference ($p<.05$). When we restrict the analysis to the subsample of repeat employers, the employee win rate is 12.2 percent with versus 16.8 percent without a repeat employer-arbitrator pairing and the mean award amount is $3,203 with versus $20,939 without a repeat pairing, though only the latter difference is of marginal significance. Overall, the use of the alternative classification approach produces slightly smaller differences in employee win rates and slightly larger differences in mean award amounts. However, the general pattern of results is very similar across the two methodologies. How exactly the repeat employer-arbitrator might operate in the area of signaling between the two sides is an interesting research question, but the alternative positions do not appear to have major effects on the outcomes.

Taken as a whole, the results indicate that there is a strong repeat employer effect in employment arbitration and a smaller, but substantial repeat employer-arbitrator pairing effect. Although the former effect appears to be larger, the latter is of greater concern from a policy standpoint. If the effect is due to either arbitrator bias or an

[27] The difference in award amounts is statistically significant at the 90 percent confidence level in a one-tailed test, but falls just short of the 90 percent level in a two-tailed test.

employer ability to systematically select more employer favorable arbitrators, one should be concerned that the employment arbitration system is being slanted against employees in these cases. Although alternative explanations may be offered, it is also plausible that the results actually understate the extent of the repeat employer-arbitrator pairing effect. In cases where employees are able to retain plaintiff counsel who are relatively experienced in this area and knowledgeable about employment arbitration, it is possible that these attorneys will enter into agreements with employer counsel to repeatedly use the same employment arbitrators in multiple cases where the arbitrators in question are acceptable to both sides. Put alternatively, where plaintiff counsel are able to act as a repeat player in arbitration, we would expect to see instances of repeat employer-arbitrator pairings that reflect the existence of repeat players on both sides, akin to the situation commonly seen in labor arbitration. These relatively employee favorable repeat employer-arbitrator pairings are likely to bias upward the level of employee success seen in repeat pairing cases overall. If it were possible to remove them from the sample, the remaining repeat pairing cases are likely to provide evidence of a stronger repeat employer-arbitrator effect.

Self-Representation

One of the possible benefits of employment arbitration is that the relatively simplicity of the forum might make self-representation by employees more plausible than in litigation. Alternatively, given that arbitration is a private forum, one might also be concerned that self-represented employees will be more disadvantaged in arbitration than in the public forum of litigation where judges may view themselves as having a greater

public obligation to protect the interests of the self-represented. The AAA-CC filings include data on whether or not employees in the cases were self-represented, allowing empirical analysis of questions related to this phenomenon. To what extent is self-representation used in employment arbitration? What is the effect of using counsel versus self-representation on outcomes in employment arbitration?

Overall, employees were self-represented in 980 out of 3,940 cases or 24.9 percent of the time. In cases where the employee was self-represented the employee win rate was 18.3 percent versus an employee win rate of 22.9 percent in cases where the employee was represented by counsel, which was a statistically significant difference ($p<.10$). Though it should be noted that this is no necessarily all that large a difference in win rates given that there is likely to a selection effect in which counsel can identify in advance cases where the employee is less likely to be successful. Turning to award amounts, the mean award received by self-represented employees was $12,228 compared to a mean award of $28,993 for employees represented by counsel, which was a statistically significant difference ($p<.05$). Again, there may be some selection effect here as plaintiff attorneys may be unable financially to take on cases below a certain value threshold.

These results suggest that while a substantial minority of employees do use self-representation, in the large majority of instances employees are retaining counsel to represent them in employment arbitration. The cases in which employees do have representation by counsel are on average those in which they have a greater chance of success and recover larger damage awards. Thus employment arbitration appears to be a dispute resolution system predominantly based on employee representation by counsel, as

is the case with litigation. To the degree that representation by counsel continues to be difficult for many employees to obtain, due to factors such as low value of claims, lack of legal sophistication of employees, and limited resources of plaintiff attorneys, employment arbitration is providing at most a limited response to this problem.

Conclusion

In the often vociferous debates over employment arbitration, empirical research has at times been criticized as unable to answer the key policy questions implicated in the rise of this new system of dispute resolution.[28] Assuming any individual study will definitely resolve what are complex issues involving a multitude of factors and influences is to create an unrealistic expectation. In practice, empirical research is more typically accumulative in nature as studies gradually enhance our base of knowledge through which to make judgments about policy issues. The present study has taken this approach in trying to extend our understanding of employment arbitration. The availability of a broader, more representative set of data about arbitration under employer-promulgated procedures by virtue of the California Code service provider reporting requirements allows a more accurate and complete picture to begin to emerge of the outcomes of employment arbitration.

What are the key findings of this study and what do they suggest are major future research needs? Estimates of employee win rates and damage award amounts based on the AAA-CC filings data indicate that arbitration outcomes are generally less favorable to

[28] See e.g., Steven Ware, "The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration" *Ohio State Journal on Dispute Resolution* Vol. 16, p. 735 (2001).

employees than those from employment litigation. Although the AAA-CC filings do not provide sufficient information on case characteristics to identify further the factors explaining these differences, the identification of a sizable arbitration-litigation gap indicates the importance of future research that gathers additional data on cases that will help identify the factors leading to these differences. Arbitration does appear to produce relatively quicker resolution of employment claims, albeit not necessarily as quickly as would be ideal for either employee or employer needs. On the closely debated issue of repeat player effects in arbitration, this study finds strong evidence of a repeat employer advantage and, more problematically, evidence of an advantage to employers in repeat employer-arbitrator pairings. The existence of an employer advantage in repeat employer-arbitrator pairings may reflect arbitral bias in some of these cases. More generally it indicates limitations in the ability of the plaintiff attorney bar to play a substitute role as a repeat player on behalf of employees in employer arbitration akin to the role played by unions in labor arbitration. This is not to say that plaintiff attorneys never or cannot play this role, but rather that there may not be sufficient numbers of plaintiff attorneys experienced in employment arbitration accessible to employees to be able to counter-act employer advantages in this area. Lastly, the results of this study indicate that while employees are self-represented in a substantial number of arbitration cases, they tend to receive less favorable outcomes than employees represented by attorneys and representation by counsel is the more common situation in employment arbitration. The question of providing effective and accessible representation for employees continues to be an important issue for investigation in future research in this area.

EXHIBIT B

STATE	CITATION	TEXT
Alabama	Ala. Code § 8-1-41 (2000).	The following obligations cannot be specifically enforced: (1) An obligation to render personal service; (2) An obligation to employ another in personal service; (3) An agreement to submit a controversy to arbitration; (4) An agreement to perform an act which the party has not power lawfully to perform when required to do so; (5) An agreement to procure the act or consent of the wife of the contracting party or of any other third persons; or (6) An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.
Arizona	Ariz. Rev. Stat. § 12-1517 (2000).	A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This article shall have no application to arbitration agreements between employers and employees or their respective representatives.
Arkansas	Ark. Stat. Ann. § 16-108-201 (1999).	A written provision to submit to arbitration any controversy thereafter arising between the parties bound by the terms of the writing is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract; provided, that this subsection shall have no application to personal injury or tort matters, employer-employee disputes, nor to any insured or beneficiary under any insurance policy or annuity contract.
Georgia	Off. Code Ga. Ann. § 9-9-2 (2000).	This part shall apply to all disputes in which the parties thereto have agreed in writing to arbitrate and shall provide the exclusive means by which agreements to arbitrate disputes can be enforced, except the following, to which this part shall not apply: (9) Any contract relating to terms and conditions of employment unless the clause agreeing to arbitrate is initialed by all signatories at the time of the execution of the agreement.
Idaho	Idaho Code § 7-901 (1999).	A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This act does not apply to arbitration agreements between employers and employees or between their respective representatives (unless otherwise provided in the agreement).

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STATE	CITATION	TEXT
Iowa	Iowa Code § 679A.1 (1999).	A written agreement to submit to arbitration an existing controversy is valid, enforceable, and irrevocable unless grounds exist at law or in equity for the revocation of the written agreement. A provision in a written contract to submit to arbitration a future controversy arising between the parties is valid, enforceable, and irrevocable unless grounds exist at law or in equity for the revocation of the contract. This subsection shall not apply to any of the following: (a) A contract of adhesion; (b) A contract between employers and employees; (c) Unless otherwise provided in a separate writing executed by all parties to the contract, any claim sounding in tort whether or not involving a breach of contract.
Kansas	Kan. Stat. Ann. § 5-401 (1999).	(a) A written agreement to submit any existing controversy to arbitration is valid, enforceable and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract. (b) Except as provided in subsection (c), a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract. (c) The provisions in subsection (b) shall not apply to: (2) contracts between an employer and employees, or their respective representatives.
Kentucky	(1) Ky. Rev. Stat. § 417.050 (1998). (2) Ky. Rev. Stat. § 336.700 (1998).	(1) A written agreement to submit any existing controversy to arbitration or a provision in [a] written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract. This chapter does not apply to: (1) Arbitration agreements between employers and employees or between their respective representatives. (2) Notwithstanding any provision of the Kentucky Revised Statutes to the contrary, no employer shall require as a condition or precondition of employment that any employee or person seeking employment waive, arbitrate, or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled under any provision of the Kentucky Revised Statutes or any federal law.

STATE	CITATION	TEXT
Louisiana	La. Rev. Stat. §§ 9:4216 (2000).	Nothing contained in this Chapter shall apply to contracts of employment of labor or to contracts for arbitration which are controlled by valid legislation of the United States or to contracts made prior to July 28, 1948.
Maryland	Md. Cts. And Jud. Proc. Code Ann. § 3-206 (1999).	A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy arising between the parties in the future is valid and enforceable, and is irrevocable, except upon grounds that exist at law or in equity for the revocation of a contract. This subtitle does not apply to an arbitration agreement between employers and employees or between their respective representatives unless it is expressly provided in the agreement that this subtitle shall apply.
New Hampshire	New Hampshire Rev. Stat. Ann. § 542:1 (1999).	A provision in any written contract to settle by arbitration a controversy thereafter arising out of such contract, or an agreement in writing to submit to arbitration any controversy existing at the time of the agreement to submit, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. The provisions of this chapter shall not apply to any arbitration agreement between employers and employees, or between employers and associations of employees unless such agreement specifically provides that it shall be subject to the provisions of this chapter.
North Carolina	N.C. Gen. Stat. § 1-567.2 (1999).	(a) Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy. (b) This Article shall not apply to: (2) Arbitration agreements between employers and employees or between their respective representatives, unless the agreement provides that this Article shall apply.
Oklahoma	15 Okl. St., § 818 (1999).	This act shall apply only to agreements made subsequent to the effective date of this act. This act does not apply to employer and employee relations. This act shall not apply to contracts between insuror and insured, except where both the insured and insuror are insurance companies.

STATE	CITATION	TEXT
South Carolina	S.C. Code Ann. § 15-48-10 (1999).	This chapter shall not apply to: (2) Arbitration agreements between employers and employees or between their respective representatives unless the agreement provides that this chapter shall apply; provided, however, that notwithstanding any other provision of law, employers and employees or their respective representatives may not agree that workmen's compensation claims, unemployment compensation claims and collective bargaining disputes shall be subject to the provisions of this chapter and any such provision so agreed upon shall be null and void. An agreement to apply this chapter shall not be made a condition of employment.
Washington	Rev. Code Wash. § 7.04.010 (2002).	Two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this chapter, any controversy which may be the subject of an action existing between them at the time of the agreement to submit, or they may include in a written agreement a provision to settle by arbitration any controversy thereafter arising between them out of or in relation to such agreement. Such agreement shall be valid, enforceable and irrevocable save upon such grounds as exist in law or equity for the revocation of any agreement. The provisions of this chapter shall not apply to any arbitration agreement between employers and employees or between employers and associations of employees, and as to any such agreement the parties thereto may provide for any method and procedure for the settlement of existing or future disputes and controversies, and such procedure shall be valid, enforceable and irrevocable save upon such grounds as exist in law or equity for the revocation of any agreement.
Wisconsin	Wis. Stats. § 788.01 (1999).	A provision in any written contract to settle by arbitration a controversy thereafter arising out of the contract, or out of the refusal to perform the whole or any part of the contract, or an agreement in writing between 2 or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable and enforceable except upon such grounds as exist at law or in equity for the revocation of any contract. This chapter shall not apply to contracts between employers and employees, or between employers and associations of employees, except as provided in § 111.10, nor to agreements to arbitrate disputes under §§ 101.143(6s) or 230.44(bm).

EXHIBIT C

TEXT

EEOC Policy Statement on Mandatory Arbitration

EEOC NOTICE Number 915.002, 7/10/97

1. *SUBJECT*: Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment.

2. *PURPOSE*: This policy statement sets out the Commission's policy on the mandatory binding arbitration of employment discrimination disputes imposed as a condition of employment.

3. *EFFECTIVE DATE*: Upon issuance.

4. *EXPIRATION DATE*: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. *ORIGINATOR*: Coordination and Guidance Programs, Office of Legal Counsel.

6. *INSTRUCTIONS*: File in Volume II of the EEOC Compliance Manual.

7. *SUBJECT MATTER*:

The United States Equal Employment Opportunity Commission (EEOC or Commission), the federal agency charged with the interpretation and enforcement of this nation's employment discrimination laws, has taken the position that agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in these laws. EEOC Motions on Alternative Dispute Resolution, Motion 4 (adopted Apr. 25, 1995), 80 Daily Lab. Rep. (BNA) E-1 (Apr. 26, 1995).[1] This policy statement sets out in further detail the basis for the Commission's position.

I. Background

An increasing number of employers are requiring as a condition of employment that applicants and employees give up their right to pursue employment discrimination claims in court and agree to resolve disputes through binding arbitration. These agreements may be presented in the form of an employment contract or be included in an employee handbook or elsewhere. Some employers have even included such agreements in employment applications. The use of these agreements is not limited to particular industries, but can be found in various sectors of the workforce, including, for example, the securities industry, retail, restaurant and hotel chains, health care, broadcasting, and security services. Some individuals subject to mandatory arbitration agreements have challenged the enforceability of these agreements by bringing employment discrimination actions in the courts. The Commission is not unmindful of the case law enforcing specific mandatory arbitration agreements, in particular, the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 33 (1991).[2] Nonetheless, for the reasons stated herein, the Commission believes that such agreements are inconsistent with the civil rights laws.

II. The Federal Civil Rights Laws Are Squarely Based In This Nation's History And Constitutional Framework And Are Of A Singular National Importance

Federal civil rights laws, including the laws prohibiting discrimination in employment, play a unique role in American jurisprudence. They flow directly from core Constitutional principles, and this nation's history testifies to their necessity and profound importance. Any analysis of the mandatory arbitration of rights guaranteed by the employment discrimination laws must, at the outset, be squarely based in an understanding of the history and purpose of these laws.

Title VII of the historic Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, was enacted to ensure equal opportunity in employment, and to secure the fundamental right to equal protection guaranteed by the Fourteenth Amendment to the Constitution.[3] Congress considered this national policy against discrimination to be of the "highest priority" (*Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968)), and of "paramount importance" (H.R. Rep. No. 88-914, pt. 2 (1963) (separate views of Rep. McCulloch *et al.*)),[4] *reprinted in* 1964 Leg.

[1] Although binding arbitration does not, in and of itself, undermine the purposes of the laws enforced by the EEOC, the Commission believes that this is the result when it is imposed as a term or condition of employment.

[2] The *Gilmer* decision is not dispositive of whether employment agreements that mandate binding arbitration of discrimination claims are enforceable. As explicitly noted by the Court, the arbitration agreement at issue in *Gilmer* was not contained in an employment contract. 500 U.S. at 25 n.2. Even if *Gilmer* had involved an agreement with an employer, the issue would remain open given the active role of the legislative branch in shaping the development of employment discrimination law. *See* discussion *infra* at section IV. B.

[3] *See, e.g.*, H.R. Rep. No. 88-914, pt. 1 (1963), *reprinted in* United States Equal Employment Opportunity Commission, Legislative History of Title VII and XI of the Civil Rights Act of 1964 ("1964 Leg. Hist.") at 2016 (the Civil Rights Act of 1964 was "designed primarily to protect and provide more effective means to enforce. . . civil rights"); H.R. Rep. No.88-914, pt.2 (1963) (separate views of Rep. McCulloch *et al.*), *reprinted in* 1964 Leg. Hist. at 2122 ("[a] key purpose of the bill . . . is to secure to all Americans the equal protection of the laws of the United States and of the several States"); Charles & Barbara Whalen, The Longest Debate: A legislative history of the 1964 Civil Rights Act 104 (1985) (opening statement of Rep. Celler on House debate of H.R. 7152: "The legislation before you seeks only to honor the constitutional guarantees of equality under the law for all. . . . [W]hat it does is to place into balance the scales of justice so that the living force of our Constitution shall apply to all people . . . ."); H.R. Rep. No. 92-238 (1971), *reprinted in* Senate Committee on Labor and Public Welfare, Subcommittee on Labor, Legislative History of the Equal Employment Opportunity Act of 1972 ("1972 Leg. Hist.") at 63 (1972 amendments to Title VII are a "reaffirmation of our national policy of equal opportunity in employment").

[4] William McCulloch (R-Ohio) was the ranking Republican of Subcommittee No. 5 of the House Judiciary Committee, to which the civil rights bill (H.R. 7152) was referred for initial consideration by Congress. McCulloch was among the individuals responsible for

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Hist. at 2123.[5] The Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq.*, was intended to conform "[t]he practice of American democracy . . . to the spirit which motivated the Founding Fathers of this Nation — the ideals of freedom, equality, justice, and opportunity." H.R. Rep. No. 88- 914, pt. 2 (1963) (separate views of Rep. McCulloch *et al.*), *reprinted in* 1964 Leg. Hist. at 2123. President John F. Kennedy, in addressing the nation regarding his intention to introduce a comprehensive civil rights bill, stated the issue as follows:

> We are confronted primarily with a moral issue. It is as old as the Scriptures and it is as clear as the American Constitution.
>
> The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated.

President John F. Kennedy's Radio and Television Report to the American People on Civil Rights (June 11, 1963), Pub. Papers 468, 469 (1963).[6]

Title VII is but one of several federal employment discrimination laws enforced by the Commission which are "part of a wider statutory scheme to protect employees in the workplace nationwide," *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995). *See* the Equal Pay Act of 1963 ("EPA"), 29 U.S.C. § 206(d); the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § § 621 *et seq.*; and the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § § 12101 *et seq.* The ADEA was enacted "as part of an ongoing congressional effort to eradicate discrimination in the workplace" and "reflects a societal condemnation of invidious bias in employment decisions." *McKennon*, 513 U.S. at 357. The ADA explicitly provides that its purpose is, in part, to invoke congressional power to enforce the Fourteenth Amendment. 29 U.S.C. § 12101(b)(4). Upon signing the ADA, President George Bush remarked that "the American people have once again given clear expression to our most basic ideals of freedom and equality." President George Bush's Statement on Signing the Americans with Disabilities Act of 1990 (July 26, 1990), Pub. Papers 1070 (1990 Book II).

III. The Federal Government Has The Primary Responsibility For The Enforcement Of The Federal Employment Discrimination Laws

The federal employment discrimination laws implement national values of the utmost importance through the institution of public and uniform standards of equal opportunity in the workplace. *See* text and notes *supra* in Section II. Congress explicitly entrusted the primary responsibility for the interpretation, administration, and enforcement of these standards, and the public values they embody, to the federal government. It did so in three principal ways. First, it created the Commission, initially giving it authority to investigate and conciliate claims of discrimination and to interpret the law, *see* § § 706(b) and 713 of Title VII, 42 U.S.C. § § 2000e-5(b) and 2000e-12, and subsequently giving it litigation authority in order to bring cases in court that it could not administratively resolve, *see* § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1). Second, Congress granted certain enforcement authority to the Department of Justice, principally with regard to the litigation of cases involving state and local governments. *See* § § 706(f)(1) and 707 of Title VII, 42 U.S.C. § § 2000e-5(f)(1) and 2000e-6. Third, it established a private right of action to enable aggrieved individuals to bring their claims directly in the federal courts, after first administratively bringing their claims to the Commission. *See* § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1).[7]

While providing the states with an enforcement role, *see* 42 U.S.C. § § 2000e-5(c) and (d), as well as recognizing the importance of voluntary compliance by employers, *see* 42 U.S.C. § 2000e-5(b), Congress emphasized that it is the federal government that has ultimate enforcement responsibility. As Senator Humphrey stated, "[t]he basic rights protected by [Title VII] are rights which accrue to citizens of the United States; the Federal Government has the clear obligation to see that these rights are fully protected." 110 Cong. Rec. 12725 (1964). *Cf. General Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980) (in bringing enforcement actions under Title VII, the EEOC "is guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement' ") (*quoting* 118 Cong. Rec. 4941 (1972)).

The importance of the federal government's role in the enforcement of the civil rights laws was reaffirmed by Congress in the ADA, which explicitly provides that its purposes include "ensur[ing] that the Federal Government plays a central role in enforcing the standards established in [the ADA] on behalf of individuals with disabilities." 42 U.S.C. § 12101(b)(3).

IV. Within This Framework, The Federal Courts Are Charged With The Ultimate Responsibility For Enforcing The Discrimination Laws

While the Commission is the primary federal agency responsible for enforcing the employment discrimination laws, the courts have been vested with the final responsibility for statutory enforcement through the construction and interpretation of the statutes, the adjudication of claims, and the issuance of relief.[8] *See, e.g., Kremer v. Chemical Constr. Corp.*, 454 U.S. 461, 479 n.20 (1982) ("federal courts were entrusted with ultimate enforcement responsibility" of Title VII); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 (1980)

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working out a compromise bill that was ultimately substituted by the full Judiciary Committee for the bill reported out by Subcommittee No. 5. His views, which were joined by six members of Congress, are thus particularly noteworthy.

[5] *See also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (The Civil Rights Act of 1964 is a "complex legislative design directed at an historic evil of national proportions").

[6] Commitment to our national policy to eradicate discrimination continues today to be of the utmost importance. As President Clinton stated in his second inaugural address:

> Our greatest responsibility is to embrace a new spirit of community for a new century . . . . The challenge of our past remains the challenge of our future: Will we be one Nation, one people, with one common destiny, or not? Will we all come together, or come apart?
>
> The divide of race has been America's constant curse. And each new wave of immigrants gives new targets to old prejudices . . . . These forces have nearly destroyed our Nation in the past. They plague us still.

President William J. Clinton's Inaugural Address (Jan. 20, 1997), 33 Weekly Comp. Pres. Doc. 61 (Jan. 27, 1997).

[7] Section 107 of the ADA specifically incorporates the powers, remedies, and procedures set forth in Title VII with respect to the Commission, the Attorney General, and aggrieved individuals. *See* 42 U.S.C.§ 12117. Similar enforcement provisions are contained in the ADEA. *See* 29 U.S.C. § § 626 and 628.

[8] In addition, unlike arbitrators, courts have coercive authority, such as the contempt power, which they can use to secure compliance.

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("Of course the 'ultimate authority' to secure compliance with Title VII resides in the federal courts").[9]

A. The Courts Are Responsible For The Development And Interpretation Of The Law

As the Supreme Court emphasized in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974), "the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." This principle applies equally to the other employment discrimination statutes.

While the statutes set out the basic parameters of the law, many of the fundamental legal principles in discrimination jurisprudence have been developed through judicial interpretations and case law precedent. Absent the role of the courts, there might be no discrimination claims today based on, for example, the adverse impact of neutral practices not justified by business necessity, *see Griggs v. Duke Power Co.*, 401 U.S. 424 (1974), or sexual harassment, *see Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). Yet these two doctrines have proved essential to the effort to free the workplace from unlawful discrimination, and are broadly accepted today as key elements of civil rights law.

B. The Public Nature Of The Judicial Process Enables The Public, Higher Courts, And Congress To Ensure That The Discrimination Laws Are Properly Interpreted And Applied

Through its public nature — manifested through published decisions — the exercise of judicial authority is subject to public scrutiny and to system-wide checks and balances designed to ensure uniform expression of and adherence to statutory principles. When courts fail to interpret or apply the antidiscrimination laws in accord with the public values underlying them, they are subject to correction by higher level courts and by Congress.

These safeguards are not merely theoretical, but have enabled both the Supreme Court and Congress to play an active and continuing role in the development of employment discrimination law. Just a few of the more recent Supreme Court decisions overruling lower court errors include: *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997) (former employee may bring a claim for retaliation); *O'Connor v. Consolidated Coin Caterers, Corp.*, 116 S. Ct. 1307 (1996) (comparator in age discrimination case need not be under forty); *McKennon*, 513 U.S. 352 (employer may not use after-acquired evidence to justify discrimination); and *Harris*, 510 U.S. 17 (no requirement that sexual harassment plaintiffs prove psychological injury to state a claim).

Congressional action to correct Supreme Court departures from congressional intent has included, for example, legislative amendments in response to Court rulings that: pregnancy discrimination is not necessarily discrimination based on sex (*General Elec. Co. v. Gilbert*, 429 U.S. 125 (1978), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), overruled by Pregnancy Discrimination Act of 1978); that an employer does not have the burden of persuasion on the business necessity of an employment practice that has a disparate impact (*Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), overruled by § § 104 and 105 of the Civil Rights Act of 1991); that an employer avoids liability by showing that it would have taken the same action absent any discriminatory motive (*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), overruled, in part, by § 107 of the Civil Rights Act of 1991); that mandatory retirement pursuant to a benefit plan in effect prior to enactment of the ADEA is not prohibited age discrimination (*United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977), overruled by 1978 ADEA amendments); and, that age discrimination in fringe benefits is not unlawful (*Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158 (1989), overruled by Older Workers Benefit Protection Act of 1990).

C. The Courts Play A Crucial Role In Preventing And Deterring Discrimination And In Making Discrimination Victims Whole

The courts also play a critical role in preventing and deterring violations of the law, as well as providing remedies for discrimination victims. By establishing precedent, the courts give valuable guidance to persons and entities covered by the laws regarding their rights and responsibilities, enhancing voluntary compliance with the laws. By awarding damages, backpay, and injunctive relief as a matter of public record, the courts not only compensate victims of discrimination, but provide notice to the community, in a very tangible way, of the costs of discrimination. Finally, by issuing public decisions and orders, the courts also provide notice of the identity of violators of the law and their conduct. As has been illustrated time and again, the risks of negative publicity and blemished business reputation can be powerful influences on behavior.

D. The Private Right Of Action With Its Guarantee Of Individual Access To The Courts Is Essential To The Statutory Enforcement Scheme

The private right of access to the judicial forum to adjudicate claims is an essential part of the statutory enforcement scheme. *See, e.g., McKennon*, 513 U.S. at 358 (granting a right of action to an injured employee is "a vital element" of Title VII, the ADEA, and the EPA). The courts cannot fulfill their enforcement role if individuals do not have access to the judicial forum. The Supreme Court has cautioned that, "courts should ever be mindful that Congress ... thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum." *Gardner-Denver*, 415 U.S. at 60 n.21.[10]

Under the enforcement scheme for the federal employment discrimination laws, individual litigants act as "private attorneys general." In bringing a claim in

[9] *See also* H.R. Rep. No. 88-914, pt.2 (1963) (separate views of Rep. McCulloch et al.), *reprinted in* 1964 Leg. Hist. at 2150 (explaining that EEOC was not given cease-and-desist powers in the final House version of the Civil Rights Act of 1964, H.R. 7152, because it was "preferred that the ultimate determination of discrimination rest with the Federal judiciary").

[10] *See also* 118 Cong. Rec. S7168 (March 6, 1972) (section-by-section analysis of H.R. 1746, the Equal Opportunity Act of 1972, as agreed to by the conference committees of each House; analysis of § 706(f)(1) provides that, while it is hoped that most cases will be handled through the EEOC with recourse to a private lawsuit as the exception, "as the individual's rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief").

court, the civil rights plaintiff serves not only her or his private interests, but also serves as "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.' " *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978) (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)). *See also McKennon*, 513 U.S. at 358 ("[t]he private litigant who seeks redress for his or her injuries vindicates both the deterrence and compensation objectives of the ADEA").

V. Mandatory Arbitration Of Employment Discrimination Disputes "Privatizes" Enforcement Of The Federal Employment Discrimination Laws, Thus Undermining Public Enforcement Of The Laws

The imposition of mandatory arbitration agreements as a condition of employment substitutes a private dispute resolution system for the public justice system intended by Congress to govern the enforcement of the employment discrimination laws. The private arbitral system differs in critical ways from the public judicial forum and, when imposed as a condition of employment, it is structurally biased against applicants and employees.

A. Mandatory Arbitration Has Limitations That Are Inherent And Therefore Cannot Be Cured By The Improvement Of Arbitration Systems

That arbitration is substantially different from litigation in the judicial forum is precisely the reason for its use as a form of ADR. Even the fairest of arbitral mechanisms will differ strikingly from the judicial forum.

1. The Arbitral Process Is Private In Nature And Thus Allows For Little Public Accountability

The nature of the arbitral process allows — by design — for minimal, if any, public accountability of arbitrators or arbitral decision-making. Unlike her or his counterparts in the judiciary, the arbitrator answers only to the private parties to the dispute, and not to the public at large. As the Supreme Court has explained:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. . . .
>
> *United Steelworkers of Am. v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) (quoting from Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1016 (1955)).

The public plays no role in an arbitrator's selection; s/he is hired by the private parties to a dispute. Similarly, the arbitrator's authority is defined and conferred, not by public law, but by private agreement.[11] While the courts are charged with giving force to the public values reflected in the antidiscrimination laws, the arbitrator proceeds from a far narrower perspective: resolution of the immediate dispute. As noted by one commentator, "[a]djudication is more likely to do justice than . . . arbitration . . . precisely because it vests the power of the state in officials who act as trustees for the public, who are highly visible, and who are committed to reason." Owen Fiss, *Out of Eden*, 94 Yale L.J. 1669, 1673 (1985).

Moreover, because decisions are private, there is little, if any, public accountability even for employers who have been determined to have violated the law. The lack of public disclosure not only weakens deterrence (*see* discussion *supra* at 8), but also prevents assessment of whether practices of individual employers or particular industries are in need of reform. "The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of [Title VII's] operation or entrenched resistance to its commands, either of which can be of industry-wide significance." *McKennon*, 513 U.S. at 358-59.

2. Arbitration, By Its Nature, Does Not Allow For The Development Of The Law

Arbitral decisions may not be required to be written or reasoned, and are not made public without the consent of the parties. Judicial review of arbitral decisions is limited to the narrowest of grounds.[12] As a result, arbitration affords no opportunity to build a jurisprudence through precedent.[13] Moreover, there is virtually no opportunity for meaningful scrutiny of arbitral

[11] Article III of the Constitution provides federal judges with life tenure and salary protection to safeguard the independence of the judiciary. No such safeguards apply to the arbitrator. The importance of these safeguards was stressed in the debates on the 1972 amendments to Title VII. Senator Dominick, in offering an amendment giving the EEOC the right to file a civil action in lieu of cease-and-desist powers, explained that the purpose of the amendment was to "vest adjudicatory power where it belongs — in impartial judges shielded from political winds by life tenure." 1972 Leg. Hist. at 549. The amendment was later revised in minor respects and adopted by the Senate.

[12] Under the Federal Arbitration Act, arbitral awards may be vacated only for procedural impropriety such as corruption, fraud, or misconduct. 9 U.S.C. § 10. Judicially created standards of review allow an arbitral award to be vacated where it clearly violates a public policy that is explicit, well-defined, "dominant" and ascertainable from the law, *see United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987), or where it is in "manifest disregard" of the law, *see Wilko v. Swan*, 346 U.S. 427, 436-37 (1953). The latter standard of review has been described by one commentator as "a virtually insurmountable" hurdle. *See* Bret F. Randall, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 BYU L. Rev. 759, 767. *But cf. Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1486-87 (1997) (in the context of mandatory employment arbitration of statutory disputes, the court interprets judicial review under the "manifest disregard" standard to be sufficiently broad to ensure that the law has been properly interpreted and applied).

[13] Congress has recognized the inappropriateness of ADR where "a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent," *see* Alternative Dispute Resolution Act, 5 U.S.C. § 572(b)(1) (providing for use of ADR by federal administrative agencies where the parties agree); or where "the case involves complex or novel legal issues," *see* Judicial Improvements and Access to Justice Act, 28 U.S.C. § 652(c)(2) (providing for court-annexed arbitration; § § 652(b)(1) and (2) also require the parties' consent to arbitrate constitutional or statutory civil rights claims). Similar findings were made by the U.S. Secretary of Labor's Task Force on Excellence in State and Local Government Through Labor-Management Cooperation ("Brock Commission"), which was charged with examining labor-management cooperation in state and local government. The Task Force's report, "Working Together for Public Service" (1996) ("Brock Report"), recommended "Quality Standards and Key Principles for Effective Alternative Dispute Resolution Systems for Rights Guaranteed by Public Law and for Other Workplace Disputes" which include that "ADR should normally not be used in

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decision-making. This leaves higher courts and Congress unable to act to correct errors in statutory interpretation. The risks for the vigorous enforcement of the civil rights laws are profound. *See* discussion *supra* at section IV. B.

3. Additional Aspects Of Arbitration Systems Limit Claimants' Rights In Important Respects

Arbitration systems, regardless of how fair they may be, limit the rights of injured individuals in other important ways. To begin with, the civil rights litigant often has available the choice to have her or his case heard by a jury of peers, while in the arbitral forum juries are, by definition, unavailable. Discovery is significantly limited compared with that available in court and permitted under the Federal Rules of Civil Procedure. In addition, arbitration systems are not suitable for resolving class or pattern or practice claims of discrimination. They may, in fact, protect systemic discriminators by forcing claims to be adjudicated one at a time, in isolation, without reference to a broader — and more accurate — view of an employer's conduct.

B. Mandatory Arbitration Systems Include Structural Biases Against Discrimination Plaintiffs

In addition to the substantial and inevitable differences between the arbitral and judicial forums that have already been discussed, when arbitration of employment disputes is imposed as a condition of employment, bias inheres against the employee.[14]

First, the employer accrues a valuable structural advantage because it is a "repeat player." The employer is a party to arbitration in all disputes with its employees. In contrast, the employee is a "one-shot player"; s/he is a party to arbitration only in her or his own dispute with the employer. As a result, the employee is generally less able to make an informed selection of arbitrators than the employer, who can better keep track of an arbitrator's record. In addition, results cannot but be influenced by the fact that the employer, and not the employee, is a potential source of future business for the arbitrator.[15] A recent study of nonunion employment law cases[16] found that the more frequent a user of arbitration an employer is, the better the employer fares in arbitration.[17]

In addition, unlike voluntary post-dispute arbitration — which must be fair enough to be attractive to the employee — the employer imposing mandatory arbitration is free to manipulate the arbitral mechanism to its benefit. The terms of the private agreement defining the arbitrator's authority and the arbitral process are characteristically set by the more powerful party, the very party that the public law seeks to regulate. We are aware of no examples of employees who insist on the mandatory arbitration of future statutory employment disputes as a condition of accepting a job offer — the very suggestion seems far-fetched. Rather, these agreements are imposed by employers because they believe them to be in their interest, and they are made possible by the employer's superior bargaining power. It is thus not surprising that many employer-mandated arbitration systems fall far short of basic concepts of fairness. Indeed, the Commission has challenged — by litigation, *amicus curiae* participation, or Commissioner charge — particular mandatory arbitration agreements that include provisions flagrantly eviscerating core rights and remedies that are available under the civil rights laws.[18]

The Commission's conclusions in this regard are consistent with those of other analyses of mandatory arbitration. The Commission on the Future of Worker-Management Relations (the "Dunlop Commission") was appointed by the Secretary of Labor and the Secretary of Commerce to, in part, address alternative means to resolve workplace disputes. In its Report and Recommendations (Dec. 1994) ("Dunlop Report"), the Dunlop Commission found that recent employer experimentation with arbitration has produced a range of programs that include "mechanisms that appear to be of dubious merit for enforcing the public values embedded in our laws." Dunlop Report at 27. In addition, a report by the U.S. General Accounting Office, surveying private employers' use of ADR mechanisms, found that existing employer arbitration systems vary greatly and that "most" do not conform to standards recommended by the Dunlop Commission to ensure fairness. *See* "Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution" at 15, HEHS-95-150 (July 1995).

The Dunlop Commission strongly recommended that binding arbitration agreements not be enforceable as a condition of employment:

> The public rights embodied in state and federal employment law — such as freedom from discrimination in the workplace . . . — are an important part of the social and economic protections of the nation. Em-

cases that represent tests of significant legal principles or class action." Brock Report at 82.

[14] A survey of employment discrimination arbitration awards in the securities industry, which requires as a condition of employment that all brokers resolve employment disputes through arbitration, found that "employers stand a greater chance of success in arbitration than in court before a jury" and are subjected to "smaller" damage awards. *See* Stuart H. Bompey & Andrea H. Stempel, *Four Years Later: A Look at Compulsory Arbitration of Employment Discrimination Claims After Gilmer v. Interstate/Johnson Lane Corp.*, 21 Empl. Rel. L.J. 21, 43 (autumn 1995).

[15] *See, e.g.*, Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 Yale L.J. 916, 936 (1979) ("an arbitrator could improve his chances of future selection by deciding favorably to institutional defendants: as a group, they are more likely to have knowledge about past decisions and more likely to be regularly involved in the selection process"); Reginald Alleyne, *Statutory Discrimination Claims: Rights 'Waived' and Lost in the Arbitration Forum*, 13 Hofstra Lab. L.J. 381, 428 (Spring 1996) ("statutory discrimination grievances relegated to . . . arbitration forums are virtually assured employer-favored outcomes," given "the manner of selecting, controlling, and compensating arbitrators, the privacy of the process and how it catalytically arouses an arbitrator's desire to be acceptable to one side").

[16] Arbitration of labor disputes pursuant to a collective bargaining agreement is less likely to favor the employer as a repeat-player because the union, as collective bargaining representative, is also a repeat-player.

[17] *See* Lisa Bingham, "Employment Arbitration: The effect of repeat-player status, employee category and gender on arbitration outcomes," (unpublished study on file with the author, an assistant professor at Indiana U. School of Public & Environmental Affairs).

[18] Challenged agreements have included provisions that: (1) impose filing deadlines far shorter than those provided by statute; (2) limit remedies to "out-of-pocket" damages; (3) deny any award of attorney's fees to the civil rights claimant, should s/he prevail; (4) wholly deny or limit punitive and liquidated damages; (5) limit back pay to a time period much shorter than that provided by statute; (6) wholly deny or limit front pay to a time period far shorter than that ordered by courts; (7) deny any and all discovery; and (8) allow for payment by each party of one-half of the costs of arbitration and, should the employer prevail, require the claimant, in the arbitrator's discretion, to pay the employer's share of arbitration costs as well.

ployees required to accept binding arbitration of such disputes would face what for many would be an inappropriate choice: give up your right to go to court, or give up your job.

Dunlop Report at 32. The Brock Commission (*see supra* n.13) agreed with the Dunlop Commission's opposition to mandatory arbitration of employment disputes and recommended that all employee agreements to arbitrate be voluntary and post-dispute. Brock Report at 81-82. In addition, the National Academy of Arbitrators recently issued a statement opposing mandatory arbitration as a condition of employment "when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights." *See* National Academy of Arbitrators' Statement and Guidelines (adopted May 21, 1997), 103 Daily Lab. Rep. (BNA) E-1 (May 29, 1997).

C. Mandatory Arbitration Agreements Will Adversely Affect The Commission's Ability To Enforce The Civil Rights Laws

The trend to impose mandatory arbitration agreements as a condition of employment also poses a significant threat to the EEOC's statutory responsibility to enforce the federal employment discrimination laws. Effective enforcement by the Commission depends in large part on the initiative of individuals to report instances of discrimination to the Commission. Although employers may not lawfully deprive individuals of their statutory right to file employment discrimination charges with the EEOC or otherwise interfere with individuals' protected participation in investigations or proceedings under these laws,[19] employees who are bound by mandatory arbitration agreements may be unaware that they nonetheless may file an EEOC charge. Moreover, individuals are likely to be discouraged from coming to the Commission when they know they will be unable to litigate their claims in court.[20] These chilling effects on charge filing undermine the Commission's enforcement efforts by decreasing channels of information, limiting the agency's awareness of potential violations of law, and impeding its ability to investigate possible unlawful actions and attempt informal resolution.

VI. Voluntary, Post-Dispute Agreements To Arbitrate Appropriately Balance The Legitimate Goals Of Alternate Dispute Resolution And The Need To Preserve The Enforcement Framework Of The Civil Rights Laws

The Commission is on record in strong support of *voluntary* alternative dispute resolution programs that resolve employment discrimination disputes in a fair and credible manner, and are entered into after a dispute has arisen. We reaffirm that support here. This position is based on the recognition that while even the best arbitral systems do not afford the benefits of the judicial system, well-designed ADR programs, including binding arbitration, can offer in particular cases other valuable benefits to civil rights claimants, such as relative savings in time and expense.[21] Moreover, we recognize that the judicial system is not, itself, without drawbacks. Accordingly, an individual may decide in a particular case to forego the judicial forum and resolve the case through arbitration. This is consistent with civil rights enforcement as long as the individual's decision is freely made after a dispute has arisen.[22]

VII. Conclusion

The use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment harms both the individual civil rights claimant and the public interest in eradicating discrimination. Those whom the law seeks to regulate should not be permitted to exempt themselves from federal enforcement of civil rights laws. Nor should they be permitted to deprive civil rights claimants of the choice to vindicate their statutory rights in the courts — an avenue of redress determined by Congress to be essential to enforcement.

Processing Instructions For The Field And Headquarters

1. Charges should be taken and processed in conformity with priority charge processing procedures regardless of whether the charging party has agreed to arbitrate employment disputes. Field offices are instructed to closely scrutinize each charge involving an arbitration agreement to determine whether the agreement was secured under coercive circumstances (e.g., as a condition of employment). The Commission will process a charge and bring suit, in appropriate cases, notwithstanding the charging party's agreement to arbitrate.

2. Pursuant to the statement of priorities in the National Enforcement Plan, *see* § B(1)(h), the Commission will continue to challenge the legality of specific agreements that mandate binding arbitration of employment discrimination disputes as a condition of employment. *See, e.g.*, Briefs of the EEOC as *Amicus Curiae* in *Seus v. John Nuveen & Co.*, No. 96-CV-5971 (E.D. Pa.) (Br. filed Jan. 11, 1997); *Gibson v. Neighborhood Health Clinics, Inc.*, No. 96-2652 (7th Cir.) (Br. filed Sept. 23, 1996); *Johnson v. Hubbard Broadcasting, Inc.*, No. 4-96-107 (D. Minn.) (Br. Filed May 17, 1996); *Great Western Mortgage Corp. v. Peacock*, No. 96-5273 (3d Cir.) (Br. filed July 24, 1996).

Date 7/10/97

/s/Gilbert F. Casellas
Chairman

[19] *See* "Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) statutes," Vol. III EEOC Compl. Man. (BNA) at N:2329 (Apr. 10, 1997).

[20] The Commission remains able to bring suit despite the existence of a mandatory arbitration agreement because it acts "to vindicate the public interest in preventing employment discrimination," *General Tel.*, 446 U.S. at 326. *Cf.* S.Rep. No. 101-263 (1990), *reprinted in*, Legislative History of The Older Workers Benefit Protection Act, at 354 (amendment to ADEA § 626(f)(4), which provides that "no waiver agreement may affect the Commission's rights and responsibilities to enforce [the ADEA]," was intended "as a clear statement of support for the principle that the elimination of age discrimination in the workplace is a matter of public as well as private interest"). As a practical matter, however, the Commission's ability to litigate is limited by its available resources.

[21] Despite conventional wisdom to the contrary, the financial costs of arbitration can be significant and may represent no savings over litigation in a judicial forum. These costs may include the arbitrator's fee and expenses; fees charged by the entity providing arbitration services, which may include filing fees and daily administrative fees; space rental fees; and court reporter fees.

[22] The Dunlop Commission similarly supported voluntary forms of ADR, but based its opposition to mandatory arbitration on the premise that the avenue of redress for statutory employment rights should be chosen by the individual rather than dictated by the employer. Dunlop Report at 33.

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Senate Banking, Housing and Urban Affairs Committee

Oversight Hearing on Mandatory Arbitration Agreements in Employee Contracts in the Securities Industry

Prepared Testimony of Mr. Cliff Palefsky
Chairman
Securities Industry Arbitration Committee

10:00 a.m., Friday, July 31, 1998

The National Employment Lawyers Association ("NELA") is an organization of over 3000 of this country's leading civil rights and employment lawyers. NELA's members include not only attorneys in private practice but also lawyers on the staffs of the Equal Employment Opportunity Commission and various state anti-discrimination agencies. We are the attorneys to whom Congress looks for help in enforcing our nation's civil rights and labor laws.

NELA strongly supports all voluntary forms of alternative dispute resolution, including arbitration and mediation. In fact, NELA has been in the forefront nationally in encouraging mediation as a preferred method for resolving employment disputes. We helped draft the Due Process Protocol for the Resolution of Statutory Disputes and worked closely with the American Arbitration Association in the development of their specialized employment arbitration rules and procedures.

Because there appears to be such a great disparity between the public perception of arbitration and its day to day reality, both legal and factual, it is important to begin these comments by setting forth some basic facts about the process which are often misunderstood.

Unlike our constitutionally defined civil justice system, arbitration is not designed with the primary goal of achieving the legally correct result. Its primary object is finality and economy in achieving that finality. Although most of the general public is unaware of the fact, arbitrators are not required to know or follow the law. Moreover, a legally incorrect ruling cannot be appealed or rectified. The law is clear that a decision reached through binding arbitration must be confirmed even if there is an error of fact or law on the face of the award that causes substantial injustice to the parties.

Litigants for whom a quick and final decision is of primary importance, who do not require much discovery to establish their cases, and who are willing to risk a decision that could impose a result contrary to law, are certainly entitled to opt for binding arbitration of their claims, and

indeed it may well be the most logical forum for the resolution of certain kinds of disputes. But the compulsory submission of all claims, including civil rights claims, whistleblower claims and ERISA claims, by employees as a condition of employment is another matter entirely. The problem is even more acute when the forum is controlled by the employers and does not conform to consensus minimum standards of due process.

Simply put, you cannot allow the entity being regulated by your legislation to unilaterally opt out of the requirements of that legislation.

Proponents of mandatory arbitration mistakenly assert that arbitration is "just another forum" and that substantive rights are not lost in that forum. These claims are simply not true. Employees lose the right to have the employment laws passed for their protection correctly enforced, which is the ultimate substantive right.

It does employees little good to have numerous protective statutes enacted by Congress for their benefit, if the arbitrators by whom those statutes are enforced are selected exclusively by their employers and are permitted to ignore or misapply these laws at their own discretion. Yet this is precisely the situation faced by employees in the securities industry arbitration context and, since courts are essentially powerless to review or correct decisions reached through such binding arbitration, arbitrators are unchecked in their power to ignore or misapply statutory law, including the civil rights laws.

Securities industry arbitrators are explicitly instructed in their *Arbitrator's Manual* that they have no obligation to follow statutory law. Even if an individual arbitrator feels morally obligated to follow the law, however, he or she may make an error of law. In such an instance, it is virtually impossible to overturn even the most blatant errors of law, since the standard of review is exceedingly narrow. As several cases have established, that standard requires that the arbitrator (a) knew the law, (b) found it applicable to the facts at issue, and nevertheless (c) specifically chose to ignore it. Not surprisingly, such a restrictive standard of "manifest disregard [of] the law" is nearly impossible to meet. This leads to such outlandish results as *DiRussa vs. Dean Witter* (121 F.3d 818 (2nd Cir. 1997)), in which the arbitrator failed to award attorneys fees to a prevailing plaintiff in a discrimination case, in plain violation of the statutory requirement. The arbitrator's erroneous decision was affirmed by the court, which stated that even though the arbitrator was clearly wrong under the law, the court could not reverse or correct his decision since there was no clear proof that he had "known" the law and then intentionally "disregarded" it.

Correction of an erroneous arbitral decision is also rendered virtually impossible by the fact that arbitrators are not required to set forth any written explanation of their decision, so there is rarely anything to review anyway. More significantly, securities industry arbitrators have historically been trained and encouraged not to provide written findings in order to frustrate judicial review. Most arbitration awards in the securities industry fora are not even written by the arbitrator. They are usually drafted by staff using boiler plate language that makes it impossible to determine what was or was not decided. The consequent lack of effective judicial review is particularly serious in arbitrations which have been unilaterally imposed by one party on the other in a forum controlled by the stronger party.

Furthermore, the costs to an employee to vindicate his or her rights in the arbitration forum are exorbitant, despite industry rhetoric to the contrary. An employee does not have to pay a federal court judge to hear his or her discrimination claim; access to the public courts is free, once the initial $150 filing fee is paid. By contrast, employees who are required to submit such claims to securities industry arbitration face exorbitant "forum" costs--a $500 initial filing fee, and then between $1500 and $3000 per day in arbitration forum fees. The result is that, over the course of a typical securities industry arbitration, a plaintiff may ultimately be liable for tens of thousands of dollars in forum fees even if he or she prevails. Forum fees in discrimination cases in the securities industry are routinely in excess of $20,000, and several have been in excess of $40,000, $60,000, or even, as in the case of *Wolfe vs. Schwab*, $82,000.

These outlandish costs and fees imposed on those who have been compelled to arbitrate their claims act as a significant barrier to employees who wish to exercise their statutory rights. Indeed, several circuit courts have recently found that there is no precedent in American jurisprudence for charging a citizen for the right to have statutes enacted for his or her protection enforced and that such costs cannot be imposed. *Cole vs. Burns International Security*, 105 F.3d 1465(D.C.Cir. 1997); *Paladino vs. Avnet Computer*, 134 F.3d 1054 (11th Cir. 1998). Despite the clear holding of two circuit Courts of Appeal that such fees are in fact illegal, the NASD not only continues to charge these unconscionable fees for the vindication of statutory rights, but has asked for the right to increase them.

It is also important to note that, in arbitration, discovery is significantly limited, which unfairly burdens employees seeking to vindicate statutory rights. Arbitration works best when the parties have equal access to the evidence necessary to prove their claimsin contract or construction disputes, for example, where extensive discovery is not necessary. An employee plaintiff, on the other hand, generally needs fairly extensive discovery if he or she is going to establish a discrimination claim. Such a plaintiff not only has the burden of proof, but must, in many employment cases, prove "state of mind" by circumstantial evidence, show "pretext" by the employer to disprove the stated reason for discharge, and/or show a "pattern" of discriminatory conduct. Without full and complete discovery, such proof is extraordinarily difficult to establish. This imbalance of access to evidence is exacerbated in the employment context by the fact that employee-plaintiffs' attorneys are ethically precluded from informally contacting most of the defendant's current employees.

In litigation, such essential discovery is easily obtained under the Federal (or applicable state) Rules of Civil Procedure. Arbitration, however, typically permits very little, if any, discovery, and whatever limited discovery is allowed is left to the discretion of the arbitrator (depositions, for example, which are often the only method for obtaining critical evidence from employee witnesses, are often either prohibited altogether or severely limited in arbitration). These limitations on discovery in arbitration inevitably, and heavily, favor the employer in any employee/employer dispute, since the employer usually controls almost all of the critical evidence. Securities arbitrators have historically been trained to permit depositions only for the purpose of preserving testimony of witnesses unavailable for the actual arbitration. Therefore, employees often hear many of the stated reasons for their discharge for the first time at the arbitration hearing itself, with no effective method of cross-examination. It must be noted that the securities industry has steadfastly refused to adopt the expanded discovery provisions of the

Due Process Protocol which have been adopted by the American Arbitration Association and every other truly neutral ADR provider.

A further obstacle to employees in arbitration is the fact that arbitrators are not required to follow the established rules of evidence. This can, and often does, mean that the employee/plaintiff loses the benefit of significant evidentiary protections. In sexual harassment cases, for example, consensual sexual activity by the plaintiff with persons other than the harasser is excluded under federal law and in many state jurisdictions as irrelevant and invasive of the plaintiff's right to privacy. Yet an arbitrator in such a case, under no obligation to comply with such an evidentiary restriction, may allow the employer to forage where it desires in a plaintiff's private conduct.

Extensive documentation now exists as to the fundamental inequity of mandatory securities industry arbitration of employees' statutory claims. Numerous recent studies, surveys and articles by professional neutrals and academics have demonstrated conclusively that mandatory arbitration of statutory claims places the employee/plaintiff at a severe disadvantage and that outcomes in mandatory arbitrations are consistently far more favorable to employers than to employees when compared to the results reached in similar cases brought in a public courtwhich is precisely why the industry has fought so hard to maintain the present system.

Evidence of this disadvantage to the employee/plaintiff includes:

1. -- "Repeat User Bias." Many scholars and commentators have for some time expressed concern that, since arbitrators rely on repeat business for income, there is a potential for "repeat user bias" by arbitrators, *i.e.*, a natural tendency to favor the party which has the potential for using the arbitrator's services again (D. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wisc. L.R. 33, 73-81, 122-23 (1997); J. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 647-52 (1996)). It goes without saying that, in the employment setting, the "repeat users" are the employers. Significantly, there now exists an empirical study by Professor Lisa Bingham of the University of Indiana School of Public Policy which demonstrates that this "repeat user bias" does in fact exist in employment arbitration (L. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Emply.Rts. & Empl.Policy Journal 1 (1997)). The importance of this study is enormous in any consideration of employer-mandated arbitration in the securities industry, since it statistically confirms the reality of structural bias in favor of the employer in employment arbitration. Securities industry employers also have extensive databases of arbitrators' prior awards and proclivities, which gives them an extraordinary advantage in the selection process.

2. -- Several studies and surveys confirm that employers are far more successful in arbitration than they are in court before a jury. Employers not only win more often in arbitration; employees who do prevail are awarded far less in damages (D. Schwartz, *Enforcing Small Print to Protect Big Business--cited above*; R. Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 Hofstra Labor L.J. 381(1996); Bompey & Pappas, *Is There A Better Way? Compulsory Arbitration of Employment Discrimination Claims After Gilmer*, 19 Emp.Rel.L.J. 197(1994)). These findings are consistent with studies indicating that, when a petition to compel arbitration is filed, it is always the employer who is seeking to compel

arbitration, while the employee is inevitably attempting to bring his or her claims in federal or state court (D. Schwartz, *Enforcing Small Print to Protect Big Business*, Bompey & Pappas, *Is There A Better Way?-- both cited above*). Employers would hardly be uniformly seeking an arbitration forum unless they correctly understood it to give them an advantage over employees.

3. -- Counsel for employers repeatedly and publically recommend that their employer clients use mandatory arbitration for discrimination claims. These attorneys unabashedly base this advice on the fact that, in arbitration, employers will win more and pay less in damage awards when they lose, be far more likely to avoid an assessment of punitive damages, and even possibly succeed in discouraging the employee from pursuing a claim altogether, given the costs and obstacles imposed by arbitration (D. Schwartz, *Enforcing Small Print to Protect Big Business*, Bompey & Pappas, *Is There A Better Way?-- both cited above*, and BNA Employment Discrimination Report, 1996, Vol. 6, p. 875, summarizing comments by Paul Cane, a management employment law attorney, in a speech before a conference sponsored by the Labor and Employment Law Section of the State Bar of California).

On the other hand, government agencies and commissions, academics and professional arbitration organizations have gone on record as strongly opposing mandatory employment arbitration of statutory claims.

The Equal Employment Opportunity Commission, the agency charged by Congress with responsibility for enforcing this nation's civil rights laws, has issued an extensive policy statement dealing with mandatory arbitration. While strongly supporting the utilization of voluntary ADR procedures, the EEOC stated that, "agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in the federal anti-discrimination statutes," and are thus illegal and unenforceable. EEOC, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, 133 Daily Lab.Rep (BNA) E-4 (July 11, 1997), *attached*. This EEOC policy was approved unanimously by the Republican and Democratic appointees to the Commission.

Among the EEOC's objections are that arbitration is not governed by the statutory requirements and standards of Title VII; it is conducted by arbitrators given no training and possessing no expertise in employment law; and it forces employees to pay exorbitant "forum fees" in the tens of thousands of dollars, greatly discouraging aggrieved employees from seeking relief.

The National Academy of Arbitrators, the leading and most respected national organization of professional labor-management arbitrators and the body which gave labor arbitration its credibility, has taken the historic step of passing a resolution condemning mandatory arbitration of statutory employment disputes. In 1997, the Academy stated that it, "opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights" (National Academy of Arbitrators Statement and Guidelines, 103 Daily Lab.Rep. (BNA) E-1 (May 29, 1997)). The Academy has expressed strong concern that mandatory arbitration often results in arbitral fora which do not provide elements of fundamental fairness to employees, and in which arbitrators are often not able or willing to enforce the claimed statutory rights. In fact, the Academy took the

unprece-dented step of filing a brief in the matter of *Duffield v. Robertson Stephens* (1998 USApp.Lexis 9284 (9th Cir. 1998)) asserting that the securities industry arbitration system and its procedures were not adequate to vindicate statutory rights.

Recently, the Society of Professionals in Dispute Resolution, this country's other leading organization of professional neutrals, announced that it, too, opposed mandatory employment arbitration. In a January 1998 policy statement issued by the its Board of Directors, the organization stated that it, "is in substantial agreement with the position taken by the National Academy of Arbitrators in opposition to agreements imposing arbitration of statutory rights as a condition of employment." Statement on Arbitration of Statutory Rights Imposed as a Condition of Employment, Approved by SPIDR Board of Directors January 24, 1998.

The requirement of voluntariness is also supported by the recommendations of the "Commission on the Future of Worker-Management Relations" (The "Dunlop Commission"), a blue ribbon Presidential commission consisting of business and labor leaders, government officials and professional neutrals. In its December 1994 "Report and Recommendations", the Commission stated that, "binding arbitration agreements should not be enforceable as a condition of employment." Commission on the Future of Worker-Management Relations: Report and Recommendations (December 1994), also expressing concern as to:

> the potential for abuse of ADR created by the imbalance of power between employer and employee, and the resulting unfairness to employees who, voluntarily or otherwise, submit their disputes to ADR. These concerns are obvious if the process is controlled unilaterally by employers, such as when employees are required to sign mandatory arbitration clauses as a condition of employment.

Indeed, the Dunlop Commission specifically singled out the securities industry in its report. The Commission stated that, "with respect to the securities industry, the Commission believes employees of securities firms should not be required as a condition of employment to arbitrate disputes arising under federal or state employment laws."

The National Labor Relations Board has also challenged mandatory employment arbitration agreements as being illegal. In a 1996 report, the General Counsel of the NLRB concluded that mandatory binding arbitration clauses, imposed as a condition of employment, violated the National Labor Relations Act. NLRB General Counsel Report, 1996 Daily Lab.Rep. 36 E-4, E-6,7 (Feb. 23, 1996).

The General Accounting Office has similarly determined that securities industry arbitrators were frequently not qualified or properly trained to decide discrimination cases. General Accounting Office, Report HEHS-94-17, *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes* (March 30, 1994)

Additionally, a number of the country's most prominent employment law professors and legal scholars have written law review articles in which they conclude that mandatory arbitration of statutory employment claims--imposed by employers as a condition of employment--is unlawful. Their reasons include the absence of a "voluntary" waiver of rights, a lack of constitutional due

process in the arbitration system, the basic conflict with the purposes and language of the civil rights laws, and the fact that the Federal Arbitration Act ("FAA") simply does not apply to employment contracts. (R. Alleyne, *Statutory Discrimination Claims*, L. Bingham, *Employment Arbitration: The Repeat Player Effectboth cited above*; P. Carrington & P. Haagen, *Contract and Jurisdiction*, 1996 Sup.Ct.Rev. 331, 344-45 (1997); J. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy In Wake of Gilmer*, 14 Hofstra Lab.L.J. 1 (1996); S. Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 Berk.J.Empl.&Lab.L. 131 (1996); R. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 Calif.L.Rev. 3 (1997); D. Schwartz, *Enforcing Small Print to Protect Big Business*, J. Sternlight, *Panaceaboth cited above*; J. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers and Due Process Concerns*, 72 Tulane L.R. 1, 7 (1977); S. Ware, *Employment Arbitration and Voluntary Consent*, 25 Hofstra L.Rev. 83 (1996).)

Arbitration is only viable, from either a legal or policy perspective, if it is the result of a truly voluntary agreement by the parties, who are aware of arbitration's strengths and limitations, and who have freely decided to use that process to settle a particular dispute. Without this element of a knowing, voluntary agreement, there is no legal or moral justification for enforcing an arbitration agreement.

As the National Academy of Arbitrators has stressed:

> the strength and justification for the enforcement of agreements to arbitrate, and for the limited judicial review of arbitration awards, rests on the foundation that agreements to arbitrate be voluntary ...unless a party has agreed to arbitrate, it will not be compelled to do so. Likewise, the immunity from judicial review of an arbitrator's alleged error of law or fact is premised on the voluntary choice of the parties to submit to an arbitrator's judgment. Without the voluntariness of the arbitration agreement, the public policy favorable to arbitration lacks a foundation." (Academy Amicus Brief in *Duffield, cited above*.)

Aside from general concerns about mandatory arbitration required as a condition of employment, the securities industry arbitration systems involve certain unique features distinguishing them from other arbitration systems administered by neutral entities.

For the past ten years I have been the Chair of NELA's Securities Industry Arbitration Committee. In that capacity, I have been extensively involved in monitoring the rules, procedures and results of securities industry arbitrations. I have had numerous meetings and discussions on the topic of arbitration of employment disputes with executives in charge of the NASD and NYSE arbitration systems. I have had meetings and discussions with the staff of the Securities and Exchange Commission and I have frequently been asked by the SEC to comment on changes to arbitration rules proposed from time to time by the various self-regulatory organizations.

I am also co-counsel for plaintiff in *Duffield vs. Robertson Stephens* (USDC/NDCal. Case No. C95-0109-EFL, filed 1/11/95), in which the Ninth Circuit unanimously held that the securities industry could not compel arbitration of discrimination claims through the use of the Form U-4. In the course of my representation of Ms. Duffield, I took the depositions of the heads of the arbitration programs at both the NASD and the NYSE and reviewed the arbitration awards, procedures and all of the training materials used in the securities industry since 1990. The extensive record we developed in *Duffield* was submitted to and relied upon by federal Judge Nancy Gertner in her landmark decision in *Rosenberg v. Merrill Lynch* (76 FEP 681 (D.Mass. 1998).

In *Rosenberg*, after reviewing the actual structure, operations and results of the securities arbitration system as the Supreme Court had invited in *Gilmer v. Interstate/Lane Johnson Corp.* (500 U.S. 20 (1991)), Judge Gertner determined that the Exchange's system was structurally biased against employees and fell outside "contemporary standards of arbitral impartiality" due to the industry's domination of the system. There is no question that Judge Gertner was correct in her analysis.

A review of the awards I have obtained demonstrates that even when plaintiffs prevail in securities industry arbitration, they are frequently not awarded attorneys' fees and costs as required by the civil rights laws. As already noted, forum fees have been as high as $42,600, $42,900, $49,000 and even $82,000. My review of these awards demonstrated that many cases have hearings stretching over months, with lengthy breaks between the sessions. This sort of scheduling makes it very difficult to present evidence coherently and for the arbitrators to keep the facts of a particular case in mind.

In building our record in *Duffield*, we also discovered that the NASD requires a special review by its staff of any award of attorneys' fees or punitive damages before such an award is issued, since in the NASD forum attorneys' fees or punitive damages are considered "extraordinary awards." This review is not provided for in any published rules of the exchange. The purported reason for the review is to assure that the award of these damages or fees has a legal basis. It is telling, however, that no such review is conducted for any other issueincluding situations in which claims are dismissed in their entirety without any explanation at all.

Over the past several years, the NASD, at the industry's insistence, has discussed proposals to cap punitive damages in their arbitration forum, even though every judicial opinion on the subject confirms that this is not permissible. The first recommendation to that effect was made by their Lawyers Advisory Committee. A similar recommendation was then formally made by the Ruder Committee. After being soundly rejected by the Securities Industry Conference on Arbitration and even the New York Stock Exchange itself, which deemed such an intrusion into substantive rights completely inappropriate for a theoretically neutral provider, the NASD Board of Governors went ahead and unilaterally approved a proposed rule change which has been submitted to the SEC. This rule change would cap punitive damages at $750,000 or two times special damages in customer cases, <u>whichever is less</u>, and the staff is considering a similar proposal for employment cases. These efforts have created a culture within the securities industry and its arbitration systems in which punitive damages are discouraged and, in fact, rarely awarded.

Most significantly, the securities industry fora stand alone in their refusal to endorse, use or conform to the Due Process Protocol for the Arbitration of Statutory Disputes. This means there is significantly less discovery, reasoned awards are not provided, and complicated legal issues are resolved by unqualified, industry affiliated arbitrators who have no legal training whatsoever and are told they are not required to follow the laws passed by Congress or the decisions of the United States Supreme Court.

Even when plaintiffs prevail on discrimination claims in the securities industry system, it is evident that federal discrimination laws are not being properly enforced and Title VII claimants rarely receive their full statutory remedies. I am not aware of any discrimination case in which remedial relief has been ordered to improve hostile or discriminatory working environments.

A further impediment to securities industry employees is the fact that the existence of compulsory arbitration before securities industry arbitrators makes it more difficult for a plaintiff to obtain legal help in pursuing his or her claims due to the accurate perception of unfair results, fewer awards, and lower damages resulting from such arbitrations. Based on my own extensive experience and on my conversations with plaintiff attorneys from across the country, I believe that the requirement that a claim be arbitrated in the securities industry forum deters plaintiff counsel from accepting cases that they might otherwise take on. It is thus more difficult for securities industry employees to find attorneys willing to represent them in that forum. Those who are successful in obtaining counsel have to be advised that, even if they prevail, there is no assurance that they will recover forum fees or attorneys' fees, even if such recovery is provided by statute. I am aware of far too many cases where women were advised to abandon apparently valid and substantiated discrimination and harassment claims if the only forum available to them was the securities industry arbitration forum.

Finally, and of ultimate importance, is the fact that a justice system must not only be fair in fact, but must also be perceived to be fair, if it is to fulfill its purpose. That perception simply does not exist any longer with regard to the industry-controlled securities arbitration system. It is my experience that the securities industry arbitration forum is correctly perceived by both management and employee counsel as a more favorable forum for employers than the federal courts. I have, in fact, participated in numerous presentations at the American Bar Association and other meetings where that exact statement was made. On more than one occasion I have had defense counsel in a securities industry case say to me, "What's this case worth, it's going to arbitration?"

It is now unfortunately well established that, due to the continued domination and overreaching by the industry in the operation of the system and the repeated promulgation of rule changes intended to deprive employees and customers of substantive statutory rights, the securities systems have lost the "perception of fairness," not only in the eyes of the ADR community, but of the public, the media and, increasingly, the courts as well, as evidenced by the recent Second Circuit opinion in *Halligan vs. Kidder Peabody*, in which the court vacated an arbitration decision because the arbitrators had dismissed a compelling age discrimination case with no explanation whatsoever. Even the Second Circuit, which has been historically supportive of arbitration, is now telling the industry "Enough is enough."

I have attached to these comments a sampling of articles from the *Wall Street Journal*, the *New York Times* and a number of other respected publications highlighting problems with mandatory arbitration and the perceived biases and deficiencies of the securities industry system. The bottom line is that, no matter what you think of arbitration, in 1998 there is no longer any justification for allowing the securities industry to control its own mandatory forum. This affront to law and basic principles of justice has gone on far too long, despite repeated demands by the EEOC, civil rights organizations and the professional neutral community for reform. It is necessary that Congress perform its oversight function and protect the legal and constitutional rights of securities industry employees and the investing public.

When the nation's leading academics and arbitrators summon the moral courage to publically proclaim that the securities system is unfair and take the extraordinary step of opposing the securities arbitration system in court in order to preserve the credibility of "fair" arbitration, their message cannot be ignored. When the *Wall Street Journal*, the *New York Times, USA Today*,"20-20" and other major national news sources feature prominent exposés on the abuses of mandatory arbitration, and the securities arbitration system in particular, then all fair-minded people must take note. For in the end, ensuring the integrity of the laws passed by Congress and assuring the public of the integrity of our nation's markets must be your goal. The investing public will be right in asking: "if we can't trust the industry to operate a justice system without taking unfair advantage, how can we trust them with our money?"

Thank you for your consideration. I would be pleased to meet members of your staff if you desire more information and documentation regarding the matters I have addressed.