11-5229-cv

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

H. CRISTINA CHEN-OSTER; LISA PARISI;
and SHANNA ORLICH
Plaintiffs – Appellees,
v.
GOLDMAN, SACHS & CO. and
THE GOLDMAN SACHS GROUP, INC.
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
CASE NO. 1:10-cv-06950-LBS

AMICUS CURIAE BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for the Chamber of Commerce of the United States of America certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing more than 3,000,000 businesses and organizations of every size and in every sector of the nation's economy. The Chamber frequently files *amicus curiae* briefs in cases involving matters of concern to its members, including issues relating to the interpretation of the Federal Arbitration Act ("FAA") and the enforceability of arbitration agreements.[1] *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, No. 09-893 (U.S.); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, No. 08-1198 (U.S.); *Rent-A-Center, West, Inc. v. Jackson*, No. 09-497 (U.S.); *In re Am. Express Merchs.' Litig.*, 06-1871-cv (2d Cir.); *Masters v. DirecTV, Inc.*, Nos. 08-55825 & 08-55830 (9th Cir.); *Cruz v. Cingular Wireless LLC*, No. 08-16080-CC (11th Cir.); *Litman v. Cellco P'ship*, No. 08-4103 (3d Cir.); *McKenzie Check Advance v. Betts*, No. SC-11-514 (Fla.).[2]

Many of the Chamber's members have adopted contract provisions that require their employees to pursue disputes in arbitration rather than in court, and

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Second Circuit Rule 29.1(b), amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than the amicus, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. All parties have consented to the filing of this brief.

[2] A collection of the Chamber's most recent briefs in arbitration cases is available at http://www.chamberlitigation.com/cases/issue/arbitration-alternative-dispute-resolution (last visited Mar. 30, 2012).

individually rather than on behalf of a class. The Chamber's members use arbitration because—in its traditional, bilateral form—it is quicker, fairer, less expensive, and less adversarial than litigation. Those benefits are especially important in the employment context, where the parties often maintain a relationship even after the employment dispute concludes. The Chamber thus has a strong interest in participating in this case.

SUMMARY OF THE ARGUMENT

I. The FAA establishes a federal policy strongly favoring arbitration. That policy is illustrated in many ways. The FAA, for example, requires courts to enforce arbitration agreements according to their plain terms, even if those agreements prohibit arbitration of class actions. And the FAA applies broadly to all sorts of federal statutory claims unless Congress has overridden the FAA's preference for arbitration, which Congress plainly has not done with respect to Title VII. Thus, a plaintiff who wishes to avoid her obligation to arbitrate a Title VII claim must make a demanding showing under the FAA—namely, that particular features of the arbitration agreement (other than a class-action waiver) make it impossible to vindicate her claim on an individual basis in the arbitral forum.

II. Because the liberal federal policy in favor of arbitration applies to Title VII claims, Plaintiff Lisa Parisi must arbitrate her claims here. There is no

dispute that Parisi can adequately vindicate her *individual Title VII claims* in arbitration. Those are the only claims to which she has a substantive right under Title VII. The magistrate judge nevertheless refused to enforce the parties' arbitration agreement because he reasoned that Parisi *also* has a purported statutory right to bring *pattern-or-practice class claims*, and the agreement does not provide for class arbitration. But Parisi has no statutory right to bring such claims.

To begin with, the magistrate judge was wrong that Title VII creates substantively distinct causes of action for private plaintiffs to pursue either individual disparate-treatment claims or class pattern-or-practice claims. While the statute allows both the EEOC and private parties to bring individual suits alleging disparate-treatment discrimination, its plain language permits *only* the EEOC to bring pattern-or-practice claims. Any private pattern-or-practice claim is simply a class claim brought under Federal Rule of Civil Procedure 23. The right to pursue that claim rests in Rule 23, and is not an unwaivable substantive right under Title VII.

The magistrate judge was equally incorrect to rely on Supreme Court case law creating "evidentiary standards" or "modes and orders of proof" for litigating different kinds of Title VII claims. These modes of proof are not statutory rights that exist for certain types of suits; they are mere procedural devices for litigating Title VII suits in different factual situations. Indeed, Parisi herself argued below

that the pattern-or-practice framework applies *only* in class actions. It therefore cannot possibly constitute a substantive, statutory right because the Rules Enabling Act does not permit Rule 23 to modify substantive rights.

Finally, the magistrate judge erred by relying on the classwide injunctive relief available after a finding that an employer engaged in a pattern or practice of discrimination. That type of class-wide relief is not a substantive right created by, and uniquely found in, Title VII. Rather, it is a common feature of the class-action procedure, and originates in Rule 23 rather than in substantive Title VII law.

In sum, all of the grounds on which the magistrate judge relied in this case for finding that a private plaintiff has a statutory, substantive right to bring a pattern-or-practice claim actually confirm that no such Title VII right exists. There is no question that Parisi can adequately vindicate in arbitration the only substantive right that she does have under Title VII—the right to bring an *individual* discrimination claim. The magistrate judge thus erred by refusing to enforce the parties' arbitration agreement.

ARGUMENT

I. THE FAA ESTABLISHES A LIBERAL FEDERAL POLICY IN FAVOR OF ARBITRATION.

The FAA mandates that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Congress passed the FAA to

"establish[] a national policy favoring arbitration when the parties contract for that mode of dispute resolution," *Preston v. Ferrer*, 552 U.S. 346, 349 (2008), and "to reverse the longstanding judicial hostility to [such] arbitration agreements . . . ," *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Congress's preference for arbitration manifests itself in numerous ways.

First, the FAA "ensure[s] that [arbitration] agreements are enforced according to their terms." *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989). Thus, for example, because arbitration procedures are "'matter[s] of consent, not coercion,'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010) (citation omitted), courts may not compel a party to participate in a class arbitration without the party's agreement, *see id.* at 1775-76. And courts must enforce an agreement's plain terms preventing class arbitration, even if state law would otherwise have invalidated those particular terms as unconscionable. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750-53 (2011).

Second, this "'liberal federal policy favoring arbitration,'" *id.* at 1745 (citation omitted), applies "even when the claims at issue are federal statutory claims," *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (citation omitted). Thus, the presumption of arbitration—which *Stolt-Nielsen* makes clear is a presumption of arbitrability on an individual basis absent evidence of the parties'

intent to the contrary—applies "unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit*, 132 S. Ct. at 669 (citation omitted); *see also id.* at 675 (explaining that statutory claims are "subject to valid arbitration agreements unless Congress evinces a contrary intent in the text, history, or purpose of the statute") (Sotomayor, J., concurring in the judgment). As such, the Supreme Court has held that the FAA permits the arbitration of claims under most federal statutes, including the federal securities laws, *see Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484-86 (1989); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 238 (1987), the Sherman Antitrust Act, *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985), and the Age Discrimination in Employment Act ("ADEA"), *see Gilmer*, 500 U.S. at 24.

Notably, moreover, all courts of appeals that have considered the question agree that the FAA applies to Title VII claims. *See Desiderio v. Nat'l Ass'n of Secs. Dealers, Inc.*, 191 F.3d 198, 204-06 (2d Cir. 1999); *see also, e.g., E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 748-53 (9th Cir. 2003) (en banc) (citing cases). Title VII's basic structure, which encourages informal dispute resolution, is entirely consistent with the FAA's preference for arbitration. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (noting "Congress' intention to promote conciliation rather than litigation in the Title VII context").

Indeed, Title VII does not even include any statutory right to private class-action proceedings. In *CompuCredit*, by contrast, the statute at issue expressly referenced class actions, 132 S. Ct. at 670, but the Court still allowed for arbitration, noting that it had "repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court," *id.* at 671; *see also Gilmer*, 500 U.S. at 32 (noting that "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred") (citation omitted).

Third, and consequently, absent a congressional command overriding the FAA, a party seeking to avoid the arbitration of federal claims must show that particular features of the arbitration provision (other than the class-action waiver) make it impossible to vindicate that party's statutory cause of action on an individual basis in arbitration. *See CompuCredit*, 132 S. Ct. at 669-71; *Concepcion*, 131 S. Ct. at 1750-53; *Mitsubishi*, 473 U.S. at 637. "[G]eneralized attacks on arbitration" will not satisfy the exacting standard for setting aside an arbitration agreement. *Gilmer*, 500 U.S. at 30. Thus, courts routinely reject attempts to avoid arbitration on the basis that arbitrators will be biased, or that arbitration limits discovery and appellate review. These arguments rest "on

suspicion of arbitration as a method of weakening the protections afforded in the substantive law," an outmoded view that Congress vanquished through the FAA. *Id.*; *see also Mitsubishi*, 473 U.S. at 634; *McMahon*, 482 U.S. at 232.

II. PARISI MUST ARBITRATE HER TITLE VII CLAIMS BECAUSE SHE CAN VINDICATE HER TITLE VII CAUSE OF ACTION IN AN INDIVIDUAL ARBITRATION PROCEEDING.

As explained above, there is no question that the FAA applies to Title VII claims. Indeed, far from reflecting a "contrary congressional command," *CompuCredit*, 132 S. Ct. at 669, Title VII comports fully with the FAA's liberal policy favoring arbitration. Thus, Plaintiff Lisa Parisi's agreement to arbitrate Title VII claims must be "enforced according to [its] terms," *Volt*, 489 U.S.at 478, unless the terms of her particular agreement would prevent her from vindicating her statutory cause of action in arbitration. Parisi's only statutory cause of action under Title VII, in turn, is for *individual* disparate treatment. *See* 42 U.S.C. § 2000e-5(f)(1). But Parisi has never even disputed that she could adequately prosecute her individual Title VII claims through arbitration. Consequently, her arbitration agreement must be enforced.

The magistrate judge nevertheless set aside the parties' arbitration agreement. In his view, the agreement, by prohibiting Parisi from pursuing class arbitration, infringed on her purported statutory right to bring a pattern-or-practice class claim. (JA 192-98.) But Parisi, as a private plaintiff, has no such statutory

cause of action, and the magistrate judge's reasoning to the contrary does not withstand scrutiny.

A. Parisi's Inability To Prosecute A Class Pattern-Or-Practice Claim In Arbitration Does Not Render Her Arbitration Agreement Unenforceable.

Title VII's plain text and the case law applying it demonstrate that private plaintiffs have no statutory, substantive Title VII right to bring class pattern-or-practice claims. Thus, though Parisi's agreement may preclude her from bringing such a cause of action in arbitration, it does not prevent her from vindicating her individual statutory rights, and hence is fully enforceable.

1. Title VII's plain language illustrates that private plaintiffs have no statutory right to bring class pattern-or-practice claims.

Title VII's plain text proves that private plaintiffs have no statutory right to pursue pattern-or-practice causes of action. Title VII establishes only one substantive right to be free from gender discrimination. *See* 42 U.S.C. § 2000e-2(a); *see also U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714, 715 (1983) (referring to the "ultimate question" in a disparate-treatment case as "'whether the defendant intentionally discriminated against the plaintiff'") (citation omitted). And the procedural avenues that Title VII offers for vindicating this right demonstrate that a private pattern-or-practice claim is not an additional statutory cause of action under Title VII.

The statute allows both the EEOC and private parties to bring suits alleging *individual* disparate treatment. 42 U.S.C. § 2000e-5(f)(1) (describing circumstances in which "a civil action" may be brought "by the Commission" or "by the person claiming to be aggrieved"). By contrast, Title VII, by its plain terms, allows *only* the EEOC, not private parties, to pursue the additional cause of action for *class-wide* pattern-or-practice claims. 42 U.S.C. § 2000e-6(a). Specifically, Title VII authorizes the EEOC—and the EEOC alone—to sue an employer who "is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by" Title VII. *Id.*

This pattern-or-practice claim by the EEOC, as it is grounded in Title VII's text, need not meet Rule 23's class-action requirements. *See Gen. Tel. Co. of Nw., Inc. v. EEOC*, 446 U.S. 318, 323 (1980). "Title VII, however, contains no special authorization for class suits maintained by private parties." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982). Instead, private parties may pursue such class actions only if they can satisfy Rule 23. *See, e.g., Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 967-69 (11th Cir. 2008); *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 575 (6th Cir. 2004); *Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 355-56 (5th Cir. 2001); *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 711-12 (2d Cir. 1998); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 759-61 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999).

As the plain statutory text demonstrates, therefore, private litigants may vindicate their Title VII right against gender discrimination through different *procedural* routes—an individual suit or a pattern-or-practice class action meeting Rule 23's requirements. *See Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 157 n.3 (2d Cir. 2001) (noting that "[d]isparate treatment claims under Title VII generally are of two types: (1) individual disparate treatment claims . . . and (2) pattern-or-practice disparate treatment claims"). As such, a private "pattern or practice case is not a separate and free-standing cause of action . . . , but is really 'merely another method by which disparate treatment can be shown.'" *Celestine*, 266 F.3d at 356 (citation omitted).

The magistrate judge thus erred in holding that Title VII "makes *substantively distinct claims* available to those victims of alleged discrimination proceeding individually and those proceeding as a class." (JA 196 (emphasis added).) Because the plain language of Title VII does not grant private plaintiffs any such substantive right to pursue pattern-or-practice class actions, there is no bar to enforcing an arbitration agreement that requires an employee to arbitrate on an individual basis.

2. The case law creating evidentiary standards for litigating Title VII suits further shows that Parisi has no statutory right to bring a private pattern-or-practice claim on behalf of a class.

The magistrate judge further rested his decision on the different evidentiary standards and remedies available for pattern-or-practice claims, as "construed in the case law," which he said would be unavailable to Parisi in arbitration. (*Id.*). But these evidentiary standards and remedies are not statutory rights, and whether or not they are available to Parisi is irrelevant to the enforceability of her arbitration agreement.

a. To help courts administer Title VII, the Supreme Court has established different "evidentiary standards," *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 985 (1988), or "modes and orders of proof," *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 514 (1993), for resolving pattern-or-practice claims as compared to individual claims. Numerous factors prove that these modes of proof are merely procedural devices for litigating Title VII claims in different factual situations, and are not themselves statutory Title VII rights.

First, the Supreme Court's cases adopting and applying its evidentiary framework for *individual* disparate-treatment claims shows that these standards are merely procedural tools for litigating Title VII claims. *See Hicks*, 509 U.S. at 514; *Aikens*, 460 U.S. at 715; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). Under *McDonnell Douglas*, a plaintiff must make out a prima facie

case of discrimination; the defendant must then identify a non-discriminatory reason; and, finally, if the defendant provides such a rationale, the plaintiff must present adequate proof of intentional discrimination based on all of the circumstances. *Id.* at 802. *McDonnell Douglas* itself made clear that this method was not a substantive across-the-board mandate; rather, "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie . . . is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n.13.

The Supreme Court's subsequent interpretations of the *McDonnell Douglas* framework confirm that it is a procedural device, not a substantive requirement of the statute. The Court has noted that "[t]he prima facie case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic.'" *Aikens*, 460 U.S. at 715 (citation omitted); *see Hicks*, 509 U.S. at 514. Rather, "it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Aikens*, 460 U.S. at 715. Put another way, employees have Title VII substantive rights that prohibit an employer from "treating '[them] less favorably than others because of their race, color, religion, sex, or national origin.'" *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). But employees do not have a substantive right to prove this unlawful discrimination through any particular evidentiary "method." *Id.*

Second, the Supreme Court's rationale for departing from this *McDonnell Douglas* framework for *class* pattern-or-practice claims reinforces that its evidentiary standards are not statutory Title VII rights, but procedural devices designed to fit the facts of the case. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358-60 (1977). In *Teamsters*, the Court rejected the employer's argument that the *McDonnell Douglas* framework must apply across the board, noting that *McDonnell Douglas* "did not purport to create an inflexible formulation." *Id.* at 358. It thus held that the "context of a class action" alleging a pattern-or-practice of discrimination called for the different procedures that the Court had previously approved in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), a private class action under Rule 23(b)(2). *See Teamsters*, 431 U.S. at 359. But the Court made clear that "not all class actions will necessarily follow the *Franks* model," and so different standards may be called for in different class actions. *Id.* at 360.

The Court's analysis in *Teamsters* confirms that the *Teamsters* method of proof is not a substantive right. For example, while the Court explained that a plaintiff could use statistics to help meet its prima facie case of discrimination in a pattern-or-practice class action, it also noted that the "usefulness [of statistics] depends on all of the surrounding facts and circumstances." *Id.* at 340. Likewise, the Court relied on evidentiary sources, not Title VII's commands, when

concluding that a pattern-or-practice finding creates a presumption of liability that shifts to the employer the burden to show that an individual class member was not discriminated against pursuant to the general policy. *Id.* at 362. This presumption, according to the Court, comported with "the manner in which presumptions are created generally" under the common law, as evidenced by a treatise on the rules of evidence. *Id.* at 359 n.45. Thus, the pattern-or-practice method of proof arose not out of Title VII, but out of traditional judicial sources for managing litigation.

Third, Parisi noted below (R.48, Pl.'s Mem. of Law in Opp'n, at 7) that private parties may make use of the pattern-or-practice framework *only* in the context of a class action that meets Rule 23's requirements. *See Franks*, 424 U.S. at 751; *see also Davis*, 516 F.3d at 967-69; *Bacon*, 370 F.3d at 575; *Celestine*, 266 F.3d at 355-56; *Lowery*, 158 F.3d at 759-61. But if that concession is true, it necessarily shows that the pattern-or-practice framework is not a substantive right. The Rules Enabling Act does not permit Rule 23 to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072. In other words, litigation through a class action cannot change the substantive rights that either the plaintiff or the defendant would have when litigating an individual suit. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011); *Seijas v. Republic of Argentina*, 606 F.3d 53, 58-59 (2d Cir. 2010). By definition, any procedure available *only* in a Rule 23 class action may not be considered a substantive right.

b. The magistrate judge's contrary analysis is unfounded. *First*, he noted that pattern-or-practice claims have the supposed advantage of being able to rely "entirely on statistical evidence" to establish a prima facie case of discrimination. (JA 196.) But the standard for establishing a pattern-or-practice prima facie case is more *rigorous*, not more *lenient*, than the standard for establishing an individual prima facie case. A class must prove that "intentional discrimination was the defendant's 'standard operating procedure.'" *Robinson*, 267 F.3d at 158 (quoting *Teamsters*, 431 U.S. at 336). A prima facie case for an individual claim, by contrast, typically "is not a difficult requirement to satisfy." *Gibson v. Old Town Trolley Tours of Washington, D.C., Inc.*, 160 F.3d 177, 181 (4th Cir. 1998); *see Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous."). A female plaintiff need only show that she was qualified for an employment opportunity, but passed over in favor of a male employee. *See McDonnell Douglas*, 411 U.S. at 802. Typically, therefore, a plaintiff has no *need* to rely on statistics to prove an individual prima facie case.

Regardless, individual plaintiffs, if they wish, may generally rely on statistics, and other evidence relevant to a pattern-or-practice class claim, in pursuing an individual claim. When adopting the framework for individual disparate-treatment claims, *McDonnell Douglas* itself indicated that "statistics as to

[a defendant's] employment policy and practice" could be used to bolster the plaintiff's proof of intentional discrimination. 411 U.S. at 805. Thus, this Court has found that "[s]tatistical reports may of course be admissible to support an inference of discrimination" in an individual case. *Raskin v. Wyatt Co.*, 125 F.3d 55, 67 (2d Cir. 1997); *see Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 84 (2d Cir. 1990) ("It is well-settled that an individual disparate treatment plaintiff may use statistical evidence regarding an employer's general practices at the pretext stage to help rebut the employer's purported nondiscriminatory explanation.").

Second, the magistrate judge erroneously emphasized the burden-shifting procedures that apply in pattern-or-practice class claims. (JA 195-96.) The fact that Parisi may find the pattern-or-practice method of proof "more convenient and efficient" for her particular case does not mean that she has a right to it. *E.E.O.C. v. Woodmen of World Life Ins. Soc.*, 479 F.3d 561, 567 (8th Cir. 2007). To the contrary, the "modes and orders of proof" that the Supreme Court has established according to the "traditional practice" of judicial management of litigation, *Hicks*, 509 U.S. at 514, are just like any other court procedure or practice that can be replaced by a different procedure or practice in arbitration.

That is the point of arbitration. By agreeing to arbitrate rather than litigate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628.

For example, the loss of the "broad-ranging discovery made possible by the Federal Rules of Civil Procedure" *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999), and "'[t]he loss of the right to a jury trial [are] necessary and fairly obvious consequence[s] of an agreement to arbitrate.'" *Snowden v. Checkpoint Check Cashing*, 290 F.3d at 631, 638 (4th Cir. 2002) (citation omitted); *see also Harrington v. Atl. Sounding Co.*, 602 F.3d 113, 126 (2d Cir. 2010). Likewise, arbitrators generally "are not bound by the rules of evidence" in arbitration proceedings. *Gilmer*, 500 U.S. at 31.

The question is not whether it is desirable to dispense with the procedures and rules that would be available in court; the question is whether the arbitral procedures and rules to which the parties have agreed make it effectively impossible for the plaintiff to pursue his or her own claim, thus amounting to a prospective waiver of the plaintiff's cause of action. *See Mitsubishi*, 473 U.S. at 637. Here, Parisi cannot show that the available methods of proof prevent her from vindicating her individual gender-discrimination claim. The FAA makes clear that she has no more right to a particular method of proof than she does to the Federal Rule of Evidence governing hearsay or the Federal Rule of Civil Procedure governing document requests.

The magistrate judge thus erred when concluding that the different methods of proof available in court in the context of a pattern-or-practice class action

transform that otherwise procedural device into a statutory Title VII cause of action.

3. Parisi's inability to pursue classwide remedies in arbitration does not preclude the enforcement of her agreement.

The magistrate judge suggested that the lack of classwide injunctive relief in arbitration precludes enforcement of Parisi's arbitration agreement. (JA 195.) But the absence of such relief does not preclude Parisi from pursuing her Title VII cause of action in arbitration. To the contrary, the type of relief available in a private pattern-or-practice case confirms that it is a procedural device grounded in Rule 23, not an unwaivable substantive cause of action provided by Title VII.

Once a class establishes that the defendant engaged in an illegal pattern or practice of discrimination against the class, "the court may proceed to fashion class-wide injunctive relief" without need for further proof of discrimination against any individual class member. *Robinson*, 267 F.3d at 159. This class-wide relief is not a substantive right created by, and uniquely found in, Title VII. Rather, it is a common feature of the class-action procedure, and originates in Rule 23 rather than in substantive Title VII law.

Rule 23 expressly grants this remedy by allowing class actions when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the *class as a whole*." Fed. R. Civ. P. 23(b)(2) (emphasis

added). When class-wide injunctive relief is granted as part of a pattern-or-practice claim, therefore, the source of that relief is not Title VII, but the Rule 23(b)(2) remedy that applies to a variety of different claims. *See, e.g.*, 7AA Wright et al., *Federal Practice & Procedure* § 1775, at 41 (3d ed. 2005); Fed. R. Civ. P. 23, note to 1966 Amendment. Thus, the absence of class-wide relief in arbitration does not prevent Parisi from vindicating her statutory rights.

Moreover, "it should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief," *Gilmer*, 500 U.S. at 32, whether or not individual plaintiffs have waived their right to such class claims. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295-96 (2002). The availability of these EEOC pattern-or-practice suits further evidences that the statute "will continue to serve both its remedial and deterrent function[s]," even if Parisi can arbitrate only her individual disparate-treatment claim, not a pattern-or-practice claim under Rule 23. *Mitsubishi*, 473 U.S. at 637.

As such, the magistrate judge was mistaken to hold that private plaintiffs have substantive rights to pattern-or-practice claims simply because "the existence of a pattern or practice is sufficient to allow an award of prospective relief" for the entire class. (JA 195.) Indeed, if he were correct that an individual has a substantive right to this relief, it would eviscerate the universally followed rule that parties generally have no right to pursue their claims through a class action. *See*

Jenkins v. First Am. Cash Advance of Ga., 400 F.3d 868, 877 (11th Cir. 2005); *Pleasants v. Am. Express Co.*, 541 F.3d 853, 858-59 (8th Cir. 2008); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 558-59 (7th Cir. 2003); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000). The same argument that the magistrate judge accepted here could be made in *every* class action seeking an injunction against a defendant's conduct "that appl[ies] generally to the class." Fed. R. Civ. P. 23(b)(2).

* * * *

In sum, the magistrate judge gave no legally valid reason for refusing to enforce Parisi's arbitration agreement on the basis that it precluded her from bringing a pattern-or-practice claim to which Title VII gives her no statutory right. And his reasoning is all the more troubling because it has potentially widespread, harmful effects. Agreements to arbitrate employment disputes have steadily increased over the last decades, and many companies now routinely use them. *See, e.g.*, Peter B. Rutledge, *Whither Arbitration?*, 6 Geo. J. L. & Pub. Pol'y 549, 555 (2008) (citing "[s]urveys" that "show[ed] that . . . a growing number of employers and companies are using arbitration clauses"); GAO, *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace* at 2 (1997), available at http://www.gao.gov/archive/1997/gg97157.pdf (last visited Mar. 30,

2012) (suggesting that eighty percent of the surveyed companies used some type of alternative dispute resolution and that nineteen percent used arbitration). The magistrate judge's reasoning would permit plaintiffs to sidestep those agreements merely by inserting a pattern-or-practice allegation into their complaint.

This broad-based refusal to permit arbitration in the employment setting would prove harmful to both employers and employees alike. "Parties generally favor arbitration precisely because of the economics of dispute resolution." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009). Individual arbitration allows disagreements to be resolved with "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes" like those that arise in the employment setting. *Stolt-Nielsen*, 130 S. Ct. at 1775. These advantages do not "somehow disappear when transferred to the employment context." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). They are lost, however, if parties must include class proceedings in their agreements, because those proceedings make the dispute-resolution "process slower, more costly and more likely to generate procedural morass than final judgment." *Concepcion*, 131 S. Ct. at 1751 (citation omitted).

On top of their inherent cost savings, agreements to arbitrate on an individual basis have several advantages for employers and employees. As for employers, many prefer the greater certainty that arises with arbitration, as

compared to the unpredictability of jury trials and class actions. *Cf. Mitsubishi*, 473 U.S. at 629 (enforcing international arbitration agreement, given "the need of the international commercial system for predictability in the resolution of disputes"). "For others, . . . the attraction of alternative dispute resolution . . . systems is that they provide a relatively low-cost alternative for resolving a high volume of relatively low-value cases, and do so in a manner that does not necessarily entail the dissolution of the employment relationship." David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1560 (2005).

As for employees, "[a]s in any contractual negotiation, [they] may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer." *14 Penn Plaza*, 556 U.S. at 257. Studies have also shown that employees who arbitrate their claims are more likely to prevail than those who litigate. *See, e.g.*, Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1988). And just as arbitration's reduced cost can lead to lower prices for consumers in the commercial setting, *see Metro E. Ctr. for Conditioning & Health v. Qwest Commc'ns Int'l, Inc.*, 294 F.3d 924, 927 (7th Cir. 2002), so too, arbitration's efficiencies can lead to higher wages for employees in the employment setting. Given its lower costs, arbitration may also often represent the

only viable option for financially strapped employees who would have trouble finding lawyers to prosecute claims in court.

These examples show that Congress had good reason for passing the FAA. The magistrate judge's decision would infringe the FAA's central purpose.

B. This Court's Decision In *American Express* Does Not Preclude Arbitration Of Parisi's Claims.

Finally, this Court's decision in *In re American Express Merchants' Litigation*, 667 F.3d 204, 212 (2d Cir. 2012), does not support invalidating Parisi's arbitration agreement.

American Express refused to enforce an arbitration agreement that prohibited class arbitration for claims arising under a different statutory scheme, the federal antitrust laws, because "the cost of . . . individually arbitrating [the antitrust] dispute [in that case] . . . would be prohibitive," due to the small expected recovery for any individual plaintiff. *See id.* As the Chamber has previously argued, *see* Br. of *Amicus Curiae* Chamber of Commerce of the United States in Supp. of Pet. for Rehearing En Banc, *In re Am. Express Merchs.' Litig.*, 06-1871-cv (2d Cir. Feb. 15, 2012), this Court should rehear *American Express* en banc because the panel's opinion conflicts with *Concepcion*. *See also Coneff v. AT&T Corp.*, __ F.3d __, 2012 WL 887598, at *3 n.3 (9th Cir. Mar. 16, 2012) (disagreeing with this Court's decision in *American Express*).

In *Concepcion*, the Supreme Court rejected, as inconsistent with the FAA, California's attempt at "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." 131 S. Ct. at 1744. In doing so, *Concepcion* also rejected the notion that the FAA's preference for arbitration could give way when "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system." *Id.* at 1753. The Court's conclusion that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons," *id.*, applies equally to federal courts. Indeed, the exact same "federal substantive law of arbitrability" that preempted California law in *Concepcion* controls here and, as the Supreme Court has made clear, is unaffected by the fact that a federal statutory claim is at issue. *See CompuCredit*, 132 S. Ct. at 671-73. Thus, by voiding an arbitration agreement on the ground that class procedures were purportedly necessary to litigate small-value claims, the panel in *American Express* engaged in the precise analysis that *Concepcion* expressly rejected.

In all events, even under the *American Express* panel's analysis, Parisi's claim must be arbitrated. Parisi did not present the evidentiary record on which the plaintiff in *American Express* relied. She could not possibly show that it is economically unfeasible to arbitrate her individual claims. Not only was she a high-level executive within Goldman Sachs (Vice President and then Managing

Director) (JA 245), but she also sought back pay, compensatory damages, punitive damages, and attorney's fees (JA 261-62). It is thus undisputed that Parisi could vindicate her individual Title VII disparate-treatment rights in an individual arbitration proceeding without need to resort to class procedures.

CONCLUSION

The district court's decision affirming the magistrate judge's order to deny arbitration should be reversed. The Court should require Plaintiff Lisa Parisi to arbitrate her individual Title VII claims in this case.

Date: April 3, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in Federal Rule of Appellate Procedures 29(d) and 32(a)(7)(B)(i). It contains 5,974 words as counted by the word-processing system used to prepare the brief, exclusive of the parts of the brief exempted from the type-volume limitation by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2012, I electronically filed with the Clerk's Office of the United States Court of Appeals for the Second Circuit this Amicus Curiae Brief of the Chamber of Commerce of the United States of America, and further certify that the parties' counsel will be notified of, and receive, this filing through the Notice of Docket Activity generated by this electronic filing.

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