11-5229-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LISA PARISI, SHANNA ORLICH, H. CHRISTINA CHEN-OSTER,
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

BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCATION, ASIAN AMERICAN JUSTICE CENTER, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NAACP LEGAL DEFENSE AND EDUCATION FUND, NATIONAL EMPLOYMENT LAW PROJECT, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, NATIONAL WOMEN'S LAW CENTER, THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY, WOMEN EMPLOYED, and 9TO5, NATIONAL ASSOCIATION OF WORKING WOMEN IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* National Employment Lawyers Association, Asian American Justice Center, Lawyers' Committee for Civil Rights Under Law, NAACP Legal Defense and Education Fund, National Employment Law Project, National Partnership for Women & Families, National Women's Law Center, The Employee Rights Advocacy Institute For Law & Policy, Women Employed, and 9to5, National Association of Working Women, disclose that they are not-for-profit corporations, with no parent corporations and no publicly-traded stock.

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INTEREST OF *AMICI CURIAE*

Amici curiae are non-profit organizations dedicated to, among other goals, eradicating workplace discrimination and securing enforcement of civil rights laws enacted for that same purpose. Details regarding *amici* organizations are included in a statement of interest attached hereto as Exhibit 1. *Amici* respectfully submit this brief pursuant to Rule 29 of the Rules of Appellate Procedure.[1]

Amici write to highlight the centrality of pattern-or-practice claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., in eradicating the complex and pervasive problem of employment discrimination and in providing for meaningful systemic reform, as well as to emphasize the substantive distinctions between pattern-or-practice claims and individual disparate treatment claims. Enforcement of forced arbitration agreements that ban employees from pursuing pattern-or-practice discrimination claims would allow employers to immunize themselves from private pattern-or-practice actions, diminish workers' substantive rights under Title VII, and severely undermine the purpose and efficacy of Title VII.

[1] Pursuant to Federal Rule of Appellate Procedure 29(c) and Second Circuit Rule 29.1, *amici* affirm that no party or counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Amici urge this Court to uphold the district court's well-reasoned decision that the arbitration agreement here is unenforceable because the class waiver precludes Plaintiff Lisa Parisi from vindicating her Title VII pattern-or-practice discrimination claims, and thus from vindicating her substantive statutory rights.

Private pattern-or-practice claims have long played a central role in the Title VII enforcement scheme, and are vital to the achievement of the statute's purpose of "eradicating discrimination throughout the economy," *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975), and "achiev[ing] equal employment opportunity in the future." *Ass'n. Against Discrimination in Emp't, Inc. v. City of Bridgeport*, 647 F.2d 256, 278 (2d Cir. 1981) (internal citations omitted). The pattern-or-practice cause of action offers employees an opportunity to challenge invidious practices of discrimination at their source, and to obtain powerful prospective relief including systemic reforms to company policies and practices.

However, it is largely infeasible for an employee to effectively pursue a pattern-or-practice claim in an individual lawsuit or arbitration due to limitations on the scope of discovery in bilateral adjudications, the substantial costs of proving a pattern-or-practice claim, and limitations on the scope of injunctive relief. Thus, as the district court recognized, Ms. Parisi's pattern-or-practice claims would "proceed in a class action, or not at all." *In re Am. Express Merchs.' Litig.*, 667

F.3d 204, 214 (2d Cir. 2012) ("*Amex III*"); *see Chen-Oster v. Goldman, Sachs & Co.*, 785 F. Supp. 2d 394, 410 (S.D.N.Y. 2011). Because the class waiver in the forced arbitration provision here would operate to preclude Ms. Parisi from vindicating her Title VII pattern-or-practice claim, it is unenforceable. *See Amex III.*, 667 F.3d at 218. Further, enforcement of the provision would immunize the employer from private pattern-or-practice actions, undermining Title VII's robust enforcement scheme and broad remedial purpose. *See id.*; *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981).

Defendant's argument, that pursuit of an individual disparate treatment claim instead would permit Parisi to vindicate her statutory rights, wholly fails. Pattern-or-practice claims are substantively distinct from individual disparate treatment claims, as they differ in the substance of what must be proven, the applicable method and burden of proof, and the remedies available. Further, these aspects of pattern-or-practice claims may offer employees significant advantages over pursuit of individual claims. Because these components of pattern-or-practice claims constitute part of the substantive law of Title VII, and are not simply rules of procedure, they are not subject to prospective waiver or alteration merely by assignment to an arbitral forum.

In short, enforcing arbitration agreements that preclude vindication of pattern-or-practice claims would not only undermine the remedial purposes of Title

VII, but would also deprive employees of statutory rights and remedies. As the district court properly found, that result would be inconsistent with both Title VII and the federal law of arbitrability grounded in the Federal Arbitration Act ("FAA").

ARGUMENT

I. VINDICATION OF PATTERN-OR-PRACTICE CLAIMS IS VITAL TO ACHIEVING TITLE VII'S PURPOSE OF ERADICATING DISCRIMINATION THROUGHOUT THE WORKFORCE

A. Title VII Provides a Private Pattern-or-Practice Cause of Action

Title VII establishes that discrimination with respect to "compensation, terms, conditions, or privileges of employment" because of "race, color, religion, sex, or national origin," is an unlawful employment practice that employees may challenge through private civil action. 42 U.S.C. §§ 2000e-2, 2000e-5(f). Section 706 of the statute broadly authorizes persons aggrieved by an employer's unlawful employment practices to file charges with the EEOC, and subsequently to pursue civil actions. *Id.* at § 2000e-5(f). Maintenance of a pattern or practice of discrimination in the terms of employment is an unlawful employment practice subject to such challenge by aggrieved employees. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 & n.9 (1984).

Goldman Sachs and the Chamber of Commerce ask this Court to set aside decades of Title VII jurisprudence and conclude that only the EEOC, and not private plaintiffs, may pursue a cause of action for pattern-or-practice

discrimination under Title VII. They base this argument on the fact that the private enforcement provision of section 706 does not explicitly delineate the availability of such claims. This invitation to read a significant and novel limitation on private Title VII enforcement into the absence of express statutory language delineating such claims is contrary to well-established authority and ignores Title VII's broad authorization of private enforcement actions.

Both the Supreme Court and this Court have long interpreted Title VII as providing employees with a private cause of action for pattern-or-practice discrimination, as well as with distinct causes of action for individual disparate treatment and disparate impact. *See, e.g., Cooper*, 467 U.S. at 876 n.9; *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 158 n.3, 159-160 (2d Cir. 2001) (explaining that plaintiffs may bring two types of disparate treatment claims under Title VII: "(1) individual disparate treatment claims . . . and (2) pattern-or-practice disparate treatment claims," and distinguishing pattern-or-practice claims and disparate impact claims from individual disparate treatment claims). Since at least 1984, the Supreme Court has found it "plain" that employees may bring private pattern-or-practice actions under Title VII utilizing the same elements of a *prima facie* case as in actions brought by the government under section 707(a). *Cooper*, 467 U.S. at 876 n.9.

Such interpretation is consistent with the broad language in section 706 that authorizes private suits and nowhere circumscribes the types of discrimination claims available to private plaintiffs under its auspices, as well as with language elsewhere in the statute referencing the EEOC's authority to investigate a "charge of a pattern or practice of discrimination . . . filed by or on behalf of a person claiming to be aggrieved." 42 U.S.C. § 2000e-6(e). It is also consistent with legislative history; Congress made clear in enacting amendments to Title VII in 1972: "This section [706] is not intended in any way to restrict the filing of class complaints. The committee agrees with the courts that *Title VII actions are by their very nature class complaints, and that any restriction on such actions would greatly undermine the effectiveness of Title VII*." S. Rep. No. 92-415, at 27 (1971) (emphasis added). Congress further recognized that a charging employee is to be considered a "'private attorney general,' whose role in enforcing the ban on discrimination is parallel to that of the Commission itself." *Associated Dry Goods*, 449 U.S. at 602 (internal citations omitted); *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 & n.3 (1968).

Finally, as discussed further below, *infra* at 21-28, the Supreme Court has also made plain that there is a "manifest" difference between individual disparate treatment claims and pattern-or-practice claims, which present different liability questions and are subject to different inquiries. *Cooper*, 467 U.S. at 876-77.

B. Pattern-or-Practice Claims Have Long Been Recognized by Both Congress and the Courts as Vital to Title VII's Purpose

Alongside making whole victims of past discrimination, the "central statutory purposes" of Title VII are to "eradicat[e] discrimination throughout the economy," *Albemarle*, 422 U.S. at 421, and "achieve equal employment opportunity in the future." *Ass'n. Against Discrimination in Emp't*, 647 F.2d at 278 (internal citations omitted); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.").

Wholesale eradication of discrimination in the economy and achievement of equal opportunity in employment are ambitious policy priorities, and require that the law reach beyond the resolution of individual acts of discrimination and allow for claims and remedies focused more broadly and deeply at employers' systemic practices and engrained cultures. Accordingly, both Congress and the courts have long recognized that pattern-or-practice claims, which target systemic discrimination and provide for equally systemic remedies, are vital to achieving Title VII's strong remedial purpose. The House Report regarding the 1972 amendments to Title VII acknowledged that individual acts of discrimination are often only "symptomatic" of the "pervasive and deeply embedded" "patterns and

practices of discrimination which Title VII seeks to eradicate." H.R. Rep. No. 92-238, at 14 (1971). Thus, as the Supreme Court observed, "[b]y 1972, Congress was aware that employment discrimination was a 'complex and pervasive' problem that could be extirpated only with thoroughgoing remedies; '[unrelenting] broad-scale action against patterns or practices of discrimination' was essential if the purposes of Title VII were to be achieved." *EEOC v. Shell Oil Co*., 466 U.S. 54, 69 (1984) (quoting H.R. Rep. No. 92-238, at 8, 14).[2]

C. Pattern-or-Practice Claims Provide for the Broad-Scale Systemic Reforms Critical to Eradication of Discrimination

The centerpiece of relief to redress pattern-or-practice discrimination is implementation of programmatic changes designed to reform the unlawful policies and practices. Because "the scope of injunctive relief is dictated by the extent of the violation established," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979), and because Title VII imposes on courts "the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future," *Albemarle*, 422 U.S. at 418, pattern-or-practice claims are remedied through significant reforms to company employment practices and policies designed to eradicate institutionalized discrimination. This Court has

[2] Congress thus authorized the EEOC to pursue pattern-or-practice charges, and expected employees to act as "'private attorney[s] general,' whose role in enforcing the ban on discrimination is parallel to that of the Commission itself." *Associated Dry Goods*, 449 U.S. at 602.

recognized that appropriate injunctive relief in Title VII pattern-or-practice actions may therefore include "compliance relief" "designed to erase the discriminatory effect of the challenged practice and to assure compliance with Title VII in the future" and "affirmative relief" that may include imposition of other affirmative reforms designed to foster equality of employment opportunity. *Berkman v. N.Y.C.*, 705 F.2d 584, 595-96 (2d Cir. 1983).

Pattern-or-practice cases thus allow for the formulation of remedies that can root out sources of discrimination and establish lasting mechanisms for ensuring equal employment opportunities. *See Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 361 n.47 (1977) (noting with approval that courts have "freely exercised their broad equitable discretion to devise prospective relief designed to assure that employers . . . eliminate their discriminatory practices and the effects therefrom"); *United States & Vulcan Soc'y v. N.Y.C.*, 2011 U.S. Dist. LEXIS 115074, at *37-39 (E.D.N.Y. Oct. 5, 2011) (detailing remedial order that would "compel the City to undertake a program of court-guided institutional reform to make its equal employment opportunity compliance activities effective" and "eliminate the barriers its hiring policies and practices have erected or maintained that serve to perpetuate the underrepresentation of blacks and Hispanics as firefighters in the

FDNY").[3] Injunctive remedies for pattern-or-practice violations may include requiring employers to post notice of job vacancies; establish job-related selection criteria and implement nondiscriminatory processes for hiring, assignments, raises, and promotions; provide job training and career development opportunities; and establish processes to ensure compliance, accountability, and transparency. These remedies are highly effective in reducing discrimination in workplaces, and are most often secured through private class actions challenging systemic discrimination. *See* Ariane Hegewisch, Cynthia Deitch & Evelyn V. Murphy, *Ending Sex and Race Discrimination in the Workplace: Legal Interventions that Push the Envelope* 33-34 (2011), *available at* http://www.iwpr.org/initiatives/pay-equity-and-discrimination/#publications (identifying institutional reforms found highly effective in combating discrimination in social science research, and comparing percentage of private class actions obtaining such relief with other actions).

Because remedies for pattern-or-practice violations are designed to eradicate discrimination at its source, rather than merely provide piecemeal relief to redress

[3] *See also* Hon. Jack B. Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 304 (1973) (observing that the "impact of class actions in civil rights cases is substantial" because they "permit[] the judge to get to the heart of an institutional problem"); Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659, 678 (2003) (Title VII class actions "trigger[] inquiry about institutional . . . sources of harm and encourage[] development of solutions aimed at systemic reform").

individual instances of discrimination that are symptomatic of underlying discriminatory practices, they are critical to achieving Title VII's broad remedial purposes. Institutional reforms obtained as a result of private pattern-or-practice actions have been vital to eradicating discrimination from the workplace. For example, the race discrimination action in *Haynes v. Shoney's*, 1993 U.S. Dist. LEXIS 749 (N.D. Fla. Jan. 25, 1993), resulted in the institution of companywide employment reforms, including requiring creation and posting of clear position criteria, implementation of affirmative action policies, and creation of positions tasked with investigating discrimination complaints and implementing the reforms. Within three years of these reforms, the percentage of African-American supervisors and managers at Shoney's more than quadrupled. *See* Steve Watkins, *The Black O: Racism and Redemption in an American Corporate Empire*, 231 (1997). Similarly, the pattern-or-practice gender discrimination action in *Butler v. Home Depot, Inc.*, Nos. 94 Civ. 4335 & 95 Civ. 2182 (N.D. Cal. Jan. 14, 1998) resulted in a consent decree providing for significant monetary and injunctive relief, including reforms to promotion practices, performance evaluations, compensation standards, and training, and establishment of monitoring processes. Within three years, the number of women in desirable sales floor jobs—which plaintiffs alleged women had been excluded from—more than doubled. *See* Home Depot, Female Employees Report Progress (June 24, 2002), http://hr.blr.com/HR-

news/Discrimination/Sex-Discrimination/Home-Depot-Female-Employees-Report-Progress/.

D. Pattern-or-Practice Claims Remain Critical to the Enforcement of Title VII Today

Congress and the courts recognized the centrality of pattern-or-practice actions to fulfilling the purpose of Title VII decades ago, and the importance of such actions is no less significant today. Because modern discrimination is rarely overt, employees face significant challenges in proving the motives behind individual employment decisions. But discrimination, by its very nature, is often practiced against a group of people, *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977), and its existence is therefore more readily established by looking at patterns across similarly situated employees. Pattern-or-practice claims allow for the consideration of decisions in the aggregate, and thus may reveal patterns of discrimination stemming from common practices, policies, or corporate culture and allow for assessment of whether systemic discrimination infects individual employment actions. *See Teamsters*, 431 U.S. at 340 n.20 (observing that statistical evidence of aggregate disparities is often "the only available avenue of proof . . . to uncover clandestine and covert discrimination by the employer"); *Weinstock v. Columbia Univ.*, 224 F.3d 33, 52 (2d Cir. 2000) (same). Pattern-or-practice claims are thus better suited to uncovering the types of invidious, structural discrimination common today. *See id.*; *see also* Susan Sturm, *Second*

Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458, 459-60, 465-75 (2001). Indeed, where individual motives are obscured, employees may only be able to vindicate disparate treatment claims and eradicate the discriminatory barriers they face in the workplace through pattern-or-practice actions that approach the question of discrimination through a broad lens.[4]

Moreover, the systemic injunctive relief available through pattern-or-practice suits continues to be critical to reforming discriminatory corporate practices and providing meaningful remedies for persistent discrimination. The 2010 resolution of pattern-or-practice claims in *Velez v. Novartis Pharmaceuticals Corporation* provides a recent example in which a private pattern-or-practice action generated significant nationwide reforms of corporate practices to eliminate barriers faced by female employees. 2010 U.S. Dist. LEXIS 125945 (S.D.N.Y. Nov. 30, 2010). A settlement, reached after plaintiffs succeeded in demonstrating pattern-or-practice liability at trial, mandated changes to performance evaluation processes, management development processes, and compensation determination processes to require decisions and opportunities to be transparent, accessible, and

[4] Pattern-or-practice claims brought on a class basis further support enforcement of Title VII by reducing retaliation concerns that inhibit employees from pursuing discrimination claims individually, *see, e.g.*, *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999); *Crawford v. Metro. Gov't*, 555 U.S. 271, 279 (2009) ("[F]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination."), and by allowing for aggregation of claims that would be uneconomical to litigate individually. *See, e.g.*, *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

tied to appropriate criteria. As the court observed, plaintiffs "obtained significant, extensive, and long-lasting programmatic relief" that "will provide just the sort of significant benefit for Novartis' employees for years to come that Plaintiffs sought all along." *Id.* at *41-42. Thus, in vindicating their pattern-or-practice claims, female Novartis employees were able to bring about meaningful and lasting changes to the processes that inhibited equal employment opportunity.

II. ARBITRATION AGREEMENTS THAT BAR EMPLOYEES FROM PURSUING AND VINDICATING PATTERN-OR-PRACTICE CLAIMS UNDER TITLE VII ARE UNENFORCEABLE

A. Arbitration May Not Diminish Substantive Statutory Rights or Remedies or Prevent Effective Vindication of Statutory Rights

It is well established that arbitration agreements may not diminish substantive statutory rights or preclude effective vindication of statutory claims. In enacting the FAA, Congress endorsed only parties' ability to contractually agree to usage of an alternate forum with streamlined procedures for resolution of legal claims, and not to contract away the substance of statutory rights prospectively. Indeed, substantive waivers of federally protected civil rights—whether or not packaged in an arbitration clause—are unenforceable. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009); *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 116 (2d Cir. 2000) (observing that civil rights are "vested in workers as a class by Congress, and they are not subject to waiver or sale by individuals"). Thus, the Supreme Court explained, "[b]y agreeing to arbitrate a statutory claim, a

party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum," and "in the event the [provisions of an arbitration agreement] operate[] in tandem as a prospective waiver of a party's right to pursue statutory remedies," the Court "would have little hesitation in condemning the agreement." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 637 n.19 (1985); *see also Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 28 (1991); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704-05 (1945) ("Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.").

Relying on this principle, this Court has established that arbitration agreements are unenforceable to the extent they operate to prevent effective vindication of substantive statutory rights, or otherwise undermine the relevant statutory scheme. *Amex III*, 667 F.3d at 213, 218-19. Arbitration agreements are thus unenforceable where a plaintiff cannot vindicate her statutory cause of action under the terms of the agreement or where the terms diminish substantive statutory rights and remedies. *Id.*; *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995) (refusing to enforce choice-of-law clause in arbitration agreement that would have the effect of prohibiting punitive damages because "it

seems unlikely that petitioners were actually aware . . . that by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right"); *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 125-126 (2d Cir. 2010) (arbitration provisions establishing a shorter claim filing period and less employee-friendly fee-shifting rule than available to plaintiffs pursuing Title VII claims in court would "significantly diminish a litigant's rights under Title VII" and thus may be unenforceable under the federal substantive law of arbitrability).[5]

As this Court has recognized, these fundamental tenets of arbitration jurisprudence remain as vital today as they were when they were first articulated decades ago. *Amex III*, 667 F.3d at 214. Contrary to Goldman Sachs' arguments, neither *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), nor *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), undermines the fundamental premise that arbitration agreements may only alter the forum and procedures for resolution of disputes, and must leave undisturbed parties'

[5] *See also Kristian v. Comcast Corp*., 446 F.3d 25, 29 (1st Cir. 2006) (finding invalid provisions of arbitration agreements barring the recovery of treble damages, attorney's fees and costs, and class arbitration because they precluded vindication of statutory rights); *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 79 (D.C. Cir. 2005) (Roberts, J.) ("Statutory claims may be subject to agreements to arbitrate, so long as the agreement does not require the claimant to forgo substantive rights afforded under the statute."); *Paladino v. Avnet Computer Techs., Inc*., 134 F.3d 1054, 1060 (11th Cir. 1998) (arbitration agreement barring award of Title VII damages was unenforceable because it was fundamentally at odds with the purposes of Title VII).

substantive statutory rights. *See Amex III*, 667 F.3d at 213-14 & n.5. *Concepcion* addressed FAA preemption of state rules barring class action waivers in arbitration agreements per se;[6] it did not concern the federal substantive law of arbitrability or present the question of whether a class waiver is enforceable if it operates to prevent vindication of federal substantive statutory rights, and does not undermine vindication of statutory rights jurisprudence.[7] *See Amex III*, 667 F.3d at 213-14.

CompuCredit is similarly inapplicable. The case presented a statutory interpretation question of whether language in the Credit Repair Organizations Act ("CROA") referencing a "right to sue" should be construed to provide an unwaivable right to bring a claim *in court*, as opposed to in an arbitral forum, such that plaintiffs could not be compelled to arbitrate their CROA claims. 132 S. Ct. at 670-72. *Amici* readily acknowledge that Title VII does not provide an unwaivable right to pursue discrimination claims in court; rather, the limitation on arbitration here derives from the complementary principle that arbitration can only be compelled "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi*, 473 U.S. at 637. As

[6] The Ninth's Circuit's recent decision in *Kilgore v. KeyBank, N.A.*, similarly concerned only federal preemption of a state rule barring arbitration of certain claims, and made clear that a different analysis applies when federal law provides a constraint on compelling arbitration. 673 F.3d 947, 961-63 (9th Cir. 2012).

[7] Indeed, the *Concepcion* Court noted that plaintiffs could more effectively vindicate their consumer claims through individual arbitration than through class proceedings, 131 S. Ct. at 1753, so the question of whether the class arbitration waiver would be enforceable if it precluded vindication was not presented.

this Court observed in *Amex III*, *CompuCredit* does not inform the question of whether arbitration can be compelled where a class waiver provision would prevent vindication of otherwise arbitrable claims. *Amex III*, 667 F.3d at 213 n.5.

B. Forced Arbitration Agreements that Bar Employees From Proceeding on a Class Basis Will Have the Effect of Preventing Employees From Pursuing Pattern-or-Practice Claims in Any Forum

The arbitration agreement here is not so bold as to explicitly preclude employees from bringing Title VII pattern-or-practice claims; however, due to the class waiver provision, the agreement will nonetheless have the same effect. As the district court correctly concluded, enforcement of the arbitration agreement would therefore effectively preclude Plaintiff from vindicating her pattern-or-practice claim under Title VII.

"Pattern-or-practice disparate treatment claims focus on allegations of widespread acts of intentional discrimination" and by their nature involve injury to a class. *Robinson*, 267 F.3d at 158; *see also E. Tex. Motor Freight Sys.*, 431 U.S. at 405 ("[S]uits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs."); S. Rep. No. 92-415, at 27 (1971) ("The committee agrees with the courts that Title VII actions are by their very nature class complaints . . . ."). In private enforcement, these claims are routinely brought on behalf of a class.

Pursuit of pattern-or-practice claims in individual adjudications is impracticable for three reasons.[8] First, individual plaintiffs generally face a limited scope of discovery that precludes gathering evidence regarding the employment actions affecting employees who are not parties to the suit, and this evidence is often necessary to establish a pattern or practice of discrimination. *See* 8 Alba Conte and Herbert Newberg, *Newberg on Class Actions* (4th ed. 2002) § 24:62 ("The broader discovery rights of the class device are useful in the employment context when seeking to establish wide-scale discriminatory practices by providing a more complete record on which to reach determinations on either injunctive relief or liability.").

Second, even assuming an individual plaintiff is permitted the broad reach of discovery available in class proceedings, the costs of individually arbitrating or litigating a pattern-or-practice claim would be prohibitive in light of the tremendous resources required to obtain and effectively marshal pattern-or-practice evidence and the relatively limited damages available to an individual plaintiff. *Cf.*

[8] The district court recognized the impracticality of vindicating pattern-or-practice claims on an individual basis and additionally concluded that individuals may not pursue such claims on an individual basis. This Court need not resolve as a matter or law whether pattern-or-practice claims may be pursued on an individual basis, as the parties agree for the purposes of this appeal on the determinative point that Parisi cannot effectively *vindicate* her pattern-or-practice claims in individual arbitration.

Amex III, 667 F.3d at 217-18. For example, en route to proving the pattern-or-practice claims in *Velez*, plaintiffs:

> took and defended approximately 107 depositions from coast to coast; . . . reviewed and catalogued approximately 3.7 million pages of documents produced by Novartis; engaged two testifying expert witnesses, four consulting experts . . . ; produced eight expert reports; . . . identified over 1,300 trial exhibits . . . ; prepared and presented 17 witnesses and called eight hostile witnesses at trial; and filed . . . over 750 proposed findings of fact and conclusions of law.

2010 U.S. Dist. LEXIS 125945, at *9-10. Class counsel incurred $16 million in lodestar fees and $2 million in expenses, much of which was on experts. *Id.* at *23, 67. These fees and expenses were justified and recoverable in light of the $100 million in backpay and compensatory damages secured on behalf of the plaintiff class, *see id.* at *49-68, but would be beyond reach in an action brought on behalf of a single plaintiff.

Third and finally, because injunctive relief is limited to providing relief to plaintiffs, and because the development of appropriate systemic injunctive relief may be fraught in the context of a lawsuit or arbitration to which only a single employee is party, the systemic injunctive relief that is the centerpiece of pattern-or-practice claims is not readily available in actions brought by individual plaintiffs. *See, e.g. Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989) ("Ordinarily, classwide relief, such as [an] injunction . . . which prohibits sex discrimination . . . , is appropriate only where there is a properly certified

class."). Indeed, some courts have gone so far as to bar individual plaintiffs from pursuing pattern-or-practice claims or systemic relief if they are not part of a certified class. *See, e.g., Houston v. Manheim-New York,* 2010 U.S. Dist. LEXIS 142076, at *19 (S.D.N.Y. July 7, 2010) ("Pattern-or-practice discrimination claims . . . must be made as a class action.").

Due to these significant hurdles, pattern-or-practice claims are most effectively vindicated by classes or the government, which can obtain the broad discovery needed to evince systemic patterns of discrimination and have the sizeable resources needed to support complex, multiyear adjudication and expert analysis of employment practices and statistical patterns. Because these forces dictate that in effect pattern-or-practice suits will "proceed as a class action or not at all," *Amex III.*, 667 F.3d at 214, enforcing a class waiver against an employee asserting pattern-or-practice Title VII claims would preclude vindication of "the totality of her substantive claims against the defendants." *Chen-Oster*, 785 F. Supp. 2d at 410.

C. Title VII Pattern-or-Practice Claims are Substantively Distinct from Individual Disparate Treatment Claims

The essential features of pattern-or-practice claims, which distinguish such claims from individual disparate treatment claims, are: (1) what must be proven to establish a violation, and the associated methods and burdens of proof; and (2) the remedies available. These are differences not of procedure, which may be

waivable through an arbitration agreement, *Mitsubishi*, 473 U.S. at 628, but of the very substance of the claims and remedies available under Title VII. As the district court properly found, pattern-or-practice claims are therefore substantively distinct from individual disparate treatment claims, and arbitration cannot be compelled where it would preclude vindication of pattern-or-practice claims.

1. The Substance of a Claim, Method of Proof, and Burden-Shifting Framework for Pattern-or-Practice Claims Are Distinct and Substantive Components of Title VII

Maintenance of a pattern-or-practice of discrimination constitutes a violation of Title VII that is distinct from an individual act of discrimination, and the substance of a pattern-or-practice claim differs accordingly. *See Teamsters*, 431 U.S. at 336, 357; *Cooper*, 467 U.S. at 876-78. First, and fundamentally, the showing necessary to prevail on a pattern-or-practice claim is different from that necessary for an individual discrimination claim. Whereas an individual claim is established by demonstrating that a specific adverse employment action against the plaintiff was motivated by discriminatory intent, *see Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981), a pattern-or-practice claim is established by demonstrating that "discrimination was the [company's] standard operating procedure." *Robinson*, 267 F.3d at 158 (quoting *Teamsters*, 431 U.S. at 336); *see also Jones v. UPS, Inc*., 502 F.3d 1176, 1187-1188 (10th Cir. 2007) (distinguishing an individual disparate treatment claim from pattern-or-practice claims). Indeed,

the Supreme Court has described this difference as "manifest," and explained that because pattern-or-practice and individual disparate treatment claims require proof of different elements, an adverse judgment in a pattern-or-practice action is not preclusive of individual disparate treatment claims. *Cooper*, 467 U.S. at 876-78; *see also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157-58 (1982) (noting the "wide gap" between an individual discrimination claim and a claim that a company has a policy of discrimination). Further, unlike an individual violation, a pattern-or-practice claim may be demonstrated through statistical evidence. *See Teamsters*, 431 U.S. at 339 n.20. Although each plaintiff must still demonstrate that she was a victim of discrimination to obtain damages in a pattern-or-practice suit, the establishment of a pattern-or-practice violation is sufficient to allow award of prospective relief without any individualized showing. *Id.* at 361. Thus the substance of what must be proven to establish a *prima facie* case, and ultimately a pattern-or-practice violation, differs from that which must be shown to establish an individual Title VII violation.[9]

Second, the method of proof and burden-shifting standards applicable to pattern-or-practice claims are distinct from those applicable to individual disparate treatment claims. *See, e.g., Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1106

[9] *Cf. Smith v. Bray*, 2012 U.S. App. LEXIS 10471, at *14 (7th Cir. May 24, 2012) (stating that "[t]he substantive standards . . . that apply to claims of racial discrimination and retaliation under Title VII also apply to claims under § 1981," and citing to discussion of *prima facie* elements of such claims).

(10th Cir. 2001) ("[T]he order and allocation of proof . . . in a pattern-or-practice case differ dramatically from a case involving only individual claims of discrimination."). In a pattern-or-practice action, the plaintiff bears the burden at the liability phase of demonstrating that "unlawful discrimination has been a regular procedure or policy followed by an employer." *Teamsters*, 431 U.S. at 360. If the plaintiff satisfies this burden, the court may award prospective relief without any further showing. *Id.* at 361. Additionally, a rebuttable presumption is established for the purpose of a subsequent damages phase that "any particular employment decision, during the period the discriminatory policy was in force, was made in pursuit of that policy." *Id.* at 362. This shifts the burden of proof to the defendant. *Franks v. Bowman*, 424 U.S. 747, 772 & n.32 (1976); *Wal-Mart Stores, Inc, v. Dukes*, 131 S. Ct. 2541, 2561 (2011). The effect of this framework is that employees who demonstrate a pattern-or-practice violation face a "substantially lessen[ed] . . . evidentiary burden relative to that which would be required if the employee were proceeding separately with an individual disparate treatment claim under the McDonnell Douglas framework." *Robinson*, 267 F.3d at 159; *see also Thiessen*, 267 F.3d at 1106 (noting that plaintiffs "reap a significant advantage" in the second stage of a pattern-or-practice action).

This method of proof and burden-shifting framework are derived from Title VII and constitute part of the substance of the law; thus, unlike rules of evidence or

procedure, they are not subject to waiver or alteration when a Title VII claim is brought in the arbitral forum. *See Mitsubishi*, 473 U.S. at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute," but "trades the procedures and opportunity for review of the courtroom . . . ."); *see also Bourbon v. Kmart Corp*., 223 F.3d 469, 475 (7th Cir. 2000) (Posner, J., concurring) ("The McDonnell-Douglas rule . . . is not a general rule of federal procedure; it is tailored for and limited to discrimination cases . . . . It is part of the law of discrimination, which is substantive."). Indeed, in the context of adjudication of federal claims in state courts and agencies, courts have long recognized that the burden of proof applicable to a claim is a substantive component of the statutory claim not subject to alteration or waiver based on forum. *See, e.g., Cent. Vt. Ry. Co. v. White*, 238 U.S. 507, 512 (1915) (explaining that a state court correctly declined to apply the state burden framework to a question of contributory negligence under the Federal Employers' Liability Act because "it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure," rather, "proof of plaintiff's freedom from fault is a part of the very substance of his case"); *Dir. v. Greenwich Collieries*, 512 U.S. 267, 271 (1994) (rejecting argument that because agency was not bound by rules of evidence or procedures applicable in courts it was not required to apply the statutory burden of proof standard, because "the

assignment of the burden of proof is a rule of substantive law"). Similarly, courts almost uniformly consider the method of proof and burden-shifting framework applicable to a claim of discrimination as part of the substantive law that governs adjudication of the claim regardless of the forum. *See, e.g.*, *Norville v. Staten Island Univ. Hosp*., 196 F.3d 89, 95 (2d Cir. 1999) (applying New York state method and order of proof to state antidiscrimination claims brought in federal court).[10] Moreover, it would be particularly inappropriate to limit or alter the statutory method of proof and burden-shifting framework where, as here, the effect would be to change the evidentiary burden plaintiff faces, and alter the likelihood that plaintiff can prevail on her claims. *Cf. Bourbon*, 223 F.3d at 476-477 (explaining that the *McDonnell-Douglas* framework should not be applied to a state claim brought in federal court if the requirements for proving cause under the framework "give the plaintiff a boost toward winning his case").

2. The Prospective Injunctive Remedies Available Upon Proof of a Pattern-or-Practice Violation are Not Subject to Prospective Waiver

As Congress made clear, the centerpiece of pattern-or-practice remedies is the prospective, systemic injunctive relief designed to reform the policies and practices giving rise to the pattern of discrimination. Such relief is available if

[10] *See also Payne v. Norwest Corp*., 185 F.3d 1068, 1073 (9th Cir. 1999) (applying Montana's "more lenient" standard, relative to *McDonnell Douglas*, to discrimination claim brought under Montana Human Rights Act in federal court); *Bourbon*, 223 F.3d at 474 (collecting cases from other circuits).

plaintiffs asserting a pattern-or-practice claim succeed at the liability phase in demonstrating that the employer has maintained a pattern or practice of discrimination, and requires no further showing that any particular plaintiff was subject to an unlawful adverse employment action. *Teamsters*, 431 U.S. at 361; *Cooper*, 467 U.S. at 876. In contrast, individual disparate treatment claims do not afford any relief if the plaintiff is unable to prove that the adverse employment action she suffered individually was motivated by discrimination. And even when a plaintiff does prevail on an individual treatment claim, the injunctive relief provided is generally limited to redressing individual harm suffered and not the underling discriminatory practices that may exist. *See* Laura Beth Nelson, et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. Empirical Legal Stud. 175 (2010) (finding that injunctive relief in individual discrimination lawsuits is rare and typically limited to individual reinstatement or retroactive promotion). This is unsurprising, as individual plaintiffs pursuing individual disparate treatment claims face the same barriers to obtaining broad injunctive relief as do employees seeking to assert pattern-or-practice claims on an individual basis: limitations on the scope of discovery that would be necessary to demonstrate a pattern-or-practice violation; preclusive costs required to make such a showing; and the restriction of the scope of injunctive relief to the scope of the violation established. *See supra* at

18-21. Further, because proof of an individual discrimination claim only necessarily establishes that the individual suffered an individual instance of discrimination, courts will generally only award the monetary and injunctive relief necessary to remedy that particular instance of discrimination. Indeed, some circuits have reversed district court grants of broad injunctive relief in individual cases. *See, e.g., Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003).

Thus, the effect of enforcing arbitration agreements that preclude pattern-or-practice claims will be to prevent plaintiffs from obtaining injunctive relief available under Title VII to redress the broader practices of discrimination that may exist. This would not only significantly undermine the remedial purposes of Title VII, but would also deprive employees of statutory remedies. The FAA does not permit such a result, and courts have repeatedly refused enforcement of arbitration clauses limiting statutory remedies. *See, e.g., Mastrobuono,* 514 U.S. at 63-64; *Hadnot v. Bay, Ltd*., 344 F.3d 474, 478 n.14 (5th Cir. 2003). Thus the district court's denial of Defendant's motion to compel arbitration was also proper because the arbitration agreement would constitute a "prospective waiver of a party's right to pursue statutory remedies." *Amex III*, 667 F.3d at 214 (quoting *Mitsubishi*, 473 U.S at 637 n.19).

3. The Substantive Terms and Remedies Applicable to Title VII Claims Cannot Be Limited by an Arbitration Agreement Expressly or By Implication

As the method and burdens of proof applicable to pattern-or-practice claims, as well as the prospective injunctive remedies available, are substantive elements of the Title VII statutory scheme, they may not be prospectively waived or burdened through a forced predispute arbitration agreement. This is more readily apparent if we consider an arbitration agreement that, rather than including a class bar, explicitly altered the method of proof, burden-shifting framework, and remedies available for Title VII claims. For example, consider a forced arbitration agreement that states employees may not prove a Title VII claim by establishing a pattern or practice of discrimination, may not utilize the *Teamsters* method of proof, and will retain the burden of proof for proving individual injury even after demonstrating a pattern or practice of discrimination and adverse employment action, and that further precludes the arbitrator from awarding prospective injunctive relief upon proof of a pattern or practice of discrimination. Such an agreement would clearly alter not just the forum and "procedures" applicable to resolution of employment disputes, but the substance of employees' Title VII rights and remedies, and would therefore be unenforceable against a plaintiff asserting Title VII pattern-or-practice claims. The arbitration agreement at issue here would, by its ban on class proceedings, impose the very same limits on the

substantive rights provided by the Title VII enforcement scheme, and frustrate the broad remedial purpose of the statute. It is thus no more enforceable than if it were to alter expressly the burdens of proof or the remedies that may be awarded.

CONCLUSION

The district court's decision denying Defendant Goldman Sachs' motion to stay the proceedings and compel arbitration of Plaintiff Parisi's claims should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in Fed. R. App. P. 29(d) and 32(a)(7)(B)(i). It contains 6,948 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: July 2, 2012

/s/ Joseph M. Sellers
Joseph M. Sellers

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2012, I caused the foregoing Brief of *Amici Curiae* National Employment Lawyers Association, *et al.*, in Support of the Plaintiffs-Appellees and Affirmance to be electronically filed through the Court's CM/ECF system, which will send notification of such filing to parties' counsel registered as CM/ECF participants.

/s/ Joseph M. Sellers
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EXHIBIT 1

STATEMENT OF *AMICI CURIAE*

The **National Employment Lawyers Association ("NELA")** is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The **Asian American Justice Center ("AAJC")**, member of the Asian American Center for Advancing Justice, is a national nonprofit, nonpartisan organization whose mission is to advance the civil and human rights of Asian Americans and to promote a fair and equitable society for all. Founded in 1991, AAJC engages in litigation, public policy, advocacy, and community education and outreach on a range of issues, including fairness and non-discrimination in the workplace. Workers from immigrant and other underserved communities such as

those for whom AAJC advocates are particularly vulnerable to unfair employment practices. AAJC has a long history of supporting disparate impact litigation and "pattern or practice" claims and is committed to ensuring that civil rights laws, like Title VII of the Civil Rights Act of 1964, are fully implemented and vigorously enforced.

The Employee Rights Advocacy Institute For Law & Policy ("The Institute") is a charitable non-profit organization whose mission is to advocate for employee rights by advancing equality and justice in the American workplace. The Institute achieves its mission through a multi-disciplinary approach combining innovative legal strategies, policy development, grassroots advocacy, and public education. In particular, The Institute has sought to eliminate mandatory pre-dispute arbitration of employment claims through its public education work.

The **Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee")** is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee is dedicated, among other goals, to eradicating all forms of workplace discrimination affecting racial and ethnic minorities,

women, individuals with disabilities, and other disadvantaged populations. Since the 1960s, the Lawyers' Committee has relied on the class action mechanism and all available remedies under the Civil Rights Act of 1964 and other federal statutes as essential tools for combating unlawful discrimination in the workplace. The Lawyers' Committee, through its Employment Discrimination Project, has been involved in cases before the United States Supreme Court involving the interplay of arbitration clauses and the exercise of rights guaranteed by civil rights laws prohibiting employment discrimination.

The **NAACP Legal Defense & Educational Fund, Inc. ("LDF")** is a non-profit legal organization that has assisted African Americans and other people of color in securing their civil and constitutional rights for more than six decades. In litigation in the Second Circuit and other courts, LDF has focused particularly upon class actions, including class-based challenges to patterns or policies of discrimination, because class actions more effectively and efficiently secure systemic change. *See, e.g., Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Wright v. Stern*, 450 F. Supp.2d 335 (S.D.N.Y. 2006), *Powell v. Georgia-Pacific Corp.*, 843 F. Supp. 491 (W.D. Ark. 1994); *Haynes v. Shoney's, Inc.*, No. 89–30093–RV, 1993 WL 19915 (N.D. Fla. Jan. 25, 1993); *Teamsters v. United States*, 431 U.S. 324 (1977) (as *amicus curiae*).

LDF also has appeared as a party and as an amicus before this Court to ensure that the Federal Arbitration Act, 9 U.S.C. § 1 et seq., is interpreted in a manner consistent with effective enforcement of our nation's civil rights laws. *See, e.g.*, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998).

The **National Employment Law Project ("NELP")** is a non-profit legal organization with over 40 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of employment laws. Pattern and practice claims under Title VII of the Civil Rights Act of 1964 are an indispensable tool for eradicating widespread, invidious discrimination at workplaces across the country. Compelling individual arbitration of discrimination claims when pattern and practice allegations are raised would gut this important tool which is necessary to fight employment discrimination. Failure to allow this case to proceed as a class action would result in a victory for invidious discrimination in its many forms, in likely countless workplaces. NELP urges the Court to uphold the District Court's ruling and allow this class action case to proceed in court.

The **National Partnership for Women & Families** (formerly the Women's Legal Defense Fund) is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, access to quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership has worked to advance equal employment opportunities through several means, including by challenging discriminatory employment practices in the courts.

The **National Women's Law Center ("NWLC")** is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace. It has played a leading role in the passage and enforcement of federal civil rights laws, including through class action and pattern or practice litigation and in numerous amicus briefs involving sex discrimination in employment before the United States Supreme Court, federal courts of appeals and state courts.

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts,

particularly on the systemic level. Women Employed strongly believes that pattern and practice claims are crucial to eradicating employment discrimination, and that arbitration agreements that prevent employees from pursuing these claims are unenforceable.

9to5, National Association of Working Women is a 39 year-old, multi-racial, national membership organization of women in low-wage jobs working to achieve economic justice and end discrimination. 9to5's members and constituents are directly affected by sex and other forms of discrimination, sexual and other forms of harassment, and retaliation, as well as the difficulties of seeking and achieving redress for all these issues. The issues of this case are directly related to 9to5's work to protect women's rights in the workplace, end discrimination, achieve systemic change, and strengthen women's ability to achieve economic security. The outcome of this case will directly affect our members' and constituents' rights in the workplace and their ability to achieve redress for workplace discrimination, harassment and retaliation, as well as their long-term economic well-being and that of their families.