No. 11-5229

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

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Securities Industry and Financial Markets Association ("SIFMA") states that it is a non-profit organization that has no parents or subsidiaries, but it has the following three non-profit affiliates: Foundation for Investor Education, Inc. ("FIE"); The Bond Market Educational Foundation; and the Securities Industry Association, New York District, Economic Education Foundation, Inc.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES, RULES, AND OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

INTEREST OF THE AMICUS CURIAE

The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.[1]

In the financial services industry, arbitration has long been used as an alternative to the courts because it is fair and because it is a faster and more economical means of resolving disputes than court-based litigation. Indeed, industry rules require that all registered representatives submit to arbitration to resolve investment-related disputes with their customers. Many SIFMA members regularly include arbitration agreements in their contracts with employees. In general, and in the financial services industry in particular, the parties typically agree to arbitrate pursuant to a written pre-dispute arbitration agreement (PDAA) that the parties enter into prior to any dispute arising.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Second Circuit Rule 29.1(b), *amicus* affirm 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.

The securities arbitration system has worked well for decades in resolving disputes, including disputes between employers and employees in the securities industry. It is also subject to oversight by multiple independent regulators. PDAAs are a vital component of this system. Such agreements have helped shape the public policy in favor of arbitration that has been recognized by Congress, the U.S. Supreme Court, and courts around the country including this Court. Such public policy is strengthened by the recognition that arbitration, both as a general matter and in the financial services industry specifically, promotes fair, efficient, and economical dispute resolution for all parties.

The ruling below, if allowed to stand, would erode the significant benefits of arbitration over litigation, which include simplicity, informality, and expeditious resolution. The ruling also would frustrate the intent of parties to arbitration agreements and undermine those agreements already in existence. Accordingly, SIFMA, on behalf of its members, has a strong interest in this case.

SUMMARY OF THE ARGUMENT

Lisa Parisi ("Parisi") and the other Plaintiffs-Appellees filed a putative class action against Defendants-Appellants Goldman, Sachs & Co. and The Goldman Sachs Group, Inc. (together "Goldman Sachs"), alleging gender discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. ("Title

VII"), and the New York City Human Rights Law ("NYCHRL"). Ms. Parisi also asserts individual gender discrimination and retaliation claims.

In consideration of her promotion to a Managing Director of Goldman Sachs and the significant economic benefits of the promotion, Ms. Parisi and Goldman Sachs entered a Managing Director Agreement which included a provision requiring the parties to arbitrate any claim arising from her employment. In their opening brief, Appellants Goldman Sachs persuasively demonstrate why, under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, Supreme Court precedent and this Court's decisions, including, most recently in *In re American Express Merchants' Litigation*, 667 F.3d 204 (2d Cir. 2012) ("*AmEx III*")[2], the arbitration agreement between Ms. Parisi and Goldman Sachs must be enforced according to its terms and Ms. Parisi ordered to arbitrate her claims on an individual basis with Goldman Sachs. SIFMA focuses this amicus brief on two points that are of particular importance to SIFMA's members.

First, the concerns that prompted this Court to identify a narrow exception to enforcing an arbitration agreement according to its terms plainly do not apply to sophisticated, highly compensated employees like Managing Director Ms. Parisi, who can easily and effectively vindicate their rights through individual arbitration. And practical considerations, such as cost, efficiency, and success rates strongly

[2] A petition for rehearing *en banc* is pending.

favor ordering arbitration of individual disputes. This is particularly true in the financial services industry, where arbitration agreements are prevalent and there is a long history of using arbitration as an effective means of dispute resolution.

Second, Magistrate Judge Francis erred when he ruled that the PDAA between Managing Director Parisi and Goldman Sachs is unenforceable because, in the court's view, Ms. Parisi could only vindicate her rights by proceeding in court, on a class-wide basis, with resort to the evidentiary burden-shifting method applied to pattern-or-practice claims. *Chen-Oster v. Goldman, Sachs & Co*., 785 F. Supp. 2d 394 (S.D.N.Y. 2011). This is error for at least four independent reasons. First, there is no substantive right to proceed under the pattern-or-practice method of proof. "Pattern or practice" is a procedural approach, devised by the judiciary, and is thus plainly waivable by the parties in arbitration agreements. Second, under the plain text of Title VII, only the government has a right to bring a pattern-or-practice claim. Third, there is no *per se* bar to introducing pattern-or-practice evidence in individual actions—either in court or in arbitration. Indeed, under both FINRA and AAA employment arbitration rules, arbitrators have broad discretion to admit such evidence. Fourth, even under the pattern-or-practice method of proof, the fact finder's ultimate inquiry remains the same—namely, whether the adverse employment action against the particular individual was based on discrimination in violation Title VII—and thus there is no logical basis for the

magistrate judge's distinction between the arbitrability of Title VII claims brought by an individual alone compared to those brought by an individual as a purported class representative.

Furthermore, if the magistrate judge's ruling were upheld and the pattern-or-practice method of proof were erroneously raised to the level of a statutory, substantive right, the practical effect would be to wreak havoc over the administration of class claims covered by arbitration agreements—in stark contrast to the FAA's stated purpose of affording parties streamlined, efficient methods of dispute resolution. Nothing in Title VII, the FAA, or Supreme Court or this Court's precedent supports such a result. Indeed, such a result cannot be reconciled with the FAA and judicial interpretations of the FAA and Title VII.

For the reasons stated herein and in Goldman Sachs' brief, SIFMA urges this Court to correct the legal errors of the decision below and reverse the order below, so that no harm is done to the federal policy favoring arbitration and the benefits of alternative dispute resolution in financial services and other industries.

ARGUMENT

I. ARBITRATION AGREEMENTS SUCH AS THE ONE BETWEEN GOLDMAN SACHS AND MANAGING DIRECTOR PARISI SHOULD BE ENFORCED ACCORDING TO THEIR TERMS.

A. The FAA, Supreme Court Decisions, And Second Circuit Precedent, Including *AmEx III*, Confirm That PDAAs In Which The Parties Agreed To Individually Arbitrate Claims Are Enforceable And Require Arbitration Of Claims Such As Those Asserted In This Action.

As this Court recently reaffirmed, the FAA creates a "liberal federal policy favoring arbitration agreements." *AmEx III*, 667 F.3d at 212 (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011)) (citation and internal quotation marks omitted). In fact, this Court has stressed that "it is difficult to overstate the strong federal policy in favor of arbitration, and it is a policy we have often and emphatically applied." *Arciniaga v. Gen. Motors Corp.*, 460 F.3d 231, 234 (2d Cir. 2006) (citation and internal quotation marks omitted); *see also*, *e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24 (1983); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012).

The Supreme Court and this Court have also repeatedly stressed that the FAA and this liberal policy in favor of arbitration "*requires* courts to enforce agreements to arbitrate *according to their terms*." *CompuCredit*, 132 S. Ct. at 669 (emphases added). "That is the case even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *Id*. (citation and internal quotation marks omitted).

> Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, *it is the congressional intention expressed in some other statute on which the courts must rely* to identify any category of claims as to which agreements to arbitrate will be held unenforceable.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985) (emphasis added).

It is unmistakably clear, as the magistrate judge correctly held below, that there is no statutory prohibition against compelling arbitration in this case, as "[i]t is well established that Congress intended claims under Title VII to be arbitrable." *Chen-Oster*, 785 F. Supp. 2d at 405 (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001)). Indeed, each of the "circuits have concluded that Title VII does not bar compulsory arbitration agreements." *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 748 (9th Cir. 2003); *see also*, *e.g.*, *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 147 (2d Cir. 2004) (same).

Furthermore, the Supreme Court and this Court have instructed that class action waivers are enforceable and that the FAA requires the enforcement of agreements to arbitrate on an individual basis. *See Concepcion*, 131 S. Ct. at 1748-49; *AmEx III*, 667 F.3d at 219; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991). Indeed, if an agreement is silent on whether class arbitration is permitted, the agreement cannot be interpreted to allow them, because the

"changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp*., 130 S. Ct. 1758, 1776 (2010).

In *AmEx III*, this Court emphasized that class action waivers are enforceable, and that the vindication of rights doctrine does not mean that "class action waivers in arbitration agreements are per se unenforceable." *AmEx III*, 667 F.3d at 219. Rather, the Court identified a narrow, limited exception to the requirement that arbitration agreements be enforced according to their terms where:

> the cost of plaintiffs' individually arbitrating their dispute with [defendant] would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws.

Id. at 217. The *AmEx III* plaintiffs fell within that narrow exception, as they adduced evidence that the four-year damages of the median individual plaintiff would amount to less than $1,800 (and the largest recovery for a named plaintiff was $38,549 including treble damages), while the *unrecoverable* costs for individual arbitration would exceed that recovery by at least "several hundred thousand" or "$1 million" dollars. *Id*. at 218.

The limited exception described by this Court in *AmEx III* does not apply to employment claims such as those asserted in this case. Unlike the small potential monetary awards available to the *AmEx III* plaintiffs in comparison to the extremely large expenses required to prove an individual antitrust claim, the

Title VII claims at issue in this case provide substantial monetary awards if successful, including back pay, front pay, compensatory damages, punitive damages, as well as attorneys' fees and expert fees. 42 U.S.C. § 2000e-5. Each of those remedies is available through individual arbitration. Thus, Managing Director Parisi, and others with similar claims, should be compelled to arbitrate their claims according to the terms of the applicable arbitration agreement.[3]

B. The FAA And Court Decisions Favoring Arbitration Are Especially Applicable To Claims Asserted By Individuals, Like Managing Director Parisi, Who Are Sophisticated, High Ranking, and Highly Compensated.

The limited exception identified in *AmEx III* is particularly inapplicable to claims brought by high-ranking, highly compensated individuals such as Managing Director Parisi. Ms. Parisi is a sophisticated business person with sophisticated skills and substantial resources. At the time she was hired, Ms. Parisi held an M.B.A. degree and had more than 15 years of professional experience in the asset management business. During her employment by Goldman Sachs, she was promoted to the position of Managing Director, which elevated her to an exclusive

[3] Ms. Parisi's Managing Director Agreement provides for arbitration before FINRA (as the successor to NYSE and NASD) or AAA. JA 105. Under FINRA rules, arbitrators "may award ***any*** relief that would be available in court under the law" and "reasonable attorneys' fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law." *FINRA Code of Arbitration Procedure for Industry Disputes* (2011), Rule 13802(e)-(f) (emphasis added). Similarly, AAA rules permit the arbitrator to "grant ***any*** remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs, in accordance with applicable law." *AAA Employment Arbitration Rules and Mediation Procedures* (2009), Rule 39(d) (emphasis added).

group of high level leaders and decision makers among the upper tier of the business. Ms. Parisi also was highly compensated by Goldman Sachs, earning a standard base salary of $300,000, with a substantially higher total annual compensation when bonus payments are taken into account. JA 202-03. In exchange for attaining that high status and compensation, Ms. Parisi and Goldman Sachs entered a Managing Director Agreement which includes a pre-dispute arbitration provision to resolve their disputes on an individual basis. JA 105.

These attributes place Ms. Parisi among the upper tier of employees in the financial services industry. Before the Goldman Sachs public offering, the Managing Director position included the partners, owners, and other senior leaders of the company. After the public offering, Managing Directors continued to be the highest ranking employees at the company. Individuals in positions such as this at Goldman Sachs and other comparable financial services firms are highly compensated. For example, in 2011, the base salary for Managing Directors at Goldman Sachs was reported to be $500,000.[4] Other third-party sources confirm that managing directors in the financial services industry generally earned base

[4] *See* NEW YORK TIMES, *DealBook, Goldman Names Managing Directors* (Nov. 18, 2011), http://dealbook.nytimes.com/2011/11/18/goldman-names-managing-directors/.

salaries well into six figures, and they are also eligible and frequently earn six-figure bonuses.[5]

Practical implications weigh strongly in favor of enforcing arbitration agreements like the one between Ms. Parisi and Goldman Sachs, entered into when Ms. Parisi became a Managing Director. As the Supreme Court recently noted, arbitration increases the likelihood that clients' interests will be advanced over those of class-action lawyers who often place their own interests first and do not serve the interests of the class. *Concepcion*, 131 S. Ct. at 1750. This is because attorneys often forgo individual actions not because the recovery is too small to justify the costs, but because "there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process." *Id*. The Supreme Court also noted that class actions give plaintiffs tremendous leverage that is divorced from the actual merits of the claims: "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Id*. at 1752. That desire to "reap far higher fees" and to wield such "pressure" may very well be the reason why Ms. Parisi, who can more than adequately vindicate her Title VII rights through individual arbitration

[5] *See* Options Group, *2011-2012 Global Financial Market Overview & Compensation Report*, http://www.optionsgroup.com (reporting average base salary in 2011 ranging from $300,000-$400,000 per year).

under the terms of the agreement she voluntarily and knowingly entered into, still seeks to avoid her obligations under the PDAA.

Employees also generally fare better in arbitration than in court litigation. For example, studies have shown that employees who arbitrate their claims are more likely to prevail than employees who litigate in court. *See*, *e.g.*, Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 46 (1998). One study of employment arbitration in the securities industry concluded that employees who arbitrate were 12% more likely to win their disputes than employees litigating in the Southern District of New York. *See* Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 DISP. RESOL. J. 56, 58 (Nov. 2003-Jan. 2004). And awards obtained by employees in arbitration are typically the same or even larger than court awards. *See id*.

The benefits of arbitration are particularly compelling in the financial services industry, which has a long history of successful resort to arbitration for dispute resolution. Arbitrators in financial services matters often have special knowledge of the industry that courts and juries do not have. Thousands of arbitration cases are filed with FINRA every year and quickly resolved. More than 4,700 new cases were filed with this organization in 2011 alone, and cases closed in 2011 had an average time from filing to decision of 13.3 months for arbitration,

which is more than *two years* faster than the 38.5 month average disposition for civil matters filed in the United States District Court for the Southern District of New York.[6]

The positive attributes and effects of arbitration have prompted the Supreme Court to observe repeatedly that "arbitration's advantages often would seem helpful to individuals . . . who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995); *see also*, *e.g.*, *Concepcion*, 131 S. Ct. at 1749 ("[T]he informality of arbitral proceedings . . . reduc[es] the cost and increas[es] the speed of dispute resolution."); *Stolt-Nielsen*, 130 S. Ct. at 1775 (observing that "the benefits of private dispute resolution" include "lower costs" and "greater efficiency and speed"); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution.").

In the context of the strong federal policy favoring arbitration, as well as the ability of employees to vindicate Title VII rights through individual arbitration, it is plain that arbitration agreements like the one at issue in this case should be enforced according to their terms. If the contrary decision of the magistrate judge

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[6] *Compare* FINRA Dispute Resolution Statistics, http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics (last visited Mar. 31, 2012), *with* U.S. District Courts, *Federal Court Management Statistics—Median Time Intervals From Filing To Disposition of Civil Cases, During The Twelve Month Period Ending March 31, 2011*, http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2011Mar.pl (select "All District Courts" from the drop-down menu and follow the "Generate" hyperlink).

is allowed to stand, then the enforceability of countless PDAAs will be threatened, as will the concomitant efficiency, effectiveness, and other practical benefits that arbitration brings to financial services and other industries. Accordingly, SIFMA urges the Court to reverse the decision below and reiterate the importance of compelling individual arbitration according to the terms of the agreement.

II. THE MAGISTRATE JUDGE ERRED BY HOLDING THAT MS. PARISI MAY VOID HER ARBITRATION AGREEMENT AND LITIGATE HER CLAIMS IN COURT VIA HER CHOSEN BURDEN-SHIFTING SCHEME.

Magistrate Judge Francis refused to enforce Ms. Parisi's arbitration agreement because the court believed that private individuals have a federal, statutory, substantive right to bring a pattern-or-practice suit which can only be litigated on a class-wide basis. *Chen-Oster*, 785 F. Supp. 2d at 408. This is incorrect for at least four independent reasons and would also lead to anomalous results that are inconsistent with the letter, spirit, and purpose of the FAA.

A. The Pattern-or-practice Method Of Proof Was Created By The Judiciary And Is A Waivable, Procedural Mechanism, Not A Substantive Right.

It is evident from the decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), that the Supreme Court created the familiar burden-shifting approach as an alternative method of proof in Title VII discrimination claims, not as a new substantive claim. The magistrate judge erred by raising this procedural method to a substantive right.

In *Teamsters*, the defendants argued that the government's burden of proof should be equivalent to that announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under the *McDonnell Douglas* standard, "an individual Title VII complainant must carry the initial burden of proof by establishing a prima facie case of . . . discrimination." *Teamsters*, 431 U.S. at 357. If met, "[t]his initial showing justifie[s] the inference that the [plaintiff] was denied an employment opportunity for reasons prohibited by Title VII, and therefore shift[s] the burden to the employer to rebut that inference by offering some legitimate, nondiscriminatory reason for the rejection." *Id*. at 358.

The Supreme Court rejected defendants' argument, explaining that "[t]he importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that any employment decision was based on a discriminatory criterion illegal under the Act." *Id*. Instead, the Supreme Court endorsed and adopted a different approach which had been articulated in an earlier case and which "illustrates another means by which a Title VII plaintiff's initial burden of proof can be met." *Id*. at 359 (citing *Franks v. Bowman Transp. Co*., 424 U.S. 747 (1976)). From the *Franks* foundation, the Court articulated the now familiar *Teamsters* burden-shifting method:

The plaintiff in a pattern-or-practice action is the Government, and its initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers. At the initial, "liability" stage of a pattern-or-practice suit[,] the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed. The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the Government's proof is either inaccurate or insignificant. An employer might show, for example, that . . . during the period it is alleged to have pursued a discriminatory policy it made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination.

. . .

When the Government seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief. . . . [A]s is typical of Title VII pattern-or-practice suits, the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination. The force of that proof does not dissipate at the remedial stage of the trial. The employer cannot, therefore, claim that there is no reason to believe that its individual employment decisions were discriminatorily based; it has already been shown to have maintained a policy of discriminatory decisionmaking.

The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy. The Government need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a

> potential victim of the proved discrimination. ***As in* Franks*, the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons***.

Teamsters, 431 U.S. at 360-62 (footnotes and citations omitted; emphases added).

This burden-shifting approach aids the *courts*; it does not create a new, independent substantive right under Title VII. The Supreme Court itself expressly recognized this in *Teamsters*, explaining that the framework it was creating is "consistent with the manner in which presumptions are created generally. Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof." *Id*. at 359 n.45. As the Third Circuit has explained, "[t]he *Teamsters* framework was *judicially promulgated* as a *method of proof*." *Hohider v. United Parcel Serv., Inc*., 574 F.3d 169, 183 (3rd Cir. 2009) (emphasis added). Such methods of proof are "merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Id*. (quoting *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983)) (internal quotation marks omitted).

It is well established that the FAA does not prohibit parties from waiving *procedural* rights. In *Gilmer*, for example, the Supreme Court rejected the plaintiff's arguments that arbitration of his age discrimination claims was inconsistent with the framework and purpose of the statute. 500 U.S. at 27. The

rights that Gilmer identified, including the right to proceed in a judicial forum or to proceed on a class-wide basis, were procedural, and thus could be waived by a valid arbitration agreement. As the Court explained, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Id*. at 31 (quoting *Mitsubishi Motors*, 473 U.S. at 628).

Similarly, this Court has held that the right to bring a Rule 23 class action is procedural and thus may be waived:

> [I]nsofar as a plaintiff may be said to possess a "right" to litigate an action in federal court as a class action under Rule 23 of the Federal Rules of Civil Procedure, the right "*is a procedural right only, ancillary to the litigation of substantive claims*."

In re Am. Express Merchs.' Litig., 554 F.3d 300, 312 (2d Cir. 2009) ("*AmEx I*") (quoting *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980)) (emphasis added); *see also*, *e.g.*, *In re Am. Express Merchs.' Litig*., 634 F.3d 187, 196 (2d Cir. 2011) ("*AmEx II*") ("The plaintiffs do not proffer the argument rejected in *Gilmer*, namely that the class action waiver is unenforceable merely because the relevant statute allows for class actions."); *CompuCredit*, 132 S. Ct. at 669.[7]

[7] Procedural rights may be waived in favor of arbitration even when they are so significant that they are embedded in the Constitution. The right to a jury trial is one such example. This right is granted by the Seventh Amendment and is further bolstered by certain federal statutes, including Title VII and the Age Discrimination in Employment Act ("ADEA"). Notwithstanding this right, in *Gilmer*, an ADEA case, the Supreme Court ordered arbitration and thus denied the plaintiff the opportunity to present his case to a jury. 500 U.S. at 35. If even

In short, it is plain from the Supreme Court's *Teamster*'s decision that the pattern-or-practice method of proof is not a substantive right but a procedural mechanism created for the benefit of the judiciary for purposes of evaluating certain Title VII claims. As such, the right to proceed under this method of proof is waivable and presents no bar to ordering arbitration.

B. Only The Government Has A Statutory Right To File A Title VII Pattern-Or-Practice Claim.

Further evidence that there is no substantive right for an individual plaintiff to bring a distinct pattern-or-practice suit is found in the language of Title VII. In the entirety of the Act, the phrase "pattern or practice" is confined to a single paragraph of section 707, a section detailing the authority of the *government* to bring a suit, providing that:

> Whenever the ***Attorney General*** has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the ***Attorney General*** may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the ***Acting Attorney General***), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order

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fundamental constitutional protections may be waived for arbitration, there is no basis to conclude that a matter of significantly lower import—the use of a particular procedural method of proof—warrants voiding an otherwise valid arbitration agreement.

> against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

42 U.S.C. § 2000e-6(a) (emphases added). This authority was subsequently transferred to the Equal Employment Opportunity Commission ("EEOC"). 42 U.S.C. § 2000e-6(c); *see also Teamsters*, 431 U.S. at 329 n.1 ("Section 707 was amended . . . to give the [EEOC], rather than the Attorney General, the authority to bring 'pattern or practice' suits under that section against private sector employers").

Accordingly, "[t]he plaintiff in a pattern-or-practice action ***is the Government***." *Teamsters*, 431 U.S. at 360 (emphasis added). In fact, a section 707 pattern-or-practice case "cannot be initiated by an individual charge, and it cannot be filed as a civil suit by an individual." *EEOC v. Mitsubishi Motor Mfg. of Am., Inc*., 990 F. Supp. 1059, 1084 (C.D. Ill. 1998) (citing *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 327 (1980) (section 707 pattern-or-practice cases not designed to advance personal interest of any particular aggrieved person)).

Thus, private litigants have no substantive, statutory right under Title VII to bring a distinct pattern-or-practice suit. A private plaintiff's invocation of "pattern or practice" as something other than a procedural method of proof is misplaced and should provide no assistance to an attempt to avoid the terms of an arbitration agreement.

C. Individuals May Seek To Present Pattern-Or-Practice-Type Evidence In Arbitration.

Not only is "pattern or practice" merely a procedural method of proof and under the statute such claims are limited to those brought by the government, but also courts have routinely permitted the introduction of such evidence in appropriate individual cases. *See*, *e.g.*, *Hollander v. Am. Cynamide Co*., 895 F.2d 80, 84 (2d Cir. 1990) ("Evidence relating to company-wide practices may reveal patterns of discrimination against a group of employees, increasing the likelihood that an employer's offered explanation for an employment decision regarding a particular individual masks a discriminatory motive."); *Haskell v. Kaman Corp*., 743 F.2d 113, 119 (2d Cir. 1984) (recognizing that a plaintiff can proffer evidence of a pattern or practice of discrimination in the context of an individual suit); *Gilty v. Vill. of Oak Park*, 919 F.2d 1247, 1252 (7th Cir. 1990) (pattern-or-practice evidence may be "collateral to evidence of specific discrimination against the actual plaintiff" (citation and internal quotation marks omitted)).

Similarly, there is no *per se* bar to introducing pattern-or-practice evidence, such as statistical evidence, policies, and the like, in arbitration proceedings. Indeed, arbitrators have broad discretion to allow a plaintiff to present evidence even where the federal rules would bar such evidence. For example, the FINRA employment arbitration rules provide that the arbitration panel decides what evidence to admit and that state and/or federal rules of evidence need not be

followed.[8] Likewise, AAA's employment arbitration rules provide arbitrators with authority to admit pattern-or-practice evidence in individual cases.[9] Because parties have the same opportunity—and possibly a greater opportunity—to present evidence in the arbitral forum than in court, there can be no argument that enforcing an agreement to arbitrate individually will deprive those like Ms. Parisi of an opportunity to vindicate Title VII rights.

D. Even Under A Pattern-Or-Practice Method Of Proof, The Fact Finder Ultimately Must Determine Whether Each Class Member Suffered An Actionable Wrong Under Title VII.

Finally, the magistrate judge's decision is also erroneous and should be reversed because even under the pattern-or-practice rubric, courts must still conduct individual determinations whether a given plaintiff was subject to discrimination. Indeed, the pattern-or-practice method is generally seen as a more difficult method to establish discrimination involving a particular individual.

Under the *McDonnell Douglas* framework generally applied in individual cases, a plaintiff must only offer evidence that a particular employment decision was based on discriminatory criteria. By comparison, as this Court has held, "[t]o succeed on a pattern-or-practice claim, plaintiffs must prove more than sporadic acts of discrimination; rather, they must establish that intentional discrimination

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[8] *See FINRA Code of Arbitration Procedure for Industry Disputes*, Rule 13604.

[9] *See AAA Employment Arbitration Rules and Mediation Procedures*, Rule 30.

was the defendant's 'standard operating procedure.'" *Robinson v. Metro-N. Commuter R.R.*, 267 F.3d 147, 158 (2d Cir. 2001) (citing *Teamsters*, 431 U.S. at 336). If this standard is satisfied, separate hearings are nonetheless required for any individual award. *Id*. at 161-62. During this second stage, any award of damages requires additional proof by the class member. *Id*.

Stated differently, whether the *McDonnell Douglas* framework or the *Teamsters* framework is applied, the ultimate issue remains the same: "[A]ny Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." *Teamsters*, 431 U.S. at 358; *Hohider*, 574 F.3d at 183 (same). Thus, any person's claim rises or falls based on the fact finder's decision whether he or she suffered an adverse employment action in violation of Title VII, notwithstanding the particular method of proof that is employed to assess the claim.

For this additional reason, the magistrate judge's decision is incorrect and must be reversed in order to preserve the important policies favoring arbitration of individual claims.

E. The Magistrate Judge's Novel Holding Would Lead To Numerous Procedural And Legal Oddities.

By misconstruing the procedural steps of the *Teamsters* burden-shifting approach as a substantive, statutory right, the magistrate judge has not only erred,

but has created a novel legal framework which would raise more questions than it answered and would be flatly inconsistent with one of the FAA's primary goals, which is to afford parties a streamlined means of dispute resolution with "lower costs, greater efficiency and speed." *Stolt-Nielsen*, 130 S. Ct. at 1775; *see also*, *e.g.*, *Concepcion*, 131 S. Ct. at 1749 ("[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution."); *14 Penn Plaza*, 556 U.S. at 257 ("Parties generally favor arbitration precisely because of the economics of dispute resolution."); *Adams*, 532 U.S. at 122-23 ("[T]here are real benefits to the enforcement of arbitration provisions" including that "[a]rbitration agreements allow parties to avoid the costs of litigation[.]"). Moreover, the magistrate judge's novel conclusion would allow individual plaintiffs to avoid the terms of their arbitration agreements—and essentially void their agreements to individually arbitrate—merely by uttering the magic words "pattern or practice" in their complaint.

Consider the following circumstances, many of which would become commonplace if the court's ruling below is affirmed:

1. If a district court declines to certify a class, but plaintiffs' individual claims survive, would plaintiffs' individual claims then be referred to arbitration? Because the answer to that question is almost certainly yes under the FAA, then the magistrate judge's ruling undermines "the overarching purpose of the FAA . . . to

ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings"—which, inter alia, "increas[es] the speed of dispute resolution." *Concepcion*, 131 S. Ct. at 1748-49 (citation omitted).

2. If a district court grants class certification but concludes at the end of Phase One proceedings that plaintiffs have not satisfied their burden to establish a pattern or practice of discrimination, should the individual claims of plaintiffs which still remain then be referred to arbitration? The remaining individual claims clearly proceed under the *McDonnell Douglas* framework (*see Cooper v. Fed. Res. Bank of Richmond*, 467 U.S. 867, 880 (1984)), which even the magistrate judge concedes to be appropriate for individual arbitration. *Chen-Oster*, 785 F. Supp. 2d at 409. Thus, the answer again is almost certainly yes under the FAA.

3. If a district court concludes after Phase One proceedings that an employer has engaged in a pattern or practice of discrimination, should the claims of plaintiffs who seek individual relief, as Ms. Parisi does here, then be referred to arbitration? As described above, the Phase Two proceedings require separate hearings where individual class members must adduce individual proof to justify an award of damages. *Robinson,* 267 F.3d at 159. Thus, the answer again is almost certainly yes, under the FAA.

4. If a district court orders arbitration of individual claims after Phase One proceedings, whether or not plaintiffs meet their burden, must the arbitrator

honor the court's conclusion whether a pattern or practice of discrimination does or does not exist?

5. If a district court declines to order arbitration of individual claims after denying class certification or Phase One proceedings, would that mean any arbitration agreement may be voided if a plaintiff invokes the phrase "pattern or practice," no matter how frivolous the claim or how much consideration was furnished for the individual arbitration agreement? How can this result be reconciled with the liberal policy in favor of arbitration and the Supreme Court's repeated admonition that arbitration agreements must be "enforce[d] according to their terms"? *CompuCredit*, 132 S. Ct. at 669; *Concepcion*, 131 S. Ct. at 1745.

As demonstrated, the decision by the lower court would wreak havoc on what has heretofore been an efficient, effective, and expeditious method of resolving cases. This would be particularly true for individuals like Managing Director Parisi—sophisticated business people who are well able to vindicate their Title VII claims through the individual arbitration to which they agreed.

CONCLUSION

For all of the foregoing reasons, the magistrate judge's decision below was in error and the court's order denying the motion to compel arbitration should be reversed, so that the FAA is followed and the important policy favoring arbitration

is given effect and the attendant benefits of arbitration in financial services and other industries may be realized in this and other cases.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Sam Shaulson, hereby certify that this Brief Amicus Curiae Of the Securities Industry and Financial Markets Association In Support Of Defendants-Appellants complies with the type-volume limitations set forth in Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B)(i). This brief is written in Times New Roman fourteen-point typeface using MS Word 2007 word-processing software and contains 6,307 words.

Dated: April 3, 2012

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CERTIFICATE OF FILING AND SERVICE

I hereby certify, pursuant to Federal Rule of Appellate Procedure 25(c) and Second Circuit Rule 25.2 that on April 3, 2012, I caused the foregoing brief to be electronically filed with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. In addition, I caused a PDF version of this brief to be emailed to counsel for the parties at the follow e-mail addresses:

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