11-5229

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LISA PARISI, SHANNA ORLICH, H. CHRISTINE CHEN-OSTER,
Plaintiffs-Appellees,

v.

GOLDMAN, SACHS & CO., THE GOLDMAN SACHS GROUP, INC.,
Defendants-Appellants.

On Appeal from the U.S. District Court
for the Southern District of New York

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN, INC. IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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July 3, 2012

CORPORATE DISCLOSURE STATEMENT

Amicus Public Citizen, Inc., is a non-profit organization that has no parents, subsidiaries, or affiliates that have issued shares or debt securities to the public. Public Citizen advocates for the public interest on a range of issues, including public access to the civil justice system.

/s/ Scott L. Nelson
Scott L. Nelson

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INTEREST OF *AMICUS CURIAE*

Public Citizen, Inc., a national consumer advocacy organization founded in 1971, appears on behalf of its members before Congress, administrative agencies, and the courts on a wide range of issues and works toward enactment of laws protecting consumers, workers, and the general public. Public Citizen supports legislative efforts to reform mandatory arbitration because forced arbitration, which has become commonplace in employment and other agreements, deprives individuals of the chance to hold corporations accountable in court. At a minimum, however, an arbitration agreement should not require a worker to forgo, as a matter of law or in light of practical considerations attendant to arbitration, her statutory rights. A worker's ability to vindicate her rights is especially critical under statutes such as Title VII, which serve both a remedial and deterrent function in the public interest.

All parties have consented to the filing of this brief.[1]

[1] This brief was not authored in whole or in part by counsel for a party. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

BACKGROUND

Plaintiff Lisa Parisi, like all other employees protected by Title VII, has a federal statutory right to be free from sex-based discrimination in the workplace. 42 U.S.C. §§ 2000e-2; 2000e-5. An employer violates this right if it engages in a pattern or practice of discrimination that adversely affects employees, and employees who are victims of the pattern or practice are entitled to a Title VII remedy. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 875-76 (1984).

On behalf of themselves and a class of similarly-situated employees of Goldman Sachs, Ms. Parisi and two other named plaintiffs brought Title VII disparate treatment and other discrimination claims in the district court, alleging that Goldman Sachs engaged in a company-wide pattern and practice of discrimination against three classes of female employees, including Managing Directors. Joint Appendix (JA) 253.

Ms. Parisi, unlike the other two plaintiffs, had signed an employment agreement when she was promoted to Managing Director at the company. *See id.* 100-07. That agreement contained a provision saying that Ms. Parisi must arbitrate any claims arising out of her employment. *Id.* at 105. Goldman Sachs at the outset sought to compel arbitration of Ms. Parisi's claims. *Id.* at 97-98. The district court determined that Ms. Parisi's employment discrimination claims were covered by the terms of the agreement and therefore presumptively arbitrable. *See id.* at 177-

80. It also determined that the agreement was "silent with respect to class arbitration," *id.* at 183, and that, under *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), and New York contract law, Goldman Sachs could not be compelled to submit to class arbitration, JA 180-86.

The district court ultimately denied Goldman Sachs's motion to compel arbitration, however, because it determined that under case law in the Southern District of New York and the federal courts of appeals, Ms. Parisi could not obtain relief based on proof of a Title VII pattern-or-practice claim in an individual proceeding, but only as part of a class action. *Id.* at 167-68, 193-94, 314. The court therefore held that enforcing the arbitration agreement would impermissibly prevent Ms. Parisi from vindicating her Title VII rights. *Id.* at 197, 199-200.

SUMMARY OF ARGUMENT

This case presents the question whether a mandatory employment arbitration agreement precluding class arbitration is enforceable under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, if a worker subject to the agreement asserts a Title VII "pattern-or-practice" claim of disparate treatment that can be brought only on behalf of a class. The district court held that such an agreement is unenforceable because it does not ensure that the worker can effectively vindicate her federal statutory right under Title VII to be free of sex discrimination in the workplace.

The district court's decision follows from the firmly established principle that arbitration agreements may not waive or prevent effective vindication of substantive rights under federal law, for three reasons. First, a Title VII claim that invokes the pattern-or-practice method of proof is distinct from an individual disparate treatment claim based on isolated incidents of discrimination. The pattern-or-practice framework provides a plaintiff an entitlement to recovery based on a different evidentiary showing and a different allocation of burdens of proof than apply to an individual disparate treatment claim.

Second, a substantial body of case law holds that Ms. Parisi cannot, as a matter of law, pursue her Title VII claim on a pattern-or-practice basis as an individual; she must do so, if at all, on behalf or as part of a class. Yet under the arbitration agreement, she cannot proceed in arbitration on behalf or as part of a class. As a result, if the case law precluding pattern-or-practice claims outside of a class action is correct, an arbitrator applying Title VII law could not simultaneously obey the district court's ruling that the arbitration agreement does not permit a class proceeding and entertain a pattern-or-practice claim.

Third, by precluding use of the pattern-or-practice framework, enforcing the arbitration clause would effectively prevent Ms. Parisi from recovering under circumstances where she would be entitled to relief under Title VII. The district court correctly held that the agreement prevents Ms. Parisi from effectively

vindicating her rights under Title VII through use of the pattern-or-practice framework and, therefore, is unenforceable under the FAA in a pattern-or-practice case.

ARGUMENT

An employee may generally waive her right to a judicial forum for the resolution of a statutory discrimination claim by signing an arbitration agreement. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265-66 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *see also Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999) (Title VII claims). Through that waiver, a plaintiff submits to the claim's "resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *accord Gilmer*, 500 U.S. at 26. However, she "does not forgo the substantive rights afforded by the statute." *Mitsubishi*, 473 U.S. at 628. Under the federal substantive law that governs arbitrability, an arbitration agreement that prevents a prospective litigant from effectively vindicating her federal statutory rights is unenforceable. *See In re Am. Express Merchants' Litig.*, 667 F.3d 204, 214 (2d Cir. 2012) (*Amex III*) (citing *Mitsubishi*, 473 U.S. at 632); *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 126 (2d Cir. 2010). Because the arbitration agreement in this case effects such

an outcome with respect to Ms. Parisi's Title VII pattern-or-practice claim, it is likewise unenforceable in a pattern-or-practice case.

I. Title VII Entitles a Plaintiff to Relief upon Proof of the Elements of a Claim Using the Pattern-or-Practice Framework.

Title VII prohibits both individual and widespread acts of intentional discrimination by providing a cause of action for disparate treatment on the basis of membership in a protected class, including sex. *See* 42 U.S.C. §§ 2000e-2, 2000e-5. Allegations involving group-wide discrimination are called "pattern-or-practice" disparate treatment claims. *See Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 157 n.3 (2d Cir. 2001). The method of proof and the manner in which burdens are allocated for a pattern-or-practice claim are unique, differing fundamentally from the analogous mechanism—commonly called the *McDonnell Douglas* standard—applicable to allegations of individual acts of discrimination. Those differences are critical to the issue presented in this appeal.

Although disparate treatment claims alleging only individual instances of discrimination may be proved by direct evidence that a decisionmaker intentionally discriminated against the plaintiff, they are generally analyzed using the familiar *McDonnell Douglas* standard, under which a plaintiff establishes a *prima facie* case of discrimination "by demonstrating that: (1) she is a member of a protected class; (2) her job performance was satisfactory; (3) she suffered adverse employment action; and (4) the action occurred under conditions giving rise to an

inference of discrimination." *Demoret v. Zegarelli*, 451 F.3d 140, 151 (2d Cir. 2006) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). After the plaintiff makes this initial case, "a presumption arises that the employer unlawfully discriminated against the employee." *Dister v. Cont'l Group, Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988) (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)). That is, the establishment of a *prima facie* case "'produces a required conclusion [of discrimination] in the absence of explanation.'" *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 446 (2d Cir. 1999) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993)).

If a plaintiff establishes a *prima facie* case, "the burden shifts to the defendant employer to provide a legitimate, non-discriminatory reason for the action" to rebut the presumption. *Demoret*, 451 F.3d at 151. If the defendant carries this burden of production by presenting evidence of a non-discriminatory rationale, "the presumption drops out of the case." *Dister*, 859 F.2d at 1112. The plaintiff must then bear the burden of "prov[ing] discrimination, for example, by showing that the employer's proffered reason is pretextual." *Demoret*, 451 F.3d at 151. Although the burden of production shifts under the *McDonnell Douglas* standard, the burden of persuasion remains with the plaintiff at all times. *Vivenzio v. City of Syracuse*, 611 F.3d 98, 106 (2d Cir. 2010). In sum, the essence of the inquiry in an individual case applying *McDonnell Douglas* "is the reason for a

particular employment decision," *Cooper*, 467 U.S. at 876, as evaluated based on evidence of the adverse employment action, the identity of the plaintiff, the plaintiff's qualifications or job performance, and the employer's motivations.

Unlike individual disparate treatment claims analyzed under *McDonnell Douglas*, "[p]attern-or-practice disparate treatment claims focus on allegations of widespread acts of intentional discrimination against individuals." *Robinson*, 267 F.3d at 158. "To succeed on a pattern-or-practice claim, plaintiffs must prove more than sporadic acts of discrimination; rather, they must establish that intentional discrimination was the defendant's 'standard operating procedure.'" *Id.* (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977)).

Pattern-or-practice cases are typically litigated in two phases. In the first phase, plaintiffs must make a *prima facie* showing of the existence of a discriminatory pattern or practice, usually through statistical evidence. *Id.* at 158 & n.5. At that point, the burden of production shifts to the employer to present evidence that the plaintiffs' "'proof is either inaccurate or insignificant.'" *Id.* at 159 (quoting *Teamsters*, 431 U.S. at 360). If an employer comes forward with such evidence, the plaintiffs must prove "by a preponderance of the evidence that the defendant engaged in a pattern or practice of intentional discrimination." *Id.* If they do so, the court may award class-wide relief. *Id.*; *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 n.7 (2011) (stating that a plaintiff's showing of a

pattern or practice "will justify 'an award of prospective relief,' such as 'an injunctive order against the continuation of the discriminatory practice'" (quoting *Teamsters*, 431 U.S. at 361)). Accordingly, plaintiffs in a class may obtain injunctive relief forbidding the use of a discriminatory pattern or practice without showing that each plaintiff suffered an adverse employment action and without proof relating to individual employees' qualifications for or job performance in particular positions.

In the second stage of a pattern-or-practice case, in which class members seek back pay, front pay, and compensatory damages, class members benefit from "a presumption in their favor 'that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of th[e] [discriminatory] policy.'" *Robinson*, 267 F.3d at 159 (quoting *Teamsters*, 431 U.S. at 362); *see also Wal-Mart*, 131 S. Ct. at 2552 n.7 (stating that proof of a pattern or practice "will support a rebuttable inference that all class members were victims of the discriminatory practice"). Critically, this Court has stated that the presumption "substantially lessen[s] each class member's 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. Instead of having to carry the ultimate burden of persuasion with respect to the reasons for individual

employment decisions as under the *McDonnell Douglas* test, each class member in the second stage "need only show that he or she suffered an adverse employment decision 'and therefore was a potential victim of the proved [class-wide] discrimination.'" *Id.* (quoting *Teamsters*, 431 U.S. at 362). Unlike in the burden-shifting method used in individual disparate treatment cases, "[t]he burden of *persuasion* then shifts to the employer to demonstrate that the individual was subjected to the adverse employment decision for lawful reasons." *Id.* at 159-60 (emphasis added) (internal quotation marks and alterations omitted).

In sum, proof of a claim using the pattern-or-practice framework differs significantly from proof of an individual claim using the *McDonnell Douglas* standard. The two ways of proving disparate treatment differ as to *what* must be proved, *how* it may be proved, and *who* bears the burden of proof to establish an individual employee's entitlement to relief.

II. Prevailing Judicial Authority Holds that Title VII Plaintiffs May Pursue Claims Using the Pattern-or-Practice Framework Only Through Class Proceedings.

Under prevailing federal case law, Ms. Parisi cannot pursue her Title VII pattern-or-practice claim as an individual plaintiff. Federal district courts in the Southern District of New York uniformly bar such suits.[2] Although this Court has

[2] *See United States v. City of New York*, 631 F. Supp. 2d 419, 427 (S.D.N.Y. 2009); *Alvarado v. Metro. Transp. Auth.*, No. 07-3561, 2012 WL 1132143, at *15 (S.D.N.Y. Mar. 30, 2012); *Marrow v. Potter*, No. 06-13681, 2010 WL 6334856, at

not directly addressed the issue, it has noted pointedly that the pattern-or-practice method of proof was developed for class actions and that authorities on employment law have stated flatly that it may not be used in individual actions. *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 711 (2d Cir. 1998).[3] Moreover, existing appellate authority outside this circuit is unanimously in accord with the Southern District of New York: At least six circuits have held that individual Title VII plaintiffs cannot bring a pattern-or-practice claim.[4]

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*7 (S.D.N.Y. May 27, 2010), *report and recommendation adopted*, No. 06-13681, 2011 WL 1118687, at *1 (S.D.N.Y. Mar. 24, 2011); *Garrett v. Mazza*, No. 97-9148, 2010 WL 653489, at *11 n.8 (S.D.N.Y. Feb. 22, 2010); *McManamon v. City of New York Dep't of Corr.*, No. 07-10575, 2009 WL 2972633, at *5 n.3 (S.D.N.Y. Sept. 16, 2009); *Rambarran v. Mount Sinai Hosp.*, No. 06-5109, 2008 WL 850478, at *8-*9 (S.D.N.Y. Mar. 28, 2008) (Section 1981 claim); *see also Tucker v. Gonzales*, No. 03-3106, 2005 WL 2385844, at *4 (S.D.N.Y. Sept. 27, 2005) (casting doubt on whether plaintiff could bring a pattern-or-practice claim as an individual); *Blake v. Bronx Lebanon Hosp. Ctr.*, No. 02-3827, 2003 WL 21910867, at *5 (S.D.N.Y. Aug. 11, 2003) (same with regard to Section 1981 claim).

[3] Some courts have read *Brown* to hold that individual plaintiffs cannot bring pattern-or-practice claims. *See, e.g.*, *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 575 (6th Cir. 2004). In fact, however, *Brown* holds that even assuming an individual could bring a private, non-class pattern-or-practice claim, the plaintiff in that case had not adequately pleaded a *prima facie* claim. *See Brown*, 163 F.3d at 711-12.

[4] *See Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 967-69 & n.24 (11th Cir. 2008); *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 575 (6th Cir. 2004); *Celestine v. Petroleos de Venez. SA*, 266 F.3d 343, 356 & n.4 (5th Cir. 2001); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 760-61 (4th Cir. 1998), *judgment vacated on other grounds*, 527 U.S. 1031 (1999); *Gilty v. Village of Oak Park*, 919 F.2d 1247, 1252 (7th Cir. 1990); *Semsroth v. City of Wichita*, 304 F. App'x 707, 716-18 (10th Cir. Dec. 22, 2008); *see also Craik v. Minn. State Univ.*

Thus, enforcing an arbitration agreement that does not permit class proceedings would, under the prevailing federal case law construing Title VII, preclude Ms. Parisi, as a matter of law, from pursuing her Title VII claim under the pattern-or-practice framework. Goldman Sachs's speculation that the arbitrator might not follow the prevailing law on this point, *see* Brief of Defendants-Appellants at 30-31, is irrelevant.[5] If, as the federal courts routinely hold, Title VII does not permit a pattern-or-practice claim to be brought in an individual action, the plain effect of the arbitration agreement is to preclude such a claim in an arbitration that does not allow use of the class mechanism.

III. Preclusion of Ms. Parisi's Pattern-or-Practice Claim Would Prevent Her from Effectively Vindicating Her Title VII Rights.

Because the Federal Arbitration Act does not authorize enforcement of agreements in which parties "forgo … substantive rights," *Mitsubishi*, 473 U.S. at

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Bd., 731 F.2d 465, 467-71 (8th Cir. 1984) (distinguishing, in a case involving a class claim, between *McDonnell Douglas* and pattern-or-practice methods of proof on the basis of whether the plaintiffs assert individual or class claims).

[5] Attempting to create uncertainty on this point, Goldman Sachs points to *Tucker v. Gonzales*, No. 03-3106, 2005 WL 2385844, at *4 (S.D.N.Y. Sept. 27, 2005), and asserts that a refusal "to permit 'pattern or practice' evidence [in an individual case] has not been a uniform rule even in court proceedings." Brief for Appellant at 30. *Tucker* did not hold that a plaintiff could bring an individual pattern-or-practice claim, but only concluded that such a claim, *if permissible*, need not be separately pleaded from a general disparate treatment cause of action. *Id.* at *5. Moreover, *Tucker* itself cast doubt on whether such a claim would be permissible. *Id.* at *4 (collecting cases).

628, arbitration is a permissible vehicle for resolving federal statutory claims "only 'so long as the prospective litigant may *effectively* vindicate its statutory cause of action in the arbitral forum.'" *Amex III*, 667 F.3d at 214 (quoting *Mitsubishi*, 473 U.S. at 632). Precluding Ms. Parisi from bringing a pattern-or-practice claim in her individual capacity would prevent her from effectively vindicating her right to be free from sex discrimination under Title VII. For this reason, the arbitration agreement is unenforceable. *See id.*

Goldman Sachs argues that Ms. Parisi can fully vindicate her statutory rights under Title VII in arbitration, likening the pattern-or-practice framework to a mere "procedural mechanism," not a substantive right, and in particular, not a free-standing cause of action under Title VII. Brief for Defendants-Appellants at 25-26 (emphasis omitted); *see also id.* at 28. It also contends that this is not "a case in which an arbitration procedure is alleged to be inconsistent with a particular individual's ability to vindicate her rights." *Id.* at 38.

Goldman Sachs is incorrect. An arbitration agreement that waives a substantive aspect of a statutory right, such as the right to a form of legally required relief, is unenforceable. It need not altogether foreclose a cause of action or statutory claim. This Court, therefore, need not determine that a pattern-or-practice allegation is a distinct cause of action under Title VII to determine that it is necessary to the effective vindication of Ms. Parisi's rights. Rather, it is

sufficient for the Court to determine that the pattern-or-practice framework bears the hallmarks of substantive law and therefore cannot be waived by an arbitration agreement. In the alternative, even if the pattern-or-practice framework's method of proof and allocation of burdens were "merely" procedural, this case is one in which the absence of such procedure in arbitration would interfere with a plaintiff's ability *effectively* to vindicate her federal statutory rights.

A. An arbitration agreement that waives a substantive aspect of Title VII or other statutes, such as the right to a form of legally required relief, is unenforceable. *See Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n.14 (5th Cir. 2003) (holding provision in an arbitration clause barring punitive and exemplary damages in Title VII cases unenforceable); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (declining to enforce arbitration clause that purported to exclude claims for damages and equitable relief under Title VII because "[w]hen an arbitration clause has provisions that defeat the remedial purpose of the statute … the arbitration clause is not enforceable"); *see also Kristian v. Comcast Corp.*, 446 F.3d 25, 47-48 (1st Cir. 2006) (holding unenforceable a provision in an arbitration clause barring antitrust claims for treble damages).

Ms. Parisi argues that a pattern-or-practice allegation is properly recognized as a distinct type of Title VII claim or theory of liability under the statute. Brief for

Plaintiffs-Appellees at 19-24. But regardless of whether a claim using the pattern-or-practice framework is a distinct cause of action or, as Goldman Sachs asserts, "merely" an alternative way of proving the same claim, this Court has never held that a plaintiff must show that arbitration would directly foreclose a cause of action as a matter of law before finding that arbitration would preclude her from effectively vindicating her federal statutory rights. *Amex III*, for example, held unenforceable an arbitration provision prohibiting class arbitration where it would be "financially impossible" for plaintiffs to arbitrate their federal antitrust claims on an individual basis. 667 F.3d at 219. The Court did not suggest that the plaintiffs could not, as a matter of law, bring any antitrust claim. And in *Ragone v. Atlantic Video at the Manhattan Center*, this Court stated that an arbitration provision limiting Title VII's statute of limitations to 90 days and providing fee awards to a prevailing party "would significantly diminish a litigant's rights under Title VII" if enforced. 595 F.3d at 126. The Court cautioned that had the defendant not waived enforcement of these provisions, the plaintiff might have been "able to demonstrate that the[] provisions were incompatible with her ability to pursue her Title VII claims in arbitration, and therefore void under the FAA." *Id.* In *Ragone*, as in *Amex III*, the Court's decision did not hinge on whether the arbitration agreement directly barred a particular cause of action under the statute. As a result, this Court need not conclude that a pattern-or-practice allegation is a distinct cause

of action under Title VII to determine that it is crucial to the effective vindication of Ms. Parisi's statutory rights.

B. The pattern-or-practice framework, while it has procedural elements, is substantive in that it defines the showing that entitles a plaintiff to relief. Under the framework, a plaintiff can obtain injunctive relief if she can demonstrate by a preponderance of the evidence that her employer maintained a discriminatory pattern or practice. *Robinson*, 267 F.3d at 159. The same is not true under the *McDonnell Douglas* framework, which requires individualized evidence of a plaintiff's qualifications. Moreover, in a pattern-or-practice case, after a plaintiff demonstrates in the second phase of litigation that she was subject to an adverse employment action, she is entitled to a rebuttable presumption that she was a victim of discrimination. *Id.* This presumption has the effect of "substantially lessen[ing] each class member's evidentiary burden" as compared to the *McDonnell Douglas* standard. *Id.*

Thus, by foreclosing a class proceeding, the sole mechanism by which Ms. Parisi can make use of the pattern-or-practice framework, Ms. Parisi's arbitration agreement prevents her from obtaining relief under an evidentiary showing that—in a court—would entitle her to relief. In this respect, then, the arbitration agreement would have the effect of changing, to Ms. Parisi's disadvantage, the *substantive* law applicable to her Title VII claims.

Moreover, Goldman Sachs's assertion that the pattern-or-practice framework is procedural in nature elides the role that the framework plays in substantive anti-discrimination law. Because the framework is tailored to address claims of discrimination that violate Title VII's substantive prohibitions, courts have recognized that other anti-discrimination laws with similar substantive effect permit use of a pattern-or-practice framework. *See, e.g.*, *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1108 (10th Cir. 2001) (ADEA claims); *Gavalik v. Cont'l Can Co.*, 812 F.2d 834, 857 (3d Cir. 1987) (ERISA discrimination claims); *Payne v. Travenol Labs., Inc.*, 673 F.2d 798, 818 (5th Cir. 1982) (Section 1981 claims). However, because the framework used in Title VII cases is tailored specifically to the nature of Title VII's substantive elements, courts do not necessarily import the Title VII pattern-or-practice framework into all such statutes. In *Hohider v. United Parcel Service, Inc.*, for example, the Third Circuit held that a showing of a pattern or practice in the initial stage of class litigation under the Americans with Disabilities Act (ADA) was insufficient to warrant class-wide liability and relief. 574 F.3d 169, 189-90 (3d Cir. 2009). It reasoned that, because the ADA incorporates into its definition of discrimination a finding that class members are "qualified individuals" under the statute, plaintiffs would have to prove such qualifications in the first phase of litigating a pattern-or-practice claim, which is not required in Title VII cases using the *Teamsters* framework. *Id.*

The pattern-or-practice framework, like the *McDonnell Douglas* standard, also furthers Title VII's substantive goal of rooting out discrimination, further supporting the conclusion that it is itself substantive. Both the pattern-or-practice framework and the *McDonnell Douglas* standard were developed for Title VII disparate treatment cases to reflect the difficulties of finding direct evidence of and proving discrimination. "[A] *prima facie* case under *McDonnell Douglas* raises an inference of discrimination only because we presume [an employer's] acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978); *cf. Bourbon v. Kmart Corp.*, 223 F.3d 469, 475 (7th Cir. 2000) (Posner, J., concurring) (stating that for purposes of applying the *Erie* doctrine, the traditional *McDonnell Douglas* framework is "tailored for and limited to discrimination cases," and thus "is part of the law of discrimination, which is substantive"). Likewise, under the pattern-or-practice framework, a plaintiff can create an inference of a discriminatory pattern or practice using indirect evidence—typically statistical in nature—based on the assumption that an imbalance disfavoring protected groups, unless otherwise explained by the employer, "is often a telltale sign of purposeful discrimination." *Teamsters*, 431 U.S. at 339 n.20. Both approaches, then, are inextricably linked to Title VII's substantive aims.

In short, the pattern-or-practice framework is closely entwined with and effectively defines Ms. Parisi's substantive rights under Title VII. Because the arbitration agreement in this case prevents Ms. Parisi from obtaining relief to which she is entitled upon proof of a pattern-or-practice violation, it is likewise unenforceable.

C. Even if the pattern-or-practice framework were considered merely procedural and somehow separable from Ms. Parisi's substantive entitlement to obtain relief for a proved violation of Title VII, the unavailability of class proceedings in which the pattern-or-practice method of proving a claim could be employed would render the arbitration provision unenforceable in this case.

This Court has signaled that arbitration terms commonly perceived as regulating "procedural" mechanisms may nevertheless hinder a plaintiff's ability to effectively vindicate her statutory rights. Thus, in *Guyden v. Aetna, Inc.*, this Court recognized in a federal whistleblower case that "courts generally treat arguments relating to discovery provisions as procedural in nature," but stated that an arbitration provision limiting discovery to one deposition "raise[d] serious questions about whether [the plaintiff could] 'effectively … vindicate her statutory cause of action in the arbitral forum.'" 544 F.3d 376, 386 (2d Cir. 2008) (quoting *Mitsubishi*, 473 U.S. at 637) (additional internal quotation marks omitted). The Court's ultimate holding that the provision was enforceable hinged in part on the

arbitrator's ability—set forth in the arbitration agreement—to order additional discovery where necessary for a plaintiff to have a meaningful opportunity to present her claim. *Id.*; *see also Brooks v. Travelers Ins. Co.*, 297 F.3d 167, 169-70 (2d Cir. 2002) (suggesting that an arbitration clause limiting the number of days allotted for hearings might prevent a plaintiff from vindicating her statutory rights but dismissing appeal after defendant agreed not to seek to compel arbitration).

In this case, the arbitration agreement blocks one of two routine routes by which plaintiffs prove a claim of disparate treatment. Whereas a worker could permissibly assert both an individual claim under *McDonnell Douglas* and (as a member of a class) a pattern-or-practice claim under *Teamsters* in court, Ms. Parisi can assert just one in arbitration. By so limiting Ms. Parisi's options at the outset, regardless of whether those options are deemed procedural, the arbitration agreement frustrates the effective vindication of Ms. Parisi's Title VII rights and is, as a consequence, unenforceable under the FAA.

* * *

Unless this Court holds that Title VII's pattern-or-practice framework may be employed by individual plaintiffs, the arbitration clause of Ms. Parisi's employment contract, by disallowing class proceedings, will prevent her from obtaining relief for a Title VII violation in arbitration under circumstances where she would be entitled to relief in court if she were permitted to participate in a class

action. Because arbitration agreements under the FAA are enforceable only to the extent they permit the relief to which a plaintiff is entitled under federal law, the arbitration clause may not be enforced against Ms. Parisi if it would prohibit her from obtaining relief on proof that would suffice to make out a Title VII claim in court.

CONCLUSION

For the foregoing reasons, the district court's decision denying Goldman Sachs's motion to compel arbitration should be affirmed.

July 3, 2012

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d). The brief is composed in a 14-point proportional type-face, Times New Roman. As calculated by my word processing software (Microsoft Word), the brief (exclusive of those parts permitted to be excluded under the Federal Rules of Appellate Procedure) contains 4,921 words.

/s/ Scott L. Nelson
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