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The Future of Class-Action Waivers in Consumer Contract Arbitration Agreements after *DIRECTV, Inc. v. Imburgia*

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— Comment —

THE FUTURE OF CLASS-ACTION
WAIVERS IN CONSUMER CONTRACT
ARBITRATION AGREEMENTS AFTER
DIRECTV, INC. v. IMBURGIA

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INTRODUCTION

James Pendergast wanted to contest \$20 worth of roaming fees that Sprint had charged him, as these charges were incurred from calls in his own home.¹ Pendergast filed a class action on behalf of Sprint customers who had noticed the same issue only to learn, when his suit was thrown out of a Miami court, that Sprint included an arbitration clause in its form.² Pendergast was like many consumers who have no idea they agreed to arbitrate all disputes, as well as waive a right to join any actions, when entering into these types of “take it or leave it” contracts.³ In this situation, Pendergast’s lawyer advised him that

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1. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<https://perma.cc/CPZ8-6TFQ>].
 2. *Id.*
 3. See Arbitration Agreements, 81 Fed. Reg. 32830 (proposed May 24, 2016) (to be codified at 12 C.F.R. pt. 1240) (prohibiting credit card issuers from including mandatory arbitration clauses as a tactic to prevent class-action lawsuits). The Bureau of Consumer Financial Protection conducted a study in which it found that “[w]hen asked if they could participate in class-action lawsuits against their credit card issuer, more than half of the respondents whose contracts had pre-dispute arbitration agreements thought they could participate (56.7 percent).” *Id.* at 32843. The same study analyzed

winning would require expensive expert analysis, which Pendergast could not risk in arbitration, absent joining a class.⁴ Consequently, Pendergast declined to pursue any action to recover the \$20, and Sprint was not held to account for its inconsistent roaming charges in the Miami market.⁵

Consumer advocates have long argued that the ability to bring class actions in arbitration is essential to guarding against such corporate malfeasance.⁶ Thus, some have noted, with undisguised horror, that with the *DIRECTV, Inc. v. Imburgia*⁷ decision, the Supreme Court has seemingly put the final nail in the class-arbitration coffin, first constructed with the Court's *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*⁸ holding in 2010.⁹ A close examination of the *DIRECTV* opinion, however, suggests that the Court was more concerned with the California court's blatant disregard of the *AT&T Mobility v. Concepcion*¹⁰ holding than in broadening an anti-class arbitration policy.¹¹ Indeed, in looking closely at the *Concepcion* line of

arbitration contracts throughout the financial services market and found that "85 percent to 100 percent of the contracts with arbitration agreements—covering over 99 percent of market share subject to arbitration in the six product markets studied—included such no-class-arbitration provisions." *Id.* at 32842.

4. Silver-Greenberg & Gebeloff, *supra* note 1.
5. *Id.*
6. See Ellen Meriwether, *The Fiftieth Anniversary of the Rule 23 Amendments: Are Class Actions on the Precipice?*, 30 ANTITRUST 23, 24 (2016) (noting that "the choice is not between a class case and an individual action but between a class action and no action at all").
7. 136 S. Ct. 463 (2015).
8. 559 U.S. 662 (2010).
9. *Id.* at 687 (holding that imposing class arbitration on parties who have not agreed is inconsistent with the Federal Arbitration Act); see Imre S. Szalai, *DIRECTV, Inc. v. Imburgia: How the Supreme Court Used a Jedi Mind Trick to Turn Arbitration Law Upside Down*, 32 OHIO ST. J. ON DISP. RESOL. (forthcoming 2016) (manuscript at 2) (arguing that the "Court in *DIRECTV* reached a new low, a result so extreme and 'dangerous,' . . . [that the] decision turns arbitration law completely upside down"); see also Silver-Greenberg & Gebeloff, *supra* note 1 (quoting the Honorable William G. Young as saying that "business has a good chance of opting out of the legal system altogether and misbehaving without reproach").
10. 563 U.S. 333 (2011).
11. See Greg Klass, *First Do No Harm: The DIRECTV v. Imburgia Decision*, NEW PRIV. L. BLOG (Dec. 15, 2015), <https://blogs.harvard.edu/nplblog/2015/12/15/first-do-no-harm-the-directv-v-imburgia-decision-greg-klass/> [<https://perma.cc/A3YR-V4GM>] (arguing that, even though the Court came to the wrong decision, Justice Breyer's opinion did not adopt *DIRECTV*'s

cases, the *DIRECTV* holding is far more narrow than most commentary would suggest.

Furthermore, the Consumer Financial Protection Board (“CFPB”), acting under the Congressional mandate provided by section 1028(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, proposed a set of rules that would prohibit financial service providers from putting class action waivers in certain consumer agreements.¹² Some corporate lawyers are reacting with horror at the promulgation of these rules, and multiple legal challenges are likely.¹³ Although it is uncertain what a new Court might rule after the 2016 election and subsequent appointment of a 9th justice, the current iteration of the Court is more closely aligned in favor of allowing class-arbitrations than the lopsided *DIRECTV* majority would otherwise suggest. That balance is unlikely to shift, even if the Senate confirms a candidate in the mold of the late Justice Scalia, as seems likely at the time of publication.¹⁴ This Comment, therefore, posits that the Court could uphold the new CFPB rules against class action waivers, despite the 6–3 *DIRECTV* decision.¹⁵

argument for a presumption in favor of arbitration and did not create new law).

12. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 1028(b), 124 Stat. 1376, 2004 (2010) (codified in 12 U.S.C. 5518) (“The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.”).
13. See Jessica Silver-Greenberg & Michael Corkery, *Rule on Arbitration Would Restore Right to Sue Banks*, N.Y. TIMES (May 5, 2016), <http://www.nytimes.com/2016/05/05/business/dealbook/consumer-agency-moves-to-assert-bank-customers-right-to-sue.html> [<https://perma.cc/E69U-5TPQ>] (quoting Alan S. Kaplinsky as saying that “[i]t’s going to spell the end of arbitration”); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 629 (2012) (characterizing legal challenges to CFPB regulations as “inevitable”).
14. The Honorable Neil M. Gorsuch is President Trump’s nominee, and is likely to be confirmed. In a recent tribute to the late Justice Scalia, Gorsuch spoke at length of Scalia’s influence on his own approach to the judiciary. See Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 906 (2016).
15. “Pro-arbitration” is in quotation marks because, despite the Court’s avowed favor towards arbitration, this Comment will discuss the overwhelming scholarly opinion which persuasively argues that the Court’s recent rulings fail to display a clear understanding of arbitration in practice.

In making that determination, Part I of this Comment will briefly examine the history of arbitration agreements and class-action waivers in consumer adhesion contracts. Part II will discuss how the *Stolz-Nielson* line of cases, culminating in *DIRECTV*, have led to an apparent inability of consumers to circumvent class action waivers. Finally, Part III will briefly consider the likely future of such waivers in adhesion contracts, in light of the CFPB rules limiting class action waivers and arbitration clauses in certain financial services contracts.

I. ARBITRATION AND CLASS ACTIONS

A. *The Federal Arbitration Act (“FAA”) and Consumer Contracts*

In 1925, Congress enacted the precursor to what is now known as the FAA, in order to enforce commercial arbitral agreements in front of a hostile judiciary.¹⁶ As codified into law, the enforcement scope of the FAA is limited to “[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction.”¹⁷ This § 2 enforcement clause is the “heart of the FAA” which served to overcome judicial hostility to arbitration.¹⁸ It did so by putting arbitration clauses on *equal footing* with other contract law, as Congress intended when it enacted the statute.¹⁹ In the 1980s, however, the Court shifted from an “equal footing” to a “pro-arbitration” stance, when it stated that “[i]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration.”²⁰ This judicial shift towards “pro-arbitration”—in opposition to Congress’ explicit intention to create “equal footing”²¹—marked the beginning of a series of cases

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16. The FAA was called the U.S. Arbitration Act when President Calvin Coolidge signed it into law in 1925. It was renamed the Federal Arbitration Act in 1947, when it was reenacted. See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L. J. 2804, 2861–62 (2015) (explaining the origin and constitutionality of the FAA).
 17. 9 U.S.C. § 2 (2012).
 18. Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 92 (2012).
 19. *Id.* at 93 (quoting H.R. REP. NO. 68-96, at 1–2 (1924); S. REP. NO. 68-536, at 2–3 (1924)).
 20. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (adopting both a pro-arbitration stance, as well as broadening the application of the FAA to preempt state law).
 21. See 9 U.S.C. § 2 (2012) (requiring enforcement of arbitration clauses); H.R. REP. NO. 68-96, at 1–2 (“An arbitration agreement is placed upon the same footing as other contracts, where it belongs.”).

where the Court misapplied the FAA when addressing the issue of class arbitration.²²

Congress certainly intended the FAA to facilitate arbitration between merchants and other parties with equal bargaining power, but did not express such an intention for the FAA to be applicable to adhesion contracts.²³ In fact, the legislative record indicates that Congress was concerned with that very possibility. In a lengthy exchange, members of Congress discussed the danger that employers and corporations could use the FAA to impose mandatory arbitration in contracts where the other party did not have equal bargaining power, and explicitly stated that the FAA would not allow that to occur.²⁴ Since Congress'

22. See Gary Born & Claudio Salas, *The United States Supreme Court and Class Arbitration: A Tragedy of Errors*, 2012 J. DISP. RESOL. 21, 21 (2012) (“[T]he U.S. Supreme Court has issued a series of confusing and, at times, confused opinions on class arbitration.”).

23. See *id.* at 26 (noting the differences between traditional arbitration disputes and those involving adhesion contracts); see, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 25 (1984) (O’Connor, J., dissenting) (“One rarely finds a legislative history as unambiguous as the FAA’s.”).

24. An exchange between a member of a sub-committee of the Senate Commission on the Judiciary and witness, over what eventually became the FAA, makes this concern over adhesion contracts clear:

Mr. W. H. H. PIATT: . . . It is not intended that this shall be an act referring to labor disputes at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it.

Senator WALSH of Montana: The trouble about the matter is that a great many of these contracts that are entered into are really not voluntary things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it . . . Either you can make that contract or you can not make any contract. It is the same with a good many contracts of employment. A man says “These are our terms. All right, take it or leave it.” Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

Mr. PIATT: That would be the case in that kind of a case, I think; but it is not the intention of this bill to cover insurance cases.

Mr. PIATT: . . . I would say I would not favor any kind of legislation that would permit the forcing of a man to sign that kind of contract . . .

Senator WALSH of Montana: You can see where they are not really voluntary contracts, in a strict sense.

Mr. PIATT: I think that ought to be protested against, because it is the primary end of this contract that it is a contract between merchants one with another, buying and selling goods . . .

enactment of the FAA, however, the judiciary has held that “both employment and consumer contracts constitute ‘commerce’ within the meaning of the FAA.”²⁵ Nonetheless, until the 1980s, the Court did not consider arbitration agreements “operative when parties had significantly different bargaining powers.”²⁶ For example, in *Wilko v. Swan*,²⁷ the Court unanimously recognized that “the right to select the ‘forum’ even after the creation of a liability is a ‘substantial right’ and that the agreement, restricting that choice, would thwart the express purpose of the [federal] statute.”²⁸ Thus, the Court recognized Congress’s concern over the significant risk to consumers incurred by imposing mandatory arbitration in adhesion contracts.

In a series of holdings throughout the 1980s, however, the Court gradually abandoned the *Wilko* Court’s concerns over unequal bargaining power between parties to an arbitration agreement and parties’ statutory right to legal recourse. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,²⁹ the Court allowed for the arbitrability of antitrust claims under the Sherman Act. There, the Court held that there is no “presumption against arbitration of statutory claims . . . [nor] any reason to depart from the federal policy favoring arbitration where a party bound by an arbitration agreement raises claims founded on statutory rights.”³⁰ In *Shearson/American Express, Inc. v. McMahon*,³¹ the Court upheld the arbitrability of the Racketeer Influenced and Corrupt Organizations Act (RICO) and Securities Exchange Act claims by finding that the FAA requires the courts to rigorously enforce arbitration agreements and that “the burden is on

Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Comm. on the Judiciary, 67th Cong. 9–10 (1923) (statement of W. H. H. Piatt).

25. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 309 (2nd ed. 2014).
26. Resnik, *supra* note 16, at 2862 (citing *Wilko v. Swan*, 346 U.S. 427, 435 (1953) (“While a buyer and seller . . . under some circumstances[] may deal at arm’s length on equal terms, it is clear that the Securities Act was drafted with an eye to the disadvantages under which buyers labor.”)). *See also* *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 265 (1949) (finding that “contracts limiting the choice of venue are void as conflicting with the [Federal Employers’] Liability Act”).
27. 346 U.S. 427 (1953).
28. *Id.* at 438.
29. 473 U.S. 614 (1985).
30. *Id.* at 615.
31. 482 U.S. 220 (1987).

the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.”³² Finally, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,³³ the Court ruled that claims under the Securities Act were arbitrable, even absent express consent.³⁴ Thus, the Court gradually moved away from the notion of express consent, despite it being a central tenet of the practice of arbitration.³⁵

B. The Emergence of Class Actions in Arbitration

As the Court began enforcing mandatory arbitration in adhesion contracts, arbitration clauses became well-nigh ubiquitous.³⁶ Corporations now use them in a variety of contexts, ranging from consumer purchases, financial services to nursing home contracts. These form contracts are “provided to the consumer on a take-it-or-leave-it-

32. *Id.* at 226–27.

33. 490 U.S. 477 (1989).

34. *Id.* at 480–81 (overruling *Wilko* and its “steadily eroded” view toward arbitration). *See also* *Southland Corp. v. Keating*, 465 U.S. 1, 16 (holding that the FAA supersedes state law). *Southland* also marked the beginning of unrestrained criticism of the Court’s rulings on arbitration, with Justice O’Connor’s blistering dissent: “Today’s decision is unfaithful to congressional intent, unnecessary, and, in light of the FAA’s antecedents and the intervening contraction of federal power, inexplicable.” *Id.* at 36 (O’Connor, J., dissenting).

35. Scholar Gary Born has noted that, regardless of what the parties choose to call their forum, it is “necessary to examine the substance of a dispute resolution provision to determine, objectively, whether it constitutes an agreement to arbitrate under applicable law.” GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE § 1.01A (2012). Born then goes on to state that “[w]ith some variations, virtually all authorities accept that arbitration is—and only is—a process by which parties *consensually submit* a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording each party an opportunity to present its case.” *Id.* (emphasis added).

36. These clauses are generally considered mandatory because “they do not allow the consumer a means by which to opt out of the clause, and they become effective upon use or purchase.” Kristina A. Del Vecchio, *Consumer Class Claims and Arbitration: Between a Rock and a Hard Place*, BANKING & FIN. SERVS. POL’Y REP., Oct. 2014, at 1. In addition, the CFPB found that, other than payday and private student loan agreements, most financial consumer contracts did not contain an “opt-out” provision, and the ones that did generally require all authorized users to sign and mail a document to the company, within a specific time. Arbitration Agreements, 81 Fed. Reg. 32830, 32842 (proposed May 24, 2016) (to be codified at 12 C.F.R. pt. 1240). Even if the company included an opt-out provision, most consumers are unaware of that option. *Id.* at 32843.

basis,” which terms become operable at the point of purchase.³⁷ Within twenty years of the Court overturning *Wilko*, arbitration clauses had even become common in employment contracts. A 2007 survey found that 46.8% of 757 responding companies used employment arbitration, up from only 4 out of 107 in 1991.³⁸ This explosion of mandatory arbitration clauses in contracts between parties with unequal bargaining power thus fulfilled the very misgivings expressed by members of Congress in the legislative record of 1924.³⁹

Section 2 of the FAA clearly requires party consent in order for an arbitration agreement to be binding, and the Court has continually underlined consent as an integral aspect of enforcing arbitration.⁴⁰ Courts, however, generally look only to the terms of the agreement in determining whether such consent is present.⁴¹ Even though many consumers may be completely unaware that they have relinquished their rights to jury trials when accepting an adhesion contract, it is highly unlikely that a court would refuse to enforce an arbitration agreement on grounds of unconscionability.⁴² In fact, the Supreme Court has not found, in any case, that “arbitration [is] inadequate, inaccessible, or ineffective to vindicate rights.”⁴³

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37. Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUSTON L. REV. 1237, 1247 (2001).
38. Mark D. Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91, 95–96 (2014).
39. Arbitration Agreements, 81 Fed. Reg. 32835–36.
40. 9 U.S.C. § 2 (2012). See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (“[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.”).
41. See *Vernon v. Qwest Comm’ns Int’l, Inc.*, 925 F. Supp. 2d 1185 (D. Colo. 2013) (enforcing an arbitration clause and class action waiver contained in a provider’s terms and conditions, even though the customers never signed the agreement, nor were provided paper copies of such); Alderman, *supra* note 37, at 1249 n.47 (citing numerous examples of the court finding consumer consent to adhesion contracts).
42. In its study, the CFPB found that “[w]hen asked if they could participate in class action lawsuits against their credit card issuer, more than half of the respondents whose contracts had pre-dispute arbitration agreements thought they could participate (56.7 percent).” Arbitration Agreements, 81 Fed. Reg. 32843.
43. Resnik, *supra* note 16, at 2886; see, e.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 80 (2000) (syllabus) (holding that an “agreement to arbitrate is not rendered unenforceable simply because it says nothing about arbitration costs, and thus fails to provide her protection from potentially substantial costs of pursuing her federal statutory claims in the arbitral forum”). The Court also “rejected generalized attacks on arbitration that rest

Despite the Court's advocacy, it is not clear whether informed parties necessarily prefer forgoing their rights to litigation in favor of the efficiency of arbitration. A recent comparative study of consumer and nonconsumer contracts used by large public corporations showed that while over seventy-five percent of the consumer contracts included arbitration clauses, only six percent of the corporations' nonemployment, nonconsumer contracts included mandatory arbitration.⁴⁴ This data led the authors of the study to surmise, rather plausibly, that "the frequent use of arbitration clauses in the same firms' consumer contracts may be an effort to preclude aggregate consumer action rather than, as often claimed, an effort to promote fair and efficient dispute resolution."⁴⁵ The disparity between the use of arbitration clauses in adhesion contracts, and the lack of such in negotiated contracts between parties with equal bargaining power also suggests that corporations may not prefer efficiency against the risk of forgoing the right to litigation for themselves.⁴⁶

In its shift away from the unanimous *Wilko* Court's concerns over consent, the Court has focused on the avowed "simplicity, informality . . . of arbitration" and its "streamlined proceedings and expeditious results . . . [which] cause[s] parties to agree to arbitrate their disputes."⁴⁷ In agreeing to arbitration, a party waives "a wide range of procedural rights and protections that it would otherwise be entitled to claim in a

on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law.'" *Id.* at 89–90 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989)).

44. Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REFORM 871, 882–83 (2008).
45. *Id.* at 871.
46. See Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 335 (2007) (noting that "[l]ittle evidence was found to support the proposition that [public companies that filed contracts with the SEC] routinely regard arbitration clauses as efficient or otherwise desirable contract terms"). However, in discussing this study, scholars Drahozal and Ware caution against reading too large an inference from its results "[b]ecause the litigation process receives government subsidies, sophisticated parties can be expected to agree to arbitrate only when arbitration has a large cost (or other) advantage over litigation." Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 435 (2010).
47. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 633 (1985).

judicial proceeding.”⁴⁸ Proponents argue that this efficacy leads to lower costs for consumers, since the cost of individual disputes is limited by fewer procedural and evidentiary rules, and “is less disruptive of ongoing and future business dealings among the parties.”⁴⁹

Arbitration can certainly be less costly in addressing complex or large disputes, as the parties agree to eschew extensive discovery and evidentiary rules, as well as appellate review, while also relying on robust enforcement mechanisms.⁵⁰ Enforcing arbitration clauses in adhesion contracts, however, can significantly raise the cost of proceedings for consumers. These clauses often preclude access, absent the consent of the corporation, to the small claims court that would otherwise be best suited for the small sums typically under dispute.⁵¹ In addition, many arbitration clauses allow for cost-shifting, so a consumer may

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48. Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District at 22, *Discover Bank v. John Szetela*, 537 U.S. 1226 (2003) (denying cert.) (No. 02-829), 2002 WL 32133742, at *22.
49. Michael Hoenig & Linda M. Brown, *Arbitration and Class Action Waivers Under Concepcion: Reason and Reasonableness Deflect Strident Attacks*, 68 ARK. L. REV. 669, 679 (2015) (quoting H.R. REP. NO. 97-542, at 3 (1982)). At the same time, the Court has also held that efficiency is not necessarily the goal of enforcing arbitration agreements. In *Dean Witter Reynolds Inc. v. Byrd*, the Court held that “[w]hen arbitrable and non-arbitrable claims arise out of the same transaction” courts must enforce motions to compel arbitration, “even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.” 470 U.S. 213, 216–17 (1985).
50. It should also be noted that this Comment is concerned with binding arbitration clauses in domestic contracts, as distinct from such clauses in international commercial contracts. In international contracts, sophisticated parties do generally prefer binding arbitration, as such clauses prevent forum shopping and provide much greater certainty of enforcement than a foreign jurisdiction would. See *Drahozal & Ware*, *supra* note 46, at 341 (showing that sophisticated parties prefer not to arbitrate domestic issues).
51. Alderman, *supra* note 37, at 1250 (comparing the typical price of \$100 in total to access small claims court, versus a possible \$1000 daily cost of using an arbitrator). The CFPB study analyzed the difference in procedural costs and “noted that the fee for filing a case in Federal court is \$350 plus a \$50 administrative fee—paid by the party filing suit, regardless of the amount being sought—and the fee for a small claims filing in Philadelphia Municipal Court ranges from \$63 to \$112.38. In arbitration, under the AAA consumer fee schedule that took effect March 1, 2013, the consumer pays a \$200 administrative fee, regardless of the amount of the claim and regardless of the party that filed the claim; in JAMS arbitrations, when a consumer initiates arbitration against the company, the consumer is required to pay a \$250 fee.” *Arbitration Agreements*, 81 Fed. Reg. 32844. However, the CFPB found in its study that “most of the arbitration agreements contained a . . . ‘carve-out,’ permitting either the consumer or both parties to file suit in small claims court.” *Id.* at 32842.

potentially bear the risk of the full cost of an unsuccessful dispute in arbitration.⁵² As the “mass production of arbitration clauses” has become an integral aspect of consumer transactions, consumer advocates point to these costs and risks of mandatory arbitration as a significantly troubling aspect of form contracts.⁵³ It is certainly true that class actions do not easily adapt to the “fast and efficient” nature of commercial arbitration, but as noted earlier, requiring a party to submit to arbitration, absent clear and unambiguous consent, is also not consistent with the practice of arbitration. Nor is it consistent with Congress’ clear intent in passing the FAA.⁵⁴ Because the Supreme Court has essentially elided over the latter issue, both plaintiff and defendant lawyers continue to extensively litigate the former.⁵⁵

One way plaintiff lawyers fought back against mandatory arbitration was by initiating class arbitration disputes.⁵⁶ Consumer advocates argued that it was an effective way to mitigate the expense of arbitration, as well as the risk of cost shifting. At the same time, such action could hold corporations accountable, even when the damage to each consumer might have been minimal, as when Sprint allegedly wrongly charged roaming fees in the Miami market.⁵⁷ While aggregation is not specifically forbidden, the FAA is silent on the issue. In practice, parties adopt class action procedures available in litigation, with the significant difference that in arbitration, class membership is limited to “those governed by similar arbitration agreements.”⁵⁸

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52. “The Study found that many arbitration agreements permit the arbitrator to reallocate arbitration fees from one party to the other. About one-third of credit card arbitration agreements, one-fourth of checking account arbitration agreements, and half of payday loan arbitration agreements expressly permitted the arbitrator to shift arbitration costs to the consumer.” *Id.* at 32842.
53. *See generally* Resnik, *supra* note 16 (discussing the diffusion of consumer rights as the Supreme Court gradually moved to enforce arbitration and class waiver clauses in consumer and employee contracts).
54. *See supra* note 24.
55. *See* Born & Salas, *supra* note 22, at 34 (discussing the Supreme Court’s decision in *Stolt-Nielsen*, which found that class arbitration agreements require clear indication that parties agreed to class arbitration).
56. *Id.* at 21–22 (recounting the development of class arbitration).
57. *See* Silver-Greenberg & Gebeloff, *supra* note 1 (explaining the impediment of arbitration clauses in a consumer lawsuit against Sprint). “The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.” *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 476 (2015) (Ginsburg, J., dissenting) (quoting *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (2004)).
58. Francisco Blavi & Gonzalo Vial, *Class Actions in International Commercial Arbitration*, 39 *FORDHAM INT’L L.J.* 791, 794 (2016).

In *Southland Corp. v. Keating*,⁵⁹ the Court first considered the question of “whether arbitration under the federal Act is impaired when a class-action structure is imposed on the process by the state courts.”⁶⁰ Although the Court noted it was an issue of first impression, it held that the question of class arbitration had not been contested on federal grounds, and was for California to decide in this instance.⁶¹ Class arbitration continued as a niche practice, however, largely confined to California courts, until the Supreme Court decided *Green Tree Financial Corp. v. Bazzle*⁶² in 2003.⁶³ In that case, arising out of South Carolina, the Court determined that if the arbitration agreement did not “clearly preclude class action” the appointed arbitrator would determine whether to certify the class as the FAA “did not foreclose class action.”⁶⁴ Corporations sought to push back against the post-*Green Tree* explosion of class arbitrations by inserting explicit class action waivers in all mandatory arbitration clauses.⁶⁵ In response, California courts began to invalidate such waivers on public policy grounds.⁶⁶ In 2005, the California Supreme Court stepped into the fray and held that state courts could find a class action waiver to be unconscionable “when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.”⁶⁷ This so-called *Discover Bank* rule for unconscionability was affirmed by the 9th Circuit, and lower courts began to find class action waivers to be invalid under this unconscionability test.⁶⁸

59. 465 U.S. 1 (1983).

60. *Id.* at 3.

61. *See* Born & Salas, *supra* note 22, at 24 (explaining how the Supreme Court reached its decision in *Southland*).

62. 539 U.S. 444 (2003).

63. *See* Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J. L. REFORM 813, 835 (2008) (discussing the rise of class arbitration following the Supreme Court’s decision in *Green Tree*).

64. *Green Tree Fin. Corp.*, 539 U.S. at 444 (syllabus).

65. *See* Drahozal, *supra* note 63, at 838 (illustrating the amount of class action waivers in arbitration clauses).

66. The California Court of Appeal refused to enforce a credit card class action waiver on the grounds that “it violates public policy by granting Discover a ‘get out of jail free’ card while compromising important consumer rights.” *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101 (2002).

67. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005).

68. *See* *Ting v. AT&T*, 319 F.3d 1126, 1149 (9th Cir. 2003) (stating that “[w]here an arbitration agreement is concerned, the agreement is

While consumer plaintiffs lawyers saw the unconscionability test as a winning argument, corporate entities were determined to abrogate California courts' public policy reasoning against class-action waivers.⁶⁹ In his petition to the Supreme Court on behalf of Discover Bank, future Chief Justice Roberts argued that *Szetela v. Discover* was in direct conflict with the "Court's cases emphasizing the Act's 'central purpose' of enforcing arbitration agreements 'according to their terms.'"⁷⁰ Furthermore, he argued that "state laws in conflict with the Act's strong policy in favor of arbitration must give way . . . [as] the Court of Appeal's couching its ruling on 'unconscionability' grounds [does not] blunt the Arbitration Act's preemptive force."⁷¹ The Court declined to accept the Discover petition, however, and the subsequent *Discover Bank* unconscionability rule remained unchallenged for a few years.

After Roberts ascended to the Court as Chief Justice in 2005, however, advocates renewed their push to strengthen corporations' ability to impose class-action waivers.⁷² It is against this backdrop that the Roberts Court has issued a series of rulings, starting with *Stoltz-Nielson* in 2010 and culminating with *DIRECTV* in 2015, that have severely curtailed consumers' ability to bring class-actions under mandatory arbitration clauses.

II. THE DISAPPEARANCE OF CLASS-ARBITRATION

In 2010, the Court accepted *Stoltz-Nielson*. As in *Bazzle*, the corporation was challenging an arbitral class-action award where the arbitration clause was silent on the issue of class aggregation. This time however, the outcome was decidedly different. Justice Alito, writing for the majority, determined that the issue was "ripe for judicial review"

unconscionable unless the arbitration remedy contains a 'modicum of bilaterality') (citation omitted); Josephine Lee, *California Consumer Contracts After AT&T Mobility v. Concepcion*, 15 U.C. DAVIS BUS. L.J. 219, 221 (2014) (acknowledging that after *Discover Bank*, lower courts began applying an unconscionability test and finding class arbitration waivers invalid). *But see* Alan S. Kaplinsky & Mark J. Levin, *The Gold Rush of 2002: California Courts Lure Plaintiffs' Lawyers (but Undermine Federal Arbitration Act) by Refusing to Enforce "No-Class Action" Clauses in Consumer Arbitration Agreements*, 58 BUS. LAW. 1289, 1290–91 (2003) (noting that state courts often find "no-class action clauses" to be *not* unconscionable in federal arbitration law).

69. *See Szetela*, 97 Cal. App. 4th at 1096 (holding that a credit card class action waiver was unconscionable and unenforceable).
70. Petition for Writ of Certiorari, *supra* note 48, at 21.
71. *Id.* at 5, 12.
72. Silver-Greenberg & Gebeloff, *supra* note 1 (investigating a "coalition of credit card companies and retailers" that moved to "block class actions").

and held that “[i]mposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the Federal Arbitration Act (FAA).”⁷³ In holding that class actions could *only* be allowed when explicitly permitted by the arbitration clause, the Court “substantially undercut both the Court’s earlier decision in *Bazzle* and the burgeoning growth of class arbitrations.”⁷⁴ In her dissent, Justice Ginsburg, joined by Justices Breyer and Stevens, dryly noted that the issue was in fact not ripe for judicial review, and that the Court was substituting its judgment for that of experienced arbitrators.⁷⁵

Stoltz-Nielson limited consumers’ ability to bring class actions when the arbitration agreement was silent on the issue, but courts still had discretion to apply the *Discover Bank* unconscionability rule. In 2011, a coalition of credit card companies and retailers presented a case that was carefully selected to knock out courts’ ability to refuse to enforce class-action waivers under public policy objections.⁷⁶ In accepting *AT&T Mobility v. Concepcion*, the Court had the opportunity to address the public policy exceptions Chief Justice Roberts had argued against on behalf of Discover Bank in 2002. Justice Scalia wrote the plurality opinion (Justice Thomas wrote a separate concurring opinion) in which the Court upended the *Discover Bank* rule “as an obstacle to the accomplishment of the FAA’s objectives.”⁷⁷ In holding that the

73. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 663 (2010).

74. *Born & Salas*, *supra* note 22, at 22.

75. *Stolt-Nielsen S.A.*, 559 U.S. at 688 (Ginsburg, J., dissenting) (Justice Sotomayor took no part in the proceedings). An ongoing critique of the Court’s ruling is that the Court failed to understand the sophisticated nature of arbitration. *See Born & Salas*, *supra* note 22, at 39–42 (discussing the Court’s failure to consider various nuances of arbitration proceedings).

76. In its investigation, the New York Times found that AT&T followed a specific strategy in its arbitration clause in order to “try to tempt the Supreme Court to wade into the fray.” Silver-Greenberg & Gebeloff, *supra* note 1. This strategy was to include (unusually) consumer-friendly provisions in its arbitration clause, such as denying AT&T reimbursement of its attorney’s fees, and requiring AT&T to pay a \$7,500 minimum and claimant’s attorney fees, if the customer received an arbitration award greater than AT&T’s last written settlement offer. *AT&T Mobility v. Concepcion*, 563 U.S. 333, 338 (2011). *See Hoenic & Brown*, *supra* note 49, at 671 (providing an overview of *Discover Bank v. Superior Court*); *Arbitration Agreements*, 81 Fed. Reg. 32842 (noting that “a significant share of arbitration agreements across almost all markets did not address attorney’s fees”).

77. *Concepcion*, 563 U.S. at 343. Justice Thomas concurred with the ruling, but on the grounds that § 2 of the FAA requires “enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake.” *Id.* at 355 (Thomas, J., concurring).

FAA preempted the *Discover Bank* rule, Justice Scalia reasoned that Congress never intended the FAA to encompass class arbitration, since class arbitration “requires procedural formality” that Congress likely did not want an arbitrator to define.⁷⁸ Although Born and Salas note that the result of *Concepcion* was likely correct, they expressed concern that with Scalia’s “misconceived and dangerous” reasoning that the FAA only encompasses arbitration as it was practiced in 1924, the Court “abandoned the conception of ‘arbitration’ . . . as a process for resolving a wide variety of disputes, using an equally wide range of procedures, depending on the parties’ individual needs and objectives.”⁷⁹

In contrast, Justice Breyer’s dissent in *Concepcion*, in which he was joined by Justices Ginsburg, Sotomayor, and Kagan, took issue with Scalia’s narrow reading of the purpose of the FAA. Justice Breyer contended that the *Discover Bank* rule fell directly within the Act’s § 2 savings clause, and was therefore “consistent with the basic ‘purpose behind’ the act . . . [which is to] ‘ensur[e] judicial enforcement’ of arbitration agreements” that are valid and enforceable.⁸⁰ Justice Breyer noted that the FAA permits courts to refuse to enforce arbitration agreements on grounds that exist “for the revocation of *any* contract.”⁸¹ He thereby disagreed with the majority that allowing state courts to enforce contract law against arbitration did not, *per se*, impinge on the purpose of the FAA, and further, that Congress did not intend to guarantee certain particular procedural advantages, as Scalia argued. Instead, the Court’s focus should have been on the Act’s *stated* objective, which “was to secure the ‘enforcement’ of agreements to arbitrate,” regardless of the agreed-upon procedure.⁸² As such, Justice Breyer argued that class actions were “consistent with the use of arbitration,”⁸³ as the decisive factor was that “California law sets forth certain circumstances in which ‘class action waivers’ in *any* contract are unenforceable.”⁸⁴ Therefore, the California law met the FAA’s requirement that arbitration be treated *equally* as other contract law. With the narrow majority *Concepcion* ruling, however, the Court

78. *Concepcion*, 563 U.S. at 349.

79. Born & Salas, *supra* note 22, at 22; *see Concepcion*, 563 U.S. at 350 (discussing weaknesses of arbitration as a dispute resolution process).

80. *Concepcion*, 563 U.S. at 359 (Breyer, J., dissenting) (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985)).

81. *Id.* at 357 (quoting 9 U.S.C. § 2 (2012)) (emphasis added).

82. *Id.* at 360.

83. *Id.* at 362.

84. *Id.* at 357.

delivered a decisive blow against allowing class actions into arbitration.⁸⁵

Given Justice Breyer's careful discussion of the purpose of the FAA and its savings clause in his *Concepcion* dissent, commentators noted with surprise that he wrote the majority opinion in *DIRECTV*, which served to uphold *Concepcion*.⁸⁶ Most of that commentary suggests that Breyer's opinion indicates that any attempt to protect class arbitration is now doomed before the Supreme Court.⁸⁷ A closer analysis, however, suggests that Breyer was more concerned about the California Court of Appeal's clear attempt to circumvent the recent *Concepcion* holding, than in further structuring class-arbitration. Furthermore, Breyer's opinion is consistent with his *Concepcion* dissent in that he argued in both cases that California courts must treat an arbitration clause the same way as they would treat any other contract.

DIRECTV v. Imburgia arose from a dispute over the company's service agreement, which included a mandatory arbitration clause with a class action waiver.⁸⁸ The waiver included language "that if the 'law of your state' makes the waiver . . . unenforceable, then the entire

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85. In addition to forestalling class actions on contractual and unconscionability grounds with *Stoltz-Nielson* and *Concepcion*, a plurality of the Court ruled in 2013 that courts cannot invalidate a contractual class waiver when the plaintiff's cost of individually arbitrating a federal statutory claim might preclude a vindication of federal statutory rights. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309–12 (2013) (Thomas, J., concurring; Kagan, Breyer, and Ginsburg, JJ., dissenting; Sotomayor, J., recused herself as she served on the 2nd Circuit Court of Appeals Panel that ruled in favor of the plaintiffs).
86. See Ellen Meriwether, *The Fiftieth Anniversary of the Rule 23 Amendments: Are Class Actions on the Precipice?*, 30 ANTITRUST MAGAZINE 23 (2016) (noting that without Justice Scalia, the Supreme Court may reach a different conclusion concerning the appropriateness of class action bans in arbitration agreements); Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1593 (2016) (criticizing Supreme Court Justices for not joining Justice Ginsburg's dissent in *DIRECTV*); Ronald Mann, *Opinion Analysis: Justices Rebuke California Courts (Again) for Refusal to Enforce Arbitration Agreement*, SCOTUSBLOG (Dec. 14, 2015, 2:08 PM), <http://www.scotusblog.com/2015/12/opinion-analysis-justices-rebuke-california-courts-again-for-refusal-to-enforce-arbitration-agreement/> [https://perma.cc/M32B-CNVK] (suggesting that the lower court's attempt to avoid *Concepcion* in *DIRECTV* may have swayed Breyer to change his position).
87. See Meriwether, *supra* note 86 (explaining that the Roberts Court continuously rejected arguments "that class action bans in arbitration agreements violated state public policy"); Szalai, *supra* note 9, at 2 (arguing "that the Court's *DIRECTV* decision turns arbitration law completely upside down").
88. *DIRECTV v. Imburgia*, 136 S. Ct. 462, 464 (2015).

arbitration provision ‘is unenforceable.’”⁸⁹ When, in 2008, customers brought a class action in California state court against DIRECTV over early termination fees, DIRECTV sought to have the arbitration clause enforced,⁹⁰ but *Discover Bank* controlled, which rendered DIRECTV’s arbitration agreement unenforceable under California law.⁹¹ By 2011, however, the *Concepcion* ruling had overturned the *Discover Bank* rule. Nonetheless, in 2012, the Court of Appeals held that “the law of California would find the . . . waiver unenforceable.”⁹² The California court reasoned that the clause the parties agreed to referred to “the law of your state without considering the preemptive effect, if any, of the FAA.”⁹³ In doing so, the court applied sections of California’s Consumers Legal Remedies Act (“CLRA”), instead of the *Discover Bank* rule, to render the class waiver unenforceable.⁹⁴ The Court of Appeals acknowledged that the relevant sections of the CLRA embodied the *Discover Bank* rule, and thus would be preempted under federal law.⁹⁵ The court, however, “reasoned that just as the parties were free in their contracts to refer to the laws of different States or different nations, so too were they free to refer to California law *as it would have been* without this Court’s holding invalidating the *Discover Bank* rule.”⁹⁶ Finally, the California court found that “the law of your state” was a specific provision that governed the general arbitration provision, and that the phrase was ambiguous and should therefore be constructed against the drafter.⁹⁷

The California court’s attempt to narrow the *Concepcion* holding by allowing parties a valid choice of invalid law is what Justice Breyer seemed most concerned about in writing for the majority. The Justice began his commentary by noting that California courts are bound by *Concepcion*, and stating that “[l]ower court judges are certainly free to note their disagreement with a decision of this Court. But the ‘Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to

89. *Id.* at 466 (citation omitted).

90. *Id.*

91. *Imburgia v. DIRECTV, Inc.*, No. BC398295, 2012 WL 7657788 (Cal. Super. Ct. Feb. 26, 2012).

92. *DIRECTV*, 136 S. Ct. at 467.

93. *Imburgia v. DIRECTV, Inc.*, 225 Cal. App. 4th 338, 344 (2014).

94. *Id.* at 342.

95. *Id.* at 344.

96. *DIRECTV*, 136 S. Ct. at 467 (emphasis added).

97. *Id.*

recognize the superior authority of its source.”⁹⁸ In particular, Justice Breyer noted that “the view that state law retains independent force even after it has been authoritatively invalidated by this Court is one courts are unlikely . . . to apply in other contexts.”⁹⁹ At the same time, the Court acknowledged that “California courts are the ultimate authority on [California contract] law” but only if their decisions “rest[] upon ‘grounds as exist at law or in equity for the revocation of any contract.’”¹⁰⁰ The California court’s distinction, where parties can choose to be bound by invalid law, did not put “arbitration contracts ‘on equal footing with all other contracts’” and therefore did not “give ‘due regard . . . to the federal policy favoring arbitration.’”¹⁰¹ Because the California courts reached a conclusion on contract interpretation that would only be applicable to arbitration, the Court found the Court of Appeal’s interpretation discriminatory toward arbitration, and thus preempted by the FAA.¹⁰² This is entirely consistent with Breyer’s *Concepcion* dissent, where he argued that class arbitration should be allowed when treated the same as any other contract.¹⁰³

After presenting the Court’s opinion that the “California courts would not interpret contracts other than arbitration contracts the same way,” Justice Breyer helpfully labeled the reasons 1–6 as to why the Court reached that holding.¹⁰⁴ Three of the reasons focused on federal supremacy, as outlined above. The other three focused on the fact that the clause was not ambiguous, and that California courts would not have reached the same interpretation in cases not involving arbitration. Therefore, the Court held that California’s application of the “antidrafter canon” was not appropriate in this case.¹⁰⁵

It is interesting to note that in the oral arguments, Chief Justice Roberts also did not seem troubled by the California court’s contention that the contract was ambiguous. Instead, he obliquely referred back to the argument he raised on behalf of Discover Bank, that courts are generally obliged to enforce a strong pro-arbitration policy.¹⁰⁶ The Chief

98. *Id.* at 468 (quoting *Howlett v. Rose*, 496 U.S. 356, 357 (1990)).

99. *Id.* at 470.

100. *Id.* at 468 (quoting 9 U.S.C. § 2 (2012)).

101. *Id.* at 471 (citations omitted).

102. *Id.*

103. *AT&T Mobility v. Concepcion*, 563 U.S. 333, 357 (2011).

104. *DIRECTV*, 136 S. Ct. at 469–71.

105. *Id.* at 465.

106. Petition for Writ of Certiorari, *supra* note 48, at 5.

Justice expressed a concern that the California court's ruling instead displayed an "unexpressed" hostility towards arbitration.¹⁰⁷

That focus on the California court's hostility to arbitration is reflected in the written opinion, where Justice Breyer seemed content to merely reaffirm the Court's "pro-arbitration" policy, as well as remind California courts of the Supremacy clause.¹⁰⁸ Indeed, as one commentator noted, Breyer's focus on "the law of your state" as unambiguous kept the Court from creating even more problematic arbitration law.¹⁰⁹ If the Court had accepted that the clause was ambiguous, or accepted DIRECTV's argument that that the FAA "requires a presumption in favor of arbitration," that would have served to upend the *contra proferentem* rule in favor of the corporations who routinely draft these clauses.¹¹⁰ Justice Breyer chose instead to dismiss the California court's contention that the contract should be construed against the drafter, by stating that the term "the laws of your state" unambiguously refers to *valid* state law, and that California courts would not interpret that phrase to include invalid laws in "cases not involving arbitration."¹¹¹ Indeed, the Justice underscored the narrowness of the decision by declaring that the Court's holding went "no further than present well-established law."¹¹²

In her dissent, Justice Ginsburg took issue with the Court's assertion that this decision created no new law. Instead, she posited that the ruling was "a dangerous first" that interpreted the arbitration clause in favor of the drafter, in other words, upending the *contra proferentem* rule.¹¹³ As discussed above however, it seems clear that the holding was narrowly constructed to avoid doing just that. Nonetheless, Justice Ginsburg argued that the clause was unambiguously constructed in favor of the consumers, and was interpreted in favor of the drafters.

107. See Mann, *supra* note 86 (summarizing Justice Breyer's suggestion to lower courts to follow Supreme Court rulings and the Supremacy Clause). Chief Justice Roberts demonstrated his concern by asking "what could be more hostile to the FAA than to interpret a phrase that says nothing about the FAA to dispense with our holdings about . . . what the FAA has to say." Transcript of Oral Argument at 29, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) (No. 14-462).

108. *DIRECTV*, 136 S. Ct. at 467.

109. Klass, *supra* note 11.

110. *Id.* (explaining that the *contra proferentem* rule requires that an ambiguous clause be interpreted against the drafter, and that, had the Court ruled that the FAA requires an ambiguous clause to be interpreted in favor of arbitration, it would have set a dangerous precedent for contract law).

111. *DIRECTV*, 136 S. Ct. at 465.

112. *Id.* at 471.

113. *Id.* at 473 (Ginsburg, J., dissenting).

Yet, when written and originally agreed upon, the clause meant that the customer's "home state laws" govern the relationship and, therefore, the CLRA controlled contracts agreed upon in California.¹¹⁴ Justice Ginsburg sought to distinguish the applicability of the CLRA post-*Concepcion* by arguing that *Concepcion* "held only that a State cannot compel a party to engage in class arbitration when the controlling agreement unconditionally prohibits class procedures."¹¹⁵

Justice Ginsburg's dissent reads as a well-reasoned analysis of the Court's many misadventures with the FAA, especially in *AMEX* and *Concepcion*, that "deprive consumers of effective relief"—particularly concerning when the parties may not have consented to be bound.¹¹⁶ While a principled stand for consumers, the dissent does not squarely address the issue most troubling to the majority: the California Appellate Court sought to essentially ignore the *Concepcion* ruling by treating the arbitration clause differently than it would other contracts. This Comment posits that may be the likely reason that Justice Ginsburg's dissent only received the vote of Justice Sotomayor.¹¹⁷

As discussed above, it seems clear that the Court was more concerned about the California's imaginative use of "law of your state" to circumvent the Court's *Concepcion* holding than in reaffirming, or strengthening, class action waivers. Perhaps, therefore, the Justices simply did not view *DIRECTV* as the appropriate case to reverse its own rulings from just a few years earlier, rather than seizing the opportunity to turn "arbitration law completely upside down."¹¹⁸ This Comment suggests that the former is the likelier reason Justice Kagan, who wrote the dissent in *AMEX*, joined Justice Breyer, the author of the *Concepcion* dissent, in the *DIRECTV* opinion upholding *Concepcion*.¹¹⁹

Despite the hue and cry, therefore, the *DIRECTV* ruling may in fact mark the end of the Court's move to narrow consumer rights in contracts with "powerful economic enterprises," rather than marking

114. *Id.* at 473–75.

115. *Id.* at 473.

116. *Id.* at 476.

117. Justice Thomas also dissented from the majority, but did so on the grounds that the FAA does not apply to state court proceedings—a viewpoint that had not been seriously argued since *Southland*. See *Southland Corp. v. Keating*, 465 U.S. 1, 23 (1983) (O'Connor, J., dissenting) ("Congress intended to require federal, not state, courts to respect arbitration agreements.").

118. Szalai, *supra* note 9 (manuscript at 2).

119. See Klonoff, *supra* note 86, at 1593 (2016) (noting that a "particularly troubling feature of *DIRECTV*" is that Justices Kagan and Breyer "refused to read *Concepcion* narrowly" and did not join Justice Ginsburg's dissent).

the end of class-arbitration.¹²⁰ Indeed, one commentator suggested that “the outcome of *DIRECTV* should serve as a demarcation, a sort of tipping point, for consumer advocate groups.”¹²¹ This Comment posits that such a demarcation has already been created. In addition to not creating new law, the Court also did not publicly admonish the California Court of Appeal for its attempt to limit *Concepcion*, as it rebuked and summarily reversed the 6th Circuit in a *per curiam* opinion issued that same day.¹²² The absence of a “pointed rebuke” may very well signal that the Court is open to revisiting the issue of class action waivers in the near future.¹²³

Of course, such a shift may also depend on who will eventually replace the late Justice Scalia.¹²⁴ With the author of the narrow majorities in *Concepcion* and *AMEX* no longer on the bench, however, it may be that the Robert’s Court could very well reconsider its current “pro-arbitration” outlook, especially given the current and expected numerous challenges to the CFPB’s proposed rules on arbitration clauses and class waivers.

III. THE POSSIBLE REEMERGENCE OF CLASS ARBITRATION AFTER *DIRECTV*

The CFPB’s Congressional mandate includes the ability to conduct a comprehensive empirical study of the use of arbitration clauses, and subsequently propose rules to address relevant issues.¹²⁵ The CFPB

120. *DIRECTV*, 136 S. Ct. at 471 (Ginsburg, J., dissenting).

121. Angelica Sanchez Vega, *DIRECTV, Inc. v. Imburgia: Supreme Court Holds California Court’s Interpretation Preempted by Federal Arbitration Act*, 91 NOTRE DAME L. REV. ONLINE 70, 77 (2016).

122. *White v. Wheeler*, 136 S. Ct. 456, 458 (2015) (pointedly stating that the 6th Circuit, “despite the substantial deference it must accord to state-court rulings in federal habeas proceedings . . . contravene[d] controlling precedents from this Court, and it is now necessary to reverse the Court of Appeals by this summary disposition”).

123. See Mann, *supra* note 86 (suggesting that the majority’s opinion in *DIRECTV* was not as harsh as it seemed at first analysis, as the decision was not unanimous and the Court did not rebuke the 9th Circuit for “intransigence”).

124. Ellen Meriwether, *supra* note 86, at 27 (“[T]he future of modern Rule 23 may well depend on whether Scalia’s replacement shares similar views on the relative importance of the class action mechanism.”); Klonoff, *supra* note 86, at 1599 (“It is also possible that *Concepcion*, *American Express*, and *DIRECTV* could be judicially or legislatively overruled in the next decade as a result of changes in the composition of the Supreme Court or in the makeup of Congress.”).

125. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1028(a), 124 Stat. 1376, 2004 (2010) (codified at 12 U.S.C.

published its study on arbitration in 2015.¹²⁶ As discussed in Part II of this Comment, the study found significant issues with consumers' awareness that they were under binding arbitration, as well as few instances of consumers bringing arbitration disputes.¹²⁷ Therefore, the CFPB determined "that pre-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis."¹²⁸

Pursuant to its findings and mandate, the CFPB proposed rules limit the use of "pre-dispute arbitration agreements by covered providers of consumer financial products and services . . . [as] it would prohibit providers from using a pre-dispute arbitration agreement to block consumer class actions in court and would require providers to insert language into their arbitration agreements reflecting this limitation."¹²⁹ The public commenting period for these proposed rules ended on August 22, 2016.¹³⁰ At the time of publication it is unclear whether the rules have been affected by President Trump's recent executive orders.¹³¹ Furthermore, the Wells Fargo sham accounts scandal has thrust the issue of forced consumer arbitration back into national headlines.¹³² In response, Democratic law-makers have vowed action,

§ 5518) ("The Bureau shall conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services.").

126. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [<https://perma.cc/PH6L-BAZL>].
127. *See id.* at 11 (listing the study's empirical findings, as related to consumer understanding and awareness).
128. Arbitration Agreements, 81 Fed. Reg. at 32829.
129. *Id.* at 3–4.
130. Proposed Rule: Arbitration Agreements, CFPB, <http://www.consumerfinance.gov/policy-compliance/rulemaking/rules-under-development/arbitration-agreements/> [<https://perma.cc/NX23-F9GA>] (last visited Jan. 8, 2017).
131. *See* Alan S. Kaplinsky, *Trump Administration Issues Regulatory Freeze; Application to CFPB Uncertain*, CFPB MONITOR (Jan. 23, 2017), <https://www.cfpbmonitor.com/2017/01/23/trump-administration-issues-regulatory-freeze-application-to-cfpb-uncertain/> [<https://perma.cc/95PC-4QJ4>].
132. *See* Michael Corkery & Stacy Cowley, *Wells Fargo Killing Sham Accounts by Using Arbitration*, N.Y. TIMES (Dec. 6, 2016), <https://www.nytimes.com/2016/12/06/business/dealbook/wells-fargo-killing-sham-account-suits-by-using-arbitration.html> [<https://perma.cc/S7TS-HNJ3>] (describing the

thus affecting the political expediency of rescinding these consumer protections.¹³³ If unaffected, the rules on arbitration would essentially revive the California *Discover Bank* rule disallowing class action waivers, but on a national basis. Even if the rules go into force however, there is no doubt that they will be challenged.

Because the CFPB is a financial regulatory body, these rules are limited to financial services. Nevertheless, advocates who hope to expand prohibition against class aggregation waivers, were encouraged by the agency's action.¹³⁴ Furthermore, the Dodd-Frank Act also authorized the Securities and Exchange Commission to regulate arbitration agreements in contracts between consumers and securities broker-dealers or investment advisors when "in the public interest and for the protection of consumers."¹³⁵ Thus, Congress revisited the *Wilko* Court's concerns over allowing arbitration claims under the Securities Act. In addition, the Dodd-Frank Act prohibits arbitration agreements as part of mortgage loans, as well as in civil whistleblower retaliation actions.¹³⁶

bank's strategy to force affected customers into arbitration by arguing that the arbitration clauses customers agreed to when opening legitimate accounts also apply to sham accounts opened in their names).

133. See *Brown and Sherman Introduce Bill to Help Wells Fargo's Victims Get Their Day in Court*, SHERROD BROWN: SENATOR FOR OHIO (Dec. 1, 2016), <https://www.brown.senate.gov/newsroom/press/release/brown-and-sherman-introduce-bill-to-help-wells-fargos-victims-get-their-day-in-court> [<https://perma.cc/9256-2GVT>].

134. While encouraging, the passage of the Dodd-Frank Act in 2009 marked the end of Congressional action to reform arbitration. Multiple attempts by Democrats in the House and Senate to pass an Arbitration Fairness Act have failed since then. Furthermore, Donald Trump, the new Republican President, has pledged to essentially dismantle Dodd-Frank. The Republican House leadership is also calling for "replacing Dodd-Frank with new rules that ease up on . . . consumer protection laws." Billy House & Kevin Cirilli, *Trump's Dodd-Frank Plan Will Be Early Test of Republican Unity*, BLOOMBERG (May 19, 2016, 5:00 AM), <http://www.bloomberg.com/politics/articles/2016-05-19/trump-s-dodd-frank-plan-will-be-early-test-of-republican-unity> [<https://perma.cc/H5KD-KKFQ>]. The House leadership has also allowed "a Republican-backed provision to ban CFPB funding for regulating arbitration agreements" in its appropriations bill for the upcoming fiscal year. Yuka Hayashi, *CFPB's Arbitration Proposal Draws 13,000 Comments*, WALL ST. J. (Aug. 23, 2016, 4:12 PM), <http://www.wsj.com/articles/cfpbs-arbitration-proposal-draws-13-000-comments-1471983139> [<https://perma.cc/K6QF-JQYU>]. Thus, the future of the CFPB itself may rest on the outcome of the 2016 election, just as much its rules may rest on the as-yet unappointed 9th Justice.

135. 15 U.S.C. §§ 78o(o), 80b-5(f) (2012).

136. 15 U.S.C. §§ 1639c(e), 1514A(e) (2012) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.").

In each instance, the CFPB cites a public policy justification for banning class action waivers, which Justice Breyer noted in his *Concepcion* dissent was valid under the FAA savings clause.¹³⁷

As noted earlier, the future of class action waivers largely depends on who becomes the 9th Justice of the Supreme Court, as well as what transpires under the Trump administration. Nonetheless, Justices Ginsburg, Kagan, Sotomayor, and Breyer have all indicated that they take the issues of consumer consent and ability to vindicate rights as integral aspects of the FAA, and that class arbitration is an important avenue for protecting those rights.¹³⁸ Despite the lopsided *DIRECTV* decision, these four Justices could very well seek to uphold limitations on class-action waivers in future cases.¹³⁹

CONCLUSION

Commentators point to *DIRECTV* as a definitive showing of the Court's unwavering "pro-arbitration" stance at the expense of both consumers' rights to legal recourse, as well as basic tenets of contract law.¹⁴⁰ As Justice Ginsburg noted in her fiery dissent: "[T]his Court has again expanded the scope of the FAA, further degrading the rights of consumers and further insulating already powerful economic entities

137. See *AT&T Mobility v. Concepcion*, 563 U.S. 333, 357 (2011) (Breyer, J., dissenting) (asserting that the Court wrongly held "that the federal Act preempts the rule of state law" in that case).

138. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting) (arguing that "[t]he FAA conceived of arbitration as a 'method of resolving disputes'—a way of using tailored and streamlined procedures to facilitate redress of injuries In the hands of today's majority, arbitration threatens to become more nearly the opposite—a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability. The Court thus undermines the FAA no less than it does the Sherman Act and other federal statutes providing rights of action"); *Concepcion*, 563 U.S. at 333 (Breyer, J., dissenting) (describing the Act's purpose as "one of 'ensur[ing] judicial enforcement' of arbitration agreements"); *DIRECTV v. Imburgia*, 136 S. Ct. 462, 473 (2015) (Ginsburg, J., dissenting) (urging the enforcement of arbitration provisions in accordance with the terms of the contract, and emphasizing the importance of consent, not coercion).

139. It should be noted, however, that the Court could refuse to enforce the CFPB rules over questions of administrative power, which is beyond the scope of this Comment.

140. See Klonoff, *supra* note 86, at 1593 (discussing Justice Ginsburg's dissent in *DIRECTV* and characterizing her argument as "very credible and principled"); Szalai, *supra* note 9 (manuscript at 1–2) (commenting on the "defective" nature of *DIRECTV*).

from liability for unlawful acts.”¹⁴¹ However, *DIRECTV* seems more a culmination of the Court’s misunderstanding and misapplication of the FAA against consumers in adhesion contracts, than a further stricture on class-arbitration.¹⁴² Given the acknowledgement of such a disastrous history of applying the FAA by four Justices currently on the bench, along with the CFPB’s unambiguous Congressional mandate to regulate consumer contracts, it is just as likely that *DIRECTV* could be the last case to follow the *Stolz-Nielson* precedent of severely curtailing class arbitration.

The financial industry is decrying the CFPB rules as a “class action expansion” rule that ignores the benefits of arbitration, and would all but ensure its demise.¹⁴³ Far from spelling the “end of arbitration,” however, if the Court were to uphold the CFPB’s rules against class-action waivers, the effect could be instead to reinforce both public and corporate confidence in arbitration as an effective and equitable practice of private law that squarely rests on parties’ consent.¹⁴⁴ Practitioners and advocates can only hope that the Supreme Court will seek to correct its fundamental misunderstanding of arbitration and the FAA, as reflected in the *Stoltz-Nielson* line of cases. The likely challenges to the CFPB rules may provide the Court with an early opportunity to do just that, nearly 100 years after the FAA was ratified.

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141. *DIRECTV*, 136 S. Ct. at 478 (Ginsburg, J., dissenting).

142. Born & Salas, *supra* note 22, at 21 (stating that “the Court’s most recent decisions threaten to undermine U.S. arbitration law . . . their analysis badly misinterprets the Federal Arbitration Act (FAA) and misconceives the basic concept of ‘arbitration’ in the United States”).

143. Hayashi, *supra* note 134.

144. See Silver-Greenberg & Corkery, *supra* note 13 (discussing some problems with the arbitration system that the CFPB rules may address); see also Born & Salas, *supra* note 22, at 21 n.3 (discussing the impact of U.S. court decisions on international courts and legislatures).

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