Tilting the Scales of Justice: Conservatives' Multi-Front Assault on Access to the Courts

By Elisabeth M. Stein*

Introduction and Summary

Conservatives have been engaged in a long-term campaign to promote the agenda of business advocates to restrict individuals' access to the courts. In Congress, conservatives have repeatedly introduced legislation designed to substantially obstruct individuals' access to the courts when corporations and other powerful organizations violate their rights. In addition, conservatives have pursued this courthouse door-closing agenda in the federal courts, and, more obscurely but not insignificantly, before committees of the Federal Judicial Conference, which are appointed by the Chief Justice to develop amendments to the Federal Rules of Civil Procedure. At this juncture, business interests have already moved far along in achieving significant components of their agenda, both through legislation and Congressional lobbying as well as through strategic federal court litigation during the tenure of former Chief Justice William Rehnquist and current Chief Justice John Roberts.

Even when Congress tends strongly towards conservative interests guided by business advocates, as it does now in both chambers, progressives can successfully beat back anti-civil justice legislation. They did exactly that during the last budget battle by forcing the exclusion of Chamber-backed language aimed at blocking a pending Consumer Financial Protection Bureau (CFPB) rule barring the use of class action bans in arbitration clauses in consumer financial agreements.

This issue is even more crucial than ever as we contemplate the future and importance of the Court. It is unclear whether the Senate will act to fulfill its duty to advise and consent on President Obama's nominee to replace Justice Scalia on the Court.[1] Business advocates have signaled recognition of their dependence on his support, along with that of like-minded

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[1] Judith Schaeffer, *Senator McConnell's Partisan Supreme Court Smokescreen*, HUFFINGTON POST (last updated Feb. 14, 2016), http://www.huffingtonpost.com/judith-e-schaeffer/senator-mcconnells-partis_b_9231638.html; *see also* David H. Gans, *Republicans Who Block Obama's Supreme Court Pick are Violating the Constitution*, THE NEW REPUBLIC (Mar. 16, 2016), https://newrepublic.com/article/131700/republicans-block-obamas-supreme-court-pick-violating-constitution.

colleagues, to advance their agenda – hence, the potential impact of his successor on the Court's posture toward that agenda.[2]

The purpose of this Special Report is to provide analysis and background that will enable broader understanding of these multi-front court access narrowing efforts, their origins, purposes, provisions, and effects, so as to inform and strengthen advocacy across all these arenas. This Introduction and Summary sets out the essential findings, conclusions, and recommendations elaborated in the body of the paper. In the body, part I details the considerable efforts to restrict judicial enforcement in four areas: arbitration, class actions, lawsuit reform, and pleading standards. Each subsection considers the state of play of the specific issue before the institutional arenas in which the campaign is taking place as well as the ways that the campaigns and issue areas interact to mutually reinforce each other. Part II suggests proactive steps Congressional progressives can take by using the regular legislative calendar and process, actively engaging with the courts, including filing *amicus curiae* (friend of the court) briefs, and continuing to resist and spotlight efforts to cripple the CFPB, particularly now as the final CFPB arbitration rulemaking approaches. Such initiatives will allow progressives to underscore the way consumer remedies are being undermined and further the progressive agenda of preserving the judiciary's constitutional role as guarantor of justice for individuals and legal accountability for powerful interests.

A. The Conservative Agenda for Obstructing Individuals' Access to the Courts

The Constitution established, as a third and co-equal branch of government, an independent judiciary, insulated from political pressure by life tenure, where people can vindicate their rights prescribed by the Constitution and federal laws. In 1938, in furtherance of this ideal, the Federal Rules of Civil Procedure were promulgated to operationalize the Framers' constitutional vision for the courts. As succinctly reflected in Rule 1: The Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."[3] Yet, particularly in recent years, encouraged by business advocates, the modern Supreme Court and Congress have moved aggressively to nullify that vision. More specifically, the components of that access narrowing agenda include:

- Effectively immunizing corporations from judicial accountability for violations of virtually all consumer, worker, civil rights, and other individual protections – both federal and state – by misinterpreting the 1925 Federal Arbitration Act.

- Drastically curtailing class actions, in particular by the Catch-22 expansion of evidentiary barriers to class certification, to levels unattainable without extensive discovery

[2] Joshua Jamerson and Brent Kendall, *Scalia's Vacancy Could Leave Companies At A Loss,* WALL STREET JOURNAL, February 26, 2016, http://www.wsj.com/articles/dow-chemical-settles-lawsuit-citing-supreme-court-position-after-scalias-death-1456491317.

[3] FED. R. CIV. P. 1.

that is permissible only after certification is granted as well as other efforts to undermine the class action vehicle.

- Blocking access to the courts for injured individuals under the guise of deceptively packaged "lawsuit reform."

- Raising pleading standards that define the legal sufficiency of complaints, in similar Catch-22 fashion, to require evidence and knowledge controlled by the defendant, and possible for most individual complainants to obtain only after post-complaint discovery.

B. Arenas of Obstruction: Congress, the Court, and the Judicial Conference – And Opportunities for Progressive Push-Back

Congress is a critical arena in which business interests, often led by the Chamber of Commerce, promote measures that benefit large organizations at the expense of consumers, employees, small investors, retirees, depositors, insurance beneficiaries, franchisees, and other small business suppliers and customers. On this legislative front, the Chamber and its allies enjoy one overriding advantage: business community resources for lobbying dwarf those available to constituencies with a stake in preserving individual court access. These groups spend $34 dollars for every dollar spent by labor and public interest groups, and 95 of the top 100 organizations who spend the most on lobbying consistently represent business.[4] In addition to direct lobbying, the Chamber's agenda is frequently conveyed to Congress through the "Civil Justice Caucus Academy" which purports to "provide[] rigorous *and balanced* educational programs on a range of civil justice issues for the benefit of the general public and members of the US Congress and their staff."[5] Despite claims of neutrality, the monthly staff briefings serve as a front for the Chamber.[6] Not coincidentally, the briefings reflect whatever issue the Chamber is encouraging the conservative Congress to take up in a given period.[7]

A second arena where the Chamber and its allies have been successful in their court access-narrowing agenda is in the courts. There, business interests have been represented

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[4] Ezra Klein, *Corporations now spend more lobbying Congress than taxpayers spend funding Congress*, VOX (July 15, 2015, 10:11 AM), http://www.vox.com/2015/4/20/8455235/congress-lobbying-money-statistic (citing Lee Drutman, author of *The Business of America is Lobbying*).

[5] *Congressional Civil Justice Caucus Academy*, GEO. MASON U. SCH. OF LAW: LAW & ECON. CTR., http://www.masonlec.org/programs/congressional-civil-justice-caucus-academy (last visited Apr. 27, 2016) (emphasis added).

[6] A list of the briefings is available at *Event Archive*, GEO. MASON U. SCH. OF LAW: LAW & ECON. CTR., http://masonlec.org/programs/469 (last visited Apr. 27, 2016).

[7] For example, one briefing was titled "Class Action Abuse: Ten Years after CAFA." It took place two months after the House Judiciary Committee held a hearing on class actions featuring a Chamber witness, less than a week before a bill limiting class actions was introduced, and only two weeks before the House Judiciary Committee held a hearing on the same bill, also featuring a Chamber witness.

most prominently – and, on the whole, quite effectively – by the Chamber.[8] The Chamber frequently files *amicus curiae* briefs, and sometimes directly represents parties, encouraging the Supreme Court and lower courts to tighten procedural barriers to individual complainants. In the recent past, they have, among other successes, convinced the Court to expand mandatory arbitration, limit class actions, and raise pleading standards to increase individuals' barriers to the courts.[9] In the current Term the Chamber is working to further immunize corporate interests from accountability.[10]

A third process affecting court access requirements, to which comparatively little attention is paid, is underway before the Judicial Conference of the United States. The Judicial Conference is empowered to both review the Federal Rules of Civil Procedure, which govern procedures in the federal courts, and establish policies for the administration of the federal courts.[11] It is authorized to amend the Federal Rules to promote simplicity, fairness, just determination of litigation, and "the elimination of unjustifiable expense and delay." Changes to the Federal Rules can be just as consequential as Supreme Court decisions and legislative efforts, as the Judicial Conference's actions inherently require policy decisions.[12] The members

[8] Constitutional Accountability Center has been tracking the Chamber's success before the Court since 2010. While the Chamber does not win every case, it has a very high success rate, both in persuading the Court to take cases (grant writs of *certiorari*), and in prevailing on the merits. *A Corporate Court? Tracking the U.S. Chamber of Commerce and the Roberts Court*, CONST. ACCOUNTABILITY CTR., http://theusconstitution.org/corporate-court (last visited Apr. 27, 2016). An empirical study of how business has fared before the Court concluded that the Roberts Court is friendlier to businesses than either the Burger or the Rehnquist Court. Lee Epstein, William M. Landes & Richard Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013). The same study found that five of the ten justices most favorable to business over the period 1946-2011 are currently serving, with two of them at the very top of the list. *Id*.

[9] CAC's detailed analysis of the first decade of the Roberts Courts is available at *Roberts at Ten*, CONST. ACCOUNTABILITY CTR., http://theusconstitution.org/robertsat10 (last visited Apr. 27, 2016).

[10] *See generally* Simon Lazarus, *The Stealth Corporate Takeover of the Supreme Court*, THE NEW REPUBLIC (Nov. 18, 2015), https://newrepublic.com/article/123984/the-stealth-corporate-takeover-of-the-supreme-court.

[11] The Judicial Conference has a wide range of Rules for which it is responsible. In addition to the Civil Rules Committee, which is responsible for the Federal Rules of Civil Procedure discussed in this Report, the Judicial Conference has advisory committees on Appellate, Bankruptcy, Criminal, and Evidence Rules. The Judicial Conference's Committee on Rules of Practice and Procedure ("Standing Committee") oversees the work of the five advisory committees. An extremely detailed discussion and chart of the process by which a Rule change is enacted is available on the US Courts website at *Overview for the Bench, Bar, and Public*, U.S. COURTS, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public (last visited Apr. 27, 2016).

[12] Inevitably, given the breadth of the Judicial Conference's responsibilities towards the Rules, it is difficult to enact truly neutral amendments, particularly given the many interests with a stake in the outcome. A recent example illustrates this point well. In 2013, the Rules Committee promulgated changes to the Federal Rules of Civil Procedure that proposed to fundamentally change the Rules of discovery proceedings, including by narrowing the scope of discovery in a way that would mainly benefit defendants seeking to withhold information from plaintiffs who desperately need it to meet the heightened pleading standard described in the next section and prove their case. After receiving more than 2300 written comments on the proposed rules changes, a large portion of which was opposition from the plaintiff's bar, the Committee lessened some of the severity of the proposed Rules, but

of the Rules Committee, like all the Judicial Conference committees, are appointed by the Chief Justice of the United States.

On all three of the above fronts, business interests have, for decades, registered continual successes, and moved closer and closer to their goal of restricting meaningful accountability in court. Nevertheless, progressives retain significant opportunities to bend this curve, limit damage, and lay the groundwork for restoring individuals' ability to enforce legal protections, in line with the text and history of the Federal Rules, multiple landmark statutes, and the Constitution itself. Indeed, in this vein, some encouraging, if fragmentary, signs have recently appeared. Major media seem to be turning attention to the story of corporate strategies to evade meaningful legal accountability, exemplified by a recent three-part front-page *New York Times* exposé of forced arbitration stratagems.[13] Courts, including the Supreme Court, may be prepared to resist overreach by business advocates, as occurred on January 20, 2016, prior to Justice Scalia's death, when a 6-3 majority rebuffed a Chamber of Commerce-backed attempt to empower corporate defendants to rid themselves of adverse consumer class actions, simply by offering the negligible amount necessary to settle the individual claim of the lead plaintiff. The Court did so again, on March 22, 2016, shortly after Justice Scalia's death, when they found that it is permissible to use representative evidence to establish a class. Perhaps most telling, progressives in Congress have shown that they can prioritize, push back, and even turn back major corporate campaigns to close courthouse doors to individuals; during the battle over the FY 2016 Omnibus Appropriations Act, progressives ensured that a Chamber-backed rider was not included that would have blocked the CFPB's well-supported efforts to eliminate the use of class action bans in arbitration clauses in financial products.[14]

Going forward, progressives can similarly use the regular legislative calendar and process to expose and fight back against the impact of anti-civil justice bills on the public. In addition, progressives in Congress can often respond to business interests' campaigns in other

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kept the fundamental shift in favor of defendants in place by replacing the well-understood "reasonably calculated" standard with "proportionality." One result can be seen in the version of Rule 26(b) which went into effect in December 2015. Rule 26(b) governs discovery scope and limits. The Rule's new language limits the scope of discovery to that which is proportional to the needs of the case and provides six illustrative factors for courts to consider, including the burden or expense of the proposed discovery. This language severely curtails litigants' access to information.

[13] Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html; Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES (Nov. 1, 2015), http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html; Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), http://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html.

[14] Press Release, Committee on Appropriations – Democrats, FY2016 Omnibus Appropriations Act (Dec. 15, 2015), http://democrats.appropriations.house.gov/sites/democrats.appropriations.house.gov/files/wysiwyg_uploaded/Summary%20of%20FY16%20Omnibus_1.pdf (specifically noting that the Omnibus did not include a rider forcing the CFPB to revisit its rules on arbitration).

arenas, to undermine and scuttle safeguards for individuals – in the Judicial Conference and in court. Members of Congress can speak out, and, when appropriate, intervene, by, for example, submitting *amicus curiae* briefs to courts, especially the Supreme Court, pointing out how efforts to gut laws willfully misconstrue their text and flout the intent of the Congresses that enacted them. Where appropriate, progressives need to underscore, as this Report attempts to explain, how moves to restrict court access in one arena or one issue area can reinforce each other and compound damage to the interests of consumers, workers, and retirees. Strategic deployment of these and other approaches can enable progressives to build and sustain a campaign that will engage the media and the constituencies whose needs are at stake. Such efforts will lay the groundwork for reversing and restoring the expansive vision of past Congresses, the Supreme Court, and Federal Rules writers that wronged individuals should get a fair chance in court.

I. Conservative Efforts to Restrict Judicial Enforcement of Individual Rights

Conservatives working through the Court, Congress, and the Judicial Conference have engaged in a coordinated effort to undermine the fundamental underpinnings of the provisions crafted to facilitate openness originally established in the 1938 Federal Rules of Civil Procedure. As Arthur Miller, the nation's preeminent authority on civil procedure and co-author of the multi-volume treatise universally relied upon by judges and lawyers, *Federal Practice and Procedure*, describes in detail in a recent law review article, the Federal Rules initially embodied a "justice-seeking ethos."[15] In recent years, however, conservatives have taken steps to render this original "ethos" more and more invisible in practice. Changes to seemingly technical procedural Rules and statutes can and have had a major substantive impact towards gradually narrowing plaintiffs' paths to have grievances heard in court, frequently without any public recognition of the impact.

Below, this Report reviews four areas in which business interests have been hard at work transforming the federal courts from instrumentalities to ensure enforcement of laws protecting individuals into vehicles for erecting increasingly insuperable barriers to that end.

A. Replacement of Court Enforcement with Binding Mandatory Arbitration

Arbitration is governed by the Federal Arbitration Act (FAA), which was enacted in 1925 in response to a "period of 'hostility' by the federal courts toward private arbitration agreements."[16] The FAA was enacted to facilitate mutually consensual business-to-business

[15] Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 288 (2013) (Miller's article is the most recent comprehensive review of access to the courts); *see also generally* Simon Lazarus, Symposium, *Stripping the Gears of National Government: Justice Stevens's Stand Against Judicial Subversion of Progressive Laws and Lawmaking*, 106 NW. U. L. REV. 769 (2012).

[16] J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3059 (2015) (footnote omitted).

agreements to resolve contract disputes without resorting to needlessly expensive and time-consuming court litigation. Ignoring the FAA's text and legislative history, the Rehnquist and Roberts Supreme Courts have applied the law to business contracts *with individuals*, including – especially – "contracts of adhesion," in which individuals have no meaningful capacity to opt out or alter terms. Along with other distortions of the FAA (retired Supreme Court Justice Sandra Day O'Connor once dismissed current forced arbitration jurisprudence as "an edifice of [the Court's] own creation"[17]), the Court has made mandatory pre-dispute arbitration clauses into the single most effective weapon business interests have managed to deploy to bar court enforcement of legal protections for employees, consumers, and other individuals. Such clauses lie hidden in the fine print of just about every contractual agreement that Americans have no practical choice but to sign, including employment contracts, cell phone contracts, nursing homes contracts, financial services, emergency rooms, and home building contracts. Just by signing up for a service or buying a product, Americans are forced to forego court enforcement for arbitration proceedings that are too often skewed to favor companies against the interests of consumers, employees, or other individual victims of legal violations.

These decisions were almost all decided by slim 5-4 majorities, with Justice Scalia in the majority of each. One established that a litigant who challenges the validity of an agreement to arbitrate must submit that challenge to the arbitrator him or herself, rather than get an independent judicial appraisal, unless the aggrieved person has lodged an objection to the specific line in the agreement that purports to assign such challenges to the arbitrator.[18] This decision leaves businesses free to impose one-sided terms or select arbitrators with close ties to the company. Any challenge to the arbitration agreement itself now has to be decided by the very person whose authority comes from the challenged arbitration agreement.

Another set of decisions has allowed business interests not only to force consumers into arbitration, but also to eliminate the possibility of any form of class relief. This empowers business interests to force consumers into mandatory arbitration, and simultaneously eliminate the threat of being held accountable by class actions, simply by including a class action ban within the arbitration clause. In these decisions, the Court established that class arbitrations are not authorized if the arbitration agreement is silent on whether the parties agreed to arbitration on a class basis[19] and that corporations can use mandatory arbitration provisions in

[17] Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

[18] Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63 (2010) (Scalia, J.). The result of the 5-4 decision was to limit an individual's ability to access the courts to bring claims of all kinds where they have signed arbitration agreements, even if the agreement is void under state law. CAC joined a coalition of civil rights organizations in filing an *amicus curiae* brief on behalf of Jackson. The brief emphasized that forced arbitration of civil rights claims runs counter to the text and history of the Reconstruction-era civil rights statute at issue, which was written to give Americans a right of access to federal courts. Further discussion of this case is available at David H. Gans, *Why the Supreme Court's Decision in* Rent-A-Center v. Jackson *Matters*, CONST. ACCOUNTABILITY CTR. (June 22, 2010), http://theusconstitution.org/text-history/1785.

[19] Stolt-Nielson S.A. v. Animalfeeds, Int'l Corp., 559 U.S. 662, 682 (2010) (Alito, J.). The decision was 5-3. The dissent, written by Justice Ginsburg, highlighted the real world consequence of the decision, pointing out that class

consumer and employment contracts to ban class actions.[20] As a result of the latter decision, "powerful economic entities can impose no-class-action-arbitration clauses on people with little or no bargaining position."[21] In another recent arbitration case, the Court made it even more difficult to pursue class actions in arbitration by finding that a contractual waiver of class arbitration is enforceable even when the plaintiff's cost of individually arbitrating a federal statutory claim would exceed the potential recovery.[22] The case was particularly notable for the way that it pitted a big business (American Express) against a small business which felt it was being forced to accept a form contract violating the antitrust laws.[23] It bears emphasis that, in most of these decisions, the Court held that the FAA preempted (i.e. invalidated) state laws nullifying mandatory arbitration clauses – as "unconscionable" – in the circumstances of the case, despite the fact that the FAA expressly provides that it does not preempt state laws enacted for that purpose.

During the current Supreme Court term, conservatives cemented the sweeping reconstitution of forced arbitration jurisprudence that they achieved in recent previous terms, in *DirecTV v. Imburgia*. In that December 14, 2015 decision, two of the more liberal Justices joined four conservative Justices in an opinion acknowledging that the Court's recent precedents in effect mandate that mandatory arbitration clauses pretty much always prevail and be strictly applied in favor of their business drafters, no matter what circumstances might militate otherwise. In this case, the Court found that the lower court did not place arbitration clauses on the same footing as other types of contractual provisions, and that this alleged asymmetry ran afoul of the Court's policy favoring arbitration.[24]

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proceedings may be the only way potential claimants will seek to vindicate their rights. *Id*. at 699 (Ginsburg, J., dissenting).

[20] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (5-4 decision written by Scalia, J.). The Court also found that state contract law is preempted to the extent that it categorizes class-action bans as unconscionable. *Id.* at 1746. CAC filed an *amicus curiae* brief in this case addressing the preemption issues, which is available at Brief of Constitutional Accountability Center as *Amicus Curiae* in Support of Respondents, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (No. 09-893), http://theusconstitution.org/cases/briefs/att-mobility-llc-v-concepcion/supreme-court-amicus-brief-att-mobility-v-concepcion.

[21] Miller, *supra* note 15, at 323.

[22] Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (Scalia, J.) The decision was 5-3. The Court held that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." *Id*. at 2311. Justice Kagan's dissent was particularly sharp noting that the "nutshell" of the decision "admirably flaunted rather than camouflaged: Too darn bad" for an injured party. *Id*. at 2313 (Kagan, J. dissenting).

[23] The Chamber filed an *amicus curiae* brief in favor of American Express and against small business interests. In fact, the Chamber has filed *amicus curiae* briefs in every major arbitration case decided by the Roberts Court and has been on the winning side in the vast majority of them.

[24] 136 S.Ct. 463, 471 (2015).

The flood of sharply divided Supreme Court decisions have gone a long way towards empowering corporations, as noted by one commentator, "to decide on their own which civil rights and consumer protections they want to obey, knowing that there will be no effective means available to their victims to find redress."[25] However, there have been attempts to publicize the harms of mandatory arbitration and push back against these empowered corporations. A recent exposé in the New York Times demonstrated starkly just how ubiquitous these arbitration clauses have become and documented many of the harmful impacts.[26] The CFPB is also pushing back against the tidal wave of pro-corporate decisions by considering Rules, discussed later in this Report, to eliminate the use of class action bans in arbitration clauses in financial contracts.

With regard to Congress, the reality is that the Court's decisions have gone so far toward achieving the business agenda of practical immunity from the threat of judicial redress by supplanting judicial review with arbitration, that Congress has not needed to act to further to force consumers into mandatory arbitration. However, some subject-matter area-specific forced arbitration provisions have been included in legislation.[27] Similar proposals can be expected to arise in future legislation.

B. Class Action "Reform"

Class actions are another issue that conservatives on the Court and Congress have targeted. Working through these two channels, business interests have been able to progressively limit the effectiveness of the class action mechanism as originally envisioned. Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure.[28] The drafters of the Rule aimed to open the courthouse doors to "small people."[29] Rule 23 was notable as the

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[25] Nan Aron, AT&T Mobility v. Concepcion*: The Corporate Court Does It Again*, HUFFINGTON POST (last updated June 29, 2011), http://www.huffingtonpost.com/nan-aron/att-mobility-v-concepcion_b_855161.html; *see also* 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, 2804 (2015) (describing arbitration today as an "unconstitutional evisceration of statutory and common law rights").

[26] *Supra* note 13. The three-part series details the methods by which business advocates have engineered the now-pervasive deployment of mandatory arbitration clauses, the massive legal shift that enabled this market-place transformation, and the disempowering impact it has had on individuals vis-à-vis big business organizations.

[27] For example, one bill that would provide for additional wildfire suppression activities, a subject entirely unrelated to arbitration, would establish a pilot program to not only authorize the creation of an arbitration pilot program, but also mandate its use for a particular project. To amend the FLAME Act of 2009 to provide for additional wildfire suppression activities, to provide for the conduct of certain forest treatment projects, and for other purposes, S. 508, 114th Cong. (introduced on Feb. 12, 2015.)

[28] For a detailed analysis of the changes made to Rule 23 since its inception, *see* John K. Rabiej, *The Making of Class Action Rule 23 – What Were We Thinking?*, 24 MISS. C. L. REV. 323 (2005).

[29] David Marcus, Symposium, *The History of the Modern Class Action, Part 1: Sturm Und Drang, 1953-1980*, 90 WASH. U. L. REV. 587, 599-600 (2013) (citing Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 398 (1967)).

first formal attempt to provide for class actions. It went through a significant revision through the Rules Enabling Act process in 1966. The 1966 amendments specifically described the class action vehicle as a means to "empower those without 'effective strength' to advance their claims, most notably when each individual's damages were so small that economically they had no independent litigation value."[30] In these instances, the reality is that class members must choose between the class action vehicle or no access to the courts at all.

Current efforts to undermine the operational effectiveness of Rule 23 target class action "certification," that is, the standards for the judicial determination that members of the asserted class of plaintiffs have sufficient commonality of factual and legal interests to merge their claims. Business interests have long asserted (though with little or no substantiation) that, once a class is certified, institutional defendants are often forced to settle even weak claims that might well be rejected at trial, due to the risk of a costly adverse judgment.

Contrary to such asserted grievances, consumer and worker advocates counter that the excessively strict certification standards advocated by business interests are simply intended to foreclose class actions and would have the effect of doing just that: business-backed changes tighten criteria to increase evidentiary burdens for plaintiffs with legitimate claims, add costs and compound delays, thereby facilitating obstructionist defense tactics. Through these business-backed efforts, consumer advocates and sympathetic scholars argue, class certification has become "yet another procedural stop sign" to undermine an essential method of joining relatively modest but valid claims.[31] Business advocates, including the Chamber, have strategically fought these battles through the courts, Congress, and the Judicial Conference at the same time. The result has been an attack on class actions from all three fronts simultaneously, while occasionally pausing to let one side resolve the issue before it. For example, the Judicial Conference is usually deferential to any issue that is pending before the Supreme Court. In the aggregate, the various restrictions on class actions work together to narrow access to the important procedural vehicle**.**

The fight to curtail the use of class actions has been actively waged on the Hill. In 2005, Congress passed the Class Action Fairness Act ("CAFA"), which restricts class actions by limiting plaintiffs' ability to file consumer, mass tort, and other class actions in state court.[32] Action on the Congressional front has moved on to new targets. In February 2015, the House Judiciary Committee held a hearing on class actions which included a representative of the Chamber, who argued that individuals who were "not injured" were included in class actions because

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[30] Miller, *supra* note 15, at 315-16.

[31] *Id*. at 321.

[32] 28 U.S.C. § 1332(d).

defective products that formed the basis for lawsuits had malfunctioned for some, but not (yet) for all 100% of the customers or class members.[33]

Two months later, the Chairman of the House Judiciary Committee introduced H.R. 1927, the "Fairness in Class Action Litigation Act of 2015," which would prevent federal courts from certifying a class unless the plaintiff can prove with admissible evidence that she has suffered an injury of the same type and scope as *every one* of the class members, in an attempt to target so-call "no-injury class actions." This demonstration would require a full trial at the outset of every class action, and the language of the bill is so inflexibly stringent as to ensure that, as a practical matter, there would be no way that all, or indeed, many members of a class could meet the bill's requirements for suffering the same "type and scope" of injury.[34] It would virtually eliminate the capacity of our civil justice system to hold corporations accountable for inflicting injuries on multiple individuals, too small-scale to make individual remedial lawsuits worthwhile, but worth millions or even billions in aggregate revenues to the perpetrators. The language of the bill would generate absurd results. For example, if the case were about a bank making illegal charges for each withdrawal, then a person who made ten withdrawals would not be in the same class as a person who made twenty withdrawals since the extent of their injury would not be the same.[35] The Committee immediately held a hearing on the legislation, which featured a Chamber witness on the panel,[36] and the Civil Justice Caucus Academy had

[33] *The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Judiciary Comm.*, 114th Cong. 81-82 (2015) (statement of Andrew Pincus on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform).

[34] H.R. 1927 was marked up and voted out of the House Judiciary Committee on June 24, 2015. Following the markup, one reporter critiqued the bill as "diminish[ing] your legal options more" and recognized that the Chamber is a "key backer" of the legislation. David Lazarus, *Orwellian-named Fairness in Class Action bill Aims to Restrict Consumers' Access to Court*, L.A. TIMES (June 30, 2015), http://www.latimes.com/business/la-fi-lazarus-20150630-column.html.

[35] *Fairness in Class Action Litigation Act of 2015: Hearing on H.R. 1927 Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 68-81 (2015) [hereinafter *Hearing on H.R. 1927*] (statement of Alexandra D. Lahav, Joel Barlow Professor, University of Connecticut Law School). In addition to objections from the consumer advocacy community, the American Bar Association also objected to the legislation on the grounds that the bill would circumvent the Rules Enabling Act Process, the Supreme Court is poised to rule on class actions in the next Term, and because "the proposed legislation would severely limit the ability of victims who have suffered a legitimate harm to collectively seek justice in a class action lawsuit." Letter from Thomas Susman, Dir., Governmental Affairs Office, Am. Bar Assoc, to Hon. Bob Goodlatte, Chairman, House Judiciary Comm. (June 23, 2015), http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2015jun23_classaction.authcheckdam.pdf.

[36] *Hearing on H.R. 1927*, *supra* note 35, at 36-55 (statement of John H. Beisner on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform)

held a briefing a mere two weeks prior titled, "Class Action Abuse: Ten Years after CAFA."[37] This bill passed the House the first week of January 2016.

The label "no-injury class actions" is a transparent misnomer, of course. As one witness at the House hearing said:

> if I purchase a car that has a faulty ignition switch, which has a propensity to turn off while I am driving on the highway, I should not have to wait until I suffer a potentially catastrophic accident to bring a lawsuit to assert my rights . . . A car that has a faulty ignition switch is worth less than full price, and that gives me standing to sue before I get on the road and prove that there is a defect by endangering innocent lives.[38]

Every purchaser is exposed to the risk of injury, and hence injured in that very practical sense. Further, the value of the damaged product is less than what the consumer paid on the market, and, indeed, the character of the product is different from what the consumer understood when the decision to purchase was made.

The Court has also taken steps to limit the availability of class actions by misinterpreting the purpose and application of the class action vehicle. In 2011, in a 5-4 decision written by Justice Scalia, the Court decided *Wal-Mart Stores, Inc. v. Dukes*[39] which increased the burden of securing class certification by establishing a higher level of "commonality" such that class members must "have suffered the same injury" and have common questions that are "central to the validity of each one of the claims in one stroke."[40] This decision to tighten the use of Rule 23 appears to have already had a significant impact on class actions. Elevating the burden of pretrial persuasion is an effective way to deny class certification long before the merits of the case are considered.[41]

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[37] *Congressional Civil Justice Caucus Academy Briefing: Class Action Abuse: Ten Years after CAFA*, GEO. MASON U. SCH. OF LAW: LAW & ECON. CTR. (Apr. 17, 2015), http://www.masonlec.org/events/event/224-congressional-civil-justice-caucus-academy-briefing-class-action-abuse-ten-years-after-cafa.

[38] *Hearing on H.R. 1927*, *supra* note 35, at 80 (statement of Alexandra D. Lahav, Joel Barlow Professor, University of Connecticut Law School).

[39] 131 S. Ct. 2541 (2011).

[40] *Id*. at 2551.

[41] In 2013, the Supreme Court relied on its decision in *Wal-Mart* to require that the district court find, after rigorous analysis of the relevant evidence, that common questions predominate over individual ones. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (Scalia, J.). Evidently, the decision made it harder for plaintiffs to bring wage and hour claims as class actions because of the need for individualized proof of damages in such cases. Richard Alfred & Patrick Bannon, Seyfarth Shaw LLP, *Early Consensus: Courts Rely on* Comcast v. Behrend *in Refusing to Allow Wage and Hour Cases to Proceed as Class Actions*, WAGE & HOUR LITIG. BLOG (April 24, 2013), http://www.wagehourlitigation.com/rule-23-class-certification/early-consensus-courts-rely-on-comcast-v-behrend-in-refusing-to-allow-wage-and-hour-cases-to-proceed/. The Chamber filed an *amicus curiae* brief in *Comcast*.

2011 was the same year that the Court ruled in *Concepcion* (above, note 20), which effectively enabled business and other large organizations to bypass strategies to tighten class certification and other Rule 23 requirements, by empowering them to eliminate class actions altogether – simply by inserting bans on class action bans in arbitration clauses.[42] The impact on class actions from *Concepcion* was immediate. One study found that in the year following the decision, judges stopped at least 76 potential class action lawsuits from going forward under *Concepcion* and that lower court judges were frustrated by the limitation.[43]

The Supreme Court's current term contained three class action cases, all of which show how bold the Chamber and its allies have become in inviting the Court's conservative majority to deliver their ultimate goal of eliminating class relief as a feasible remedy for corporate misconduct. The most audacious of these cases, *Spokeo, Inc. v. Robins*, seeks to invalidate a Fair Credit Reporting Act (FCRA) provision enacted in 1977, which authorizes private lawsuits, with statutorily fixed damages, for individuals who are subjects of false credit reports by credit reporting agencies. Spokeo, an internet aggregator of consumer credit information, asserts two claims: first, that Congress lacks constitutional power to empower individuals to challenge a law violation such as a false credit report, until the victim experiences "actual" harm, such as loss of a job opportunity or denial of a mortgage; and, second, that no class action can be mounted to challenge violations of such FCRA credit reporting requirements, regardless of how many thousands or millions of individuals might be affected, until and unless each individual class member can prove the nature and extent of their "actual" harm resulting from the violation. If accepted, Spokeo's argument would cripple Congress' ability to prevent future harm of any kind, and could eliminate Congress' ability to make violation of any law an actionable wrong.[44]

In another of this term's three class action cases, *Tyson Foods, Inc. v. Bouaphakeo*, the corporate defendant and its allies sought to bar the use of widely-accepted statistical sampling as a means to establish liability and damages, and whether a class can be certified that could contain some individual members who have not been injured and have no legal right to damages. This argument would have made it prohibitively risky and expensive, or just plain impossible, to seek class redress – which, in practice means *any* redress – for a vast spectrum of corporate misconduct. In the third case, *Campbell-Ewald Co. v. Gomez*, the Chamber and its allies claimed that, when a class action defendant makes an offer of judgment to resolve the

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[42] The Chamber filed *amicus curiae* briefs in both *Wal-Mart* and *Concepcion* on behalf of the business defendant.

[43] CHRISTINE HINES ET AL., PUB. CITIZEN, JUSTICE DENIED: ONE YEAR LATER: THE HARMS TO CONSUMERS FROM THE SUPREME COURT'S *CONCEPCION* DECISION ARE PLAINLY EVIDENT (2012), *available at* http://citizen.org/concepcion-anniversary-justice-denied.

[44] Spokeo's argument would effectively bar class actions for a wide variety of statutory damages authorized by Congress including the Truth in Lending Act, Fair Debt Collection Practices Act, Telephone Consumer Protection Act, Employee Retirement Income Security Act, Real Estate Settlement Procedures Act, Lanham Act, Fair Housing Act, Americans With Disabilities Act, Video Privacy Protection Act, Electronic Communications Privacy Act, Stored Communications Act, Cable Communications Privacy Act, Migrant and Seasonal Agricultural Worker Protection Act, Expedited Funds Availability Act, Homeowners Protection Act, Equal Credit Opportunity Act and the Driver's Privacy Protection Act. Arthur H. Bryant, *Will Class Actions Get the Hammer Next Term?*, NAT'L L.J. (Sept. 7, 2015).

claim of the lead plaintiff (ordinarily involving a negligible cost), the offer in and of itself dissolves the entire class action lawsuit, even if the lead plaintiff declines the offered judgment.

During the oral arguments in these three cases late last year, hints surfaced that at least some members of the Court's conservative bloc might be uncomfortable with the radical and unprecedented reach of business advocates' anti-class action claims. And, indeed, in the two of these cases that have already been decided this term, a majority of the Court rebuffed outright the corporate defendant's claims. On January 20, 2016, the Court held in *Campbell-Ewald* that an unaccepted offer of judgment to a class representative does not moot the case. In a forceful decision, the majority stated that business advocates' position incorrectly "place[d] the defendant in the driver's seat."[45] Then again, on March 22, 2016, the Court held in a 6-2 decision in *Tyson Foods* that the class was properly certified and the use of statistical evidence was proper in the case.[46] The Court stopped short, however, of addressing the claim of the Chamber and its allies that district courts must ensure that absolutely no "uninjured" class member can recover, on the ground that the question was not fairly presented in the case -- because the damage award has not yet been distributed and the record did not indicate how the damages would be disbursed.[47]

Despite these victories in *Campbell-Ewald* and *Tyson Foods*, and regardless of the outcome in *Spokeo*, the Court's decisions in recent years have dramatically narrowed the circumstances in which class redress for corporate misconduct is, as a practical matter, feasible, or, indeed, permissible at all. These continually increasing court-made barriers demonstrate how business advocates' separate efforts in different arenas can reinforce each other and magnify their impact. For example, CAFA, passed in 2005, requires most class actions to be filed in federal, rather than state courts. While, on its face CAFA may have appeared to affect only the venue for class lawsuits, in practice CAFA has had major effects on the effectiveness and incidence of class actions, by denying potential class plaintiffs any alternative to given subsequent procedural hurdles erected for federal court plaintiffs by the Supreme Court and, at least potentially, by the Judicial Conference.

C. Lawsuit "Reform"

Guided largely by the Chamber and acting under the guise of "lawsuit reform," Congress has taken repeated steps to increase the difficulty of challenging illegal conduct in court. One example of such "reform" that is really about limiting plaintiffs' access to the courts is the "Lawsuit Abuse Reduction Act" (LARA).[48] LARA would amend Rule 11 of the Federal Rules of Civil Procedure. Rule 11, in its current form, gives judges discretion about when and how to

[45] Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 672 (2016).

[46] Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016).

[47] *Id.* at 1050.

[48] Lawsuit Abuse Reduction Act of 2015, H.R. 758, S. 401, 114th Cong. (2015).

sanction lawyers for filing frivolous cases, requires any monetary sanctions to be paid to the court, and provides a "safe harbor" period to allow a plaintiff to withdraw and correct a claim within 21 days if a motion for sanctions is served by the defendant. These are balanced, appropriate standards which discourage the filing of frivolous lawsuits without deterring plaintiffs from filing legitimate suits. LARA would make sanctions mandatory, remove the 21-day safe harbor provision, and make the sanctions payable to the opposing party. While LARA is ostensibly about reining in lawsuit abuse, it is, in reality, a not-so-veiled attempt to discourage individuals from bringing legitimate lawsuits against businesses.

The Chamber is strongly behind the new push to persuade Congress to pass LARA and override the Judicial Conference's carefully considered decision to drop mandatory Rule 11 sanctions. As far back as October 2013, the Congressional Civil Justice Caucus Academy held a briefing on Rule 11 reform. Further, the President of the Chamber's Institute for Legal Reform was quoted in a National Law Journal article as being "optimistic" that the current Congress would "move on litigation reform . . . including . . . the Lawsuit Abuse Reduction Act, which [] passed the House in 2013." [49] The House has already passed the bill this Congress.[50]

LARA is not the first time that mandatory Rule 11 sanctions have been considered. In fact, the Judicial Conference ran what turned out to be a decade-long experiment in mandatory sanctions from 1983, when they changed Rule 11 to make sanctions mandatory, until ten years later when the discretionary language was reinstated. The mandatory Rule 11 sanctions were universally regarded as a failure; the inflexible regime had a chilling effect on the filing of meritorious cases,[51] a proven disproportionate impact on plaintiffs in civil rights cases,[52] burdened the court system with increased litigation costs due to a drastic increase in "satellite litigation,"[53] and were universally disliked by judges, attorneys, litigants, and scholars.[54]

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[49] Katelyn Polantz, Jenna Greene & Andrew Ramonas, *Corporate Lobbyists Target Taxes, ACA: Consumer Finance Bureau Will Also Face Scrutiny*, NAT'L L.J. (Nov. 4, 2014), http://www.nationallawjournal.com/id=1202675541412/Corporate-Lobbyists-Target-Taxes-ACA#ixzz3ZGuHgArL. In fact, the House passed LARA on September 17, 2015.

[50] The House Judiciary Committee, Subcommittee on the Constitution and Civil Justice held a hearing on LARA on March 17, 2015. *Lawsuit Abuse Reduction Act of 2015: Hearing on H.R. 758 Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 23 (2015) [hereinafter *Hearing on H.R. 758*]. It was marked-up by the full Judiciary Committee on April 15, 2015 and May 14, 2015 and reported out of the Committee on a party-line vote of 19-13. It passed the House of Representatives on September 21, 2015.

[51] *Lawsuit Abuse Reduction Act: Hearing on H.R. 966 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 23-44 (2011) (statement of Lonny Hoffman, George Butler Research Professor of Law, Univ. of Houston Law Ctr.).

[52] SAUL M. KASSIN, FED. JUDICIAL CTR., AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 38 (1985).

[53] Mandatory sanctions, coupled with awarding fees to the moving party, incentivize parties to drag out litigation by filing often meritless Rule 11 motions. The resulting "satellite litigation" drives up the costs of litigation. *Hearing on H.R. 758, supra* note 48 (testimony of Robert S. Peck, President, Center for Constitutional Litigation, PC).

Reflecting this experience, the Judicial Conference itself objected to LARA in a written letter, largely on the grounds that Congress is disregarding the Rules Enabling Act process, and the Judicial Conference's thorough prior examination of the issue.[55] Nothing has changed since the Judicial Conference and the Supreme Court, two decades ago, recognized the need to restore individual judges' discretion to fine-tune remedies in individual cases. As the American Bar Association concluded, mandatory Rule 11 sanctions "'created a significant incentive to file unmeritorious Rule 11 motions by providing a possibility of monetary penalty; engender[ed] potential conflicts of interest between clients and lawyers; and provid[ed] little incentive . . . to abandon or withdraw a pleading or claim – and thereby admit error – that lacked merit.'"[56]

D. Pleading Standards

Another important court access issue involves Rule 8(a) of the Federal Rules of Civil Procedure, which provides that a plaintiff's complaint must set out "a short and plain statement of the claim showing that the pleader is entitled to relief."[57] The 1938 rulemakers drafted the pleading standard to avoid peremptory dismissal of worthy claims on the basis of technicalities. This concept was termed "notice pleading," meaning that complaints must be specific enough to give a defendant notice of the legal claim asserted and its anticipated factual basis, but contemplating that evidence will ordinarily be obtained or confirmed through discovery after the complaint has been filed and answered, or the case moves along otherwise. In 1957, the Supreme Court decided *Conley v. Gibson*, the leading case on the issue until 2007. The Court interpreted the pleading standard broadly stating that the rule is "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can

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[54] A 2005 survey of federal judges found that more than 90% of federal judges opposed mandatory sanctions and 85% said that groundless litigation was only a small to nonexistent problem. DAVID RAUMA & THOMAS E. WILLGING, FED. JUDICIAL CTR., REPORT OF A SURVEY OF UNITED STATES DISTRICT JUDGES' EXPERIENCES AND VIEWS CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE 4, 7-8 (2005), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/Rule1105.pdf/$File/Rule1105.pdf.

[55] Letter from Jeffrey Sutton, Chair, Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, to Bob Goodlatte, Chairman, House Judiciary Comm. (April 13, 2015), http://www.afj.org/wp-content/uploads/2015/04/Judicial-Conference-Letter.pdf.

[56] Letter from Thomas Susman, Dir., Governmental Affairs Office, Am. Bar Assoc., to Robert Goodlatte, Chairman, House Comm. on the Judiciary, and John Conyers, Jr., Ranking Member House Comm. on the Judiciary (April 14, 2015), http://www.americanbar.org/content/dam/aba/uncategorized/GAO/20150414_larahousejud.authcheckdam.pdf (citing Letter from the Judicial Conference of the United States to James Sensenbrenner, Chair House Judiciary Comm. (2004)). The ABA letter notes that the same sentiments were reiterated in the Judicial Conference's 2013 letter to the House Judiciary Committee opposing the bill.

[57] FED. R. CIV. P. 8(a)(2).

prove no set of facts in support of his claim which would entitle him to relief."[58] The *Conley* rule stood for 50 years.

However, in 2007 and again in 2009, the Roberts Court significantly heightened the pleading standard. In *Bell Atlantic v. Twombly*, the Court held that "[f]actual allegations must be enough to raise a right to relief above the speculative level."[59] The Court directly overturned the *Conley* standard and created a new "plausibility" standard. Two years later, in *Ashcroft v. Iqbal*, the Court elaborated that "plausible" requires that a complaint must show there is reasonable possibility of relief,[60] and clarified that this new standard applied to all civil cases and not just to complex matters like the antitrust dispute at issue in *Twombly*.[61] The Court explained that determining whether a claim for relief is plausible will be context-specific and will require the reviewing court to "draw on its judicial experience and common sense."[62] Critics have pointed out that "judicial experience and common sense" is highly subjective and allows judges to base their decisions on individual attitudes rather than law,[63] and echoed Justice Stevens' dissenting criticism that the new standard was inconsistent with Rule 8 and contrary to its access-broadening purpose.[64]

And, indeed, studies have shown that *Twombly* and *Iqbal* have had an access-foreclosing impact in cases where there is information asymmetry.[65] This is entirely predictable, since, in

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[58] 355 U.S. 41, 45-46 (1957), *abrogated by* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). The Court stated, "[t]he Federal Rules reject the approach that pleading is a game of skill . . . and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. *Id*. at 48.

[59] 550 U.S. 544, 555 (2007).

[60] *Id.* at 678.

[61] 556 U.S. 662 (2009).

[62] *Id*. at 679.

[63] *See generally* Nancy Gertner, *A Judge Hangs Up Her Robes*, 38 LITIG. 60, 61 (2012) (noting that her "common sense" may differ from another judge's "common sense"); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128 (2012) (judges' personal opinions impact judicial decision making). Kang et al. attribute no malice to this reality noting, "the best scientific evidence suggests that we – all of us, no matter how hard we try to be fair and square, no matter how deeply we believe in our own objectivity – have implicit mental associations that will, in some circumstances, alter our behavior. . . . There is simply no legitimate basis for believing that these pervasive implicit biases somehow stop operating in the halls of justice." *Id*. at 1186.

[64] Justice Stevens explained that the new heightened pleading standard would improperly limit access to the courts. Harkening back to the intent of the drafters of the Federal Rules, he noted that the pleading standards were deliberately intended to keep litigants in the court instead of out of the court. *Id*. at 575 (Stevens, J., dissenting).

[65] *See generally*, for example, Miller, *supra* note 15, at 340-43. *Id* at 341("Since the Supreme Court appears to have denied plaintiffs the opportunity to employ even limited discovery before they plead a plausible case, *Twombly* and *Iqbal* have shifted this information-access balance so that it favors those defendants best able to keep their records, conduct, and institutional secrets to themselves." (footnotes omitted)).

such cases, which include discrimination, consumer protection and civil rights cases, essential information is largely in the custody of defendants, making it impossible for plaintiffs to plead details with specificity. A recent data-based analysis found that courts have dismissed civil rights and employment discrimination at greater rates after *Iqbal*. The study found that, while individual plaintiffs were more likely to have their cases dismissed under the *Twombly*/*Iqbal* "plausibility" standard, corporate and governmental plaintiffs generally saw no change in their dismissal rates.[66] The author notes that "[t]he data reported here suggest that the Court was able to accomplish through judicial fiat what corporate interests could not, despite their best efforts, obtain through the more open, transparent, and deliberative [Judicial Conference] rulemaking process."[67]

Congress has seen little activity regarding the pleading standards issue raised by *Twombly* and *Iqbal*. The last legislation introduced to resolve this issue was H.R. 4115, the "Open Access to Courts Act" and S. 1504, the "Notice Pleading Restoration Act of 2009" in the 111th Congress in 2009, both of which attempted to remedy the Court's notice pleading decisions. The legislation had two hearings in the House and one in the Senate, but ultimately did not pass out of Committee on either side. No legislation has been introduced since that time.

The Judicial Conference has been reluctant to get involved in the pleading issue.[68] However, the Judicial Conference has, very recently, adopted a change to the Federal Rules of Civil Procedure that could, depending in part on how it is applied in practice, compound the adverse effects of *Twombly* and *Iqbal* for small and individual plaintiffs suing to rectify

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[66] Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117 (2015). Reinert notes that the effects were of "significant magnitude." *Id.* at 2122. For an excellent simplified summary of the article's conclusions, see Adam Liptak, *Supreme Court Ruling Altered Civil Suits, to Detriment of Individuals*, N.Y. TIMES (May 18, 2015), http://www.nytimes.com/2015/05/19/us/9-11-ruling-by-supreme-court-has-transformed-civil-lawsuits.html (arguing that *Iqbal* may be Justice Roberts' "most consequential" ruling).

[67] Reinert, *supra* note 66, at 2171 (footnotes omitted); *see also* Alan B. Morrison, *Saved by the Supreme Court: Rescuing Corporate America*, AM. CONSTITUTION SOC'Y (2011), http://www.acslaw.org/sites/default/files/Morrison_-_Saved_by_the_Supreme_Court.pdf ("the Court concluded that there was a problem with the existing pleading standard and decided that it need not involve the rules committee in solving the problem, but that it could do so on its own").

[68] In response to concerns about the impact of the decisions, the Federal Judicial Center (FJC), the research arm of the Judicial Conference, compared across time the rate increases at which motions to dismiss were granted before *Iqbal* and after. The FJC's 2011 study found non-statistically significant rates of dismissal in civil rights cases. Joe Cecil et al, MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 21 (2011). Many scholars disputed the findings and, as discussed above, subsequent date analysis has demonstrated a disparate impact on certain kinds of cases. *See, for example,* Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1, 36 (2011) ("Comparing how many motions were filed and granted before *Twombly* to after *Iqbal* cannot tell us whether the Court's cases are deterring some claims from being brought, whether they have increased dismissals of complaints on factual-sufficiency grounds, or how many meritorious cases have been dismissed as a result of the Court's stricter pleading filter.").

violations of legal protections. Chief Justice John Roberts recognized the Rule change as a "big deal," in his 2015 Year-End Report on the Federal Judiciary.[69] The Chief Justice touted the change, which limits the extent to which litigants can demand information from their adversaries, as a means of correcting what is widely decried as a long-developing trend toward increasingly costly, time-consuming, and adversarial litigation. However, consumer advocates and representatives of the plaintiffs' bar strongly opposed the Rules changes, on the ground that, while phrased in neutral terms, they will in practice inherently disadvantage small plaintiffs who legitimately require information solely under the control of large corporate defendants. Such information is needed to prove valid claims of, for example, workplace unfairness, unlawful discrimination, and consumer fraud.[70] These advocates' objections and recommendations were weakly reflected in the final Rule.[71] The new Rule replaced the longstanding provision that information (discovery) requests must be "reasonably calculated" to yield information relevant to the issues, with a new standard that such requests must be "proportional," with the cost of meeting such requests a factor in determining "proportionality."

Notably, the Court's heightened pleading standards work in tandem with the Judicial Conference's new amendments to the Federal Rules of Civil Procedure, to make it more difficult for smaller plaintiffs to get into court or to sustain potentially meritorious claims if they do. It is one example of how this multi-pronged campaign by conservative interests functions in practice. The new pleading standard requires plaintiffs to have more information to file a valid initial complaint, while the new discovery Rules make it more difficult to get that information. Again, this mutual reinforcement rewards business advocates for pursuing their campaign to restrict court access on multiple fronts.

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[69] 2015 Year-End Report on the Federal Judiciary, at 5, http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

[70] *See generally* Arthur Bryant, *Access to Justice at Stake with Federal Rules Changes*, PUB. JUSTICE (Jun. 2, 2014), http://www.publicjustice.net/content/access-justice-stake-federal-rules-changes; *see also* Patricia Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. Cin. L. Rev. 1083 (2015); *see also generally* Adam Liptak, *Chief Justice's Report Praises Limits on Litigants' Access to Information*, N.Y. TIMES (Dec. 31, 2015), http://www.nytimes.com/2016/01/01/us/politics/chief-justices-report-praises-limits-on-claimants-access-to-information.html.

[71] See *supra* note 12 for additional information on this Rule change. In the final version of Rule 26(b), the Judicial Conference added an additional factor of "the parties' relative access to relevant information" and moved "the importance of the issues at stake in the action" to the first factor to be considered in the proportionality analysis. FED. R. CIV. P. 26(b). However, the Judicial Conference has made clear that no specific factor is more important than any other.

II. How Congressional Progressives Can Increase Individuals' Access to the Courts

Realistic opportunities exist to bend the curve of the above-described trend, and lay the groundwork for ultimately turning it around as progressives gain more influence in Congress. Progressives' over-arching goal should be to raise the visibility and priority of these courthouse door-closing threats, by exposing their real-world impact on vital concerns of hardworking individuals and families. As long as the debate is couched in technical legal terms, conservatives can continue to make it an inside game, in which organized and well-funded business interests can prevail. Below, we briefly review recent efforts by Congressional progressives to spotlight and advance court access issues, and sketch three areas where further such efforts offer potential for success.

A. Past Congressional Response to Conservative Success in Narrowing Access to the Courts

It has not gone without Congressional notice that the Court has been narrowing access to the courts and curtailing Congressionally enacted statutes that otherwise encourage increased access to the courts. Between 2008 and 2013, the Senate Judiciary Committee and House Judiciary Committee held a series of hearings examining the impact of Supreme Court decisions on Americans, but were unable to move remedial legislation to President Obama's desk. They considered a variety of issues including the treatment of laws protecting Americans' health, safety, jobs, and retirement, equal pay, Federal Rules, general access to courts, workplace fairness, corporate behavior, pleading standards, and arbitration.[72] These hearings on access to justice ended in each chamber of Congress when, respectively, they came under Republican control.

Beyond hearings, prior Congresses have sometimes been able to directly "correct" the Supreme Court when their decisions misinterpret a statute to limit an open and accessible

[72] *Short-Change for Consumers and Short-Shrift for Congress? The Supreme Court's Treatment of Laws that Protect Americans' Health, Safety, Jobs and Retirement Before the S. Comm. on the Judiciary*, 110th Cong. (2008); *Barriers to Justice: Examining Equal Pay for Equal Work (Lilly Ledbetter Fair Pay Act) Before the S. Comm. on the Judiciary*, 110th Cong. (2008); *Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans Without Access to Justice? Before the Subcomm. on Bankr. and the Courts of the S. Comm. on the Judiciary*, 113th Cong. (2013); *Has the Supreme Court Limited Americans' Access to Courts Before the S. Comm. on the Judiciary*, 111th Cong. (2009); *Workplace Fairness: Has the Supreme Court Been Misinterpreting Laws Designed to Protect American Workers from Discrimination? Before the S. Comm. on the Judiciary*, 111th Cong. (2009); *Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior (Considering* Wal-Mart v. Dukes*) Before the S. Comm. on the Judiciary*, 112th Cong. (2011**)**; *Access to Justice Denied:* Ashcroft v. Iqbal*; Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties, of the H. Comm. on the Judiciary*, 111th Cong. (2009); Hearing on: H.R. 4115, the "Open Access to the Courts Act of 2009*" Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2009); *Has the Supreme Court Limited Americans' Access to Courts Before the S. Comm. on the Judiciary*, 111th Cong (2009); *The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses? Before the S. Comm. on the Judiciary*, 113th Cong. (2013).

courtroom. Congress once did so with more frequency.[73] For example, in 2009, a progressive Congress acted to override the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co*.,[74] which misinterpreted Title VII of the Civil Rights Act of 1964, by enacting the "Lilly Ledbetter Fair Pay Act." However, recent history has demonstrated just how difficult it is for Congress to do more than examine an issue. Legislative overrides of Supreme Court decisions are difficult regardless of which party controls Congress, but it is particularly difficult to change Court rulings restricting access to justice when the current Congress is controlled by like-minded conservatives responsive to the Chamber's agenda on access to justice issues.[75]

B. How Progressives in Congress Can Bend the Curve

In this subsection, we briefly review three areas in which progressives can fruitfully broaden media and public focus on efforts to narrow individuals' court access.

1. Spotlight Conservatives' Efforts to Suppress the Consumer Financial Protection Bureau's Authority

A significant current battleground for consumer advocates struggling to preserve court access for individuals is at the CFPB. The CFPB is engaged in implementing the authority granted to it under Dodd-Frank to prohibit or impose conditions or limits on mandatory arbitration clauses in financial contracts.[76] Business interests have made a high priority of blocking or hamstringing the CFPB's effort, primarily through Congressional action. Dodd-Frank requires the CFPB to first undertake a study and issue a report to Congress before enacting any rules. The CFPB has carefully followed the required steps, including a notice and comment period on the scope, methods, and data sources for conducting the study. It released its preliminary results in December 2013[77] and its final report to Congress in March 2015.[78] The

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[73] *See generally* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331 (1991). *See also* Lazarus, *supra* note 15, at 829. The article notes that the 1991 Civil Rights Act overrode twelve separate Supreme Court decisions that narrowly interpreted federal employment discrimination law. Congress was able to override the several decisions relating to the Americans with Disabilities Act in 2008. Note that the Court's arbitration decisions effectively nullify some of these laws by forcing individuals into arbitration where their claims cannot be fairly heard.

[74] 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

[75] Lazarus, *supra* note 15, at 830. The author notes that it is particularly difficult to overturn the Court's statutory interpretation decisions "when the Court's 'mistakes' coincide with the policy preferences of even a significant minority of the contemporary Congress, or the White House, *or with the interests of highly mobilized interest group*s – such as, for example, businesses affected by employment discrimination." *Id.* (emphasis added).

[76] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1028, 124 Stat. 1376, 2003-04 (2010).

[77] CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS: SECTION 1028(a) STUDY RESULTS TO DATE (2013), *available at* http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

[78] CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) (2015), *available at*

CFPB Director, Richard Cordray, indicated to Congress that the agency would soon begin rulemaking on the use of forced arbitration in financial products for all American consumers.[79] The CFPB then announced on October 7, 2015 that the agency plans to develop a rule that will eliminate the use of class action bans in arbitration clauses in financial products.[80] The final proposed Rule was released on May 5, 2016.[81]

Progressives, including Congressional progressives, have pushed back against the business community's public relations campaign to protect their mandatory arbitration clauses and undermine the legitimacy of the CFPB's actions. Those efforts can be stepped up. In particular, Congressional progressives can upgrade efforts to spotlight and, ultimately, defeat business interests' campaign to delay the CFPB's rulemaking and eliminate the CFPB's authority to regulate in this area.[82] On the fifth anniversary of the passage of Dodd-Frank last July, the Senate Democratic Policy & Communications Center released a Special Report analyzing the

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http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf. A good summary of the report can be found at Jonnelle Marte, *What Happens When Consumers are Banned From Class Action Lawsuits*, WASH. POST (Mar. 10, 2015), http://www.washingtonpost.com/news/get-there/wp/2015/03/01/cfpb-most-consumers-have-no-idea-whether-theyre-subject-to-arbitration-agreements/.

[79] *Hearing on the Consumer Financial Protection Bureau's Semi-Annual Report to Congress Before the S. Comm. on Banking, Hous., and Urban Affairs*, 114th Cong. (2015) (testimony of Richard Cordray, Director of the Consumer Financial Protection Bureau) (stating that the CFPB would proceed in due course to undertake the first step in the rulemaking process).

[80] CONSUMER FIN. PROT. BUREAU, CFPB CONSIDERS PROPOSAL TO BAN ARBITRATION CLAUSES THAT ALLOW COMPANIES TO AVOID ACCOUNTABILITY TO THEIR CUSTOMERS, *available at* http://www.consumerfinance.gov/newsroom/cfpb-considers-proposal-to-ban-arbitration-clauses-that-allow-companies-to-avoid-accountability-to-their-customers/.

[81] Press Release, Consumer Financial Protection Bureau, CFPB Proposes Prohibiting Mandatory Arbitration Clauses that Deny Groups of Consumers their Day in Court (May 5, 2016), http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-prohibiting-mandatory-arbitration-clauses-deny-groups-consumers-their-day-court/.

[82] The campaign has been ongoing since the CPFB began its arbitration study, but ramped up when the agency released its preliminary results. *See*, for example, Press Release, U.S. Chamber Comments on Consumer Financial Protection Bureau Arbitration Study (Mar. 10, 2015), https://www.uschamber.com/press-release/us-chamber-comments-consumer-financial-protection-bureau-arbitration-study (claiming the CFPB protects plaintiffs' lawyers instead of consumers and is the "result of an unfair and biased approach"); *see also* Letter from American Banks Association et al. to Richard Cordray, Dir., Consumer Fin. Prot. Bureau (July 13, 2015), http://www.consumerfinancialserviceslawmonitor.com/wp-content/uploads/sites/260/2015/07/26298470_11.pdf (identifying "numerous additional issues" they would like the CFPB to research and analyze before engaging in Rulemaking); *see also* The CFPB's Flawed Arbitration "Study", https://www.uschamber.com/sites/default/files/documents/files/cfpb_arbitration_study_critique.pdf (Chamber produced White Paper claiming that the CFPB's study is "deeply flawed in numerous respects.") The Civil Justice Caucus Academy held a briefing critiquing the study. *A Critique of the CFPB's Arbitration Study*, GEO. MASON U. SCH. OF LAW: LAW & ECON. CTR. (Sept. 25, 2015), http://www.masonlec.org/events/event/299-a-critique-cfpbs-arbitration-study.

various ways that Congressional Republicans have sought to weaken the CFPB.[83] The Report specifically notes Republican efforts to derail this important authority granted to the CFPB. For example, the House Appropriations Committee adopted a specific proposal to require the CFPB to redo its three-year study.[84] To emphasize the point, more than 80 conservative members of Congress signed a letter requesting that the CFPB redo its arbitration study.[85]

Importantly, in the struggle over the FY 2016 omnibus appropriations bill, progressives were able to block the drive of the Chamber and its allies to incorporate language along the lines of the Appropriations Committee's proposal.[86] This significant result shows that when progressives prioritize, and skillfully advocate on an important, but relatively under-the-radar consumer protection issue like the CFPB's arbitration regulations, they can prove an equal match for business advocates.

Progressives need to continue to defend the authority of the CFPB to regulate in this area, and to explain the public importance of preserving that authority. Proposals to abort the CFPB's forced arbitration rules will resurface, particularly after the recent high profile release of the proposed arbitration rule. Progressives have demonstrated an impressive ability to mobilize support, as, example, in June 2015, when the Fair Arbitration Now Coalition delivered a supportive petition to the CFPB signed by more than 78,000 consumers.[87] Progressive advocates also scored a highly important victory in their efforts to acquaint the media with the scope and impact of the abusive impact of fine print mandatory arbitration clauses, with the *New York Times* expose noted above. Progressives should be ready to fend off new threats and to take advantage of new opportunities to build on these recent successes, especially to

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[83] *Special Report: Republican Attacks on the Consumer Financial Protection Bureau*, DEMOCRATIC POL'Y & COMMS. CTR. 8 (July 22, 2015), http://www.dpcc.senate.gov/files/documents/ReportGOPAttacksOnCFPB_2015.pdf.

[84] Letter from Consumer Groups to Hon. Thad Cochran, Hon. Barbara Mikulski, Hon. Harold Rogers, and Hon. Nita Lowey (May 19, 2015), http://www.citizen.org/documents/letter-approps-re-cfpb-authority-mandatory-arbitration.pdf. Consumer groups also reacted strongly in opposition to the proposal. *See*, for example, Letter from the Fair Arbitration Now Coalition to Hon. Harold Rogers, Chair, and Hon. Nita Lowey, Ranking Member, House Comm. on Appropriations (June 17, 2015), http://www.consumeradvocates.org/sites/default/files/FAN%20Letter%20Opposing%20Womack-Graves%20Amendment%206-17-15.pdf.

[85] Letter from Rep. Patrick McHenry and Sen. Tim Scott et al. to Hon. Richard Cordray, Dir., Consumer Fin. Prot. Bureau (June 17, 2015), http://www.cfpbmonitor.com/files/2015/06/McHenry-Scott-to-Cordray-Letter-re-Arbitration.pdf.

[86] Consolidated Appropriations Act, 2016, Pub. L. No. 114-113; *see also* Bernie Becker, *2,200 Pages, $1.8 Trillion, Dead of Night: What's Really in the Year-End Tax and Spending Bill?* (Dec. 16, 2015), http://www.politico.com/story/2015/12/what-is-in-federal-budget-216877 ("banks and Republicans fell short in efforts to pare back Dodd-Frank regulations . . . efforts to impede Consumer Financial Protection Bureau rules were also brushed aside").

[87] Press Release, Fair Arbitration Now, 78,000+ Consumers to CFPB: End Forced Arbitration (June 18, 2015), http://www.fairarbitrationnow.org/78000-consumers-to-cfpb-end-forced-arbitration/.

educate constituencies whose needs and interests are at stake about what they are doing to protect those interests.

2. Use the Regular Legislative Calendar and Process

There are legislative avenues available to Congressional progressives even when conservatives control both Chambers. Many civil justice reform bills have been introduced addressing mandatory arbitration, class actions, and access to the courts for individuals. Progressives may not be able to have their bills signed into law, but such legislation may provide opportunities to message effectively. Moreover, conservative efforts to enact their restrictive agenda can also provide opportunities to expose the threat their agenda poses to broad public interests. For example, well-selected, compelling witnesses at legislative hearings can generate media focus on consumers, workers, retirees, and small investors, as well as other safeguards at stake. Similarly, Congressional progressives can use the Rules Enabling Act process to bring attention to the Judicial Conference's sometimes significant changes to the Federal Rules.

3. Actively Engage with the Courts

Progressives in Congress should actively follow and respond to business interests' campaign to undermine and scuttle safeguards for individuals in court – often safeguards in laws that past Congresses passed. Members of Congress can speak out publicly and, where appropriate, submit *amicus curiae* briefs to courts, especially the Supreme Court, that are hearing cases that are part of this campaign. For example, two cases are currently pending before trial and appellate courts within the D.C. Circuit that challenge the constitutionality of, and could otherwise cripple, the Consumer Financial Protection Bureau. These threats to the CFPB will be joined by a massive effort by the Chamber and its allies to use the courts to overturn the agency's restrictions on the forced arbitration clauses in consumer financial transaction contracts (if they fail to delay, gut, or kill the rule legislatively). In addition, the Department of Justice has recently appealed to the D.C. Circuit a D.C. district judge's decision adverse to another critical agency created by the Dodd-Frank financial reform law, the Financial Stability Oversight Council. One or more of these cases will, eventually, reach the Supreme Court, possibly as early as the Court's 2016-2017 term. These cases present excellent opportunities for congressional progressives to play a meaningful and visible role preserving vital, recently enacted, consumer protections designed to prevent a recurrence of the 2008 implosion of the financial system and the ensuing Great Recession.[88]

[88] The 3 pending cases are: (1) *PHH Corp. v. CFPB* (pending before D.C. Circuit, oral argument held April 12, 2016) (case # 15-1177), http://www.wsj.com/articles/appeals-court-panel-sharply-questions-structure-of-consumer-watchdog-agency-1460480484; (2) *State National Bank of Big Spring, Texas v. Lew* (pending in D.C. District Court, following partial reversal of previous decision and remand, 795 F.3d 48 (D.C. Cir. 2015), awaiting decision on cross-motions for summary judgment) (case # 1:12-cv-01032); (3) *MetLife v. Financial Stability Oversight Council* (appeal by DOJ from adverse District Court decision, docketed in D.C. Circuit April 20, 2016), http://www.nytimes.com/2016/04/08/business/dealbook/ruling-behind-metlifes-too-big-to-fail-reprieve-unsealed.html. In addition to these pending cases, two district courts outside the D.C. Circuit have rejected

Another pending example where progressives in Congress can speak out is *Spokeo*, *Inc*. *v. Robins*, discussed above, which threatens to cripple Congress' longstanding and essential power to create effective remedies in virtually any statute protecting individual interests, in particular statutes aimed at preventing future harm. A decision in *Spokeo* is expected any day now, but Congressional progressives can comment when the case is decided, as appropriate depending on the result.

Conclusion

In sum, across a wide array of legal issue areas, ordinary people's capacity to get justice from our legal system is being progressively narrowed by conservatives in Congress, the federal courts, and the Judicial Conference. The goals and, in many instances, the results already secured by this campaign, effectively nullify landmark laws to protect individuals that Congress and state legislatures have enacted over many years. They flout the original courthouse door-opening design of the Federal Rules of Civil Procedure, and run counter to the aim of the Framers of the Constitution, who created a third branch of independent federal judges able to assure justice for individuals free from political pressures. The current vacancy on the Court may very well, as business advocates themselves fear, have an impact on this trend of cases stripping away ordinary individuals' ability to enforce hard-won statutory consumer, employee, and other protections. Yet, quite apart from the Supreme Court vacancy and its ultimate resolution, progressives in Congress can significantly benefit their constituents by matching the high priority that business interests have given to their courthouse door-closing campaign, by executing effective strategies to slow, stop, and reverse that campaign, and restore their constituents' rights.

challenges to the CFPB's for-cause-removal structure, *CFPB v. ITT Educational Services, Inc.*, 2015 WL 1013508 (S.D. Ind. 2015); *CFPB v. Morgan Drexen, Inc.,* 69 F.Supp.3d 1082 (C.D. CA 2014).