Class Action Waivers in Title VII Cases after *Italian Colors:* Sidestepping the Individual Arbitration Mandate

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Reactions have been virtually unanimous that the Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant*[1] casts an unfriendly shadow on class or collective arbitration of employment-related claims. Indeed, the common wisdom in the wake of the Court's ruling -- that a waiver of class treatment in arbitration is enforceable, even when the cost of individual arbitration exceeds a claimant's potential recovery -- is that this decision will engender a large scale denial of employment law claims.[2] But, this essay suggests that employee waivers of class treatment in arbitrations are not appropriate for Title VII[3] claims because of enforcement provisions unique to that statute. By explicitly commanding that employees[4] be afforded an efficient, expeditious and inexpensive judicial remedy for class-based discrimination, Congress did for Title VII claimants what the Court said it failed to do for the antitrust plaintiffs in *Italian Colors*: it effectively set its legislative face against limits on employee access to class treatment. Whatever the case may turn out to be under other employment statutes, both status discrimination and retaliation claims under Title VII appear to fall outside *Italian Colors'* shadow.

This essay first summarizes the Justices' several opinions in *Italian Colors* with a view to locating the boundaries of the Court's rationale for approving class action waivers and

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mandatory individual arbitrations. Next, the distinctive portions of Title VII's enforcement provisions are set forth in order to appreciate Congress' command that employees have access to an affordable, speedy and efficient judicial remedy for violations of their class-based rights. Third, the essay posits that Title VII claims fit squarely within the Court's exception to its approval of class action waivers in *Italian Colors*. Arguments both for and against this thesis are examined before concluding that mandatory individual arbitration is contrary to Title VII's command and that refusing to enforce class action waivers for Title VII claims best harmonizes the competing interests Congress means to promote.

I. The *Italian Colors* Decision.

Italian Colors Restaurant and other merchants who accept American Express Company ("Amex") cards sued Amex and one of its subsidiaries, claiming that Amex used its monopoly power in the charge card market to force the merchants also to accept its credit cards at rates 30% higher than fees for competing credit cards. The merchants alleged that this tying arrangement between Amex's charge cards and credit cards violated the Sherman Act.[5]

The agreements between the merchants and Amex required all disputes between the parties to be resolved by arbitration and that there "shall be no right or authority" for any claims to be arbitrated "on a class action basis."[6] On the authority of these provisions, Amex moved to compel individual arbitration under the Federal Arbitration Act ("FAA".)[7] The merchants responded with a declaration from an economist estimating that the cost of expert analysis to

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prove their antitrust claims would be at least several hundred thousand dollars, while the maximum recovery for an individual merchant would be less than $13,000 (and thus less than $39,000 if trebled under the Clayton Act.[8])

The district court granted Amex's motion and dismissed the merchants' suits. The Second Circuit reversed, holding that the class action waiver was unenforceable because the merchants had established that the expense of individual arbitrations was prohibitive.[9] The Supreme Court granted certiorari, vacated the judgment and remanded for consideration in light of *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.* [10] The Second Circuit reaffirmed its prior judgment,[11] and the Supreme Court again granted certiorari to consider whether the FAA permits courts to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal statutory claim.[12]

The Supreme Court ruled for Amex again in a 5-to-3 decision. (Justice Sotomayor did not participate in this case.) Justice Scalia's majority opinion, joined by the Chief Justice and Justices Kennedy, Thomas and Alito, concluded that a class action waiver is enforceable under the FAA even when the cost of individual arbitration of a federal statutory claim exceeds a plaintiff's potential recovery. Justice Scalia's opinion first reviews the FAA's history, noting that Congress enacted it in response to widespread judicial hostility to arbitration and concluding that because arbitration is a matter of contract, courts must rigorously enforce those contractual obligations according to their terms.[13] The opinion states that this conclusion holds

true for claims alleging a violation of a federal statute, "unless the FAA's mandate has been 'overridden by a contrary congressional command.' "[14] *Take special note of these words, for here is where Justice Scalia sows the first seed for exempting Title VII claims from mandatory individual arbitrations.* The majority then concludes that no such command required it to decline enforcement of the class arbitration waiver in the Amex agreement here.

In rejecting the merchants' argument that mandatory individual arbitrations would contravene the policies of the antitrust laws, Justice Scalia remarked that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[15] *Again, take special note of these words, for here is where Justice Scalia sows another seed for a Title VII exception to mandatory individual arbitrations.* While acknowledging that Congress took some measures in the antitrust statutes to go beyond normal limits in attempting to deter and remedy unlawful trade practices, Justice Scalia finds "irrational" the argument that Congress must have intended to preclude class action waivers.[16] He points out that the antitrust statutes do not mention class actions and, indeed, were enacted before the federal courts' rules of procedure even contemplated class litigation.[17]

Additionally, the majority rejects the notion that Congress' approval of Rule 23[18] established an entitlement to class proceedings for the vindication of statutory rights. According to Justice Scalia, not only would such a notion likely abridge or modify a substantive right in violation of the Rules Enabling Act,[19] but also there is nothing in Rule 23

that suggests an entitlement to class action treatment, even when the cost of complying with the rule's "stringent" requirements is prohibitively high.[20] Accordingly, the Court found no "contrary congressional command" in Rule 23 that would require it to disapprove the waiver of class arbitration that bound the merchants in this case.

In a section of the opinion that has garnered the most notoriety, the majority goes on to reject the merchants' argument that courts may invalidate arbitration agreements where necessary to "effectively vindicate" a federal statutory right. In contrast to a provision forbidding the assertion of federal rights or, perhaps, imposing filing fees so high that access to any forum is impracticable, this case is simply about whether *proving* a violation is worth the expense involved, according to Justice Scalia.[21] Reviewing some of the Court's non-Title VII arbitration precedents, the majority concludes that they all but resolve (in favor of Amex) the merchants' argument that class arbitration is necessary to vindicate their substantive antitrust rights in this case. Accordingly, the Court reversed the judgment of the Second Circuit, stating that the FAA does not sanction the type of judicially created superstructure that would be necessary to determine whether a claimant can be held to its contractual obligation of individual arbitration.[22]

Justice Thomas concurred in a separate opinion indicating that while he joined the majority's opinion in full, he was writing separately to note that the result here is required by the plain meaning of section 2 of the FAA. Because the merchants simply did not furnish grounds for the revocation of their agreements with Amex within the meaning of that section,

the agreement (including the class action waiver) must be enforced.[23]

Justice Kagan, joined by Justices Ginsburg and Breyer, dissented. Her opinion begins by characterizing the majority's approach this way: It's "too darn bad" that the effect of the Court's decision is to permit Amex to insulate itself from antitrust liability, even if it has violated the law.[24] In Justice Kagan's view, the "effective vindication" principle (that arbitration clauses cannot choke off a plaintiff's ability to enforce Congressionally created rights) requires that the merchants have a chance to vindicate their federally created antitrust rights.

The dissent reasons that since the Court would not enforce a total exculpation clause (*e.g.*, merchants may not bring antitrust claims), the Court cannot permit an arbitration clause to thwart federal law by the procedural device of class arbitration waivers. Pointing out that the "effective vindication" rule operates only rarely to invalidate arbitration clauses, it has not - and in this case would not - undermine the national policy favoring arbitration under the FAA. Because Amex's clause outlaws not only class arbitration, but also forbids any joinder or consolidation, forbids the merchants from making informal arrangements for a common expert report and precludes fee-shifting of costs to Amex, the upshot is that it would cost Italian Colors Restaurant (and each other merchant individually) several hundred thousand dollars to pursue a claim worth less that $39,000 at best.

Justice Kagan goes on to refute the majority's disparagement of the effective vindication rule as originating in *dictum*.[25] Additionally, her opinion demonstrates that the majority's exclusion of class action waivers from the rule rests on the false premise that this case turns on

such a waiver. The dissent points out that the rule looks at whether the arbitration agreement as a whole prevents a claimant from vindicating federal statutory rights. Because Amex's agreement is a more tightly drawn individualized arbitration contract that effectively insulates it from Sherman Act liability, it runs afoul of the effective vindication rule.[26] Finally, Justice Kagan distinguishes as unpersuasive (and thus not controlling) prior decisions based on preemption of state attempts to invalidate arbitration clauses. Viewing this case as an attempt by the majority to use the FAA to *block* federal antitrust claims instead of *resolving* them, the dissent bemoans the prospect that the majority's decision will undermine the antitrust laws as well as the FAA itself.[27]

II. Title VII's Distinctive Enforcement Features

The enforcement provisions of Title VII speak clearly for themselves as a command by Congress that limits mandatory individual arbitration that the FAA would otherwise permit. Section 706(f)(1) of Title VII provides:

> Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance.
>
> Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security.

42 U.S.C. 2000e-5(f)(1).

Section 706(f)(4) and (5) of Title VII provides:

> (4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.
>
> (5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.
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> 42 U.S.C. 2000e-5(f)(4) and (5).

III. Squaring Title VII with *Italian Colors'* construction of the FAA.

Squaring the FAA, as construed in *Italian Colors*, and Title VII is neither difficult nor complicated. As Justice Scalia's *Italian Colors* opinion concludes, where a federal statute evinces an intention to override the FAA's policy of strict enforcement of contract terms, the latter's policy must yield to the former's intention.[28] That is precisely the case for the subset of employment discrimination claims that arise under Title VII. Construed in light of the purposes expressed by Congress in the statute itself and elsewhere, Title VII evinces an intention not to limit employee access to the array of remedies and procedures necessary to enforce the statute's anti-discrimination imperative. Mandatory individual arbitration fails to heed that explicit legislative command, and class treatment waivers are thus not enforceable for Title VII arbitrations. It's as simple as that.

A. *The command of section 706(f).*

Look first at Title VII's original enforcement provisions. When considered in light of Title VII's purpose and history, these provisions by themselves constitute a "contrary congressional command" that was missing from the Sherman and Clayton Acts in *Italian Colors*. *First,* Congress mandates that in appropriate Title VII cases a plaintiff need not pay a filing fee, need not pay costs and need not advance security in order to vindicate her rights. No such financial protection attended the antitrust plaintiffs in *Italian Colors*. *Second*, Congress mandates that Title VII actions, alone among other employment-related civil cases, are to be expedited and advanced on the court's docket, even to the point of using non-Article III special masters under Rule 53.[29] Again, no such requirement of expedited judicial treatment covered the antitrust claims in *Italian Colors*. *Third*, Title VII endows district judges with authority to appoint counsel for plaintiffs where it is just to do so, a discretion that federal trial judges lacked in the antitrust case (except to the extent that the Federal Judicial Code may permit appointment of counsel for indigent plaintiffs generally in civil cases.)[30] *Fourth*, intervention by the Equal Employment Opportunity Commission ("EEOC") or the Attorney General is available in appropriate Title VII cases, another enforcement feature that bespeaks the public importance of vindicating Title VII rights - and a feature that was conspicuously missing in the antitrust case.

Reading section 706(f)'s enforcement scheme holistically, it is indisputable that Congress has singled out Title VII claims for special treatment. The impetus for doing so is pretty obvious. Congress was addressing the disparity of power and resources between employees

and employers by ensuring employees' access to an efficient, speedy and inexpensive judicial determination of their class-based claims.[31] Examining the appointment of counsel portion of section 706(f), the Second Circuit remarked in an early Title VII case:

> "**[T]his language suggests a special congressional concern with legal representation in Title VII cases**. . . . [t]he House Report states, "[b]y including this provision in the bill, the committee emphasizes that the **nature of Title VII actions more often than not pits parties of unequal strength and resources against each other**. The complainant, who is usually a member of a disadvantaged class, is opposed by an employer who not infrequently is one of the nation's major producers, and who has at his disposal a vast array of resources and legal talent." H.R.Rep. No. 238, 92nd Cong., 1st Sess. 12 (1972), reprinted in 1972 U.S.Code Cong. & Ad.News 2137, 2148. Although the statute does not provide a right to counsel, see Caston v. Sears, Roebuck & Co., Hattiesburg, Miss., 556 F.2d 1305, 1309 (5th Cir.1977), this legislative history reinforces Congress's view that courts must give serious consideration to these requests.

Jenkins v. Chemical Bank, 721 F. 2d 876, 879 (2d. Cir. 1983) (**boldface** added). Five decades of Title VII litigation have not diminished, much less resolved, this "special congressional concern." *See, Note*, 127 Harv. L. Rev. 278, 284 at n. 67 and text (2013). Moreover, recent scholarship confirms a significant racial disparity in legal representation rates for African Americans in employment disputes, thus compounding Congress' original concern. *See*, A. Myrick, "Job Claims: African Americans Least Likely to Have a Lawyer," *Labor and Employment Law*, p. 3 (Am. Bar Ass'n, Spring 2014) (summarizing findings in published article of disparities affecting minority representation in employment disputes.)

B. *Interfacing the Civil Rights Act of 1964 with Rule 23.*

There's more, however, to the congressional command about the availability of class treatment than what Title VII contains. When Congress approved the 1966 amendments to the Federal Rules of Civil Procedure, the Advisory Committee on Rules annotated Rule 23 to

express that (b)(2) class treatment is *specifically intended* to embrace civil rights claims:

"Subdivision (b)(2). **This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate.** Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See Potts v. Flax, 313 F.2d 284 (5th Cir. 1963); Bailey v. Patterson, 323 F.2d 201 (5th Cir. 1963), cert. denied, 377 U.S. 972 (1964); Brunson v. Board of Trustees of School District No. 1, Clarendon City, S.C., 311 F.2d 107 (4th Cir. 1962), cert. denied, 373 U.S. 933 (1963); Green v. School Bd. of Roanoke, Va., 304 F.2d 118 (4th Cir. 1962); Orleans Parish School Bd. v. Bush, 242 F.2d 156 (5th Cir. 1957), cert. denied, 354 U.S. 921 (1957); Mannings v. Board of Public Inst. of Hillsborough County, Fla., 277 F.2d 370 (5th Cir. 1960); Northcross v. Board of Ed. of City of Memphis, 302 F.2d 818 (6th Cir. 1962), cert. denied 370 U.S. 944 (1962); Frasier v. Board of Trustees of Univ. of N.C., 134 F.Supp. 589 (M.D.N.C. 1955, 3-judge court), aff'd, 350 U.S. 979 (1956)."

F. R. Civ. P. 23, Notes of Advisory Committee on Rules - 1966 Amendment (**boldface** added).

Congress' approval in 1966 of this special reference to civil rights actions in the wake of Title VII's enactment two years earlier is telling. It highlights Congress' conclusion that neither individual nor Government suits are adequate to assure effective enforcement of Title VII. Moreover, it differentiates the chronology that the *Italian Colors* majority found persuasive in the antitrust area. The Sherman Act preceded the FAA; Title VII and the pertinent amendment to Rule 23 did not. Indeed, Congress approved the 1966 class action amendment in the face of more than four decades of experience under the FAA. None of this history can simply be

blinked away. At the very least, it nourishes the notion that Congress intended for class treatment to be available for prosecution of class-based claims under Title VII, whatever the forum may be.

C. *Title VII's special history*.

Turning back to Title VII itself, look carefully at the context in which the statute's singular enforcement scheme is intended to operate. Congress has stressed repeatedly since 1964 the need for robust enforcement of Title VII's moral imperative of equal opportunity in the American workplace. After a few years of experience under the original provisions of the 1964 Civil Rights Act, Congress amended Title VII in 1972 to ". . . further promote equal employment opportunities for American workers."[32] As the EEOC has explained, the report accompanying the 1972 amendments stated: "The time has come for Congress to correct the defects in its own legislation. The promises of equal job opportunity made in 1964 must [now] be made realities . . . ."[33] After the 1972 amendments and following nearly two more decades of experience under the amended statute, Congress enacted the Civil Rights Act of 1991 ["1991 Act"] in order to . . . "amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws."[34] Indeed, Congress specified its findings and purposes in the following sections:

> *SEC. 2. FINDINGS.*
> *The Congress finds that--*
>
> *(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace . . . .*

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

SEC. 3. PURPOSES.
The purposes of this Act are--

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace . . . .and

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

Civil Rights Act of 1991 text at *http://www.eeoc.gov/eeoc/history/35th/thelaw/cra_1991.html,* accessed September 15, 2013.

The explicit "congressional command" of the 1991 Act is to ensure that Title VII's operative provisions are fully enforced because of the continuing need to deter and remedy unlawful discrimination in the workplace. Class action waivers in arbitration agreements can too easily work a forfeiture of employee claims. In some cases the cost to an employee of individually arbitrating a claim is disproportionate to the potential financial benefit of the claim. In other cases pursuit of an individual claim may draw unwanted attention to the employee both by the upper management and by co-workers and supervisors. In both situations, the disincentive to arbitrate individually is strong enough that many employees will simply forfeit their Title VII rights instead of trying to vindicate them. Congress intended no such forfeitures, and class treatment waivers in employee agreements are thus "contrary to the congressional command" embodied in the specific findings outlined here, as well as in the enforcement provisions of section 706 itself.[35]

D. *The 1991 Amendments - A Different View - and an Answer*.

To be sure, some proponents of mandatory individual arbitration might view Congress'

mention of arbitration in an amendment to Title VII as supportive of class treatment waivers in discrimination cases.[36] Putting the mere inclusion of the word "arbitration" together with Congress' intent in section 706(f) that Title VII claims be prosecuted in a speedy and inexpensive manner, one can hear class waiver proponents arguing that individual arbitrations are best suited to determine employee disputes inexpensively for employers and promptly for all concerned. Moreover, it is now part of the Court majority's dispute resolution canon that arbitration is favored because it is expeditious, informal and private.[37] But such a view of Title VII overestimates the statutory text and underestimates Congress' purposes in enacting and safeguarding the special provisions of section 706.

Actually, there is neither literal nor implied support whatsoever for class waivers or mandatory individual arbitration in the text of the 1991 amendment. Witness the actual words of the amendment:

"Alternative Means of Dispute Resolution

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title [enacting section 1981a of this title and amending this section, sections 1988, 2000e, 2000e–1, 2000e–2, 2000e–4, 2000e–5, 2000e–16, 12111, and 12112 of this title, and section 626 of Title 29, Labor]."

Pub. L. 102-166, title I, Sec. 118, Nov. 21, 1991, 105 Stat. 1081, appended to 42 U.S.C.1981.

Quite tellingly, the words of the 1991 Act simply encourage the use of arbitration as one of several means of dispute resolution for discrimination claims. And, they do so without

mention of class action waivers, mandatory individual arbitrations or any purported supervening requirement of the FAA or any other statute.[38]

Beyond any textual argument, the historical context of section 118 is also informative. That section was included in an act whose stated purpose is to fortify, not impoverish, enforcement of Title VII's command to eradicate and remedy unlawful discrimination in the workplace. Indeed, section 1107 of the 1991 Act directs the courts to construe Title VII in this manner:

SEC. 1107. RULES OF CONSTRUCTION FOR CIVIL RIGHTS LAWS.

"(a) EFFECTUATION OF PURPOSE.--All Federal laws protecting the civil rights of persons shall be interpreted consistent with the intent of such laws, and shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies.

"(b) NONLIMITATION.--Except as expressly provided, no Federal law protecting the civil rights of persons shall be construed to repeal or amend by implication any other Federal law protecting such civil rights.

"(c) INTERPRETATION.--In interpreting Federal civil rights laws, including laws protecting against discrimination on the basis of race, color, national origin, sex, religion, age, and disability, courts and administrative agencies shall not rely on the amendments made by the Civil Rights Act of 1990 as a basis for limiting the theories of liability, rights, and remedies available under civil rights laws not expressly amended by such Act.

Ibid. at section 1107.

Given this rule of construction, it is clear that Congress' encouragement of dispute resolution was not intended to *eliminate* remedies available to employees. Because class action waivers and mandatory individual arbitrations are devices that do *limit* enforcement, their proponents cannot logically or justly rely on section 118 to support their applicability to Title VII claimants.

E. *Additional Considerations*.

First, mandatory individual arbitration would ill serve the measures Congress has taken to facilitate litigation of Title VII claims. Distinct from the antitrust laws, which Justice Scalia points out in *Italian Colors* ". . . do not guarantee an affordable procedural path to the vindication of every claim[,]" section 706(f) does establish such a path for employment discrimination claims.[39] And, Congress' intent in doing so is not simply to confer a benefit on individual claimants. Nay, the legislative motive behind the Civil Rights Act of 1964 is much more profound than that. In the face of notorious resistance to racial equity and justice, Congress determined that status discrimination in the workplace should be eradicated and its harmful effects remedied. In plain English, the legislative purpose is to make sure that Title VII's imperative of equal opportunity is not nullified. Imposition of mandatory individual arbitrations, however, is likely to do just that.

Second, not a single concern expressed by the Court about respect for the FAA supports mandatory individual arbitration of Title VII claims. No "superstructure" or preliminary litigating hurdle of the kind that worried Justice Scalia in *Italian Colors* would have to be imposed in order to determine the enforceability of class treatment waivers.[40] That's the advantage of the bright-line rule this essay offers as a way to harmonize the FAA and Title VII. Likewise, no sacrifice of arbitration's speed or efficiency would be required to determine the rights of multiple employees claiming the same form of discrimination. A properly managed class arbitration can assuredly provide a quicker and more efficient way to determine those claims, with the added prospect of an overall lower transaction cost for employers.

Third, although class action waivers have been approved post-*Italian Colors* in Fair Labor Standards Act cases,[41] there has been no suggestion that Title VII claims should be treated the same way. Indeed, there has been no mention at all of Title VII's "contrary congressional command" as a basis for requiring that sex, race, color, national origin and religion discrimination claims be arbitrated individually.[42] Likewise, the rapidly developing jurisprudence at the intersection of the FAA and other federal statutes is devoid of any mention of Title VII's special enforcement provisions. *E.g.*, *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) (Employers may not require employees to waive their rights to arbitrate collectively their employment claims.)[43] Accordingly, there appears to be no impediment to recognition by the courts of an exception to enforcement of class action waivers in Title VII cases.[44]

D. Conclusion

When Congress addressed discrimination in the workplace, it did not remain silent in the face of the FAA's policy of strict enforcement of contractual obligations.[45] Instead, Congress determined that vindication of Title VII's class-based rights is a matter of such transcendent importance that employees must have access to a special enforcement regime. As if this determination were not clear enough, Congress then amended Title VII for the express purpose of strengthening employee enforcement of its equal opportunity imperative. Properly regarded both literally and holistically, therefore, the Civil Rights Act of 1964 unmistakably expresses a

preference against limiting the manner in which employee rights can be enforced.[46]

To sum up this essay's thesis, mandatory individual arbitrations would constrain full enforcement of Title VII's moral, social, economic and legal imperatives. Class action waivers, therefore, are contrary to the "congressional command" that robust access to Title VII's full remedial scope be available to employees, lest their rights be nullified, discrimination be allowed to fester and inequality of opportunities be permitted to persist. To the extent that the FAA contemplates strict enforcement of class treatment waivers in employee arbitration agreements, Title VII's special enforcement provisions command to the contrary. Taking Justice Scalia's words in *Italian Colors* at face value, therefore, Title VII claims fit comfortably within the "contrary congressional command" exception the majority opinion crafted in order to harmonize the FAA with other federal laws. Whatever shadow *Italian Colors* may cast over other employment-related disputes, Title VII claims fall outside its perimeter.

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1. 570 U.S. ---, 186 L. Ed. 2d 417, 133 S. Ct. 2403 (2013).

2. *E. g.*, D. Garcia and L. Caseria, *Opinion analysis: A class action waiver in an arbitration agreement will be strictly enforced under the Federal Arbitration Act*, SCOTUSblog (Jun. 21, 2013), accessed at: ***http://www.scotusblog.com/2013/06/ opinion-analysis-a-class-action-waiver-in-an-arbitration-agreement-will-be-***

strictly-enforced-under-the-federal-arbitration-act/; Hunton & Williams LLP, *Supreme Court delivers another arbitration victory for employers but challenges remain* (NADN Lexology, June 27, 2013), accessed at: *http:///www.lexology.com/library/detail.aspx?g=2951934-1d4c-4e9a-...ly+feed&utm_content+Lexology+Daily+Newsfeed+2013+2013-07-05&utm_term=*.

3. Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (July 2, 1964), codified at 42 U.S.C. 2000e, *et seq*.

4. The term "employees" is used in the statutory sense to cover incumbent, former and prospective employees.

5. 15 U.S.C. 1, *et seq*.

6. 570 U.S. at ---, Slip Op., p. 1.

7. 9 U.S.C. 1, *et seq*.

8. 15 U.S.C. 4.

9. *In Re American Express Merchants' Litigation*, 554 F. 3d. 300 (2d Cir. 2009).

10. *American Express Co. v. Italian Colors*, 559 U.S. 1103, 176 L. Ed. 2d 920, 130 S. Ct. 2401 (2010) (remanding for reconsideration in light of *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662, 176 L. Ed. 2d. 605, 130 S. Ct. 1758 (2010).)

11. *In Re American Express Merchants' Litigation*, 681 F. 3d. 139 (2d Cir. 2012)

12. 568 U.S. --- (2012).

13. 570 U.S. at ---, Slip Op., p. 3.

14. *Id*. at p. 4.

15. *Id*. at p. 4.

16. *Id*. at p. 4.

17. *Id*. at p. 4.

18. Rule 23 of the Federal Rules of Civil Procedure ("F. R. Civ. P.")

19. 28 U.S.C. 2072.

20. 570 U.S. at ---, Slip Op., p. 5.

21. *Id*. at pp. 6-7.

22. *Id*. at p. 9.

23. 570 U.S. --- (Thomas, J., concurring), Slip Op., p. 1.

24. 570 U.S. --- (Kagan, J., dissenting), Slip Op., p. 1.

25. *Id*. at pp. 8-9.

26. *Id*. at pp. 11-12.

27. *Id*. at pp. 14.

28. 570 U.S. ---, Slip Op., pp. 3-4. *See also*, Note, 127 Harv. L. Rev. 278, 287 (2013.)

29. 42 U.S.C. 2000e-5(f)(5)

30. 42 U.S.C. 2000e-5(f)(1)

31. An interesting aside: When Congress enacted the FAA, it also addressed the same disparity in power and resources between employees and employers: "As the history of the [FAA] indicates, the potential disparity in bargaining power between individual employees and large employers was the source of organized labor's opposition to the Act, which it feared would require courts to enforce unfair employment contracts. That same concern . . . underlay Congress' exemption of contracts of employment from mandatory arbitration. When the Court simply ignores the interest of the unrepresented employee, it skews its interpretation with it own policy preferences." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 149 L. Ed. 2d. 234, 121 S. Ct. 1302 (2001) (Stevens, J., dissenting at Slip op., p. 10.)

32. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, Mar. 24, 1972, 86 Stat. 103, accessed at *www.eeoc.gov/eeoc/history/35th/thelaw/eeo_1972.html.*

33. *See, www.eeoc.gov/eeoc/history/35th/thelaw/eeo_1972.html*; *see also*, Steven Napolitano, "Interpreting the Legislative History of Section 706(g) of Title VII," 7 B.C. Third World L.J. 263, 274-275 (1987), accessed on August 28, 2013 at *http://lawdigitalcommons.bc.edu/twlj/vol7/iss2/7.*

34. Civil Rights Act of 1991, accessed on August 29, 2013 at: *http://www.eeoc.gov/eeoc/history/35th/thelaw/cra_1991.html.*

35. *Supra*, section B

36. *Infra* at n. 38 and text.

37. *E.g*., *AT&T Mobility v. Concepcion,* 563 U.S. 321, 179 L. Ed. 2d. 742, 131 S. Ct. 1740 (2011); *CompuCredit Corp. v. Greenwood*, 565 U.S. ---, 181 L. Ed. 2d 586, 132 S. Ct. 665 (2011).

38. Because the notion of mandatory individual arbitrations did not really surface until well after enactment of the Civil Rights Act of 1991, it is hardly surprising that the 1991 Act does not address in more direct terms class action waivers in arbitrations. Likewise, the current Court majority's embrace of arbitration and its newly fashioned interpretation of the FAA did not come to the fore until recently, so it is not remarkable at all that a statute passed more than two decades ago would not contain a more detailed and explicit rejection of class action waivers in arbitration. Unlike the FLSA and RICO cases, however, Title VII's original enforcement provisions (which have remained untouched since 1964) make clear enough that mandatory individual arbitrations are plainly inconsistent with what Congress was seeking to accomplish fifty years ago.

39. 570 U.S. ---, Slip Op., p. 9.

40. *Id*.

41. The Second Circuit applied *Italian Colors* to an FLSA dispute, ruling that a waiver of collective action claims is enforceable, despite the Circuit's prior reluctance to enforce such waivers. *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013). See also, *Raniere v. Citigroup Inc*., --- F. 3d --- (2d Cir. 2013). *Cf., Parisi v. Goldman Sachs Group*, 710 F. 3d 483 (2d Cir. 2013) (Reversing a district court's refusal to enforce a class action waiver because the Court of Appeals concluded that plaintiffs had no substantive right to pursue a pattern-or-practice claim.) Other courts have done much the same in FLSA and state wage and hour cases. *E.g., Walthour v. Chipio Windshield Repair, LLC, 745 F. 3d. 1326, (11th Cir. 2014), cert. den. 571 U.S. ---, (No. 13-1354, June 30, 2014); Hickey v. Brinker Int'l Payroll, etc*., No. 1:13 CV 951 (D. Colo., February 18, 2014, accessed on August 1, 2014 at *http://02ec4c5.netsolhost.com/blog/data/20/1/142/136/1957625/user/2137514/htdocs/blog/wp-content/uploads/2014/04/Hickey-2.18.14.pdf.*

42. Also of interest is that the special case of Title VII's enforcement provisions was not mentioned in any of the *amicus curiae* merits briefs submitted in *Italian Colors*, and the transcript of oral argument in that case omits any reference to those provisions - or to Title VII at all. *See, http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-133.pdf*, last accessed on September 30, 2013.

43. The swirl of controversy surrounding the decision of the National Labor Relations Board ("Board") in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied 737 F.3d 344 (5th Cir. 2013), has so far omitted any mention of Congress' special treatment of Title VII claims. That is not surprising, as the Board's concern is limited to proper application of the concerted action provision of the National Labor Relations Act. 29 U.S.C. 157. Notwithstanding that concern, a number of circuit courts have joined the Fifth Circuit in refusing to enforce the Board's *D.R. Horton* rule. *E.g., Sutherland v.Ernst & Young LLP, supra; see also, Richards v. Ernst & Young, LLP, __ F.3d __, 2013 WL 4437601 (9th Cir. Aug 2, 2013); Owen v. Bristol Care,Inc., 702 F.3d 1050 (8th Cir. 2013)*. Because the Board did not petition for review of the Fifth Circuit's denial of enforcement, its rule prohibiting waivers of class treatment of employment claims is effectively moribund absent favorable judicial review. Whatever the ultimate fate of the *D.R. Horton* rule may be, it should not affect in the least the very different notion that class treatment waivers for Title VII claims are not enforceable. *Cf.,* C. Sullivan and T. Glynn, "Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution," 64 *Alabama L. Rev*. 1013 (2013); B. Sachs, "Arbitration and Labor Law: Where the Fifth Circuit Went Wrong in Horton," posted in the blog *On Labor,* December 5, 2013 (noting distinction between statutes that do and do not provide a substantive right to collective action.)

44. Indeed, one federal district court has refused to compel arbitration of FLSA wage and hour claims of securities industry employees subject to an industry rule prohibiting arbitration for members who are part of a putative class or collective action. *See, Zeltser v. Merrill Lynch & Co.*, No. 13CV1531, 2013 WL 4857687, *2 (S.D.N.Y., Sept. 11, 2013) (Enforcing FINRA Rule 13204.); *see also*, S. McCallion, "Anachronism Revealed: FINRA Rules Trump *Italian Colors* to Give Registered Members Their Day in Court," accessed on October 20, 2013 at *http://www.lexology.com/library/detail.aspx?g=62eac8e0-8eb5-4893-aa72-e4bda5383591&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+Federal+section&utm_campaign=NADN+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2013-10-18&utm_term=*. In an analogous situation involving securities industry customer disputes, the Financial Industry Regulatory Authority ("FINRA") Board of Governors affirmed that class treatment waivers violated FINRA's Customer Code and that the Code was not pre-empted by the FAA. *Dep't of Enforcement v. Charles Schwab & Co., Inc*., Complaint No. 2011029760201 (April 24, 2014), accessed on August 3, 2014 at *http://www.finra.org/web/groups/industry/@ip/@enf/@ad/documents/industry/p493598.pdf. See also,* S. Antilla, *The New York Times,* Dealbook (September 5, 2013, p. B5.)

45. Of course, the "strict enforcement" policy was not fully articulated until many years *after* Title VII's enactment. Ignoring that chronology for the moment and crediting the 88th Congress with ultra-prescient foresight of the current majority's romance with arbitration, there is still no doubt that Congress did not contemplate, much less intend, that the FAA would would hamstring all subsequent Congresses by anticipatory impeding full vindication of Title VII rights. Nowhere in Title VII itself or in its legislative history is there any suggestion that

employee access to class treatment can be waived in what amount to adhesion contracts with employers.

46. There may very well be a compelling argument that Title VII disputes (as well as all employment discrimination claims) ought not to be subject to mandatory arbitration of any kind, much less class treatment waivers. See, e.g., *Arbitration Fairness Act of 2013*, H.R. 1844, 113th Cong. (2013); *but cf., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991) (Individual claim based on the Age Discrimination in Employment Act of 1967 may be subjected to compulsory arbitration under an arbitration clause in the employee's securities registration application.) That proposition, however, goes beyond this essay's solution for resolving a more narrow species of tension between the FAA and Title VII. It suffices here to demonstrate that Title VII's special enforcement regime assuredly renders class treatment waivers in employee arbitrations unenforceable.