Barriers to Justice and Accountability:
How the Supreme Court's Recent Rulings Will Affect Corporate Behavior

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On behalf of its hundreds of thousands of members across the country, People For the American Way Foundation commends the Senate Judiciary Committee for calling this hearing. The conservative Supreme Court's all too frequent rewriting of the law to favor large corporations endangers millions of Americans in a variety of ways.

An Ominous Time in American History:
Giant Corporations' Ubiquity in Our Daily Lives

One of the daunting realities of modern life is that we as individuals are confronted in almost every facet of our life by corporations that are vastly more powerful than we are. When we wake up in the morning, it is likely in a house whose mortgage is held by a giant bank. We turn off the alarm clock made by an electronics giant and purchased from a giant consumer electronics store. We check news and mail through phone and Internet services provided by a telecommunications giant. We turn on the TV, where we pay one of a handful of giant telecommunications companies for access to hundreds of channels, most of which are owned by a small number of giant entertainment companies. Much of the TV news is provided by some of those same entertainment companies.

Perhaps we pick up some prescription drugs made by an enormous pharmaceutical company and purchased at an enormous nationwide chain store. We buy gas provided by one of a few enormous oil companies. We go to our job, where we may be one of thousands or even millions of employees of an enormous company run by people who live hundreds of miles away and who would not recognize our face or name in a million years. We look forward to retirement and think about our investments, tied up in gargantuan funds controlled by people whose compensation in just one year exceeds our entire retirement savings. Thinking about it all, we take a deep breath of air that may have been dangerously polluted by large companies we've never even heard of.

This is an ominous time in American history with so many Americans having so many facets of our lives controlled by our interactions with gigantic corporations that dwarf us in power.

Corporation vs. Individual: Restoring the Power Balance

Unfortunately, when we want to buy a product, get a job, or hold a large corporation accountable for its misdeeds, our negotiating power is severely limited by the fact that we are individuals. In contrast, due to their many state-granted benefits, including perpetual life and limited liability, corporations have consolidated vast resources – and power – that dwarf those of individual Americans.

So when that corporation does wrong against individuals – when it engages in a pattern of invidious discrimination, sells defective products, or defrauds its customers – the victims would be powerless to hold the corporation accountable unless they, too, could consolidate their resources.

Perhaps the most important way that Americans consolidate our power and use our numbers to create fair rules for the road is through government, both state and federal. Indeed, the United States Constitution was designed with a variety of mechanisms and protections to ensure our ability to do just that. The American people have throughout our history harnessed the power of law to empower ourselves in ways that we could not accomplish as individuals.

As part of harnessing that power, individual litigants frequently turn to the procedural tool of class actions to correct for gross power imbalances. There are often times when a corporation causes millions of dollars of damages to people, but the amount of damages per person is so small that the cost of seeking justice would vastly outweigh the benefits, and no lawyer would ever take the case. But when the aggrieved can unify as a class, such disincentives disappear, allowing the entire universe of aggrieved individuals to collect damages and making possible the deterrent effect of a potentially significant financial loss to the corporation. Class action also helps inform people who would not otherwise know that they have been wronged in some way.

Unfortunately, during its 2010-2011 term, the Supreme Court has severely undermined individuals' ability to harness the power of law to rein in giant corporations' excesses. Indeed a small, ultra-conservative majority on the Court is rewriting our nation's laws in order to help elites game the system and create an uneven playing field. The four more progressive Justices in their dissents have quite frankly – and accurately – accused the conservatives of imposing a return to the discredited *Lochner* era. This term, the Roberts Court has, unfortunately, continued to earn its appellation as "the Corporate Court."

Highlighted below are some of the cases most exemplary of the Corporate Court trend this term.

AT&T v. Concepcion:
The Corporate Court Undermines Class Action Consumer Protection Suits

Large corporations, with resources dwarfing those available to the average individual, clearly benefit when their victims are unable to pool resources through a class action. In several cases this term, the Supreme Court was asked to dismantle this vital tool, one that has proved time and again to be the only way to hold corporate wrongdoers accountable. In two cases, a sharply divided Court granted the request

AT&T Mobility v. Concepcion ranks among the most devastating of the Court's opinions in years, in terms of the breadth of its ruling, the commonality of the fact situation for average Americans, and the sheer amount of power it shifted to corporate interests. It also is a case where the Roberts Court took away substantive and procedural tools at our disposal.

In *AT&T Mobility v. Concepcion*, the telecommunications giant asked the Roberts Court to take a wrecking ball to state consumer protection laws. Unfortunately, the five conservative Justices were only too willing to do so, using a federal arbitration law in a way wholly alien to its intent.

At issue was whether states have the right to protect consumers from contracts that are so unfair as to be unconscionable - where one party has so much bargaining power over the other that the weaker one has little choice but to agree to highly disadvantageous terms.

This case started when AT&T offered phone purchasers a "free" second phone, then charged the consumers for the taxes on the undiscounted price of the "free" phone. AT&T allegedly pulled this scam on thousands of its customers. One of its victims, the Concepcion family, brought a class action suit against AT&T. However, AT&T had a service contract where consumers had to agree to resolve any future claims against the cell phone company through arbitration, rather than the courts. In addition, customers had to agree not to participate in any class action against AT&T. So AT&T asked the court to enforce the agreement it had imposed upon the Concepcions by throwing out the class action suit and forcing them into arbitration, one lone family against AT&T without the protections of courts of law or neutral judges.

Because the individual people of California were able to consolidate their own power through government, they have acted to prevent abusive contracts like the one forced upon the Concepcions. Under California law, the contractual prohibition against class action is so outrageous as to be illegal. California recognizes that such provisions effectively protect companies from being held liable for their transgressions, and that they are able to force them upon consumers only because of the corporations' vastly superior bargaining position.

Indeed, given the overwhelming power imbalance, a cell phone consumer has about as much chance of getting the class action arbitration provision removed as one of Joseph

Lochner's bakery employees had a century ago of negotiating his work week down to 60 hours.

Unfortunately, consumers before the Roberts Court fare about as well as the bakers did in *Lochner*. By a 5-4 vote, the Court said that California's protection of consumers from contracts so outrageous as to be unconscionable is preempted by the Federal Arbitration Act, which generally encourages courts to compel arbitration in accordance with the terms of arbitration agreements.

As countless Americans can attest, it is not at all uncommon for a giant telecommunications service provider to provide extremely complex monthly bills that are nearly impossible for the average person to understand. It is certainly not unheard of for such bills to hide relatively small charges for services never ordered, or mysterious taxes or fees that the company should not be charging. Unfortunately, the vast majority of consumers who are victimized in these situations don't even realize it. Moreover, because the amounts at issue are relatively small, there is little incentive for consumers to undertake the significant expenses of recovering their loss. Even when the company pays out to the tiny percentage of defrauded customers who go to the trouble to engage in lone arbitration against the company, the overall practice remains profitable.

That is why class actions are so important. They allow the entire universe of defrauded consumers to recoup their losses, making possible the deterrent effect of a potentially significant financial loss to the corporation. In ruling for AT&T, the Roberts Court has devastated state-level consumer protections like California's and essentially given corporations an instruction manual on how to commit fraud against consumers.

Big Business surely recognizes the benefits this case may offer in providing insulation from accountability. Many large companies require new employees to sign, as a condition of employment, an agreement to resolve future conflicts through arbitration, with a ban on class action. When a potential employer and employee each has a reasonably strong bargaining position, such a demand would be quickly rejected by the job applicant. Unfortunately, powerful corporations are generally able to force aspiring job applicants to sign away their most important rights. As a result, the logic of *AT&T v. Concepcion* may enable such employers to easily cut off the most efficient method of anti-discrimination enforcement by simply refusing to hire anyone who does not agree to accept such an unconscionable demand.

There can be little doubt that the conservative majority, as in Lochner, was imposing its own policy choices upon the states. Indeed, in their brief to the Court, AT&T's attorneys made part of their argument one of pure policy rather than of law:

> "Accordingly, California's professed belief that class actions are necessary for deterrence boils down to the proposition that deterrence is served by imposing on all businesses -- without regard to culpability -- the massive costs of discovery that typically precede a class certification motion and the inevitable multimillion dollar fee award extracted by the class action attorneys as the price of peace. In

> other words, because class actions *always* cost vast amounts to defend and eventually settle with a large transfer of wealth from the defendant to the class action lawyers no matter how guiltless the defendant may be, *all* businesses will be deterred from engaging in misconduct by the very existence of this externality producing procedure."[1]

David Arkush of Public Citizen called this "politically charged hyperbole." Soon after oral arguments, he wrote:

> AT&T's lawyers are not hacks. They are some of the nation's best Supreme Court litigators. It is a devastating indictment of the Roberts court that these lawyers think repeating myths about greedy trial lawyers is an effective way to argue. They must think the court is brazenly activist and political.[2]

Indeed, the majority opinion in *AT&T v. Concepcion* is unlikely to convince anyone otherwise.

Consumers in California and elsewhere retain the right not to be defrauded, but that right is increasingly a right without a remedy and, therefore, essentially meaningless. It remains illegal for a large corporation to defraud a million customers out of a paltry $5 apiece for a hefty profit of $5 million. Yet, with the blessing of the Roberts Court, Big Business now has an instruction manual on how to make sure that no one ever holds them accountable for that fraud.

Wal-Mart v. Dukes:
Class Action Ban Leads to Rules Without Remedies

The Supreme Court this term also turned federal anti-discrimination protections into a right without a remedy for millions of Americans employed by large corporations. In a result that, unfortunately, surprised no one, the Roberts Court struck out against women employees seeking to hold Wal-Mart accountable for illegal employment discrimination.

Wal-Mart is the nation's largest private employer. Several women sued the corporate giant on behalf of themselves and similarly situated women around the country - anywhere from 500,000 to 1.5 million employees. To sue as a class, they would have to show that they have claims typical of the whole group.

And that's exactly what they did. As Justice Ginsburg's dissent pointed out, the district court that had certified them as a class had identified systems for promoting in-store employees that were sufficiently similar across regions and stores to conclude that the manner in which these systems affect the class raises issues that are common to all class members. Vacancies are not regularly posted, and promotion to in-store management

[1] AT&T Mobility LLC, Brief for Petitioner, page 46, note 14 (emphasis in original).
[2] David Arkush, "Roberts Court: Unclear, Activist, and Pro-Corporate," *Huffington Post*, November 19, 2010, http://www.huffingtonpost.com/david-arkush/roberts-court-unclear-act_b_785849.html

positions is an informal “tap on the shoulder” process. Across the nation, managers choose who to promote based on their own subjective impressions.

Wal-Mart also operates its compensation policies uniformly throughout the nation. For each position’s hourly rate, it establishes a $2 band. The company does not provide standards or criteria for setting wages within that band, and, as the dissent pointed out, therefore does nothing to counter any unconscious bias on the part of supervisors.

And, although the conservative Justices did everything they could to find the fact differently, Wal-Mart clearly encouraged such a bias against women. The women showed that Wal-Mart has a national corporate climate infused with invidious bias against women. The record included instance after instance demonstrating disdain for women workers, as well as stereotypes about men vs. women. The plaintiffs showed that Wal-Mart executives refer to women employees as “Janie Qs,” approve holding business meetings at Hooters restaurants, and attribute the absence of women in top positions to men being more aggressive in seeking advancement. They also presented evidence of the same kind of gender bias attributable to managers at all levels of the company.

In sum, Wal-Mart had a national policy to have personnel decisions made by local managers who are products of a toxic corporate climate. Expert testimony documented that pay and promotions disparities at Wal-Mart “can be explained only by gender discrimination and not by . . . neutral variables.” This conclusion was based on reliable statistical analyses that controlled for factors including job performance, length of time with the company, and the store where an employee worked.

But none of that mattered to the conservative five-Justice majority. The opinion, authored by Justice Scalia, went out of its way to overlook the obvious commonality, focusing instead on the differences that will inevitably be present when a corporate giant targets so many people. The five conservatives of the Roberts Court accepted Wal-Mart's assertion that the women cannot be designated a class under Rule 23(a) because the representative plaintiffs do not have claims typical of the whole group.

What this 5-4 opinion states is that Wal-Mart is so large – and the discrimination it has allegedly engaged in is so great – that its victims cannot unify as one class to hold the company accountable. Unfortunately, individuals or small groups are much less likely to have the resources to seek justice, and any damages paid to them would be negligible for a company of Wal-Mart’s size.

Certainly Wal-Mart itself now has much less incentive to change its behavior. The corporation has reaped millions of dollars in underpaying women, money that is unlikely to be exceeded by the payouts it would have to make to women with the resources to sue as individuals or in substantially smaller classes.

And other large corporations will realize as well the implications of this case for their own accountability -- that a rule without a remedy is no rule at all.

Janus Capital Group v. First Derivative Traders:
An Instruction Manual for Getting Away With Fraud on the Market

Janus Capital Group v. First Derivative Traders was another 5-4 decision in the usual alignment. In this case, the conservative Justices played word games that took advantage of the fact that Janus officials created multiple entities to control different aspects of the Janus mutual funds' operations, resulting in a decision to protect corporate actors who had defrauded investors.

The Janus family of mutual funds is organized in a business trust called Janus Investment Funds (the Janus Fund). Critically, the Janus Fund's Board of Trustees may not have even been aware of the alleged fraud at the center of this case, and the Fund holds no assets other than those it holds for shareholders, meaning that if it were sued, it would not be able to pay damages.

Under the allegations in the case, the Fund's prospectuses contained materially false or misleading statements. The Janus Fund was created by Janus Capital Group (Janus Group), which is a publicly traded company. This company created a wholly-owned subsidiary, Janus Capital Management (Janus Management), which served as the mutual fund investment advisor and administrator. Janus Management developed the fraudulent material that the Janus Fund published. Technically, the Janus Fund was a client of Janus Management, which advised the Fund and administrated its funds.

Federal securities law makes it illegal for any person, directly or indirectly, "to **make** any untrue statement of a material fact" in connection with the buying or selling of securities. The case rests on the definition of the word "make."

Under any common sense understanding, Janus Management, which developed the allegedly fraudulent information disseminated by its "client" the Janus Funds, made untrue statements. Therefore, Janus Management and its parent company should be liable for violating the law, and it is perfectly logical for investors to sue them, knowing that these entities were the ones responsible for breaking the law and that they had the resources to compensate the investors for the damages they incurred.

The five ultra conservatives in the majority, however, proceeded to redefine the verb "make," bending it beyond all recognition, thereby permitting Janus Management and its parent company Janus Group to evade accountability. Out of thin air, the Roberts Court decided that the only ones who could "make" the fraudulent statements were the trustees of the Janus Fund itself, since only they had final authority to include the fraudulent information in the prospectuses.

Of course, this interpretation ignores our regular understanding that someone "makes a statement" regardless of whether the speaker is the "final authority" for the organization on whose behalf he speaks. The idea that the company that wrote a fraudulent document

for its client to use didn't "make" the statements included in that document is simply ludicrous.

To make matters worse, the Corporate Court majority also ignored the obvious connections among all the Janus entities. Writing for the majority, Justice Thomas placed great emphasis on the fact that the Janus Fund is owned by investors and has a separate legal identity from that of the company that created it. But this defies the reality of the close relationships among all the entities here. As Justice Breyer pointed out in his dissent:

- Each of the Janus Fund's officers is a Janus Management employee;
- Janus Management, acting through those employees (and other of its employees), manages the purchase, sale, redemption, and distribution of the Janus Fund's investments;
- Janus Management prepares, modifies, and implements the Janus Fund's long-term strategies;
- Janus Management, acting through those employees, carries out the Janus Fund's daily activities;
- Janus Management disseminated its "client's" prospectuses through the website of its parent company (Janus Group);
- Janus Management employees drafted and reviewed the Janus Fund's prospectuses, including the deceptive language;
- Janus Management may have concealed the factual data is was hiding from the public from members of the Janus Fund's Board of Trustees as well.

To ignore the close interrelationships among these entities is to direct corporate officials on exactly how they can avoid being held liable for fraud on the market.

Sorrell v. IMS Health:
The Roberts Court Strikes Down a Medical Privacy Law in a Gift to Pharmaceutical Companies

In *Sorrell v. IMS Health*, a 6-3 Court (the five usual suspects joined by Justice Sotomayor) struck down a common-sense medical privacy law passed by Vermont. As part of its comprehensive regulation of pharmaceuticals, the state requires pharmacies to retain certain information about prescriptions and the doctors that order them. Knowing that the drug companies would no doubt want to take advantage of this information in order to target doctors to sell more of their product, Vermont protected medical privacy by prohibiting the sale to or use of this data by drug companies without the prescribing doctor's authorization.

According to the majority, since the law allowed others to use the data for other purposes, it could not be defended as protecting medical privacy. It therefore characterized the law as targeting speech based on the identity of the speaker and the content of the message,

thereby triggering heightened First Amendment scrutiny, which, according to the majority, the privacy protection law failed to meet.

Justice Breyer's dissent on the other hand recognized the Vermont law as the standard, commonplace regulation of a commercial enterprise. It did not prohibit or require anyone to say anything, to engage in any form of symbolic speech, or to endorse any particular point of view. It simply addressed a problematic abuse of the prescription data. As the dissenters pointed out, federal and state governments routinely limit the use of information that is collected in areas subject to their regulation, as pharmaceuticals have been for over 100 years. Surely heightened First Amendment scrutiny should not be triggered by a law that, for instance, prohibits a car dealer from using credit scores it gets for one purpose (to determine if customer is credit-worthy) for another (to search for new customers).

The dissent stated that the Court had never before subjected standard, everyday regulation of this sort to heightened First Amendment scrutiny. Yet this was not the first time the Court had taken everyday economic regulation and struck it down on the basis of freedoms enumerated in the Bill of Rights. In fact, the dissenters specifically warned of a return to

> the bygone era of *Lochner v. New York*, in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies.

With *Lochner*, conservative, pro-corporate ideologues routinely struck down consumer and worker protection laws as violating the Due Process Clause replacing these laws with their own policy preferences. Simply replacing Due Process with Free Speech does not suddenly make this radicalism valid.

Proving that Big Business is paying attention to the opportunities afforded it by the Roberts Court, the morning after the medical privacy case was decided, NPR reported:

> [W]ithin hours of the decision, lawyers representing business and financial interests were contemplating new first amendment challenges to laws that restrict the way securities can be sold; and lawyers for the tobacco industry said they now have fresh ammunition for fighting the FDA's new requirement for graphic depictions of health risks on cigarette packages.

PLIVA v. Mensing:
The Roberts Court Lets Corporations Off the Hook For Failing to Warn of Their Dangerous Drugs

PLIVA v. Mensing involved a woman seriously injured by the generic drugs she took. She sued the manufacturer in state court over its failure to warn of risks the manufacturer

knew were much greater than had been believed at the time the FDA approved its labeling. However, the five-justice conservative majority on the Court ruled that she had no right to file such a lawsuit.

All prescription drugs must have warning labels that are approved by the FDA. Under a recent precedent, if a brand-name drug manufacturer fails to warn consumers of a known risk not on the label, it cannot avoid being sued in state court simply by saying its label was approved by the FDA. *PLIVA v. Mensing* involved similar circumstances, except in this case it was a generic drug maker, calling into play a separate federal law that requires generics to use the same warning labels as brand-names.

Gladys Mensing developed a severe and irreversible neurological disorder as a result of her long-term use of a generic drug. At the time, the label indicated that the risk of a disorder of the type she developed was about one in 500 patients. However, according to Mensing, it turned out that the actual incidence was much higher, perhaps as high as one in five patients. Despite mounting evidence that the label greatly understated the risks, none of the companies that manufactured the drug proposed that the FDA modify the warning label.

Justice Thomas, writing for a 5-4 majority, twisted the doctrine of "impossibility" beyond recognition. In particular, Justice Thomas concluded that under federal law, the generic drug maker had no obligation to ask the FDA to update the brand name label and could not (under the "same label" law) have changed the label on its own without permission from the federal government. Therefore, according to this twisted logic, since compliance with both state and federal law is impossible, the federal law preempts the state law under the Supremacy Clause of the United States Constitution and Ms. Mensing is left without a remedy for failure to warn under state law.

Justice Sotomayor's blistering dissent (joined by Ginsburg, Breyer, and Kagan) harshly criticized Justice Thomas's reasoning. As Justice Sotomayor explained, we do not know if it would really have been impossible for the generic drug manufacturer to have complied with state law by getting the FDA to approve a label change in a timely manner, *because it did not even try*. Justice Sotomayor wrote:

> We have traditionally held defendants claiming impossibility to a demanding standard: Until today, the mere possibility of impossibility had not been enough to establish pre-emption.
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> ...
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> The Court strains to reach [its] conclusion. It invents new principles of pre-emption law out of thin air to justify its dilution of the impossibility standard. It effectively rewrites our [2009] decision in *Wyeth v. Levine*, which holds that federal law does not pre-empt failure-to-warn claims against brand-name drug manufacturers.

As a result of the conservative majority's decision, therefore, the ability of a victim to collect under state law for failure to warn of a prescription drug's dangers depends on happenstance: whether the pharmacist happened to fill the prescription with a brand name or a generic. Congress has acted over the years to make low-cost generics more widely available to the American people. Surely a result like that mandated by the Roberts Court was not its intent.

Where This Leaves Us

What the conservative majority on the Roberts Court has done, as evidenced by these cases, is to provide a road map for those who want to escape accountability. Indeed, Justice Kagan frankly accused the conservative majority of doing just that in another context this term. In her dissent in *Arizona Christian Tuition v. Winn*, a case involving state funding of religion schools through tuition tax credits, Justice Kagan wrote:

> The Court opinion thus offers a roadmap – more truly, just a one-step instruction – to any government that wishes to insulate its financing of religious activity from legal challenge. Structure the funding as a tax expenditure, and *Flast* [the precedent recognizing taxpayers' standing to sue over Establishment Clause violations] will not stand in the way. No taxpayer will have standing to object. However blatantly the government may violate the Establishment Clause, taxpayers cannot gain access to the federal courts.

Conclusion

Time and again, the Roberts Court has removed substantive and procedural protections that are the only way that individuals can avoid becoming victimized by giant corporations that dwarf them in size, wealth, and power. Indeed, these decisions often provide road maps to corporate interests in how to avoid accountability for harm that they do. The constitutional design empowering individuals to consolidate their power against corporations is slowly being eroded by a fiercely ideological Court.

Today's hearing before the Senate Judiciary Committee is an important opportunity to further expose the harm that the Roberts Court is exposing all Americans to.