BEFORE THE
VERMONT GENERAL ASSEMBLY HOUSE COMMITTEE ON JUDICIARY

S.105 AN ACT RELATING TO CONSUMER JUSTICE ENFORCEMENT

Statement of Seamus C. Duffy, Drinker Biddle & Reath LLP,
on behalf of New England Cable & Telecommunications Association

April 6, 2018

INTRODUCTION

Good afternoon Chairwoman Grad and members of the Committee. Thank you for inviting me here today.

My name is Seamus Duffy. I am the Chair of the class actions practice at Drinker Biddle & Reath LLP,[1] and am here today on behalf of the New England Cable & Telecommunications Association ("NECTA"), which has represented the interests of the cable telecommunications industry with regulators and legislatures for more than forty years.

I hope with my testimony to persuade the Committee that this legislation is unsound, unwarranted, and unwise for Vermont. It is unsound because it evidences a hostility to arbitration that is at odds with federal law and with a large and growing body of evidence supporting the benefits of arbitration for consumers. It is unwarranted because nothing in the record suggests either that the courts in Vermont are unwilling or unable to police potentially unconscionable contracts or that the "presumptively unconscionable" contract provisions targeted are so common or concerning that legislation is necessary. And it is unwise because it would open the floodgates to the sort of lawyer-driven, no-injury class action litigation that does very little for actual consumers and is a drain on the judicial system and a threat to local businesses. I therefore urge the Committee to reject S.105.

S.105 IS THE PRODUCT OF HOSTILITY TO ARBITRATION

First, although the recent draft of S.105 is called "an act relating to consumer justice,"[2] the original draft reveals that its true purpose is "to prohibit forced arbitration of consumer disputes."[3]

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1 A brief description of my professional experience is attached as Exhibit 1.

2 S.105 (as passed by Senate) ("An act relating to consumer justice enforcement.").

3 S.105 (as introduced) ("Statement of purpose of bill as introduced: This bill proposes to prohibit forced arbitration of consumer disputes.").

That purpose is not only inconsistent with—but also preempted by—federal law. Indeed, for nearly 100 years, the Federal Arbitration Act ("FAA") has mandated that arbitration agreements "shall be valid, irrevocable, and enforceable" except on grounds that apply to "any contract."[4] That provision—often called the "non-discrimination" or "equal-treatment" provision of the FAA—was an antidote to state courts' "hostility to arbitration."[5] It accomplishes that by preempting state laws that would subject arbitration agreements to requirements that do not apply to other contracts. Courts have not hesitated to invalidate such state laws.[6]

As it happens, the Vermont Arbitration Act already has two such provisions. First, it requires that arbitration agreements—and ***only*** such agreements—have an "acknowledgment" that includes specific language and is "signed by each of the parties or their representatives."[7] Second,

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[4] 9 U.S.C. § 2.

[5] *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233-33 (2013); *see also, e.g.*, *Kindred Nursing Ctrs. L.P. v. Clark*, 137 S. Ct. 1421, 1424 (2017) (describing the FAA's command "to place arbitration agreements on an equal footing with all other contracts."); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345-46 (2011) ("[O]ur cases place it beyond dispute that the FAA was designed to promote arbitration" and that it embodies a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) ("Its purpose was to . . . place arbitration agreements upon the same footing as other contracts." (citations omitted)); *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (describing the "liberal federal policy favoring arbitration agreements" (citation omitted)); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (noting "emphatic federal policy in favor of arbitral dispute resolution"); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (explaining that courts must "rigorously enforce" arbitration agreements); *Southland Corp. v. Keating*, 465 U.S. 1, 10, 12, 16 (1984) (explaining that FAA "declared a national policy favoring arbitration" that applies "in state as well as federal courts" and "foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements"); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (explaining that FAA codifies "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary").

[6] *See, e.g.*, *Kindred Nursing*, 137 S. Ct. at 1426 ("A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'"); *see also Concepcion*, 563 U.S. at 345.

[7] 12 V.S.A. § 5652(b) ("No agreement to arbitrate is enforceable unless accompanied by or containing a written acknowledgment of arbitration signed by each of the parties or their representatives. When contained in the same document as the agreement to arbitrate, that acknowledgment shall be displayed prominently. The acknowledgment shall provide substantially as follows: 'ACKNOWLEDGMENT OF ARBITRATION. I understand that . . . this agreement . . . contains an agreement to arbitrate. After signing (this/that) document, I understand that I will not be able to bring a

it categorically exempts from arbitration "constitutional" and "civil rights" claims, among others.[8] Not surprisingly, state and federal courts have held that those provisions and others like them are invalid because they are preempted by the FAA.[9]

S.105 is cut from the same cloth. Indeed, its original stated purpose was to "prohibit" the so-called "forced arbitration of consumer disputes."[10] Or, in preemption parlance, its purpose is

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lawsuit concerning any dispute that may arise which is covered by the arbitration agreement, unless it involves a question of constitutional or civil rights. Instead, I agree to submit any such dispute to an impartial arbitrator.'") (typography in original).

[8] 12 V.S.A. § 5653(a) ("This chapter applies to all arbitration agreements to the extent not inconsistent with the laws of the United States. However, this chapter does not apply to labor interest arbitration, nor to arbitration agreements contained in a contract of insurance, nor to grievance arbitration under 3 V.S.A. chapter 28."); *id.* § 5653(b) ("No arbitration agreement shall have the effect of preventing a person from seeking or obtaining the assistance of the courts in enforcing his or her constitutional or civil rights.").

[9] *See David L. Threlkeld & Co. v. Metallgesellschaf, Ltd.*, 923 F.2d 245, 249 (2d Cir. 1991) (finding that FAA preempts § 5652(a)); *Little v. Allstate Ins. Co.*, 705 A.2d 538 (Vt. 1997) (finding that FAA preempts § 5653(a)); *see also, e.g.*, *Concepcion*, 563 U.S. at 341 ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."); *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) (finding that FAA preempts state law lodging primary jurisdiction over certain claims in an administrative forum); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (rejecting typography requirements because states cannot "condition[] the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally"); *Perry*, 482 U.S. at 492 n. 9 ("A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot."); *Caley v. Gulfstream Aero. Corp.*, 428 F.3d 1359, 1371 (11th Cir. 2005) ("As the Supreme Court has recognized, a court can decline to enforce an arbitration agreement under the FAA only if the plaintiffs can point to a generally applicable principle of *contract* law under which the agreement could be revoked."); *Oblix, Inc. v. Winiecki*, 374 F.3d 488, 492 (7th Cir. 2004) ("If a state treats arbitration differently, and imposes on form arbitration clauses more or different requirements from those imposed on other clauses, then its approach is preempted by § 2 of the Federal Arbitration Act."); *Sec. Indus. Asso. v. Connolly*, 883 F.2d 1114, 1118-22 (1st Cir. 1989) (invalidating state statute prohibiting arbitration of claims brought by sellers of securities); *Taylor v. First N. Am. Nat'l Bank*, 325 F. Supp. 2d 1304, 1312 (M.D. Ala. 2004) ("To the extent that Alabama law requires that an arbitration agreement be conspicuous or disclosed in a particular way, it is preempted by the FAA."). Although to my knowledge no court has had occasion to invalidate Section 5653(b)—presumably because arbitration agreements are not often invoked in cases arising from "constitutional" or "civil rights" claims—that provision is preempted for the same reason and to the same extent as the others discussed above.

[10] S.105 (as introduced) ("Statement of purpose of bill as introduced: This bill proposes to prohibit forced arbitration of consumer disputes.").

to "stand[] as an obstacle to the . . . full purposes and objectives of Congress."[11] It does so by weaponizing the law of unconscionability and severability to target arbitration agreements and related terms. Specifically, it:

- targets five provisions that are believed to be common in arbitration agreements;[12]
- declares those provisions to be "presumptively unconscionable";[13]
- encourages courts to invalidate the entire agreement that contains such a provision (rather than sever the provision in order to enforce the remainder of the agreement);[14] and
- discourages businesses from using such provisions by subjecting them to a statutory penalty of $1,000 per "presumptively unconscionable" provision (apparently without regard to whether the provision is actually unconscionable).[15]

In short, its sole purpose is to discourage the use and enforcement of arbitration agreements—which of course is precisely what state laws cannot do. If it is enacted in its current form, it would not be long before the courts were flooded with costly, collateral litigation about its legality. And I believe that, like similar statutes, it would eventually be struck down by the courts.

S.105'S HOSTILITY TO ARBITRATION IS UNWARRANTED

Second, this hostility to arbitration is inconsistent not only with federal law, but also with a large and developing body of evidence supporting the benefits of arbitration, and the ability of courts to police the contracting and the arbitral processes.

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11 *Concepcion*, 563 U.S. at 352 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

12 S.105 § 6055(a)(1)-(a)(5).

13 S.105 § 6055(a).

14 S.105 § 6055(c).

15 S.105 § 6055(d).

Simply put, arbitration is good for businesses and consumers alike. It provides an efficient, cost-effective forum in which consumers can prosecute small, individualized claims—claims many of which, by definition, cannot be pursued in a class action.[16] The United States Supreme Court has often touted the benefits of arbitration, including that arbitration is less expensive and more efficient, particularly for consumers with small claims.[17]

The Supreme Court did not imagine that. On the contrary, studies show that, on average, consumers will spend less, win more often, and be awarded more in arbitration than in class actions filed in court. As for the costs of arbitration, mainstream arbitration organizations have due process protocols and fee schedules that ensure that costs are reasonable. Filing fees are generally no more than, and oftentimes are much less than, what consumers would pay to commence court proceedings.[18] What's more, businesses often agree to cover not only the filing fee, but also the remainder of the arbitrator's fees and costs,[19] and as a result, consumers have no out-of-pocket costs and businesses are incentivized to settle disputes in their early stages.[20]

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[16] *See, e.g.*, *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281 (1995) (emphasizing the benefits of arbitration for consumers with small claims).

[17] *Dobson*, 513 U.S. at 281 (explaining that a consumer complaining about a product may want to pursue arbitration as a cheaper alternative to litigation); *Concepcion*, 563 U.S. at 346 ("A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'") (quoting *Preston*, 552 U.S. at 357-58 (2008)); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.").

[18] *See* Consumer Fin. Protection Bureau ("CFPB"), *Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, § 2.5.10, at 58 n.126, § 4.3, at 11 (Mar. 2015), https://goo.gl/wcKw1f ("Arbitration Study"). The CFPB's Arbitration Study contained flawed conclusions about the usefulness of arbitrations—conclusions that were undermined by the data within the study itself (such as this statistic). Among other things, a major flaw in the Arbitration Study, which directly led to its flawed conclusions, is that it completely ignored the benefits, or even existence, of arbitral settlements in its analysis, but emphasized the amount recovered in class action settlements. However, it did contain some useful data points that are highlighted herein.

[19] *Id.* § 4.3, at 11, § 5.7.5 at 75 n.128.

[20] *See* AAA Consumer Arbitration Rules (the "AAA Consumer Rules") at 34, https://www.adr.org/sites/default/files/Consumer_Rules_Web.pdf (under AAA consumer rules, a business

As for the results of arbitration, studies have found that consumers prevail in arbitration more than 50% of the time.[21] This compares favorably with plaintiffs pursuing claims in court.[22] Consumers also obtain larger awards in arbitration on average, as compared to class action settlements where much of the benefits go to the plaintiffs' attorneys and claims administration. A study by the Consumer Financial Protection Bureau determined the average arbitral award for consumers was over $5000, whereas the average amount paid to consumers after a class action lawsuit was just over $30.[23] The same study observed that arbitrations proceed efficiently,[24] and generally take place in locations that are convenient to consumers.[25] So to the extent that S.105 is

must cover at least $1,500 in fees for arbitrators serving on a desk/documents-only arbitration); *see also* Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 Cardozo J. Conflict Resolution 267, 267 (2008) (noting that, without access to arbitration, consumers would be "far worse off, for they would find it far harder to obtain a lawyer, find the cost of dispute resolution far more expensive, wait far longer to obtain relief and may well never see a day in court").

[21] *See* Christopher Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. Case on Disp. Resol. 843, 896-904 (2010) (in a review of claims filed with the AAA, consumers who initiated the claim won relief 53.3% of the time); Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2005) (review of sample of customer initiated claims with AAA found customers prevailed 55% of the time, and received favorable result (including settlements) 79% of the time).

[22] *See, e.g.*, Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 Seattle U. L. Rev. 433, 437 (1996) (study finding that in 1991-92, plaintiffs won 51% of jury trials in state court and 56% of jury trials in federal court, and that during the period 1979-1993 plaintiffs won 50% of federal jury trials); *see also* Jason Scott Johnston & Todd Zywicki, *The Consumer Financial Protection Bureau's Arbitration Study: A Summary and Critique*, Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA at 25-27 (Aug. 2015), https://www.mercatus.org/system/files/Johnston-CFPB-Arbitration.pdf (reviewing CFPB study data and determining that individual arbitration achieved comparable or slightly better results for consumers than individual consumer court actions, as 57% of all arbitrations result in settlement, and 6% result in an award for a consumer complaint, compared with consumer lawsuits where up to 48% result in settlement and 7% in consumer judgments).

[23] *See* CFPB, *Arbitration Study*, *supra* note 18 § 5.6.6, at 41 (average arbitral result gave individual consumers $5,389); *id.* § 8.3.3, at 27-28 (average payment to individuals following a class-action settlement was $32.35 when you divide $1.1 billion in total payments by 34 million class members who received a payout).

[24] *Id.* § 5.7.3, at 71-73.

[25] *Id.* § 5.7.2, at 70-71.

animated by concerns about inconvenient forums and unreasonable costs, those concerns have already been addressed by businesses and arbitration organizations.[26]

Not surprisingly, then, studies show that individuals viewed arbitration as faster, simpler, and cheaper than litigation in court, and most reported that they were satisfied with the process and would choose to use arbitration again if given the opportunity.[27] The fact is that hostility to arbitration comes not from actual consumers, or from concerns for actual consumers, but largely from lawyers who make their living on class actions and complex aggregate litigation in the courts.

S.105 IS A SOLUTION IN SEARCH OF A PROBLEM

Third, nothing in the record suggests that the five targeted contractual provisions are so common or concerning that new legislation is even necessary. On the contrary, several of those

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[26] *Id*. As mentioned, two of the major arbitration organizations, AAA and JAMS, have developed due process protocols that apply to consumer arbitrations. These protocols ensure that the parties must abide by certain standards that protect consumers, even if the original agreement doesn't include these provisions. The AAA and JAMS protocols ensure, for example, 1) reasonable costs and deadlines; 2) clear and conspicuous notice has been provided to the consumer; 3) information about arbitration is provided to consumers; 4) a convenient location for a hearing; 5) a competent neutral arbitrator; 6) access to small claims court; 7) ability to retain counsel; 8) the administrators can provide same relief as in court; 9) discovery can be conducted; and 10) a binding award. *See JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness*, JAMS Consumer Arbitration Minimum Standards, ("JAMS Minimum Standards") at ¶¶ 1-7; 9-10 (Effective July 15, 2009), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Stds-2009.pdf; AAA National Consumer Disputes Advisory Committee, *Consumer Due Process Protocol Statement of Principles* ("AAA Due Process Protocol") at 1-3, https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20(1).pdf (describing Principles 2, 3-7, 9, 11, 13-15). The existence of these protocols demonstrate that businesses and arbitration organizations have taken criticisms of the arbitration process seriously, and enacted these guidelines to protect consumers. *See* Searle Civil Justice Institute, *Consumer Arbitration before the America Arbitration Association Preliminary Report*, Searle Center on Law Regulation and Economic Growth Northwestern University School of Law at 93 (March 2009), https://www.adr.org/sites/default/files/document_repository/Searle%20Civil%20Justice%20Institute%20Report%20on%20Consumer%20Arbitration.pdf ("When a business refuses to waive a provision that violates the Consumer Due Process Protocol, or when the business fails to pay its share of the arbitration costs in an arbitration the AAA's policy is to refuse to administer the case.").

[27] U.S. Chamber Institute for Legal Reform, *Arbitration: Simpler, Cheaper, and Faster than Litigation* (2005) at 5, 19-21, 24, 30; *see also* Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* at 8-9 (2005) (finding in telephone survey of individual claimants that 69% of individuals who responded were satisfied with arbitration process).

provisions are largely a thing of the past, as mainstream arbitration organizations will not enforce, *e.g.*, a forum selection clause that would require a consumer to travel to an inconvenient forum,[28] or a cost-shifting provision that would require a consumer to pay an unreasonably high filing fee.[29] S.105 ignores that the movement to modernize consumer arbitration has taken consumer contracts in the exact opposite direction—providing efficient, cost-effective dispute resolution programs that are actually tailor-made for consumer disputes.

Nor does anything in the record suggest that there has been a breakdown—or even a hiccup, for that matter—in the traditional framework for identifying and policing potentially unconscionable contracts. The FAA makes room for time-honored state-law principles such as fraud, duress, and unconscionability, and allows courts to address them on a case-by-case basis.[30] Judging the fairness of contract provisions is an undertaking that our courts take very seriously, and any lawyer who spends time in this space will tell you that it is important for courts to have the flexibility to address each case on its own particular facts. That approach is preferable to the prescriptive approach suggested by this Bill, which would in my view disrupt and confuse rather than clarify the law in this important area.

The more flexible, fact-intensive approach is also one with which courts in Vermont and elsewhere are familiar and comfortable. Not surprisingly, Vermont courts have demonstrated that

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[28] JAMS Minimum Standards, *supra* note 26 at 5 (providing that an arbitration agreement must allow for an in-person hearing in the consumers hometown); AAA Due Process Protocol, *supra* note 26 at 19 ("[T]he proceedings should be conducted at a location which is reasonably convenient to both parties with due consideration of their ability to travel and other pertinent circumstances").

[29] JAMS Minimum Standards, *supra* note 26 at 5 ("[T]he only fee required to be paid by the consumer is $250 which is approximately equivalent to current Court filing fees. All other costs must be borne by the company. . ."); AAA Due Process Protocol, *supra* note 26 at 17 (describing Principle 6 "Reasonable Costs" which states that providers of goods and services should develop programs which are at a reasonable cost to consumers, and may need to subsidize the consumer).

[30] *See, e.g.*, *Concepcion*, 563 U.S. at 339.

they are perfectly capable of severing unconscionable provisions from otherwise conscionable contracts.[31] By doing so, Vermont courts ensure that individuals will not be forced to litigate under agreements with unfair terms, without creating a cottage industry for lawyers which will needlessly harm businesses and consumers. Nothing in the legislative history here suggests that courts are not properly enforcing Vermont's unconscionability doctrines, or that the punitive penalties provided by S.105—which would expose businesses to potentially annihilating aggregate damages rather than simply severing a clause from a contract—are necessary or appropriate.

Finally, it should be noted that S.105 would wreak a dramatic change in the substantive contract law of Vermont. Take, for example, forum selection clauses.[32] Under existing law, forum selection clauses are permitted in Vermont law so long as their enforcement is not unreasonable.[33] Under S.105, however, agreeing to litigate in any "inconvenient venue"—which is defined as any place other than the state or federal district where the individual resides or the contract was consummated—would be presumptively unconscionable and indeed actionable on its face.[34] In other words, any forum selection clause that provides for litigation just across the state line would be presumptively unconscionable even if it would not inconvenience the parties or increase the cost of litigation. That would be a radical departure from existing law and would make Vermont

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[31] *See, e.g.*, *Chase Commercial Corp. v. Barton*, 571 A.2d 682 (Vt. 1990) (severing unreasonable forum selection clause).

[32] S.105 § 6055(a)(1).

[33] *Chase Commercial*, 571 A.2d at 684 (holding that while "forum selection clauses are prima facie enforceable in Vermont" the forum selection clause in question was unreasonable); *Kaser USA, LLC v. Seabreeze Trading Corp.*, Docket No. 204-9-09 Ocevs, 2011 Vt. Super. LEXIS 21, at *6 (Vt. Super. Mar. 14, 2011) ("[C]ourts generally enforce such [forum selection clauses] so long as they are reasonable." (citing *Chase Commercial*, 571 A.2d 682)).

[34] *Int'l Collection Serv. v. Gibbs*, 510 A.2d 1325, 1326 (1986) (citing *The Bremen v. Zapata Off-Shore*, 407 U.S. 1, 10 (1972)) (In Vermont, "[m]ere inconvenience or additional expense" will not suffice to defeat a forum selection clause").

an outlier.[35] Much the same could be said of a prohibition on waivers of punitive damages,[36] or waivers of certain claims or relief.[37] Indeed, the only provision in S.105 that would not fundamentally change Vermont law is the one regarding statute of limitations periods, which is wholly unnecessary given that Vermont already prohibits agreements to limit such periods.[38]

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[35] The United States Supreme Court held in *The Bremen v. Zapata Off-Shore* that forum selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." 407 U.S. 1, 10 (1972). States, including Vermont, have followed the Supreme Court's lead in enforcing forum selection clauses. *See Gibbs*, 510 A.2d 1325; *M.G.I. USA, Inc. v. J.C. Penny Corp.*, No. DBDCV054004701S, 2007 Conn. Super. LEXIS 1692, at *5 (Super. Ct. May 10, 2007) (forum selection clauses are enforceable under Connecticut law); *Pietroske, Inc. v. Globalcom, Inc.*, 2004 WI App 71 ¶ 4, 275 Wis. 2d 444, 685 N.W.2d 884 (citing *Leasefirst v. Hartford Rexall Drugs, Inc.*, 483 N.W.2d 585, 587-88(Wis. App. 1992)) (forum selection clause are enforceable under Wisconsin law unless they are substantively unreasonable); *Ex parte Rymer*, 860 So. 2d 339, 342 (Ala. 2003) (citing *Ex parte Northern Capital Res. Corp.*, 751 So. 2d 12, 14 (Ala. 1999)) (Alabama "has adopted the majority rule that a outbound forum-selection clause should be enforced so long as enforcing it is neither unfair nor unreasonable under the circumstances of the case."); *Cohn Law Firm v. YP Se. Advert. & Publ'g, LLC*, No. W2014-01871-COA-R3-CV, 2015 Tenn. App. LEXIS 497, at *12 (Tenn. App. June 24, 2015)) (forum selection clauses are enforceable under Tennessee law unless unconscionable); *Magno v. The Coll. Network, Inc.*, 1 Cal. App. 5th 277, 288 (Cal. App. 2016) (forum selection clauses are enforceable under California law unless unconscionable such that they "negate the reasonable expectations of the nondrafting party").

[36] *See, e.g.*, *Martin v. SCI Mgt. L.P.*, 296 F. Supp. 2d 462 (S.D.N.Y. 2003) (parties to an arbitration agreement may expressly preclude an arbitrator from awarding punitive damages); *Inv. Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314 (Miss. App. 2002) (holding provisions in arbitration agreements that prohibit punitive damages are generally enforceable); *7-Eleven, Inc. v. Dar*, 757 N.E.2d 515 (Ill. App. 2001) (holding that arbitrators may award punitive damages only where the parties have expressly agreed to the arbitrator's authority to award punitive damages); *Hayes v. Oakridge*, 122 Ohio St. 3d 63, 2009-Ohio-2054, 908 N.E.2d 408, at ¶ 5, 14, 35 (arbitration agreement waiving punitive damages was not unconscionable).

[37] *See Colgan v. Agway, Inc.*, 553 A.2d 143, 145-46 (Vt. 1988) (exculpatory provisions are not per se unconscionable under Vermont law); *Weinstein v. Leonard*, 2015 VT 136 ¶8, 200 Vt. 615, 134 A.3d 547 (Vt. 2015) (exculpatory provisions are disfavored under Vermont law, subject to strict scrutiny, and will be "strictly construed" against the party seeking to enforce them).

[38] *See* VT. Stat. Ann. Tit. 12, § 465. Again, there is no indication in the record that courts are unwilling or unable to enforce this statute. *See Bergman v. Spruce Peak Realty, LLC*, 847 F. Supp. 2d 653, 666-67 (D. Vt. 2012) (recognizing that a contractual provision that shortens a period of limitation is null and void under Vermont law). Vermont, it should be noted, is in the distinct minority on this point. *See, e.g.*, *Wechsler v. HSBC Bank USA, N.A.*, 674 F. App'x 73, 75 (2d Cir. 2017) ("An agreement which modifies the [s]tatute of [l]imitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable."); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274 (4th Cir. 2007), ("As a general rule, statutory limitations periods may be shortened by agreement, so long as the limitations period is not unreasonably short.").

S.105 WOULD OPEN THE FLOODGATES TO CLASS ACTION LAWSUITS

Fourth, S.105 is unwise as a matter of policy because it would encourage an explosion in extortionate class action litigation. In its current form, S.105 provides that it is an "unfair and deceptive practice . . . to include one of the presumptively unconscionable terms identified in subsection (a)," and that "a party who prevails in a claim under this section shall be entitled to $1,000.00 in statutory damages per violation and an award of reasonable costs and attorney's fees."[39] In theory, a business that drafts a contract with all five "presumptively unconscionable" provisions in it would be subject to an aggregate penalty of ***$5,000 per contract***—without regard, some plaintiffs will argue, to whether the provisions were actually unconscionable, and whether they were ever invoked against the consumer, etc.

New Jersey's recent experience with its Truth-in-Consumer Contract, Warranty, and Notice Act ("TCCWNA") is instructive.[40] TCCWNA regulates consumer "contracts," "warranties," "notices," and "signs" and prohibits provisions that "violate[] any clearly established legal right of a consumer or responsibility of a seller."[41] The statute entitles any "aggrieved consumer" to recover a "civil penalty of not less than $100.00" for violations under the statute.[42] While this statute was utilized sparingly for almost 30 years, in the past few years, plaintiffs' attorneys have aggressively pursued (or threatened to pursue) litigation, claiming that the statute allows *any* recipient of *any* contract with *any* unenforceable provision to recover $100.00, even if the offending provision was never enforced against or even read by the plaintiff. Many of those cases have targeted boilerplate contractual provisions that the plaintiffs did not even allege that

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39 S.105 § 6055(d).

40 N.J.S.A. 56:12-14 *et seq.*

41 N.J.S.A. 56:12-15.

42 N.J.S.A. 56:12-17.

they had read, let alone relied on or been injured by. This phenomenon has been described as "class actions at their worst,"[43] and even caught the attention of *The Economist*, among others.[44]

Vermont can expect even worse if S.105—which would create a statutory penalty ***fifty times greater*** than TCCWNA, and which does not even purport to require that consumers have been "aggrieved" in order to file suit—becomes law. The result would be an all too familiar flood of lawyer-driven litigation despite the absence of any actual harm to the plaintiffs or anyone else—all of which would raise serious due process concerns, and none of which would be good for business, consumers, or indeed anyone other than those who are in the business of filing class actions.[45]

CONCLUSION

I appreciate the opportunity to join the Committee today, and I look forward to answering any questions you may have.

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[43] *See The Truth About TCCWNA*, New Jersey Civil Justice Institute, http://www.civiljusticenj.org/issues/the-truth-about-tccwna.

[44] *See Ticking All the Boxes*, The Economist (Jun. 30, 2016), https://www.economist.com/news/business/21701496-fight-over-baffling-online-contracts-heading-courts-ticking-all-boxes.

[45] The United States Supreme Court has held that "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996). When evaluating statutory penalty provisions, courts examine (1) the "reprehensibility of the defendant's conduct," *e.g.*, whether conduct was violent and whether it was malicious or merely negligent; (2) the ratio of the amount of the penalty "to the actual harm inflicted on the plaintiff"; and (3) the differences between the proposed penalty and other "civil or criminal penalties that could be imposed for comparable misconduct." *Id.* at 575-83. Here, S.105's penalty provision—which could result in a penalty of $5,000 per contract—would fail all three prongs of that test. First, it would impose a substantial penalty even in cases where the defendant had no culpable mental state, since even a bare technical violation would seemingly trigger the penalty provision. Second, it would result in an astronomically high ratio between the penalty ($1,000 per violation) and the actual harm allegedly visited upon consumers (none whatsoever). And third, the proponents of S.105 have not even tried to point to a comparable penalty that is triggered by a scienter-less, harmless violation of a statute.

Exhibit 1

Drinker Biddle

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Seamus C. Duffy is a partner in Drinker Biddle's Litigation Group and the chair of its class action practice. He concentrates his practice on multi-state consumer class action and related government enforcement litigation. He has a depth of experience representing companies with interstate business and operations in managing overlapping federal and state private and government enforcement proceedings. A nationally recognized authority on issues relevant to class actions, Mr. Duffy regularly serves as national counsel for companies in federal multidistrict litigation proceedings and their state-court equivalents. He also assists companies in resisting the improper assertion of state authority over federally regulated aspects of their businesses, and has managed industry efforts to oppose state legislation and regulation that is preempted by federal law or violates the First Amendment.

Mr. Duffy is rated by Chambers, a member of the American Law Institute and the National Institute for Trial Advocacy, and has been recognized as a "Litigation Star" by Benchmark Litigation. He received his J.D. from Villanova University School of Law, *summa cum laude*, and his B.A. from Villanova University.