CLOSING THE COURTHOUSE DOORS: THE INJUSTICE OF FORCED ARBITRATION AGREEMENTS

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

OF THE

COMMITTEE ON EDUCATION AND LABOR U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

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CLOSING THE COURTHOUSE DOORS: THE INJUSTICE OF FORCED ARBITRATION AGREEMENTS

Thursday, November 4, 2021

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON HEALTH, EMPLOYMENT,
LABOR, AND PENSIONS,
COMMITTEE ON EDUCATION AND LABOR,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:17 a.m., via Zoom, Hon. Mark DeSaulnier (Chairman of the Subcommittee) presiding.

Present: Representatives DeSaulnier, Norcross, Wild, Mrvan, Allen, Walberg, Banks, Harshbarger, Miller, Fitzgerald, and Foxx (*ex officio*).

Staff present: Kyle deCant, Labor Policy Counsel; Christian Haines, General Counsel; Rasheedah Hasan, Chief Clerk; Sheila Havenner, Director of Information Technology; Eli Hovland, Policy Associate; Ariel Jona, Policy Associate; Andre Lindsay, Policy Associate; Richard Miller, Director of Labor Policy; Max Moore, Staff Assistant; Mariah Mowbray, Clerk/Special Assistant to the Staff Director; Kayla Pennebecker, Staff Assistant; Jessica Schieder, Economic Policy Advisor; Banyon Vassar, Deputy Director of Information Technology; Cyrus Artz, Minority Staff Director; Michael Davis, Minority Operations Assistant; Rob Green, Minority Director of Workforce Policy; Georgie Littlefair, Minority Legislative Assistant; John Martin, Minority Deputy Director of Workforce Policy/Counsel; Hannah Matesic, Minority Director of Member Services and Coalitions; and John Witherspoon, Minority Professional Staff Member.

Chairman DESAULNIER. Good morning, everyone. We are ready to begin. I will count down from five, and then we will start. Five, four, three, two, one. The Subcommittee on Health, Employment, Labor, and Pensions will come to order.

Welcome everyone. I note that a quorum is present. The Subcommittee is meeting today to hear testimony on "Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements." This is an entirely remote hearing and as such the Committee's hearing room is officially closed. All microphones will be kept muted as a general rule to avoid unnecessary background noise.

Members and witnesses will be responsible for unmuting themselves when they are recognized to speak or when they wish to

seek recognition. If a Member or witness experiences technical difficulties during the hearing please stay connected on the platform, make sure you are muted, and use your phone to immediately call the Committee's IT director whose number was provided in advance. Should the Chair experience technical difficulty, or need to step away, another majority Member is hereby authorized to assume the gavel in the Chair's absence.

In order to ensure that the Committee's five-minute rule is adhered to, staff will be keeping track of time using the Committee's digital timer, which appears in its own thumbnail picture. Members and witnesses are asked to wrap up promptly when their time has expired, please.

Pursuant to Rule 8(c) opening statements are limited to the Chair and Ranking Member. I'll now recognize myself now for the purpose of making my opening statement. Today we meet to discuss employers use of forced arbitration agreements and collective action waivers, and how these arrangements affect workers' ability to secure fair treatment.

On their first day of work employees flip through a stack of papers, click a series of modules, and sign the terms and conditions of their contract. Even before their first day employees often skim through a dense job application. More often than not, these documents include an arbitration clause.

In the fine print it states that an employee cannot take the employer to Court. Instead the employees must bring their claims to a closed-door meeting with an arbitrator who may not even have a law degree, and the employee will have no right to appeal the result.

Workers who carefully review these agreements are forced to choose between signing or walking away from their job, but most of the time employees sign these clauses and do not realize until they have experienced workplace violations and seek justice. Unfortunately, over the last three decades employers have increasingly—some employers, have increasingly used forced arbitration clauses to circumvent workers' right to due process.

In 1990, 2.1 percent of non-union employees got an arbitration clause in their employment contract, 2.1 percent in 1990. As of 2018, nearly 60 percent of all non-unionized private sector employees were covered by forced arbitration agreements. Once again, in 1990, 2.1. In 2018, 18 years later, 60 percent. That's 60 million American workers locked out of a courtroom and forced to go through a process that often is rigged against them.

While proponents of forced arbitration describe it as more efficient litigating than in Court, we will hear from our witnesses today on how it is not efficient, and often time less efficient than normal litigation. When workers do enter into the arbitration process, they rarely emerge victorious.

Research shows that employees have an overall win rate around 19 percent. And when an arbitrator is paired repeatedly with the same employer, that win rate reduces to nearly 11 percent. In contrast, employees are more than 30 percent likely to win when they go to Federal Court.

As a result, arbitration has become a tool of employers—some employers—to evade accountability for violating their workers'

rights. In the ten most populous states workers have eight million dollars stolen from them in minimum wage violations every year. This amounts to $3,300.00 in losses per worker every year. The Federal minimum wage is inadequate as it is, and without protections workers are left with even less while the employers line their pockets and duck litigation.

Forced arbitration also makes it difficult for workers to seek justice when they experience discrimination. Arbitrations are private and allow the employers to be shielded from the court of public opinion. Additionally, the ordinary rules of discovery and evidence that come into the courtroom rarely apply, so employers can control the evidence that is brought into the room. These unfair practices allow employers to hide abuse while stacking the cards against workers who experience discrimination.

In recent years the Supreme Court has only worsened the problem. In 2018 the Court's conservative majority ruled in the Epic Systems v. Lewis case, that an employer can even require employees to give up their right to join a joint, class, or collective action. This leads the employees to try their cases as individuals and prevents them from proving that their experience is one of many.

Ultimately, this prevents employers from being held accountable. As Justice Ginsburg wrote in her dissent, "congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order." That's why today's hearing will focus on the Restoring Justice for Workers Act introduced by Chairs Nadler and Scott.

First the legislation reopens the Courthouse doors for workers by prohibiting the use of forced arbitration clauses in employment contracts prior to dispute. Second, it reverses the Supreme Court's decision in Epic to ensure workers can ban together to hold unscrupulous employers accountable.

And finally, it ensures that after an employment dispute arises, employers cannot obtain arbitration agreements by threat or coercion. I'd like to congratulate my colleagues on the Judiciary Committee for their efforts to advance the Forced Arbitration Injustice Repeal Act, or the FAIR Act, which ends forced arbitration in many other contexts.

This legislation is crucial for empowering workers' rights under the statutes this Committee oversees. The Restoring Justice for Workers Act builds on the FAIR Act by including essential provisions like making collective action labors unfair labor practices under the National Labor Relations Act and preventing forced post dispute arbitration.

If workers are shut out of the court system, they are not protected under the law. This is an outcome we should not accept. We cannot accept. I want to thank our witnesses for joining us today. I now yield to the distinguished Ranking Member Mr. Allen for purposes of him making his opening statements. Mr. Allen.

[The statement of Chairman DeSaulnier follows:]

STATEMENT OF HON. MARK DESAULNIER, CHAIRMAN,
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

Today, we meet to discuss employers' use of forced arbitration agreements and collective action waivers and how these arrangements affect workers' ability to secure fair treatment.

On their first day of work, employees flip through a stack of papers or click a series of modules and sign the terms and conditions of their contract. Even before their first day, employees often skim through a dense job application. More often than not, these documents include an arbitration clause, hidden in the fine print, which states that the employee cannot take the employer to court. Instead, the employee must bring their claims to a closed-door meeting with an arbitrator who may not even have a law degree, and the employee will have no right to appeal the result.

Workers who carefully review these agreements are forced to choose between signing or walking away from their job. But most of the time, employees sign these clauses and do not realize it until they have experienced workplace violations and seek justice.

Unfortunately, over the last three decades, employers—some employers—have increasingly used forced arbitration clauses to circumvent workers' right to due process. In 1990, 2.1 percent of non-union employees had an arbitration clause in their employment contract. 2.1 percent in 1990. As of 2018, nearly 60 percent of all non-unionized private sector employees were covered by forced arbitration agreements. Once again, 1990 2.1 percent, 2018, 28 years later, 60 percent. That's 60 million American workers locked out of the courtroom and forced to go through a process that is often rigged against them. While proponents of forced arbitration describe it as more efficient than litigating in court, we will hear from our witnesses today on how it is not efficient, and oftentimes less efficient than normal litigation.

When workers do enter the arbitration process, they rarely emerge victorious. Research shows that employees have an overall win rate of around 19 percent, and when an arbitrator is paired repeatedly with the same employer, that win rate reduces to nearly 11 percent. In contrast, employees are more than 30 percent likely to win when they go to Federal court.

As a result, arbitration has become a tool for employers, some employers, to evade accountability for violating their workers' rights.

In the ten most populous states, workers have $8 billion stolen from them in minimum wage violations every year. This amounts to $3,300 in losses per worker every year. The Federal minimum wage is inadequate as it is, and without protections, workers are left with even less while their employers line their pockets and duck litigation.

Forced arbitration also makes it difficult for workers to seek justice when they experience discrimination. Arbitrations are private, allowing employers to be shielded from the court of public opinion. Additionally, the ordinary rules of discovery and evidence common to the courtroom rarely apply, so employers can control the evidence that is brought into the room. These unfair practices allow employers to hide abuse, while stacking the cards against workers who experience discrimination.

In recent years, the Supreme Court has only worsened the problem. In 2018, the Court's conservative majority ruled in *Epic Systems Corp.* v *Lewis* that an employer can even require employees to give up their right to join a joint, class, or collective action. This leaves employees to try their case as individuals and prevents them from proving that their experience is one of many. Ultimately, this prevents employers from being held accountable.

But as Justice Ginsburg wrote in her dissent, "congressional correction of the FAA over workers' rights to act in concert is urgently in order." That's why today's hearing will focus on the *Restoring Justice for Workers Act* introduced by Chairs Nadler and Scott.

- First, this legislation re-opens the courthouse doors for workers by prohibiting the use of forced arbitration clauses in employment contracts prior to a dispute;
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If workers are shut out of the court room, they are not protected under the law. That is an outcome we cannot accept. I want to thank our witnesses for joining us

today. And I now yield to the distinguished Ranking Member, Mr. Allen, for the purposes of him making his opening statement.

Mr. ALLEN. Thank you, and good morning, Mr. Chairman. Before coming to Congress I spent 40 years building a business, creating hundreds of jobs for Georgians. From a business standpoint I can say without a doubt that H.R. 4841, or the so-called Restoring Justice for Workers Act will be devastating for both employers and employees.

This is just another instance of a heavy-handed government reaching way too far. One thing our economy doesn't need right now is more burdensome regulations, but that's exactly what H.R. 4841 is, it's a burden. By banning arbitration in workplace matters, this law unfairly targets job creators and American workers. Arbitration is known as an effective and proven method for resolving workplace disputes, and the American worker demands choice.

Arbitration provides practical and affordable legal recourse for employees who believe their rights have been violated. It also provides the necessary flexibility to address workplace claims of all sizes. Banning the use of arbitration unfairly penalizes individual employees and employers. This bill would hurt workers by delaying justice and resolution to disputes.

Instead of trying to tie the hands of workers and employers, Democrats should be focused on getting our economy back on track and combatting the rising prices that are caused by inflation, and out of control spending. The only thing H.R. 4841 is good for is enriching our trial lawyers. The legislation will result in a tsunami of class action lawsuits leaving many workers claims unaddressed due to the costly and time-consuming nature of litigation.

Outlawing arbitration and facilitating class action lawsuits will funnel more money directly from the pockets of workers and job creators into the wallets of trial lawyers. In most cases arbitration is significantly less expensive, and speedier than drawn out Court battles.

Democrats claim that arbitration gives employers an advantage over employees, but in reality, costly court battles only benefit trial lawyers. It is unfair to force workers into judicial proceedings they may not be able to afford. This will be another case of democrat legislation that will have unintended consequences of hurting those it intended to help by imposing a top down, big government solution.

Our judicial system is already stretched thin, and the COVID–19 pandemic has already made things worse. Forcing all workplace disputes into the courtroom won't just exacerbate this backlog. It will clog our judicial system completely. Democrats must be aware that this is bad legislation, why else would they exempt the unions?

HR 4841 bans all arbitration except when it comes to arbitration clauses and collective bargaining agreements. Exempting big labor from this bill tells us everything we need to know about how much it will disadvantage job creators. Democrats also have a bad habit of trying to treat all Americans the same, but our workers and businesses do not fit into a one size fits all box.

The American workforce is diverse. It does not make sense to treat independent contractors the same as salaried or hourly employees, independent contractors set their own hours and earnings, and are entrepreneurs in their own right, yet this legislation unfairly targets independent contractors, and will ultimately decrease, and disincentivize these growing opportunities.

Everyone here wants to see our workers thrive. We also want to see those who have been mistreated receive justice. The real question in hand is what is the most effective and efficient way to get justice for both workers and employers? I believe outlawing arbitration as H.R. 4841 would do and shoving every workplace dispute into an overwhelmed court system would delay the very justice that mistreated workers need.

The last thing this economy needs is more control and regulations from Washington. Forced lockdowns and supply chain crisis, rising prices, and inflation and a worker shortage, are already wrecking our economy. Legislation like this could be the nail in the coffin for many struggling job creators.

In the end those who will suffer the most from H.R. 4841 are the workers that won't be able to have their cases heard, and the employers that will be forced to tread water continuously under the heavy weight of endless litigation. And with that Mr. Chairman I yield back.

[The statement of Ranking Member Allen follows:]

STATEMENT OF HON. RICK W. ALLEN, RANKING MEMBER,
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

Before coming to Congress, I spent nearly 40 years building a business creating hundreds of jobs for Georgians.

From a business standpoint, I can say without a doubt that H.R. 4841, or the so-called Restoring Justice for Workers Act, will be devastating for both employers and employees.

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Democrats must be aware that this is bad legislation. Why else would they exempt the unions?

H.R. 4841 bans all arbitration, except when it comes to arbitration clauses in collective bargaining agreements. Exempting big labor from this bill tells us everything we need to know about how much it will disadvantage job creators.

Democrats also have a bad habit of trying to treat all Americans the same, but our workers and businesses do not fit into a one-size-fits all box.

The American workforce is diverse. It does not make sense to treat independent contractors the same as salaried or hourly employees. Independent contractors set their own hours and earnings and are entrepreneurs in their own right. Yet this legislation unfairly targets independent contractors and will ultimately decrease and disincentive these growing opportunities.

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I believe outlawing arbitration, as H.R. 4841 would do, and shoving every workplace dispute into an overwhelmed court system will delay the very justice that mistreated workers need.

The last thing this economy needs is more control and regulations from Washington.

Forced lockdowns, a supply chain crisis, rising prices and inflation, and a worker shortage are already wrecking our economy. Legislation like this could be the nail in the coffin for many struggling job creators.

In the end, those who will suffer the most from H.R. 4841 are the workers who won't be able to have their cases heard and the employers who will be forced to tread water continuously under the heavy weight of endless litigation.

Chairman DESAULNIER. Thank you, Mr. Allen. Without objection all of the Members who wish to insert written statements into the record may do so, submitting them to the Committee Clerk electronically in Microsoft Word format by 5 p.m. on November 18, 2021.

Now I'd like to go to our witnesses. Thank you all for participating today, we look forward to all of your testimony. I'd like to now introduce the witnesses. Professor Alexander Colvin is the Kenneth F. Kahn Dean of the Cornell University School of Industrial and Labor Relations.

Ms. Glenda Perez is a former Implementation Set-Up Representative at Cigna.

Mr. Roger King is a Senior Labor and Employment Counsel at the H.R. Policy Association.

And Ms. Kalpana Kotagal is a Partner in the law firm of Cohen Milstein Sellers & Toll. I apologize for the mispronunciation. As you can imagine with my name, I'm used to people doing the same thing to my name, so I apologize. Unfortunately, it hasn't made me better at pronunciations.

We appreciate the witnesses for participating today and look forward to your testimony. Your written statement will appear in full in the hearing record, and you are asked to limit your oral presentation to five minutes, and your written statement will appear in full in the hearing record, and you are asked to limit your oral presentation to a five-minute summary.

After your presentation we'll move to Member questions. The witnesses are aware of their responsibility to provide accurate information to the Subcommittee, and therefore we will proceed right now with their testimony. I will first recognize Professor Colvin, go ahead.

STATEMENT OF ALEXANDER COLVIN, JD, PH.D., KENNETH F. KAHN 1969 DEAN, SCHOOL OF INDUSTRIAL AND LABOR RELATIONS, CORNELL UNIVERSITY

Mr. COLVIN. Thank you. Thank you, Chairman DeSaulnier, Ranking Member Allen, and distinguished Members of the Subcommittee. It's a pleasure to have the opportunity to testify today about the impact of forced arbitration on American workers.

My name is Alexander Colvin. I am the Kenneth Kahn Dean and Martin Scheinman Professor of Conflict Resolution at Cornell University. Most workers discover that they have entered into forced arbitration after the fact. They are fired from their job, and thought their rights are being violated, so they went to see a lawyer.

After asking some questions, and reviewing documents the lawyer explained that way back when they were hired amidst the stack of paperwork, we all sign at the start of a job was a document stating that the worker agreed to resolve any future employment law claims against the employer through arbitration.

Now the worker might believe that private arbitration forum established by a contract drafted by the employer, could not govern claims under statute enacted by Congress or State legislature, that they retained their right to their day in Court. The worker might object that he or she was essentially forced into agreeing because the employer stated that the arbitration clause was a term and condition of employment. No signature, no job.

But the Supreme Court has held that an arbitration clause imposed as a term and condition of employment is enforceable. That's the essence of forced arbitration. The worker is required to agree to arbitration as a condition of getting or keeping a job. This forced arbitration clause can cover the vast majority of rights the worker might have from protection against racial discrimination, sexual harassment, to rights of returning veterans, to rights to be paid the minimum wage and overtime.

The arbitration clause is drafted by the employer who is effectively deciding who is administering arbitration, and what the rules and procedures will be. An example of the rules that many employers include in forced arbitration is privacy provisions that prevent the worker from disclosing what happened in arbitration.

The result is that employees and public regulators may be unaware of systematic problems of discrimination or sexual harassment at a company because individual cases are kept under a veil of confidentiality in the private form of arbitration.

Under the recent the recent Epic Systems precedent of the Supreme Court the rules of forced arbitration can also include a ban on bringing a class action or a collective claim. The worker is unable to pursue a class action in court because of the forced arbitration clause, and unable to pursue a class action arbitration because the rule as drafted by the employer do not allow it, essentially a heads I win, tails you lose situation. The inability to bring a class or collective action leaves many with low value claims with no effective recourse at all.

What do we know about how this system of forced arbitration is operating? My own empirical research, and that of other scholars in the area has yielded the following conclusions. First, forced arbi-

tration has become a widespread practice. In my 2018 survey, I found that over half of all establishments in the survey were imposing forced arbitration on their employees, that's 60 million American workers subject to it.

Second, employees do worse in forced arbitration than in litigation, winning fewer cases and recovering less damages. My research found that taking into account the chance of winning, and likely damages, the average recovery per case for employees in forced arbitration was only $25,000.00 compared to $143,000.00 in Federal court, and $328,000.00 in State court.

Similarly, a new 2021 study by Mark Gough of Penn State University finds that employees receive 203 percent greater damage in Federal court, and 165 percent greater damage in the State court than in forced arbitration. And that's controlling for differences in Plaintiff and case characteristics, comparing apples to apples.

Third, employees are at a structural disadvantage in forced arbitration procedures. There's evidence of a repeat clear advantage to corporations that have multiple cases before the same arbitrator where these employers tend to win more often and have lower damages awarded against them.

Fourth, forced arbitration reduces access to due justice. As a result of a less favorable outcome for employees in forced arbitration, there's a reduced ability of plaintiff attorneys to accept cases under the normal contingency fee basis, leading to far fewer cases being filed. Research by Cynthia Estlund of NYU finds that cases are being brought in forced arbitration at only 1 to 2 percent the rate they are brought in court. If cases are not being brought, this means that our employment laws are going unenforced for much of the workforce that is subject to forced arbitration.

After the problems be addressed, the provisions of H.R. 4841, Restoring Justice for Workers Act, would directly address the more pernicious effects that we're seeing in forced arbitration through ensuring that no pre-dispute agreements are valid or enforceable, and restoring the ability to bring class actions and collective claims.

It also appropriately preserves the beneficial use of arbitration in the collective bargaining and voluntary post-dispute context where it's been successfully used for many years. By contrast, the current system of forced arbitration imposed on workers by corporations, undermines employment rights and should be eliminated. Thank you for your time.

[The prepared statement of Mr. Colvin follows:]

PREPARED STATEMENT OF ALEXANDER COLVIN

Testimony Before the Subcommittee on Health, Employment, Labor, and Pensions

Hearing on

"Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements"

Alexander Colvin

ILR School, Cornell University

November 4, 2021

Chairman DeSaulnier, Ranking Member Allen, and all members of the subcommittee, thank you for the opportunity to testify today about the impact of forced arbitration on American workers.

My name is Alexander Colvin and I am the Kenneth F. Kahn Dean and Martin F. Scheinman Professor of Conflict Resolution at the School of Industrial and Labor Relations at Cornell University. The views expressed here are my own and do not represent those of Cornell University or any other organization.

For the past 25 years, my research has focused on workplace dispute resolution, including the question of how the practice of forced arbitration is affecting the enforcement of our employment laws. From an obscure practice, drawing the attention mostly of specialists in the field like myself, forced arbitration has grown to become the predominant way in which employment law disputes are resolved in the American workplace. This change has occurred with little public oversight, but has profound implications for the rights of the American worker. In my testimony, I will describe the key findings from the growing body of research, both by myself and others, on forced arbitration of employment disputes.

1) What is forced arbitration?

Arbitration is a conflict resolution procedure where a third-party neutral decides the outcome of the dispute. Arbitration has been used successfully in many areas, including commercial, labor, international, and construction disputes. A key advantage of arbitration is that it is a private dispute resolution process under the control of the parties that allows them to avoid having to go to court to resolve their dispute. By contrast, forced arbitration is a process imposed by corporations on workers or consumers that requires them to give up their right to go to court and instead resolve any dispute with the corporation through an arbitration process that the corporation itself established.

Most workers discover that they have entered into forced arbitration after the fact. They were fired from their job and thought their rights had been violated so they went to see a lawyer. After asking some questions and reviewing documents, the lawyer explained that way back when they were hired, amidst the stack of paperwork we all sign

at the start of a job, was a document stating that the worker agreed to resolve any future employment law claims against the employer through arbitration.

The worker might believe that a private arbitration forum established by a contract drafted by the employer could not govern claims under a statute enacted by Congress or a state legislature – that they retained the right to their day in court. But in its 1991 decision in *Gilmer v. Interstate/Johnson Lane*[1] the Supreme Court held that arbitration could be used to resolve claims under employment statutes, including civil rights laws and protections against discrimination in the workplace. The worker might object that he or she was essentially forced into agreeing because the employer said signing the arbitration clause was a term and condition of employment – no signature, no job. But in its 2001 decision in *Circuit City v. Adams*[2] the Supreme Court enforced an arbitration clause imposed as a mandatory term and condition of employment.

This is the essence of forced arbitration, the worker is required to agree to arbitration as condition of getting or keeping a job. This forced arbitration clause can cover the vast majority of rights that the worker might have, from protections against racial discrimination and sexual harassment, to rights of returning veterans, to rights to be paid a minimum wage and overtime. If the worker objects and tries to go court, the court will order the worker to go to arbitration instead. The arbitration clause is drafted by the employer, who is effectively deciding who is administering arbitration and what the rules and procedures will be.

An example of the rules that many employers include in forced arbitration is privacy provisions that prevent the worker from disclosing what happened in arbitration. The result is that employees and public regulators may be unaware of systematic problems of discrimination or sexual harassment at a company because individual cases are kept under a veil of confidentiality in the private forum of arbitration.[3] Under recent precedents of the Supreme Court[4], the rules of forced arbitration can also include a ban on bringing a class action or collective claim. The worker is unable to pursue a class

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[1] 500 U.S. 20 (1991).
[2] 532 U.S. 105 (2001).
[3] For example, see Gretchen Carlson, Ch. 6 "Forced into Silence" in *Be Fierce: Stop Harassment and Take Your Power Back* Center Press: New York, NY.
[4] *AT&T v. Concepcion,* 563 U.S. 333 (2011); *Epic Systems v. Lewis,* 138 S. Ct. 1612 (2018).

action in court because of the forced arbitration clause and unable to pursue a class action in arbitration because the rules drafted by the employer do not allow it. This 'heads I win, tails you lose' situation is the current law in America. The inability to bring a class or collective action leaves many with low value claims with no effective recourse at all since their claims are too small to make bringing a case on an individual basis feasible.[5]

In the follow sections of my testimony, I will describe what we know about how this system of forced arbitration is operating, drawing on my own research and that of other scholars in the area.

2) How widespread is forced arbitration?

The first and most basic question is how widespread is forced arbitration? During the 1990s and early 2000s, surveys indicated that relatively few employers were requiring their employees to enter into arbitration clauses. However by the 2010s there were indications that forced arbitration was growing and becoming more widespread. Arbitration service providers were seeing increasing case numbers. To investigate the extent of forced arbitration, in 2017 I conducted a national survey of private-sector American business establishments, which had a response rate of 47.6%, yielding 627 responses with complete data on the variables of interest.[6]

I found that a total of 53.9 percent of all establishments in the survey were imposing forced arbitration on their employees. Adjusting for workforce size, overall 56.2 percent of employees in the establishments surveyed were subject to forced arbitration procedures. Extrapolating to the overall private-sector nonunion workforce, this corresponds to 60.1 million American workers who are now subject to forced arbitration procedures.[7]

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[5] Justice Breyer noted in his dissent in *AT&T v. Concepcion* the impracticality of expecting a consumer to bring a $30 claim where the costs of bringing the claim far exceed the amount in dispute. The same issues arise in employment cases, particularly with wage and hour claims where the amount in dispute for any individual who was denied a break, overtime pay, or was being paid below the minimum wage, is often small relative to the costs of bringing a claim.

[6] Colvin, Alexander J.S. 2019. "The Metastisization of Mandatory Arbitration." *Chicago-Kent Law Review*, 94(1): 3-24. This research project was conducted in collaboration with the Economic Policy Institute (EPI) whose funding support for it I gratefully acknowledge.

[7] This estimate is based on the Bureau of Labor Statistics report "Union Members – 2016," (https://www.bls.gov/news.release/pdf/union2.pdf) released January 26, 2017, which reports an overall

Where is forced arbitration used most? It is used nationwide, by over 40% of employers in most states and by over two-thirds of employers in California, Texas, and North Carolina. Larger employers (those with over 1000 employees) are more likely to use forced arbitration (65.1% of businesses with over 1000 employees used forced arbitration). Low wages workplaces are more likely to use forced arbitration, with 64.5% of businesses paying less than $13/hour having the practice. [8]

3) The impact of the rise of class action waivers

The most important new development in arbitration law over the past decade is the enforcement of class action waivers in arbitration clauses. Some forced arbitration clauses have included specific provisions stating that claims must be brought individually in arbitration and not on a class or collective basis. In its 2011 decision in *AT&T v. Concepcion*[9], a majority of the Supreme Court held that a class action waiver in a cell phone arbitration clause was enforceable. Customers could be required by the arbitration clause to go to arbitration, not to court, with their claims and the arbitration clause could require that the claims be brought individually in arbitration. The result is that a class action waiver in a forced arbitration clause can effectively bar a plaintiff from bringing a class action in either the courts or in arbitration. This creates a powerful incentive for the introduction of forced arbitration clauses with class action waivers.

My research found that by 2017, 41.1% of the forced arbitration clauses that employees were subject to included class action waivers, affecting some 24.7 million workers.[10] At the same time, some legal uncertainty remained about whether the forced arbitration class action waivers permitted in cell phone and other consumer contracts also applied to employment contracts. In its 2018 decision *Epic Systems v. Lewis*[11], the Supreme Court resolved this question in favor of enforcing class action waivers in forced

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private-sector workforce of 115.417 million, among which 8.437 million are union represented private sector workers, with the remainder of 106.980 million workers being nonunion.

[8] Colvin, Alexander J.S. 2019. "The Metastisization of Mandatory Arbitration." *Chicago-Kent Law Review*, 94(1): 3-24.

[9] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

[10] Colvin, Alexander J.S. 2019. "The Metastisization of Mandatory Arbitration." *Chicago-Kent Law Review*, 94(1): 3-24.

[11] 138 S. Ct. 1612 (2018).

arbitration clauses. Following *Epic Systems*, we can expect a continued expansion of class action waivers and further incentives for corporations to impose forced arbitration on their workers.

4) What are the outcomes of forced arbitration?

What have been the outcomes of cases brought in forced arbitration? Some early evidence from the 1990s suggested relatively similar outcomes to litigation, but subsequent research using larger samples of cases that focused specifically on forced arbitration has found much less favorable outcomes for employees in arbitration than typically seen in litigation. Whereas studies of litigation have found employee win rates ranging from 36.4% in federal courts to 57% in state courts,[12] in a study of 2,802 mandatory arbitration cases over an 11 year period from 2003-2013 Mark Gough and I found an employee win rate of only 19.1%.[13] Average damages recovered by successful employees in those same studies averaged $394,223 in federal court and $575,453 in state court, but only $135,316 in arbitration. Taking into account the chance of winning and likely damages, the mean recovery per case for employees in mandatory arbitration was only $25,929, compared to $143,497 in federal court and $328,008 in state court.

The significant of these differences is confirmed by a new 2021 study by Mark Gough that controls for differences in plaintiff, attorney, and claim characteristics, providing the most robust evidence to date that these differences are real and substantial.[14] Gough finds that, controlling for these factors, the employee win rate in federal court jury trials is 70.7% higher than in forced arbitration and in state court jury trials the employee win rate is 146.0% higher than in forced arbitration. Similarly, he finds that the monetary damages awarded to employees in federal court jury trials are 203.1% greater than in forced arbitration and in state court jury trials are 165.9% greater than in forced arbitration. These results show the starkly less favorable outcomes that workers obtain in forced arbitration compared to litigation.

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[12] Colvin, Alexander J.S. 2011. "An Empirical Study of Employment Arbitration: Case Outcomes and Processes." *Journal of Empirical Legal Studies*, 8(1): 1-23.
[13] Colvin, Alexander J.S. and Mark Gough. 2015. "Individual Employment Rights Arbitration in the United States: Actor and Outcomes" *ILR Review*, 68(5): 1019-1042.
[14] Mark Gough. 2021. "A Tale of Two Forums: Employment Discrimination Outcomes in Arbitration and Litigation" *ILR Review* 74(4): 875-897.

Why have outcomes been less favorable for employees in forced arbitration? One possibility is that different types of cases are being heard in arbitration than in litigation, perhaps due to pre-hearing filtering out of some cases. Differences in pre-hearing settlement or summary judgment behavior might be a factor, though both of these practices are far more common in arbitration than often believed. Gough and I found that 63 percent of forced arbitration cases settled before a hearing, a higher rate than in some litigation studies.[15] Gough's 2021 study found that summary judgement motions were brought in 48% of forced arbitration cases and controlling for this factor did not explain the difference between arbitration and litigation outcomes.[16] Another possibility is that relatively small cases that wouldn't be economically viable in litigation are being filed in arbitration. However in research Kelly Pike and I conducted, we found that the median claim in mandatory arbitration was $167,880 and three quarters of claims were over $60,000, sometimes used as a cut-off estimate for the size of claim that would be viable to take to litigation.[17] As of yet, the existing research has not provided findings that would explain away the arbitration-litigation outcome gap.

4) How is forced arbitration structurally imbalanced?

Arbitration by design gives primary responsibility for the outcomes of the procedure to the arbitrator him or herself and so another important question is who are the arbitrators in forced arbitration and how are they chosen. To investigate this question, Gough and I surveyed 481 practicing employment arbitrators to learn about their backgrounds and professional practices. [18] As would be expected, the vast majority of employment arbitrators have backgrounds as practicing attorneys. They are a group with limited demographic diversity, with 74 percent being male and 92 percent non-Hispanic white. They also tend to come from management side backgrounds, with 59 percent

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[15] Colvin, Alexander J.S. and Mark Gough. 2015. "Individual Employment Rights Arbitration in the United States: Actor and Outcomes" *ILR Review*, 68(5): 1019-1042.
[16] Mark Gough. 2021. "A Tale of Two Forums: Employment Discrimination Outcomes in Arbitration and Litigation" *ILR Review* 74(4): 875-897.
[17] Colvin, Alexander J.S. and Kelly Pike. 2014. "Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?" *Ohio State Journal on Dispute Resolution*, Vol. 29, No. 1, pp. 59-83.
[18] Gough, Mark D., and Alexander J.S. Colvin. 2020. "Decision-Maker and Context Effects in Employment Arbitration." *ILR Review*, 73(2): 479-497.

having represented employers at some point in their careers, versus only 36 percent who had represented employees or unions. Analyzing the outcomes of cases decided by these arbitrators, we found that those with a background representing management were significantly more likely to rule in favor of employers in cases.

A troubling finding is evidence of a repeat player advantage to employers. Large employers are likely to do better in arbitration by virtue of their greater resources, ability to hire better legal counsel, more developed human resource policies, and more sophisticated internal grievance procedures that filter out meritorious claims before they get to arbitration. However as more regular participants in the mandatory arbitration system, some employers may gain an advantage by accumulating information on the decision-making tendencies of particular arbitrators or the types of evidence and arguments that tend to appeal to specific arbitrators. There is also a danger that some arbitrators may exhibit a tendency to favor employers who could be the source of selection for future cases, despite the clear ethical violation of doing so.[19] In our research on arbitrator decision-making, Mark Gough and I found that even after we controlled for the number of cases an employer had in arbitration, i.e. the first type of large employer advantage, that employers tend to win more often and have lower damages awarded against them the more cases they had before the same arbitrator.[20] This finding of a repeat employer-arbitrator pairing effect indicates that there is a structural imbalance against workers in forced arbitration.

5) How does forced arbitration affect access to justice?

At one point, there was hope that the relative simplicity of arbitration would allow employees to effectively bring cases without representation by legal counsel. In practice,

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[19] The danger of the repeat player advantage that employers hold in forced arbitration is illustrated in comments made in a NY Times story: "Victoria Pynchon, an arbitrator in Los Angeles, said plaintiffs had an inherent disadvantage. 'Why would an arbitrator cater to a person they will never see again?' she said." … "Some of the chumminess is subtler, as in the case of the arbitrator who went to a basketball game with the company's lawyers the night before the proceedings began. (The company won.) Or that of the man overseeing an insurance case brought by Stephen R. Syson in Santa Barbara, Calif. During a break in proceedings, a dismayed Mr. Syson said he watched the arbitrator and defense lawyer return in matching silver sports cars after going to lunch together. (He lost.)" NY Times, "In Arbitration, 'A Privatization of the Justice System'", Nov. 1, 2015.

[20] Colvin, Alexander J.S. and Mark Gough. 2015. "Individual Employment Rights Arbitration in the United States: Actors and Outcomes." *ILR Review*, Vol. 68(5): 1019-1042.

however, it has turned out that most employees use lawyers to bring cases in arbitration, just like in court. Among cases administered by the American Arbitration Association, only 21 percent of the employees were self-represented.[21] Employees who do bring cases to arbitration without legal representation tend to do much worse than those with legal representation. In our study, Gough and I found that the odds of an employee winning decrease by 46% if he or she is self-represented and the size of their average damage award is 47% lower. Self-represented employee plaintiffs are also less likely to obtain a settlement of the case before a hearing. These findings indicate that forced arbitration has not provided a forum that allows self-represented employees to pursue cases with a reasonable prospect of success.

The reality is that the vast majority of workers need to have representation to get access to justice when their legal rights are violated. How does forced arbitration affect the likelihood of getting legal representation? Most workers are unable to pay the high hourly fees that attorneys charge. For most regular Americans, a contingency fee arrangement where the attorney gets a percentage of the damages if the case is successful is the only practical way to obtain legal representation in employment cases.[22] The problem is that if in forced arbitration the average case only produces $25,929 in damages, compared to $143,497 in federal courts and $328,008 in state courts, then plaintiff attorneys will not be earning enough through a contingency fee in most forced arbitration cases to justifying taking on those cases.

The result of the less favorable outcomes for employees and reduced ability and willingness of plaintiff attorneys to accept cases where the employee is subject to forced arbitration is that far fewer cases are being filed. Research by Cynthia Estlund finds that cases are being brought in forced arbitration at only 1-2% the rate they are being brought in court.[23] If cases are not being brought, this means that our employment laws are going unenforced for much of the workforce that is subject to forced arbitration.

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[21] Colvin, Alexander J.S. and Mark Gough. 2015. "Individual Employment Rights Arbitration in the United States: Actors and Outcomes." *ILR Review*, Vol. 68(5): 1019-1042.
[22] In a survey of practicing plaintiff attorneys, Mark Gough and I found that 90% of the time they were using contingency fees in the employment cases they bring.
[23] Estlund, Cynthia. 2018. "The Black Hole of Mandatory Arbitration", *North Carolina Law Review*, 96(3), 679-709

6) Where can ADR be used effectively?

The problems with forced arbitration should not lead us to turn away from all forms of alternative dispute resolution (ADR). At its best, ADR can provide more accessible and consensual methods of dispute resolution that serve the interests of all parties. In contrast to forced arbitration, where do we see ADR working well?

Mediation, where a third-party neutral helps the parties negotiate the resolution of a dispute, is an ADR procedure with a strong track-record of success in producing good outcomes that satisfy the interests of both parties.[24] Organizations should also be encouraged to adopt in-house grievance procedures and conflict management systems that provide workers with the ability to voice concerns and enhance workplace due process.[25] However, unlike forced arbitration these ADR procedures do not bar workers from having their day in court if their rights are violated.

Arbitration itself works well in settings where it is truly voluntary and bilateral in nature. For example, the long-standing system of labor arbitration through which workplace disputes are resolved in unionized workplaces has been one of the great successes of American labor relations because it is a genuinely bilateral system established and maintained by both employers and unions. [26] Similarly arbitration has been used effectively in public sector collective bargaining in many states as an alternative to strikes for resolving disputes over the negotiation of a new contract.

Research also finds that arbitration works well where it is chosen on a voluntary basis by the parties after a dispute has arisen.[27] The problem with forced arbitration is that it is unilaterally developed and imposed by one party before any dispute has arisen, in a context without meaningful negotiation. Reforms to ban the practice of forced arbitration should preserve the beneficial use of arbitration in the collective bargaining context and where it is agreed to as a voluntary, post-dispute procedure.

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[24] Lisa B. Bingham. 2004. "Employment Dispute Resolution: The Case for Mediation" *Conflict Resolution Quarterly*, 22(1): 145-174.
[25] David B. Lipsky, Ronald L. Seeber, and Richard D. Fincher. 2003. *Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals.* Jossey-Bass: San Francisco, CA.
[26] Harry C. Katz, Thomas A. Kochan, and Alexander J.S. Colvin, *An Introduction to U.S. Collective Bargaining and Industrial Relations, 5th Ed.* ILR Press: Ithaca, NY (2017), Ch. 12.
[27] J. Ryan Lamare and David B. Lipsky. 2019. "Resolving Discrimination Complaints in Employment Arbitration: An Analysis of the Experience in the Securities Industry" *ILR Review*, 72(1): 158-184.

7) What would be the impact of the *Restoring Justice for Workers Act*?

The provisions of H.R 4841 – *Restoring Justice for Workers Act* would directly address the pernicious effects of forced arbitration on workplace disputes through ensuring that no pre-dispute arbitration agreements are valid or enforceable. It also addresses one of the problematic features of the *Epic Systems* decision by restoring workers rights under the *National Labor Relations Act* to engage in concerted activity by filing joint, class, or collective claims.

It is important that the *Restoring Justice for Workers Act* preserves the beneficial use of arbitration in the collective bargaining and voluntary post-dispute contexts. In the collective bargaining context, labor and management have jointly established the highly effective system of labor arbitration for resolving disputes in unionized workplaces and this system should be protected and supported. Post-dispute arbitration can also be an effective tool, so long as it is truly voluntary and entered into by informed parties. The provisions of the *Restoring Justice for Workers Act* recognize this by ensuring that post-dispute agreements are clearly described in plain language, workers have adequate time to consider entering into them, and are not subject to retaliation for declining to agree to arbitration. With these basic protections in place, voluntary post-dispute arbitration can be a valuable tool to enhance the resolution of work disputes.

Conclusion

Looking across the research on forced arbitration yields the following conclusions:

- Forced arbitration has become a widespread practice, affecting most private sector nonunion workers.
- Class action waivers are a growing feature of forced arbitration, cutting off worker access to class actions and collective claims.
- Employees do worse in forced arbitration than in litigation, winning fewer cases and recovering less damages.

- Employees are at a structural disadvantage in forced arbitration procedures with rules designed by corporations, most arbitrators coming from employer side backgrounds, and repeat player advantages favoring companies.
- Forced arbitration reduces access to justice, suppresses claims, and undermines enforcement of our employment laws.
- The *Restoring Justice for Workers Act* would eliminate forced arbitration and restore the ability of workers to bring class or collective claims, while preserving the beneficial use of arbitration in the collective bargaining context and where there is a genuinely voluntary post-dispute agreement.

In order to achieve the promise of ADR procedures like arbitration and mediation, it is necessary that they be truly voluntary, bilateral processes agreed to and run equally by both parties to disputes. The current system of forced arbitration imposed on workers by corporations undermines employment rights and should be eliminated.

Thank you for your time.

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Chairman DESAULNIER. Thank you, Professor. Thank for being on time. Now I would like to recognize Ms. Perez, your five minutes are available.

STATEMENT OF MS. GLENDA PEREZ, FORMER IMPLEMENTATION SET-UP REPRESENTATIVE, CIGNA

Ms. PEREZ. Thank you, Chairman. Chairman DeSaulnier, Ranking Member Allen and Members of the Committee, thank you for the opportunity to testify in support of important legislation that would end forced arbitration for workers across America. My husband I used to work for Cigna, a global healthcare insurance company from October 2013 to July 2017.

I was an Implementation Set-Up Representative structuring both national and commercial pharmacy benefits. I trained new hires, and quickly became a subject matter expert. I won the Cigna Champion Award 2 years in a row. Through Cigna I volunteered for the Red Cross and Habitat for Humanity, and I was featured on Cigna's Twitter page.

To say I was proud is an understatement. I was honored to say I work for the company. In March 2017, meetings were held with my team to address an ongoing issue related to pharmacy benefits. The following month my manager singled me out as being responsible for making errors and called me a risk to the team.

My manager put me, apparently with other employees, on a performance corrective action plan. I was shocked and confused, as I was sure that I had not made any such errors. When I asked to see the evidence of the errors, my manager refused.

I asked my husband who also work at Cigna if he could find the report with the alleged errors. He found reports of other individuals, specifically white women, who were making those errors, however they were not participating in the performance corrective plan. I filed a complaint with H.R. regarding my manager's discrimination against me.

Normally, a full investigation takes around 60 days. My investigation took 1 day, and H.R. simply agreed with my manager. My manager then put me on a far more oppressive performance plan.

Two months after reporting my manager to H.R. for discrimination I was fired. When I wanted to file a complaint for racial discrimination and retaliation, H.R. said it must be handled in arbitration.

I didn't really understand what arbitration meant. Apparently, I had e-signed an arbitration document in my onboarding employee packet. I quickly learned that forced arbitration wasn't an informal, internal process, but instead a complicated, formal, and binding process that was nothing like mediation or going to court.

I couldn't find any attorney willing to represent me in forced arbitration. I don't have any legal background whatsoever, so I tried to do my own research. We couldn't afford internet at home, so I used the Wi-Fi of a local dentist in the parking lot and struggled to pay for gas to drive to the law library.

This was all when I was caring for my three children and looking for a new job. I filed a complaint in forced arbitration for claims of racial discrimination and retaliation. Cigna chose the arbitration provider, and it took several months just to choose an arbitrator.

I tried to get information from Cigna to prove my case, including my employee personnel profile. Cigna's attorneys said that discovery request would cost over one million, and the arbitrator denied my request. Cigna filed a motion for summary judgment, and a couple of days later the arbitrator rules in Cigna's favor and canceled the hearing.

I was devastated, as I wanted to tell my side of the story at the hearing. That night my husband found a photo on the internet of the arbitrator, and the attorney for Cigna looking very friendly, hugging each other at the arbitrator's 50th birthday party. The arbitrator also used to work for the firm representing Cigna, and even listed Cigna's attorney as a reference on his CV.

To me this obviously showed that the arbitrator was not impartial. Had I known of this personal relationship, I would have moved to disqualify him, but it was never disclosed. I filed the motion to vacate the arbitrator's award in court with the help of my husband who hired a process server to deliver Cigna my motion. After Cigna was served, they fired my husband.

It turned into a 4-year battle with no real opportunity to have my voice heard. A person should be able to hold a corporation accountable when they violate the law. Now I know that's not the case because of forced arbitration. Forced arbitration left us barely surviving. Little by little, the things we worked so hard for were taken from us.

Our newly bought house is in foreclosure, our car was repossessed, we had to empty our 401K's and sell all my jewelry, including my wedding ring. We were on food stamps and relied on family Members to help pay our bills, and for things our kids needed. Not only were my kids robbed of their parents for 4 years, but I was robbed of my dignity.

I'm in this fight to end forced arbitration because no one should have to go through what I went through. Workers should be able to protect their rights and have access to our civil justice system.

I urge the Members of this Committee to support, and for Congress to pass the Restoring Justice for Workers Act, and the Forced Arbitration Injustice Repeal Act, a bill that I have long advocated for, which would end forced arbitration for workers and consumers. Thank you and I look forward to your questions.

[The prepared statement of Ms. Perez follows:]

PREPARED STATEMENT OF GLENDA PEREZ

November 4, 2021

Written Testimony of Glenda Perez, former Implementation Set-Up Representative at Cigna, for House Education and Labor Committee, Health, Employment, Labor and Pensions Subcommittee hearing entitled "Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements"

Chairman DeSaulnier, Ranking Member Allen, and members of the committee, thank you for the opportunity to testify in support of important legislation that would end forced arbitration for workers across America, including the Restoring Justice for Workers Act (H.R. 4841) before this committee.

My husband and I used to work for Cigna, a global healthcare and insurance company, from October 2013 to July of 2017. I was an Implementation Set-up Representative responsible for keying data into a computerized system that interfaces with pharmacies, allowing the pharmacies to correctly charge consumers filling their prescriptions. I structured both National and Commercial Pharmacy benefits for multiple companies across many different states. I trained new hires when asked, and quickly became a Subject Matter Expert. I won the "Cigna Champion" award two years in a row. Through Cigna, I also volunteered for the Red Cross and Habitat for Humanity and Cigna featured a picture of me on their Twitter page. To say I was proud is an understatement, I was honored to say I worked for the company.

In March of 2017, meetings were held with my team to address an ongoing issue related to pharmacy benefits. The following month, my manager singled me out as, in her words, "a risk to the team", as being responsible for making errors related to this problem. She told me that I would be put on a performance corrective action plan. I was shocked and confused, as I was sure that I had not made any such errors. When I asked to see evidence of the errors, my manager refused and insisted that I just accept responsibility and take ownership of the problem.

Subsequently I was introduced to a new process under the performance corrective plan. That process meant I had to explain the status of accounts I worked on each day and submit my work to a private email box that was reviewed by a trainer. I was told that I wasn't the only one being required to take corrective action and that other employees were already doing this process as well. This whole process was deeply concerning to me because I had never had a performance issue and Cigna never provided me with any documents showing the errors they claimed I had made. Also, as a trainer and Subject Matter Expert, I along with a few other Subject Matter Experts, had access to the very same email box the trainer had , so I knew no one in my department was submitting any work to the private email box.

I talked to my husband, who also worked at Cigna as a Root Cause Analyst, about this issue and asked him if he could pull up the report with the alleged errors. My husband found reports of other individuals, specifically white women, one of whom was a Subject Matter Expert as well, who were making those same errors I was accused of making. They were not partaking in the new work process that I was made to do.

In May, based on this information, I filed an internal complaint with Human Resources regarding my manager's discriminatory acts against me. After just one day, they returned with the results of their "investigation" – simply agreeing with the manager. Notedly, on the internal complaint form that I filled

out, it said the turnaround time for a full investigation takes approximately 60 days. That very same day that I received the "investigation" results from Human Resources, my manager instructed me to take part in a far more onerous performance corrective plan which was well outside of the scope of what I normally did and wasn't in line with the original performance plan. The new plan meant I had to provide screen shots of every single step I took to complete an account. Knowing that my colleagues saw what I had to submit was belittling, demoralizing, and embarrassing. Not even new hires were subjected to this type of treatment. I felt like this was designed to punish or embarrass me.

Two months after reporting my manager to Human Resources for discrimination, I was fired.

I contacted Human Resources because I was confused and completely blindsided. I found out that Human Resources was never even made aware that my manager had terminated me. When I wanted to file a complaint for racial discrimination and retaliation, Human Resources told me my complaint would have to be handled by their "arbitration process". I didn't really understand what "arbitration" meant, and in my mind, I thought it was simply another department in Human Resources that manages this level of complaint. Apparently, I had e-signed an arbitration document that was in the onboarding employee packet, a month prior to my first day at Cigna. After reviewing Cigna's forced arbitration policy, I quickly learned that it wasn't an informal internal process, but instead a complicated, formal and binding process that was nothing like going to court.

I started looking for attorneys to help me, but I didn't find any willing to represent me in forced arbitration. All the attorneys I spoke with were interested in my case, until I mentioned that I had started the forced arbitration process. While some told me it might be quicker and more informal, that wasn't the case. It turned out to be very challenging, lengthy, and confusing. I don't have any legal background whatsoever and it took a lot of time for me to understand the process. We couldn't afford internet at home, so we would use the Wi-Fi of a local dentist in the parking lot, and we drove to a law library, which was far away and the gas to get there was expensive, to do research to try and understand the process. This was all while I was caring for my three children and looking for a new job. It was completely overwhelming.

I filed a complaint in forced arbitration for claims of racial discrimination and retaliation under Title VII of the Civil Rights of 1964, the Florida Civil Rights Act of 1992, and 42 U.S.C.A. § 1981. Cigna chose the arbitration provider named the American Arbitration Association. From that company, Cigna and I were supposed to then choose an arbitrator. It took several months to choose a specific arbitrator. We went through a lengthy discovery process in which I was trying to get information from Cigna to prove my case. At one point Cigna's attorneys said my discovery request would cost over $1 million – even though I was only requesting my employee personal profile. And from my research, I found that requesting your personal profile was a common request, but I was denied it by the arbitrator.

Upon Cigna's request, the arbitrator even instructed me to withdraw my EEOC complaint that I had filed and he told me that I had to request a right to sue letter before my arbitration hearing date or else the arbitration hearing would be canceled. The arbitrator said that they couldn't have two cases going on at

the same time – and if I didn't get my right to sue letter, they would have no choice but to postpone my hearing until my EEOC claim concluded – so I did.

Cigna then filed a motion for summary judgment and the arbitrator instructed me that I had a week to respond to Cigna's motion. A couple of days later, just before my hearing date, the arbitrator ruled in Cigna's favor and canceled the hearing. I was never even given a chance to participate in a hearing.

I was devastated, I couldn't understand what had happened. The arbitrator's ruling didn't make sense to me. He kept ensuring me that I would have my hearing, but that never happened. I never had a chance to tell my side of the story.

That night my husband found a photo on the Internet of the arbitrator and the counsel for Cigna looking very friendly, arms around each other, at the arbitrator's 50th birthday party. The photo of them is included at the end of this testimony. In fact, the arbitrator also used to work for the firm representing Cigna. To me, this obviously showed that the arbitrator was not impartial. Had I known of this personal relationship, I would have moved to disqualify him. But the personal relationship between them was never disclosed. In his original submitted oath, the arbitrator was asked:

> "Have you had any professional or social relationship with counsel for any party in this proceeding or the firms for which they work?
> Answer: NO".

Only in a subsequent amended oath, and only after I had agreed to this arbitrator, did the arbitrator disclose that he was previously a Shareholder at the firm representing Cigna, but he did not disclose the personal relationship. Further, a secondary CV that I later found showed that the arbitrator even listed the counsel for Cigna as one of three individuals he used as a reference.

I filed a motion to vacate the arbitrator's award in the United States District Court for the Middle District of Florida with the help of my husband who hired a process server to deliver Cigna my motion. It took several attempts for Cigna to even accept the motion, and when they finally accepted, they fired my husband from his job.

It took two years for the Florida Middle District Court, to ultimately dismiss my motion. The court ruled that the arbitrator had disclosed his previous employment with the firm, thus, waiving my right to complain of any evident partiality. The court also stated that the evidence only shows a friendly relationship between the arbitrator and Cigna's Counsel. I took my case up to the United States Court of Appeals for the Eleventh Circuit.

It took one year for the Eleventh Circuit Court to deny my motion to vacate the arbitration award. In its decision, the court said, "Judicial review of arbitration awards is narrowly limited," and "the FAA presumes that arbitration awards will be confirmed."' It was then that I realized that I was stuck with the results of an unfair process of forced arbitration.

This turned into a 4-year battle– with no real opportunity to have my voice heard – and it left me broken. I once had faith in the judicial system and a person's ability to hold a corporation accountable when they violated the law. Now I know that we as individuals are being stripped of our access to the judicial system because of forced arbitration, and thus the system has failed me.

I'm beginning to slowly put my life back. Both my husband and I are fully employed, but this entire process still has its long-lasting effects. We were once a family thriving, and forced arbitration left us barely surviving. Little by little, the things we worked so hard for - were taken from us. Our newly bought house is in foreclosure, our car was repossessed, we had to empty our 401ks, sell all my jewelry including my wedding ring, we were on food stamps, and relied on family members to help pay our electricity and water bills and things our kids needed. My kids were robbed of their mom and dad for four years. Finally, I was robbed of my dignity.

I'm in this fight to end forced arbitration because no one should have to go through what I went through. My family's lives were destroyed – only because I made the decision to speak up and believed the judicial system would be there to help me seek justice. Forced arbitration cannot be the "reset" button for companies to escape responsibility for a wrong they have committed. It is important for workers to be able to protect their rights and have access to the civil justice system. I urge the members of this Committee to support, and for Congress to pass, the Restoring Justice for Workers Act and the Forced Arbitration Injustice Repeal Act (H.R. 1423), a bill that I have long advocated for which would end forced arbitration for workers and consumers.

Thank you and I look forward to your questions.

Chairman DESAULNIER. Thank you, Ms. Perez. We'll now go to Mr. King. Mr. King the floor is yours.

STATEMENT OF ROGER KING, SENIOR LABOR AND EMPLOYMENT COUNSEL, H.R. POLICY ASSOCIATION

Mr. KING. Thank you, Mr. Chairman, Ranking Member Allen, and distinguished Members of the Subcommittee. I've spent about 50 years of my professional life working in the arbitration area. I've drafted arbitration agreements. I represented clients in arbitration proceedings. I've been deeply involved in policy discussions regarding the merits of arbitration.

I also have followed closely the FAIR Act, Mr. Chairman, that you referenced earlier, and I had the opportunity to testify before the House Judiciary Committee earlier this year regarding the FAIR Act, and a copy of my testimony to that Committee is included in my statement this morning.

I've also been involved in class action and collective action matters. So my testimony today represents that substantial professional and personal experience. This legislation that we're considering today, H.R. 4841 has two primary objectives. The first is to completely eliminate pre-dispute arbitration.

I submit to you that is a serious mistake. The pre-dispute arbitration has worked well. And indeed, the approach this legislation is taking would prohibit Professor Colvin and I just to sit down and work out a previous arbitration procedure that we could agree upon, so nothing is available for pre-dispute arbitration.

Second, the total prohibition on class action waivers is a substantial overreach, and of course really the proof is in the pudding here as Ranking Member Allen stated because labor unions and employers are permitted to continue such arrangements. That in and of itself shows a major deficiency in this legislation.

Let me move through a few points that I have in my testimony, but before I do that, I think we have a really substantial misunderstanding here. Virtually everything that goes on in an arbitration proceeding, at least the vast majority of cases are what I would call standard workplace issues.

Did I get the raise that I was entitled to? Was I properly disciplined? Did I get the vacation when I should have gotten it? Those are the kinds of day-to-day matters that are addressed in previous arbitration. They're not complex, they don't require expert witness. They don't require class action litigation.

Those are what work. Those procedures are what work-related matters address. So you're going way overboard on this whole discussion. You're making everything into a very complex matter. But to the extent statutory rights are involved in any of these disputes, they are preserved.

It's improper to say that some of the testimony being submitted today, that statutory rights are being eliminated. That's a misstatement of the law. This legislation overrules virtually or attempts to overrule virtually decades of Supreme Court case law, and these are not just 5–4 decisions.

Justices Kennedy, White, Kagan, et cetera, were in the majority in these cases. They can't all be wrong. And it's a misstatement to say that the Federal Arbitration Act only is applicable to disputes between merchants. That is just a simple misstatement.

Now the proposed legislation and subsequent do away with any incentive for employers, employees, and indeed even unions to a certain extent, to work out a pre-dispute arbitration procedures. The whole flow of our jurisprudence is going to a different approach. We're trying to resolve disputes through alternative dispute resolution, that's the way this process should work.

With respect to union matters and the carve out, there's some real misstatements here also, or misunderstandings. An employee in a union environment doesn't get to decide whether the matter goes to arbitration, the union makes that decision. The employee

doesn't decide who it's counsel is, the employee doesn't decide who the arbitrator is, and in fact virtually every arbitration proceeding between employers and employees is subject to the American Arbitration rule.

So these are not complex negotiated agreements, et cetera, they're standard of the mill agreements. With respect to our court system, as Ranking Member Allen said, our court system is simply overflowing today with issues that have been waiting sometimes years for disposition. It is suggested cases are being resolved in 8 months as one of the witnesses suggest, is simply a misstatement of fact.

Finally, with respect to comparing apples and oranges, in all due respect Professor, your stats are right, but the comparisons are incorrect. You're comparing jury trials with standard run of the mill arbitration settlements in most cases, or awards. Those awards are much different in a jury trial than they are in a standard I got disciplined incorrectly type of arbitration.

You can't compare them. That's not just apples and oranges, that's apples and zebras. One of the most recent studies that's being articulated in the press, and apparently being used to support this legislation are the Trial Lawyers Association counts settlements as losses for the employee.

That's a misleading and inappropriate way to proceed. So the stats in this area actually show just the opposite. When you compare actual apples to apples cases, the claimants in arbitration do much better. This arbitrable system also has very distinguished and ethical people.

I really think it's a misstatement to characterize arbitrators of having substantial conflicts of interest, or somehow always siding with the corporation. The arbitrators I'm aware of over my 50 years of practice are very ethical, and they try to do the right thing.

Chairman DESAULNIER. Mr. King, if you can wrap up, please?

Mr. KING. Yes, yes certainly, Mr. Chairman. They try to do the right thing, and they don't play favorites. They have enough business, and they do the right thing. Thank you very much.

[The prepared statement of Mr. King follows:]

PREPARED STATEMENT OF ROGER KING

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND LABOR

Hearing Before the Subcommittee on Health, Employment, Labor, and Pensions

"Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements"

November 4, 2021

Testimony of G. Roger King[1]

[1] Mr. King is a graduate of Miami University (1968) and Cornell University Law School (1971). Mr. King is a member of the District of Columbia and Ohio Bar Associations, and his professional experience includes serving as a legislative staff assistant to Senator Robert Taft Jr. and professional staff counsel to the United States Senate Labor Committee (1971-1974), associate and partner with Bricker & Eckler (1974-1990), partner and of counsel at Jones Day (1990-2014), and Senior Labor & Employment Counsel at HR Policy Association (2014-Present). Mr. King's testimony is being presented on his own behalf and not on behalf of any other party.

Chairman DeSaulnier, Ranking Member Allen, and Members of the Subcommittee:

Thank you for the invitation to testify this morning. I have been involved professionally in the field of arbitration my entire professional career. I have had considerable experience during this 50-year period in drafting arbitration agreements, serving as counsel in arbitration hearings, and analyzing arbitration issues from a policy perspective. I have also served as counsel to employers in class and collective action litigation. Additionally, I have closely followed the discussions and debates in this body and the United States Senate regarding the FAIR Act and related legislative proposals. Earlier this year, I testified before the House Judiciary Committee regarding the FAIR Act and arbitration related issues. A copy of my testimony to that Committee is attached to this testimony.

H.R. 4841 and similar proposals have two primary objectives: (1) to prohibit all pre-dispute arbitration agreements of work disputes and (2) to prohibit all class action waiver agreements between employees and employers UNLESS such agreements have been entered into between labor unions and employers. This is a radical approach to pursue as it precludes any pre-dispute arbitration procedure, including class-oriented pre-dispute procedures. It also inappropriately discourages or prohibits innovative alternatives to class action dispute resolution procedures from being developed and utilized by employees, consumers, and employers. The approach taken by H.R. 4841 should be rejected.

- H.R. 4841 is in conflict with decades of well-established U.S. Supreme Court arbitration precedent and incorrectly attempts to overturn the Court's most recent decisions in the consolidated cases of *Epic Systems, Ernst & Young,* and *Murphy Oil*.[2]

- The proposed legislation and related theories to completely ban pre-dispute arbitration are based on the false premise that pre-dispute arbitration agreements are inherently bad and that class action and collective action litigation should be the preferred approach to resolve disputes in the workplace.

- H.R. 4841 also incorrectly attempts to eliminate well-established definitions of independent contractor status under the National Labor Relations Act and classifies all workers as employees. The definition of independent contractor

[2] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

status and various classification policy issues associated with this important matter should be separately considered by this Subcommittee and the United States Senate. This issue should not be dealt with in an indirect manner in this legislation.

- H.R. 4841 is internally contradictory by attempting to completely prohibit pre-dispute arbitration and class action waivers between employees and employers but concurrently permitting employers and labor organizations to continue to negotiate such agreements. This approach not only defies common sense but is also contrary to Supreme Court precedent.[3]

- H.R. 4841 fails to recognize the increasing trend to resolve workplace disputes through nonjudicial alternative dispute resolution procedures, including well-established, individualized arbitration procedures.

- The post-dispute arbitration procedures set forth in H.R. 4841 are unnecessarily complex, will lead to disputes and protracted litigation, and simply will prove to be unworkable – they are a poorly disguised attempt to severely limit, if not eliminate, all individualized arbitration of workplace disputes. Indeed, the legal system in this country is built upon the establishment of pre-dispute procedures such as the Federal Rules of Civil Procedure, similar state judicial procedure rules, and American Arbitration Association rules – that is how courts and arbitrators hear and decide cases.

- Post-dispute resolution procedures, to the extent H.R. 4841 even would permit them, are largely unachievable as the dispute in question already has arisen, and parties have significant disincentives to mutually agree upon procedures to resolve their disputes. Accordingly, to the extent H.R. 4841 relies upon post-dispute procedures to substitute for the complete elimination of pre-dispute procedures, it is flawed, and this approach should be rejected.

- H.R. 4841 would not only significantly increase class action litigation but also increase litigation under the National Labor Relations Act by creating new unfair labor practice charges against employers. The bill would also increase litigation by creating a private right of action for employees to file

[3] *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009) ("Nothing in the law" [however] "suggests a distinction between the status of arbitration agreements signed by individual employee and those agreed to by a union representative.").

lawsuits against employers who establish or continue to have class action waiver agreements in place. The establishment of unfair labor practice charges against employers is particularly troubling given the pending proposal in the budget reconciliation bill to create, for the first time under the NLRA, civil monetary fines against representatives of employers.[4]

- Finally, as a practical matter, our nation's courts simply are not in a position to expeditiously resolve the thousands of cases currently being decided by pre-dispute arbitration. The arbitral system in this country also is not in a position to efficiently accept, process, and decide the additional heavy volume of class arbitration filings that would occur if pre-dispute arbitration is eliminated.

Mr. Chairman, before proceeding further regarding the specific flaws of H.R. 4841 and its underlying premises, I would like to attempt to level set our discussion this morning. I am not here to defend arbitration agreements obtained through fraud, coercion, or duress. Such agreements should not exist in the workplace or elsewhere. Additionally, any type of such improper agreements can be set aside as they are subject to revocation under the Federal Arbitration Act (FAA) and substantial precedent established in state and federal courts.

Further, I am not here this morning to defend hostile workplace situations, including especially incidents of sexual harassment. Such situations have unfortunately, however, served as a misleading "stalking horse" to support total elimination of pre-dispute arbitration procedures. Often the real issue in such situations is the presence of improper or overbroad nondisclosure agreements (NDA's) that are included in the terms of the arbitration agreement and the secrecy required by such provisions. Such secrecy requirements prohibiting transparency of the arbitration process should be addressed but the misuse of NDA's is not a sound basis to completely eliminate pre-dispute arbitration.

Additionally, to the extent that the opponents of pre-dispute arbitration can make a case at all to attack the system that has been in place for decades to informally resolve employment and consumer disputes, a more informed discussion would be to explore ways to ensure procedural due process protections in all arbitration procedures – not the complete elimination of pre-dispute arbitration. Simply put, H.R. 4841 is an extreme overreach and a product of extensive lobbying efforts by the plaintiffs' trial bar to further their economic interests. Employees, employers,

[4] A similar proposal is also included in the PRO Act, currently pending in the Senate.

and the general public will not benefit from legislative proposals such as H.R. 4841. The only beneficiaries will be class action lawyers.

Finally, I would agree that class and collective actions may be appropriate in certain situations, but individualized arbitration procedures also have an important place in addressing and solving workplace issues. It is insightful and instructive that the proponents of H.R. 4841 are unwilling to concede to this obvious conclusion. Perhaps such intransigence provides an accurate picture of their extreme position in this area. One would hope they would at least entertain the inescapable conclusion that individualized arbitration agreements and corresponding class action waivers have been and continue to be an important part of solving workplace disputes.

Mr. Chairman, Ranking Member Allen, and Members of the Subcommittee, I would like to expand on certain objections I noted above.

- **Courts and experienced arbitrators already have overcrowded dockets and are not in a position to expeditiously and efficiently handle the increased docket that would occur if pre-dispute arbitration procedures are prohibited.**

Currently, many state and federal courts are already overburdened with significant case backlogs. This backlog has only been further worsened by the ongoing COVID-19 pandemic, which caused many courts to temporarily close down and continues to prevent in-person case handling in many areas. Courts simply are not in a position to take on the increased burdens that would be placed on them if all pre-dispute arbitration procedures are prohibited.

Additionally, there is a shortage of seasoned arbitrators in the country who are available to handle the increased docket of class proceedings that would occur if pre-dispute arbitration is completely eliminated. Indeed, many qualified arbitrators are either not experienced in the class area or would refuse to accept complicated and complex class proceedings. Finally, as a practical matter, even those arbitrators that have the requisite experience and are willing to accept such assignments, may not have the necessary administrative support staff or research capability to successfully and expeditiously handle such cases.

- **Alternative dispute resolution procedures and due process protections for existing arbitration procedures should be the focus of this Subcommittee.**

H.R. 4841 and similar proposals go in the wrong direction. Instead of providing consideration for numerous alternatives to expeditiously and efficiently settle workplace disputes, they take the extreme approach of simply making unlawful both pre-dispute individualized arbitration and class action waivers under the National Labor Relations Act. I submit that a more thoughtful approach would be to consider requiring basic due process protections in any type of arbitration proceeding to ensure that employee and consumer interests are protected. Further, in this context, the Subcommittee should consider exploring and researching alternative dispute resolution procedures that are rapidly evolving to settle workplace disputes. These procedures and initiatives come in many forms, including the use of ombudsmen, mediation, peer review panels, expedited fact finding, early case assessments, "mini" trials, and numerous other expedited methods to obtain verbal or "bench rulings" from an experienced mediator or arbitrator. An examination of these approaches would provide a more informed and thoughtful discussion regarding how workplace disputes should be resolved.

- **Class proceedings in court and in arbitration have numerous procedural and substantive disadvantages**

Class litigation under Rule 23 of the Federal Rules of Civil Procedure (FRCP) have many procedural requirements that can quickly result in a "procedural morass." For example, Rule 23(a) requires a court to find that a proposed class satisfies commonality, typicality, numerosity and adequate representation requirements before a class can be certified and proceed to merits litigation.[5] Opt-in and opt-out rights of class members must be resolved depending on which statutory claims are being advanced in the proceeding. Numerous notice requirements must also be met with respect to class members. Protracted and expensive litigation often occurs in all of the above areas before the alleged merits of the dispute are addressed. These civil procedure requirements have led many commentators to conclude that class actions are arguably the most controversial of all judicial avenues for remedying cases of employment discrimination.[6]

Further, Rule 23 (b) of the Federal Rules of Civil Procedure provides that:

> [a]n action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate

[5] *See, e.g. General Tel Co. v. Falcon*, 457 U.S. 147, 157-58 (1982) ([Employment discrimination cases "...like any other class action, many only be certified if the trial court is satisfied, **after a rigorous analysis**, that the prerequisites of Rule 23 (a) have been satisfied." (emphasis added)).

[6] *See, e.g.*, Herbert B. Newberg et al., Newberg on Class Actions, § 1.01(3d ed. 1992).

> actions by or against individual members of the class would create a risk of (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy…[7]

The complexity and legalese of this Section speaks for itself.

In addition, Rule 23 (b)(2) of the FRCP provides additional requirements for injunctive and declaratory relief in class litigation cases. Further, in addition to Rule 23 procedural requirements for class actions, other federal statutes have different class litigation procedural requirements. For example, under the Fair Labor Standards Act (FLSA), the Equal Pay Act, and the Age Discrimination in Employment Act (ADEA), class actions are known as "collective actions" and are covered by Section 216 (b) of the FLSA. Different procedural requirements are applicable under this Section of the FLSA, including requirements for individuals that wish to be part of a class to "opt-in" to participate in and be bound by any judgment that may issue. Again, there has been substantial litigation in interpreting and applying Section 216 procedural requirements. Mr. Chairman, this Subcommittee would have to spend literally weeks, if not months, to review the case law developments that have occurred in federal and state class action procedure cases before members could have a complete and accurate picture of the procedural complexity that occurs in this area.

In summary, "fine print and legalese" in consumer and employee arbitration agreements certainly can be challenging in certain cases – BUT the substantial class procedural requirements in the courts, as noted above, can be even more confusing to the layperson. Indeed, class action procedural requirements that are applicable in these types of cases require consumers and employees to retain

[7] Fed. R. Civ. P. 23(b)

lawyers to interpret, apply, and in many cases litigate the meaning of such requirements - all of course at their expense.

Finally, I am aware of arguments by some that group grievances can be successfully pursued in arbitration.[8] This is no doubt true. Indeed, many of these types of arbitrable proceedings do not have the procedural requirements outlined above under Rule 23 and Section 216. However, as I noted previously, dockets of experienced arbitrators are quite crowded. Finding a mutually agreed upon and experienced arbitrator can be difficult. Further, some arbitrators simply may not have the requisite administrative and research support capability to handle class action cases. In any event, the fact that qualified arbitrators can be located and will agree to hear class action cases does not dictate that class action procedures should be the preferred method to address workplace disputes.

- **There are many positive attributes to individualized arbitration procedures as compared to class litigation**

U.S. Supreme Court Justice Stephen Breyer summarized the many positive attributes of arbitration as follows:

> [Arbitration] is usually cheaper and faster than litigation; it can have similar procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearing and discovery devices.[9]

As Justice Breyer noted, such positive attributes include:

  - **Speedy resolution of claims**

The old saying "justice delayed is justice denied" is particularly applicable to class action litigation compared to individualized dispute resolution. Indeed, class action cases take years to resolve, particularly if appeals are pursued. By contrast, individualized dispute resolution, including arbitration of such claims, can in many

[8] Brief for the National Academy of Arbitrators as Amicus Curiae Supporting Respondents, *Epic Sys. v. Lewis,* 138 S. Ct. 1612 (2018).
[9] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)).

instances also be resolved in less than 180 days from the selection of the arbitrator to the issuance of a decision.[10]

- **Less Expense**

Arbitration that proceeds on an individualized basis does not have to devote time to class identification, class certification, class notice procedures, discovery protocols, and many other related procedural issues. Such procedural requirements of class litigation are expensive and time consuming. Correspondingly, individualized arbitration can be far more cost effective given the minimal number of procedural requirements that are involved.

- **Better outcomes for claimants**

Contrary to a recent plaintiff trial lawyers commission study,[11] many other detailed analyses have found that consumers and employers receive far better outcomes under individualized arbitration procedures than in class action procedures.[12] For example, "A 2015 study by the Consumer Financial Protection Bureau found that only 13 percent of class actions resulted in a payout for consumers. And even then, the average award for consumers is about $32, while plaintiffs' attorneys got about $1 million." *The Mass Arbitration Racket: Unscrupulous Abuse of the Arbitration Ecosystem*, U.S. Chamber Inst. for Legal Reform (Dec. 18, 2020).

- **Better attention to claimants' individualized situations**

In class action litigation, an individual's situation is subordinated to the homogenized interest of class members. A claimant's personal situation and circumstances are not considered. In individualized arbitration proceedings, employees can have their specific circumstances addressed and remedies tailored to such.

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[10] *See Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (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.").

[11] *Forced Arbitration in a Pandemic: Corporations Double Down*, (Am. Assoc. for Justice – The Association for Trial Lawyers, October 27, 2021) (https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic).

[12] See, e.g. a statistical analysis conducted in 2019 that found that "employee-plaintiffs who brought cases and prevailed in arbitration won approximately double the monetary award that employees received in cases won in court." Nam D. Pham & Mary Donovan, FAIRER, BETTER, FASTER: AN EMPIRICAL ASSESSMENT OF EMPLOYMENT ARBITRATION 5 (2019).

- **Better understanding by claimants of the procedure involved and the outcome**

The complexity of class action procedures, particularly in the judicial arena, lead to frequent disagreements, even among lawyers. Attempting to have nonlawyers understand such protocols and procedure is almost an unsurmountable task to achieve. By contrast, individualized arbitration procedures can be much more easily explained to claimants. Arbitrators hear the individualized situation of the claimant, and explain not only the procedure involved, but also the decision that is reached.

- **Less adversarial in nature**

Informal approaches to dispute resolution, including individualized arbitration, provide much better opportunities for employers and claimants to speak to one another, explain their positions, and to explore solutions. Time that would otherwise be spent in procedural disputes in class action litigation and discovery can be more productively used in individualized arbitration proceedings.

- **Claimants retain concerted activity rights**

Finally, as noted in Petitioner's *Epic Systems* and *Murphy Oil's* brief to the Supreme Court, employees that enter into individualized arbitration agreements retain considerable rights:

> Class waivers leave employees free to work together at every step of the judicial or arbitral process. Employees may cooperate in hiring a lawyer, drafting their complaints, developing their legal strategies, finding and preparing witnesses, writing briefs, and seeking appellate review. They may even pool their financial and legal resources and present the exact same case in the exact same way for every plaintiff. Indeed, the other side cannot point to a single activity that employees can engage in "concerted[ly]" by litigating as a class that they cannot engage "concerted[ly] by litigating individually with the support and assistance of their colleagues.[13]

- **H.R. 4841 is in conflict with decades of U.S. Supreme Court precedent in the arbitration area, ignores the clear intent of Congress in the enactment of the Federal Arbitration Act favoring arbitration**

[13] Brief for Petitioner at 40, *Epic Sys. v. Lewis*, 138 S. Ct. 1612 (2018).

procedures agreed to by the parties, and fails to recognize the retention of statutory rights for employees and consumers in any form of dispute resolution.

The FAA was enacted by Congress in 1925, and no Congress since its enactment has amended the statute. The intent behind the FAA has been clearly identified in numerous interpretations by the Supreme Court and lower courts. The recurring point that such courts have made is that the FAA was enacted to eliminate the judicial hostility toward arbitration.[14] Such court decisions provide that there is an emphatic federal policy in favor of arbitrable dispute resolution.[15] In fact, the Supreme Court has specifically stated that "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted."[16]

The Supreme Court has also specifically upheld the rights of employers and employees to avoid pursuing class proceedings in resolving workplace disputes. Indeed, the FAA prohibits courts from "invalidat[ing] arbitration agreements on the grounds that they do not permit class arbitration" or class proceedings in court.[17]

It is also important to understand that access to class action is a procedural right, not a substantive right. As the Supreme Court stated, "the right of a litigant to employ Rule 23 [Class Action Procedure] is a procedural right only ancillary to the litigation of substantive claims."[18] Additionally, it is important to note that it is a well-established matter of law that employers cannot preclude in arbitration agreements employees and consumers from pursing their statutory rights.

Finally, proponents of the total elimination of pre-dispute arbitration frequently fail to note that federal and state regulatory agencies continue to have oversight over employee and consumer rights and are not bound by any constraints that may be placed on employees and consumers in arbitration agreements. Indeed, such regulatory agencies can and do vigorously pursue class relief for consumers and employees.[19]

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[14] *EEOC v. Waffle House, Inc.*, 434 U.S. 279, 289 (2002).
[15] *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011).
[16] *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).
[17] *Id.* at 2308.
[18] *Deposit Guar., Nat'l Bank of Jackson v. Roper*, 445 U.S. 326, 332 (1980).*See also Circuit City Stores, Inc. v. Admb*, 532 U.S. 105, 122-23 (2001); *Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 612 -13 (1997).
[19] See *EEOC v. Waffle House, Inc.*, 534 U.S. 568 (1983).

The considerable precedent noted above and the statutory rights retained by employees who may otherwise be precluded by their employment agreements to participate in class action litigation correctly led the Court to its decision in the consolidated *Epic Systems, Murphy Oil* and *Ernst & Young* cases. Specifically, the Court's holding that it was not a violation of the NLRA for an employer and employee to enter into class action waiver agreements was correct both as a matter of law and as a matter of policy. H.R. 4841 is not only an effort to overrule the *Epic Systems* consolidated cases, but also an attempt to undermine decades of Supreme Court case law in the arbitration area. Such an attempt should be rejected.

Concluding Thoughts

Finally, Mr. Chairman, Ranking Member Allen, and Members of the Subcommittee, I would like to complete my testimony by making certain suggestions as to how the future of arbitration should be discussed. I want to emphasize that these are my personal recommendations, and they are not being made on behalf of any entity.

- Secrecy in arbitration proceedings should, unless mutually agreed upon by all parties, be eliminated. This lack of transparency, especially in hostile work and sexual harassment cases, has unfairly detracted from the many positive attributes of arbitration. Specifically, the overuse of nondisclosure agreements should be reviewed. Indeed, some state jurisdictions have enacted legislation that prohibits or limits the use of NDA's.[20]

- A thorough Congressional review should be undertaken regarding class and collective actions, particularly as class action litigation has proceeded under Federal Rule of Civil Procedure 23 and Section 216 (b) of the Fair Labor Standards Act (and also similar class procedures in state jurisdictions). I submit that if an objective review is undertaken of this area, a number of misuses and abuses of class and collective action procedures may be uncovered.

- This Subcommittee and other Congressional committees that have jurisdiction over arbitration issues should invest time and resources to

[20] California, New Jersey, Tennessee, Vermont, and Washington have all enacted legislation prohibiting or otherwise limiting the use of NDAs in certain contexts. There may, however, be federal preemption issues presented by such statutes, depending on their scope and whether they arguably conflict with the FAA.

identify and incentivize the use of alternative dispute resolution procedures to resolve workplace and consumer issues. These procedures can be informal in nature and can produce positive results. They also can provide relief for the dockets of our nation's courts. Finally, such procedures can also permit matters to be thoughtfully and expeditiously addressed without stakeholders incurring substantial legal fees.

Mr. Chairman, that concludes my testimony. I will be happy to respond to questions of the Subcommittee.

STATEMENT OF G. ROGER KING[1]

"Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights"

HEARING BEFORE THE SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW OF THE HOUSE COMMITTEE ON THE JUDICIARY

February 11, 2021

Mr. Chairman, and Ranking Member Buck, and Members of the Subcommittee:

Thank you for the invitation to testify this morning. I have been involved professionally in the field of arbitration my entire professional career. I have had considerable experience during this 50-year period in drafting arbitration agreements, serving as counsel in arbitration hearings, and analyzing arbitration issues from a policy perspective. I have also served as counsel to employers in class action litigation. Finally, I have closely followed the discussions and debates in this body and the United States Senate regarding the FAIR Act and related legislative proposals.

I have also included a number of supplemental materials in an appendix to my testimony that I would request be made part of the record for today's hearing.

A summary of my testimony regarding the issues before the Subcommittee today is perhaps best captured in part by a quote by U.S. Supreme Court Justice Stephen Breyer, where he stated as follows:

> [Arbitration] is usually cheaper and faster than litigation; it can have similar procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearing and discovery devices.[2]

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[1] Mr. King is a graduate of Miami University (1968) and Cornell University Law School (1971). Mr. King is a member of the District of Columbia and Ohio Bar Associations, and his professional experience includes serving as a legislative staff assistant to Senator Robert Taft Jr. and professional staff counsel to the United States Senate Labor Committee (1971-1974), associate and partner with Bricker & Eckler (1974-1990), partner and of counsel at Jones Day (1990-2014), and Senior Labor & Employment Counsel at HR Policy Association (2014-Present). Mr. King acknowledges the assistance of Gregory Hoff, Associate Counsel, HR Policy Association in the preparation of his testimony. Mr. King's testimony is being presented on his own behalf and not on behalf of any other party.

[2] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)).

Justice Breyer's opinion[3] emphasizes certain of the numerous constructive features of arbitration. I hope that the Subcommittee would consider his thoughts and that of his fellow justices, and also carefully examine the important role that arbitration plays in our nation's jurisprudence and conflict resolution system. Arbitration from both a legal policy and practical administrative law perspective has tremendous merit and has served all stakeholders – except perhaps plaintiff class-action attorneys – exceedingly well. Unfortunately, there are a number of myths, misunderstandings, and erroneous assumptions associated with arbitration. Some of these involve the inappropriate intertwining of confidentiality and nondisclosure agreement issues in the discussion of the merits of arbitration. Confidentiality and nondisclosure agreement discussions present separate and distinct matters. Unfortunately, such discussions are being used as "weapons" to inappropriately undermine the numerous favorable aspects of arbitration. I will address confidentiality requirements, including review of the use of nondisclosure agreements, in my testimony.

In addition to the numerous positive aspects of arbitration, I endorse the inclusion of due process rights for claimants following the procedures that have been adopted by the American Arbitration Association, JAMS, and other arbitration service providers. Notably, contrary to what some have argued, current law permits public disclosure of discrimination, harassment, retaliation, and sexual abuse practices, and regulatory filings with the appropriate federal and state agencies. Many arbitration agreements expressly guarantee these rights. And this approach has been utilized for a considerable period of time in settlement agreement language between claimants and employers.

I would also urge the Subcommittee to review the increasingly important emergence of alternative dispute resolution procedures ("ADR") in addressing consumer, employee, and other claimants interests in dispute resolution. Finally, the Subcommittee should prioritize a review of the issues associated with class action litigation, which touch upon many of the issues associated with mandated arbitration being examined by the Subcommittee.

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[3] Other Supreme Court Justices of the so-called "liberal wing" of the Court have similarly expressed support for arbitration and the wide scope of the FAA. For example, in *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017), the Court upheld arbitration agreements and invalidated state laws imposing restrictions on such agreements. The majority opinion for this case was written by Justice Kagan and joined by Justices Breyer, Kennedy, Ginsburg, Sotomayor, Alito, and Roberts. The majority of these justices have also written or joined majority opinions in other Supreme Court cases upholding arbitration agreements, including *DIRECTV, Inc.*, *v. Imburgia* 136 S. Ct. 463 (2015).

- **Positive attributes of arbitration cannot objectively be dismissed.**

The evidence is overwhelming that there is merit in mandated arbitration. Even the harshest critics of arbitration appear to accept certain of its various virtues, including the ability of arbitration procedures to flexibly address individualized grievances and complaints, its ability to resolve disputes expeditiously, its cost-effective structure as compared to court litigation, and the equitable results that it provides to all stakeholders. These attributes have been recognized from a wide spectrum of sources. A limited sampling of support for arbitration includes the following quotes from Supreme Court justices and excerpts from research studies and scholarly sources:

  - "The point of affording discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute…and the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344-45 (2011).
  - "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." *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010).
  - "Arbitration…does not require the 'time consuming procedures that must be adhered to in court proceedings,' instead allowing for a more customizable, abbreviated process that is more directly tailored to the type of dispute." Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2353 (2012).
  - "[Banning mandatory arbitration] would…undermine the central efficiency advantage that such arbitration provides. Banning mandatory arbitration would also create an additional burden for federal courts…could disincentivize international commerce with the United States…and could create problems regarding the enforceability of current arbitration agreements." Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2363 (2012).
  - A statistical analysis conducted in 2019 found that "employee-plaintiffs who brought cases and prevailed in arbitration won approximately double the monetary award that employees received in cases won in court." NAM

D. PHAM & MARY DONOVAN, FAIRER, BETTER, FASTER: AN EMPIRICAL ASSESSMENT OF EMPLOYMENT ARBITRATION 5 (2019).

- **Justice delayed – or eliminated – is justice denied.**

The increased burden that could be placed on our already strained court system by elimination of mandated arbitration should be considered. Any member of Congress favoring the elimination of mandated arbitration should visit, for at least a week, courthouses in their districts and states. Such visits would provide the unfortunate picture of overcrowded dockets, ongoing discovery disputes, delayed and continued hearings and trials, and mountains of electronic and paper filings. Judges, magistrates, court clerk officials, and other judicial representatives would readily attest in such visits to the constant and at times overwhelming pressures on our nation's judicial system. Examples of such conditions include the following:

- As of March 2020, the number of civil cases pending more than three years is nearly 30,000. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, MARCH 2020 CIVIL JUSTICE REFORM ACT REPORT (2020).
- Dating back to 2015, monthly case filings in federal district courts increased by the tens of thousands in four of the last five years, including an increase of 150,000 between 2019 and 2020 alone. U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS (2020).
- As of September 30, 2020, more than 650,000 cases were pending in federal district courts. U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS (2020).
- Between 2019 and 2020, the total number of civil filings in federal district and circuit courts increased by more than 40 percent. U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY – JUNE 2020 (2020).
- "Delay is one of the largest problems in our legal system. In the last several decades, the state and federal courts have seen increasing caseloads and have resolved disputes at slower and slower rates…the median civil case no takes over seven months to be resolved, and many cases take more than three years to reach a resolution." Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2352 (2012).

The elimination of mandated arbitration will certainly compound the problems faced by our court system, as the courts will have to deal with an increased number of disputes, particularly in the class action area. Time periods between filing of complaints and resolution of the same will be even greater than the delays already faced by litigants. Unfortunately, these types of delays of justice have only increased due to the current pandemic. Such delays of justice will increase litigation expenses and harm all stakeholders, including especially individuals who need to have their complaints expeditiously resolved.

Further, as a practical matter, elimination of mandated arbitration will deprive many individuals of any opportunity to have their complaints resolved. Numerous studies clearly establish that a vast majority of disputes are individualized grievances that do not fit into even liberally defined "commonality" and "numerosity" class certification standards. Further, many of such individualized disputes for low and middle income individuals will not attract qualified legal representation, and as noted by Professor Samuel Estreicher, such individuals will have little or no "consumer protections" and be the unfortunate victims of the so-called arbitration reform movement.[4]

- **The Supreme Court and other courts have consistently upheld mandated arbitration agreements.**

Arbitration issues have been thoroughly litigated and reviewed in numerous precedent-setting Supreme Court decisions. The Court has extensively examined the legislative history of the Federal Arbitration Act ("FAA" or "the Act") and the issues associated with the interpretation and enforcement of the Act. In virtually every case involving arbitration issues, the Court has not only upheld the enforcement of the arbitration agreement in question, but also broadly endorsed policies supporting the use of arbitration arrangements. A sampling of these court decisions includes the following:

  - *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) (holding that under the FAA an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration).

[4] *See* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. 559, 563 (2001).

- *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (holding that nothing in the NLRA overrides the FAA's protection of the enforceability of class waivers in arbitration agreements).
- *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017) (holding that a state law imposing more stringent requirements for a power of attorney to enter into an arbitration agreement than required for other contracts was preempted by the FAA).
- *DIRECTV, Inc.*, *v. Imburgia* 136 S. Ct. 463 (2015) (holding that a state law interpretation of choice of law that invalidated an arbitration agreement was preempted by the FAA).
- *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (holding that the Sherman Act does not override the FAA's protection of the enforceability of class waivers in arbitration agreements).
- *Marmet Health Care Ctr. v. Brown*, 132 S. Ct. 1201 (2012) (holding that a state law rule invalidating arbitration agreements involving wrongful death and personal injury claims was preempted by the FAA).
- *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding that the FAA bars states from refusing to enforce arbitration agreements that contain class action waivers).
- *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) (holding that an arbitrator cannot read a class arbitration requirement into an arbitration agreement absent an explicit agreement by the parties to such a requirement).
- *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991) (holding that nothing in the ADEA precluded an individual's termination-of-employment claim under the ADEA from being subjected to compulsory arbitration under the FAA).

It is thus clear from the above decisions that the Supreme Court not only supports an expansive interpretation of the FAA, but also the right of parties to retain the benefits of their bargain, including the often-required utilization of arbitration procedures. Indeed, these decisions of the Court reflect support from a wide spectrum of judicial philosophy, including support from Justices Breyer, Kagan, and Kennedy. The Subcommittee should not ignore the strong precedent established by such decisions and the positive public policy considerations in such decisions. Further, the Subcommittee should acknowledge the Congressional

endorsement of arbitration as evidenced in the enactment of the FAA and the substantial, decades-long precedent of leaving the Act intact – without amendment – since its passage in 1925.

- **Bad facts make bad laws, and emphasis on bad arbitration procedures lead to bad arbitration policy.**

Critics of mandated arbitration rely on procedures that have in the past, in certain situations, imposed onerous requirements on claimants. Such critics are correct to point out these deficiencies – consumers, employees, and others have, in certain instances, not been treated properly by the imposition of some mandated arbitration approaches. Such deficiencies in mandated arbitration can and should be addressed. Arbitration agreements should contain due process protections for claimants and should not contain limitation on public disclosure of issues being addressed. Specifically, as noted above, it may be best practice for arbitration agreements to provide language that reiterates existing law that claimants may report, communicate, and disclose disposition of Title VII discrimination claims, as well as harassment, retaliation, and sexual abuse claims. Further, best practices for drafters of arbitration claims should include language that is found in settlement agreements that reminds claimants of the existing legal right to communicate with appropriate federal and state agencies and file charges of discrimination and other violations of employee rights and protections with the same.

Leading arbitration dispute entities in the country have already proceeded in this direction. For example, the American Arbitration Association requires the following due process procedural safeguards in its proceedings, among others:

- Arbitrators must be neutral and disclose any conflict of interest
- Both parties have an equal say in selecting the arbitrator
- Employees and consumers' fees are limited to $300 and $200 respectively
- Arbitrators are empowered to order any necessary discovery
- Damages, punitive damages, and attorneys' fees are awardable to the claimant to the same extent that they would in traditional litigation
- Claimants have the right to choose their own representation

- Claimants have access to all information reasonably relevant to their claims[5]

JAMS and other arbitral providers have incorporated other similar due process requirements.[6] Thus, due process protections for claimants exist in the majority of arbitration proceedings, and should be applied to all such proceedings.

- **Federal and state courts provide protection from arbitration agreements that infringe upon claimants' rights.**

The text of the FAA itself provides protections for consumers and/or employees against enforcement of unfair arbitration agreements, with a "savings clause" that preserves common law defenses to contractual agreements such as fraud, duress, or unconscionability. Specifically, Section 2 of the FAA provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." Thus, claimants have recourse in federal and state courts for inequitable arbitration agreements. Indeed, the courts have not hesitated to invalidate those arbitration agreements that unfairly impair the claimants' rights.[7] To the extent that certain arbitration agreements may unfairly impair the rights of consumers and employees, such rights are adequately protected by federal and state courts. Accordingly, there is not a proper legal premise upon which to proceed to justify the entire elimination of mandated arbitration procedures.

- **Confidentiality-related arguments to support the elimination of mandated arbitration are without merit.**

One of the most frequent criticisms of mandated arbitration pertains to the so-called secretive nature of arbitration and the perceived lack of public transparency in such proceedings. Such arguments are erroneous. While nonparties can be excluded from arbitration hearings and arbitrators and arbitration service providers cannot disclose information regarding such proceedings, there is nothing to prevent claimants from disclosing the issues addressed in the proceeding and the resolution of their claims. Claimants can also disclose to regulatory authorities, law

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[5] *Employment Arbitration under AAA Administration*, AMERICAN ARBITRATION ASSOCIATION, https://adr.org/employment (last visited Feb. 9, 2021).
[6] *See JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness*, JAMS, (https://www.jamsadr.com/employment-minimum-standards/) (last visited Feb. 9, 2021).
[7] *See, e.g. Ziglar v. Express Messenger Sys.* 2017 U.S. Dist. LEXIS 220460 (D. Ariz. 2019); *Ramos v. Superior Ct.,* 28 Cal. App. 5th 1042 (2018); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d (2006); *see also* Stephanie Greene & Christine Neylon O'Brien, *New Battles and Battlegrounds for Mandatory Arbitration After Epic Systems, New Prime, and Lamps Plus* 56 Am. Bus. L.J. 815, 830-38 (2019).

enforcement officials, co-workers and friends, and the media the issues that were presented for resolution and the disposition of same. Indeed, in this internet/platform world we all now live in, dissemination of such information can occur quickly and receive wide attention. Further, California, for example, requires arbitration service providers to publish certain aspects of arbitration proceedings.[8] So-called "gag orders" attempting to prevent public disclosure of such information considered in an arbitration proceeding, including reporting relevant information to regulatory agencies and law enforcement officials, can be set aside in court.[9]

Another area in the arbitration discussion that merits attention is the utilization of nondisclosure agreements ("NDAs"). First, it needs to be understood that the utilization of NDAs and the use of same should not be confused with the question of whether mandated arbitration should be permitted to continue. These are two entirely different issues. NDAs are ancillary in nature to the underlying arbitration agreement. They are the result of negotiations between parties and are self-imposed by such parties. To the extent that such agreements raise confidentiality issues, such issues should be separately discussed. Further, such agreements are often secured between the parties with enhanced economic sums to claimants in return for confidentiality. Indeed, in certain instances, it may be the desire of all parties to have the issues in dispute be kept confidential.

Finally, as noted above, if criminal conduct, or egregious patterns of conduct such as widespread sexual harassment, are uncovered in arbitration proceedings, such NDAs can be set aside by the courts or safeguards can be incorporated into mandated arbitration agreement procedures that would permit the claimant, the arbitrator, or a court to void or disregard the NDA in question. Indeed, many states have already taken action on this issue, passing laws limiting the use of NDAs in employment agreements or otherwise providing protections against potentially problematic use of NDAs, making the discussion of NDAs as they relate to wider arbitration issues perhaps moot in these jurisdictions.[10]

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[8] California Code of Civil Procedure 1281.96 requires arbitration service providers to publish quarterly reports containing information related to arbitration proceedings.

[9] *See, e.g.*, *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1078 (9th Cir. 2007) (overruled on other grounds), *Longnecker v. Am. Express Co*., 23 F. Supp. 3d 1099, 1110 (D. Ariz. 2014); *DeGraff v. Perkins Coie LLP*, No. c 12-02256 JSW, 2012 WL 3074982, at *4 (N.D. Cal. July 30, 2012).

[10] California, New Jersey, Tennessee, Vermont, and Washington have all enacted legislation prohibiting or otherwise limiting the use of NDAs in certain contexts. There may, however, be federal preemption issues presented by such statutes, depending on their scope and whether they arguably conflict with the FAA.

- **Do not discard the positive experience of mandated arbitration in employment dispute settings.**

For the approximate 6% of the country's private sector employees that work under collective bargaining agreements, mandated arbitration has been in place for decades. These procedures have worked relatively well and have successfully served the interests of employees, unions, and employers. Lessons can be learned from this successful model and should be considered by the Subcommittee.[11]

Additionally, many employers that operate on a union-free basis have successfully implemented mandated arbitration procedures or similar protocols. Indeed, some of these approaches include peer review panels and various labor-management problem solving procedures that expeditiously and successfully resolve workplace conflict issues. The success of these types of approaches should also be studied by the Subcommittee as it analyzes arbitration and dispute resolution issues.

- **Increased development and use of ADR procedures is the desirable policy path to follow.**

Significant positive advancements have been made in the development and implementation of ADR procedures in the last ten years. These ADR concepts involve such procedures as implementation of user-friendly complaint filing systems, expedited fact finding, early case assessments, neutral case evaluation, utilization of ombudsmen, mediation, conciliation, mini-trials, and other options.[12] As noted in the comprehensive Harvard Negotiation Law Review article by Professor Thomas J. Stipanowich and Professor J. Ryan Lamare:

> Businesses were motivated [to move towards implementing these types of dispute resolution procedures] not only by the risk of excessive judgments or settlements, but also by significant transaction costs, including the expenses of legal counsel, supporting experts, preparation time and discovery – costs that were often a multiple of the settlement amount.[13]

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[11] The previously proposed FAIR Act (H.R. 1423) exempted the restriction of use of mandated arbitration found in collective bargaining agreements. This approach appears to be inconsistent with the prohibition of mandated arbitration in any other setting. This inconsistent approach also appears to show that proponents of the FAIR Act clearly recognize, at least in part, the benefits of mandatory arbitration, but also unfortunately evinces an apparent bias towards increasing class action litigation in all disputes arising out of any area except collective bargaining situations.

[12] Thomas J Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 100 Corporations*, 19 Harv. Negotiation L. Rev. 1 (2014).

[13] *Id*. at *9.

These types of ADR options are not mutually exclusive of the use of mandated arbitration models. Indeed, incorporation of such ADR approaches in a layered or integrated manner, with ADR options to be pursued in succeeding steps prior to the potential need for mandated arbitration, should be encouraged. Such an approach should provide significant opportunities for settlement without ever reaching the alleged negative aspects of mandated arbitration.

- **Reform of class action procedures is needed and elimination of mandated arbitration will impede such efforts.**

Misuse and abuse of the class action system in our courts in this country is well documented and troubling. For example, consider the following observations from research studies, scholarly articles, and statements from members of Congress:

  - "Class-action settlements are more effective in transferring money from the defendant to class counsel than in compensating class members…class action settlements may be at best problematic on deterrence grounds." Jason Scott Johnston, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions under Federal Consumer Protection Statutes*, 2017 COLUM. BUS. L. REV. 1, 7 (2017).
  - "A 2015 study by the Consumer Financial Protection Bureau found that only 13 percent of class actions resulted in a payout for consumers. And even then, the average award for consumers is about $32, while plaintiffs' attorneys got about $1 million." *The Mass Arbitration Racket: Unscrupulous Abuse of the Arbitration Ecosystem*, U.S. CHAMBER INST. FOR LEGAL REFORM (Dec. 18, 2020), https://instituteforlegalreform.com/the-mass-arbitration-racket-unscrupulous-abuse-of-the-arbitration-ecosystem/.
  - "Too many class actions are litigated today such that the victims of unlawful conduct often receive only pennies on the dollar, if anything at all, when their trial lawyer representatives amass millions of dollars in compensation. Many times, the damages in class action lawsuits are so tiny that it is impossible to even identify the victims. In many such cases, awards are given to entities that are not part of the lawsuit whatsoever." *Examination of Litigation Abuses: Hearing before the Subcomm. on Const. and Civil Just. of the H. Comm. on the Judiciary*, 113th Cong.

(2013) (statement of Rep. Trent Franks, Chairman, Subcomm. on Const. and Civil Just. of the H. Comm. on the Judiciary).

- "The unfortunate continuing irony, however, is that in many class actions, particularly those that go on in state courts, the plaintiffs are not the real winners in the case. A number of high-profile cases continue to result in class members 'winning' coupons worth maybe a few dollars while the lawyers walk away with millions." *Class Actions: A Distortion of Justice and Continued Threat to America's Prosperity*, U.S. CHAMBER INST. FOR LEGAL REFORM (May 16, 2011), https://instituteforlegalreform.com/class-actions-a-distortion-of-justice-and-continued-threat-to-americas-prosperity/.
- In one study, the average time of class action litigation from filing to settlement was found to be three years. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUDIES 811, 820 (2010).
- "The data principally show that (i) only a small fraction of class members receive any monetary benefit at all from the settlements; (ii) class counsel are often given very large attorneys' fee awards even when class members receive little to no monetary recovery." *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010-2018)*, JONES DAY (2020).

The Subcommittee should examine these concerns and explore solutions to this unfortunate type of "procedural coercion" of employers in the country. The direction that the Subcommittee took in the last Congress, and the direction that the majority is apparently taking in this Congress to eliminate mandated arbitration is troubling, as it fails to focus on the connection between eliminating mandated arbitration and the expected corresponding increase in class action filings. This is a bad result for all stakeholders.

Even a cursory review of class action procedures by non-lawyers readily discloses the problems with our current system. For example, class members in a certified class often receive notification of the litigation issues being contested through documents that are written in "legalese" and that are difficult to understand and follow. If the class action is an "opt-in" proceeding, many class members simply discard the notice and never pursue the matter further. Even in "opt-out" situations, when class members receive notice of their "winnings," the procedures to follow to either receive such payments or procedures to follow to opt out of the settlement

are exceedingly difficult to understand or too onerous to follow. Presented with these obstacles, and given the frequent de minimis nature of the financial payment for class members, they often decide never to participate in the "settlement."[14] The only "winners" in this litigation lottery system, as noted above, are the trial lawyers bringing such class actions. While the "inside the beltway" political influence of such attorneys may be strong, they no doubt do not make up the majority of constituents in your districts or represent their best interests. Reform of the class action system in this country should be the priority of this Subcommittee, not the elimination of mandated arbitration.

Finally, the criticism directed at employers for including class action waivers in arbitration agreements is misguided. Such criticism misses the primary reason for inclusion of such waivers – the goal is to prevent the numerous deficiencies and inequities as outlined above in the class action litigation process from becoming integrated into the arbitration process. It simply is not rational to permit such a flawed system to be incorporated into the arbitration process. In addition to such flaws, the considerable expense involved in defending against such protracted litigation is also another valid reason for excluding class action options in arbitration procedures. Finally, as a practical and administrative matter, arbitrators and related arbitration procedures in general do not lend themselves well to the various administrative and procedural requirements of class action litigation. As Justice Scalia has noted, "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[15]

Concluding Thoughts

The Subcommittee should undertake a bipartisan policy approach to discuss and resolve mandated arbitration issues. This discussion should involve an emphasis on the inclusion of due process protections in arbitration agreements. Strict elimination, however, of mandated arbitration procedures, especially if done on a retroactive basis, will adversely and unnecessarily disrupt untold numbers of established and well-functioning dispute resolution systems, including contractual arrangements that provide for such procedures. This extreme approach does not protect claimants and should be rejected. Entities that desire to continue, at least in

[14] *See, e.g. Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns*, FTC (2019); *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010-2018)*, JONES DAY (2020); *Securities Class Actions in the United States*, MORGAN LEWIS (2016).
[15] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011).

part, mandated, due process-oriented arbitration procedures, should be permitted to do so while concurrently encouraging the development of effective ADR programs. Finally, the Subcommittee should prioritize a thorough examination of the increasingly discredited class action litigation system in this country. As noted above, this system does not benefit class members, places unnecessary and excessive litigation costs on employers, and only unjustly enriches class action plaintiff-oriented law firms.

Mr. Chairman, thank you again for the opportunity to testify. I would be happy to answer any questions you or other members of the Subcommittee may have.

Chairman DESAULNIER. Thank you. I appreciate it. Now we'll go to our last witness Ms. Kotagal. How was that?

Ms. KOTAGAL. That was good thank you.

Chairman DESAULNIER. I'm a slow learner, but I'm not very bright.

Ms. KOTAGAL. It's a hard name. I appreciate the effort. It's Kalpana Kotagal. And my family is from India, so that's where the name comes from.

STATEMENT OF KALPANA KOTAGAL, JD, PARTNER, COHEN MILSTEIN SELLERS & TOLL PLLC

Ms. KOTAGAL. Chairman DeSaulnier, Ranking Member Allen, and distinguished Members of the Subcommittee, thank you for inviting me today. At the outset I want to just say that I and my colleagues at Cohen Milstein have cases currently pending in arbitration and I won't be talking about those cases today.

I am eager, however, to offer what I have learned from litigating employment cases in forced arbitration for more than a decade. If you take nothing else away from my remarks today, please hear this. In my experience, forced arbitration in the employment setting poses such a threat to a workers' ability to vindicate their rights, and to our system of common law, that congressional action is required.

The justification for forced arbitration is predicated on myths, on fictions about how arbitration is a good thing for workers, and we've heard many of those today. I want to address a few of them. Myth No. 1 forced arbitration reflects actual consent and is a negotiation between similarly positioned parties. This is not true.

On the one side are well-resourced corporations. On the other are individual workers who must commit to arbitration before a dispute has arisen. Pre-dispute, workers often can't appreciate that eventual claims will be decided in confidential and individualized forums, with restricted discovery and limited appellate review before a decisionmaker often selected by the employer.

There are places that binding arbitration in the employment setting may make sense—where it is the product of negotiation between parties of equal bargaining power, and that's where this piece about unions and employers, where the union wields the authority of the collective of workers, as well as substantial experience.

That's not the case in most forced arbitration, as Ms. Perez's story tells us. Moreover, in my experience forced arbitration burdens those who are already marginalized. Hourly workers, women, black workers, and workers of color.

Myth No. 2 forced arbitration is speedy. Consider one of my ongoing cases, a sexual harassment case filed in 2008. It has already gone through four appeals of the arbitrator's decisions, and we still haven't made it to trial. This is because many arbitration rules permit appeals as a matter of right where there would be no such option in court. In our case, the appeals included challenging the arbitrator's interpretation of the arbitration agreement to permit my clients to even seek class certification, a step that doesn't exist in court at all.

These years-long appeals are ironic. Arbitration was heralded as an opportunity to free up the courts, but evidence suggests that courts are increasingly dealing with litigation about arbitration.

Finally myth No. 3. Forced arbitration does not impede the effective mitigation of rights. The truth is that forced arbitration does just the opposite, by deterring workers from filing claims to vindicate the rights granted to them by Congress. Forced arbitration provisions often include joint action bans, or as employers like to call them class action waivers, which prevent workers from being able to proceed together, even when their claims challenge identical workplace misconduct.

In my experience, the ability to conduct discovery and distribute costs to advance the shared claims of many workers at once makes those cases possible. Barring class and collective actions makes it nearly impossible for workers with smaller claims.

And while mandatory arbitration in employment with adequate guardrails post-dispute may sometimes make sense, I cannot as I sit here, envision a situation where bans on joint action ever do. Employer's own statements confirm that their primary concern is preventing workers from joining together. Indeed, some companies have announced their decision to end forced arbitration only for individual sexual harassment matters, acknowledging that it impedes accountability. If ending forced arbitration is the right thing to do, as one company put it, for individual sexual harassment claims, why are systemic discrimination claims any different?

Joint action bans also cause inefficiency and inconsistent outcomes, whereas class and collective actions can only proceed where a court agrees that the claims can be fairly and efficiently adjudicated together, and that class counsel is experienced.

Joint action bans apply categorically, requiring serial litigation of the exact same issue. Claims that might have been adjudicated together in a single action are instead decided many times over, risking inconsistent outcomes. Finally, forced arbitration undermines our system of common law, by which judges offer opinions that are subject to scrutiny.

Forced arbitration is typically confidential. Matters of public consequence are hidden from sight. I was heartened to see in Mr. King's testimony that he agrees. The secrecy in which forced arbitration is shrouded is alarming and should be prohibited.

Moreover, arbitral decisions are not precedential. There is no notion that today's decisions must flow from yesterday's. The Supreme Court has described forced arbitration as nothing more than a change of forum, in reality moving employment claims from the Courthouse to a conference room fundamentally changes the playing field, creating a system of secret decisions that lack protections and undermine the integrity of our legal system, and the atrophy of common law.

With that I thank you, and I welcome your questions.

[The prepared statement of Ms. Kotagal follows:]

Prepared Statement of Kalpana Kotagal

TESTIMONY BEFORE THE
HOUSE COMMITTEE ON EDUCATION AND LABOR,
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS
UNITED STATES HOUSE OF REPRESENTATIVES

November 4, 2021

Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements

Kalpana Kotagal
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Washington, D.C.

Chairperson DeSaulnier, Ranking Member Allen, and Members of the Subcommittee,

I am a partner in the Civil Rights and Employment Practice Group of the law firm Cohen Milstein Sellers & Toll, P.L.L.C., in Washington, D.C. We represent workers who are regularly subject to forced arbitration clauses governing claims arising under Title VII and other anti-discrimination statutes as well as claims under wage and hour laws. Because these cases are currently pending before arbitrators, I will not be discussing the specifics of these cases or the claims asserted therein. However, I draw upon our experience to share lessons learned about the limitations inherent in arbitration which call into serious doubt that it should be routinely regarded as a forum fully comparable to adjudication by the judiciary.[1]

At the outset, I briefly define two of the terms that I use frequently. First, forced arbitration, sometimes referred to as "mandatory arbitration," is the process by which employers impose on workers a requirement that any legal claims that ultimately arise will be disposed of in a forum selected by the corporation and adjudicated by a private individual. Mandatory arbitration is usually confidential and there is limited appellate review; it typically covers a wide range of claims, from discrimination or sexual harassment to wage and hour claims. Second, joint action bans, which include bans on class or collective actions,[2] are often included within forced arbitration provisions, and require that individuals relinquish the ability to bring their claims in a single dispute. These bans are imposed without regard for whether it is in fact more efficient, or avoids the risk of inconsistent outcomes, to pursue multi-party claims in a single action rather than one-by-one.

In the last two decades, the expansion of forced arbitration together with joint action bans in the workplace, such that arbitration has become the exclusive forum for workers to bring claims against their employers, has disrupted workers' abilities to vindicate their substantive rights, in particular their federal statutory rights, creating systemic and persistent disadvantages for workers who seek to be free from discrimination at work and to be paid fairly for their work.

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[1] I am grateful for the assistance of Cohen Milstein Fellow Brendan Schneiderman in preparing this testimony.
[2] Corporate defendants refer to these joint arbitration bans as "*class* arbitration *waivers*," a term which I and other advocates view as at odds with the reality of how these provisions operate. For one, a waiver is a consensual, knowing, and well-informed relinquishment of a right. In my experience, this almost never accurately describes the circumstances under which an employee enters into mandatory arbitration. Usually, employees are pressured into signing such agreements without knowing what a ban on class arbitration is or why it is significant. I also use the term "joint action" because focusing only on class or collective action bans may understate the problem. Mandatory arbitration provisions often reach further than merely banning class actions, to banning *any* kind of consolidation or joinder of multiple people's claims into a single arbitration.

In our practice representing workers in discrimination and wage and hour claims, my colleagues at Cohen Milstein and I regularly see the effects of forced arbitration and associated bans on joint actions. These practices, despite the Supreme Court's jurisprudence holding the contrary, interfere with workers' abilities to combat workplace discrimination and ensure they are being paid fairly. Workers have rights granted to them by Congress that they cannot effectively vindicate. I will not be discussing the particulars of cases my colleagues and I are litigating in arbitration, as those matters are ongoing. Having said that, our experience allows me to draw lessons about forced arbitration and joint action bans and to reflect on how arguments enshrining arbitration and joint action bans come up short in practice.

THE EXPANSION OF THE FEDERAL ARBITRATION ACT

As practitioners, understanding the way in which the Supreme Court has drawn upon a statute, the Federal Arbitration Act ("FAA"), to diminish the value and meaning of rights afforded to workers through more recent Congressional action has been important as we advocate for our clients. To that end, I provide a primer. The FAA, enacted in 1926, was originally intended to provide a "framework for courts to support a limited, modest system of private dispute resolution for commercial disputes"[3] and permits parties to agree to handle a dispute between them in arbitration, treating agreements to arbitrate as "valid, irrevocable, and enforceable" to the same degree as any other contract.[4] Arbitration was only ever intended to serve as an alternative forum to federal courts in a limited set of cases: commercial disputes, between merchants, on matters arising out of contractual or maritime claims.[5] And in these circumstances – between parties of equal bargaining power to resolve commercial disputes – arbitration makes sense.

However, in recent decades, the Supreme Court has expanded the FAA's reach far beyond its original purpose, into state courts and cases where statutory rights are at issue, resulting in arbitration's metastasis – to use Professor Colvin's term.[6] Today, more than half of all private-sector non-union employees are subject to forced arbitration provisions.[7] And these provisions reach every corner of the American workforce: traditional employees and gig workers, commonly classified as "independent contractors," alike.[8]

The expansion of the FAA began in 1985, with the 5-3 Supreme Court opinion in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[9] in which the Supreme Court first upheld an effort to compel arbitration of claims derived from statutes. Despite that expansion of the FAA's scope, the *Mitsubishi* Court acknowledged an important boundary: the FAA could not be construed to prevent the "effective vindication of [*other*] statutory rights." This principle, which has become known as the "effective vindication doctrine," has been the subject of numerous cases.

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[3] Imre S. Szalai, Exploring the Federal Arbitration Act through the Lens of History Symposium, 2016 J. DISPUTE RESOL. 115, 117 (2016).
[4] 9 U.S.C. § 2.
[5] *Id.* at 122.
[6] *See* Alexander J.S. Colvin, The Metastasization of Mandatory Arbitration, 94 CHI.-KENT L. REV. 3 (2019).
[7] Hugh Baran & Elisabeth Campbell, *Forced Arbitration Helped Employers Who Committed Wage Theft Pocket $9.2 Billion in 2019 From Workers in Low-Paid Jobs*, NAT'L EMP'T L. PROJECT (June, 2021), https://s27147.pcdn.co/wp-content/uploads/Data-Brief-Forced-Arbitration-Wage-Theft-Losses-June-2021.pdf.
[8] *See generally* Charlotte Garden, Disrupting Work Law: Arbitration in the Gig Economy, 2017 U. CHI. LEGAL F. 205 (2018); *see also infra* at 9 discussion of situation in which workers must challenge their collective misclassification as independent contractors, resulting in more than 1,500 individual claims being brought to date.
[9] *See Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 (1985).

Unfortunately, since *Mitsubishi*, employers have used the FAA to erect countless hurdles against workers seeking justice, and Supreme Court opinions like *Italian Colors* and *Epic Systems* have rejected complaints that those hurdles interfere with the effective vindication of statutory rights. It is unclear whether anything remains of the effective vindication doctrine.

In its 2013 *Italian Colors* opinion, the Supreme Court held that a provision that bans joint arbitration does not interfere with plaintiffs' ability to effectively vindicate their statutory rights, even when that ban renders a plaintiff's cost of individually arbitrating the case more expensive than the potential individual recovery, preventing such claims from being brought at all.[10] The result is an upending of the economics of many employment claims: because joint action bans force the millions of dollars in expert expenses that are normally borne by class counsel and spread over a large pool of claimants to instead be borne individually, claims that were once economically viable evaporate.

In *Epic Systems Corp. v. Lewis*, decided in 2018, the Supreme Court further eroded the effective vindication doctrine by deprioritizing federal statutory rights set forth in the National Labor Relations Act ("NLRA") and Fair Labor Standards Act ("FLSA").[11] In *Epic Systems*, the Supreme Court was asked squarely whether provisions banning joint arbitration conflict with the NLRA,[12] which guaranteed workers a right to "engage in … concerted activities for the purpose of collective bargaining or other mutual aid or protection."[13] Though the National Labor Relations Board ("NLRB"), the agency charged with interpreting and administering the NLRA, concluded that it did,[14] the Supreme Court disagreed, holding instead that a group arbitration ban in an employment agreement was enforceable, despite the NLRA.[15]

The *Epic Systems* opinion is at odds with the reality on the ground in several ways,[16] but I would like to highlight one in particular: Justice Gorsuch's opinion replaced the NLRB's well-reasoned harmonious reading of the NLRA, FAA and Supreme Court precedent with a reading based on two distinct fictions. First, Justice Gorsuch relies on a fiction that forced arbitration agreements in the employment setting are the product of bargaining and consent between two well-informed parties; in reality, individuals are often compelled into forced arbitration proceedings, imposed and designed by corporations, often without understanding what it is to which they are agreeing. Second, implicit in Justice Gorsuch's opinion is a false belief that joint arbitration bans are consistent with the effective vindication doctrine required by *Mitsubishi*; here, too, Justice Gorsuch badly misunderstands the myriad ways in which forced arbitration directly impedes the vindication of statutory rights for individuals. I elaborate on each of these fictions below.

The FAA's judicially-imposed overreach has touched nearly every corner of workplace protections. In 1991, the Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corporation* that an employee's claim under discrimination statutes is subject to the FAA unless Congress explicitly says

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[10] *See Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).
[11] *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612 (2018).
[12] 138 S.Ct. at 1632–33 (construing 29 U.S.C. § 151–169). The NLRA was also passed nearly a decade after the FAA.
[13] 138 S.Ct. at 1616 (construing 29 U.S.C. § 157).
[14] *See, e.g.*, *In re D.R. Horton, Inc.*, 357 NLRB 184 (2012).
[15] 138 S.Ct. at 1632 (construing 9 U.S.C. § 2).
[16] For a deeper discussion of the Supreme Court's opinion versus the NLRB's earlier opinion, see Kalpana Kotagal, *Knocking the Federal Arbitration Act Off Its Pedestal: How the NLRA Can Re-Establish Balance*, in ARBITRATION AND MEDIATION OF EMPLOYMENT AND CONSUMER DISPUTES, PROCEEDINGS OF THE NEW YORK UNIVERSITY 69TH ANNUAL CONFERENCE ON LABOR (2018).

otherwise.[17] *Gilmer* itself was about the Age Discrimination in Employment Act ("ADEA"), but its holding has been applied to other statutory schemes, including Title VII, the central legislation used to protect Americans from race-, religious-, or sex-based discrimination, among others, in employment.[18]

The creeping reach of the FAA also interferes with state-level legislative efforts to protect workers. For example, courts have held that the federal FAA preempts state efforts to forbid the use of mandatory arbitration in the context of sexual harassment,[19] effectively preventing states from doing anything to pare down the reach of the federal statute.[20] While we as practitioners must bend over backwards to show Congress intended a given statute to supersede the FAA, the Supreme Court has been much more generous to employers in interpreting the language they draft. In its 2019 *Lamps Plus* opinion, the Supreme Court reversed a lower court's finding that an ambiguous employment agreement should be construed against the employer. Relying in large part on the 2010 opinion *Stolt-Nielsen*, in which the Court concluded that there must be a "contractual basis for concluding that the [parties] agreed" to permit joint arbitration, the *Lamps Plus* Court extended the *Stolt-Nielsen* holding to agreements where the language is ambiguous, not just silent, on the matter of joint arbitration.[21]

Reading this line of cases together, the unwarranted expansion of forced arbitration becomes undeniable. The FAA – originally intended solely for contractual commercial disputes between merchants – now governs nearly every conceivable cause of action. It renders forced arbitration provisions enforceable, even when they contravene the goals of Congress or state legislatures with respect to protecting consumers, employees, and marginalized communities, and it sanctions employers' bans on employees' joining together to arbitrate their claims, even when employment contracts are silent or ambiguous on whether the agreement permits class treatment.

Recent efforts by Congress are reassuring, demonstrating a recognition of the pervasive and harmful nature of forced arbitration clauses and joint action bans: the Protecting the Right to Organize ("PRO") Act would overturn both *Epic Systems* and *Lamps Plus* by making it an unfair labor practice to impose joint action bans on employees.[22] The Forced Arbitration Injustice Repeal ("FAIR") Act goes even further, to explicitly pare down the scope of the FAA back to commercial disputes (and ban it from employer, consumer, antitrust, or civil rights disputes).[23] Finally, the Restoring Justice for Workers Act is

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[17] *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

[18] *See, e.g.*, *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 499 (6th Cir. 2004) (holding that "Title VII claims may be subjected to binding arbitration"); *Murray v. United Food & Com. Workers Int'l Union*, 289 F.3d 297, 301 (4th Cir. 2002) (calling the question of whether the FAA applies to Title VII "settled").

[19] *See* Samuel D. Lack, *Forced into Employment Arbitration? Sexual Harassment Victims are Saying #MeToo and Beginning to Fight Back—But They Need Congressional Help*, HARV. NEGOT. L. REV. (Aug., 2020), https://www.hnlr.org/2020/08/forced-into-employment-arbitration-sexual-harassment-victims-are-saying-metoo-and-beginning-to-fight-back-but-they-need-congressional-help/ (noting that New York, Illinois, Missouri, and Maryland have passed such statutes).

[20] For one example, a former employee of Morgan Stanley was unable to bring his claims of "inappropriate comments regarding his sexual orientation, inappropriate touching, sexual advances, and offensive comments about his religion," in court because the FAA was held to preempt New York's state law barring forced arbitration for such matters. *See Latif v. Morgan Stanley & Co.*, No. 18cv11528 (DLC), 2019 WL 2610985, at *1 (S.D.N.Y. June 26, 2019).

[21] *See Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407 (2019). In yet another favor to proponents of arbitration, the *Lamps Plus* Court also held that construing language against the draft is an inappropriate exercise when interpreting arbitration agreements, regardless of state contract law. *Id.* at 1416–18.

[22] *See* Protecting the Right to Organize Act, H.R. 842, 117th Cong. (2021).

[23] *See* Forced Arbitration Injustice Repeal Act, H.R. 963, 117th Cong. (2021).

significant because it bans *pre*-dispute arbitration for workers' claims and limits *post*-dispute arbitration for workers' claims to only those instances where the arbitration was actually consented to by a well-informed employee.[24]

What follows is an explanation, from the perspective of an attorney who navigates this landscape on behalf of workers, of how forced arbitration *systemically* undermines workers' abilities to vindicate their statutory rights and erodes the pillars of our legal system. The secretive, non-precedential nature of forced arbitration stands diametrically opposed to the American common law regime, in which adjudications are meant to be public, reviewable, and in concert with previous opinions. I hope to convey to this Subcommittee my grave concerns about the lasting damage that forced arbitration is doing, and why tinkering at the FAA's edges is a wholly inadequate statutory response to that damage.

MYTH 1: FORCED ARBITRATION IN THE EMPLOYMENT SETTING IS A MATTER OF CONSENT

Among the most pervasive myths about forced arbitration provisions in the employment setting is that they are truly a matter of consent, the product of a fair bargaining process. Unfortunately, given the "who" – namely corporations and individual workers with vastly unequal bargaining power – and "when" – well before grounds for any claims have actually arisen, before there is an actual dispute – behind forced arbitration, the concept that arbitration is actually a matter of consent is a fiction. In my experience, workers confronting the terrible circumstance of workplace discrimination or violations of the wage and hour laws are horrified to realize that their options are further limited by a term imposed on them before the dispute arose, shunting them into a forum with limitations not found in court – joint action bans, confidentiality, limited options for review, limited discovery, and a decision-maker whose impartiality may be in doubt.

Unfortunately, the twin fictions of mutual consent and equal bargaining power on which forced arbitration and joint action bans rest have been perpetuated in the Supreme Court's recent jurisprudence. For example, the majority opinion in *Epic Systems* is anchored in the underlying assumption that the forced arbitration provision, which included a joint action ban, was mutually agreed upon. Justice Gorsuch sets the scene by asking whether employees should "always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?"[25] He observes that "the parties before us contracted for arbitration," that "*[t]hey* proceeded to specify the rules that would govern their arbitrations," and that it was "*their* intention to use individualized rather than class or collective action procedures."[26]

It is not my position that there is no place for arbitration in our legal system. In fact, in some instances – like when it occurs between two sophisticated commercial entities, or in the context of good faith bargaining between unions and employers – arbitration may even be desirable. But *Epic Systems'* depiction of forced arbitration inaccurately conflates entering into forced arbitration agreements with those other contexts. Employer-union bargaining results in the creation of collective bargaining agreements ("CBAs") that contain their own arbitration procedures. But unlike in the forced arbitration context, CBAs are the product of a bilateral system of negotiation between the employer and the

[24] *See* Restoring Justice for Workers Act, H.R. 4841, 117th Cong. (2021).
[25] 138 S.Ct. at 1619.
[26] *Id.* at 1621 (emphasis added).

employees' representative, the union. In these negotiations, the union wields the considerable power of the bargaining unit and enjoys the technical expertise and institutional knowledge that comes with having negotiated CBAs in the past. Mandatory employment arbitration, by contrast, is the product of unilateral dictation by the employer, is usually non-negotiable, and leaves individual employees to try and decipher the legalese often contained in such agreements. [27]

Moreover, in my experience, forced arbitration falls on the shoulders of those who are already marginalized in the American economy, imposed disproportionately on low-wage workers.[28] My firm's clients contending with forced arbitration are hourly workers, overwhelmingly women, Black workers, and workers of color. This comports with the statistics that tell us that women are more likely than men to be subject to forced arbitration.[29] And Black workers are more likely than white workers to be bound by forced arbitration provisions.[30]

As to the timing of the imposition of forced arbitration, perhaps these concerns would be allayed somewhat if corporations asked individuals to sign these agreements after a dispute between the worker and the employer had already arisen. Then, at least the employees would have a clearer understanding of what dispute they were taking into arbitration. Instead, these agreements are entered into at the very start of employment and include sweeping, often vague, language that has been read to cover claims as wide-ranging as wage theft, sexual harassment, and negligence liability. They are entered into before individuals understand what the arbitral forum is like, and how it comes with secrecy, limits on discovery, and an inability to challenge patterns or practices. Workers should not have to think like lawyers, but imposing pre-dispute forced arbitration forces them to do so. Thankfully, this is exactly the sort of situation that the Restoring Justice for Workers Act seeks to remedy.

MYTH 2: ARBITRATION PRODUCES EFFICIENT DISPOSITION OF CLAIMS

Another dangerous myth about forced arbitration is that it provides for more efficient disposition of claims than litigation would. Despite being one of the most frequently cited justifications for arbitration, this notion is patently false. As a threshold matter, litigation in court is overseen from the very outset by a judge who can, and often does, press the parties to proceed efficiently. According to the Federal Rules of Civil Procedure, for example, cases are supposed to end within 8 months of being

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[27] Some employers attempt to gloss over this power disparity by technically offering an "opt out" provision, by which individuals that oppose forced arbitration clauses may invalidate them. This solution is wholly inadequate for several reasons, as summarized in a study by the Consumer Financial Protection Bureau: first, individuals are usually unaware that these opt out provisions even exist, and even when they are aware of them, often fail to comprehend the legal language and what it may require if a dispute were to arise. Finally, the corporations often make opting out cumbersome, by imposing tight time restrictions, and requiring that specific words be uttered to make the opt out effective. *See Arbitration Study*, CONSUMER FIN. PROT. BUREAU (Mar., 2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf; Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPORTS (Jan. 30, 2020), https://www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern/.

[28] Baran & Campbell, *supra* note 7.

[29] *Id.*

[30] *Id.*

filed, plus time for discovery and trial.[31] Even in complex cases requiring extensive fact and expert discovery, in my experience, the court plays an active role in advancing litigation.

I am currently involved in a case alleging systematic sex-based discrimination brought by women working in sales at the company. That case has been conducted through arbitration but has hardly led to a speedy disposition of the claims at issue. Our arbitration was first filed in 2008 and the case remains ongoing because of numerous appeals of the arbitrator's decisions, an option afforded under many arbitration rules that permits appeals of right at stages of the case where there would be no such option in court. In the case in question, there have been four separate appeals through the district court to the court of appeals, including twice asking the Supreme Court to weigh in, and the case has not yet reached trial. These appeals included challenging the arbitrator's interpretation of the arbitration agreement as permitting the class arbitration, known as clause construction. The Second Circuit Court of Appeals confirmed that the arbitrator was within her powers to reach that decision, and the Supreme Court declined to hear the matter, but years slipped away.[32] Of course the clause construction stage does not occur in litigation taking place in the judicial forum. There have also been several appeals of the arbitrator's class certification determination. Most recently, the Second Circuit held that the arbitrator was within her authority to certify the class as she did to include absent class members who had not affirmatively opted into this particular arbitral proceeding, a decision which the Supreme Court also declined to hear. Together these appeals, several of which would not have been possible in court, have consumed years.

An important observation about my experience in that case, aside from the obvious point that it badly undermines the narrative that arbitration is necessarily speedier than litigation, is that this approach to arbitration is one that only corporate defendants can afford. The clients I represent, often low-wage or hourly workers who simply wish to be made whole as quickly as possible and to ensure that other workers do not have to endure what they have endured, do not have years to spend appealing every negative outcome to the district courts and inevitably the Courts of Appeals. This control of the timeline is just one of the many ways in which forced arbitration skews the balance of power dramatically in favor of employers.

The dispute resolution timeline in arbitration, as compared with litigation in court, is also problematic with respect to the process of selecting the adjudicator. In litigation, as soon as the clerk's office processes a complaint, the case is assigned to a judge who will then oversee every legal development in the case. If the judge can no longer see to that case for whatever reason, the case is immediately transferred to another judge in the same court. In contrast, when arbitration commences, the parties themselves must seek out an arbitrator to process their dispute. Thus, there is a period at the beginning of a dispute where no adjudicator is refereeing. Moreover, if the eventual arbitrator must step away from the case, the parties must seek out a new one. Sometimes this happens in the middle of the case, opening another front between the parties and badly delaying proceedings. This too is something I experienced first-hand, where the arbitrator resigned after years of overseeing the case.

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[31] *See* Paul Stephan, *Arbitration's Supposed Benefits Don't Measure Up*, LAW360 (Sept. 30, 2021); Paul Stephan, *Nothing to Say for the FAA: Why Arbitration Does Not Offer Unparalleled and Mutual Benefits*, 51 UNIV. OF MEMPHIS L. REV. 71 (2020).

[32] Note, then, that the years spent on this dispute were focused on an interpretation of the arbitration agreement to determine whether the agreement permitted my clients to seek certification of a class at all, this clause construction determination does not arise in court proceedings.

The process of selecting a new arbitrator took another year, a year during which there was no one with jurisdiction over the matter, no one to whom my clients could turn in the event of retaliation or other workplace issues.

MYTH 3: JOINT ACTION BANS AND FORCED ARBITRATION DO NOT IMPEDE "EFFECTIVE VINDICATION" OF SUBSTANTIVE RIGHTS

Perhaps the most alarming aspect of forced arbitration is the provision often embedded in forced arbitration provisions, to which I have already alluded: joint action bans. As described above, these joint action bans prevent workers from being able to proceed together in a case against their employer, even where their claims challenge the same workplace policy or practice of their shared employer, for example, a process for setting pay or giving raises that leads to discrimination in compensation or classifying workers as independent contractors when they are actually employees. These joint action bans have a tremendous impact on the viability and ultimate outcome of employment disputes. In fact, several academics have suggested – and I believe – that being able to prevent workers from coming together to bring their claims is really what motivates employers to utilize mandatory arbitration in the first place.[33] The *Mitsubishi* opinion discussed above gave birth to what was supposed to be an important limitation on the way in which the FAA privileges arbitration: "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the [FAA] will continue to serve both its remedial and deterrent function."[34] This, the "effective vindication" doctrine, stood for the proposition that arbitration could not be used as an impediment to parties' vindicating rights afforded to them by statutes, statutes like Title VII or the FLSA or even the Sherman Act. Though the Supreme Court has repeatedly insisted plaintiffs can effectively vindicate their rights, that arbitration has imposed impediments to that, even a cursory review of the state of forced arbitration and joint arbitration waivers makes clear this is wrong.

The behavior of corporations proves as much. Consider, for example, how readily corporations announce their decisions to abandon forced arbitration for individual sexual harassment matters, publicizing such decisions in an effort to promote themselves as "model workplaces." In so doing, these companies acknowledge that forced arbitration cuts against our sense of fairness, effectively conceding that forced arbitration is a barrier to justice. If removing forced arbitration is "the right thing to do," as

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[33] *See, e.g.*, David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND L.J. 239, 240, 242 (2012) ("The compelling logic of what is commonly called 'mandatory arbitration' is that it is intended to suppress claims," and "[n]othing is more claim-suppressing than a ban on class actions, particularly in cases where the economics of disputing make pursuit of individual cases irrational."); Myriam Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 391–412 (2005); Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REFORM 871, 888 (2008) (finding the "most plausible" explanation for the disparity in forced arbitration use rates in employment and non-employment contracts is avoidance of joint action); Nicole F. Munro & Peter L. Cockrell, *Drafting Arbitration Agreements: A Practitioner's Guide for Consumer Credit Contracts*, 8 J. Bus. & Tech. L. 363, 381 (2013) ("The class action waiver is the focal point of any arbitration clause. Without a class action waiver, one need not engage in arbitration.")

[34] 473 U.S. at 637.

Uber puts it, in the context of individual sexual harassment claims, why are potential class or collective action claims challenging potential wage theft or systemic discrimination any different?[35]

Joint action bans cause unnecessary delays, inefficiency, and exhaustion of resources. One of the key justifications for the creation of the class action was the efficiency gains that could be had by litigating like cases together rather than separately. Federal Rule of Civil Procedure 23 has a list of criteria to which a court must give "rigorous" consideration before a class can be certified. Among the elements of Rule 23 is ensuring that named plaintiffs and members of the class have claims that are common – that the policies they challenge are consistent across members of the class and that the key issues in determining the legality of those policies can be determined in one fell swoop for members of the class, that the plaintiffs are sufficiently numerous, and that the legal and factual similarities that characterize the claims of class members predominate over the differences. These criteria help ensure that the class action will provide serious efficiency gains over individual litigation. Joint action bans in arbitration destroy these gains by forcing claimants – no matter how similar their claims are – to resolve their disputes individually. This often requires that depositions, document sharing, and other slow, costly, and labor-intensive aspects of discovery are duplicated unnecessarily.

Consider another case, where we represent workers who claim they were misclassified in their employment status with a very large company. Because those workers' arbitration agreements ban collective arbitration, they are obliged to pursue their claims individually. At this point, over 1,500 claims have been filed, and we anticipate more to come. This is despite the fact the inquiry around worker classification is nearly identical for each of the claimants.

From where I sit, the inefficiencies of joint action bans can hurt corporate defendants, too. While joint action bans were originally intended to deter individuals from ever bringing cases, a phenomenon has emerged recently wherein individuals may file their claims anyway. This maneuver, referred to as "serial" or "mass" arbitration, is as much a form of political organizing as it is a legal strategy, and it has become a source of frustration for corporate defendants. Consider the recent mass arbitration action against Intuit, in which the TurboTax software creator faced a deluge of 40,000 arbitration claims all filed at once.[36] The onslaught of claims, and subsequent fees, associated with the mass arbitration action led Intuit to attempt to "beat a hasty retreat," one that the courts refused to allow.[37] Corporate defendants suffer the consequences of joint action bans outside the consumer context, too. In 2019, 5,000 workers filed individual arbitration claims against DoorDash because the employer barred joint arbitration. Rather than pay the millions of arbitration fees for which it was suddenly responsible, DoorDash sought reprieve from the arbitrations in federal court, which was

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[35] *See, e.g.*, *A Letter From Bobby Kotick Regarding Progress and Commitments Made at Activision Blizzard*, BUS. WIRE (Oct. 28, 2021, 5:15 AM), https://www.businesswire.com/news/home/20211028005446/en/A-Letter-From-CEO-Bobby-Kotick-Regarding-Progress-and-Commitments-Made-at-Activision-Blizzard; Laharee Chatterjee, *Uber, Lyft scrap mandatory arbitration for sexual assault claims*, REUTERS (May 15, 2018), https://www.reuters.com/article/us-uber-sexual-harassment/uber-lyft-scrap-mandatory-arbitration-for-sexual-assault-claims-idUSKCN1IG1I2.

[36] *See* Scott Medintz, *How Consumers Are Using Mass Arbitration to Fight Amazon, Intuit, and Other Corporate Giants*, CONSUMER REPS. (Aug. 13, 2021), https://www.consumerreports.org/contracts-arbitration/consumers-using-mass-arbitration-to-fight-corporate-giants-a8232980827/.

[37] *Id.*

swiftly rejected as "hypocrisy" that would "not be blessed."[38] Having said that, this rise of mass arbitrations is the exception rather than the rule in my experience and requires well-resourced counsel who can credibly threaten to litigate thousands of individual claims against a defendant. More often than not, joint arbitration bans work exactly as they are intended, suppressing claims, preventing workers from vindicating their statutory rights.[39]

Forced arbitration can lead to inconsistent outcomes. In cases where the conditions for class or collective treatment are satisfied, there are, by definition, issues that are common across members of the class or collective action, common features that that should be adjudicated together. When these workers are forced to adjudicate their claims individually, there is a serious risk of inconsistent findings – one arbitrator might uphold the company's practice while another finds it violates the law – from case to case where different arbitrators hear these individuals claims. The inconsistency of outcomes that results from forced arbitration and joint action bans may take multiple forms. First, the decision to proceed to arbitration is left to the discretion of the employer, whether through their decision to include a forced arbitration provision in the first place, or by adopting a provision that leaves it to the sole discretion of the employer whether to initiate arbitration on a case-by-case basis. Thus, as Professor Colvin points out, "[t]he result is variation across the economy from employer to employer in whether employees have access to the courts or are required to bring their claims in arbitration."[40]

Second, there is no uniform set of procedures that apply when parties proceed to arbitration. While many employers utilize the American Arbitration Association's default procedures, employers may also rewrite these rules as they please, or construct their own rules entirely. Thus, in addition to the use of arbitration in the first place, the rules that govern that arbitration also vary widely. Such variability, squarely in the hands of the employer, is at odds with one of the defining principles of the American legal system, that individuals should enjoy *equal* protection under the law.

Third, the quality of arbitrators themselves can vary greatly from matter to matter. While ideally arbitrators are neutral third parties, many are advocates, "most frequently employer side counsel, who arbitrate cases on a part-time basis—representing management one day, deciding employment rights cases the next."[41]

A fourth and final source of inconsistency comes from the simple fact that cases that would otherwise be decided in one consolidated action are instead spread over many (sometimes hundreds or thousands) of separate arbitrations. These separate arbitrations can arrive at vastly different conclusions with respect to liability, damages, witness credibility, and more. Such an outcome can produce confusing results for claimants and respondents alike about what conduct is legally permissible

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[38] *See* Stephan, *supra* note 31.
[39] *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L. J. 2804 (2015) ("The result has been the mass production of arbitration clauses without a mass of arbitrations. Although hundreds of millions of consumers and employees are obliged to use arbitration as their remedy, almost none do so—rendering arbitration not a vindication but an unconstitutional evisceration of statutory and common law rights").
[40] Colvin, *supra* note 6, 22.
[41] *Id.* at 23 (citing Mark D. Gough & Alexander J.S. Colvin, Decision-Maker and Context Effects in Employment Arbitration (July 26, 2018) (unpublished manuscript) (on file with the International Labor and Employment Relations Association 18th World Congress, Seoul, South Korea)).

and what transgressions constitute legally cognizable misconduct. This result also undermines the notion that our legal system is one that is applied uniformly to everyone.

Forced arbitration skews in favor of corporate defendants. In the law, there is a well understood phenomenon known as the "repeat player effect,"[42] where "repeat players," those involved in many similar litigations over time, enjoy systematic advantages as compared to "one-shotters," who have only occasional recourse to the courts.[43] In the forced arbitration context, the repeat players are the corporate defendants who draft the arbitration provisions, choose or even write the arbitration procedures, and repeatedly find themselves in arbitration hearings.[44] The disadvantaged one-shotters are the employees who enjoy fewer resources and dramatically less familiarity with the arbitration system. This is another notable difference between the forced employment arbitration system as compared to labor arbitration, where both the employer and the union can be classified as repeat players that therefore stand on somewhat equal footing. The concern about the repeat player bias in arbitration is borne out in the data, as Professor Colvin's research has highlighted.[45]

Characteristics inherent to forced individual arbitration directly impede "effective vindication" of claimants' rights. Forced individual arbitration can *directly* reduce claimants' ability to enforce their statutory rights. For one, consider the imbalance in information where an employee must challenge the workplace practices of a large corporate defendant individually, rather than with others who have claims arising from the same workplace policy. When determining the scope of permissible discovery, judges and arbitrators alike will take account of the "proportionality" of the request. Imagine, for instance, that an individual employee who worked for a company for one year, and a group of thousands of employees who spent centuries, collectively, at that same company, both allege sex-based discrimination in the company's promotion process. While both sets of claimants might seek all of the available internal records including workforce data for analysis, an adjudicator is more likely to grant the class the information that it seeks than it is the individual claimant. Thus, by forcing what could be a class arbitration to instead be resolved at the individual level, employers directly impede claimants' access to critical information, information to which they (the employers) have ready access. Furthermore, in class or collective cases – where common issues including challenges to company-wide policies are being litigated together – counsel for employees can spread the considerable costs of gathering information and data over multiple people. Where individual arbitrations and associated rules prevent that, costs deter workers from bringing claims, belying the foundational assumption that a worker can enforce her substantive rights in arbitration. Forcing claimants to seek redress individually can create other impediments too. Consider, for example, that federal courts have held that individual plaintiffs are not entitled to broad-based injunctive relief – even if class plaintiffs are – in Title VII cases. The Eleventh Circuit recently held that individual employees may not prosecute "pattern or practice"

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[42] The notion of repeat players was initially made famous in Marc Galanter's essay, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 1 (1974).

[43] *Id.* at 3.

[44] For deeper discussion of this idea, see the "Repeat player advantages in arbitration" discussion in Katherine V.W. Stone & Alexander J.S. Colvin, *The arbitration epidemic: Mandatory arbitration deprives workers and consumers of their rights*, ECON. POL'Y INSTITUTE (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/#_ref57.

[45] *See* Alexander J.S. Colvin and Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 INDUS. LAB. REL. REV. 1019 (2015).

claims for declaratory and injunctive relief unless they are certified as class representatives.[46] Thus, the Supreme Court's blessing of joint action bans and courts' interpretations of Title VII combine to produce the very real possibility that joint action bans impede the vindication of the statutory right to pursue a pattern or practice investigation.

In addition, the FAA makes clear that arbitrators have much more limited power to compel witnesses to appear or to require the production of materials.[47] For example, an arbitrator is limited in her ability to compel the appearance of a third-party witness outside her jurisdiction.[48] Some courts reading Federal Rule of Civil Procedure 45 together with Section 7 of the FAA have held that district courts in the jurisdiction where the arbitrator is sitting do not have personal jurisdiction over a non-party entity served with a subpoena to appear in the arbitration.[49] Discovery isn't the only domain in which our claimants' hands are tied. In the sex discrimination case I mentioned above, unlike if we were in court, where the matter would become public the moment it is filed, under the governing arbitration rules, the female workers were forced to proceed confidentially until their case was certified as a class arbitration.

This highlights how forced arbitration is fundamentally at odds with the foundations of our legal system. Our legal system is based on the common law – a process by which judges author publicly available opinions, consistent with the opinions that came before, that are subject to popular and legislative scrutiny. In the world of forced arbitration, on the other hand, pending claims and opinions are often confidential, and there exists no notion of jurisprudence by which today's opinions must flow from and be consistent with yesterday's. Arbitral awards are not precedential, which means they are not iterative, building on one another over time to refine and clarify ambiguities in the law. In fact, most arbitral awards are never even made public. What claims workers are able bring are secreted behind the curtains of forced arbitration and joint action bans, leaving a hole in the common law where there should be decisions regarding workplace practices and their legality. What will be the state of employment law in twenty years when arbitration has been favored for decades? Furthermore, this hole in the common law left by forced arbitration is particularly alarming when one considers that many of these cases address matters of public consequence. This includes claims of sexual harassment and misconduct against employees, but other types of claims as well. American workers have the right to know which employers consistently engage in the practice of depriving their workers of earned wages. Over the course of the last century, Congress has issued laws to protect workers and consumers against those abuses, but the advent of forced arbitration and class waiver have done serious damage in clawing back those protections.

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[46] *See, e.g., Davis v. Coca-Cola Bottling Co.*, 516 F.3d 955 (11th Cir. 2008).
[47] *See, e.g., CVS Health Corp. v. Vividus LLC*, 878 F.3d 703 (9th Cir. 2017) (upholding the district court's ruling that the FAA does not grant an arbitrator the power to compel third-party document production); 9 U.S.C. § 7 (conferring on arbitrators the power to "summon in writing any person to attend before them . . . as a witness and in a proper case to bring with him . . . any book, record, document, or paper which may be deemed material as evidence in the case.").
[48] *See* Fed. R. Civ. P. 45(c); 9 U.S.C. § 7 (combining to allow arbitral subpoenas to compel third-party witness appearances at trial only if the witness lives within 100 miles of the hearing or has substantial relations with the state if particular conditions are satisfied).
[49] *Dynegy Midstream Servs. v. Trammochem*, 451 F.3d 89, 94 (2d Cir. 2006); *Vividus*, 878 F.3d at 708.

In my experience, aside from undermining the general principle of transparency in the legal system and the dangers of having matters of public significance shielded from scrutiny, confidentiality also limited our client's ability to contact and collaborate with other women whose interests may have been affected. Indeed, women whose claims were being adjudicated were not permitted to see evidence being submitted in support of their claims under the arbitral rules. Only after the class was certified did the arbitrator permit limited materials in the case to be made public.

Even this does not describe the totality of the procedural barriers forced arbitration erects against workers. Claimants are also deprived of the constitutional right to a jury trial when they are forced to proceed through arbitration.[50] The right to a jury trial, viewed by some legal scholars to be so important as to be considered a fourth branch of our system of government,[51] is enshrined both in the Seventh Amendment of the Constitution, and explicitly in anti-discrimination statutes like the ADA and Title VII. Nonetheless, courts have repeatedly enforced bans on jury trials embedded in forced arbitration provisions, despite the fact that this procedural change may reduce claimants' success rates and the size of the damages they usually recover.

All of this presumes that the individual claims are even brought in the first place. As the Supreme Court itself acknowledged, forcing a worker to bring a claim as an individual, rather than as part of a group, destroys the economics of bringing the claim, such that it is often financially irrational to do so. The ability to aggregate a handful of relatively small claims into one suit, where resources and legal expenses are pooled, works to overcome this collective action problem, but cutting off employees' access to group-level mechanisms reimposes the collective action problem as a prohibitive barrier. Empirical studies support this concern: research by Cynthia Estlund found that employees bring claims in arbitration at only 1-3% the rate that they bring them in court.[52]

For those employees that elect to bring their cases to arbitration anyway, they suffer from a reduced likelihood of success and, on average, a lower award when they prevail.[53] Professor Colvin's study found an employee win rate in arbitration of 21%, as compared with previous studies' findings of a 33-36% win rate for employees in federal court and 50-60% in state court.[54] And this matters: as my colleagues Joe Sellers and Stacy Cammarano have written, "[s]ubstantive rights are only as good as the procedures available to enforce them."[55]

CONCLUSION

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[50] *See* Jacob W. Gent, *Forced Arbitration and the Vanishing Right to Jury Trial*, ADLER GIERSCH (Feb. 25, 2016), https://www.adlergiersch.com/provider-blog/disappearing-right-trial-jury-big-business-misappropriates-rights-forced-arbitration-clauses/.

[51] *See, e.g.*, SUJA A. THOMAS, THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES (2016).

[52] *See* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 690 (2018).

[53] *See* Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 5 (2011).

[54] *Id.* at 6–7.

[55] Stacy N. Cammarano & Joseph M. Sellers, *The PRO Act Offers Some Hope for Protecting Workers' Rights*, BLOOMBERG L. (June 22, 2021, 4:00 AM), https://news.bloomberglaw.com/daily-labor-report/the-pro-act-offers-some-hope-for-protecting-workers-rights.

In *Mitsubishi*, the Supreme Court described the forced arbitration provision as nothing more than an agreement to change forum, stating that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[56] What practitioners have learned in the nearly forty years since that case was decided is that moving a claim from the courthouse to a conference room is far more than just a change in scenery. The transition from the judicial forum to arbitration fundamentally changes the playing field to one that is unilaterally designed, imposed, and slanted.

What results is an underworld of dictated secret law that lacks the guardrails of justice – democratic accountability, disinterested adjudication, and equal protection – that the Framers of our constitution envisioned as inseparable from our legal system. What results is the atrophy of the common law. And without Congress's prompt intervention, this erosion of our system of justice will proceed apace.

[56] 473 U.S. at 628.

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Chairman DESAULNIER. Thank you all, all the witnesses for your testimony. Under Committee Rule 9(a) we will now question witnesses under the five-minute rule. I'll be recognizing Subcommittee Members in seniority order. As Chair, I now recognize myself for five minutes.

Professor Colvin you discussed research by Cynthia Estlund on how workers bring cases to forced arbitration only 1 or 2 percent. Many Americans don't look at the judicial system as being as fair as we would like it to be. Some might use the word "rigged". Can you talk a little about your research and if you would like to respond to Mr. King's comments about your research feel free to use some time for that as well.

Mr. COLVIN. Sure. So I think one of the critical issues here is, do we have a forum that allows workers effectively to bring claims. And Cynthia Estlund's research, which builds on some of my own work, has found that we really don't see very many cases at all being brought in arbitration relative to the large number of workers being covered by forced arbitration.

Now what's going on there. I think really the crucial thing is that the outcomes are so much less in forced arbitration—the damage awards, the win rates are lower, that it's really hard to bring a case. One thing that we know from the research is that it's really hard to do it by yourself.

Ms. Perez's testimony I think is very reflective of what we see in the research. It's a huge hill to climb to do it by yourself. You need a lawyer, but in practical terms the lawyers can't bring the cases when the outcomes of the chances of success are really low. And that's really the big barrier we're seeing, why we don't see very many cases.

And you know the research we're trying to pull this out in terms of controlling for all the different factors that may be going in here, but we're really consistently seeing this large barrier to bringing the cases.

Chairman DESAULNIER. Thanks. Ms. Perez maybe you could speak to your experience. You mentioned about how difficult it was just to get the resources you needed, and an attorney given your budget. If you could speak to that a little.

Ms. PEREZ. Yes. I have no legal background whatsoever, so entering into arbitration, I didn't know what I was going into. The company has all the rules because they're the ones that hire the pro-

vider, so they know what to expect. When I entered into the arbitration, I was told in the beginning that it would be informal, however, it quickly became formal.

So I had to quickly learn the Federal Rules of Civil Procedure. Again, I have no legal background, so having to learn and get my own discovery it was just a tug and pull, and many trips to the law library, using their computers. It was extremely difficult because not only did I have to learn this, but I also had to write the motions, so it was extremely difficult.

Chairman DESAULNIER. Thank you. Ms. Kotagal maybe you can talk a little bit about just the difficulty that employees have with discovery. Ms. Perez talked a little bit about this.

Ms. KOTAGAL. Yes absolutely, thank you. So the thing about proceeding along discovery and arbitration is that the rules, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, the tools that we use to shape the discovery that we ask for are sometimes not present.

And then the second piece of it that I think is really important is that where you are forced to proceed on an individual basis, you have access to less discovery. You know the rules of so-called proportionality in discovery mean that even if Ms. Perez were the victim of a pattern of discrimination at the company, she wouldn't have access to evidence showing that.

And so those limits on what you can get as an individual trying to understand where your situation fits into the company's policies are tremendously significant.

Chairman DESAULNIER. Thanks. Professor Colvin in the short time I have left. I'm from the San Francisco Bay Area. Like Mr. Allen I was an employer, I owned restaurants. I didn't have these issues. Best not to have conflict with your employees, but I understand how to make a payroll and manage people.

A lot of the criticism on these provisions in my area were in tech companies, and these were fairly sophisticated employees. The California legislature has moved to do what they can under preemption to change that. Would you comment on that at all, specifically in that industry?

Mr. COLVIN. So assuming we see a lot of cases in the tech industry, Uber famously has had a long-standing set of conflicts involved forced arbitration clauses. So it's a critical issue in that industry. California it's about two-thirds of business in California using forced arbitration, so it's having a massive impact there, and there's very little the states can do under the Supreme Court's preemption doctrines.

This really needs to be regulated by Congress. Congress is the one that has the ability to act in this area.

Chairman DESAULNIER. Thank you. With that I will turn to the Ranking Member, Mr. Allen go ahead.

Mr. ALLEN. All right. Thank you, Mr. Chairman. Mr. King one of the reasons Congress enacted the National Labor Relations Act was to curtain certain private sector labor and management practices which can harm workers, businesses, and the economy. How did the Supreme Court's Epic System's ruling in 2018 protect the ability of workers and employers to resolve disputes outside of Court?

And how would overturning that ruling as this bill would do, affect workers, businesses, and the economy?

Mr. KING. Well, Mr. Allen the Supreme Court and Epic Systems followed what had been decades of Supreme Court case law. As I mentioned earlier, both so-called conservative and liberal justices agreed in many instances.

And what the Court did in Epic is to harmonize the Federal Arbitration Act, and the National Relation's Act. And it's improper to conclude that an employee has no regrets. An unfair labor practice charge could be filed on any number of different theories, but also an employee can file if it has a problem outside of the arbitral system, complaints, charges with the Equal Employment Opportunity Commission, with the National Relations Board, State and Federal Agencies.

So what the Court in essence said in Epic, arbitration should be encouraged, it's indeed the intent of the Congress. It can be utilized in a way that's fair, and also in arbitrable systems its statutory rights, whatever they may be, are preserved, contrary to other suggestions, and there's nothing that undermines the National Labor Relations Act in any way, shape, or form.

And finally, the petitioners in the case, those that are asking the Court to review the entire matter, laid out—I have this in my testimony, any number of ways that workers in a non-union environment can work together to pursue individual claims, and bring them to the attention of the employer.

But let me just, Mr. Allen, finish this one point. This issue of access, and filing. Here's what really happens, contrary to the testimony you're hearing, and based on practical real-world experience. Cases are settled, as the Professor notes in his testimony. Employers have good counsel. They settle matters out, and you have steps in the process, just like in the union process, and during those steps—they're called grievances generally in the union environment, employer and employees reach agreement.

That's why you don't have these matters going to any type of arbitration. That's what practically happens here.

Mr. ALLEN. Well, in talking about that further, you know, the Constitution provides for equal protection under the law, H.R. 4841 bans mandatory arbitration agreements that are used to settle disputes between a worker and an employer.

Is the bill consistent without a dispute between a union and an employer, and why does the bill treat workers and labor unions unequally?

Mr. KING. Well, its inherently inconsistent. I can't think of a practical or logical reason to support that other than intense lobbying pressure from organized labor. The fact of the matter is what happens in a labor environment in arbitration, is very similar to what happens in a non-union environment.

The American arbitration rules are followed in the union environment. They're followed by and large, if not almost exclusively, in the non-union environment. There's not much difference if any. And this myth that in the employee and union environment as I noted in my opening statement, has a lot of control over the process.

That's just flat not correct. So there is no rationale that I can think of that would support this differentiation, and the suggestion that somehow these are sophisticated negotiations between a union and employer to arrive at an arbitration system. That's just not true. The standard arbitration clause and effective bargaining agreement is generally no different than a non-union environment.

Mr. ALLEN. Well, one of our testimoneys about the fact that the appeals process was unfair in arbitration. But there's an appeals process in the court system is there not? I mean I don't quite—in other words, are they both equally unfair? The appeals process? Or do they both apply to the same process?

Mr. KING. Well, first of all the statement about appeals is a misstatement. There may be certain arbitration cases, certain arbitration clauses that appeal rights, but generally that's not the case. Where appeals come in is in the court system as you know. That takes literally years in the process. I don't see appeals coming in through at least the many arbitrations I've been involved in, they just don't happen.

Mr. ALLEN. Well, thank you so much Mr. King, and with that Mr. Chairman I yield back.

Chairman DESAULNIER. Thank you, Mr. Allen. I'll now recognize Representative Wild for her five minutes.

Ms. WILD. Thank you, very much, Mr. Chairman. I first want to address some things that you said Mr. King. I come at this from a fairly unique perspective on this Committee. I was a lawyer for 35 years before I came to Congress. I handled a lot of employment cases, I've represented both plaintiffs, in other words the employees, and I've represented employers as defendants, and I've also served as an arbitrator.

So I was listening to your remarks very, very,—all of the witnesses' remarks very, very carefully, and I have to tell you Mr. King that I differ with your assessment of arbitrators and arbitration generally.

First of all I have—I don't in any way mean to impugn the reputation, or qualifications of arbitrators who preside over these cases. But I do have to say that in my experience, which is fairly extensive, arbitrators are very much dependent on repeat business if they want to maintain arbitration as a full-time practice, as opposed to practicing the other kind of law. And that means the institutional clients, whether it be hospitals, or employers, or you know, any kind of industry who continually refer cases to them for arbitration, I believe have undue influence and I don't again mean to suggest that they are doing this intentionally.

But it is almost impossible, and I speak as somebody who has been an arbitrator, to ignore the fact that a party who has appeared before you on multiple occasions and likely will again, doesn't have some sort of advantage over the lone employee who has this one claim and will never again appear before the arbitrator.

So I feel like that needs to be pointed out. In addition, arbitration can be a very, very expensive process. The hourly fees for most of the arbitrators that I used to retain through the American Arbitration Association, were somewhere on the order—and this was a few years ago now, of $600.00 per hour at the low end.

So you know, to suggest that this is an inexpensive process, or something that is within the reach of the plaintiffs, I think is unfair. And keep in mind, as has already been pointed out, that the number of damages recoverable is often, although very significant to the plaintiff, the litigant, not so significant in the whole scheme of things for lawyers who are being asked to take on their cases.

And by the way, the lawyers who take on the cases for these employees, are doing so nine times out of ten on a contingent fee basis, meaning that lawyer is bearing all the expenses while the case is proceeding, and it also means that they are taking on the risk of whether the case will be successful or not.

And so again, I don't think that we can in any way suggest that an employer and an employee are on a level playing field in the arbitration world. Honestly, I'm not sure that they're on a level playing field in a courthouse either, but that is largely due to jury bias and that kind of thing which is unique to each jurisdiction and venue.

And finally, I think it's really important to note that what we are talking about here today is forced arbitration. There is nothing to stop an employee from agreeing to arbitration when the time arises. If that employee and his or her lawyer makes the determination that arbitration is the way to go, that because of delays at the courthouse, because of jury bias that's known in that venue, an employee and his or her lawyer may very well make the decision to go forward with arbitration.

But what we're talking about here is whether the employee should be forced to go through arbitration. That is really the salient issue, and they do not have equal negotiating power at the time of commencing their employment. So I just felt that those points needed to be made.

I'm going to move on to Dr. Colvin because I have a question for you about wage theft. Dr. Colvin, your testimony notes that almost 65 percent of businesses that pay less than $13.00 per hour have forced arbitration clauses. So this would apply without doubt to most fast-food workers, most retail workers, and people who literally have no negotiating power over their terms of their employment. Am I correct?

Mr. COLVIN. That's correct yes.

Ms. WILD. According to the National Employment Law Project in 2019 alone employees of these businesses lost 9.2 billion dollars to wage theft. Can you comment on how mandatory arbitration contributes to this issue of wage theft?

Mr. COLVIN. So one thing we know in that area is that the collective claims, class action claims, are one of the primary ways of addressing those issues because they often apply to many workers. Imagine in restaurant chains, if you have say a minimum wage worker missing a 30 minute break, being paid a day. If you take over 6 months that would only amount to about $435.00 per worker. That's a pretty small amount, not enough for an individual case, but if you aggregate that over 1,000 workers in a restaurant chain, that's $400,000.00. That's a case you can bring, and you can move forward with that.

So the class action waivers really impact those low-wage workers a lot.

Ms. WILD. So and the short version of that is that a single employee who experiences wage theft is likely to be unable to find a competent lawyer to handle his or her claim?

Mr. COLVIN. That's exactly right. We just don't see those cases being brought.

Ms. WILD. Thank you very much. Mr. Chairman I thank you for your indulgence, I see I am over time, and I apologize for that.

Chairman DESAULNIER. That's quite all right. Thank you for your comments. I do want to just mention that California law was directed as Congresswoman Wild mentioned in her comments at forced arbitration, and it's currently being litigated, but it's been upheld in the 9th Circuit. Now we'll go to Mr. Walberg. Mr. Walberg?

Mr. WALBERG. Thank you, Mr. Chairman. And thanks to the panel for being with us today. Mr. King, H.R. 4841, severely limits the use of arbitration agreements, and encourages litigation. We all know that litigation is expensive, adversarial, and slow. Can you discuss the shortcomings of litigation resolving disputes in the workplace as compared to the benefits of arbitration, and additionally how would a movement toward increased litigation impact low to middle income worker's ability to have their complaints resolved?

Mr. KING. Thank you, Mr. Walberg. It's nice to see you again and thank you for the question. Let me start by the expense issue. We just heard a comment that it's expensive to go to arbitration. Let me concede that for just a moment, but it's more expensive to go to court. And to somehow suggest that court litigation is less expensive than arbitration is a non-starter.

Second, by forcing workers to go to the court system, they're going to be even more hard pressed to find attorneys. As Professor Sam S. Recker said and it's noted in my testimony, the House Judiciary Committee, many workers are going to be without any form whatsoever. So just the opposite is going to occur.

By having informal, pre-dispute systems in place that are fair, and to suggest they are not is also a misnomer. Virtually every arbitral system I know that employers have followed the American Arbitration procedures and protocols. Yes, national disclosure, or excuse me, non-disclosure agreements should be examined. Secrecy should be taken out of the process, but the process is fair Mr. Walberg, and it works.

And as I said earlier, the reason we don't have more of a filing system here is that workers are arriving at settlements. This is a system that ought to survive. It provides good benefits. Back to your question. House Bill 4841 prohibits all together any type of pre-dispute arbitration system period. That makes absolutely no sense.

Mr. WALBERG. Let me just add on to the question. In class action lawsuits, do employees often see large financial awards when they're claims are successful? And conversely, how do class action lawyers fair?

Mr. KING. Well, they go in opposite directions. The lawyers always win, and the employer/consumer in most cases, in a recent study that I just saw yesterday, even further emphasizes this, do

much worse. The only winners here really are the plaintiff's trial lawyers. It's quite unfortunate.

Senator Ernest just introduced a bill last night that would stop that process and prohibit the trial lawyer form receiving any more than they award to the claimant. That's where we ought to have this discussion. It's really interesting.

The consumer gets what the employee gets, the worker gets very little unfortunately.

Mr. WALBERG. It's an old story that we've heard. Mr. King, according to the Director of the Administrative Office of the U.S. Courts, as of March 2020, the number of civil cases pending for more than 3 years is nearly 30,000.00 cases.

Mr. KING. Right.

Mr. WALBERG. And that statistic came before the worst of the COVID–19 pandemic. What impact would H.R. 4841 have on the current case backlog, and how would this impact workers?

Mr. KING. It would increase that $30,000 figure many fold Mr. Walberg. The court systems are absolutely overflowing at the moment. I note that in one of the submitted testimoneys today that the Federal Rules of Civil Procedure have an 8-month target for civil litigation.

That's not being met, that's not even close to being met. And in class actions it takes years, literally years often just to litigate the procedural issue of whether we have commonality, typicality, et cetera. Class action litigation is a procedural morass. It's one of the absolute worst procedural ways to do business in the courts.

So the short answer to your question is dumping hundreds of thousands of worker complaints into our court system is a non-starter. It's just not a practical solution, nor is it a solution Mr. Walberg, to dump those types of cases in a class matter into our arbitral system. That arbitral system can't handle that influx either.

Mr. WALBERG. I guess additional evidence why unions are carved out of this, the cause of the outcomes.

Mr. KING. Yes.

Mr. WALBERG. Thank you, thank you for your testimony, and Mr. Chairman I will yield back 11 seconds.

Chairman DESAULNIER. You're a generous man, Mr. Walberg. I now recognize Mr. Banks.

Mr. BANKS. Thank you, Mr. Chairman. California's AB5 law, better known as the Gig Worker Law, may be one of the best-known failures of a democratic attempt to regulate labor standards. This law forced companies to classify independent contractors as employees, placing a one size fits all chain around their neck. Mr. King, what effect did this law have on California businesses?

Mr. KING. Very negative. And as you know the so-called worker protections are not there. And the voters in California resoundingly rejected it. So this also is a non-starter, and I see it's woven—at least there's an attempt to weave it in 4841. Absolutely poor policy.

Mr. BANKS. Agreed. Can you tell us more about how did this law affect the shipping industry, and help create the supply chain crisis that we're experiencing today?

Mr. KING. Well, we literally have, the last I saw, hundreds of ships outside of Santa Barbara, outside of Long Beach, the entire

industry of moving goods is in a State of flux. And it just brought litigation into those areas. A lot of the companies that move these goods as you know, are small and medium-sized companies.

If they have to divert resources to litigate these matters, they have less resources to pay workers and to improve productivity. It's certainly an impediment in the supply chain.

Mr. BANKS. Now, Mr. King I appreciate that explanation very much. What's shocking to me is that despite how disruptive AB5 was, my democrat colleagues want to expand this law nationally as you pointed out. The PRO Act, which unfortunately passed the House back in March contains provisions similar to that of AB5.

Additionally, H.R. 4841, which is the topic of the discussion today, would prohibit independent contractors from engaging in arbitration if classified as an employee. Can you speak on that? On the disastrous effects of that, and that the PRO Act would have for labor standards if they're signed into law.

Mr. KING. It's an excellent question. The whole issue of classification, independent contractor status is quite complex in many scenarios, only to be dealt with separate hearings, separate proposals, separate discussion.

Beyond that the Federal Arbitration Act, I would at least concede in part was designed to settle disputes between merchants, between third parties. Why should we take that well-known, well-established procedure where an employer and a third-party merchant or supplier or vendor cannot enter into dispute resolution?

And certainly there even if you concede there's some uneven bargaining power on how these agreements are established, which has long since passed with procedural safeguards being adopted, but even if you go there, this is an area where you certainly ought to preserve arbitrable pre-dispute procedures.

And the funny thing I note here, our entire juris prudence system is built on procedures being agreed upon in advance. I can't go into Court and ask the Court well, let's change the rules. We'd like to negotiate a different set of rules. The Civil Rules of Procedure are there in place, so are the American Arbitration Act Procedures.

So it's a misnomer to say these procedures shouldn't be agreed upon in advance. That's the way the system has worked and should work.

Mr. BANKS. And finally Mr. King, can you elaborate more with that on the effect that H.R. 4841 would have on contractors?

Mr. KING. Well, it turns upside down the whole definition of independent contractor worker employee. As I read the bill everybody is an employee. Everybody that even has an agreement to supply goods and services at arms-length has to be brought into an employee status, and therefore no pre-dispute arbitration agreement ever could be entered into. That makes absolutely no good policy sense or common sense.

As I said in the outset of my remarks. I'm sure I could sit down with Professor Colvin at an arm's length and negotiate a good, predispute arbitration procedure that has procedural safeguards, no secrecy. That's foreclosed. So whether it be independent contractors or anyone else, this bill goes way too far.

Mr. BANKS. Agreed. It seems enormously dangerous. With that Mr. Chairman I yield back.

Chairman DESAULNIER. Thank you, Mr. Banks. I just want to make, if anybody listening has a question, I was referring to a separate bill, assembly bill AB51 that dealt directly with arbitration. AB5 I'm very familiar with as a former Chair of the Senate Labor Committee in California, but I just want to clarify that. They are two separate bills, not that Mr. Banks was inferring that, I just want to clarify for the record. Mrs. Harshbarger you're next for five minutes.

Mrs. HARSHBARGER. OK. Thank you, Chairman and Ranking Member, and thank you for the witnesses for being here today. Mr. King I'm going to read part of your testimony. It says, "Arbitration is usually less expensive and faster than litigation. It can have similar procedural and evidentiary rules. It normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties.

It's more flexible in regard to scheduling of times and places appearing in discovery devices." And you know I've been a business owner for over 30 years, and you know if it were me, I would absolutely want to sit down with an employee and have an arbitrator because of the timeframe, the hostility factor is huge.

Earlier this Congress, as Representative Banks said, House democrats passed H.R. 842, and that's the Protecting the Right to Organize after the PRO Act. And it is a bill which bans arbitration agreements to settle disputes between workers and employees, and it allows the NLRB to impose large, monetary penalties, up to $100,000.00 on employers for unfair labor practices, and that includes violations of the bill's prohibition on arbitration agreements.

These huge financial penalties in the Pro Act are consistent. I mean that would devaState a business sir is what I'm trying to say. $100,000.00 fine would devaState a business, and I guess what is your opinion on what would happen if these were consistently applied because there wasn't arbitration?

Mr. KING. Excellent question. The PRO Act contains many toxic provisions for business, and you just identified one of the central ones. That's apparently still pending in the so-called budget reconciliation discussions. What as a practical matter can happen, and will happen, is that unfair labor practice charges without any foundation in many cases will be filed against medium and small employers, particularly.

They don't have the financial ability to defend their position. And if the National Labor Relations Board then finds an objectionable conduct unfair labor practice has occurred, then the business is subject to hundreds of thousands of dollars of potential fines, including representatives on the Board, Chief Human Resource Officers, owners of the business.

The Wagner Act, which is the predecessor of the National Labor Relations Act passed in 1935, never envisioned the National Labor Relations Act to be this type of statute. It's been throughout its history a remedial statute. Both Democrat and Republican Congresses have accepted that.

The PRO Act is a substantial unfortunately overreach and the civil penalties you just mentioned are totally unneeded.

Mrs. HARSHBARGER. Well, I don't think a small business could stay in business very long if that happened, and you know when you look at the Supreme Court case Epic Systems, and they encourage arbitration initially. You know I'm assume once you do the arbitration and you work everything out, what's the timeframe generally that a case is dismissed, or penalties taken care of?

I mean is that a reasonable amount of time during an arbitration? Is there you know a standard amount of time?

Mr. KING. Most arbitrations again in the workplace as I note in my opening comments are generally involving relatively minor disputes frankly.

Mrs. HARSHBARGER. Yes.

Mr. KING. Was I paid properly? Did I get my vacation when I should have? Did I get my job letting rights? Those can, and are resolved quickly, in many cases less than 180 days from time. The arbitrator is selected and tell her or his award.

Correspondingly in the judicial area, and I just saw stats in this yesterday. You're talking 560 days at a minimum in many cases, and if you are in a class action you don't even get to the merits of the litigation until sometimes years because procedural issues of technicality, numerosity, et cetera are litigated.

So much quicker, absolutely no case that I can see out there that's at least supportable would suggest that the court system is more efficient, just the opposite.

Mrs. HARSHBARGER. Well I agree. If you have—in my experience as a business owner you have 10 different attorneys, you're going to get 10 different answers, but you're going to be billed 10 times too. Just FYI. So I appreciate you, and I have a little bit of time left, and I yield back.

Chairman DESAULNIER. Thank you, Congresswoman. You're learning from Mr. Walberg. Representative Fitzgerald your time is here.

Mr. FITZGERALD. Thank you, Mr. Chairman. Mr. King instead of setting one standard and having everyone play by the same rules, I think where my colleagues across the aisle are, they've singled out the unions for favorable treatment. Yesterday a very similar bill came forward in Judiciary, of which I'm a Member, and I offered an amendment.

In that markup in the Judiciary Committee the amendment was aimed directly at the FAIR Act that would remove the exemption for unions in a bill that would otherwise ban the pre-dispute arbitration. You know clearly, it's a union carve-out. The legislation bans the pre-dispute arbitration for non-union employees while preserving these benefits for the union employees.

The discrepancy, it just doesn't make any sense other than you know trying to appease the unions like I said. I mean but legally this has to make this entire area of law, a little more vulnerable I would say, and you know it's probably not a wise move when you're talking about this area of statute. Would you agree or disagree, or what are your thoughts on that?

Mr. KING. Well, good points Mr. Fitzgerald. It's intellectually insupportable. I don't know how one could say that a union and a corporation, an employer, should be able to negotiate pre-dispute

arbitrable procedures and also ban class actions if they so agree, but yet say no, that can't occur anywhere else in the world.

If it's inherently illegal, unconscionable, unacceptable as a general premise, why isn't that also applicable in the unionized environment? You just can't reconcile those two points of view. And to somehow suggest that, as I said earlier, that a union and employer negotiate at arms-length sophisticated complex, arbitrable agreements, that's just not reality.

What those agreements look like are the same as we see in the non-union deal. So there ought to be a level playing field here. As noted by the previous questions, this whole attempt to fine employers, to force employers into dealing against the will often of their employees in a union environment is just a pressure play to chill the rights of employers, and to cause them to have all kinds of litigation and regulatory problems.

It's not a playing field that's fair.

Mr. FITZGERALD. Very good. Thank you. Just one other quick question. So the other thing about H.R. 4841 is it applies to employees of the employer, as well as independent contractors. And in my estimation, you know I think that this will have a direct effect on for the most part, entrepreneurs, or people that are trying to do a startup. And I was wondering I you could make a brief comment on that part as well.

Mr. KING. Oh absolutely. So it's an end around of an intelligent thoughtful discussion about whether an individual is an employee, or an independent contractor, a merchant, or a third party. And those are all entirely separate issues. If you foreclose merchant's third parties and other employers, the user employer, from negotiating previous agreements, and you prohibit them from carving out class actions, you're forcing everybody into the Courts and primarily into class action litigation.

That makes no policy sense, it's inefficient, it's the wrong way to go to about that discussion.

Mr. FITZGERALD. Very good. Thank you, Mr. Chair, and I would yield back.

Chairman DESAULNIER. Thank you, Mr. Fitzgerald. We'll now recognize Congresswoman Miller for five minutes.

Mrs. MILLER. Thank you, Chairman DeSaulnier, Ranking Member Allen, and all the witnesses. While the Committee democrats and those that object to arbitration agreements in general argue that their intention is to get better outcomes for claimants through litigation—that is not the answer.

Mr. King in your testimony you mentioned how proponents of banning arbitration in this hearing are citing faulty studies. You cite studies that show only 13 percent of class action lawsuits result in payout, and the average award is about $32.00, while plaintiff's attorneys got about 1 million. Would you please elaborate on how the studies you cite are correct, and how others that are cited are misleading?

Mr. KING. Thank you, Congressman Miller. First of all as I mentioned the recent student by the Plaintiff Trial Lawyers Association counted all settlements as losses for workers. That's inherently misleading. It's really a disservice to this discussion.

Second, in some of the statistics we've seen, and I certainly respect Cornell University. It's my alma mater, my lawsuit, but in all due respect to the ROI studies, they're comparing jury awards to standard, what I would call run of the mill arbitral workplace settlements. You just can't do that. That's as I said apples and zebras.

And the disparity Congressman Miller between what the claimant is getting in court, compared to what the claimant is getting in arbitration, the figures we are citing is as close as possible to a real-world apples to apples study. And study after study, indeed the updated study that I just saw yesterday, refutes entirely this suggesting of that Plaintiffs and workers are doing better in the court system.

And where the real reward in that court award is going, as inherent in your question, is to the trial lawyer, not to the consumer, not to the worker.

Mrs. MILLER. Thank you that was interesting, especially in light of the fact I'm reading a book called "How to Lie with Statistics." Mr. King your written statement quotes Supreme Court Justice Breyer on the advantages of arbitration. Is Justice Breyer's statement of support for the arbitration process unusual? Have other judges across the ideological spectrum made similar statements?

Mr. KING. Absolutely. He's not alone. I would hardly label Justice Breyer an outlier, but Justice White, Justice Kennedy, Justice Kagan, and many other Justices of varying philosophies have clearly articulated in their written decisions that arbitration is the preferable way to proceed and is the congressional intent behind the Federal Arbitration Act. It is the law of the land.

But even if you rejected those very thoughtful opinions by very intelligent people, and even if you reject decades of court case law as Mr. Allen said at the outset—our court system and arbitration system is not equipped to handle hundreds of thousands of disputes that would be put into that system. That's not workable. So let's do a reality check here.

If you really want to get to the heart of this issue let's encourage employers, workers, even unions to have alternative dispute resolution procedures, settle these matters in the workplace, informally, thoughtfully, and expeditiously.

Mrs. MILLER. Thank you. That's good information to know. And finally Mr. King as I speak with my constituents, the most frequent thing that I hear is that they're having a hard time retaining and finding new employees. If we were to ban arbitration agreements, how would this harm employment?

Mr. KING. Well, you know it's interesting. We hear this disparity of bargaining argument that workers are being forced to accept these agreements. Well first of all, more and more companies are making them optional, and they're not being forced as suggested in testimony, on workers.

Second, workers in this economy particularly will go somewhere else if they find the system to be inherently unfair. And third, given our platform economy, if word is out on the street that employer access unfairly treating its workers in so-called forced arbitrations, they'll go somewhere else to work.

So this worker shortage is having a very interesting impact upon this entire discussion. But in our whole system, I mean workers

don't have an opportunity to renegotiate the Civil Rules of Procedure in the courts, they don't have the ability to renegotiate arbitration rules and regulations by the American Arbitration Association. So this whole discussion is off kilter in that regard.

Mrs. MILLER. Thank you. Thank you again to all of our witnesses, and I yield back.

Chairman DESAULNIER. Thank you, Congresswoman Miller. I now recognize Congressman Mrvan for five minutes.

Mr. MRVAN. Congressman, if I could I just if I could be recognized for five minutes in about 2 minutes, I'd greatly appreciate it.

Chairman DESAULNIER. I'm sure the Ranking Member of the Full Committee would love to go now if that's appropriate, Ms. Foxx get ready to go. Your five minutes are here. I always want to show you the deference you so richly deserve, Ranking Member.

Ms. FOXX. Thank you, so much Mr. Chairman. I always love seeing you on the screen. I'd like to see you in person better, but I love seeing you on the screen. Thank you so much. Mr. King for over 80 years Congress has struck a careful balance in Federal labor law with respect to the interest of workers, employers, and labor organizations, however H.R. 4841 encourages adversary class action lawsuits between workers and employers, while preserving labor union access to arbitration.

Is H.R. 4841 consistent with the balanced approach of the National Labor Relations Act?

Mr. KING. Dr. Foxx, very nice to see you again, albeit virtually.

Ms. FOXX. Thank you.

Mr. KING. There is no balance as we just discussed, but I don't know how you intellectually or classically defend a carve out for union agreements in this area. If you accept the premise of 4841 that previous arbitration is completely bad and should never be utilized, then the same ought to be applicable in the union environment, but of course that's a misnomer and a false premise to start out with.

And to say that you can never have a class action abridgement or prohibition in the non-union sector, but yet you could have it in the union sector, that's again inherently inconsistent and not intellectually supportable.

Ms. FOXX. Thank you very much. Mr. King in the Epic System's decision in 2018, Supreme Court found that the NLRA and the Federal Arbitration Act are not in conflict and that workers ability to organize unions and collectively bargain does not guarantee the ability to litigate as a collective entity.

In your view is this finding, correct? And what implications does it have for the NLRA?

Mr. KING. Well, I think it's an absolutely correct decision. It codified decades of the Supreme Court case law that as we just established had various judicial philosophies in those previous decisions. The Wagner Act, the predecessor of the National Relations Act was passed in 1925, excuse me 1935.

The Federal Arbitration Act was 1925, so the authors of the NLRA and the Wagner Act in 35, they knew of the Federal Arbitration Act. If they had wished to include class action protection in the National Relations Act, they certainty could have done so. They did not do so. The National Relations Act as the Supreme Court said

in Epic, doesn't have any provision that guarantees class action litigation.

Ms. FOXX. Thank you. You mentioned in your testimony H.R. 4841 creates new unfair labor practice charges against employers, and that this is even more troubling in view of the democrats impending budget reconciliation bill. When this legislative monstrosity was considered by the Education and Labor Committee in September, the Democrats included an appalling provision which for the first time, even under the NLRA creates massive civil, monetary penalties against employers and corporate officers.

Can you elaborate quickly please on why this combination is so unprecedented and dangerous?

Mr. KING. The National Relations Act in its many decades of history never has included fines against employers. This is an attempt to chill employers, to exercise their rights, it's also an attempt to chill employers to respond to unfounded unfair labor practice charges. Small and medium-sized businesses are going to be put in a very difficult position. It is inherently not fair. It's certainly not needed. It's an overreach.

Ms. FOXX. Thank you. Mr. King when Congress considers a piece of legislation, we should be absolutely clear about how the legislation would affect the American people. Your testimony states that arbitration is an effective and proven method for resolving workplace disputes.

Would you elaborate on the advantages of arbitration for workers any more than you might need to based on your previous testimony?

Mr. KING. It's quicker. It's more informal as we discussed earlier. It forces the employer and the employee to sit down with one another. And you know what Dr. Foxx as a practical matter what really happens here, let's put aside all this philosophical approach. It forces the parties to come to an agreement.

And in my experience over 50 years, there's a very high sell of the break, not only an arbitrable system, but also in the Courts. The particularly informal arbitration procedures, pre-dispute arbitrations lead to settlements. And that's what we all ought to strive for here.

Ms. FOXX. Thank you. And Mr. Chairman thank you again for letting me help out Mr. Mrvan as he was walking over. I see the technique he used. I thought I was going to be in that position too of running over here. He and I were just on the floor, so I ran like crazy to get over here. I move a lot faster than he does by the way, so anyway, I'm glad we're able to—I like him, and I like you, thank you Mr. Chairman. I yield back.

Chairman DESAULNIER. Thank you, Congresswoman Foxx, the most charming Member. Mr. King I would agree with you on this. Congresswoman Foxx is always best in person. Congressman Mrvan, five minutes is yours.

Mr. MRVAN. Thank you, Chairman. And Congresswoman Foxx I played in the football game yesterday. I can barely blink without being in pain, so that's why you beat me. But respectfully I thank you, everyone, for the opportunity. Professor Colvin can you explain the difference between individual forced arbitration and the forms of arbitration that many unions require through collective bar-

gaining? Why is arbitration more appropriate when it is a part of collective bargaining agreements?

Mr. COLVIN. It's a great question. There's a fundamental difference to how arbitration operates in the collective bargain contracts, what we call labor arbitration. It's a system that's been around since the 30's, 40's, that has been very successful for ensuring collective agreements are enforced, and as an alternative to strikes in the workplace.

What's really different there is that the system operates with two sophisticated parties—two repeat players, one on each side. What that means is that the arbitrators are responsible to both parties. The cadre of labor arbitrators who decide these cases are widely respected by both sides, that's why the system works. That's what's different on the forced arbitration side where you have on one side large, sophisticated corporations, and on the other side individual employees who are not repeat players.

They don't have the same engagement, same ability to hold the system to account, and what we see is much more variation across arbitrators in making decisions on the forced arbitration aside, it's not consistent the way it is in labor arbitration.

The other major difference, and here I have to disagree with what Mr. King's testimony suggested, is that the types of cases are really different. Labor arbitration is dealing with regular workplace, day to day disputes about scheduling, about job assignments, those kinds of things. Forced arbitration, we did a study where we spent time reading through a whole year's worth of all the forced arbitration cases decided under the administration of the American Arbitration Association.

And what we found is half of them are discrimination cases, another 10 percent are wage an hour cases, and the rest are other statutes and common law claims. They're not typically workplace day to day problems, they're legal issues, much like the kinds of cases that you see in the Court system. So it's really different from what goes on in labor arbitration.

The labor arbitration works well with two repeat player parties, and a well-established group of labor arbitrators who are trusted by both sides. They're really different systems.

Mr. MRVAN. Professor Colvin in your testimony you cite research by Cynthia Estlund that suggests the cases are brought in forced arbitration at a rate of only 1 to 2 percent when compared with cases brought in Court. Gives the rates of forced arbitration you describe, is it fair to say that this means for a large percentage of the workforce our employment laws are going unenforced?

Mr. COLVIN. That's exactly right. In theory you could create a new dispute resolution system that was accessible to all workers and have a lot of claims. Professor Estlund, who was mentioned earlier, made this argument made this argument about 20 years ago, maybe we can have an arbitration system that looks like that.

However, when we do the empirical research, we don't find that forced arbitration produces that system. There's hardly any cases that are small. Three quarters of the claims filed are over $60,000.00 claims. These are similar to the kind of claims that are filed in Court. They're not small claims. We don't see the accessibility, and the reality is if you don't have the accessibility, then for

most American workers, you're not seeing their employment rights being enforced.

Mr. MRVAN. Can you lay out the facts that make claims so much less likely to be brought in the forced arbitration than they would be if the worker had access to the Courts?

Mr. COLVIN. So one thing I think that has to be recognized is some of what you heard in Ms. Perez's testimony, that there's procedural complexity in arbitration that gets unrecognized. She is an individual worker without legal representation. It's not really possible to easily navigate this system. It's more complex, and it's become more complex over time.

It's also the case that what you see successful in arbitration systems is sort of larger, higher income, you know, sophisticated parties with substantial resources. Those are the ones that succeed. By contrast, our employment laws are really there to try to protect the typical American worker without large scale resources, or sophisticated legal representation.

You've got to protect those workers and that's the challenge.

Mr. MRVAN. I thank you. With that I yield back.

Chairman DESAULNIER. Thank you, Congressman. I don't see any other Members, so I want to thank all the witnesses. I didn't imagine being so dominated by Cornell. I felt like all of a sudden singing Hail, Hail, Cornell, so thank you, far above Cayuga's waters—I have some friends who attended.

But I do want to thank all the witnesses. You are terrific. Pursuant to Committee practice materials for submission for the hearing record must be submitted to the Committee Clerk within 14 days following the last day of the hearing, so by close of business on November 18, preferably in Microsoft Word format.

Only a Member of the Subcommittee, or an invited witness may submit materials for inclusion in the hearing record, and the materials must address the subject matter of today's hearing. Please submit materials to the Committee Clerk electronically by emailing submissions to the *Edandlabor.hearings@mail.house.gov*.

Again I want to thank the witnesses. I did want to mention that unfortunately some Members, particularly on our side weren't able to attend because they were attending memorial services to former Congressman Kildee from Michigan, the uncle of our colleague Representative Kildee who served for many years on this Committee, so I just wanted to let people know that you know that many of us wished we could have been there.

And again, one last time thank you all. Even the people who aren't affiliated with Cornell for participating as witnesses today. If we have other additional questions for you, we may ask that you please respond to those questions in writing. The hearing record will be held open for 14 days in order to receive those responses.

I want to remind my colleagues that pursuant to Committee practice witness questions for the hearing record must be submitted to the Majority Committee Staff or Committee Clerk within 7 days. The questions submitted must address the subject matter of the hearing.

I now want to recognize our distinguished Ranking Member for a closing statement.

Mr. ALLEN. Thank you, Mr. Chairman, and my condolences to Dan and the entire Kildee family as I heard also about the memorial service this morning at our prayer breakfast. As we heard today, H.R. 4841 will only add to the challenges that job creators and American workers are already facing in this struggling economy.

We've had great testimony by our witnesses, and I thank all of our witnesses for participating today in this important hearing. Based on my experience as a business owner, I know that banning the use of arbitration will unfairly penalize individual employees, and employers, by delaying resolutions to their workplace disputes.

Arbitration is a proven method for solving employment issues. It is often a lot quicker and less expensive than Court battles resulting in swifter justice for proven incidents of wrongdoing. H.R. 4841 is contradictory in its effort to ban pre-dispute arbitration and class action waivers between employees and employers because the bill still allows employers and unions to continue negotiating agreements through the same process.

It's blatantly a one-sided approach, it allows unions a huge advantage which is in conflict with principles of equal treatment. H.R. 4841 also unfairly penalizes independent contractors and fails to recognize that they are entrepreneurs who set their own hours and earnings.

By putting independent contractors in the same category as salaried or hourly employees, H.R. 4841 will decrease opportunities for these American workers at the very same time that flexible employment options are needed the most. Forced lockdowns, the supply chain crisis, rising inflation and worker shortages are already wrecking our economy.

This legislation if signed into law could be the nail in the coffin for many struggling job creators. As I stated in my opening statement the only thing H.R. 4841 is good for is enriching trial lawyers. The legislation will result in ongoing class action lawsuits, leaving many worker's claims unresolved due to the costly and time-consuming nature of litigation.

I'd like to again thank our witnesses for participating today, and with that Mr. Chairman I yield back.

Chairman DESAULNIER. Thank you, Mr. Allen. I really appreciate that. Again, I want to thank all my colleagues, thank you for adhering to the five-minute rule, and the witnesses, and as a former employer for many, many years, meeting a payroll as Mr. Allen and others have said, what I hope for is a structure that's balanced, and I think we all agree on that.

Our perspectives may be different, and on one of those occasions I agree with the Hoover Institute person, Francis Fukuyama, that it's best if we avoid this in the employer/employee relationship if both sides treat each other with respect, and not get into those situations as he enumerated in his book Trust, that's probably the most efficient way.

But knowing human nature that's not always possible, and that's why I believe strongly in this bill, but value the perspectives, and hope to continue the conversation. Now I'd like to recognize myself for a closing statement.

Today we highlighted the importance of passing legislative solutions to end forced arbitration and ensure that workers have a fair shot at securing justice. Access to the American legal system is an essential pillar to our democracy. Unfortunately for decades employees have been forced, often times, into signing arbitration clauses that close the doors to the Courtroom.

As a result, employers—some employers duck litigation, and evade accountability at the expense of worker's rights. Congress must pass, in my view, the Restoring Justice for Workers Act to ensure that workers can ban together to hold employers accountable for wage theft, harassment, discrimination, and other violations of essential workplace positions.

I look forward to working with my colleagues on both sides of the aisle to better protect workers. Thank you again for our witnesses. If there's no further business without objection the Subcommittee stands adjourned. Thanks again.

[Additional submissions by Mr. Allen follow:]

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November 18, 2021

The Honorable Robert Scott
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Chairman
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2328 Rayburn House Office Building
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The Honorable Virginia Foxx
United States House of Representatives
Ranking Member
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The Honorable Mark DeSaulnier
United States House of Representatives
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503 Cannon House Office Building
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The Honorable Rick Allen
United States House of Representatives
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Dear Chairman Scott, Ranking Member Fox, Chairman Desulnier, and Ranking Member Allen:

My name is David Sherwyn, and I am the John and Melissa Ceriale Professor at Cornell University.[1] I am also the current, and founding, Academic Director of the Cornell Center for Innovative Hospitality Labor and Employment Relations (CIHLER). I very much appreciate the opportunity to communicate with the committee, and I urge you to refrain from eliminating pre-dispute mandatory arbitration and forcing employees and employers to seek justice in the current untenable and impossible to change, tort-like, EEOC/Litigation System. Unlike this system, arbitration, while flawed, can be fixed to provide a system to address workplace disputes that are inevitable, often negatively life-changing, but sometimes healthy.

[1] My full title is: John and Melissa Ceriale Professor of Hospitality Human Resources and Professor of Law; Academic Director of the Cornell Center for Innovative Hospitality Labor & Employment Relations (CIHLER); CO-Director of the Pillsbury Institute for Hospitality Entrepreneurship (PIHE); Stephen H. Weiss Presidential Fellow; Cornell Nolan School of Hotel Administration; SC Johnson College of Business; Cornell University

Background

Before joining the faculty at Cornell, I practiced management-side labor and employment law in Chicago, Illinois, with the law firm Laner Muchin. The dominant portion of my practice was defending discrimination cases. While at Laner Muchin, I became disheartened by a system for resolving disputes that benefitted "bad actors" and hurt "good actors." In the more than 100 cases I resolved, I found that we settled for nuisance value, or even prevailed in cases where the employer violated the law – thus the good actor employee was denied any form of justice. Alternatively, good actor employers were forced to settle meritless claims, because the time and cost of defense made it untenable to pursue the truth.

I became extremely frustrated and began searching for "another way." When the *Gilmer* decision came out, it seemed clear to me that there was a pathway to justice. I left practice and began a new career studying alternative dispute resolution. As I began to study and contribute to the literature in the field, I found academics who had never practiced law were attacking arbitration, using inapplicable data to support their arguments and, as a fallback, championing a system without any real analysis of its numerous faults. Thus, instead of working to fix the problem, the anti-arbitration crowd simply argued for status quo to perpetuate an untenable system.

Below I will explain why the current EEOC/Litigation system is unjust, why the research championed by the anti-arbitration advocates is flawed, and conclude by stating that arbitration's imperfections can be fixed.

The Current System is Untenable

To file a charge of discrimination, an employee must first file with the EEOC[2] or a corresponding state agency. In the last decade, the EEOC averaged 89,402 charges filed per year.[3] In the last decade, the EEOC averaged 97,388 resolutions per year. The EEOC classifies charges as "A", "B", or "C. "A" cases make up 10%-20% of the charges, "B" cases 60-70%, and "C" cases 10-20%. With "C" cases, the EEOC will notify the employer that no action is required at this time – essentially ending the charge. The "B" cases are the garden variety cases that do not fit into the EEOC's then current national enforcement plan.[4] The "A" cases are the cases that fit into the enforcement plan and are where the EEOC devotes most of its resources but does not have the resources to litigate these cases. From 2010 to 2019, the EEOC, on average, litigated 191 cases per year. Thus, on average, the EEOC litigates .21% of the total cases filed, and under 2% of the

[2] Before examining EEOC process, we must emphasize our criticism is not directed at the EEOC's leaders or investigators. Through our work in the field, the authors have the opportunity to work with several EEOC commissioners and the former EEOC General Counsel. We have found the commissioners, both Democrats and Republicans, and the General Counsel, to be true professionals who are committed to enforcing the law and working to eliminate discrimination in the workplace.

[3] See https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2019. We noticed that charges seem to be a lot higher during Democratic Administrations than Republican Administrations. The reasons for that pattern are not clear.

[4] For 2017-2021, the national enforcement plan included: segregation, harassment, trafficking, pay, retaliation and other policies and practices against vulnerable workers, including immigrant and migrant workers, as well as persons perceived to be members of these groups, and against members of underserved communities. See https://www.eeoc.gov/us-equal-employment-opportunity-commission-strategic-enforcement-plan-fiscal-years-2017-2021

"A" cases. That means the EEOC does not litigate more than 98% of the cases that fit into its national enforcement plan. These cases and the "B" cases go through the "regular" EEOC process.

The regular EEOC process is focused on pragmatic resolutions. Upon receiving an EEOC charge, the Agency will assign an investigator to the case. It often takes the EEOC as long as one year to assign an investigator.[5] Investigators attempt to settle cases without even discussing their merits. Instead, the focus is on identifying what the employer will pay and what the employee will accept to effectively make cases "go away." If the parties cannot settle, the EEOC will schedule a "fact-finding" conference to facilitate settlement. If the parties do not settle, the EEOC will, in "B" cases, schedule a mediation. The EEOC will ultimately "resolve" the case and end its involvement in the dispute.

As stated above, between 2010 and 2019, the EEOC resolved, on average, 97,388 charges per year. The EEOC categorizes each case resolution into one of two broad categories: merit resolutions and non-merit resolutions. Merit resolutions consist of: (1) settlements; (2) withdrawal with benefits (basically a settlement); and (3) a finding of reasonable cause which results in a right-to sue letter. Non-merit resolutions consist of "administrative closures" and findings of "no reasonable cause." In these cases, the employee also receives a right-to-sue letter. Over the last decade, the **merit resolutions** made up an average of 17.0% of the cases while non-merit resolutions made up 83% of the cases. After concluding the EEOC process, 14.3% received some type of remuneration, 12.6% filed lawsuits, and .21% have the EEOC litigate their cases. The remaining 73.1% (71,191 claimants) received no compensation and essentially walked away from their charge.

The Research is Flawed

The academic research is all flawed, because we do not know what constitutes just results of adjudication. Should employees win 50%, 90%, 10%? If we don't know that answer, how do we determine justice? Moreover, research examines the win/loss rates in litigation v. arbitration. This is problematic because: (1) under 1% of the cases filed with the EEOC go to verdict, and they are neither random nor representative; (2) each study has different results, because they deal with a different set of cases, and (3) most problematic, the anti-arbitration research excludes motions which represent the vast majority of judicially decided cases from their studies. These motions result in employee losses and thus, greatly skew the results and mislead those relying on the research. Several years ago, Laura Beth Nielsen and her co-authors conducted a study where they collected a random sample of employment civil rights cases filed in federal courts between 1988 and 2003 in seven regionally diverse federal districts: Atlanta, Chicago, Dallas, New Orleans, New

[5] The employee may request a right to sue after six months when the EEOC has not resolved the case.

York City, Philadelphia, and San Francisco.[6] The final sample consisted of 1,672 cases.[7] The study grouped cases according to a chronology: early dismissal (i.e., 12b6 motions to dismiss): 19%; early settlement: 50%; summary judgment: 18% (for a total of 37% of the cases dismissed by motion); settled post summary judgment: 8% (and 57% of the cases that survived summary judgment); and tried to verdict: 6% of the total cases and 43% of the cases that survived summary judgment. Plaintiffs prevailed in 33% of the cases that went to verdict or 2% of the total cases. Plaintiffs prevailed in 4.5% of the cases where either a judge (by motion or verdict) or jury decided the case. Including the settlements, and counting the settlements as plaintiff victories, the plaintiffs prevailed in 60% of the cases. We call the first number, 4.5% (plaintiffs victories divided by total number of cases decided by a court, be it in motions or at trial), the effective win rate. We call the second number, 60% (settlements + pro-plaintiff trial verdicts), the plaintiff compensation rate.

Applying the effective win rate and the plaintiff compensation rate to arbitration yields results showing that arbitration is more employee friendly than litigation even if we exclude 73.1% of the EEOC cases where the employee received no compensation and not even a day in court.

In their article "Saturn and Rickshaws revisited: What Kind of Employment Arbitration has Developed"[8], Alex Colvin and Kelly Pike used American Arbitration Association (AAA) data to study 449 arbitration cases: 267 (59.5%) cases were settled, 121 (26.9%) cases went to award, 29 cases (24.7% of those cases that went to award) resulted in the plaintiff prevailing; and 13.3% were either withdrawn or dismissed by the arbitrator (the AAA conflates these two categories). Thus, we calculate as if 50% (27 or 6.2%) or 100% (54 or 13.3%) of the cases in this category are dismissed. The effective plaintiff win rate (i.e., plaintiffs victories divided by total number of cases decided by a court, be it in motions or at trial) results in the following: 19.6% or 16.6% - both well above the litigation numbers. Our own study of 7,316 AAA employment arbitration cases resolved from 2012-2017 produced the following results: 5,538 (75.7%) cases were settled; 847 (11.6%) cases went to award; in 189 (22.4%) of these cases the plaintiff prevailed; and 931 (12.7%) of the cases were either withdrawn or dismissed by a dispositive motion. Again, because the AAA conflates the two, we calculate our effective win rate as if 100% and then 50% of these 931 cases were dismissed by motion. The effective plaintiff win rate in our study is: 10.6% and 14.4%. The plaintiff compensation rate in our study is 78.3% - meaning plaintiffs either prevailed or settled in 5,727 cases out of 7,316. Thus, the range for the effective win rates for plaintiffs in the two arbitration studies was 10.6%-19.6%, and the range for the plaintiffs' compensation rate

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[6] See Nielsen, L.B., et al., Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States, 7 J. Empirical Legal Stud. 175, 176, 181 (2010).
These districts contain about 20 percent of all filings, capture variation in legal and social context, and, for cost considerations, are located close to federal records depositories. Three-hundred cases were drawn from the list of all civil employment discrimination cases (classified as nature of suit code "442") in these districts from 1988 to 2003 compiled by the Administrative Office of the U.S. Courts (AOUSC) in each city, yielding a sample of 2,100 total cases. We derived sampling weights by district based on the total number of employment discrimination case filings in each district. This article examines only closed cases ($N = 1,805$) with all required key variables for this analysis, producing a final sample for analysis of 1,672 cases.

[7] Id.

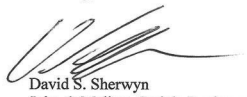
[8] Colvin, A. Pike, K., In their article Saturn and Rickshaws revisited: What Kind of Employment Arbitration has Developed, 29:1 Ohio State Journal on Dispute Resolution 59 (2014)

was 65.9% -78.3%. In Nelson's litigation study described above, the plaintiffs' effective win rate was 4.5%, and the plaintiffs' compensation rate was 60%. The effective employee win rate for all EEOC cases is 0.3%, and the plaintiff compensation rate is 23.8%. Thus, when dispositive motions are included in the analysis, employment arbitration is more plaintiff friendly than litigation. When we compare employment arbitration to the entire EEOC litigation system, we see that employment arbitration is drastically more plaintiff friendly.

Conclusion

Like many others who have contributed to the arbitration/litigation literature, I have gone down the win/loss rabbit hole even though it is the wrong question. We should be asking: what is the best way to resolve employment law disputes? We should then begin by defining the goal of the system. For example, in a Stanford Law Review article, my co-authors and I studied an employer with a mandatory arbitration policy that resulted in more than 81% of the claims resolved in under one week and more than 75% of the claimants remaining employed – are these two variables relevant? Are they more relevant than the win/loss record of under 1% of the cases? We need to answer those questions. After we define our goals, we need to research what happens to those EEOC claims that are neither settled nor litigated by tracking all the claims from one office in one year. We need to then examine employers who have arbitration polices and track their claims. With our defined goals, we can then create a just and fair system. In our latest article, under review at the Cornell Quarterly, we create such a proposal based on the information we have now. More targeted data would help refine our proposal. I urge this committee to follow the title of the first law review article I wrote: "In Defense of Mandatory Arbitration: Saving the Baby, Throwing Out the Bath Water, and Creating a Whole New Sink in the Process."

Sincerely,



David S. Sherwyn
John & Melissa Ceriale Professor of Hospitality Human Resources &
Professor of Law

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

NEIL L. BRADLEY
EXECUTIVE VICE PRESIDENT &
CHIEF POLICY OFFICER

1615 H STREET, NW
WASHINGTON, DC 20062
(202) 463-5310

November 17, 2021

The Honorable Mark DeSaulnier
Chairman
Subcommittee on Health,
Employment, Labor, and Pensions
U.S. House of Representatives
Washington, DC 20515

The Honorable Rick Allen
Ranking Member
Subcommittee on Health,
Employment, Labor, and Pensions
U.S. House of Representatives
Washington, DC 20515

Dear Chairman DeSaulnier and Ranking Member Allen:

The U.S. Chamber of Commerce opposes H.R. 4841, the "Restoring Justice for Workers Act," which would eliminate the use and availability of pre-dispute arbitration agreements as a means to fairly resolve employment disputes and creates a private right of action against employers. The ultimate goal of this bill is to promote expensive class action litigation that does little to help businesses and employees. Such litigation serves principally to benefit the attorneys who file class action lawsuits.

Arbitration is a fair, effective, and less expensive means of resolving disputes compared to going to court. Empirical studies demonstrate that employees in arbitration do just as well, or in many circumstances, considerably better, than in court. For example, recent studies have found that employees in arbitration prevail three times more often, win almost twice as much money, and resolve their claims much faster than in litigation.[1] Studies have also shown that class action settlements frequently provide only a pittance – or many times, nothing at all – to class members while millions of dollars are paid to their attorneys.[2]

Since 1925, the Federal Arbitration Act has protected the enforceability of agreements to resolve disputes through arbitration, including agreements made before any disputes arise. The "Restoring Justice for Workers Act" would radically alter these longstanding principles. It threatens the validity and enforceability of millions of contracts while imposing new, intolerable burdens on our already overcrowded courts. It would even add a new cause of action against employers under which plaintiffs' lawyers can sue for punitive damages and get their attorneys' fees paid with respect to alleged claims of retaliation for not entering into an arbitration agreement.

Critics of the current arbitration system often distort or ignore the fairness and due process protections built into the design of employment arbitration systems. The American

[1] *See* Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration (May 2019) available at https://www.instituteforlegalreform.com/research/fairer-faster-better-an-empirical-assessment-of-employment-arbitration.
[2] *See* Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions (Dec. 11, 2013) available at https://www.mayerbrown.com/files/uploads/documents/pdfs/2013/december/doclassactionsbenefitclassmembers.pdf.

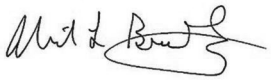
Arbitration Association (AAA), the country's largest arbitration provider, imposes detailed fairness protocols for employment arbitrations. They will not accept a case unless the arbitration agreement complies with those standards. These requirements mandate that arbitrators must be neutral and disclose any conflict of interest, give both parties an equal say in selecting the arbitrator, limit the fees employees have to pay to $300 (which is less than the filing fee for a case in federal court), empower the arbitrator to order any necessary discovery, and require that damages, punitive damages, and attorneys' fees be awardable to the claimant to the same extent as in court. The AAA rules require that consumers be given the option of resolving their dispute in small claims court. JAMS, another leading arbitration provider, requires similar protections.

The courts provide another layer of oversight. If an arbitration agreement is unfair, courts can and do step in to declare those arbitration agreements unconscionable and unenforceable. Arbitration clauses that provide for biased arbitrators, impose unfair procedures, limit awards of damages or attorneys' fees, or require arbitration in out-of-the-way places are routinely held unenforceable. Courts also invalidate arbitration agreements that purport to impose a "gag order." Many courts have ruled that arbitration agreements cannot prevent employees from publicly discussing claims or filing complaints with government agencies, nor can arbitrators' decisions be kept secret. Furthermore, state laws require arbitral forums such as the AAA to disclose arbitration outcomes in all consumer and employee arbitrations. Courts consistently hold that either party may disclose the results of arbitration proceedings.

The opponents of pre-dispute arbitration agreements also ignore the critical reality that, if enacted, the "Restoring Justice for Workers Act" would eliminate the only realistic opportunity for employees to obtain a remedy for the vast majority of grievances that they have. While getting rid of arbitration will enable class action lawyers to bring more cases, most employee disputes are not eligible to be resolved through a class action. In addition, they involve amounts too low to attract an attorney to take an individual case. Arbitration empowers employees by giving them the only realistic avenue for obtaining relief for such claims. The only real beneficiaries of this bill would be the plaintiffs' lawyers who would be able to bring more lawsuits to enrich themselves while providing little or no benefit to class members.

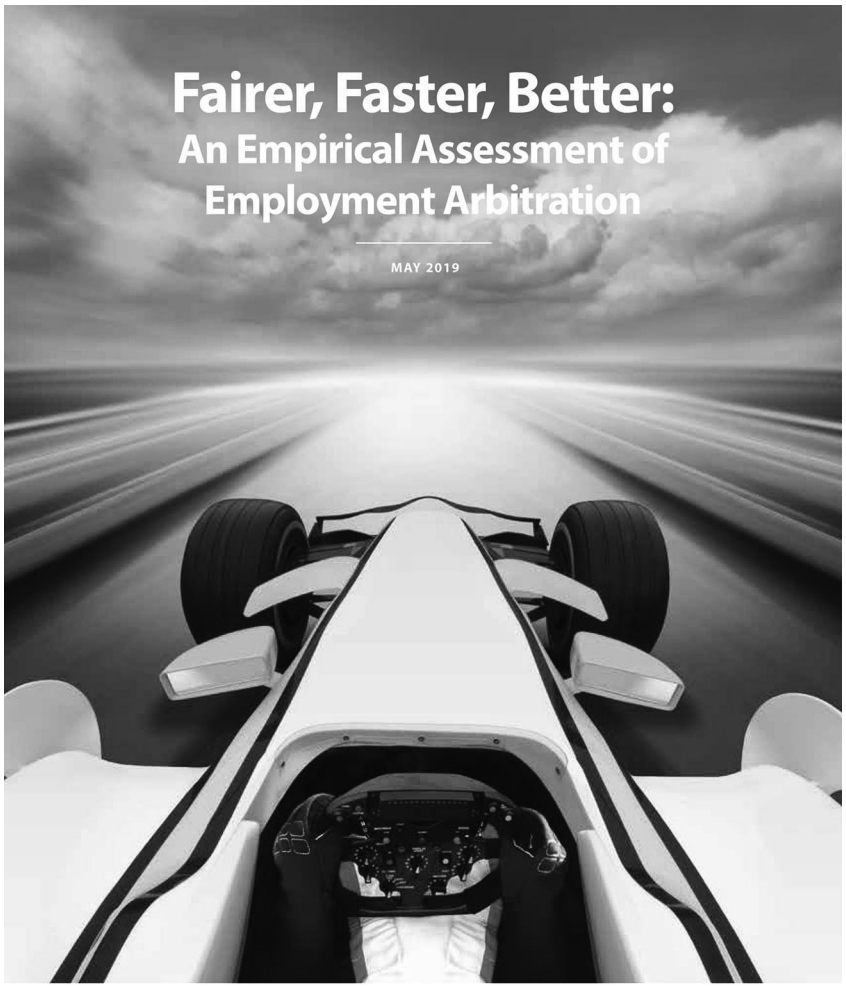
Accordingly, we urge you to oppose H.R. 4841.

Sincerely,



Neil L. Bradley

cc: Members of the House Subcommittee on Health, Employment, Labor, and Pensions



ndp analytics
research · data · innovation

Fairer, Better, Faster:
An Empirical Assessment of Employment Arbitration

Nam D. Pham, Ph.D. and Mary Donovan[1]

Table of Contents

1 Nam D. Pham is Managing Partner and Mary Donovan is a Principal at ndp | analytics. Lea Lassoued and Davide Sonzogni provided research assistance. The U.S. Chamber Institute for Legal Reform provided financial support to conduct this study. The opinions and views expressed in this report are solely those of the authors.

EXECUTIVE SUMMARY

Alternative dispute resolution (ADR) procedures have become more common over the last couple of decades as a means to resolve employment disputes in the workplace. One ADR method, employment arbitration, is an alternative to having a judge or jury decide an employment dispute through proceedings in court.

Arbitration has a long history as a method of resolving employment-related disputes. Arbitration has been recognized as a lawful method of dispute resolution at least since the Federal Arbitration Act was enacted in 1925. The Act requires federal and state courts to enforce and uphold arbitration agreements to the same extent as other types of contracts.

In 1995, the American Arbitration Association (AAA) developed the Employment Due Process Protocol, a new set of arbitration rules tailored for the employment context. Other ADR providers, such as Judicial Arbitration and Mediation Services, Inc. (JAMS), have followed suit and established their own employment arbitration procedures.

Employment arbitration is an adjudicative proceeding. Similar to the traditional litigation process, each party presents evidence and arguments to an arbitrator or a panel of arbitrators at a hearing. Unlike litigation, plaintiffs and defendants in arbitration typically are not limited to state or federal rules of evidence and the process can be more informal than traditional court-based litigation. After the evidence is presented, the arbitrator provides a written opinion. That decision, called an award, is final and is subject to deferential review in court.[2] The U.S. Supreme Court has noted that the arbitration process has many advantages compared to litigation, because it is faster, simpler, less expensive, less disruptive, and more flexible.[3] However, only a limited number of empirical studies have fully assessed and compared similar arbitrations and litigation.

Arbitration has a long history as a means of resolving employment-related issues, and it has gained popularity as a forum for resolving employment disputes since the mid-1990s. But there have been few empirical studies of the arbitration process. This report compiles, analyzes, and compares over 10,000 employment arbitrations with over 90,000 employment lawsuits in federal courts that terminated between 2014-18. These arbitrations and litigations exhibited a similar outcome pattern, in which three quarters were settled and only between 10%-14% ended with prevailing and losing parties. However, when cases proceeded to adjudication, plaintiffs, who almost always were employees, were more likely to prevail in arbitration than in litigation. During 2014-18, in decided cases, employee-plaintiffs prevailed in more than 32% of arbitrations but only 11% of litigations. Furthermore, prevailing employees typically won twice as much money in arbitration than in litigation. Employment arbitration also was faster than litigation.

2 See 9 U.S.C. §§ 10-11.

3 See, e.g., Mitsubishi v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985); Circuit City Stores, Inc. v. Adams, 532 U. S. 105, 123 (2001); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018).

This study compiled a large dataset of over 100,000 employment disputes to undertake an empirical analysis of employment arbitration in comparison to court-based employment litigation. We first compared the outcome pattern of all employment arbitration and employment litigation cases, whether initiated by employees or employers, that were terminated between 2014 and 2018. Then we compared the win rate, award amount, and dispute processing time from initiation to termination for employment arbitration cases and employment litigation cases that were initiated by employees and were terminated with awards between 2014 and 2018. The employment arbitration data came directly from AAA and JAMS, and the employment litigation data indirectly came from Lex Machina, a data provider that compiles litigation data from Public Access to Court Electronic Records (PACER)—the federal courts' system for accessing information about federal court cases.

Key findings of the report are:

1. **In general, the way most employment disputes are ultimately resolved does not vary between arbitration and litigation.** Nearly three-quarters of all employment disputes, whether instituted by employees or employers, or in arbitration or litigation, were settled. About half of the remaining cases were either dismissed, abandoned, or withdrawn; and the remaining cases were terminated with monetary and/or non-monetary awards. Only a small fraction (1.5%) of employment litigation cases filed in court reached trial.

2. **Employees are three times more likely to win in arbitration than in court.** Employees initiated and prevailed in 32% of all employment arbitrations that were terminated with awards during 2014-18. In contrast, employees initiated and prevailed in only 11% of all employment litigations that were terminated with judgments during the same period.

3. **Employee-plaintiffs receive higher monetary awards in employment arbitration than in litigation.** Employee-plaintiffs who brought cases and prevailed in arbitration won approximately double the monetary award that employees received in cases won in court. The median award to employee-plaintiffs was $113,818 in arbitration compared to $51,866 in litigation. The average award to employee-plaintiffs was $520,630 in arbitration compared to $269,885 in litigation. Furthermore, the award of the top 90th percentile was $668,998 in employment arbitration compared to $539,574 in litigation.

4. **Employment arbitration is quicker than litigation.** Employee-plaintiff arbitration cases that were terminated with monetary awards averaged 569 days (523 days in median). In contrast, employee-plaintiff litigation cases that terminated with monetary awards required an average of 665 days (532 days in median).

In sum, employees have a better chance of winning in arbitration than in litigation. Employees initiated and prevailed in 32.3% of all arbitration cases that terminated with awards during 2014-18 compared to only 11.3% in litigation. Employee-plaintiffs in arbitration received monetary awards approximately two times the amounts received in litigation, both in average and median values. And employment arbitration cases were resolved faster than court cases, both in average and median number of days. (Table 1)

Table 1.
Employee-plaintiffs had better chances to win, had higher monetary award values, and spent less time in arbitration than in litigation

	Cases that employees initiated and prevailed as % of all winning cases	Amount awarded	Time spent from initiation to termination with monetary awards
Arbitration	32.3%	$520,630 (average) $113,818 (median)	569 days (average) 523 days (median)
Litigation	11.3%	$269,885 (average) $51,866 (median)	665 days (average) 532 days (median)

OUTCOMES OF EMPLOYMENT ARBITRATION AND LITIGATION

An employment dispute, resolved either by arbitration or litigation, has three potential outcomes: (1) the dispute is settled at some point during the process on terms that can include monetary payments and/or non-monetary promises (the settlement details may or may not be disclosed publicly); (2) the dispute is dismissed, abandoned, or withdrawn during the process; or (3) the dispute ends in a decision by the adjudicator in favor of one or both sides. We analyzed and compared the outcome pattern between employment arbitration and litigation cases that were initiated by employees or employers and were terminated during 2014-18.

Arbitration. Among 10,486 employment arbitration cases that were terminated during 2014-18, 7,664 cases (73%) were settled; 1,792 cases (17%) were dismissed, abandoned, or withdrawn; and 1,030 cases (10%) resulted in decisions with monetary and/or non-monetary elements. (Table 2)

Table 2.
More than 73% of employment arbitration cases were settled and 10% terminated with decisions

	Number of Cases	As % of Terminated Cases
Terminated cases	10,486	100.0%
Decision	1,030	9.8%
Settlement	7,664	73.1%
Dismissed/Withdrawn	1,792	17.1%

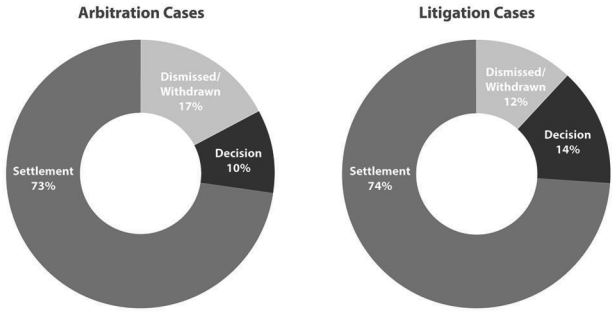
Litigation. During 2014-18, 90,758 employment cases were terminated in federal courts. Among these terminated cases, 66,927 (74%) cases were settled, 10,768 (12%) cases were dismissed, abandoned, or withdrawn, and 13,063 (14%) cases were terminated by court or jury determinations. (Table 3)

Table 3.
Similarly, nearly 74% of federal court employment litigation cases were settled and 14% resulted in decisions

	Number of Cases	As % of Terminated Cases
Terminated cases	90,758	100.0%
Decision	13,063	14.4%
Settlement	66,927	73.7%
Dismissed/Withdrawn	10,768	11.9%

Overall, the resolution pattern of employment disputes is similar between arbitration and litigation. Nearly three-quarters of all employment disputes (whether initiated by employees or employers) were settled regardless of the process (arbitration or litigation). Of the remaining cases, about half were either dismissed, abandoned, or withdrawn. About 10% of arbitration cases and 14% of litigation cases resulted in decisions, with monetary and/or non-monetary elements. (Figure 1)

Figure 1.
The general pattern of outcomes is similar between employment arbitration and litigation



DECIDED CASES

Employment disputes can be initiated by either the employee or employer and can be terminated with a decision in favor of the plaintiff, the defendant, or both. We reviewed all cases that terminated in a decision (in arbitration or in court) and calculated the share of employee-initiated cases in which the employee prevailed.

Arbitration. Among the 1,030 employment arbitration cases terminated by decisions during 2014-18, 776 cases identify a prevailing party. The information regarding the prevailing party in the remaining 254 cases was unknown or indicated that there were awards to both plaintiffs and defendants. Among these 776 cases identifying a single prevailing party, employees initiated and prevailed in 251 cases, accounting for 32.3%. (Table 4)

Table 4.
Employees initiated and won 32% of employment arbitration cases that terminated with decisions

	Number of Cases	As % of Awarded Cases
Decided cases with one prevailing party	776	100.0%
Employees initiated and prevailed	251	32.3%

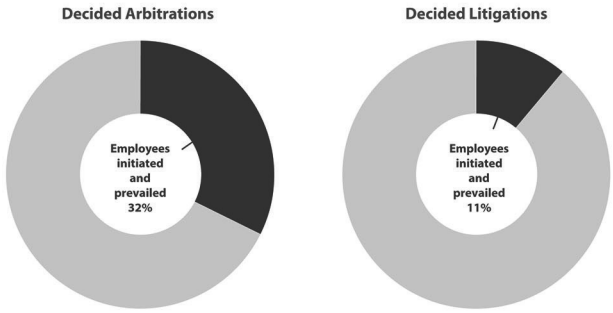
Litigation. All 13,063 federal court employment cases that terminated with decisions during 2014-18 have information regarding the prevailing party. Among these 13,063 cases, employees initiated and prevailed in 1,456 cases, accounting for 11.1%. (Table 5)

Table 5.
Employees initiated and won only 11% of employment litigation cases that terminated with decisions

	Number of Cases	As % of Awarded Cases
Decided cases with one prevailing party	13,063	100.0%
Employees initiated and prevailed	1,456	11.1%

Overall, both employment arbitration and litigation cases had a small chance of terminating with decisions: 10% for arbitration and 14% for litigation. However, an employee is much more likely to win in arbitration than in litigation. For employment disputes that terminated with awards to one party during 2014-18, employees initiated and prevailed 32% of the time in arbitration compared to only 11% in litigation. In other words, the chances for employees to win in employment arbitration were three times higher than in court. (Figure 2)

Figure 2.
The chances for employees to win in employment arbitration were three times higher than in litigation



AMOUNT AWARDED

Employment arbitration and litigation can be resolved with monetary and non-monetary awards to plaintiffs, defendants, or both. We calculated and compared the distribution of monetary award amounts to employees who prevailed in employee-initiated cases in arbitration and litigation.

In employee-plaintiff arbitration cases that terminated with monetary awards, prevailing employees received approximately two times the amount that employee-plaintiffs received in cases litigated in court. Among employment arbitration cases that terminated during 2014-18, the median and average awards to employee-plaintiffs were $113,818 and $520,630, respectively. The first and third quartile of award amounts were $23,118 and $295,936, respectively. The award amounts were at least $668,998 for the top 10% of employment arbitration cases awarded to employees who initiated the claims. During the same period, the median and average amounts awarded to employees who initiated employment litigation were $51,866 and $269,885, respectively. The first and third quartile of award amounts were $15,750 and $178,440, respectively. The award amounts were at least $539,574 for the top 10% of employment litigation cases awarded to employees who initiated the claims. (Table 6)

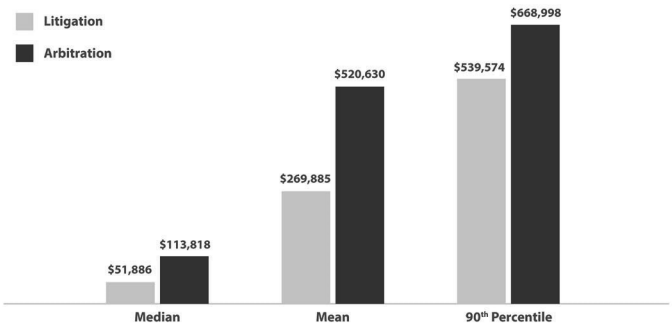
Table 6.
Award amounts to employee-plaintiffs were higher in arbitration than in litigation

	Mean	First Quartile	Median	Third Quartile	90th Percentile
Arbitration (247 cases)	$520,630	$23,118	$113,818	$295,936	$668,998
Litigation (1,446 cases)	$269,885	$15,750	$51,866	$178,440	$539,574

Overall, employee-plaintiffs received higher awards, both in median and mean values, in arbitration than in litigation: (Figure 3)

- The median award for employee-plaintiffs in employment arbitration was nearly 120% higher than litigation, $113,818 compared to $51,866.
- The average award for employee-plaintiffs in employment arbitration was 93% higher than litigation, $520,630 compared to $269,885.
- The top 10% of awards to employee-plaintiffs in employment arbitration was 24% higher than litigation, beginning at $668,998 compared to $539,574.

Figure 3.
Employees received higher awards in employment arbitration than in litigation



TIME TO RESOLUTION

Another important feature of arbitration is that it resolves cases faster than litigation. We calculated and compared the dispute-processing time from initiation to termination for disputes initiated by employees in arbitration and litigation. Time was measured by days from the filing date to the termination.

Arbitration. The median and average number of days from initiation to termination were 523 and 569, respectively, in cases where employees initiated and prevailed during 2014-18. The bottom quartile and the third quartile were 397 days and 686 days, respectively. 10% of arbitration cases that employees initiated and in which they prevailed with awards required at least 844 days. (Table 7)

Table 7.
The average employment arbitration case terminated with awards in 569 days

	Mean	First Quartile	Median	Third Quartile	90th Percentile
Arbitration cases where employees initiated and prevailed (251 cases)	569	397	523	686	844

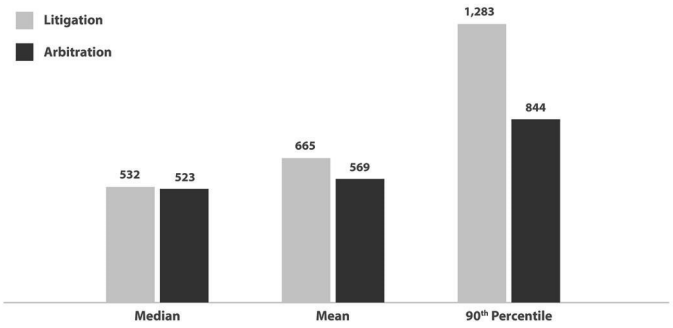
Litigation. The litigation process has many steps and therefore requires time. Half of cases that employees initiated in litigation in federal courts and prevailed during 2014-18 required at least 532 days, with an average of 665 days. 10% of litigation cases that employees initiated and terminated in courts with awards required at least 1,283 days. (Table 8)

Table 8.
The average time for litigation to terminate with monetary awards was 665 days

	Mean	First Quartile	Median	Third Quartile	90th Percentile
Litigation cases where employees initiated and prevailed (1,453 cases)	665	274	532	867	1,283

Overall, the processing time for employees to win awards in arbitration is less than in litigation. The average processing time from initiation to completion was 569 days in employee-plaintiff arbitration cases compared to 665 days in employee-plaintiff litigation cases. The median processing time was 523 days in employee-plaintiff arbitration cases compared to 532 days in employee-plaintiff litigation cases. The processing time of the 90th percentile started from 844 days in arbitration compared to 1,283 days in litigation. (Figure 4)

Figure 4.
Employee-plaintiff employment disputes required fewer days in arbitration than in litigation

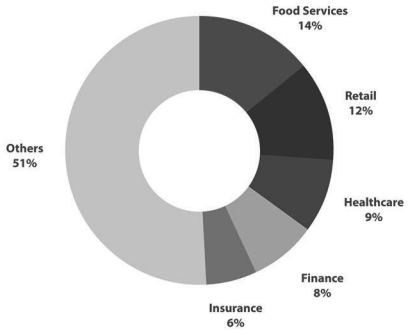


CHARACTERISTICS OF EMPLOYMENT ARBITRATION CASES

Half of the employment arbitration cases that were terminated during 2014-18 were concentrated in five industries: food services, retail, healthcare, finance, and insurance.

Both food services and retail industries have higher numbers of small businesses, part-time employees, and lower-income employees. (Figure 5)

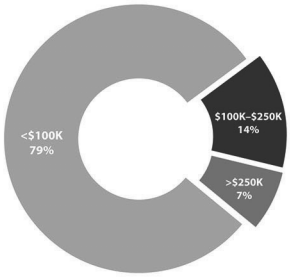
Figure 5.
Employment arbitration spans across industries, with more than 25% of arbitrations concentrated in food services and retail industries



Employees across salary levels use arbitration to resolve their employment disputes. Over 79% of employees who initiated employment arbitration had annual salaries under $100,000 at the time of the dispute. For comparison, over 70% of U.S. households earned less than $100,000 per year in 2017.[4] About 14% of employees involved in employment arbitration had annual salaries between $100,000 and $250,000 and 7% had annual salaries above $250,000. (Figure 6)

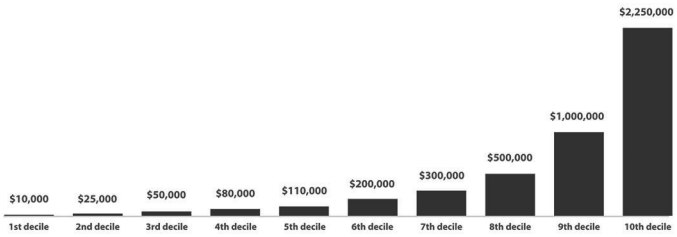
4 U.S. Census Bureau, Households by Total Money Income, Race, and Hispanic Origin of Household: 1967 to 2017.

Figure 6.
79% of employees who initiated employment arbitration earned less than $100,000 a year



Among those 10,486 employment arbitration cases terminated during 2014-18, AAA and JAMS reported the amount claimed for about one-third of all cases. The dollar amount claimed in these 3,550 cases ranges from several thousands of dollars to tens of millions of dollars. The median claim amount was $150,000 and the mean was $947,000. The median amount claimed of the lowest 10% was $10,000 and the top 10% was $2.25 million. (Figure 7)

Figure 7.
Employment arbitration claims ranged from several thousands to tens of millions of dollars



METHODOLOGY

This study compiled employment arbitration data from AAA and JAMS reports and employment litigation data in federal courts from PACER records to construct a large database to compare employment arbitration and employment litigation. Our dataset contains arbitration and litigation cases that were initiated by either employees or employers and were terminated during 2014-18. Using the data, we first compared the outcomes (decisions, settlement, or dismissed/withdrawn) of all employee-initiated and employer-initiated cases between arbitration and traditional employment litigation. We then compared the win rate, award amount, and dispute processing time from initiation to termination for employment arbitration cases and employment litigation cases that were initiated by employees and were terminated with awards between 2014 and 2018.

Arbitration Data. Our analysis of employment arbitration cases relies on two data sources – American Arbitration Association (AAA), the largest provider of employment arbitration services, and Judicial Arbitration and Mediation Services, Inc. (JAMS).[5]

We downloaded data directly from the AAA and JAMS websites in January 2019. We combined both AAA and JAMS employment arbitration data for our analysis. Both AAA and JAMS provide data for arbitration cases terminated during 2014-18. AAA does not provide data of employment arbitration terminated prior to 2014. JAMS employment arbitration data prior to 2014 are incomplete and we therefore did not include them in our analysis. AAA and JAMS do not provide data for on-going employment arbitration cases. We removed employment arbitration cases with missing data on the initiating party and/or outcome.

Our dataset contains 7,601 employment cases from AAA and 2,885 employment cases from JAMS, totaling 10,486 arbitration cases that terminated during 2014-18. The employer and employee in each case were assigned as plaintiff and defendant depending on the initiating party. 1,030 cases were recorded as terminating in awards, of which 776 had awards either only to the plaintiff or only to the defendant; the remaining cases had awards to both parties or failed to indicate which party prevailed. Of those 776 cases, 251 were initiated by employees. When analyzing award amounts, cases with the amount recorded as "0" are included and cases where the value is missing are excluded.

Litigation Data. Our analysis of litigation cases relies on 90,758 federal court cases that terminated during 2014-18. We downloaded litigation data from the Lex Machina portal in January 2019. Lex Machina is a database that collects and organizes federal court data from the federal courts' Public Access to Court Electronic Records (PACER) system.

Our analysis excludes class actions and cases where the plaintiff was a government agency, as these claims are not comparable to private party employment arbitration. Additionally, cases terminated with a consent judgment were classified as "settled cases" instead of "awarded cases" because they embody settlements between the parties. This reclassification was applied to 144 cases (1.1% of all awarded cases). After removing consent judgments, we identified 13,063 awarded cases (i.e., defendant or plaintiff wins). Of these,

5 AAA Consumer and Employment Arbitration Statistics, available at https://www.adr.org/consumer and JAMS Consumer Case Information, available at https://www.jamsadr.com/consumercases/

4,303 cases have monetary damage amounts. These damages are referred to as "monetary awards" throughout the report. Due to missing data, there is a negligible discrepancy between the total number of cases used to analyze the award amount and the total number of cases used to analyze the duration from initiation to award. Of the 13,063 awarded cases, plaintiffs won 1,711. To determine the number of employee-initiated cases, we manually classified cases won by the plaintiff based on the names of the plaintiff and defendant. Plaintiffs or defendants with companies or organizations in the name were labeled "company," individuals were labeled "employee."

CONCLUSION

The empirical evidence shows that employment arbitration is an effective process for resolving employment disputes. While litigation is a long and often burdensome process with many rules and requirements, arbitration is simpler and more flexible. We used a large dataset from the largest employment arbitration providers and a national litigation database to analyze and compare arbitration and litigation in recent years. Analysis of that evidence shows that arbitration yields better results for employee-plaintiffs. Arbitration is faster than litigation, taking 569 days, instead of 665 days, on average for employee-plaintiffs to obtain an award. Importantly, employee-plaintiffs fare better in arbitration, winning 32% compared to 11% of awarded cases for litigation. Moreover, monetary awards for employee-plaintiffs in arbitration were 93% higher than litigation on average. In sum, arbitration is faster and more favorable to employees than litigation.

ABOUT THE AUTHORS

Nam D. Pham, Ph.D., Managing Partner
Nam D. Pham is Managing Partner of ndp | analytics, a strategic research firm that specializes in economic analysis of public policy and legal issues. Prior to founding ndp | analytics in 2000, Dr. Pham was Vice President at Scudder Kemper Investments in Boston. Before that he was Chief Economist of the Asia Region for Standard & Poor's DRI; an economist at the World Bank; and a consultant to both the Department of Commerce and the Federal Trade Commission. Dr. Pham is an adjunct professor at the George Washington University. Dr. Pham holds a Ph.D. in economics from the George Washington University, an M.A. from Georgetown University; and a B.A. from the University of Maryland. He is a former member of the board of advisors to the Dingman Center for Entrepreneurship at the University of Maryland, Smith School of Business and the Food Recovery Network.

Mary Donovan, Principal
Mary Donovan is a Principal at ndp | analytics. She serves dual roles of economist and communications manager. Her responsibilities include client research and analysis, as well as public relations. Before joining ndp | analytics, Mary was an Account Executive at the Kellen Company where she provided full-service management, including government affairs work and strategic consulting, to trade associations in the payments and food-business industries. Mary holds a Master's in Applied Economics from the University of Maryland and a Bachelor's from State University of New York (SUNY) Geneseo.

About ndp | analytics
Founded in 2000, ndp | analytics produces reports and products through the rigor of quantitative analyses. Our work is rooted in economic fundamentals that construct deliverables that appeal to a broad audience through clear messaging. Our firm has advised the business community on the economic impacts of a wide-range of public policies, developed comprehensive research-based advocacy programs, established benchmarks across industries, and assessed the costs and benefits of major legislation and regulations. The work our team has conducted has been prominently cited in numerous channels including the Economic Report of the President to Congress, national media outlets, reports from government agencies, Congressional testimonies, and by Members of Congress. We provide support to a diverse group of clients including trade associations, corporations, law firms, multilateral organizations, and government agencies.

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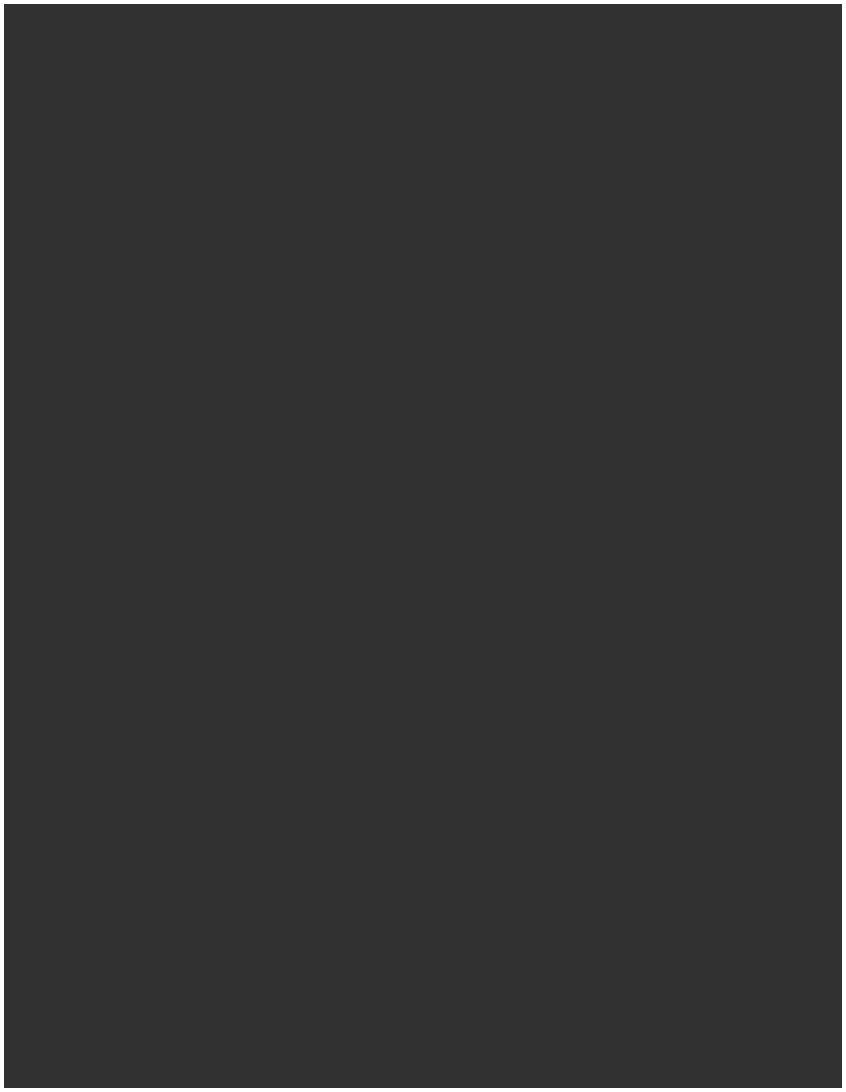

ndp analytics
turning data into action

Claimant Win Rates in Consumer and Employment Arbitration

November 3, 2021

As the national debate over arbitration intensifies, we believe it is important to make available the most up-to-date statistics on the win rates for individuals in employment and consumer arbitration cases. We have provided the below analysis to ensure that policymakers have access to accurate information on this critical topic.

In this document, we calculate win rates for individuals in employment and consumer arbitration cases using the latest data available (January 2016 through June 2021). We use the same methodology as in our two previous reports, Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration and Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration, to organize and analyze the latest AAA and JAMS datasets.

Employment Arbitration

The most recent AAA and JAMS datasets include 19,773 employment arbitration cases that terminated between January 2016 and June 2021, of which 7,359 terminated during the final 18 months of the study period (January 2020 – June 2021).[1]

Approximately 7% of 2016 – 2021 cases were decided on the merits, i.e., terminated with awards, and the remainder were settled, withdrawn, or dismissed. This figure includes 1,462 decided cases in the entire dataset, including 521 cases from January 2020 to June 2021.

Turning to the question of how often claimants prevail in employee-initiated arbitrations, our original 2019 employment arbitration report found that the win rate[2] of employment arbitration cases was 32.3%. The win rate of employment arbitration cases that terminated during January 2016 – June 2021 is higher, at 34.0%. From January 2020 – June 2021 this figure is higher still, at 38.9%.

Table 1.
Employment Arbitration Win Rates

	2014 – 18 (dataset from 2019 report)	**Jan 2016 – Jun 2021** (full five-year dataset)	**Jan 2020 – Jun 2021** (most recent available)
Total Employment Arbitration Cases	10,486	19,773	7,359
Decided Cases	1,030	1,462	521
Decided Cases as % of Total	9.8%	7.4%	7.1%
Decided Cases with 1 Prevailing Party	776	1,295	494
Employee Initiated & Prevailed	251	440	192
Win Rate	**32.3%**	**34.0%**	**38.9%**

[1] Less than 1% of cases closed prior to 2016.
[2] To calculate the win rate, we divide the number of cases where the employee initiated and prevailed by the total number of decided cases with one prevailing party (we exclude cases where both parties won and cases with no prevailing party).

Consumer Arbitration

The most recent AAA and JAMS data include 31,510 consumer arbitration cases that terminated between January 2016 and June 2021, of which 13,734 terminated during the final 18 months of the study period.[3]

Less than 16% of these cases were decided on the merits, i.e., terminated with awards, and the remainder were settled, withdrawn, or dismissed. This figure includes 4,875 decided cases in the entire dataset, including 1,536 cases from January 2020 to June 2021.

Again turning to the question of how frequently claimants prevail, our 2020 consumer arbitration report found that the win rate[4] of claimant-initiated consumer arbitration cases that terminated during January 2014 – June 2020 is 44.3%. The win rate of consumer arbitration cases that terminated during January 2016 – June 2021 is higher, at 46.3%, and during January 2020 – June 2021 this number is marginally higher still, at 46.7%.

Table 2.
Consumer Arbitration Win Rates

	Jan 2014 – Jun 2020 (dataset from 2020 report)	Jan 2016 – Jun 2021 (full five-year dataset)	Jan 2020 – Jun 2021 (most recent available)
Total Consumer Arbitration Cases	24,629	31,510	13,734
Decided Cases	5,129	4,875	1,536
Decided Cases as % of Total	20.8%	15.5%	11.2%
Decided Cases with 1 Prevailing Party	4,113	4,088	1,293
Consumer Initiated & Prevailed	1,821	1,893	604
Win Rate	**44.3%**	**46.3%**	**46.7%**

Sources

AAA Consumer and Employment Arbitration Statistics, available at https://www.adr.org/consumer.
JAMS Consumer Case Information, available at https://www.jamsadr.com/consumercases.

Researchers

Nam D. Pham, Ph.D., Managing Partner, ndp | analytics
Mary Donovan, Principal, ndp | analytics

[3] Less than 1% of cases closed prior to 2016.
[4] To calculate the win rate, we divide the number of cases where the consumer initiated and prevailed by the total number of decided cases with one prevailing party (we exclude cases where both parties won and cases with no prevailing party).

[Questions submitted for the record and the responses by Mr. Colvin follow:]

November 15, 2021

Alexander Colvin, J.D., Ph.D.
Kenneth F. Kahn '69 Dean
School of Industrial and Labor Relations, Cornell University
454 ILR Research Building
Ithaca, NY 14853-3901

Dear Dr. Colvin:

I would like to thank you for testifying at the Subcommittee on Health, Employment, Labor, and Pensions hearing entitled "*Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements,*" held on Thursday, November 4, 2021.

Please find enclosed additional questions submitted by Committee Members following the hearing. Please provide a written response no later than Monday, November 22, 2021, for inclusion in the official hearing record. Your responses should be sent to Rasheedah Hasan (Rasheedah.Hasan@mail.house.gov), Mariah Mowbray (Mariah.Mowbray@mail.house.gov), and Kyle DeCant (Kyle.DeCant@mail.house.gov) of the Committee staff. They can be contacted at 202-225-3725 should you have any questions.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

Enclosure

Subcommittee on Health, Employment, Labor, and Pensions Hearing
"Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements"
Thursday, November 4, 2021
10:15 a.m. (Eastern Time)

Representative Donald Norcross (D – NJ)

1. Does anything in the Restoring Justice for Workers Act prevent employers and employees from choosing arbitration if they both agree that it is the best way to resolve their dispute?
    a. What are the types of disputes that are suited to be resolved through arbitration?

2. I used to hear constantly that workers were scared to come forward and demand the wages they were owed from their employer when they were stolen from them. One particularly troubling aspect of collective action waivers is that it makes it harder for employees to pool their resources into a single case—especially in a wage theft case where the amounts owed to each worker may be relatively small. Does this affect an employee's decision to file an individual claim, and does it lead to eligible cases just never getting filed?

Representative Lucy McBath (D – GA)

1. In your testimony you describe how employees are substantially less likely to win in cases brought under forced arbitration. Does your research suggest that this is due to differences in the strength of cases brought in arbitration versus court, or is it an effect of the arbitration process?

Representative Andy Levin (D – MI)

1. Can you tell us about what you described in your testimony as the "repeat player advantage?"
    a. How did your research establish the existence of the "repeat player advantage"?
    b. What can you tell us about the scale of the advantage employers gain through being repeat players?

Testimony Before the Subcommittee on Health, Employment, Labor, and Pensions
Hearing on
"Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements"

Responses to Questions from Members

Alexander Colvin
ILR School, Cornell University
November 4, 2021

Representative Donald Norcross (D – NJ)
1. Does anything in the Restoring Justice for Workers Act prevent employers and employees from choosing arbitration if they both agree that it is the best way to resolve their dispute?
a. What are the types of disputes that are suited to be resolved through arbitration?

Answer:

The Restoring Justice for Workers Act allows employers and employees to choose arbitration to resolve their disputes after the dispute has arisen. This allows voluntary post-dispute use of arbitration if the employer and the employee decide it is the best way to resolve their dispute. Research has found that where voluntary post-dispute arbitration is available as an option the parties will make use of it as an option to help resolve disputes.[1] The Restoring Justice for Workers Act does include some basic protections to ensure that the decision to choose arbitration is truly voluntary, including allowing the parties a reasonable period of time to make this decision. This allows arbitration to be used to resolve any dispute where the parties both choose it as the method of resolution on a voluntary basis.

A category of disputes where the Restoring Justice for Workers Act specifically supports the use of arbitration is in the resolution of disputes under collective agreements. In my view this is an appropriate recognition of a long-standing and successful method of resolving workplace disputes. This system of labor arbitration has proven a successful method of providing due process in union represented workplaces while ensuring that conflicts are resolved through arbitration rather than through strikes and other work actions that disrupt production. The reason that labor arbitration has been so successful and should be protected is that it is truly bilateral process negotiated by two sophisticated parties, employers and unions, through the collective bargaining process. The labor arbitrators who make decisions under this system are well respected neutrals who must be acceptable to both parties to be selected to resolve disputes.

2. I used to hear constantly that workers were scared to come forward and demand the wages they were owed from their employer when they were stolen from them. One particularly troubling aspect of collective action waivers is that it makes it harder for employees to pool their resources into a single case—especially in a wage theft case where the amounts owed to each worker may be relatively small. Does this affect an employee's decision to file an individual claim, and does it lead to eligible cases just never getting filed?

Answer:

We find consistently across studies that it is very hard for a worker to make a claim for lost wages or other employment rights on their own. Making a claim effectively requires legal representation and it works better when workers can band together in a class or collective action. Many individual lost wage claims are small in size, amounting to a few hundred dollars. They matter a lot to the worker, but they are not large enough to allow a lawyer to take that single case on the standard contingency fee basis given the costs involved in pursuing the case. What we see in practice is that there are very few small value cases brought in forced arbitration. Only a quarter of the claims brought are under $61,984 in value

[1] J. Ryan Lamare and David B. Lipsky. 2019. "Resolving Discrimination Complaints in Employment Arbitration: An Analysis of the Experience in the Securities Industry" *ILR Review*, 72(1): 158-184.

and only 20.9 percent of plaintiffs in forced arbitration earn less than $100,000 per year.[2] What is missing from forced arbitration are large numbers of small value claims and claims brought by workers with mid to lower income levels. More generally, the relatively small number of cases filed in arbitration compared to litigation, despite just over half of all workers being subject to forced arbitration, indicates that many eligible claims are not getting filed because of forced arbitration.

Representative Lucy McBath (D – GA)
1. In your testimony you describe how employees are substantially less likely to win in cases brought under forced arbitration. Does your research suggest that this is due to differences in the strength of cases brought in arbitration versus court, or is it an effect of the arbitration process?

Answer:

In my own research, and that of others doing similar work, we have looked at indicators of whether there are differences in the types of cases brought in arbitration versus court that might explain the differences in outcomes that we find. Looking across these research findings, we do not see differences in the cases that would explain away the differences in outcomes. For example, in research I conducted with Kelly Pike, we found that claims in forced arbitration are mostly about violations of employment laws, like anti-discrimination and wage and hour statutes, similar to the types of claims we see in the courts.[3] The best analysis on this question is a 2021 article by Mark Gough of Penn State, who does a comprehensive comparison of forced arbitration and court cases taking into account various indicators of the type and strength of cases.[4] His key finding is that the employee win rates and damage amounts are higher in court than in forced arbitration controlling for differences between cases.

These findings are also in line with the results of experimental research that presents different decision-makers with the same cases and compares how they decide them. This experimental research finds that employment arbitrators are significantly less likely to rule in favor of employees than are other decision-makers such as jury members.[5] The fact that we see similar results emerging from different research methods increases our confidence in the findings that the differences in outcomes are due to the effect of the forced arbitration process.

Representative Andy Levin (D – MI)

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[2] Colvin, Alexander J.S. and Kelly Pike. 2014. "Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?" *Ohio State Journal on Dispute Resolution*, Vol. 29, No. 1, pp. 59-83

[3] Colvin, Alexander J.S. and Kelly Pike. 2014. "Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?" *Ohio State Journal on Dispute Resolution*, Vol. 29, No. 1, pp. 59-83.

[4] Mark Gough. 2021. "A Tale of Two Forums: Employment Discrimination Outcomes in Arbitration and Litigation" *ILR Review* 74(4): 875-897.

[5] Klaas, Brian, S., Douglas M. Mahony, and Hoyt N. Wheeler. 2006. "Decision-Making about Workplace Disputes: A Policy-Capturing Study of Employment Arbitrators, Labor Arbitrators, and Jurors." *Industrial Relations*, Vol. 45, no. 1 (January), pp. 68–95.

1. Can you tell us about what you described in your testimony as the "repeat player advantage?" a. How did your research establish the existence of the "repeat player advantage"?
b. What can you tell us about the scale of the advantage employers gain through being repeat players?

Answer:

To establish the existence of the repeat player advantage, we looked across a large dataset of 2802 forced arbitration cases decided over an 11 year period.[6] Larger employers with a lot of cases in forced arbitration tended to do better, winning more cases and having lower damage awards against them. But we were interested in the true repeat player advantage where an employer was doing better where they had multiple cases before the same arbitrator. To analyze this we looked at repeat employer-arbitrator pairing cases, controlling for other factors like an employer that simply had a lot of cases. What we found was that for each additional case that an employer has before the same arbitrator, the odds of the employee winning goes down by 6.2%. Similarly, damages are lower with repeat pairings. Whereas the expected award amount on a first-time pairing was $20,903, we found that by the fifth case that the employer had before the same arbitrator the expected award amount was cut in half to $10,100.

We argue that there are two possible explanations for this finding. One is that employers may be getting an advantage by being able to better select and argue before particular arbitrators. For example, employers may be figuring out what types of cases arbitrators are less likely to rule in favor of and then systematically selecting those arbitrators. The second is that arbitrators may feel a conscious or unconscious bias in favor of employers who are likely to be sources of repeat business in the future. Arbitration works in settings where both sides are repeat players, like in labor arbitration where employers and unions are both sophisticated parties, serving as a check on each other so that arbitrators need to maintain acceptability to both sides. By contrast, our results show that in forced arbitration one side, the repeat player employer, has a systematic advantage over the individual employee who is not a repeat player. This produces a structural disadvantage against employees in the system.

[6] Colvin, Alexander J.S. and Mark Gough. 2015. "Individual Employment Rights Arbitration in the United States: Actor and Outcomes" *ILR Review*, 68(5): 1019-1042.

[Questions submitted for the record and the responses by Ms. Kotegal follow:]

November 15, 2021

Kalpana Kotagal, J.D.
Partner
Cohen Milstein Sellers & Toll PLLC
2200 New York Ave., NE, Fifth Floor
Washington, D.C. 20005

Dear Ms. Kotagal:

I would like to thank you for testifying at the Subcommittee on Health, Employment, Labor, and Pensions hearing entitled "*Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements,*" held on Thursday, November 4, 2021.

Please find enclosed additional questions submitted by Committee Members following the hearing. Please provide a written response no later than Monday, November 22, 2021, for inclusion in the official hearing record. Your responses should be sent to Rasheedah Hasan (Rasheedah.Hasan@mail.house.gov), Mariah Mowbray (Mariah.Mowbray@mail.house.gov), and Kyle DeCant (Kyle.DeCant@mail.house.gov) of the Committee staff. They can be contacted at 202-225-3725 should you have any questions.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

Enclosure

Subcommittee on Health, Employment, Labor, and Pensions Hearing
"Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements"
Thursday, November 4, 2021
10:15 a.m. (Eastern Time)

Representative Donald Norcross (D – NJ)

1. Throughout Mr. King's testimony emphasizes that these provisions are agreements, and that the employee agreed to take any claims to arbitration rather than to court. What does this argument miss about the reality of forced arbitration of workplace disputes?

2. Prof. Colvin shared in his written testimony that the average successful case brought in forced arbitration results in damages of $25,929. How does that number compare to the cost of investigating and bringing even a simple workplace discrimination or harassment case? What about the cost of bringing more complex cases?

3. Ms. Perez testified that she discovered the arbitrator in her case had a personal and professional relationship with her employer's counsel and was previously a shareholder at the firm representing the employer, but she was unable to get the arbitrator's decision set aside. Based on the information in Ms. Paez' testimony, if Ms. Perez had been able to bring her claim in court before a judge would she have had additional protections in the handling of her cases?

4. Are the safeguards to ensure fairness and impartiality generally as strong in arbitration as they are in court?

Representative Lucy McBath (D – GA)

1. Some defenders of forced arbitration argue that it allows workers to represent themselves, making the process simpler and less expensive for them to bring claims when they are wronged in the workplace. In your experience bringing cases in arbitration, do workers stand a fair chance of getting justice if they do not have counsel to assist them?

Representative Andy Levin (D – MI)

1. In your experience, is the risk of having a case brought against them in individual arbitration enough of a deterrent to prevent employers from violating their employees' rights?
    a. How does the deterrent effect of individual arbitration compare to the possibility of litigation, especially class action litigation?

2. Ms. Kotagal, in his testimony Mr. King suggests that the court system would be unable to handle the volume of cases created by restricting the use of forced arbitration. In your experience, given employers often retain the right to appeal decisions of the arbitrator, do forced arbitration clauses always mean a reduction in the burdens on the courts?

ANSWERS TO QUESTIONS FOR THE RECORD
FOLLOWING A HEARING ON THE
INJUSTICE OF FORCED ARBITRATION AGREEMENTS
CONDUCTED BY THE HOUSE COMMITTEE ON EDUCATION AND LABOR,
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS
UNITED STATES HOUSE OF REPRESENTATIVES

November 22, 2021

Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements

Kalpana Kotagal
Cohen Milstein Sellers & Toll, P.L.L.C.
Washington, D.C.

On November 4, 2021, the House Subcommittee on Health, Employer, Labor and Pensions convened a hearing at which Kalpana Kotagal, Partner at Cohen Milstein Sellers & Toll, P.L.L.C., testified about the implications of forced arbitration has for workers' ability to vindicate their rights. After the hearing, three Members of the Subcommittee submitted questions for the record. This document provides Ms. Kotagal's answers.

Congressman Norcross

Question. Throughout Mr. King's testimony emphasizes [sic] that these provisions are agreements, and that the employee agreed to take any claims to arbitration rather than to court. What does this argument miss about the reality of forced arbitration of workplace disputes?

Answer. That forced arbitration in the employment setting is the product of meaningful agreement or consent is a key myth, one that has allowed forced arbitration to expand into more dimensions of our legal system. In reality, there is nothing mutual or consensual about forced arbitration contracts. Consider *who* is involved in the "bargaining": on one side are well-resourced corporations with legal teams. On the other are individual workers, in need of jobs to maintain their livelihoods. Moreover, consider *when* these contracts are entered into: workers are compelled to "consent" to arbitration well before grounds for any claims have actually arisen, before there is an actual dispute. It is only after workers have begun confronting the terrible circumstance of workplace discrimination or violations of the wage and hour laws that they realize that forced arbitration means that if they seek to challenge that workplace conduct, they will be shunted into a forum with joint action bans, confidentiality requirements, limited options for review, limited access to information to prove their claims, and a decision-maker whose qualifications and impartiality may be in doubt. There is no consent in an arrangement where individual workers, at the behest of their employers, must sign away access to the judicial system before any dispute exists.

While proponents of forced arbitration tend to conflate the imposition of forced arbitration upon individual employees with the good faith bargaining between unions and employers that may include an agreement to utilize arbitration, the two regimes are quite different. Employer-union bargaining results in the creation of collective bargaining agreements ("CBAs") that may contain their own arbitration procedures. But unlike in the forced arbitration context, CBAs are the product of a bilateral system of negotiation between the employer and the employees' representative, the union. In these negotiations, the union represents the collective power of the bargaining unit and enjoys the

technical expertise and institutional knowledge that comes with having negotiated CBAs in the past. Mandatory employment arbitration, by contrast, is the product of unilateral dictation by the employer, is usually non-negotiable, and leaves individual employees to try and decipher the legalese often contained in such agreements, typically without counsel or expertise.

Question. Prof. Colvin shared in his written testimony that the average successful case brought in forced arbitration results in damages of $25,929. How does that number compare to the cost of investigating and bringing even a simple workplace discrimination or harassment case? What about the cost of bringing more complex cases?

Answer. This gets at perhaps the most destructive aspect of forced arbitration: joint action bans. When employment discrimination or wage and hour claims are successfully litigated in the judicial system, they may result in substantial recoveries – *in the aggregate* – that are distributed across affected workers, even where each individual worker's recovery is relatively small. The result is a collective action problem: even though the aggregate damages may amount to millions of dollars, no single worker's potential recovery is large enough to justify the costs of discovery and experts that are critical – necessary – for a worker to win her case. In the judicial forum, the class action and collective action vehicles surmount this collective action problem by allowing claimants to pool their claims into one joint action. This means only one set of experts and one round of discovery is needed to resolve the claims of potentially tens of thousands of claimants. This dramatically reduces the costs incurred by the claimants, rendering their claims economically viable, and permitting them to secure expert counsel to represent them.

Forced arbitration provisions, however, often include joint action bans, which forbid workers from pursuing their claims together. As a result, each individual claimant must pay for her own discovery and expert witnesses, and attorneys are rarely able to take these individual cases. Most frequently workers just give up – they cannot pursue their claims. Shockingly, the Supreme Court held in its 2013 *Italian Colors* opinion that even though these joint action bans render the adjudication of claims "prohibitively expensive," they do not amount to an impediment to the vindication of workers' rights. Not only does this re-imposition of the collective action problem prevent workers from bringing their claims, it also creates horrible inefficiencies in dispute resolution, because it requires the unnecessary duplication of depositions, interviews, and document production across thousands of claims that are nearly identical. Most frequently, however, forced arbitration and joint action bans operate to suppress claims. Workers and employees cannot afford to pursue individual claims in arbitration.

Question. Ms. Perez testified that she discovered the arbitrator in her case had a personal and professional relationship with her employer's counsel and was previously a shareholder at the firm representing the employer, but she was unable to get the arbitrator's decision set aside. Based on the information in Ms. Perez's testimony, if Ms. Perez had been able to bring her claim in court before a judge would she have had additional protections in the handling of her cases?

Answer. There are many additional protections with respect to access to an impartial adjudicator afforded to workers in the judicial forum as opposed to the arbitral forum. First, in a courtroom, the adjudicator is a disinterested, experienced referee who, at least in federal cases, has been confirmed with the Advice and Consent of the Senate and serves a position for life. Arbitrators, by contrast, are "most frequently employer side counsel, who arbitrate cases on a part-time basis—representing

management one day, deciding employment rights cases the next," and act without the guardrail of being democratically confirmed.[1]

Second, in a courtroom, as soon as the clerk's office processes a complaint, the case is assigned to a judge who will then oversee every legal development in the case. If the judge can no longer see to that case for whatever reason, the case is immediately transferred to another judge in the same court. In contrast, when arbitration commences, the parties themselves must seek out an arbitrator to process their dispute. Thus, there is a period at the beginning of a dispute where no adjudicator is refereeing. Moreover, if the eventual arbitrator must step away from the case, the parties must seek out a new one. In my experience, this sometimes happens in the middle of the case, opening another front between the parties and badly delaying proceedings.

Question. Are the safeguards to ensure fairness and impartiality generally as strong in arbitration as they are in court?

Answer. Absolutely not. In addition to the concerns about adjudicators described above, countless other safeguards to ensure fairness and impartiality are lacking in arbitration where they are not in court. The rules governing federal courtrooms are enacted by Congress, with the assistance of the federal judiciary, meaning they are backed by democratic legitimacy. The rules that govern arbitration proceedings are privately written and can be changed as often and as drastically as an employer chooses. Moreover, a worker's access to review – or the right to appeal a decision – is often severely restricted in arbitration, unlike in litigation that takes place in a courtroom.

Perhaps most importantly, courts are public forums. The public is entitled to observe court proceedings, judges issue publicly-available opinions, and lawsuits that are filed against corporations for their misconduct become part of the public record. Arbitration, on the other hand, takes place in secret. As Mr. King pointed out in his written testimony, this is a deeply troubling aspect of forced arbitration that must be addressed. Not only do workers have the right to know which employers are consistently violating the law, but employers and employees alike need the clarity that comes with publicly available legal opinions to inform what kind of conduct is legal and not. Moreover, ours is a system of common law, which requires that today's judicial opinions be consistent with yesterday's. Because arbitration opinions are secretly authored, they are eroding that common law system: they halt the development of new legal interpretations, and undermine the notion that our laws must be equally applied to everyone.

Congresswoman McBath

Question. Some defenders of forced arbitration argue that it allows workers to represent themselves, making the process simpler and less expensive for them to bring claims when they are wronged in the workplace. In your experience bringing cases in arbitration, do workers stand a fair chance of getting justice if they do not have counsel to assist them?

Answer. No, for a couple of reasons. First, because it is a mischaracterization of the arbitration experience to suggest that resolving arbitral disputes amounts to simply a mediated conversation between employer and employee. I have never – not once in the more than a decade that I have handled arbitration claims – seen a case where an employer is not represented by sophisticated counsel. Ms. Perez's story is illustrative of what the experience is actually like: "forced arbitration [isn't an]

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[1] *See* Alexander J.S. Colvin, The Metastasization of Mandatory Arbitration, 94 CHI.-KENT L. REV. 3, 23 (2019) (citing Mark D. Gough & Alexander J.S. Colvin, Decision-Maker and Context Effects in Employment Arbitration (July 26, 2018) (unpublished manuscript) (on file with the International Labor and Employment Relations Association 18th World Congress, Seoul, South Korea)).

informal, internal process," but instead a "complicated, formal, and binding process that looks nothing like mediation or going to court." To suggest that workers will fare well without bringing counsel to advocate on their behalf is a mischaracterization of the process that is as dangerous as it is misleading. Second, because of a well understood phenomenon known as the "repeat player effect," where "repeat players," those involved in many similar litigations over time, enjoy systematic advantages as compared to "one-shotters," who have only occasional recourse to the courts. In the forced arbitration context, the repeat players are the corporate defendants who draft the arbitration provisions, choose or even write the arbitration procedures, and repeatedly find themselves in arbitration hearings. The disadvantaged one-shotters are the employees who enjoy fewer resources and dramatically less familiarity with the arbitration system. This is another notable difference between the forced employment arbitration system as compared to labor arbitration, where both the employer and the union can be classified as repeat players that therefore stand on somewhat equal footing. The concern about the repeat player bias in arbitration is borne out in the data, as Professor Colvin's research has highlighted.

Congressman Levin

Question. In your experience, is the risk of having a case brought against them in individual arbitration enough of a deterrent to prevent employers from violating their employees' rights? How does the deterrent effect of individual arbitration compare to the possibility of litigation, especially class action litigation?

Answer. Compelled arbitration with joint action bans is an inadequate venue for vindicating the rights of workers and deterring harmful workplace practices in the first instance. First, forced arbitration suppresses claims: workers cannot bring them. As I mention above, joint action bans – which almost always accompany forced arbitration provisions – often render dispute resolution "prohibitively expensive," in the words of the Supreme Court. When forced to be paid for on an individual basis, the costs of expert witnesses and document production often exceed the potential recoveries workers might win. As Ms. Perez described in her testimony, individual workers subjected to forced arbitration may not be able to find lawyers to represent them because a meaningful recovery in arbitration is so difficult to attain. In addition, forcing workers to bring their claims in the isolation of individual arbitration limits the amount of information about their employers' practices they can get in the fact-finding process. All of these factors combine to prevent claims from being brought in the first place. In fact, some research suggests that claims subjected to forced arbitration are brought at only 3% the rate of similar claims in the judicial forum. When workers aren't bringing claims, and in particular when they cannot work together to challenge harmful workplace practices that affect all of them, corporations aren't being deterred from misconduct.

Second, because of the systemic advantages that employers enjoy when they successfully confine matters to the arbitral forum, forced arbitration undermines the legal deterrent preventing corporate misconduct because it makes the playing field – when, on the rare occasion, workers do actually bring their claims – badly skewed in favor of employers. Part of the issue is the secrecy of forced arbitration: whereas complaints filed with courts and federal agencies are matters of public record, the same disputes, when disposed of in arbitration, can be covered by strict confidentiality requirements. These requirements prevent the public and, more importantly, current and potential employees, from understanding the depth and breadth of corporate misconduct.

Moreover, as my answer below underscores, part of the reason arbitration undermines deterrence against corporate misdeeds is because corporations can – or at least attempt to – avoid binding arbitration decisions when they do not suit the corporations' purposes. Corporations get to write the

rules by which arbitration matters are carried out and decide whether or not a claim will be subject to arbitration in the first place. Corporations can appeal unfavorable arbitrator decisions at every step along the way – a dilatory tactic that workers who are in need of swift dispute resolution cannot afford.

All of these advantages have a real impact on case outcomes: workers recover less often, and in smaller amounts, when claims are resolved in arbitration as compared with judicial litigation.

Question. Ms. Kotagal, in his testimony Mr. King suggests that the court system would be unable to handle the volume of cases created by restricting the use of forced arbitration. In your experience, given employers often retain the right to appeal decisions of the arbitrator, do forced arbitration clauses always mean a reduction in the burdens on the courts?

Answer. This is another foundational myth about forced arbitration in the employment setting: that it provides for speedy and efficient disposition of cases, thereby alleviating the burden on the judicial system.

One of the major sources of delay in arbitration is that employers enjoy a right of appeal at points in a dispute where they wouldn't in a court setting. I am currently involved in a case alleging systematic sex-based discrimination brought by women working in sales at a company. That case has been conducted through arbitration but has hardly led to a speedy disposition of the claims at issue. Our arbitration was first filed in 2008 and the case remains ongoing because of numerous appeals of the arbitrator's decisions which would not be an option in court. In the case in question, there have been four separate appeals and the case has not yet reached trial. Among other disputes, these appeals included challenging the arbitrator's interpretation of the arbitration agreement as permitting the class arbitration, a stage known as clause construction which does not exist when arbitration provisions are not used. At bottom, in addition to all of the harms it imposes, arbitration does little to alleviate the burden on courts because court dockets are now inundated with arbitration-related questions.

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[Whereupon, at 11:56 a.m., the Subcommittee adjourned.]