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SILENCED: HOW FORCED ARBITRATION KEEPS VICTIMS OF SEXUAL VIOLENCE AND SEXUAL HARASSMENT IN THE SHADOWS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

FIRST SESSION

TUESDAY, NOVEMBER 16, 2021

Serial No. 117–46

Printed for the use of the Committee on the Judiciary



Available via: *http://judiciary.house.gov*

U.S. GOVERNMENT PUBLISHING OFFICE
46–552 WASHINGTON : 2022

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SILENCED: HOW FORCED ARBITRATION KEEPS VICTIMS OF SEXUAL VIOLENCE AND SEXUAL HARASSMENT IN THE SHADOWS

Tuesday, November 16, 2021

U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

Washington, DC

The Committee met, pursuant to call, at 10:15 a.m., in Room 2141, Rayburn House Office Building, Hon. Jerrold Nadler [Chair of the Cmmittee] presiding.

Present: Representatives Nadler, Lofgren, Jackson Lee, Cohen, Johnson of Georgia, Bass, Jeffries, Cicilline, Raskin, Jayapal, Demings, Scanlon, Garcia, Neguse, McBath, Stanton, Dean, Escobar, Jones, Ross, Bush, Jordan, Chabot, Gohmert, Issa, Buck, Gaetz, Johnson of Louisiana, Biggs, McClintock, Steube, Tiffany, Massie, Bishop, Fischbach, Spartz, Bentz, and Owens.

Staff Present: Perry Apelbaum, Staff Director and Chief Counsel; Aaron Hiller, Deputy Chief Counsel; Amy Rutkin, Chief of Staff; Arya Hariharan, Chief Oversight Counsel; David Greengrass, Senior Counsel; John Doty, Senior Advisor; Moh Sharma, Director of Member Services and Outreach and Policy Advisor; Jacqui Kappler, Oversight Counsel; Roma Venkateswaran, Professional Staff Member/Legislative Aide; Cierra Fontenot, Chief Clerk; John Williams, Parliamentarian and Senior Counsel; Gabriel Barnett, Staff Assistant; Atarah McCoy, Staff Assistant; Merrick Nelson, Digital Director; Kayla Hamedi, Deputy Communications Director; Joseph Van Wye, Professional Staff Member/Legislative Aide, Antitrust, Commercial, and Administrative Law; Slade Bond, Chief Counsel, Antitrust, Commercial, and Administrative Law; Ella Yates, Minority Member Services Director; Douglas Geho, Minority Chief Counsel for Administrative Law; Elliott Walden, Minority Counsel; Andrea Woodard, Minority Professional Staff Member; and Kiley Bidelman, Minority Clerk.

Chair NADLER. The House Committee on the Judiciary will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome everyone to this morning's hearing titled "Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the Shadows."

Before we begin, I would like to remind Members that we have established an email address and distribution list dedicated to cir-

culating exhibits, motions, or other written materials that Members might want to offer as part of our hearing today.

If you would like to submit materials, please send them to the email address that has been previously distributed to your offices, and we will circulate the materials to Members and staff as quickly as possible.

I would also remind Members that guidance from the Office of Attending Physician states that face coverings are required for all meetings in an enclosed space, such as Committee hearings, except when you are recognized to speak.

I now recognize myself for an opening statement.

Arbitration was originally developed as an alternative to the court system for parties of relatively equal bargaining power to enter voluntarily.

In recent decades, however, forced arbitration, which lacks many of the fundamental due process and transparency safeguards present in the courts, has worked its way into nearly every aspect of our lives, largely in the form of "take it or leave it" contracts between very large companies and individual consumers. The sum total of this trend is that forced arbitration clauses have rendered our court system inaccessible to far too many.

Nowhere is that trend more apparent or problematic than in the workplace. It's projected that by 2024, 80 percent of private sector workers will be forced to sign an arbitration clause when accepting employment—a full 80 percent of our fellow citizens. Consider that, over the past 5 years, employers prevailed over their employees in 98.1 percent of these arbitration cases.

Somewhere in the paper these workers were required to sign, they bound themselves to a system in which they are nearly guaranteed to fail, they foreclosed the possibility of ever having their day in court, and in nearly all these instances they even gave up the right ever to talk about their experience.

Now, it is easy to quantify the percentage of workers who give up their right to a trial by jury to get a job. We can count the number of individuals who have no idea what they have given away until it is too late.

It is difficult to fathom the true human toll of forced arbitration, stories that cannot be distilled down to a number or a statistic. That's why we are here today—to step back from the statistics and talk about a system that is fundamentally unjust.

Four of our Witnesses today are survivors of sexual harassment and sexual assault. We are here to listen to their stories. Because they were forced into arbitration agreements as a condition of their employment, this is the first time many of these stories will be told in public.

By forcing these women into silence, by denying them their day in court, forced arbitration allowed toxic office cultures to flourish and emboldened sexual predators to operate with impunity.

For each one of the survivors before us today, imagine the thousands of forced arbitration schemes that worked. An employee who really needed that job scared into silence. The person forced to look for other work in another field after being fired for reporting their sexual trauma. The colleagues who Witnessed their coworker fired for doing the right thing but who just cannot afford to make the

same choice. The new employee who will never know that their boss is a predator because everyone involved in the last incident must remain silent or lose their job.

Think of all the employees who went into arbitration. Think of the few who won against staggering odds. Remember that, even now, the vast majority still cannot say anything about what they have endured. Remember that there are people who feel comfortable sexually harassing and stalking their colleagues because they know they will never have to go to court or face public pressure. Remember that forced arbitration of sexual assault claims allows hundreds of companies to look the other way.

Because, in a system that binds employees to secrecy forever, a company with a history of sexual assault and harassment claims against its executives is going to manage that liability by forcing its employees to sign an arbitration clause.

In a system that sides with the company 98 percent of the time, accusations of sexual assault will remain hidden forever. The company gets to pick the judge and the jury, truncate the discovery process, choose the law applied, and prevent all appeals. When the company wins, it can request that the victim pay its attorney's fees.

In this context, forced arbitration sounds repulsive—because it is. We have created a system in which American companies are seemingly better off retaliating against victims of sexual assault than taking responsibility and holding the perpetrators to account.

Forced arbitration has robbed survivors of sexual violence and sexual harassment of their voice. The four victims who appear before us today are only here because a congressional subpoena has compelled their testimony. Without that subpoena, they would still be unable to share their stories.

Before we begin, we should take a moment to observe their bravery. They stood up to their harassers. When they were told to stay silent, they resisted. When they had the opportunity to appear before Congress and in front of the world, they came forward to give their testimony. This is true courage, and this Committee and the American people are grateful.

These Witnesses are not here for themselves. They are not here to restart their arbitrations. As much as we might like to do so, we in Congress cannot change the outcome of those cases.

No, these brave women are here for the countless individuals without a voice. Not just women, but all those who have been assaulted and harassed and don't know where to turn—the person who was fired for reporting sexual harassment and just found out they signed an arbitration clause in that mess of papers they were given on their first day, and the new employee who might be the next victim of a predator operating under the protection of forced arbitration.

The survivors before us today were silenced by their forced arbitration clauses. They are here to show us what a world with accountability might look like. I, for one, am here to listen. I thank all of you for being here today.

I now recognize the Ranking Member of the Judiciary Committee, the gentleman from Ohio, Mr. Jordan, for his opening statement.

Mr. JORDAN. Thank you, Mr. Chair, for convening today's hearing.

First, I just want to thank our Witnesses for courageously agreeing to be here today.

The Judiciary Committee is charged with safeguarding America's most fundamental rights, and we all know that a right without a remedy is no right at all. We must make sure that the pathways that Americans must resolve their disputes function properly and are fair to everyone. That is true for our court system and for other dispute resolution mechanisms, like arbitration.

In fact, Congress enacted the Federal Arbitration Act nearly a century ago, and today arbitration provides an alternative to the cumbersome and expensive process of a civil lawsuit.

Arbitration is a process that should be as fair as court, but also easier, more affordable, and much faster. Going to court can be extremely expensive if you are an average citizen bringing suit against a major business entity who has an army of attorneys.

As we examine the benefits of arbitration and the areas for reform, we should be careful not to frame the question as one of arbitration versus jury trial in a court. Over the last 90 years, the number of civil cases that reached conclusion through trial has declined substantially. In other words, if you are not in arbitration, it is highly likely your alternative to resolve your dispute is a protracted settlement negotiation involving major attorney fees.

We all understand the benefits that arbitration provides. However, if the arbitration system is not functioning properly and is being used to stifle individual rights, we have an obligation to fix it.

Any reforms must be done in a way that benefits the parties to the suit and advances the interests of fairness and justice. It would be wrong for us to make reforms that do not benefit the parties to the dispute but rather enrich the lawyers who seek to exploit suffering and hardship by taking a major cut of any damages that are awarded.

Finally, I would like to thank again all our Witnesses for their testimony, particularly the Witnesses who have shared their personal stories. Thank you all for taking the time to be here today to help us better understand how our arbitration system needs to work.

Thank you, Mr. Chair, and I yield back.

Chair NADLER. Without objection, all other opening statements will be included in the record.

I will now introduce today's Witnesses.

Eliza Dushku is an actor, producer, student, and philanthropist. She has been a professional actress for over 30 years and has appeared in numerous television shows and independent films. Today she is a psychology master's degree candidate in a graduate program in greater Boston.

Tatiana Spottiswoode is a first-year law student at Columbia Law School. Previously she was a Business Analytics Associate at Afiniti. She received her undergraduate degree in philosophy and classics from Brown University.

Anna St. John is President and General Counsel of the Hamilton Lincoln Law Institute. Previously she clerked for Judge Rhesa H.

Barksdale on the Fifth Circuit Court of Appeals and as an Attorney with Covington & Burling, LLP. Ms. St. John earned her law degree from Columbia Law School.

Andowah Newton is Vice President for Legal Affairs and head of litigation at LVMH, Louis Vuitton Moet Hennessy, Inc. I hope I got that pronunciation right. Before joining LVMH—that's easier—before joining LVMH in 2015, Ms. Newton litigated complex commercial cases for several years in private practice. Ms. Newton began her legal career as a Judicial Clerk for the First Vice-President Judge of the International Criminal Court in The Netherlands. She earned a Bachelor of Science degree from Georgetown University and dual law degrees in U.S. and French law from Cornell Law School and The Sorbonne.

Sarah Parshall Perry is a Legal Fellow for the Edwin Meese III Center for Legal and Judicial Studies, part of the Institute for Constitutional Government at the Heritage Foundation. Previous positions include serving as Senior Counsel to the Assistant Secretary for Civil Rights at the U.S. Department of Education and Senior Fellow for Education Reform at the Family Research Council. Ms. Perry earned a Bachelor of Science from Liberty University and a law degree from the University of Virginia School of Law.

Lora Henry began her career in the dental field where she worked for 16 years and earned a degree in dental hygiene from Stark State University. She then chose to leave the dental field and follow her dream of owning her own business in the restaurant industry. After 9 years, she chose to switch careers and now is a Sale Associate for Waikem Mitsubishi in Canton, Ohio.

Myriam Gilles served as the Paul R. Verkuil Research Chair in Public Law and Professor of Law at the Benjamin Cardozo School of Law. From 2016–2018, she also held the post of Vice Dean for Academic Affairs. Professor Gilles received a Bachelor of Arts from Harvard-Radcliffe Colleges and a law degree from Yale Law School.

We welcome all our distinguished Witnesses, and we thank them for participating today.

I will begin by swearing in our Witnesses. I ask that our Witnesses in person please rise and raise your right hand. I ask that our remote Witness please turn on her audio and make sure I can see your face and your raised right hand while I administer the oath.

Do you swear or affirm under the penalty of perjury that the testimony you are about to give is true and correct to the best of your knowledge, information, and belief, so help you God?

Let the record show that the Witnesses have answered in the affirmative.

Thank you, and please be seated.

Please note that each of your written statements will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in 5 minutes.

To help you stay within that time limit, there is a timing light on your table. When the light switches from green to yellow, you have 1 minute to conclude your testimony. When the light turns red, it signals your 5 minutes have expired.

For the Witness appearing virtually, there's a timer on your screen to help you keep track of time.

Ms. Dushku, you may begin.

TESTIMONY OF ELIZA DUSHKU

Ms. DUSHKU. Thank you.

Good morning, Chair Nadler, Members of the Committee. I'm Eliza Dushku, an actress, producer, new mother of two, and currently a graduate student in my hometown of Boston.

I've worked in the entertainment industry from the time I was 9 years old in numerous movies with actors such as Robert DeNiro, Leonardo DiCaprio, Halle Berry, and Arnold Schwarzenegger, more recently as the lead in two network television series.

I appreciate the opportunity to speak to you today about this important issue and will share my experience as a victim and survivor of sexual harassment in the workplace and as someone who was fired and silenced when I attempted to address it.

In 2017, I was aggressively pursued by CBS to become a co-lead on a show called "Bull." I was told that the role would be a 6-year commitment to play a smart, strong leading lady, a confident high-powered lawyer meant to counterbalance the existing male lead, and that the role had been written specifically with me in mind.

However, in my first week on my new job, I found myself the brunt of crude, sexualized, and lewd verbal assaults. I suffered near constant sexual harassment from my co-star. This was beyond anything I had experienced in my 30-year career.

My male co-star, who was also one of the show's producers, would frequently refer to me as "Legs." He would smell me and leeringly look me up and down.

Off-script, in front of about one hundred crew members and cast members, he once said that he would take me to his "rape van" and "use lube and long phallic things" on me and take me over his knee and spank me like a little girl. Another time he told me that his sperm were "powerful swimmers."

These are just a few examples. These were not lines in the script. They were incessant and demeaning and directed at me in the middle of what was supposed to be a professional workplace.

Per my history, I tried to be professional and just do my job, but was relentlessly sexualized, crudely mocked, and laughed at. I began dreading going to work each day and often rode home in silence, on the verge of tears, feeling this confusing shame over not having been able to stick up for myself more. I feared that if I pushed back or reacted strongly, my job could be at risk or my professional reputation could be harmed.

One day, after I delivered a courtroom monologue that I had spent significant time rehearsing, my co-star shouted out that he and his buddy wanted to have a "threesome" with me and began mock penis-jousting while the camera was still rolling.

Then, as I walked off to my coffee break in between scenes, a random male crew member sidled up to me at the food service table and whispered, "I'm with Bull. I want to have a threesome with you too, Eliza."

I was horrified and became physically nauseous. I had just been humiliated in front of one hundred co-workers on the set by the star, and now it seemed it was open season for others to demean me sexually too. My co-star's behavior continued and increased. It

was pervasive and mean and intentionally disempowering. It was awful.

As vulnerable as it feels to admit, I began to borrow my husband's sweatpants and wore big Timberland boots to work to avoid more comments about my appearance.

Over the years I'd become accustomed to the usual banter that occurs on a set. This was very different. The multiyear contract I agreed to was a big deal, and my drive to succeed was strong. I had received rave reviews from the showrunner, who is the person in charge of the shows, and others at CBS. I wanted to make the show work, and I loved the role that had been created for me.

I spoke with my manager, and we decided that I would try to address the intolerable sexual harassment I was being forced to endure. I had built a professional reputation and should have been able to speak directly with my co-star as an equal. I specifically asked him to be my ally on set and tone down some of the sexualized comments directed at me, especially because he set the tone for the workplace.

Admittedly, I was nervous, but I shared with him how he made me feel on set and asked if he'd work with me to rectify this. He responded in feigned shock, "No one is more respectful of women than me. I grew up with sisters."

What I found out later was that 40 minutes after this conversation, he texted the head of CBS Studios that I had a "humor deficit" and he didn't want me on the show. The CBS studio head replied that I was great and made the show better.

I was fired the next day.

The showrunner told me straight-up that after the next episode I would not be returning. He even suggested that I ask CBS and Steven Spielberg, whose company, Amblin, co-produced "Bull," for my own show because he thought my work was so impressive.

Now, I've worked as an actress since I was a child and signed countless contracts negotiated on my behalf, but never understood that there were mandatory arbitration clauses that would be used to keep what had happened to me a secret and would protect CBS and the sexual harassment perpetrator who had blatantly retaliated against me for trying to stop the harassment in my workplace. I was shocked to learn that I had signed away my rights to a public forum before taking a job.

Who would ever think up such a clause? Who are these clauses meant to favor and protect? It suddenly became clear: Not me.

I began to understand how very limited my options were to try to address the prohibited sexual harassment and illegal retaliation I had experienced.

In response to a letter from my counsel, CBS handed over hundreds of hours of tape which included video of the actual harassment. It was captured verbatim on their tapes. No one other than my legal advisers and CBS has ever seen or will ever see those tapes. I was trapped by the binding arbitration clause I had unknowingly signed.

For the next year, I found myself pitted against one of the most powerful media corporations in the world, CBS, with its unlimited resources, which was controlled by the men who used the arbitra-

tion clause to protect themselves, their profitable show, and to silence me.

To this day, whenever my career, my life's work, is referenced, my accomplishments as an actor are ignored. I've been reduced to being Eliza Dushku, the actress who was paid off for "allegedly" being sexually harassed on a TV series.

As I hope you can understand, this was not the outcome I desired, nor ever expected. Because of binding arbitration, there will never be real justice for me and for countless other victims of sexual harassment and assault.

Lastly, there's an irony that I fully understand: I'm getting to break that silence today. Countless others who are bound by arbitration are not so fortunate.

I offer my strength and solidarity to all the other brave women who will speak today. We can help end this. Accountability and transparency aren't partisan issues.

Thank you for hearing me and for considering this important legislation.

[The statement of Ms. Dushku follows:]

Eliza Dushku, Actor/Producer & Graduate Student

Good morning Chairman Nadler and Members of the Committee. My name is Eliza Dushku. I am an actress and producer, a new mother of two, and currently a graduate student in my hometown of Boston.

I have worked in the entertainment industry from the time I was nine years old in numerous movies with actors such as Robert DeNiro, Leonardo DiCaprio, Halle Berry and Arnold Schwarzenegger -- and more recently as the lead in two television series.

I appreciate the opportunity to speak to you today about this important issue and will share my experience as a victim and survivor of sexual harassment in the workplace-- and as someone who was fired and silenced when I attempted to address it.

Though I had decades of experience, this was the first time that I became aware (painfully) of what mandatory arbitration was, and how it kept me and my ability to seek justice in the shadows.

Four years ago, in 2017, I was aggressively pursued by CBS to become a co-lead on a show called "Bull." I was told that the role would be a smart, strong, leading lady, a confident high-powered lawyer, and that the role had been written "specifically with me in mind."

CBS's representatives said they wanted to turn this still newly established show into one with two leading roles-- the existing male lead, and me as the new co-star.

This was to be a 6-year commitment. Most actors dream of being offered such a role.

However, in my first week in my new job, I found myself the brunt of crude sexualized, lewd verbal assaults. I suffered near constant sexual harassment from my costar.

This was beyond anything I had experienced in my 30-year career.

- On a daily basis my male costar-- who was also one of the show's Producers-- would, in front of everyone, refer to me as "Legs," he would smell me and leeringly look me up and down.

- Off-script, in front of about a hundred crew and cast members, he said that he would take me to his "rape van" and use lube and lots of "long phallic things" on me, or "take me over his knee and spank me like a little girl."

- Another time, he told me that his sperm were "powerful swimmers."

These are just a few examples. These were not lines in the script. They were incessant and demeaning and directed at me in the middle of what was supposed to be a professional

workplace. Per my history, I tried to be professional and just do my job, but was relentlessly sexualized, crudely mocked and laughed at. I began dreading going to work each day, and often rode home in silence, on the verge of tears, feeling this confusing shame over not having been able to "stick up for myself more."

I feared that if I reacted strongly my job could be at risk.

I worried, too, that if I pushed back, I could be deemed "difficult" which would harm my professional reputation.

One day, after I delivered a Courtroom monologue that I'd spent significant time rehearsing, my costar shouted out-loud that he and his buddy wanted to have a "threesome" with me, and began mock penis-jousting, while the camera was still rolling. Then, as I walked off to my coffee-break in between scenes, a random male crew member sidled up to me at the food service table and whispered, "I'm with Bull, I want to have a threesome with you, too, Eliza."

I was horrified and became physically nauseous. I'd just been humiliated in front of a hundred of co-workers on set by the star of the show. And now it seemed it was open season for others to demean me sexually.

My co-star's behavior continued and increased. It was pervasive and mean, and intentionally disempowering. This behavior caused genuine pain. It was awful. As vulnerable as it now feels to admit, I began to borrow my husband's sweatpants and wore big Timberland boots to work because I wanted to avoid any more comments about my appearance.

Over the years, I had become accustomed to the usual banter that occurs on a set. This was very different and intolerable. But the multi-year contract I'd agreed to was a big deal. My drive to succeed was strong. I had received rave reviews from the showrunner (the person in charge of the show) and others at CBS. I wanted to make the show work and I loved the role that had been created for me.

I spoke with my manager, and we decided that I would try to address the intolerable sexual harassment I was being forced to endure. I had built a professional reputation and should have been able to speak directly with my costar as an equal. I specifically asked him to "be my ally" on set, and perhaps "tone down" some of the sexualized comments directed at me-- especially because he set the tone for the workplace.

Admittedly, I was nervous, but I shared with him how he made me feel on set and asked if he would work with me to rectify this. He responded in feigned shock: "no one is more respectful of women than me, I grew up with sisters."

What I found out later was that about 40 minutes after this discussion, he texted the then head of CBS Studios that I had a "humor deficit" and didn't want me on the show. The CBS studio head replied that I was great and made the show better.

I was fired the next day. The Showrunner telling me straight-up that after these three episodes I would not be returning. He even suggested that I ask CBS and Steve Spielberg (his company, Amblin, co-produced Bull) for my own show because he thought my work was so impressive.

I've worked as an actress since I was a child and signed countless contracts negotiated on my behalf but never understood that there were mandatory arbitration clauses that would be used to keep what had happened to me a secret and would protect CBS and the sexual harassment perpetrator who had blatantly retaliated against me for trying to stop the harassment in my workplace. I was shocked to learn that I had signed away my rights to a public forum before taking a job.

Who would ever think up such a clause?

Who are these clauses meant to favor and protect?

It suddenly became clear: not me.

I began to understand how very limited my options were to try to address the prohibited sexual harassment and retaliation I had experienced.

In response to a letter from my counsel, CBS handed over hundreds of hours of tape, which included video of the actual harassment I had suffered. No one other than my legal advisors and CBS has ever seen, or will ever see, those tapes. I was trapped by the binding arbitration clause I had unknowingly signed.

For the next year, I found myself pitted against one of the most powerful media corporations in the world, CBS, with unlimited resources, which was controlled by the men who used the arbitration clause to protect themselves, their profitable show, and to silence me.

Ironically, I was eventually able to speak publicly because an internal investigation of CBS was leaked to the media and CBS violated the NDA. As a result I was able to pen an op-ed piece that ran in my hometown newspaper, *The Boston Globe*. Even then, because the tapes remained hidden, the perpetrator was able to deceptively spin the narrative and avoid being held accountable for his misconduct by the public.

What happened to me is still extremely difficult to talk about and triggers feelings of dread. I am not proud to say that, denied a public forum, I ultimately entered into a confidential settlement agreement with CBS in which I was paid a little over half of the salary I would have earned, along with other terms I insisted upon that were intended to remediate future sexual harassment on the show.

To this day whenever my career-- my life's work-- is referenced, my accomplishments as an actor are ignored, and I've been reduced to being Eliza Dushku who was paid off for "allegedly" being sexually harassed on a TV series. As I hope you understand, this was not the outcome I

desired or ever expected, but because of binding arbitration there will never be real justice for me and for countless other victims of sexual harassment.

Lastly, there's an irony that I fully understand-- I am getting to break that silence today. Countless others who are bound by arbitration are not so fortunate.

I offer my strength and solidarity to all the other brave women who will speak today. We can help end this. Accountability and transparency aren't partisan issues.

Thank you for hearing me, and for considering this important legislation.

Chair NADLER. Thank you.

Ms. Spottiswoode, you are recognized for 5 minutes.

TESTIMONY OF TATIANA SPOTTISWOODE

Ms. SPOTTISWOODE. Thank you, Chair.

I first met Zia Chishti, the multimillionaire founder of Invisalign and the founder and CEO of Afiniti, when I was 12 or 13. He was a business associate and friend of my father's. He would take our family out to dinner when he was in town. My father owned Afiniti stock and believed that he and my mother would retire very comfortably from that stock.

When I was in my senior year of college in December 2014, Chishti, who was 43 at the time, invited me on a ski trip. I was 21. I initially declined, but he insisted that he wanted me to meet his nephew, who also studied philosophy, so I agreed. I later learned that the nephew, who never showed up, didn't exist.

The trip was designed to groom me. Chishti told me he had feelings for me and showed me an extravagant lifestyle. I rejected him then, but after he persisted in pursuing me, 9 months later I agreed to date him. After spending time together about five times over 10 weeks, I broke off the relationship.

Months later, Chishti encouraged me to join his company. He presented a rosy picture of a great career opportunity. Naively, I believed him. Chishti assured me that he did not expect a sexual relationship.

In April of 2016, I signed a contract with Afiniti that included an arbitration agreement with a strong confidentiality clause. I did not know what that meant at the time. I was just excited and relieved to be making $60,000 a year.

As it turned out, Chishti was not willing to treat me like an employee. Instead, over the next 18 months, he oscillated between pressuring me for sex and punishing me. When I rebuffed him, he humiliated me in front of coworkers and then ignored me completely, causing me to fear for my job.

Early in my employment, I declined to go to Cuba with Chishti and a friend. He was very angry and refused to speak to or acknowledge me for months.

During a work meeting in Dubai, he put his hand inside my pants and grabbed my butt in front of coworkers. No one took any action on my behalf.

During that same trip, he turned his attention to another 20-something female employee, also the daughter of someone Chishti called a friend. The next morning, she texted him that she felt violated, that she had asked him to stop many times, and that he knew how drunk she was.

Afiniti executives and Chishti arranged for her to fly home early and later paid her a secret settlement, and the company did nothing to protect other Afiniti women, including me.

Chishti orchestrated evening social gatherings for his employees in far-flung locations, where heavy drinking was the norm. I never saw any company sexual harassment policy or training. When I asked the head of my office what I should do, he suggested that I avoid Chishti. Chishti made that impossible.

As the CEO of the company, he had power over my life and career, and I was anxious not to insult him or make him mad. I ex-

plained that I didn't want to have a sexual relationship with him in as many different ways as possible. I said it in person, but I also wrote it in texts and emails. I reminded him in almost every interaction that we had. I told him that his demands were causing me extreme stress, including panic attacks, as well as forcing me to look for work elsewhere.

He repeatedly got angry at me for rejecting his advances, such as when he requested to buy me expensive clothes. He called me a bitch in front of coworkers when I refused to hold his hand.

In just one email in January 2017, I wrote to Chishti, "Three times you have behaved inappropriately and with my explicit nonconsent." I reminded him that I had said to his face, "Zia, this is not consensual. I don't want this." I told him these experiences were "frightening, degrading, and embarrassing for me. I do not trust you when you are drunk, and these experiences make me feel scared and apprehensive."

Instead of changing his behavior towards me, Chishti became more hostile. In writing, he called me petulant, accused me of playing angsty games, and he told me I needed to "fix my behavior."

In the weeks before a performance review with Chishti of my Brazil accounts, Chishti's suggestions became more and more violent. I summoned my courage and told him that his sexual demands made me fear that I was going to lose my job and were causing me to have panic attacks.

In response, he sent me two pornographic emails describing his rape fantasy, including strangling me while having sex. I was stunned and horrified and tried to ignore them.

In Brazil, I avoided him as much as I could but was under increasing pressure from him. I began to worry that, in addition to wanting sex, Chishti wanted to hurt me and punish me for rejecting him.

After my presentation, I attended dinner with Chishti and colleagues. Later that night, I went to the hotel bathroom and texted him that I was sick and going back to my hotel. Chishti replied that he would meet me there. I said I was vomiting. He said he was on his way. I admitted that I was still at his hotel.

I felt completely trapped and hopeless. I was 23 and very far from home. I didn't want to lose my job. I didn't want him to get any angrier. I did not feel that anyone would protect me, and I was too tired to argue with him anymore.

I went to his room, where he beat me while having sex with me. I told him he was hurting me. He said, "Good." He told me he should have had sex with me when we first met when I was 13 years old. When I left, he said, "We should do this more often."

I hid in my hotel room until the next day. My body was covered with scratches, cuts, and contusions. I had bruises around my neck that looked like I had been strangled, a large bump on my head, and a Black eye. A nurse at the hospital said that I had the symptoms of a concussion.

Mr. Chair, I seek unanimous consent to enter into the record two photos of my neck and face that day at the end.

Chair NADLER. Without objection.

[The information follows:]

MR. NADLER FOR THE RECORD





Ms. SPOTTISWOODE. Thank you.

As soon as my lawyers contacted Afiniti, Chishti initiated an arbitration against me. He knew that the secrecy of arbitration would protect him.

Nine months later, just before my deposition, to punish and scare me, he sued my father, who had quit the day I returned from Brazil, in secret arbitration.

In May 2019, the arbitrator in my case ruled that I had been sexually harassed and assaulted by Chishti. Since then, Chishti's lawyers at Morgan Lewis have tried to get me to vacate the arbitration award.

In exchange for erasing the arbitration ruling, they offered to let me keep the money awarded, drop the claim against my father, and give my father $1 million.

They sued my father and then offered to give him $1 million if I erased the ruling, probably so Afiniti and Chishti could hide it from his future victims and from potential shareholders if the company goes public.

It's still not over. My father's arbitration has been going on for 3 years and has already cost him tens of thousands of dollars in attorney fees.

The harassment and assault I endured were hard enough on my family, but we still manage the financial and emotional burdens of being sued by my abuser in secret arbitration.

Chishti still has power over me. He is still able to frighten me. Forced arbitration is the reason Chishti is able to carry out this ongoing campaign of retaliation against me, my family, and probably other victims.

Today, as I speak here, I am afraid of the consequences for my family that will arise from my speaking out. I have PTSD. I have nightmares. I used to be a very social person, and I no longer am. The person who changed my life forever continues to abuse me because forced arbitration gives him the power to do it in secret.

[The statement of Ms. Spottiswoode follows:]

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TESTIMONY OF TATIANA SPOTTISWOODE
HOUSE COMMITTEE ON THE JUDICIARY
NOVEMBER 16, 2021

I first met Zia Chishti, the multi-millionaire founder of Invisalign and the founder and CEO of Afiniti, when I was 12 or 13. He was a business associate and friend of my father's. He would take our family out to dinner when he was in town. My father owned Afiniti stock and believed that he and my mother would retire very comfortably from that stock.

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As it turned out, Chishti was not willing to treat me like an employee. Instead over the next 18 months, he oscillated between pressuring me for sex and punishing me. When I rebuffed him, he humiliated me in front of co-workers and then ignored me completely, causing me to fear for my job.

SM

Early in my employment I declined to go to Cuba with Chishti and a friend. He was very angry and refused to speak to or acknowledge me for months. During a work meeting in Dubai, he put his hand inside my pants and grabbed my butt in front of co-workers. No one took any action on my behalf. During that same trip, he turned his attention to another 20-something female employee, also the daughter of someone Chishti called a friend. The next morning she texted him that she felt "violated," that she had "asked [him] to stop many times…[and] that [he] knew how drunk [she] was." Afiniti executives and Chishti arranged for her to fly home early and later paid her a secret settlement – and the company did nothing to protect other Afinti women, including me.

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Instead of changing his behavior toward me, Chishti became more hostile. In writing, he called me petulant; accused me of playing angsty games; and he told me I needed to "fix my behavior." In the weeks before a performance review with Chishti of my Brazil accounts approached in September 2017, Chishti's suggestions became more and more violent. I summoned my courage and told Chishti that his sexual demands made me fear that I was going to lose my job and were causing me to have panic attacks. In response, he sent me two pornographic emails describing his rape fantasy, including strangling me while having sex. I was

stunned and horrified and tried to ignore them.

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I went to his room where he beat me while having sex with me. I told him he was hurting me; he said, "good." He told me he should have had sex with me when we first met when I was thirteen years old. When I left, he said "we should do this more often." I hid in my hotel room until my flight the next day. My body was covered with scratches, cuts and contusions. I had bruises around my neck that looked like I had been strangled, a large bump on my head, a black eye. A nurse at the hospital said I had the symptoms of a concussion.

As soon as my lawyers contacted Afiniti, Chishti initiated an arbitration *against me*. He knew that the secrecy of arbitration would protect him. Nine months later, the day before my deposition, to punish and scare me, he sued my father, who had quit the day I returned from Brazil, in secret arbitration.

In May 2019, the arbitrator in my case ruled that I had been sexually harassed and assaulted by Chishti. Since then, Chishti's lawyers at Morgan Lewis have tried to get me to vacate the arbitration award. In exchange for erasing the arbitrator's ruling, they offered to (1) let me keep the money awarded; (2) drop the claim against my father; and (3) give my father $1,000,000. They sued my father – and then offered to give him $1 million if I erased the ruling – probably so Afiniti and Chishti could hide it from his future victims and from potential shareholders if the company goes public.

And it's still not over. My father's arbitration has been on-going for 3 years and has already cost him tens of thousands of dollars in attorneys' fees. The harassment and assault I endured were hard enough on my family, but we still manage the financial and emotional burdens of being sued by my abuser in secret arbitration. Chishti still has power over me. He is still able to frighten me. Forced arbitration is the reason Chishti is able to carry out this on-going campaign of retaliation against

me, my family, and probably other victims. Today as I speak here, I am afraid of the consequences for my family that will arise from my speaking out. I have PTSD. I have nightmares. I used to be a very social person - I no longer am. The person who changed my life forever continues to abuse me because forced arbitration gives him the power to do it in secret.

Chair NADLER. Are you finished?
Thank you.
Ms. St. John, you are recognized for 5 minutes.

TESTIMONY OF ANNA ST. JOHN

Ms. ST. JOHN. Chair Nadler, Ranking Member Jordan, Members of the Committee, thank you for inviting me to appear today. It is my honor and privilege to appear before you.

In my few minutes, I would like to discuss how arbitration can provide an alternative method of resolving disputes by which parties can avoid some of the shortcomings present in our civil justice system and why removing it as an option for dispute resolution is not in the best interests of those subjected to sexual harassment and assault.

Studies show that arbitration provides a faster and less expensive way for employees and consumers to resolve their claims against their employers and other companies and to obtain greater relief on average than they receive through litigation in court.

Arbitration tends to be more flexible, both in terms of the formality and scheduling of the proceedings, making it easier for claimants to participate. It involves less burdensome discovery and less adherence to traditional rules that may make litigation in court inaccessible and overly intimidating.

There are organizations that support arbitration proceedings to provide some uniformity and to increase accessibility and fairness for individual claimants, while also helping to lower the cost for employees bringing claims against their employers.

Employees may also realize secondary benefits from arbitration. Because arbitration is a faster and less expensive way of resolving disputes, companies may have more funds to devote to employee benefits or to lowering costs for consumers.

The judicial system itself, including the U.S. Supreme Court, has expressly recognized the benefits of arbitration. Congress, of course, recognized benefits as well in passing and maintaining the Federal Arbitration Act, which has been in place for nearly a hundred years.

So, when we talk about the problems with arbitration clauses, I think it's important to keep in mind that arbitration is not necessarily a danger or impediment to those who have experienced sexual harassment or assault in the workplace or elsewhere. Instead, it's worth considering that taking away the possibility of arbitration for these victims is a top-down, heavy-handed approach that denies them the advantages of arbitration as a means of adjudicating their claims.

It's also worth keeping in mind that an agreement to arbitrate does not impact the party's substantive claims. A claimant retains the same rights as she would in court, but simply submits her claim to adjudication in a less formal setting. Perhaps in recognition of this fact, courts allow parties to arbitrate even grave injuries, such as claims involving wrongful death.

The court system is not necessarily the answer to concerns about arbitration. Overburdened courts are often slow moving, and as a result, it is the attorneys who benefit from the prolonged resolution without any proportionate benefit to the victims.

Class actions do not provide a solution either, as sexual harassment and assault claims are often too individualized for class treatment, and, in any event, class actions are slow moving and often disproportionately benefit the attorneys while inefficiently distributing relief to the victims.

Sexual harassment and assault victims may also prefer arbitration because it allows them to choose to keep the proceedings confidential.

Unfortunately, these claims continue to often carry a stigma that victims may want to avoid to continue their day-to-day lives without suffering professional damage or negatively impacting their ability to earn a living.

While the public nature of a handful of high-profile cases has had a positive trickle-down effect, the same is not going to be true for many more routine sexual harassment cases. These victims should not be forced to have their claims adjudicated publicly, and, in fact, many would likely forego bringing claims at all if they could not be handled privately, such as through arbitration.

Arbitration, in itself, is a process that would not prevent victims from reporting criminal conduct or the underlying facts of the claims if they choose. Concerns about confidentiality agreements and NDAs can be addressed without taking away the positive advantages that arbitration can provide.

Thank you.

[The statement of Ms. St. John follows:]

Written Testimony of
Anna St. John,
President, Hamilton Lincoln Law Institute

Before the U.S. House of Representatives Committee on the Judiciary

Hearing on "Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the Shadows"

Tuesday, November 16, 2021

Dear Chairman Nadler, Ranking Member Jordan, and distinguished Members of the Committee:

Thank you for the opportunity to appear before you today. I serve as president of Hamilton Lincoln Law Institute, a non-profit public interest law firm whose Center for Class Action Fairness represents class members *pro bono* against abusive class action settlements. The organization is dedicated to safeguarding consumers and the general public against abuses in the civil justice system. I have studied and seen first-hand the ways in which alternative dispute resolution systems such as arbitration allow parties to avoid certain shortcomings in our court system to obtain remedies for wrongdoing against them.

This testimony addresses in particular the use of arbitration and how individuals and legal entities can choose arbitration to resolve disputes through a process that is typically faster and less expensive than traditional litigation without losing their substantive rights, even when serious harms such as sexual harassment and assault are at issue.

I. Arbitration can be an advantageous dispute resolution process for consumers and employees.

Arbitration is a form of dispute resolution that may be voluntarily chosen by the parties to a dispute. The parties agree, usually in advance through a contract, to submit their conflict for a legally binding and enforceable decision by a third party, with the adjudication taking place outside of the court system. It thus provides an alternative to having a judge or jury decide the dispute. The proceedings themselves remain adjudicative in nature. Each party presents his or her evidence through an attorney or on his or her own behalf to the arbitrator or panel of arbitrators and presents argument at a hearing. The arbitrator or panel of arbitrators then issues a written decision. This decision is final with only certain, limited exceptions, such as fraud or an arbitrator exceeding his or her powers. Arbitration is a more informal

process. For example, it is not subject to the traditional rules of evidence, discovery processes, the constraints of precedent, or restrictions against parties changing their claims and arguments, and it allows more flexibility in scheduling of times and places of hearings.[1] It also allows the parties in a particular case to obtain a more equitable remedy that a court might not have had the authority to order.

Congress provided federal recognition of and legitimacy to arbitration as a lawful method of dispute resolution nearly 100 years ago, when it passed the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA") in 1925. Among other things, the FAA requires both state and federal courts to enforce and uphold arbitration agreements to the same extent as other types of contracts.[2] "The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered."[3] It reflected a "liberal federal policy favoring arbitration agreements,"[4] which "is at bottom a policy guaranteeing the enforcement of private contractual arrangements."[5]

Organizations such as the American Arbitration Association ("AAA") and the Judicial Arbitration and Mediation Services, Inc. ("JAMS") have formed to support arbitration and provide continuity and uniformity to the proceedings. Both organizations have developed arbitration procedures and due process guidelines specifically tailored for employment disputes and will accept cases for arbitration only when the underlying arbitration agreement meets certain standards of fairness. Employers regularly engaged in arbitration agree to pay a disproportionate share of the expenses given the cost savings when compared to traditional litigation. The AAA has an Employment/Workplace Fee Schedule under which the filing fees for an employee who files a dispute against an employer are capped at $300, while the employer pays thousands of dollars in additional fees and expenses, including $1900 of the filing fee and the arbitrator's compensation.[6]

Unlike in litigation, the parties can choose their arbitrators, meaning that they can choose those with specialized knowledge or expertise in particular areas of the law. This feature can save the parties the significant expense of having to hire expert witnesses because the arbitrator is already knowledgeable about issues that a jury or judge with more generalized experience would not be. Another advantage

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

[2] *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (courts must "place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms").

[3] *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

[4] *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

[5] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

[6] American Arbitration Association, "Employment/Workplace Fee Schedule" (Nov. 1, 2020), *available at* https://www.adr.org/sites/default/files/Employment_Fee_Schedule.pdf.

is that arbitrators often have more time to devote to the matter, compared to a judge overburdened by a heavy docket of other civil and criminal cases. And because of the limited scope of appealable issues, arbitration resolves disputes without the lengthy, uncertain, and often expensive appeal process that may follow litigation in court.

Empirical studies confirm that arbitration tends to be both faster and less expensive than litigation, and results in higher awards for employees and consumers. A study focused on employment disputes that terminated in 2014 to 2018 found that nearly 75% of all disputes were settled, with about half of the remaining cases terminating with monetary and/or non-monetary awards and the other half either dismissed, abandoned, or withdrawn.[7] Showing the range of claims available for arbitration, the employees' claims ranged in value from several thousands of dollars to tens of millions of dollars.

The study found that employees are three times more likely to win in arbitration than in court, and when they prevailed, employee-plaintiffs won about twice the monetary award in arbitration that employees won in court. The average award to employee-plaintiffs in arbitration was $520,630, compared to $269,885 in court. Meanwhile, the average time spent from initiation to termination of proceedings that resulted in monetary awards was months shorter for arbitration. Given these numbers, it is not surprising that the study also found that employees across salary levels used arbitration to resolve their employment disputes.[8] The study concluded that employment arbitration is simpler, shorter, and more flexible than the longer, more formal, and burdensome litigation process in court and yielded better results for employee-plaintiffs.[9]

Another study published in 2020 focused on consumer-initiated arbitration and similarly found that consumers achieved both mean and median awards in arbitration that were significantly higher than in court.[10] Consumers initiated and won in 44% of all consumer arbitrations that ended during the period 2014 to 2020,

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[7] *See* Nam D. Pham & Mary Donovan, "Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration," NDP Analytics (May 2019), *available at* https://instituteforlegalreform.com/wp-content/uploads/2020/10/Empirical-Assessment-Employment-Arbitration.pdf.

[8] *See id.* at 13 (citing U.S. Census Bureau, Households by Total Money Income, Race, and Hispanic Origin of Household: 1967 to 2017).

[9] Earlier studies also show that employees succeed more frequently in arbitration than in court. *See* David Sherwyn, Samuel Estreicher, & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1568-69 (2005); National Workrights Institute, *Employment Arbitration: What Does the Data Show?* (2004).

[10] *See* Nam D. Pham & Mary Donovan, "Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration," NDP Analytics (Nov. 2020), *available at* https://instituteforlegalreform.com/wp-content/uploads/2020/11/FINAL-Consumer-Arbitration-Paper.pdf.

while they prevailed in consumer-initiated litigation only 30% of the time. The average award in consumer-initiated arbitration was significantly more than the award in litigation, while the average length of such arbitrations was shorter by over four months. Review of the empirical evidence thus shows that "most measures—raw win rates, comparative win rates, comparative recoveries, and comparative recoveries relative to amounts claimed—do not support the claim that consumers and employees achieve inferior results in arbitration compared to litigation."[11]

While these studies demonstrate benefits for employees and consumers, arbitration likewise benefits businesses that rely on the process to provide a fair and efficient resolution of workplace disputes and eliminates the costs and burdens to all parties of litigating in court. By agreeing with employees in advance to arbitrate, businesses can be certain of lower dispute resolution costs and thus can allocate those funds to reduce costs to consumers, increase benefits for employees, or other uses. It is no wonder that the Supreme Court recognizes "real benefits to the enforcement of arbitration provisions" and has "been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context."[12]

Arbitration also allows consumers and employees to avoid the use of class actions when they are among a large number of people who have experienced a common injury. Just as in comparison to bilateral litigation, arbitration tends to be less expensive and faster, with fewer hurdles to putting greater relief in the hands of the injured plaintiff, while reducing the disproportionate benefit to the attorneys.[13] Class actions are typically characterized by "procedural complexity and slow pace," while they recover only a small percentage of a claimant's damages which then must be distributed through an often ineffective claims process.[14]

II. Allowing individuals to choose arbitration before a dispute arises is pro-employee and -consumer.

A federal law that takes away individuals' right to agree to arbitrate claims relating to sexual harassment and assault pre-dispute raises concerns. It removes decisionmaking about these issues from those personally affected by them and

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[11] Peter Rutledge, *Whither Arbitration?*, 6 Geo. J.L. & Pub. Pol'y 549, 560, 571 (2008) (reviewing empirical studies).

[12] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001).

[13] *See* Ted Frank, "Class Actions, Arbitration, and Consumer Rights: Why *Concepcion* Is a Pro-Consumer Decision," Legal Policy Report at 4-5 (Feb. 2013), *available at* https://media4.manhattan-institute.org/pdf/lpr_16.pdf.

[14] *See* John C. Coffee, Jr., *Understanding Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 710 (1986).

transfers it to the federal government, which imposes a one-size-fits-all, top-down approach that denies victims access to a valid and often advantageous dispute resolution process to obtain damages for the harm inflicted on them.

A common argument in support of banning pre-dispute arbitration is that it protects employees and consumers from more powerful corporate interests and employers. This argument is often directed specifically to claims of sexual harassment and assault. Allegations of sexual harassment and assault of course should be taken seriously, and accusers afforded the full protections of the law as they seek to hold those responsible to account. Removing one form of dispute resolution, however, does not further these goals.

As described above, arbitration often provides a faster, cheaper, less daunting process for resolving disputes than a formal court case and is more favorable, on average, for employees. Courts have "remain[ed] attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'"[15] States, too, "remain free to take steps addressing the concerns that attend contracts of adhesion."[16] The market reflects an availability of choice, as studies have found that only about half of private, non-union employers have mandatory arbitration clauses, and technology and financial services companies recently have removed mandatory arbitration clauses from employment contracts.[17]

Importantly, a pre-dispute agreement to arbitrate does not devalue or otherwise alter one's substantive rights under the law. "By 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. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."[18] Underscoring the judiciary's confidence in arbitration, the Supreme Court has upheld pre-occurrence agreements to arbitrate even claims involving wrongful death and other grave injury.[19]

Removing arbitration as a form of dispute resolution will push sexual harassment and assault victims into a court system that is already overburdened and has pre-complaint procedures unique to the employment context that may be

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[15] *Mitsubishi Motors Corp.*, 473 U.S. at 627 (quoting 9 U.S.C. § 2).

[16] *Concepcion*, 563 U.S. at 347 n.6.

[17] *See* S.M., "The Supreme Court sides with companies over arbitration agreements," The Economist (May 23, 2018), *available at* https://www.economist.com/democracy-in-america/2018/05/23/the-supreme-court-sides-with-companies-over-arbitration-agreements; *see also IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989 (7th Cir. 2008) (as long as there is a competitive market, "[employers] must adopt terms that [employees] find acceptable").

[18] *Mitsubishi Motors Corp.*, 473 U.S. at 628.

[19] *See Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012).

difficult to navigate.[20] A longer proceeding not only delays a remedy; it also enriches the trial lawyers bringing these claims, as they increase their number of billable hours or strengthen their justification for a higher percentage of a monetary recovery. Requiring formal litigation in court is less likely to help employees than it is to unfairly transfer wealth from employees to wealthy attorneys.[21] Even with fee-shifting, as a matter of economic reality, a defendant will settle for a total settlement amount that then must be divided between the employee-plaintiff and her attorney such that higher attorneys' fees reduce the plaintiff's recovery. While sexual harassment and employment claims often involve individualized facts that cannot meet the commonality and other requirements for class actions under Federal Rule of Civil Procedure 23, an aggregate resolution is unlikely to provide a better result than arbitration when it is available because of the high transaction costs (including attorneys' fees) and slow and complex procedures.[22]

Even if arbitration is prohibited only pre-dispute, scholars have found that parties are unlikely to agree to arbitrate after a dispute arises—not because litigation in court is in their best interest but because they fear that suggesting arbitration will signal weakness to the opposing party or because they have built up an emotional or other irrational investment in their position.[23] Post-dispute, the parties' attorneys also have a self-interest, even if only sub-consciously, in encouraging their clients to litigate in court because of the longer process and increased opportunity for attorneys' fees that such a resolution offers.

Banning pre-dispute arbitration also increases costs. If employers no longer have the certainty that disputes will be resolved through arbitration, they may be less willing to shoulder a disproportionate share of arbitration costs when they also are subject to the high costs of litigating in court. They may opt instead for the certainty that all disputes will be litigated in court and abandon arbitration entirely. Such a result does not help employees or consumers. Real-world examples show that when consumers have a choice between contracting for a lower-priced

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[20] *See* U.S. Courts, "Judiciary Seeks New Judgeships, Reaffirms Need for Enhanced Security" (Mar. 16, 2021) (pre-pandemic, district court case loads had increased 47% since the last judgeship bill in 1990), *available at* https://www.uscourts.gov/news/2021/03/16/judiciary-seeks-new-judgeships-reaffirms-need-enhanced-security; *see also* U.S. Equal Employment Opportunity Comm'n, "What You Should Know: What to Do if You Believe You Have Been Harassed at Work" (describing steps for "filing a charge of discrimination with the EEOC to complain about the harassment"), *available at* https://www.eeoc.gov/laws/guidance/what-you-should-know-what-do-if-you-believe-you-have-been-harassed-work.

[21] Frank, *supra* note 13, at 14.

[22] *See generally id.*

[23] *See* Steven C. Bennett, *The Proposed Arbitration Fairness Act: Problems and Alternatives*, 67 Disp. Resol. J. 32, 37 (July 2012); Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 790 (2008); David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 Berkeley J. Emp. & Lab. L. 1, 68 (2003).

product or service with a mandatory arbitration clause and paying a higher price not to pre-commit to arbitration, they tend to choose the former.[24] Employees are likely to similarly choose a contract with arbitration that provides better benefits and less costly dispute resolution than one without an arbitration clause. Just as employers, as a matter of economic reality, would reduce salaries or other employee benefits to pay for a mandate that they must pay for their employees' lunch every day, they will similarly reduce employee salaries and benefits to pay for the increased dispute resolution costs that a prohibition on pre-dispute arbitration imposes on them.

Finally, while those not involved in the dispute may see value in exposing allegations of sexual harassment and assault publicly, particularly after the Me Too movement's society-wide impact, those most intimately affected by the underlying misconduct may prefer the greater anonymity and confidentiality that arbitration provides compared to a public court case. Victims may wish to resolve the matter privately for any number of reasons, such as avoiding potential negative effects to their day-to-day lives, family relationships, and career. They may be less likely to pursue a formal remedy at all if a public lawsuit is the only available option.

A public proceeding with the attendant media coverage may benefit high-profile, high-earning women, but the same is not true for countless women in more routine situations who also experience such harm. Unlike the few high-profile cases in which the victims recover substantial sums of money and are afforded lucrative post-litigation opportunities, the average claimant is more likely to want to resolve her claims quietly so as to avoid any unfortunate stigma as she moves forward with her life and career. Enacting a federal law barring individuals from seeking a private remedy turns these women into unwilling pawns, leveraging their private difficulties in pursuit of public policy objectives that don't actually benefit them. There is little reason to believe that it is desirable or beneficial to the vast majority of sexual harassment and assault claimants to force them to pursue their claims in the public limelight.[25] Arbitration offers the option of a more private resolution for these sensitive claims made by those who never chose to be subjected to the wrongdoing in the first place.

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I appreciate the opportunity to appear before this Committee, and I welcome any questions you may have.

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[24] *See* Frank, *supra* note 13, at 2 & n.10.

[25] *See* Gloria Allred, "Assault victims have every right to keep their trauma and their settlements private," Los Angeles Times (Sept. 24, 2019), *available at* https://www.latimes.com/opinion/story/2019-09-23/metoo-sexual-abuse-victims-confidential-settlements-lawsuits.

Chair NADLER. Thank you.
Ms. Newton, you are recognized for 5 minutes.
Can you put on your mic?

TESTIMONY OF ANDOWAH NEWTON

Ms. NEWTON. Sorry, it's my first time.

Chair Nadler, Ranking Member Jordan, and distinguished Members of the Judiciary Committee, thank you for inviting me here today. It is an immense honor. I am joined by my father, mother, and two of my brothers seated behind me.

Before I begin, I want to State that my remarks reflect my personal experience only and have not been made in any professional capacity, and I testify under subpoena issued to me by this Committee.

While my professional and academic profile may not fit the image of someone rendered powerless by and treated inhumanely through forced arbitration, none of my achievements has protected me from the years of intense retaliation, dehumanization, and degradation to which my employer, LVMH, has subjected me.

In December 2014, I was offered the position of director, litigation counsel for the American affiliate of LVMH Moet Hennessy Louis Vuitton, the French conglomerate with brands like Dior, Dom Perignon, Fendi, Givenchy, Veuve Clicquot, and Rihanna's Fenty. I was ecstatic. It was my dream job.

I attempted to negotiate several aspects of my employment agreement, but LVMH made it clear that no aspect, including the forced arbitration clause, was negotiable. It was a "take it or leave it" offer.

I accepted and achieved glowing, flawless performance reviews. My boss, the U.S. General Counsel, wrote, "Andowah reflects the highest degree of honesty and ethics in all she does and handles all matters with a calm demeanor."

I was soon promoted to Vice President of Legal Affairs.

I was also being sexually harassed by LVMH's Director of Property and Facility Operations, Lloyd Doran, a White male about 30 years older than me. He supervised a large staff, reported directly to an SVP who reported to the CEO, and was part of the most senior executives' inner circle.

I barely knew him when he began leering at me every time he saw me. He would walk by office very slowly, skimming the doorway. That escalated to him lurking directly outside of my office for such excessive periods of time that a colleague confronted him about it.

At work gatherings, he pointedly leered at me and as soon as I entered the room would suddenly appear near me. The fact that he monitored all security videos and oversaw security staff especially concerned me. I repeatedly rebuffed his advances but that had no effect.

One day he entered my office with the excuse of hanging artwork. Suddenly, without warning, he lunged towards me, thrusting his pelvic area into my face as I sat at my desk. He pinned his body horizontally on top of my mine. I exclaimed in shock while trying to unpin my body from under his. After I was able to stand

up, he pretended that he had done nothing wrong despite my protests.

This left me constantly agitated and distressed, preoccupied with avoiding the trauma of encountering him. I listened out for the ding of the elevators, avoided the stairwells or working very late in the office, and, when I had to, barricaded myself inside my office to try to feel safe.

When he continued to lurk outside my office, I became anxious and stressed to the point that I had tremendous difficulty concentrating on my work. It was persistent, disruptive, and suffocating.

You would think all you need to do to stop things like this would be to report it. I too thought that would end it. The opposite was true. I was about to receive a horrifying lesson on the power of forced arbitration.

In the following days, LVMH ignored my verbal and written reports and failed to do anything to stop it. They instructed me to personally confront him despite the concerns I expressed. My supervisors even reported me for confronting him.

Then they investigated me. They disregarded my colleague's testimony who had Witnessed some of the behavior and confronted him. Company management even went so far to suggest that I should apologize to him.

Ultimately, management blamed me for misinterpreting the leering, the constant attempts to be near me, and the attempted assault, calling it mere flirtation based on my misunderstanding of French culture, even though Lloyd is American, and I spent many years, as you heard, studying and living in France.

They told me this is what executives do in a French company. They seemed to justify his misconduct because the general counsel felt as professional women there are certain things we have to put up with and sacrifices we have to make.

After repeatedly rejecting my requests to engage an experienced, unbiased investigator, LVMH suddenly reversed course and paid for an outside investigator. She was unable to keep the facts straight, suggested I should be flattered by the harassment, and asked me if I wanted to keep my job, and warned that I would look like a "troublemaker" and a "son of a bitch." Excuse my language.

Then, even before completing the investigation, LVMH promoted Lloyd and publicly announced his promotion to all employees at a company event. The investigator initially proposed issuing Lloyd an internal restraining order, but after conferring with LVMH, her final report was modified.

Emboldened, Lloyd strutted around the hallway outside my office more than ever. My boss began lowering my annual evaluation ratings and inserting hypocritical and snarky comments. She excluded me from high-profile projects and warned that she would be keeping an eye on me.

LVMH left me with no choice but to file a lawsuit. They immediately tried to force my case into arbitration, threatening my attorneys and jeopardizing my case—sorry—jeopardizing my career and my livelihood by seeking sanctions against me personally.

The CEO then emailed all employees, essentially calling me a liar, misstating LVMH's knowledge, denying any retaliation, and mischaracterizing the investigator's results. He also pretended that

a new system created solely for anticorruption issues suddenly had a secondary function of receiving sexual harassment reports from employees. LVMH repeated similar lies to the press and the court.

In 2020, I had to be hospitalized twice due to a serious physical issue, likely triggered by the trauma and stress LVMH incessantly inflicted on me. My case is now in forced arbitration, and I have Witnessed firsthand some of the numerous ways it is biased and unjust against survivors.

Forced arbitration and the power it provides employers seems to have emboldened LVMH, who ramped up their retaliation, gaslighting me and inferring that the sexual assault and harassment were figments of my imagination. LVMH has been so relentless in forced arbitration that I had to take unpaid medical leave this year due to their personal attacks.

By leveraging forced arbitration, LVMH potentially endangered other employees. Had I not filed a complaint, LVMH would have permitted Lloyd and perhaps others like him to continue working there to this day.

Because of forced arbitration and confidential settlements, I may never know the extent to which Lloyd sexually assaulted or harassed others or if LVMH retaliated against others as they did me.

Thank you for unsilencing me today. You each stand in a position of far more privilege and power than most Americans could ever dream of. I hope that you use that position to protect us and your loved ones by ending forced arbitration.

[The statement of Ms. Newton follows:]

Testimony before
The United States Congress, House Committee on the Judiciary Hearing on
How Forced Arbitration Silences Victims of Sexual Violence & Sexual Harassment

Andowah A. Newton
November 16, 2021

Chairman Nadler, Ranking Member Jordan, and Distinguished Members of the Judiciary Committee,

Thank you for inviting me here today—it is an immense honor. While it is very difficult for me to provide this testimony, responding to a Congressional subpoena is a duty that I take seriously.

I. My Background

My name is Andowah Newton, and my personal background is quintessentially American. My father and mother, seated behind me, immigrated from Ghana and Panamá, fifty and sixty years ago, respectively. They met when they were both in graduate school in New York City, where I was born a few years later. Two of my younger brothers, Edward and Alex, are also seated behind me.

I realize that I may not fit the image of someone rendered powerless and treated inhumanely due to forced arbitration—a legal executive with over 20 years' experience in business and law, specializing in commercial litigation for the past 15 years, with degrees in Accounting and French from Georgetown, a law degree from Cornell, and a French law degree from The Sorbonne. I have worked in the United States, France, and The Netherlands as a Certified Public Accountant, auditor, internal controls analyst, or attorney for companies such as Johnson & Johnson, PwC, Estée Lauder, and large law firms; clerked for the First Vice President Judge of the International Criminal Court; and audited or represented clients such as Sony Music, Viacom, Thomson Reuters, KPMG, Deloitte, Chubb, and Wells Fargo.

But none of my achievements has protected me from the years of intense retaliation, dehumanization, and degradation to which LVMH, my current employer, has subjected me. Forced arbitration has given them the opportunity to treat me this way and get away with it.

II. Exemplary Performance at LVMH Moët Hennessy Louis Vuitton Inc.

In December 2014, I was offered the position of *Director, Litigation Counsel* for the American affiliate of LVMH Moët Hennessy Louis Vuitton—the $330 billion[1] French

[1] R. Cormack, *At $329 Billion, LVMH Is Now the Most Valuable Company in Europe*, Robb Report, March 2, 2021. https://robbreport.com/lifestyle/news/lvmh-is-now-the-most-valuable-company-in-europe-1234599368/

conglomerate of 75 luxury brands[2] such as Dior, Dom Perignon, Fendi, Givenchy, Rihanna's Fenty, Marc Jacobs, Sephora, Tiffany, and Veuve Clicquot. I was ecstatic—it was my "dream job," resulting from years of hard work. LVMH's internal recruiter told me that in the first two weeks of the position's posting, several hundred attorneys had already applied, and I was their number one choice.

Although I attempted to negotiate several aspects of my employment agreement, LVMH quickly made it clear that no aspect—including the forced arbitration agreement they attached—was negotiable. The "opportunity of a lifetime" was a "take-it-or-leave-it" offer and LVMH made sure to remind me of the hundreds of other candidates ready to take the position if I declined.

I accepted the offer and performed my job to high acclaim, receiving glowing accolades and flawless evaluations. My boss, the U.S. General Counsel, wrote: "[Andowah]...reflects the highest degree of honesty and ethics in all she does," is "a client's dream," achieves "excellent results," and "handles all matters efficiently with a calm demeanor." I was promoted to *Vice President, Legal Affairs* two years after I joined.[3]

III. LVMH Director Sexually Harasses & Assaults Me

Against the backdrop of achieving professional success at LVMH, I was being sexually harassed by the Director of Property & Facility Operations. Lloyd Doran is a white male about thirty years older than me, who joined the Company about a decade before me. He supervised a large staff of employees, reported directly to an SVP only one level down from the CEO, and was part of the most senior executives' inner circle.

I barely knew him when he began leering at me every time he saw me. He would walk by my office very slowly, skimming the doorway. He would visually examine my body the moment I was within sight, undressing me with his eyes. He made a lewd remark to me. His behavior escalated to lurking directly outside my office for such excessive and distracting periods of time that it caught the attention of a colleague who confronted him. At work gatherings, he pointedly leered at me as soon as I entered the room. He would suddenly appear near me. The fact that he monitored all the security videos and oversaw the security and building staff made me especially concerned with the stalking.

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[2] LVMH's brands include Tiffany, Louis Vuitton, Christian Dior, DFS, Le Bon Marché, La Grande Épicerie, Fendi, Marc Jacobs, Fenty Beauty by Rihanna, Givenchy, Sephora, Starboard Cruise Services, Berluti, Charles & Keith, Bulgari, Céline, Emilio Pucci, House of Bijan, Kenzo, Loewe, Loro Piana, Moynat, Nicholas Kirkwood, Rimowa, Chaumet, FRED, Guerlain, Kenzo, Fresh, Make Up For Ever, Hublot, TAG Heuer, Zenith, Acqua di Parma, Givenchy Parfums, Kenzo Parfums, Make Up For Ever, Parfums Christian Dior, Perfumes Loewe, Maison Francis Kurkdjian, Marc Jacobs Beauty, Kat Von D Beauty, Cheval Blanc (hotels), Caffe-Pasticceria Cova, Feadship, Les Échos, Hennessy, Belvedere, Veuve Clicquot, Dom Pérignon, Krug, Ruinart, and Moët & Chandon, among others. https://www.lvmh.com/houses/

[3] I believe I was the first and only Black person ever to attain that position or higher in the Company's history. In 2020, the Company hired another Black VP (of Diversity and Inclusion), and a Black SVP.

Although I repeatedly rebuffed the advances of LVMH's Director of Operations, my rejections had no effect.

One day, he entered my office to show where artwork would be hung. Suddenly, with no warning, he lunged towards me—thrusting his pelvic area into my face as I sat at my desk. He then pinned his entire body horizontally on top of mine. I exclaimed in shock while trying to unpin my body from under his. After I was able to stand up, he pretended that he had done nothing wrong, and did not face me as I chided him.

At a work gathering several months later, he publicly tried to force me to greet him with a kiss. When I refused both attempts, leaning back and emphatically saying "No," he embarrassed me in front of my colleagues.

His sexual harassment, attempted assault, and assault made me feel scared, demeaned, and ashamed. I found myself constantly agitated, distressed, and hypervigilant, preoccupied with avoiding the trauma of encountering him. I avoided the stairwells and listened for the ding of the elevators. I avoided working very late in the office, and when I had to, I barricaded myself inside my office to try to feel safe.

Once, at a Company event, I sought a colleague's assistance after panicking when I realized the predator had been seated at my table. I became keenly aware of his whereabouts at Company gatherings to avoid being near him. When he continued to lurk outside my office, I became anxious to the point that I had tremendous difficulty concentrating on my work, sometimes losing focus entirely. It was persistent, disruptive, stressful, and suffocating. Like many sexual assault and harassment survivors, I have since been diagnosed with PTSD.

You would think all you need to do to stop violations like this would be to report it. I, too, thought that would end it. But I was woefully mistaken. I was about to receive a horrifying lesson over several years on how the power of forced arbitration could be wielded against survivors to prolong pain and trauma without resolving anything. In my case, LVMH weaponized forced arbitration to intimidate me into silence. Instead of stopping the predator, LVMH rebuked me for accusing the predator, suggested that *I* apologize to him, promoted him while visibly alienating me, pursued court sanctions against me, and are now suing *me* for attorneys' fees for their efforts to force my case into arbitration. Believing that the forced arbitration agreement would protect them from both the court of public opinion and a jury, instead of ending the harassment, they brutally retaliated against me.

IV. Relying on the Power of Forced Arbitration, LVMH Launches a Vengeful Campaign of Retaliation and Intimidation Against Me

Bolstered and protected by the forced arbitration agreement they attached to my employment agreement, LVMH reacted to my reports of sexual assault and harassment by launching an intense campaign of retaliation, intimidation, and aggressive psychological warfare against me which continues to this day. Reversing the roles, they

have treated me like *I* am the villain, and the predator like he was the victim worthy of LVMH's protection.

Spearheaded by LVMH's U.S. CEO Anish Melwani, SVP HR Gena Smith, SVP Legal Affairs & General Counsel Louise Firestone, VP Legal Affairs & Employment Counsel Frank Martinez, and LVMH's outside counsel Rex Sessions of Winston & Strawn, LVMH responded to my repeated reports as follows:

- Completely ignored my verbal reports of harassment and assault and failed to do anything to stop it;
- Ignored my written report of the harassment;
- Refused to do anything about the harassment, giving the excuse that my reports were made to Legal instead of HR, even though I followed the Anti-Harassment Policy;
- Instructed me to personally confront the predator, despite the concerns I expressed about doing so;
- Scolded me when I followed their instructions by confronting him by email to tell him to stop harassing me;
- Reported *me* to HR for telling the predator to stop harassing me, and then investigated *me*;
- Disregarded the testimony of my colleague who had witnessed some of the predator's behavior and confronted the predator;
- Suggested that *I* apologize to the predator, per his request, because *he* "couldn't sleep…or eat" and "was afraid of losing his job," while they dismissed my inability to properly focus, concentrate, sleep, or eat due to the harassment;
- Repeatedly refused to reprimand the predator or tell him to stop harassing me or modify his conduct in any way because he supposedly "needed to be able to do his job as he saw fit"; and
- Blamed me for "misinterpreting" the attempted assault, calling it "mere flirtation," based on my supposedly "misunderstanding French culture," even though the predator is American. They told me: "This is what executives do in a French company," but in the years that I worked and studied in France, I was never sexually harassed or assaulted by a colleague.
- My boss, LVMH's General Counsel, chastised me for allegedly making her look bad by reporting the harassment and supposedly not making the HR manager conduct a better investigation.
- LVMH's General Counsel also justified the predator's misconduct because, as professional women, there are supposedly "certain things we have to put up with" and "certain sacrifices we have to make."

This was just the *beginning* of LVMH's retaliation campaign. They repeatedly rejected my requests to engage an experienced, unbiased outside investigator because they claimed it would be a waste of time and resources. A few days later, they suddenly reversed their position and paid for an outside investigator, former NY Justice Betty Ellerin, who I later shockingly learned was known in the legal community for championing women's rights.

She appeared to be unable to keep the facts straight and insisted that the incidents would be "hard to prove." She also suggested that I should be grateful for and flattered by the harassment. To my dismay, she asked me if I wanted to keep my job, and warned that I would look like a "troublemaker" and "son of a bitch."

While the investigation was still pending, LVMH *promoted* the predator and publicly announced his promotion to all employees at a Company event. They *promoted* the man that sexually assaulted and harassed me before the investigation was even complete. That is bad enough on its own. It was also contradictory to the Anti-Harassment policy.

Although the investigator initially proposed addressing the sexual harassment and assault by issuing the predator an internal restraining order, her final report was whitewashed after conferring with her client, LVMH, and concluded that no sexual harassment or violation of Company policy had taken place, even though the policy defines "leering" as harassment and the predator's assault and harassment violated New York City, New York state, and federal law. The report also confused, downplayed, and disregarded important facts, such as the testimony of my colleague who witnessed some of the harassment, while inappropriately magnifying self-serving, irrelevant, and inaccurate statements by LVMH's in-house Employment Counsel.

LVMH refused to let me see the outside investigator's report or the initial report written by the HR manager. When LVMH's SVP HR read me the concluding paragraph, I informed her that I continued to feel unsafe and feared for my safety in the office. I asked whether LVMH understood that and would ask him to change any of his behavior whatsoever. LVMH's SVP HR became infuriated and exclaimed: "*NO*, because he did *nothing* wrong!" She then encouraged me to meet and interact with the predator, suggesting that I should try to get back into *his* good graces.

Emboldened by LVMH's actions, the predator came to my floor and strutted around the hallway outside my office more often than ever. LVMH's General Counsel called him to her office more frequently, even though that meant he was once again by my office, and she tried to get me to directly interact with him when it was totally unnecessary.

LVMH's General Counsel also began lowering my evaluation ratings and inserting negative, hypocritical, and even snarky comments in my annual evaluations. She excluded me from sensitive or high-profile projects, discussions, and decisions in which I previously was involved or led, decreased my autonomy, attempted to take over some of my matters, and warned that she would be "watching" and "keeping an eye on" me. This year, LVMH lowered my annual salary increase by 33% and my annual bonus by 40%, at a time when the Company's profits are surging.

Due to LVMH's failure to stop the harassment and their continuing retaliation campaign, I was left with no choice but to file a Complaint in New York state court in April 2019.[4] Even though LVMH had required me to sign a forced arbitration agreement, New York had passed a law in 2018 banning forced arbitration and

[4] https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=tXkHlfQI6z_PLUS_CB9GinbXYRA==

permitting survivors to sue in court. LVMH had also permitted "all employees" to "file a Complaint in state court" through a Revised Anti-Harassment Policy issued in 2018 and required all employees to sign.

Realizing that forced arbitration might no longer shield them to the full extent intended, LVMH reacted to my lawsuit by threatening my attorneys, then immediately asking the court to force my case into arbitration. They also tried to jeopardize my career and livelihood by seeking sanctions against me personally, just for filing the lawsuit. Referring to me like a criminal, they insisted that I not be treated "with impunity." They revealed my salary and home address to the public, exposing me to further assault and harassment, and endangering my physical safety.

But LVMH decided that that wasn't enough punishment for me. As I was working in my office the day after my Complaint was filed, an email from the CEO, addressed to all employees, appeared in my Inbox. In it, the CEO essentially called me a liar and inferred that I couldn't be trusted, even though LVMH continued to rely on my advice for multi-million-dollar matters. He misstated when LVMH became aware of the assault and harassment, denied any retaliation, and mischaracterized the nature and outcome of the investigator and HR manager's findings, falsely stating that "neither... investigation found any evidence" and deliberately omitting the witness's testimony. He concealed LVMH's repeated objections to even conducting an investigation and their eventual manipulation of it. He also fabricated the existence of a mechanism to report sexual harassment anonymously, pretending that a system recently created solely for anti-corruption-type compliance issues suddenly had a secondary function of receiving sexual harassment reports. He concluded his tirade with "none of us should let this stand in our way of conducting business as usual."

LVMH repeated similar lies to the press and in court filings. They took advantage of the fact that I didn't name the predator in the NY state Complaint to deceivingly claim that he was in a much lower position than me and insinuate that he reported to me.

At the holiday celebration that year, LVMH made the predator a guest of honor, seating him near the CEO, SVPs, and other guests of honor, toasting him and parading him about as if he were a hero. And, unlike the holiday celebrations before I filed the Complaint, they seated me in a corner tucked behind a large column, cast aside and hidden away from view.

Certain colleagues took the CEO's cue and displayed outright hostility toward me during other company events, meetings, calls, and in emails. Some, with whom I previously had collegial relationships and friendships, began distancing themselves or avoiding being seen with me. It was incredibly isolating and devastating. The following year, I had to be hospitalized twice for multiple days due to a serious physical issue likely triggered by the unbearable trauma and stress LVMH incessantly inflicted on me.

LVMH permitted the predator to work there until his retirement, almost two full years after I made the formal written report, without any restrictions or even an admonishment. While he was promoted, celebrated, embraced, and allowed to save face and avoid public accountability, I was excluded, scolded, humiliated, punished, and attacked.

LVMH's reaction to my Complaint was appalling, demeaning, and degrading. But they knew they would get away with all of it because forced arbitration was their silver bullet.

V. Forced Arbitration Enables Harassers, Silences Survivors, and Has Emboldened LVMH to Further Retaliate

Having my case forced into arbitration[5] has been a devastating blow: it is now 3x less likely, on average, to succeed and any damages awarded are likely to be 5x less, on average, than they would have been in court.[6] Some estimate that employees prevail in only 1.6% of forced arbitrations.[7] Unlike judges in court, arbitration fees are usually paid by employers. There will be no public accountability rendered by a jury, and no public oversight or scrutiny. There is also no right to appeal and most arbitration rulings are secret. My case will be more difficult to establish because discovery will be limited. I will not be protected by the Rules of Evidence. I have already witnessed first-hand some of the additional ways in which forced arbitration excessively favors employers and is biased and unjust against survivors.

Forced arbitration of my case has also emboldened LVMH. Just after the appellate court's decision, they ramped up their retaliation, gaslighting me by inferring that the sexual assault and harassment were figments of my imagination. Their retaliation became so relentless that I had to take unpaid medical leave earlier this year to cope with and heal from their personal attacks.

In June, LVMH cruelly retaliated again by filing a separate case in arbitration against me for attorneys' fees. The $330 billion company with $60 billion in annual profits which flagrantly subjected me to sexual harassment, assault, and retaliation wants *me* to pay them hundreds of thousands of dollars for the privilege of being sexually assaulted and harassed by them. Those are attorneys' fees that *they decided* to spend, and could have avoided spending, simply by telling the predator to stop harassing me. LVMH would not have had the audacity to behave with such a disregard for the law if it had to face a public jury trial rather than an arbitration.

The secretive nature of forced arbitration not only enables companies to retaliate in the manner LVMH has; it allows them to use forced arbitration as an intimidation tactic to silence survivors and prevent them from knowing whether their harassers

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[5] The trial court denied LVMH's motion to force arbitration, finding that I had a right to sue LVMH in court on multiple legal grounds but LVMH quickly appealed and obtained a reversal. https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=D8uHdTJ71qY5Y62RDz07AA==. My case's arbitrability, however, remains in question because the appellate court referred the issue of LVMH's revised Anti-Harassment Policy and its effect on the arbitrability of my case to an arbitrator. *https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=60Pyxce4oOnFK7LMSZvovw==*.

[6] Rebecca N. Morrow, *Taxing Employers for Imposing Mandatory Arbitration, Class Action Waiver, and Nondisclosure of Dispute Provisions*, 74 SMU L. Rev. 59 (2021) https://scholar.smu.edu/cgi/viewcontent.cgi?article=4872&context=smulr

[7] Abha Bhattarai, *As Closed-Door Arbitration Soared Last Year, Workers Won Cases Against Employers Just 1.6% of the Time*, The Washington Post, Oct. 27, 2021 https://www.washingtonpost.com/business/2021/10/27/mandatory-arbitration-family-dollar/

harassed others, thereby enabling these wrongdoers to continue abusing colleagues and perpetuating a system of unfettered harassment.

By repeatedly attempting to leverage forced arbitration to silence me, LVMH potentially endangered other employees. Had I not filed the Complaint in court, LVMH would have permitted the predator to continue working there, potentially harassing others, to this day. While I wanted the harassment to stop and not continue to escalate, one of my main goals in reporting the harassment was to prevent the predator from harming others, especially the interns half my age who pass through the company for short periods of time, making them especially vulnerable. I told the Employment Counsel: "I can't possibly be the first one he has harassed. You don't start by harassing the middle-aged Head of Litigation." The Employment Counsel's silence spoke volumes. Because of forced arbitration and confidential settlements, I may never know if the predator sexually assaulted or harassed others, or if LVMH retaliated against others for reporting sexual harassment.

No survivor actually wants to sue their employer. We just want the harassment to stop. Survivors know that the minute we sue, our job security disappears, our career prospects are damaged, our personal lives suffer irreparably, and we will repeatedly be re-traumatized. Employers know this and leverage it. In my case, my personal life and career have stalled and been derailed at a very critical time. I have lost friendships inside and outside of work. And for the first time in my life, I have had to seek individual therapy from several medical providers to cope with the sexual assault, harassment, and venomous retaliation.

So if a survivor ends up suing, it is usually with extreme reluctance and only when the employer has so woefully failed to address the harassment and egregiously mistreated the survivor that they are left with no other choice. Had LVMH responded in a manner that acknowledged what I had suffered at their employee's hands, respected me as a human being, not demeaned me, desecrated my character, or tried to intimidate me into silence, there would have been no need for a lawsuit. I kept thinking: if they can do this to me, what have they done and what *will* they do to others? I thought of my niece, my friends' children, my cousins, and the young professionals and students I have mentored throughout my life. I don't want them to have to endure what I have had to endure at LVMH.

So, let's stop repeating the narrative that banning forced arbitration would increase litigation. It would actually *reduce* litigation in the long run because the potential of facing a jury, the public, and a large damage verdict would incentivize companies to stop sexual harassment rather than sweep it under the rug. There would be no need to file a claim in the first place. By contrast, the low-dollar confidential settlements or damages that forced arbitration produces wrongly incentivize companies to ignore sexual harassment and silence survivors. That, in turn, endangers others in the workplace and perpetuates harassment and the resulting claims. Under any scenario, however, our ultimate goal should be less workplace harassment, not less litigation.

The "pre-harassment" aspect of forced arbitration is particularly disturbing. It is absurd that LVMH has forced me to arbitrate, in 2021, based on an agreement they required me to sign in 2014—before the assault and harassment occurred. Even when businesses of equal bargaining power agree to arbitrate their disputes, they usually prefer to do so *after* the dispute has arisen, not beforehand. In 2014, I could not imagine that I would be sexually harassed at my "dream job," especially knowing that its customers and employees are mostly women. And I definitely did not think that if I ever were harassed, LVMH would do nothing to stop it and instead retaliate.[8]

I want to be clear that I do not think that arbitration itself is bad. In the commercial setting amongst entities with equal bargaining power, I have seen that it can be an extremely useful tool. But it is totally inappropriate when human and constitutional rights are involved. Saving *the employer's* time and money should not be the primary goal when someone has been sexually assaulted or harassed; rather, it should be accountability and preventing further harm. The ongoing situation of harassment and retaliation in which I find myself at LVMH is a stark reminder that the gross imbalance in negotiating power and resources inherent in any employment situation make it such that the employee, regardless of their position, intellect, or achievements, will always be the "David" and the employer the "Goliath."

The most important word in this bill is "forced." It gives survivors the *choice* to determine if arbitration is best for them rather than having their employer dictate what is best. Creating *real* choice is as important as creating transparency. Even those knowledgeable about arbitration can be deprived of choice when there is a power imbalance.[9] The practical, long-term effect of permitting survivors to sue is creating a safer workplace by eliminating a culture and practice of perpetual harassment and silencing. "Sunlight is the best disinfectant."

Before concluding, I want to state that my remarks reflect my personal opinions only and have not been made in any professional capacity.

Thank you for "unsilencing" me by inviting me here today. You each stand in a position of far more privilege and power than most Americans could ever dream of. I hope you use those advantages to protect us, and your loved ones, by ending forced arbitration.

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[8] My personal opinion is that any bill should apply to arbitration agreements that predate the bill's enactment. Without retroactive application, only workers who begin new jobs after the bill is enacted would be protected. In my case, the appellate division forced it into arbitration because it found that the New York law was not retroactive, even though the harassment continued after the law's enactment.

[9] That is why one tax law professor suggests taxing employers who use forced arbitration because she asserts that it is an off-balance sheet asset.
https://scholar.smu.edu/cgi/viewcontent.cgi?article=4872&context=smulr

Chair NADLER. Thank you.

Ms. Perry, you are recognized for 5 minutes.

TESTIMONY OF SARAH PARSHALL PERRY

Ms. PARSHALL PERRY. Good morning.

Chair Nadler, Ranking Member Jordan, Members of the Committee, thank you for giving me the opportunity to appear before you today. I commend this Committee for holding a hearing on an important topic.

Today's hearing is, unfortunately, to quote the great Yogi Berra, "déjà vu all over again." Since the 1980s, the progressive leadership of this and the upper Chamber has sought to curtail the protections of the Federal Arbitration Act through bills, including the Arbitration Fairness Act, Arbitration Fairness for Students Act, Consumer Mobile Fairness Act, Fairness in Nursing Homes Act, Consumer Fairness Act, Restoring Statutory Rights and Interests of the States Act, the Forced Arbitration Injustice Repeal Act, and many, many more.

In enacting the FAA, Congress sought to redirect employment disputes away from congested court dockets and to experts in employment and labor law. So, congested are these court dockets today, in fact, that between 2019 and 2020 the number of civil filings in the Federal district and Circuit court system increased by 40 percent.

Judicial delay is one of the largest problems in our American legal system. Many of the cases that are in the system take more than 3 years to reach a resolution, and every study considering the issue has concluded that results in arbitration are far swifter than litigation.

Time and again, the Supreme Court has also interpreted the FAA to be a liberal Federal policy favoring arbitration and has clarified that arbitration may be applied to antidiscrimination employment provisions, like sexual harassment claims and title VII. It routinely assumes that litigation and arbitration are equally acceptable methods for resolving disputes and has consistently so held. Data indicates that only 1 percent of all civil cases filed in Federal court ever go to trial.

The basic premise of all limiting legislation—that arbitration is somehow unfair to or bad for employees and consumers is false. The evidence shows precisely the opposite.

Empirical studies show that employees do as well or even better in arbitration than they do in litigation. They prevail at the same rate or more frequently. They recover as much or more through arbitration as they would in litigation. A study of more than 100,000 cases, the claim of employee-plaintiffs in court compared with arbitration show that those arbitrating generally recovered approximately double those in court.

The FAA also enforces neutrality requirements for arbitrators. It authorizes Federal courts to vacate arbitration awards where there is evidence of partiality in the arbitrators.

There are also remedies that exist in law to invalidate arbitration agreements, which protects employee-claimants when the balance of power has been weighted against them.

In a study performed by economics firm Micronomics, when totaling both direct and indirect financial losses associated with choos-

ing trial over arbitration, estimated total losses were calculated at approximately $28–$35 billion between 2011–2015.

When calculated for additional time through appeal, the losses rose to a skyrocketed $51–$59 billion over the same time period.

Last, and most importantly, interest groups for years have identified arbitration clauses as untenable, in large part because they claim it creates confidential proceedings that remove bad corporate actors from the sanitizing light of publicity. This conflates arbitration with confidentiality clauses, two distinct things.

The American Association of Arbitration in its due process protocols says that only the arbitrator shall maintain the confidentiality of the arbitration and has the authority to make appropriate findings to safeguard the confidentiality unless the parties agree otherwise. This is a duty for the arbitrator alone.

In fact, neither the FAA, nor the Uniform Arbitration Act, imposes any duty of confidentiality on the parties to an agreement, the arbitrator, or the arbitration administrator, and is silent on the privacy of the arbitration process. These are contractual clauses that appear on their own.

While the public cannot attend arbitration hearings and an arbitrator and arbitration administrator cannot disclose information about arbitration, the parties to the contract are under no such obligation unless they explicitly agree.

Even in arbitrating employment discrimination claims, an employee can disclose the facts of the underlying dispute, can disclose information obtained in the process and the amount of any award unless they have explicitly agreed to confidentiality provisions. They can still report, communicate, and disclose the disposition of their title VII discrimination claims, as well as harassment, retaliation, and sexual assault claims. They can always communicate with Federal and State agencies, and they may file and pursue a claim through the EEOC or an investigation in the public interest.

We do not want to protect bad actors, but these are two distinct realities.

Under U.S. law, arbitration is not really a confidential process. It is a private process. It's not that arbitration clauses are dangerous, but perhaps that confidentiality provisions are.

There is a culture of sexism, even predation within the halls of power. The Larry Nassars, the Harvey Weinsteins of the world, they deserve to be called to account.

I commend the personal bravery of the women here today. They have been fundamental to the service of justice for not only themselves, but for so many others like them simply by sharing their stories.

The very premise of this hearing—that arbitration keeps victims of sexual violence and harassment in the shadows—suggests a solution to the problem of harassment and discrimination that's ultimately misguided.

Arbitration agreements are not mandatory. No one—and the Supreme Court has held—is forced to sign a contract. Curtailing access to arbitration would injure in the end the very people that Congress has sought for nearly a century to protect. Thank you.

[The statement of Ms. Perry follows:]

The Heritage Foundation

CONGRESSIONAL TESTIMONY

"Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the Shadows"

Testimony before
House Committee on the Judiciary

Chairman Jerrold Nadler

United States House of Representatives

11/16/21

Sarah Parshall Perry
Legal Fellow
Meese Center for Legal and Judicial Studies
The Heritage Foundation

Statement of Sarah Parshall Perry, legal fellow in the Meese Center for Legal and Judicial Studies at the Heritage Foundation. The views expressed by the author are the author's own and should not be construed as representing any official position of The Heritage Foundation.

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Mr. Chairman Nadler, ranking member Jordan, and members of the committee:

Thank you for giving me the opportunity to appear before you today. I commend the committee for holding a hearing on this important topic.

My name is Sarah Parshall Perry. I am a Legal Fellow in the Meese Center for Legal & Judicial Studies at the Heritage Foundation. I am also former senior counsel to the Assistant Secretary for Civil Rights at the Department of Education, former in-house counsel and business director for a small Maryland company, and a former plaintiff's lawyer specializing in employment discrimination law and Title VII, among others.

Today's hearing is--to quote the great Yogi Berra--déjà vu all over again.

I. The Supreme Court Has Repeatedly Enforced the Federal Arbitration Act (FAA) Against Challenges.

Since the 1980's, the liberal leadership of this and the Upper Chamber has sought to curtail the protections of the Federal Arbitration Act (FAA)[1] of 1925, a law designed to recognize arbitration as a lawful method of dispute resolution and ensure that state and federal courts enforce and uphold arbitration agreements to the same extent as any other type of contract.

Congress's aims in enacting the FAA included redirecting employment disputes away from congested court dockets and towards arbitrators who specialize in labor and employment law. So congested are these court dockets, in fact, that between 2019 and 2020, the number of civil filings in federal district and circuit courts increased by more than 40%.[2] For year ending 2020, filings in federal circuit courts of appeal were up 5%, filings of civil cases in the U.S. district courts were up 16%, and pretrial services cases activated in the past 12 months increased 5%.[3]

Judicial delay is one of the largest problems in our legal system, for as scholars have pointed out: "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 now takes over seven months to be resolved, and many cases take more than three years to reach a resolution."[4] Claims that arbitration somehow removes an employee's right to a jury trial are therefore exaggerated given how few civil cases ever reach a jury. By contrast, employees in arbitration are much more likely than plaintiffs in court to have their story heard in person by a neutral factfinder. Virtually "every study considering the issue has concluded that results in arbitration are far swifter than those in litigation."[5]

Arbitration is the most common process for American workers' rights—in both the public and private sector—to be adjudicated and enforced. Time and again, the Supreme Court has interpreted section

[1] Current at: 9 U.S.C. §§ 1 *et seq.* (2015).
[2] United States Courts, Statistical Tables for the Federal Judiciary, June 2020.
[3] United States Courts, Federal Judicial Caseload Statistics, March 2020.
[4] Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2352 (2012).
[5] S. 1782: *The Arbitration Fairness Act of 2007: Hearing of the Subcomm. on the Constitution, S. Comm. on the Judiciary*, 110th Cong. (Dec. 12, 2007) (statement of Peter Rutledge).

two of the FAA to be a substantive commitment to a federal pro-arbitration policy,[6] and in 1983, the Supreme Court, led by Chief Justice Warren Burger, declared that the FAA evinces a "liberal federal policy favoring arbitration."[7]

Soon thereafter, the Court ruled that the FAA requires enforcement of agreements to arbitrate not only contract claims, but statutory claims as well.[8] In 1991, the Court—in a decision directly applicable to today's hearing—concluded[9] that the FAA requires enforcement of agreements to arbitrate claims arising under an antidiscrimination statute.[10] As recently as 2018, the Supreme Court in *Epic Systems Corp. v. Lewis*[11] clarified that the FAA pre-empted the National Labor Relations Act.[12] In 2019, in its most recent pronouncement on the continued viability of the FAA, the Court in *New Prime Inc. v. Oliveira*[13] unanimously ruled that when contracts include mandatory arbitration clauses, employees still have the right to seek court oversight to determine if their employment falls within the exceptions in section one of the FAA related to employees involved in interstate commerce.[14] And just yesterday

[6] *See, e.g.*: *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 341–43 (2011)(In evaluating a California Supreme Court decision holding that class action waivers in adhesive consumer contracts were unconscionable unless the party seeking arbitration demonstrated that bilateral arbitration was an adequate substitute for the deterrent effects of class actions, Justice Antonin Scalia's majority opinion clarified that: "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA").

[7] *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (involving an arbitration agreement between a hospital and a construction contractor).

[8] See e.g., *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614(1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987).

[9] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

[10] In *Gilmer*, the anti-discrimination provision at issue was the Age Discrimination in Employment Act (ADEA) of 1967.

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

[12] While criticized as having dealt a blow to the "me too" movement and transparency of sexual harassment claims (see, e.g., Michelle Gilman, *Supreme Court ruling against class action lawsuits is a blow for workers — and #MeToo*, SALON (May 22, 2018), https://www.salon.com/2018/05/22/supreme-court-ruling-against-class-action-lawsuits-is-a-blow-for-workers-and-metoo_partner/), the Court in *Epic Systems Corp. v. Lewis* addressed solely whether an employee seeking to bring a class action based on unlawful wage and hour violations was required to adhere by the terms of his arbitration agreement under the FAA, or whether class action lawsuits or group arbitration were available to claimants under the National Labor Relations Act (NLRA). The Court held that in the FAA, Congress had instructed that arbitration agreements providing for individualized proceedings must be enforced, and neither the FAA's saving clause nor the NLRA suggested otherwise.

Indeed, the hysteria surrounding the #MeToo movement, and particularly the sturm und drang that followed the Supreme Court's opinion in *Lewis* does a tremendous disservice to the campaign of awareness of an enduring culture of sexual harassment in the upper echelons of power. The mischaracterization of the Court's holding and its purportedly direct relationship to women in the workforce, as well as the blame shifting away from Congress as the source of any problem that might stem from the Federal Arbitration Act, does more to damage the #MeToo movement than the judicial restraint exhibited by the justices in the majority in the Court's 2018 opinion. Adherence to longstanding rules of statutory interpretation benefit employees, consumers, and businesses of all stripes. Law and judicial restraint from policymaking are not enemies of justice and democracy, but rather their fundamental prerequisites.

[13] *New Prime Inc. v. Oliveira*, 139 S.Ct. 532 (2019). In *New Prime*, the Court extended judicial review protections on interstate commerce exceptions to the FAA to not only employees, but to independent contractors as well. Particularly noteworthy is the fact that the Court, comprised of a conservative majority often criticized for its restrictive view of the FAA, chose to interpret the law in a way that expands worker's rights. See e.g., *US Supreme Court Unanimously Rules in Favor of Workers, Holding Trucking Company's Arbitration Agreement Exempt From Federal Arbitration Act*, IX NATL. L.REV. VOLUME 15 (January 2019), https://www.natlawreview.com/article/us-supreme-court-unanimously-rules-favor-workers-holding-trucking-company-s.

[14] In 1995, the Court analyzed the FAA's "involving commerce" language in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), concluding that it covers more than "only persons or activities within the flow of interstate commerce," and that the phrase is broad enough to reflect Congress' intent to exercise to the fullest its Commerce Clause

the Supreme Court granted cert. in *Morgan v. Sundance, Inc.*[15] to determine whether an arbitration-specific requirement that the proponent of a contractual waiver defense prove prejudice violates the Supreme Court's instruction[16] that lower courts must "place arbitration agreements on an equal footing with other contracts".

In its body of FAA case law, the Supreme Court routinely assumes that litigation and arbitration are equally acceptable methods for resolving disputes. [17] This assumption is well founded, as approximately 1% percent of all civil cases filed in federal court are resolved by trial — the jury trial disposition rate is approximately 0.7%, and the bench trial disposition rate is even lower.[18] Employees subject to arbitration provisions in their employment contracts therefore, are in a much better place through arbitration, with the opportunity to participate in a faster, more efficient, and more thorough adjudication of their claims than they would be in civil litigation, where civil trials have been rendered all but extinct.

II. Old, Repetitive Anti-arbitration Talking Points Are Unsupported by the Evidence

Despite a lengthy history of jurisprudence supporting the preeminence, enduring application, and pro-arbitration presumptions of the FAA, attacks on the law and the arbitration process generally have abounded on Capitol Hill for years. Critics recycle the same talking points, claiming that arbitration is unfair, biased in favor of businesses, and provides inadequate remedies. Detractors also claim inaccurately that the FAA was meant to apply only to disputes between commercial entities[19] and has therefore been misinterpreted by the Supreme Court, contrary to congressional intent.

Anti-Arbitration Legislation

These criticisms have launched a torrent of litigation designed to gut the long-standing FAA through attempts at piecemeal eliminations of its purpose and effect. Among just a few of these bills:

- (1) the Arbitration Fairness Act[20] (introduced in the 112th and the 115th Congress, which would have rendered pre-dispute arbitration agreements unenforceable and invalid in employment, consumer, antitrust, and civil rights disputes, and specifying that courts--not arbitrators--could determine the validity and enforceability of agreements to arbitrate);

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powers—extending to both direct and indirect connections to interstate commerce, not just what the parties intended at the time of agreement.

[15] Morgan v. Sundance, Inc., No. 21-328, ___ U.S. ___ (2011).

[16] In: *AT&T Mobility LLC*, *supra* note 6.

[17] David Horton, *Clause Construction: A Glimpse into Judicial and Arbitral Decision-Making*, 68 DUKE L.J. 1323, 1329 & n.33 (2019). The federal circuit courts have rightly applied these assumptions when faced with arbitration challenges and application of the FAA to various disputes. *See, e.g., Benson v. Casa de Capri Enterprises, LLC*, 980 F.3d 1328 (9th Cir. 2019).

[18] Jeffrey Q. Smith and Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICATURE 4 (Winter 2017), https://judicature.duke.edu/articles/going-going-but-not-quite-gone-trials-continue-to-decline-in-federal-and-state-courts-does-it-matter/.

[19] The Supreme Court has explained that the phrase "involving commerce" was enacted with an intent "to exercise Congress's commerce power to the full." *See*: *Allied-Bruce Terminix Cos.*, *supra* note 14, at 27.

[20] *See*: S. 878 and H.R. 1844, 113th Cong. (2013). See also H.R. 4181, 112th Cong. (2012) (barring arbitration agreements in employment contracts) and S. 2915, 111th Cong. (2009–10) (making an agreement between an employer and employee to arbitrate a claim of rape unenforceable).

- (2) the Arbitration Fairness for Students Act[21] (which would have prohibited colleges and universities that participate in federal student assistance programs from including pre-dispute arbitration agreements in student enrollment contracts);
- (3) the Consumer Mobile Fairness Act[22] (which would have invalidated pre-dispute arbitration clauses in contracts involving consumer mobile services or mobile broadband Internet access service);
- (4) the Fairness in Nursing Home Arbitration Act[23] (which would have invalidated pre-dispute arbitration clauses between long-term care facilities and their residents);
- (5) the Consumer Fairness Act (which would have amended the Consumer Credit Protection Act to define pre-dispute arbitration clauses in consumer contracts to be an unfair and deceptive trade practice);[24]
- (6) the Restoring Statutory Rights and Interests of the States Act[25] (which would have amended Section two of the FAA to provide that the Act's requirements on the enforceability of arbitration agreements would not apply to specific claims brought by individuals or certain small businesses that arise from a violation of federal or state statutes, the U.S. Constitution, or a state constitution, unless a written arbitration agreement is entered into by both parties); and
- (7) the Forced Arbitration Injustice Repeal Act (FAIR Act)(which would have amended the FAA to prohibit pre-dispute arbitration agreements that forced arbitration of future employment, consumer, antitrust, or civil rights disputes; and prohibited agreements and practices that interfere with the right of individuals, workers and small businesses to participate in litigation).[26]

In 2009, legislation introduced by Senator Al Franken (D-MN) aimed specifically at eliminating "forced" arbitration of sexual assault and sexual harassment claims, after a story concerning a particularly horrific sexual assault of a female Halliburton employee made national headlines.[27] As ultimately determined by a federal court of appeals, her claims for assault and battery; intentional infliction of emotional distress; negligent hiring, retention, and supervision; and false imprisonment were not "related to" her employment and therefore fell "outside the scope of the arbitration provision" of her Halliburton contract.[28] But neither the fact that she was not actually required to arbitrate her claims, nor the flimsiness of those claims in the first place prevented arbitration opponents from using her story to seek elimination of arbitration clauses specifically in employment contracts.

In the end, her claims were determined to be entirely fabricated. But even as her story unraveled, bills that took aim at arbitration as a long-standing method of contractual enforcement in employment continued to proliferate in Congress.

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[21] S. 3557, 112th Cong. (2012).
[22] S. 1652, 112th Cong (2011), a bill taking direct aim at the Supreme Court's holding in *AT&T Mobility LLC.*, *supra*, note 6.
[23] H.R. 6351, 112th Cong. (2012).
[24] H.R. 991, 111th Cong. (2009).
[25] H.R. 1396, 115th Cong. (2017).
[26] H.R. 963, 117th Cong. (2021).
[27] As the #MeToo movement rose to national prominence, then-Senator Franken was one of many high-profile male figures accused of sexual harassment. MJ Lee, *Woman says Franken inappropriately touched her in 2010*, CNN (November 20, 2017), https://www.cnn.com/2017/11/20/politics/al-franken-inappropriate-touch-2010/index.html
[28] *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009).

Employees Do Better in Arbitration

The basic premise of all limiting legislation—that arbitration is somehow unfair to or bad for employees and consumers—is false, and the evidence shows precisely the opposite: arbitration's speed and low costs empower consumers to bring many claims that they would otherwise be unable to pursue. Empirical studies also show that employees do as well or even better in arbitration than they do in litigation and that they prevail at the same rate or more frequently and recover as much or more through arbitration as they would in litigation.

Most recently, economics research firm NDP Analytics compared the results of employment claims that were arbitrated and employment claims that were litigated in federal court. The study examined more than 100,000 cases, using data from the nation's leading arbitration providers and data from the federal courts. The claims of employee-plaintiffs that were arbitrated generally recovered approximately double the amount recovered by employee-plaintiffs in court. Specifically, the median award in arbitration was $113,818, compared to $51,866 in court, and the mean award was $520,630 in arbitration compared to $269,885 in court.[29]

Opponents of arbitration argue that its use should be curtailed or eliminated because it is unfair to employees who are "forced" to accept arbitration in their contracts, is too expensive, favors businesses, and interferes with the class action rights of consumers. Most of these claims originate from a 2007 report by *Public Citizen* that claimed that arbitration is "rigged" and that the system "stacks the deck to favor corporate interests" over individuals.[30] But the empirical research does not support the *Public Citizen* claim. A study of over 200 AAA employment arbitrations over a three-year period found no evidence that employers were being systematically favored.[31] To the extent that there is any "repeat-player" effect in arbitration (insofar as arbitrators might be incentivized to favor business clients because they are repeat players in arbitration),[32] research shows that it is likely the result of "case selection and settlement rather than systematic bias" because businesses are "better able to screen meritorious cases and, thus, will settle them rather than proceed to the award stage."[33]

The FAA's Neutrality Guarantee

Other claims of bias in arbitration can also be answered by the FAA's clear requirement of neutrality

[29] 2 *NDP Analytics, Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration* 5-10 (May 2019). These results are consistent with other empirical analyses of employment arbitration. See Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 DISP. RESOL. J. 56, 58 (Nov. 2003-Jan. 2004).

[30] *The Arbitration Trap: How Credit Card Companies Ensnare Consumers*, PUBLIC CITIZEN 4 (Sept. 2007), available at http://www.citizen.org/ documents/ArbitrationTrap.pdf. A reviewer of the *Public Citizen* report noticed that it "ignores almost all of the existing literature bearing on this question." *See*: Prof. Peter B. Rutledge, *Arbitration—A Good Deal for Consumers: A Response to Public Citizen*, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM 6 (April 2008).

[31] Lisa Bingham, *On Repeat Players, Adhesive Contracts and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998).

[32] This is a critique proffered recently by the *Washington Post*. *See* Christopher Ingraham, *There's a little-known employment contract provision enabling billions of dollars in wage theft each year*, WASHINGTON POST, February 13, 2020, https://www.washingtonpost.com/business/2020/02/13/theres-little-known-employment-contract-provision-enabling-billions-dollars-wage-theft-each-year/.

[33] Rutledge, supra, note 29, at 21.

in selection of arbitrators. In one provision—9 U.S.C. § 5—Congress anticipated the potential for subjectivity in the arbitration process, and therefore provided for an arbiter selection process that is equally neutral for both parties.

In cases where the parties' agreement is silent on arbitrator selection, a court, acting under its section five authority, can implement that agreement by appointing an arbitrator to hear the dispute. Section five also specifies that in such cases "the arbitration shall be by a single arbitrator[,]" "unless otherwise provided in the agreement . . . ."[34] If the parties have agreed to arbitrate according to provider rules, those rules typically specify how arbitrators are to be selected, the number of arbitrators, and what their qualifications must be. Single arbitrators are required under the FAA to be neutral unless the parties otherwise agree.[35] In tripartite arbitration (where three arbitrators are selected), one arbitrator (usually designated the umpire or chair) is ordinarily required to be neutral, while party-appointed arbitrators are presumed to be non-neutral, except to the extent otherwise required by the parties' arbitration agreement. [36] Arbitration provider rules, which govern arbitrator qualifications in appropriate cases, often provide that all three arbitrators of a tripartite panel are required to be neutral.

Additionally, section 10(a)(2) of the FAA—which authorizes federal district courts to vacate arbitration awards "where there was evident partiality . . . in the arbitrators"—imposes and enforces these neutrality requirements.[37] Section 10(a)(2) establishes that parties who agree to arbitrate can legitimately expect that neutral arbitrators will meet a certain minimal standard of arbitral impartiality, and that arbitrators not appointed as neutrals can, in appropriate circumstances, be held to a substantial, material breach of a stipulated arbitrator qualification requirement related to neutrality.[38]

Material Breach as a Remedy

There are also remedies that exist in law to invalidate arbitration agreements in certain scenarios, protecting employee claimants when the balance of power has clearly been weighted in favor of an employer. For example, a material breach of an arbitration agreement by the party attempting to enforce it can justify a refusal to compel arbitration at the outset of any claim. In *Hooters of America, Inc. v. Phillips*,[39] Hooters had the obligation to promulgate adequate rules in arbitration provisions signed by all employees. The Fourth Circuit found that the rules Hooters promulgated were entirely one-sided and were calculated to produce biased proceedings.

Among other problems, the rules required the employee to provide, at the outset, information describing "the nature of the claim" and "the specific acts or omissions which are the basis of the claim," while Hooters had no such information disclosure requirement. The employee also had to provide a list of all fact witnesses with a brief summary of the facts known by each; Hooters was not

[34] 9 U.S.C. § 5 (2015).
[35] *See, e.g., Morelite v. N.Y.C. Dist. Council Carpenters*, 748 F.2d 79, 81-85 (2d Cir. 1984).
[36] *See Certain Underwriting Members London v. Florida Dep't of Fin. Serv.*, 892 F.3d 501, 510-11 (2d Cir. 2018); *Sphere Drake Ins. v. All American Life Ins.*, 307 F.3d 617, 622 (7th Cir. 2002); *Trustmark Ins. Co. v. John Hancock Life Ins. Co. (U.S.A.)*, 631 F.3d 869, 872-74 (7th Cir. 2011).
[37] The requirement that an arbitrator be "neutral" can be divided into three components. The arbitrator must be (a) impartial; (b) disinterested; and (c) independent. Section 10(a)(2) authorizes a court to vacate an award if an arbitrator is "guilty" of "evident partiality." 9 U.S.C. § 10(a)(2) (2015).
[38] *See Certain Underwriting Members*, 892 F.3d at 510-11; *Sphere Drake*, 307 F.3d at 622; *Trustmark*, 631 F.3d at 872-74.
[39] *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

so obligated. And perhaps most egregiously, the employee could only select an arbitrator from a company-approved list. Hooters was allowed to expand the scope of the arbitration to any matter, regardless of whether it related to the employee's claim, but the employee could only raise matters included in the notice of claim. The company also had the right to cancel the agreement to arbitrate upon 30-days' notice, and also had the right to modify the rules whenever it wished, without any notice. The court found that Hooters had materially breached its obligations under the arbitration agreement and thus held that the plaintiff employees were excused from having to arbitrate their claims.[40]

Forcing Litigation Would Crater Small and Mid-Sized Businesses.

Employment arbitration is preferred by American employers of all sizes, and across a variety of industries in lieu of lengthy and expensive traditional court litigation.

Specifically:

53.9% of nonunion private-sector employers have mandatory arbitration procedures
59.3% of employers with 500-999 employees have mandatory arbitration
61.8% of employers with 1,000-4,999 employees have mandatory arbitration, and
67.7% of employers with 5,000+ employees have mandatory arbitration.[41]

Employers across both public and private sectors prefer arbitration to litigation largely for its timeliness and cost-effectiveness. But as a rule, the greater the monetary value of the claim, the greater the monetary loss associated with the delay of forced litigation. A study conducted by economic research firm Micronomics illustrates this point vividly[42]

The study authors explain:

> During the period required to resolve disputes, resources at issue between litigants can be thought of as removed from circulation. When litigation takes longer to resolve, these resources remain unavailable in the sense that neither party can count on receiving them and putting them to use. By way of example: A dispute between a supplier and purchaser in which the supplier claims the purchaser owes $1 million leaves both supplier and purchaser uncertain as to which party will retain the funds after the dispute has been adjudicated. The purchaser

[40] Id. at 940-41. *See also*, *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d. 370 (6th Cir. 2005) (following *Hooters* in a case in which defendant selected an arbitration provider for which it supplied 42% of the provider's business). The material breach principle was also applied in *Brown v. Dillard's Inc.*, 430 F.3d 1004 (9th Cir. 2005)(Dillard's required Brown to agree to arbitrate any employment-related claims she had. After Brown was fired, Dillard's attempted to compel arbitration, but the 9th Circuit held that the company could not do so because it was in material breach of the arbitration agreement by failing to arbitrate earlier).

[41] *See*: Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECONOMIC POLICY INSTITUTE (April 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

[42] Roy Weinstein, Cullen Edes, Joe Hale, & Nels Pearsall, *Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings*, MICRONOMICS ECONOMIC RESEARCH AND CONSULTING (March 2017), http://www.micronomics.com/articles/Efficiency_Economic_Benefits_Dispute_Resolution_through_Arbitration_Compared_with_US_District_Court_Proceedings.pdf.

> cannot comfortably invest the $1 million to hire new employees since it may be required to pay the supplier once the dispute has been adjudicated. Likewise, the supplier cannot use the funds to purchase new equipment because it may never receive the money. Both parties are thus constrained; the funds are unavailable to either; both parties experience a loss until the dispute is resolved.

These direct losses due to delay represent unrealized investment income from funds at risk for longer duration at trial than arbitration. In the example above, these would be supply chain interruptions, hiring freezes, or the like. Based on minimum average estimated amounts at issue in federal district court cases, and on a corresponding minimum amount for arbitration cases, direct losses attributable to the lengthier adjudication time of trial were calculated at approximately $10.9 - $13.6 billion between 2011 and 2015 (or, more than $180 million per month). The direct minimum losses associated with the additional time required for possible appeal of district and circuit court cases compared with arbitration were approximately (including direct minimum costs attributable to trial) $20.0 - $22.9 billion over the same period (or, more than $330 million per month).[43]

But those direct losses are only the beginning. Economists have recognized that a given change in economic activity (such as the type of "direct" lost resources, calculated above) produces costs beyond just that initial change. As the authors of the Micronomics study clarify, these are often referred to as "multiplier effects," and reflect secondary economic impacts beyond the direct costs. These secondary losses associated with resources unavailable to litigants due to delay are referred to as "indirect" losses. These indirect losses represent decreases in spending on goods and services by organizations involved in a dispute, and who have already suffered a direct loss (unrealized investment income, above). The halting of this spending power has a ripple effect on the larger American economy.

When "direct" losses and indirect losses are added together, they reflect an estimate for the overall negative impact to society of the commonplace delays associated with the district court system as compared to arbitration. When totaling both sets of losses associated with trial over arbitration, estimated total losses were calculated at approximately $28.3 - $35.3 billion between 2011 and 2015 (or, more than $470 million per month). When calculated for additional time through appeal, the losses were calculated at an astronomical $51.9 - $59.2 billion over the same period (or, more than $860 million per month).[44]

Costs like these, borne by small and mid-sized businesses as often as their larger corporate counterparts, not only have an impact on the economy in the aggregate, but force employers to pass on the cost of goods and services to consumers, while simultaneous forcing cutbacks in staffing, business operations, and employment opportunities. The less small and mid-sized companies can arbitrate, the more likely a possible shuttering of these businesses--those that form the backbone of the American economy, and which are still beleaguered by their continued recovery efforts following the COVID-19 shutdowns.

III. Employee Arbitration Clauses are Unrelated to the Problem of Corporate Malfeasance and Cultures of Harassment.

[43] *Id.* at p. 4.
[44] *Id.*

For years, interest groups have identified arbitration clauses as untenable in large part because they claim it creates confidential proceedings that remove bad corporate actors from the sanitizing light of open litigation and allow them to hide wrongdoing.[45] This view of arbitration subjects the power of the law to regulate business conduct and prevent wrongdoing to the shield of something akin to an arbitration "invisibility cloak."

However, the American Association of Arbitration makes clear in its due process protocols setting forth employment arbitration rules, only that: "The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary."[46] This is a rule of conduct aimed at ensuring arbitrator's meet their obligations of confidentiality. Nothing more.

In fact, neither the Federal Arbitration Act nor the Uniform Arbitration Act[47] imposes any obligation of confidentiality on the parties to an arbitration agreement, the arbitrator, or the arbitration administrator. Both are also silent on the privacy of the arbitration process. While the public cannot attend arbitration hearings, and an arbitrator and arbitration administrator cannot disclose information about the arbitration, the parties to the contract are under no such obligation.

In arbitrating an employment claim, for example, an employee can still disclose the facts underlying the dispute they may have with an employer. They may also disclose information obtained in the arbitration process or any resulting award. Only if the parties have entered into a confidentiality agreement are they restricted from disclosing information about the arbitration. Otherwise, claimants may still report, communicate, and disclose the disposition of their Title VII discrimination claims, as well as harassment, retaliation, and sexual abuse claims. And there remains the legal right to communicate with appropriate federal and state agencies, and file charges of discrimination and other violations of employee rights and protections with those agencies.

In addition, if uncovered in arbitration hearings, any criminal conduct or widespread sexual harassment purportedly subject to a non-disclosure or confidentiality agreement advanced by an employer to protect its interest can be set aside by the courts. In the alternative, safeguards can be incorporated into arbitration agreement procedures that would permit the claimant, the arbitrator, or a court to void or disregard the non-disclosure agreement (NDA) in question in specific circumstances. Some states have already enacted legislation on this issue, passing laws that limit the use of NDAs in employment agreements or otherwise providing protections against potentially problematic use of NDAs.[48]

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[45] For example, in its publication, *Arbitration Activism*, the Alliance for Justice stated: "Open court proceedings can expose corporate misconduct in the public record, but through arbitration, corporations can prevent negative publicity [and] keep their wrongdoing secret …." (See: ALLIANCE FOR JUSTICE, *Arbitration Activism: How the Corporate Court Helps Business Evade our Civil Justice System,* 5 (2013)).

[46] AMERICAN ARBITRATION ASSOCIATION, *Employment Arbitration Rules and Mediation Procedures*, Amended and Effective November 1, 2009 (introduced revised on October 1, 2017), https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf.

[47] UNIF. ARB. ACT §§ 1-25 (1956).

[48] Among these states are New Jersey, Tennessee, California, Vermont, and Washington, which have all enacted legislation prohibiting or limiting the use of NDAs in certain employment contexts. Later questions on federal preemption of the FAA may arise if these laws are found to conflict with the terms of the Act, however.

The view of this committee, then, may be based on a misunderstanding of the confidential nature of arbitration. Under U.S. law, arbitration is *not* truly a confidential process, but a *private* one. Because an arbitration clause does not include an implied obligation of confidentiality under U.S. law, any confidentiality obligation must come from either administrator rules or the parties' separate agreement to maintain confidentiality.

So, it is not that arbitration clauses are dangerous, but rather perhaps that confidentiality provisions are.[49] By focusing on arbitration clauses, we are misdirecting public sentiment on a what has proven to be a useful, effective, and longstanding means of dispute resolution, when, in fact, our attention would better be directed elsewhere—whether that be in restricting non-disclosure agreements or facilitating tort reform.

In fiscal year 2020, over 6,587 sexual harassment charges were filed with the U.S. Equal Employment Opportunity Commission (EEOC), representing monetary claimant recoveries of over $65 Million.[50] As one might suspect, male sexual harassment complainants constituted a relatively minor 16.7% of those charges. These numbers are but a cold representation of the personal trauma experienced by those who might appear to the objective eye as nothing more than numbers in a database.

There is--to be sure--a culture of sexism within certain halls of power. The dynamic is as old as time immemorial. But the nation is only newly aware of its prevalence because of a series of high-profile cases. And rightly so. The Larry Nassars and the Harvey Weinsteins in our country must be called to account, and I commend the personal bravery of their accusers who were so fundamental to the service of justice for not only themselves, but for so many others like them.

Unfortunately, the very premise of this hearing - that arbitration keeps victims of sexual violence and sexual harassment in the shadows - suggests a solution to the problem of sexual harassment and discrimination that is ultimately misguided.

The Supreme Court has held that anti-discrimination claims, such as the Age Discrimination Employment Act are arbitrable and has been applied by the federal circuits in dispositions of various other anti-discrimination claims, like Title VII.[51] Our Constitution and civil rights cannon recognizes the equality of all individuals, and their equal entitlement to the protections of federal anti-discrimination law. Picking and choosing among immutable characteristics by disclosing one remedy for one claimant, and a different remedy for another claimant, does a disservice to civil rights and anti-discrimination law overall. It creates a path dependency in bills like H.R. 4445[52] that will

[49] For an excellent analysis of confidentiality vs. privacy in arbitration, see: Christopher R. Drahozal, *Confidentiality in Consumer and Employment Arbitration*, 7 Y.B. ARB. & MEDIATION 28 (2015).

[50] U.S. Equal Employment Opportunity Commission, *Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010 - FY 2020*, available at: https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2020

[51] For example, the U.S. Court of Appeals for the Fifth Circuit has expressly held that Title VII claims, like ADEA claims, are arbitrable. *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991). More recently several cases have made clear that other employment-related claims are not immune from arbitration. See, e.g., *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) ("We thus find unpersuasive the Carter Appellants' contention that FLSA claims are not subject to arbitration."); *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006) (provisions of USERRA do not preclude enforcement of agreement to arbitrate such disputes).

[52] H.R. 4445, "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021," (117th 2021).

automatically result in the elimination of arbitration clauses whole cloth, not just for certain classes of claims.

Eliminating arbitration as a method of dispute resolution for certain claims should not be the path forward.

Arbitration agreements are not mandatory. They are voluntary. No one is forced to sign a contract. Indeed, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion.[53] If employees don't like individual arbitration agreements, they are free to bargain collectively to change them, resign from their positions, or choose another job.

They are also free to pursue a claim through the EEOC, and initiate and investigation in the public interest through a private firm specializing in such Investigations. Both these avenues may be undertaken regardless of whether the parties have entered into an enforceable arbitration agreement. The Supreme Court has explained that an arbitration agreement does not preclude an individual's right to file a charge of discrimination or harassment, and have the case investigated by the EEOC.[54] The Supreme Court has also held that an arbitration agreement between an employer and employee does not bar the EEOC from pursuing victim-specific relief in litigation on behalf of an employee who files a timely charge of discrimination.[55]

It's for this reason that on December 17, 2019, the EEOC rescinded[56] its 22-year-old policy statement against mandatory employment arbitration agreements for workplace claims. The agency's decision to retract this policy was in direct response to numerous U.S. Supreme Court rulings that support the use of arbitration overall, and specifically as concerns claims of discrimination.

IV. CONCLUSION

Arbitration works. Its enforcement has been consistently upheld by the Supreme Court and the federal Circuit courts. And it's a timely, efficient, cost-effective, and thorough way to protect the interests of both parties to a contract. Relegating businesses to the expensive and protracted prospect of litigation as the only available means for settling disputes--whether related to sexual harassment or otherwise--ultimately results in a burdening of the judicial system, a delay of justice for those aggrieved, and a lining of the pockets of the plaintiffs' bar who themselves provide the data on why arbitration "doesn't work."

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[53] *See Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173 (2d Cir. 2021).

[54] *Gilmer v. Interstate/Johnson Lane Corp.*, *supra* note 3, at 28 (holding that an ADEA claim was subject to compulsory arbitration but explaining that "an individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC.")

[55] *See: EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

[56] U.S. EQUAL OPPORTUNITY EMPLOYMENT COMMISSION, *Recission of Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment* (2019), https://www.eeoc.gov/wysk/recission-mandatory-binding-arbitration-employment-discrimination-disputes-condition. The EEOC's 1997 Policy Statement on "Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment" opposed the use of such "mandatory" arbitration agreements: "[T]he use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment harms both the individual civil rights claimant and the public interest in eradicating discrimination."

Even for those claimants alleging violations of statutory law--violations that strike at the very nature of personal safety, security, and bodily autonomy in the workplace--arbitration has proven to be a better option than going to court. In the end, legislation curtailing access to arbitration would injure the very people that Congress has sought to protect for nearly a century.

Chair NADLER. Thank you.

Ms. Henry, you are recognized for 5 minutes.

TESTIMONY OF LORA HENRY

Ms. HENRY. I want to begin by thanking the Committee for the opportunity to share my story and for recognizing the ongoing harm that mandatory arbitration requirements have caused to me and countless other women who have been sexually harassed on their jobs.

Without this Committee's request for my testimony, no one would have ever heard my story, other than the one single arbitrator in a closed room with a couple of attorneys.

My name is Lora Henry, and I am a former employee of Ken Ganley Kia in Medina, Ohio, and this is my story.

Like many, when I was hired, I had a mess of papers in front of me and was told to sign here, here, and there, just HR stuff, I was told. I did not know at the time that I had signed an arbitration agreement.

While working at Ken Ganley Kia, my boss, Mike Gentry, grabbed my butt. He pinched my nipples. He repeatedly made comments about my body, including that he could see my vagina through my pants. He bragged about getting blow jobs from a customer in exchange for gift gas cards.

I hope we can all agree that this is pretty disgusting behavior.

I wish it ended there. It did not. On my birthday, Mike Gentry showed up at my house unannounced with a bag of sex toys as "gifts." I had to tell my boss to get out of my house.

Unhappy with this answer, he later offered to pay me for sex while at work, like I was some kind of whore. When I told him no, he tried to put the money down my shirt.

I was disgusted. I felt alone. I did not know whether this had happened to other women, too. Had other victims been silenced with a secret arbitration?

I found myself worried that I had offended him by rejecting his advances and kicking him out of my house, that I would be fired.

I dreaded going into work. Every drive into work I thought, "Well, what will he do today?" I would worry about how he would react to my choice of clothing.

Do you know how mentally exhausting it is to be on guard every second for a hand that could come out of nowhere and pinch or grope?

I feared that reporting this sexual harassment to Ganley Kia would cost me my job. Mike Gentry is the face of Ganley Kia's "Mike and Darwin," an advertising campaign on local and social media. I, on the other hand, was just one of the many sales representatives.

Right before Christmas 2020, Mike Gentry appeared at my home again unannounced. When I cracked my door open, Mike Gentry grabbed the door, pulled it open, and pushed his way in. He said he had gifts for me. My heart sank.

He pulled his pants down and stuck a large syringe into his penis. It would help him get an erection, he told me. I feared that he would rape me right there. I screamed for him to get out of my house as loud as I could.

That was it. I finally reported it, hoping that I was wrong and that my employer would do the right thing.

Unfortunately, everything I had feared about reporting this sexual harassment came true. Ganley Kia did not take my complaint seriously. They conducted a sham of an investigation and said it was my fault. My fault? In what world is the woman to blame for a man showing up at her house with sex toys and injecting his penis.

I now know that they felt like they could make these absurd attacks on me because they knew that no one, except an arbitrator, would hear their lame defense of a sexual predator.

They involved their lawyers to protect the company and their star sexual predator who they continued to put on their advertising. He and the dealership retaliated against me by cutting off my sales leads, which took away my sales and commissions.

When I still would not quit, they fired me. They just wanted me to shut up and go away.

I wanted to hold Mike Gentry and Ken Ganley Kia accountable. I believed that if I stayed silent, he would be free to continue preying on women and Ganley would allow it. I wanted to stop him.

So, I gathered all the courage that I could stomach and filed a lawsuit. They filed a motion to dismiss because of the "sign here, here, and there" arbitration agreement. They stole my right to a jury because you allow women like me to be silenced by arbitration. Mike Gentry will never have to stand in front of a jury and explain himself.

I cannot sit here today and tell you whether Mike Gentry has victimized other women. I cannot tell you whether the Ganley dealerships have fired other victims who complained about sexual harassment. I cannot tell you whether Ganley has systematically buried other instances of sexual assault in its 40-plus dealerships in Ohio. I cannot tell you any of this because you have given Ganley the right to keep all this in the shadows of arbitration agreements that are buried in the hiring paperwork.

What I can tell you is that the cycle of sexual assault will continue if you force women to be quiet and allow sexual harassers and the companies that allow them to hide behind arbitration agreements.

This is my story, but it is also the story of countless other victims of sexual harassment and future unnecessary victims. So, I ask, do you want to force sexual predators to explain themselves in front of a jury, or do you want to put sexual harassment victims back in a little silent box so that people like Mike Gentry can keep being the face of Ken Ganley's advertising?

This is not political. This is morality. Do you side with the sexual predators or their victims?

Thank you.

[The statement of Ms. Henry follows:]

Lora Henry
November 16, 2021

INTRODUCTORY REMARKS

I want to begin by thanking the Committee for the opportunity to share my story and for recognizing the ongoing harm that mandatory confidential arbitration requirements have caused to me and countless other women who have been sexually harassed on their jobs. Without this committee's subpoenaing my testimony, no one would have ever heard my story other than one single arbitrator in a closed room with a couple of attorneys.

My name is Lora Henry. I am a former employee of Ken Ganley Kia in Medina, Ohio. This is my story. Like many, when I was hired, I had a mess of papers put in front of me and was told to sign here, here and there. Just HR stuff, I was told. I did not know at that time that I had signed an arbitration agreement.

While working at Ganley Kia, my boss, Mike Gentry grabbed my butt. He pinched my nipples. He repeatedly made comments about my body, including that he could see my vagina through my pants. He bragged about getting blow jobs from a customer in exchange for gas gift cards. I hope we can all agree that this is disgusting behavior.

I wish it ended there. It did not. On my birthday, Mike Gentry showed up at my house unannounced with a bag of sex toys as "gifts." I had to tell him – my boss – to get out of my house. Unhappy with this answer, he later offered to pay me for sex at work, like I was some kind of whore. When I told him no, he tried to put the money down my shirt.

I was disgusted. I felt alone. I did not know whether this had happened to other women too. Had other victims been silenced with a secret arbitration? I found myself worried that I had *offended him* by rejecting his advances and kicking him out of my house -- ***that I would be fired***! I dreaded going into work. Every drive into work, I thought, "What will he do today?" I would worry about

how he would react to my choice of clothing. Do you know how mentally exhausting it is to be on guard every second for a hand that would come out of nowhere to pinch or grope?

I feared that reporting the sexual harassment to Ganley Kia would cost me my job. Mike Gentry is the face of Ganley Kia's "Mike and Darwin" advertising campaigns on local and social media. I, on the other hand, was just one of many Sales Representatives.

Right before Christmas, 2020, Mike Gentry appeared at my home again unannounced. When I cracked my door open, Mike Gentry grabbed the door, pulled it open, and pushed his way in. He said that he had gifts for me. My heart sank.

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Unfortunately, everything I had feared about reporting the sexual harassment came true. Ganley Kia did not take my complaint seriously. They conducted a sham investigation and said it was my fault. My fault? In what world is the woman to blame for a man showing up at her house with sex toys and injecting his penis?

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They involved their lawyers to protect the company and their star sexual predator, who they continued to put in their advertising. He and the dealership retaliated against me by cutting me off

from sales leads, which took away my sales and commissions. And, when I still would not quit, they fired me. Just shut up and go away.

I wanted to hold Mike Gentry and Ganley Kia accountable. I believed that if I stayed silent, he would be free to continue preying on women and Ganley would allow it. I wanted to stop him. So, I gathered all of the courage that I could stomach and filed a lawsuit. But they filed a motion to dismiss because of that "sign here, here and there" arbitration agreement. They stole my right to a jury. Because you allow women like me to be silenced by arbitration, Mike Gentry will never have to stand in front of a jury and explain himself.

I cannot sit here today and tell you whether Mike Gentry has victimized other women. I cannot tell you whether the Ganley Dealerships have fired other victims who complained about sexual harassment. I cannot tell you whether Ganley has systematically buried other instances of sexual harassment at its 40-plus dealerships in Ohio. I cannot tell you any of this because you have given Ganley the legal right to keep all of this in the shadows of arbitration agreements that are buried in hiring paperwork. What I can tell you is that the cycle of sexual harassment will continue if you force women to be quiet and allow sexual harassers and the companies that allow them to hide behind arbitration agreements.

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This is not political. This is morality. Do you side with the sexual predators or their victims?

Chair NADLER. Thank you.

Professor Gilles, you are recognized for 5 minutes.

TESTIMONY OF MYRIAM GILLES

Ms. GILLES. Chair Nadler, Chair Johnson, Ranking Member Buck, distinguished Members of the Committee, I want to thank you for having me back to talk about these important issues. It's my privilege to be here and my sincere privilege to sit next to these very, very brave women. Thank you so much.

I have been here before to talk to you about how terrible forced arbitration is. I've talked to you before to try to get you to sign and enact and support a bill that would get rid of these pernicious clauses across the board for all employees and consumers.

That's not for today, because today we don't all have to agree that forced arbitration is terrible across the board. It's terrible, but hopefully I can come back and try to persuade you of that on some other occasion. Because today we are here to talk about H.R. 4445, a bill that would prohibit employers from forcing victims of sexual harassment and violence into arbitration.

On this, I sincerely hope we can agree. Three of the Witnesses have already said this is not a partisan or political issue, and I certainly hope that you are receptive to that very clear message.

Because the truth is I can't imagine, really, I can't imagine how you could design a worse system for dealing with sexual harassment than forced arbitration. I mean, it's just the worst possible regime.

First, the entire regime is shrouded in secrecy, and not just because victims want to keep these issues confidential—which, by the way, is up to them, they should have the autonomy and the choice to decide—but because companies want to keep this stuff under wraps. They want to hide and shield sexual predators. They don't want their business in the public eye. They don't want to deal with regulators or even with lawsuits.

The secrecy here, on its own, just makes this a terrible way to deal with sexual harassment because it means that victims of sexual violence in the workplace who bravely try to come forward are prohibited from telling their stories in a public forum. Instead, they're forced into this private process where everything is under wraps and siloed. So, this is the second bad thing.

Victims can't join together, even when their injuries stem from the same wrongdoing, even when they have occurred at the hands of the same perpetrator, even when the company's tolerance for sexual harassment is structural and pervasive. Victims have to go it alone, never knowing about one another. They have to go into arbitration single file.

I don't know where all these statistics are coming from how about great arbitration is, how people win it all the time, because the truth is no one goes into arbitration because it's siloed, because it's secret, because they don't know about what else is going on in the workplace.

The secrecy that blankets these individualized proceedings prevents one victim from ever learning whether others right in the cubicle next to them might have experienced the same tragedies, the same traumas. When survivors are in the dark about cases filed by

others in the workplace, that makes coming forward, that makes being the first person to come forward that much harder.

As a corollary—and this is an important corollary—the relief that is available to the individual claimant doesn't prevent the wrongdoer from preying on other women. It doesn't prevent the predator from having all sorts of misconduct against other women in the workplace.

The proceedings are one-on-one, and the relief that arbitrators are allowed by contract to grant is individualized. They can't ever order any changes beyond what can help this one individual that happens to have the courage to come before them.

I mean, can you imagine a worse system for dealing with toxic corporate culture? Because I can't.

Third—and I think this is really important and all the survivors have spoken about this—forced arbitration is a system where the employers write the rules and they pick the arbitral provider, which means that victims of sexual harassment are shunted into a regime that's stacked against them from the get-go.

First, because the arbitrator's economic interest is to be very good to the repeat-player employer so that they can be chosen for another arbitration next time. So, the repeat-player problem has been well documented, and I think it's alive and well in arbitration and the secrecy protects that.

Second, because the employer designs the entire arbitration process, it does so to serve its interests, not the interests of its workers, but its interests, which, again, are to keep discrimination and harassment under veil of secrecy and out of the public eye.

So, given all these things, given how bad the system is for victims of sexual harassment, it's no wonder that so few ever decide to go into private arbitration. I wouldn't. I think it sounds terrible.

Because the truth is that we can't reform this system. As Ranking Member Jordan expressed in his opening, that maybe this is a system that can be fixed, I challenge you to really find a way to do that because it's broken, and it doesn't work. Moreover, none of the victims want it. So, you can't fix it if it doesn't work, and I don't think it works.

These victims deserve the right to decide for themselves where and how to file a case. They deserve to be free from retaliation for complaining about the treatment that they have suffered in the workplace. They deserve to tell their stories and to have us hear their stories, to have you hear their stories, and to hold perpetrators and employers accountable for pervasive misconduct. None of this is possible in a system of forced arbitration.

So, I urge you to support and enact this bill, and I am happy to answer any of your questions. Thank you for having me.

[The statement of Ms. Gilles follows:]

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TESTIMONY BEFORE THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

"Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the Shadows"

Prof. Myriam Gilles
Submitted November 15, 2021

Chairman Nadler, Ranking Member Buck, and distinguished members of the Committee:

Thank you for inviting me to participate in this important hearing. My name is Myriam Gilles, and I am a law professor at the Benjamin N. Cardozo School of Law. Since 2005, I have been researching and writing about the harmful effects of forced arbitration provisions on workers and consumers. I testified on these issues before a subcommittee of this body in early 2021, as well as before the Senate Judiciary Committee in 2019, 2017 and 2013. Over this stretch of time, forced arbitration provisions have grown pervasive, as millions of Americans have been forced to sign away their rights to pursue claims in court. As just one measure of this escalation: in 1992, only 2% of non-unionized employers used forced arbitration clauses.[1] A decade later, the number had crept up to approximately 25%, and by 2018, had more than doubled to 54% -- representing over 60 million workers.[2] Experts now predict that, absent any change in the law, over 80% of the American workforce will be bound by mandatory arbitration clauses by 2024.[3]

The remarkable rise of forced arbitration in the workplace is the result of a series of Supreme Court decisions that have allowed – indeed, encouraged – employers to write their own accountability-avoiding rules at the expense of American workers. These decisions have enabled companies to suppress cases of workers seeking to enforce their rights and to avoid accountability by simply adding a few magic words to their standard-form contracts – knowing full well that most employees simply

[1] Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute (2018).
[2] *Id.* (also reporting in 2018 that 65.1% of large companies -- i.e., those with more than 1,000 employees -- imposed arbitration).
[3] *Id.*

won't comprehend the magnitude of what they've surrendered in the fine print. By imposing these provisions in job applications, employment contracts, orientation materials, employee handbooks or even innocuous-seeming email correspondence with workers, companies have succeeded in shunting all cases against them into a secretive and unaccountable system of single-file forced arbitration, where they know most claims will simply be abandoned.[4]

Through my testimony, I hope to make one simple point: enough is enough. It is long past time for Congress to enact legislation that limits the reach of these pernicious clauses. The Supreme Court has expanded the reach of the Federal Arbitration Act ("FAA") to the point where this nation's most vulnerable citizens are routinely without legal remedy for serious violations of federal and state laws. In case after case, slim majorities on the Court have held that it does not matter that individual citizens are unable to vindicate their rights in forced arbitration – *i.e.,* that countless cases will "slip through the legal system," leaving serious corporate wrongdoing unaddressed.[5] And the Court has made plain that it will continue to "rigorously enforce" all the remedy-stripping terms that private companies insert in their forced arbitration clauses – never mind the consequences – unless the FAA's mandate is "overridden by congressional command."[6] Only this body can act to remedy the obvious injustices of forced arbitration, and act it must.

While H.R. 4445 addresses but a subset of claims – those brought by victims of sexual assault or harassment – enacting this measure will provide immediate and meaningful relief for survivors nationwide. Rather than being forced into a confidential process not of their choosing – often without the benefit of an attorney or the procedural protections offered in court – victims would be free to pursue their claims and confront wrongdoers in a public forum. And companies would no longer have the option to shield perpetrators of sexual misconduct from public censure.

My testimony proceeds in three parts. Part I describes how the secrecy assured by the forced arbitration regime is anathema to tenets of transparency and accountability upon which our civil justice system relies. This is because forced arbitration provisions permit corporations to conceal illegal conduct and shield serial sexual predators from public view. These clauses perpetuate a "pervasive culture of harassment" by forcing victims into secret proceedings and "quietly dispatch[ing] those who

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[4] Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, NY TIMES, Oct. 31, 2015 ("Corporations said that class actions were not needed because arbitration enabled individuals to resolve their grievances easily. But court and arbitration records show the opposite has happened: Once blocked from going to court as a group, most people dropped their claims entirely.").

[5] *ATT Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011).

[6] *American Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 232 (2013), *citing CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 97 (2012). *See also* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 395 (2005) ("[T]he Supreme Court's arbitration jurisprudence over the past thirty years have evinced an incredibly expansive view of the FAA, and while the full import of this 'national policy favoring arbitration' has been criticized by many – including members of the Court itself – there is no reason to believe the Court will swing back to a more nuanced interpretation of the FAA.").

complain" about their treatment.[7] As such, forced arbitration contradicts our fundamental understanding of the rule of law – namely, that all citizens may be held accountable to a system of public laws that is equally and fairly enforced by independent neutrals. Instead of accountability and neutrality, forced arbitration results in silence, secrecy and bias.[8]

Part II examines the handful of recently enacted state laws that attempt to limit an employer's ability to compel arbitration of sexual harassment and assault claims. While state legislatures should be commended for acting to protect their citizens from the pernicious effects of forced arbitration, these laws are exceedingly vulnerable to federal preemption. Indeed, several have already been effectively voided by courts duty-bound to apply the Supreme Court's interpretation of the FAA. Only federal legislation can overcome this sweeping reading of the FAA and restore the rights of Americans to freely access public courts.

Part III surveys the smattering of private companies and law firms that have in recent years abandoned forced arbitration clauses. While companies should (perhaps) be lauded for doing the right thing in the face of walk-outs, boycotts and public pressure, what these incidents truly reveal is that only a small subset of skilled workers have enough clout to force their employers (typically publicly traded companies), to eliminate forced arbitration. Congressional action is needed to protect all workers, consumers, victims, and survivors, particularly those who are unable to engage in bold acts of protest to secure basic workplace rights.

PART I
Private, Forced Arbitration is a Uniquely Bad Venue for Sexual Harassment Cases

The EEOC Select Task Force on the Study of Harassment in the Workplace reports that between 50-75% of women have faced some form of unwanted or unwelcome harassment in the workplace.[9] Other studies suggest an even greater prevalence of on-the-job harassment.[10] And yet, while sexual

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[7] Samuel Lack, *Forced into Employment Arbitration? Sexual Harassment Victims are Saying #MeToo and Beginning to Fight Back - But They Need Congressional Help*, HARVARD NEG. L. REV. ONLINE (August 2020).

[8] Testimony of Deepak Gupta before the U.S. House of Representatives, "Justice Denied: Forced Arbitration and the Erosion of Our Legal System" at 3 ("Forced arbitration in effect replaces the laws that Congress enacts with private legislation, written by corporations into the fine print of contracts that nobody reads and that nobody can negotiate. That's not what's supposed to happen in a democracy.").

[9] U.S. Equal Emp. Opportunity Comm'n, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 2016) (also reporting that in 2015, between 44-45% of the approximately 90,000 complaints received by the EEOC alleged sexual harassment).

[10] *See* Rhitu Chatterjee, *A New Survey Finds 81 Percent Of Women Have Experienced Sexual Harassment*, NPR NEWS (Feb. 21, 2018).

harassment is both widespread and plainly actionable under Title VII of the Civil Rights Act of 1964,[11] precious few cases are ever filed. Scholars estimate that only between 6-13% of sexual harassment victims report the misconduct they've suffered in the workplace, much less file a formal complaint.[12]

To be sure, some victims of sexual harassment in the workplace have bravely come forward to give account of the predation they experienced and the difficulties they faced in bringing the perpetrators to justice.[13] In far too many cases, however, workplace victims quickly discover that they have been shut out of the court system by a forced arbitration clause.[14] Ultimately, a toxic combination of forced arbitration provisions and non-disclosure obligations renders these victims voiceless.[15]

A. The Guaranteed Secrecy of Forced Arbitration

A key characteristic of the forced arbitral regime is its guarantee of secrecy.[16] Employer-drafted forced arbitration provisions invariably demand that all aspects of the proceeding be conducted in utter secrecy. Indeed, before an arbitrator is assigned or hearings scheduled, the initial *filing* of a forced arbitration case operates in total secrecy. The only entities with any knowledge that a case has been filed in forced arbitration are the private arbitration providers – which have a clear interest in keeping information shielded from public view and perpetuating the system of forced arbitration from which they profit. The clandestine inception of an arbitration stands in stark contrast to the open and accessible procedures available in court, where filing a public complaint entitles workers and survivors

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[11] *See, e.g., Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993) ("[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated").

[12] Lilia M. Cortina and Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, 1 THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 469-96 (J. Barling & C. L. Cooper eds., 2008); *see also* Anna North, *How Harvey Weinstein's First Accusers Paved the Way for More*, VOX (Oct. 12, 2017) (positing that women may fail to report harassment out of fear that doing so will damage their careers or result in "the public humiliation that women who accuse powerful men so often have to endure").

[13] *See, e.g.*, Emily Crocker, *Here are the Women Who Have Publicly Accused Roger Ailes of Sexual Harassment*, VOX (Aug. 15, 2016) ("If one person breaks her silence and comes forward, it can open the floodgates and embolden other victims to add their stories as testimony.").

[14] Emily Martin, *Forced Arbitration Protects Sexual Predators and Corporate Wrongdoing*, CONSUMER LAW & POLICY BLOG, Oct. 23, 2017. *See also* Testimony of Alexander J.S. Colvin Before the Subcommittee on Health, Employment, Labor and Pensions, "Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements," (Nov. 4, 2021) ("Most workers discover that they have entered into forced arbitration after the fact…they [go] see a lawyer [and] [a]fter 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.")

[15] Erin M. Morrissey, *#MeToo Spells Trouble for Them Too: Sexual Harassment Scandals and the Corporate Board*, 93 TUL. L. REV. 177, 194 (2018) (describing how forced arbitration clauses and NDAs contribute to the prevalence of sexual harassment in corporations).

[16] *See, e.g.*, Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371 (2016).

specify how, when and by whom their rights have been violated. Public processes enable victims to tell their stories, confront perpetrators and obtain meaningful redress that becomes part of a public record. This is a critical entitlement in any situation where one party – the survivor – has very little power or leverage as against a large corporation.

Secrecy pervades other aspects of arbitration as well. For example, forced arbitration hearings take place in secret locations that are closed to the press and the public at large. Complaints, briefs and other filings are not publicly docketed. Under the rules of the forced arbitral providers, both the arbitrator overseeing the proceedings and the provider itself are bound to keep all aspects of the dispute in strict confidence.[17] And -- unlike state and federal judges -- arbitrators are not "accountable to the larger public" but, by contract, are answerable only to the private entities that retain their services.[18]

B. The Injustices Concealed by Secrecy

The secrecy that surrounds forced arbitration is harmful in at least two ways: (i) secrecy allows bias and conflicts of interest to seep into the process in a manner that invariably favors repeat-player companies; and (ii) secrecy chills victims from coming forward, undermining the deterrent function of public law. Taken together, secrecy coupled with the company's ability to pre-designate the arbitration provider renders forced arbitration a uniquely ineffective and unjust venue for addressing the problem of sexual harassment in the workplace.[19]

First, forced arbitration creates an inherent problem of bias in favor of the corporation and against the employee because arbitrators only get paid when they are selected to serve on a case. This economic reality – that arbitrators may decide cases in favor of the party most likely to be in a position to appoint them to serve in a future case -- results in a well-documented repeat-player problem.[20] Professors Stone and Colvin, for example, found that when an employer and employee both appeared before an

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[17] *See, e.g.*, Code of Ethics for Arbitrators in Commercial Disputes, Canon VI, American Arbitration Association (effective March 1, 2004); JAMS Comprehensive Arbitration Rules and Procedures, Rule 26 ("the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing," and "[t]he Arbitrator may issue orders to protect the confidentiality" of the proceeding); see also, AAA Rule 23 ("[t]he arbitrator and the AAA shall maintain the privacy of the hearings").

[18] Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1046-47 (1996).

[19] *See, e.g.*, Matthew DeLange, *Arbitration or Abrogation: Title VII Sexual Harassment Claims Should Not be Subjected to Arbitration Proceedings*, 23 J. GENDER, RACE & JUST. 227 (2020) ("Sexual harassment cases go beyond simple disputes about money, property, or contractual disagreements, that are more appropriate for an arbitral process," but involve "elements of power, fear, and coercion" that "reflect how society values sexual harassment survivors, often whom, are women").

[20] Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPL. RTS. & EMPLOY. POL'Y J. 189, 198-99 (1997) (a study of 270 AAA employment arbitration awards from 1993-1994 finding that employees won only 16% of cases against repeat-player employers).

arbitrator for the first time, the employee had a 17.9% of winning. But if the employer had previously appeared before the arbitrator *four times*, the employee in the fifth case only had a 15.3% chance of winning. And if the employer had previously appeared before the same arbitrator *25 times*, the 26th employee had only a 4.5% chance of winning.[21] The empirical evidence is overwhelming, but so too is the qualitative data. For example, esteemed labor arbitrator and Harvard Law Professor Elizabeth Bartholet testified that she was blacklisted from the now-defunct National Arbitration Forum because she once – just once – ruled in favor of a consumer and against a credit card company.[22] The structural imbalance of forced arbitration allows companies to "stack the deck" by ensuring that arbitrators will be favorable to their interests, while the secrecy surrounding these proceedings makes it impossible for an individual employee to discern or challenge potential bias.[23]

Second, the secrecy of the forced arbitration system prevents survivors who have been victimized by sexual assault or discrimination from learning whether others have experienced similar problems.[24] And when survivors are in the dark as to any claims that may have been filed by other women, each potential claimant faces a chilling first-mover problem in considering whether to initiate a forced arbitration.[25] With most U.S. employees now covered by forced arbitration clauses, we should not be surprised that sexual harassment survivors who are willing to come forward are very few and far between.

And the claim-chilling effect of forced arbitration secrecy is amplified and reinforced by the provision – absolutely standard in employment arbitration clauses – that a survivor may not join her claim together with those of any other claimant inside the arbitration.[26] So even where a company's

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[21] Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, Economic Policy Institute (Dec. 7, 2015).

[22] Testimony of Professor Elizabeth Bartholet Before the U.S. Senate Committee on the Judiciary, *Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations* (July 23, 2008).

[23] *Id.* ("The big corporate players were [] free to select arbitration providers who would provide them a sympathetic forum, and to design an arbitration process that would serve their interests, since the employees and consumers would again not be in any position to bargain or even to think about these things at the point they were applying for jobs or credit cards.")

[24] Just three states – Maryland, California and New Jersey – require arbitration providers to disclose data on claim types and prevailing parties. But this data is notoriously difficult to access and search, given heavy redactions and narrow disclosures. *See* Gilles, *Day Doctrine Died*, *supra* note 16.

[25] *See* Colvin Testimony, *supra* note 14 (as a result of forced arbitration, "employees and public regulators may be unaware of systemic problems of discrimination or sexual harassment at the company because individual cases are kept under a veil of confidentiality").

[26] Stone & Colvin, *supra* note 21 (reporting that it is "common for employees to be presented with terms of employment that include both a clause that obligates them to arbitrate all disputes they might have with their employer and one that prohibits them from pursuing their claims in a class or collective action in court."); *see also* Alexander J.S. Colvin & Mark Gough, *Individual Employment Rights Arbitration in the United States: Actor and Outcomes*, 68 ILR REV. 1019, 1042 (2015) (reporting on a survey of 481 practicing employment arbitrators who reported that 52% of cases they had decided featured arbitration clauses with class and collective action bans).

tolerance of sexual harassment is structural and pervasive, the affected employees cannot proceed as a group. Even two women would be barred by the standard forced arbitration clause from joining their claims together to seek justice and accountability. And, as a corollary, the relief that is available to the individual claimant will not prevent the wrongdoer from preying upon *other* women. The proceedings are one-on-one, and the available relief is likewise totally individuated.

Simply put, forced arbitration enables wrongdoing to continue unnoticed and unpunished, perpetuating the underreporting of gender-based workplace violence and harassment.[27] If there are lessons to be gained from the scandals at Fox News, Miramax, Sterling Jewelers and dozens of other repugnant episodes, it is that real change cannot occur if corporations and the wrongdoers they protect face no public accountability.[28]

PART II
The Looming Preemption Problem

In recent years, a number of state legislatures have passed laws or introduced bills that limit an employer's ability to compel arbitration of sexual harassment and assault claims. These states include California (A.B. 51), Illinois (Public Act 101-0221), Maryland (H.B. 1596), Missouri (S.B. 154), New Jersey (N.J. ST. § 10:5-12.7), New York (C.P.L.R. § 7515), Washington (S.S.B 6313), and Vermont (H.707). In enacting these laws, state legislators have tried to tackle the "scourge of sexual harassment" by eliminating the arbitral secrecy that shields challenges to such conduct from public scrutiny.[29]

While their goals are admirable, these state laws have (or soon will) run headlong into the Supreme Court's apparently boundless interpretation of the FAA. Briefly, as background: the Court's preemption jurisprudence is rooted in its 2011 decision in *AT&T v. Concepcion*, finding California state law prohibiting enforcement of class action-banning arbitration clauses was preempted by the FAA.[30] In the Court's view, while the FAA generally preserves traditional state law defenses to forced arbitration, it preempts any state law that "stands as an obstacle to the accomplishment of the FAA's

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[27] *See, e.g.*, North, *supra* note 11.

[28] *See, e.g.*, GRETCHEN CARLSON, BE FIERCE: STOP HARASSMENT AND TAKE YOUR POWER BACK (2017); Kate Webber Nuñez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PENN. ST. L. REV. 463, 465-66 (2018) (detailing the long history of sexual harassment cases and coverups at Fox News through the use of mandatory arbitration agreements); Imre S. Szalai, *A New Legal Framework for Employee and Consumer Arbitration Agreements*, 19 CARDOZO J. CONFLICT RESOL. 653, 654 (2018) (detailing how the use of mandatory arbitration agreements enabled a series of of sexual harassment cases against Jared and Kay Jewelers); Drew Harwell, *Sterling Discrimination Case Highlights Differences Between Arbitration, Litigation*, WASH. POST, March 1, 2017.

[29] Jyotin Hamid & Adrian St. Francis, *Anti-Arbitration Statutes, the FAA and #MeToo*, REUTERS (Oct. 5, 2021).

[30] 563 U.S. 333 (2011).

objectives."[31] This reading of the FAA has led the Court to reject subsequent state law efforts to regulate forced arbitration clauses in consumer and employment contracts, repeatedly reminding states of the predominance of federal policy favoring forced arbitration[32] With each successive decision,[33] a thin majority of justices has expanded the size and reach of the FAA – so that, today, it has mushroomed into a "super-statute that preempts any state contract law that may frustrate its purpose to promote arbitration nationwide."[34]

A. The Likely Fate of State Statutes Barring Forced Arbitration of Sexual Harassment Cases

Despite state legislative efforts to avoid the reach of the FAA,[35] these laws remain vulnerable to a preemption challenge – and some have already fallen.[36] New York's law,[37] for example, was held unenforceable in *Latif v. Morgan Stanley & Co.*.[38] There, the survivor brought an employment claim alleging he had been the target of "inappropriate comments regarding his sexual orientation, inappropriate touching, sexual advances, and offensive comments about his religion," and that, after he complained about this conduct, was summarily terminated.[39] The survivor invoked the New York statute, §7515, in a bid to resolve his sexual harassment claims in court rather than forced arbitration.[40]

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[31] *Id.* at 351.

[32] *See, e.g.*, Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012). *See also* Lamps Plus, 139 S.Ct. at 1415 ("[S]tate law is preempted to the extent it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the FAA.")

[33] By my count, since 2010, the Supreme Court has decided seventeen cases interpreting the FAA. *See, e.g.*, Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015); BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014); Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013); Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17 (2012); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012); CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); KPMG LLP v. Cocchi, 565 U.S. 18 (2011); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287 (2010); Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63 (2010); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010); New Prime v. Oliviera, 138 S.Ct. 1164 (Jan. 16, 2019); Lamps Plus v. Varela, 139 S.Ct. 1407 (2019); Henry Schein, Inc. v. Archer & White Sales Co., 139 S.Ct. 534 (2019).

[34] Salvatore Bonaccorso, Note, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145 (2015).

[35] Most state laws contain express FAA carve-out language, in an effort to avoid a preemption problem. *See, e.g.*, Cal. AB-51 ("[n]othing in [the law] is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act[.]");

[36] *See* Lack, *supra* note 7("The laws are generally similar in scope and reach, although some state legislatures pay particular mind to avoiding preemption by the FAA, and other states disregard eventual judicial consequences of their far-reaching statutes.").

[37] N.Y. C.P.L.R. § 7515.

[38] 2019 WL 2610985 (S.D.N.Y. 2019).

[39] *Id.* at *1.

[40] In making this argument, the plaintiff relied on the decisional law of New York's state courts Newton v. LVMH Moët Hennessy Louis Vuitton Inc., 2020 WL 3961988at *5 (N.Y. Sup. Ct. July 10, 2020) ("[T]o

But, citing to *Concepcion*, the federal district court found that "application of §7515 to invalidate the parties' agreement to arbitrate Latif's claims would be inconsistent with the FAA."[41] Numerous federal courts in New York have now relied on the *Latif* court's preemption analysis.[42] Indeed, in one post-*Latif* decision, Chief Judge McMahon stated that "[t]he Supreme Court has specifically forbidden state legislatures from creating exceptions to the FAA like the one embodied in CPLR § 7515."[43]

New Jersey's Law Against Discrimination has suffered a similar setback.[44] In *NJ Civil Justice Initiative v. Grewal*,[45] the New Jersey Civil Justice Institute and the Chamber of Commerce filed suit challenging the statute on preemption grounds.[46] The federal district court concluded that because §12.7 "erects uncommon barriers" to forced arbitration, it is preempted by the FAA.[47] New Jersey state courts have similarly held the statute unenforceable on these grounds.[48]

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suggest that the Legislature toiled to promulgate the general rule of CPLR 7515 only to have it immediately swallowed up by a 'federal law' exception, would be to suggest an 'objectionable, unreasonable or absurd consequence.'"). *But see* Fuller v. Uber Tech. Inc., 2020 NY Slip Op 33188 (N.Y. Sup. Ct. Sept. 25, 2020) (granting a motion to compel arbitration of a sexual harassment claim and holding that the FAA preempts CPLR 7515).

[41] 2019 WL 2610985 at *3 ("The FAA sets forth a strong presumption that arbitration agreements are enforceable and this presumption is not displaced by § 7515.").

[42] *See, e.g.*, Gilbert v. Indeed, Inc., 513 F.Supp.3d 374, 397-8 (S.D.N.Y. 2021) (observing that it would be "anomalous to presume that Congress, which lacked the power to protect victims of domestic abuse with a federal remedy, has the power (and has exercised it) to deny the states the ability to provide victims of such abuse in the workplace a non-waivable right to a public forum," but that the Court's FAA jurisprudence has rendered this anomaly "water under the bridge"); *see also* Wyche v. KM Sys., Inc., 2021 WL 1535529, at *2 (E.D.N.Y. 2021) (following *Latif*); Bedoy v. NBCUniversal Media, Inc., 2021 WL 601817 (D. Co. 2021) (same); Rolleg v. Cowen, Inc., 2021 WL 807210 (S.D.N.Y. 2021) (same); Lee v. Engel Berman Grande Care at Jericho, 2021 WL 3725986 at *7 (E.D.N.Y. 2021) (same); Charter Comm's v. Garvin, 2021 WL 694549 at *13-4 (S.D.N.Y. 2021).

[43] White v. WeWork Cos., Inc., 2020 WL 3099969, at *5 (S.D.N.Y. 2020).

[44] N.J. Stat. Ann § 10:5-12.7. Notably, §12.7 does not mention arbitration on its face, but instead provides that "a provision in an employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable."

[45] 2021 WL 1138144 (D.N.J. 2021).

[46] The New Jersey AG's office initially challenged these plaintiffs' standing to sue, but the court held that these entities had associational standing as the interests they sought to protect were related to the organizations' purpose. *Id.* at *4.

[47] *Id.* at *6, citing Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017).

[48] *See, e.g.*, Peralta Jannelly v. Route 23 Auto Mall, LLC, et al., L-001070-20 (N.J. Super. Ct. Oct. 8, 2020) (characterizing §12.7 as "an assault on arbitration clauses in employment contracts" that "covertly accomplish[es] the objective of disfavoring arbitration"); Janco v. Bay Ridge Auto Mgmt. Corp., MON-L-1967-20 (N.J. Super. Ct. Jan. 22, 2021)

In California, the risk of preemption appeared so grave that then-Governor Jerry Brown twice vetoed bills prohibiting forced arbitration of employment-related claims.[49] The legislature responded to this concern by adding language to AB 51 making clear that nothing in the law "is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act."[50] Despite this FAA carve-out, a federal district court found the statute nonetheless preempted by the FAA in *Chamber of Commerce of U.S. v. Becerra*,[51] only to be reversed by the 9th Circuit in *Chamber of Commerce v. Bonta*.[52] The Chamber's petition for en banc review of the *Bonta* panel's decision is currently pending,[53] but it certainly isn't difficult to imagine that this case might soon arrive at the Supreme Court.[54] And if history is any guide, AB 51 may then suffer the same fate as other state laws or policies deemed preempted by a narrow majority of the Justices.[55] In the end, only federal legislation limiting the FAA's application can overcome the preemption problem and provide for reasonable regulation of forced arbitration clauses, in line with the original intent of the 1925 Congress.

B. The Effect of the Supreme Court's Recent Employment Forced Arbitration Decisions

State legislatures are powerless to enact laws that conflict with the Supreme Court's FAA jurisprudence. And the sweep of the Court's deference to the FAA has only expanded in recent years,

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[49] In his veto message to AB 465, Governor Brown referred to "recent decisions" by the Supreme Court finding "that state policies which unduly impede arbitration are invalid." Edward Lozowicki, *Governor Brown Vetoes California Bill Prohibiting Arbitration of Employment Claims*, ABA JOURNAL, Jan. 15, 2016.

[50] A.B. 51, Sec. 3, 432.6(f).

[51] 438 F. Supp. 3d 1078, 1099 (E.D. Cal. 2020). This lawsuit was brought by a group of business associations seeking to enjoin enforcement of AB 51. The district court granted the preliminary injunction, concluding that "AB 51 placed agreements to arbitrate on unequal footing with other contracts" and "stood as an obstacle to the purposes and objectives of the [FAA]."

[52] 13 F.4th 766 (2021). In a 2-1 decision, Judge Lucero (sitting by designation from the 10th Circuit), found that AB 51 prohibits only *nonconsensual* agreements imposed *pre-agreement*. *Id.* at 774 (AB 51 was enacted "to assure that entry into an arbitration agreement by an employer and employee is mutually consensual and to declare that compelling an unwilling party to arbitrate is an unfair labor practice"). The FAA, in turn, only ensures that consensual and executed arbitration agreements would be enforced. On this view, AB 51 does not directly conflict with the FAA. *Id.* at 791 (because AB 51 "in no way affects the validity and enforceability of such agreements," it poses no obstacle to the FAA).

[53] Chamber of Commerce et al. v. Bonta, Plaintiffs-Appellees' Petition for Rehearing En Banc (Oct. 20, 2021).

[54] Indeed, Judge Ikuta's dissent in *Bonta* may have been penned to catch the Court's attention. *See* 13 F.4th at 796 ("Like a classic clown bop bag, no matter how many times California is smacked down for violating the Federal Arbitration Act (FAA), the state bounces back with even more creative methods to sidestep the FAA.").

[55] Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012). *See also* Lamps Plus, 139 S.Ct. at 1415.

particularly in the labor and employment field.[56] Indeed, the Supreme Court has conveyed a singular indifference to employees seeking to challenge arbitration provisions.[57] In *Epic Systems Corp. v. Lewis*, employees sought to band together to hold their employers accountable for wage theft -- cases that are impossible to pursue on an individual basis. But a 5-4 Court upheld the class-banning forced arbitration clauses in their employment contracts, notwithstanding the federally-guaranteed right to "collective action" protected by the National Labor Relations Act.[58] According to the majority's view, it "makes no difference" whether a plaintiff argues that a forced arbitration clause is "'illegal' as a matter of federal statutory law [or] 'unconscionable' as a matter of state common law" – incredibly, neither argument is sufficient to overcome a contractual arbitration provision drafted by the defendant employer.[59] In a sharp dissent, Justice Ginsburg accused the majority of "ignor[ing] the reality that sparked the NLRA's passage: forced to face their employers without company, employees ordinarily are no match for the enterprise that hires them."[60]

In an even more recent employment case, *Lamps Plus v. Varela*, the majority held that an employer that had not explicitly consented to class arbitration in its contracts could not be forced to arbitrate collectively: "courts may not infer consent to participate in class arbitration absent an affirmative contractual basis for concluding that the party *agreed* to do so." [61] Justice Ginsburg's dissent – read from the bench, signaling her intense disagreement -- pointed out the cruel "irony of invoking the first principle that arbitration is strictly a matter of consent to justify imposing individual arbitration on employees who surely would not choose to proceed solo."[62] But most important for these purposes,

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[56] This expansive interpretation of the FAA in employment agreements began with *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Circuit City v. Adams*, 532 U.S. 105 (1991), where the Court found that companies could impose arbitration as a condition of employment and demand that all claims – even those alleging violations of federal civil rights law – be resolved in arbitration.

[57] There is grim irony here, given that in 1925 the drafters of the FAA clearly did not intend this statute to reach the claims of workers, as both the text and legislative history make clear. *See* FAA §1 ("nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"); *see also* A Bill To Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Hearing on S. 4213 and S. 4214, 67th Cong. 9-10 (1923) (statement W.H.H. Piatt, American Bar Association) ("It is not intended this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.").

[58] 138 S.Ct. 1612 (2018).

[59] *Id.* at 1619 ("In fact, this Court has rejected every such effort to date … with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act.") (internal citations omitted).

[60] *Id.* at 1633 (Ginsburg, J., dissenting) (calling the majority opinion "egregiously wrong," and predicting that the upshot of the decision "will be huge under-enforcement of federal and state statutes designed to advance the well-being of vulnerable workers").

[61] 139 S. Ct. 1407 (2019).

[62] *Id.* at 1421.

Justice Ginsburg's dissent recognized that the majority's misreading of the FAA had reached a critical tipping point, and "urgently" pled for "Congressional correction of the Court's elevation of the FAA over the rights of employees [] to act in concert."[63]

The plain import of *Epic Systems* and *Lamps Plus* is to "encourage more employers to require individualized arbitration as a condition of employment."[64] As a result of these cases, victims of sexual harassment in the workplace who lack the resources to hire counsel for individual arbitration are left with no recourse. H.R. 4445 would restore the rights of millions of American workers to access public courts to resolve workplace violations.

Part III
The Limits of Public Pressure

Over the past few years, a number of private employers have agreed to jettison contractual provisions requiring forced arbitration of claims for sexual harassment and assault. In many instances, these concessions were a result of worker protests and intense public scrutiny. For example, workers at Silicon Valley giants such as Facebook, Google and Microsoft staged walk-outs to protest their employers' use of forced arbitration clauses to shield serial predators from exposure.[65] Eventually, these companies bowed to the pressure and eliminated the pernicious provisions from their employment agreements.[66] Other tech companies followed suit.[67]

In 2018, Uber came under scrutiny when 14 women publicly complained that they had been sexually assaulted by Uber drivers, but were prevented from taking their case to court by a forced arbitration clause in the Uber app's terms of use. In an open letter, the women demanded that Uber release them from forced arbitration, which "takes away a woman's right to a trial by a jury of her peers and provides a dark alley for Uber to hide from the justice system, the media and public scrutiny."[68] Things got

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[63] *Id.*

[64] Stephanie Greene & Christine Neylon O'Brien, *Epic Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements, #TimesUp on Workers' Rights*, 15 STAN. J. CIV. RIGHTS & CIV. LIBERTIES 41, 68 (2019). *See also* Jess Bravin, *Supreme Court Imposes Limits on Workers in Arbitration Cases*, WALL ST. J., May 21, 2018 (predicting that the decision in *Epic Systems* may lead companies to impose forced arbitration clauses "on millions more" employees).

[65] Melia Russell & Sophia Kunthara, *Thousands Of Google Workers Protest Company's Handling Of Sexual Harassers*, SAN FRANCISCO CHRONICLE (Nov. 1, 2018); *see also* Meira Gebel, *The Organizers Of The Google Walkout Are Calling On The Tech Industry To End Forced Arbitration Employment Agreements Completely*, BUSINESS INSIDER (Jan. 19, 2019).

[66] *See, e.g.*, Daisuke Wakabayashi, *Google Ends Forced Arbitration for All Employee Disputes*, N.Y. TIMES (Feb. 21, 2019).

[67] Didi Martinez, *Facebook, Airbnb and eBay Join Google In Ending Forced Arbitration for Sexual Harassment Claims*, NBC NEWS (Nov. 12, 2018).

[68] Johana Bhuiyan, *Women Alleging Sexual Assault by Their Uber Drivers Want to See Their Day in Court*, RECODE (April 26, 2018).

worse for the company when a CNN investigation revealed that 103 Uber drivers had been accused of sexually assaulting riders between 2014-2018, but in most cases, Uber had failed to terminate these drivers despite complaints. Facing overwhelming public pressure, Uber announced that it would abandon the use of forced arbitration, as well as the practice of requiring non-disclosure agreements in private settlements.[69] Lyft and other companies quickly followed suit.

So too did a number of national law firms face pressure from female law students and their allies demanding an end to the practice of forcing arbitration of sexual harassment claims.[70] For example, in 2018, a group of Harvard Law students created the "People's Parity Project" to boycott one of the country's highest-grossing law firms, Kirkland & Ellis, in protest of the firm's policy of including forced arbitration clauses in its employment contracts. The firm quickly folded, announcing that it was ending the policy for associates,[71] and after more public recrimination, for all attorneys and staff.[72] Hoping to avoid a similar PR nightmare, other major law firms followed Kirkland's example[73] and within the year, 92% of law firms surveyed stated that they no longer imposed forced arbitration clauses on their employees.[74]

And activists are finding new and more sophisticated ways to hold companies accountable for adopting forced arbitration provisions. In April 2021, for example, ex-Fox News anchor Gretchen Carlson attended the annual meeting of Goldman Sachs shareholders and demanded a vote on a measure that would force the company to conduct and publish a report on how forced arbitration affects its staff and the workplace. The proposal was very narrowly defeated but received the backing of 49% of shareholders.[75] In response, Goldman management announced that it would conduct and publish a study examining the effects of forced arbitration on its workforce.

These activists deserve tremendous praise for shining a spotlight on forced arbitration and educating the public about the insidious effects of these provisions on American workers. But it would be a grave mistake to assume – because Silicon Valley tech workers, Harvard law students, and Goldman Sachs shareholders have succeeded in pressing some companies to roll back arbitration policies – that

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[69] Sara Ashley O'Brien, et al., *CNN Investigation: 103 Uber Drivers Accused of Sexual Assault or Abuse*, (April 30, 2018).

[70] *See, e.g.*, Kathryn Rubino, *Another Biglaw Firm Kicks Mandatory Arbitration To The Curb*, ABOVE THE LAW (Apr. 1, 2019).

[71] Aidan F. Ryan, *Harvard Law Students Push Major Firm to Drop Controversial Contract Provisions*, THE HARVARD CRIMSON (Nov. 26, 2018).

[72] Stephanie Russell-Kraft, *Kirkland & Ellis Drops Arbitration for Non-Attorney Staff*, BLOOMBERG LAW (Dec. 7, 2018).

[73] Angela Morris, *Why 3 BigLaw Firms Ended Use of Mandatory Arbitration Clauses*, ABA JOURNAL (June 1, 2018) (reporting that Munger, Tolles & Olson, Orrick, Herrington & Sutcliffe, and Skadden Arps Slate Meagher & Flom dropped arb clauses after public pressure).

[74] Stephanie Russell-Kraft, *Fewer Big Law Firms Require Mandatory Arbitration for Associates*, BLOOMBERG LAW (July 1, 2019).

[75] Saijel Kishan, *Goldman Narrowly Defeats Carlson-Backed Arbitration Vote*, BLOOMBERG (April 29, 2021).

all workers can or should do the same.[76] Real change requires more than a handful of companies to make tactical concessions to their workers.[77] The reality is that the nation's largest employers continue to impose forced arbitration clauses on their workers – and will do so until federal law prohibits these provisions.[78]

While a large chunk of the U.S. workforce is bound to arbitrate cases, most will never do so for fear of retaliation, lack of resources, or the inability to proceed collectively.[79] Study after study shows that few workers ever initiate an individual forced arbitration.[80] For example, an EPI study estimates that only 1 in 10,400 workers subject to forced arbitration will seek to resolve a workplace dispute in arbitration.[81] This means that thousands of workers with potentially valid claims – somewhere between 315,000 to 722,000 each year – are left to suffer in silence.[82] One legal scholar estimates that, as a result of forced arbitration clauses, 98% of employment cases that would otherwise be brought in some forum are abandoned.[83] So despite proponents' claims that forced arbitration offers employees a more accessible venue for redress than litigation, "empirical evidence now shows that mandatory employment arbitration is bringing about the opposite result – eroding rather than boosting employees' access to justice by suppressing employees' ability to file claims."[84]

On the rare occasion that employees do bring individual arbitrations, they are far less likely to succeed against repeat-player employers: of the 11,114 AAA/JAMS employment arbitrations between 2014-18, only 2.5% of cases resulted in monetary award to an employee (that was not outweighed by an even larger employer award).[85] And "success" in forced arbitration is not nearly the same as winning

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[76] Importantly, absent any change to the law, there is nothing to stop these companies from reviving their use of forced arbitration whenever or against whomever they wish.

[77] Moira Donegan, *Why Can Companies Still Silence Us with Mandatory Arbitration*, THE GUARDIAN (Jan. 8, 2019).

[78] *See* Imre S. Szalai, *The Widespread Use of Workplace Arbitration Among America's Top 100 Companies*, EMP. RIGHTS ADVOC. INST. FOR LAW & POL'Y (2018) (reporting that 80 of the 100 largest American companies impose arbitration as a condition of employment).

[79] *See, e.g.*, Elizabeth Kristen, Blanca Banuelos & Daniela Urban, *Workplace Violence and Harassment of Low-Wage Workers*, 36 BERKELEY J. EMP. & LAB. L. 169, 170 (2015) (observing that most workers "remain silent and never pursue justice against transgressor employers"); *see also* David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 83-84 (2005) (compiling studies indicating that workers do not report employer misconduct out of fear of retaliation).

[80] Colvin, *supra* note 1.

[81] Stone & Colvin, *supra* note 21.

[82] *Id.*

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

[84] Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1312 (2015).

[85] American Association for Justice, *The Truth About Forced Arbitration* (2019). *See also* Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011) (finding that employees win in arbitration far less often than in employment trials, and when they do win, their average awards were "substantially lower" in arbitration than in court).

in court: Professor Colvin's 2011 empirical study found that the "median awards in employment litigation are around five to ten times greater than median awards in employment arbitration."[86] Professor Estlund's study similarly concluded that "employees who did win something recovered much less in AAA arbitration than in litigation: the median award was $36,500 in arbitration versus $176,426 in federal discrimination cases."[87] And, disturbingly, the impact of forced arbitration is disproportionately borne by lower-wage workers and those working in frontline jobs (such as education and healthcare) that are largely comprised of women and African-Americans.[88] Nearly 65% of low wage workplaces (those paying their workers less than $13/hour) use forced arbitration.[89] H.R. 4445 ensures that the rights of all employees are protected – no matter their pay scale, industry or clout.

Conclusion

Forced arbitration does not accomplish what its proponents claim: it doesn't channel cases into an alternative system that's cheaper or faster. Instead, under forced arbitration, cases of survivors seeking only to vindicate their rights simply vanish. And along with those disappearing cases, we sacrifice deterrence, public accountability and the development of the law itself. As such, the harm caused by forced arbitration clauses extends far beyond individual workers: we are *all* harmed when corporations escape accountability and victims of abusive conditions are silenced. The question facing Congress is this: does this body want to continue providing private corporations with this form of government-sponsored liability insurance, or does it want instead to provide victims who suffer violations of their rights an accessible, public forum for their cases to be heard? The answer should be plain. Accordingly, I urge you to support and enact H.R. 4445.

Thank you again for the opportunity to testify. I am happy to answer any of your questions.

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[86] Colvin, *supra* note 1.

[87] Estlund, *supra* note 83 at 688.

[88] Colvin, *supra* note 1 (estimating that 57.6% of working women, 59.1% of African Americans, and 54.3% of Hispanic workers are subject to forced arbitration); *see also* Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1542 (2016) (discussing the claim-suppressing effects of forced arbitration clauses and class action bans on low-income workers).

[89] Alexander J.S. Colvin, *The Metastisization of Mandatory Arbitration*, 94 CHI-KENT L. REV. 3, 24 (2019).

Chair NADLER. Thank you.

Thank you all for your testimony.

We will now proceed under the 5-minute Rule with questions, and I will recognize myself for 5 minutes.

First , I want to thank all of you for coming before us to share such personal and traumatic experiences with us today. We're incredibly grateful. Your testimony will help save countless other women from being victimized in the future by sexual predators in the workplace.

Ms. Spottiswoode, your attacker did not attempt to conceal his actions. He operated in broad daylight. You, on the other hand, were forced into a secret, closed-door proceeding. Prior to joining Afiniti, you had no idea if your attacker had previously acted like this toward anyone else at the company.

Do you believe that secret arbitration proceedings endanger men and women in similar situations?

Ms. SPOTTISWOODE. Of course. Even at Afiniti, I don't know whether there are women there who, like me, might think that they are the only person that this has happened to and, like me, would have to wait until months into an arbitration proceeding to learn that there are other victims.

Chair NADLER. Ms. Henry, I'd like to ask you a similar question. Your harasser also operated brazenly and without fear of repercussions. If there was someone at the dealership before you who was able to take their claims to court, do you think your attacker would've repeatedly harassed you after you were hired?

Ms. HENRY. No, sir, I do not. I feel like I wouldn't be sitting here today if that would've happened previously, and it was taken care of at that time.

Chair NADLER Ms. Newton and Ms. Dushku, you both described work environments in which senior management brushed aside the reports of the sexual harassment you endured. In your view, how would prohibiting arbitration clauses from being enforced in cases of sexual violence and harassment reform workplace cultures that ignore or protect repeat offenders?

Ms. Newton?

Ms. NEWTON. I think it would send the message immediately that there is no tolerance for this in the court of law. They would know that going in: We cannot get away with this. Right now, they feel like it's open season.

Chair NADLER Ms. Dushku, what do you think?

Ms. DUSHKU. Short answer is accountability. I think that transparency and openness have to be a part of this, because transparency makes the perpetrators in sexual harassment accountable. Accountability changes behavior.

I think in my situation, if people could have seen the tapes, accountability would've changed the outcome.

Chair NADLER. Thank you.

Professor Gilles, in the time I have left, could you highlight the breadth of forced arbitration's impact on sexual assault and harassment cases?

Ms. GILLES. Yeah, of course.

So, it starts at the very beginning. A woman, a victim of sexual harassment tries to complain about her treatment, and she doesn't

get anywhere with HR, so she tries to file a lawsuit. As Ms. Henry indicated earlier—and I think her story is the story of so many women in this situation—she learns only upon speaking to a lawyer reviewing documents that she signed, something, somewhere that she doesn't even remember. None of us remember all those documents they give us to sign on orientation day. In there, tucked in the very deep, deep fine print, is a forced arbitration clause that says that you've waived your right to a jury, you have to go into a private arbitration predesignated by the employer, who has retained that arbitration provider, so you're not very sure how fair the proceeding will actually be.

In arbitration, for this apparent speed and cheapness, we get very, very streamlined proceedings, so streamlined that the rules of discovery and the rules of evidence and other procedural protections that would apply in court no longer apply. So, right off the bat, we're just treating these people as though they're second-class citizens.

When an arbitration complaint is filed, it's filed in secret. In other words, the only entities that know that the arbitration has even been filed are the employer, the complaining employee, and the arbitration entity of the AAA or JAMS or one of these arbitration providers. Nobody else knows. Contrast that with court. If I go down to the D.C. District Court today and I file a complaint, that complaint is on the public record, right? So, is the defendant's answer or motion to dismiss. All the pleadings, they're public.

Litigation in the public court system, it has power. The powers it has is the power of signaling, not only to the defendant that I've sued, but to all similarly situated defendants that this is a wrong. This person has complained about something, she's told her story, and she plans to prove it.

None of that happens in arbitration. From the beginning, it is private throughout the entire proceeding, which is held in a secret location, no public, and no press. All of it is private. Arbitrators don't write decisions.

There are only three States in the Union that currently require minimal disclosure of arbitrations—pretty redacted and hard to read if you're a researcher, like I am, about these issues. Other than that, everything that happens in arbitration is a Black box.

So, should we be surprised that women are feeling incredibly angry that they don't get to tell their story, that they don't get to know whether the place they choose to work is full of problems that they never learn about?

This is overwhelmingly bad, right? This is, as I said in my opening remarks, I think the worst possible system one could design to deal with a problem of this nature.

Chair NADLER. Thank you.

I would ask our Witnesses to please put their masks on when they are not speaking.

Mr. Chabot is recognized for 5 minutes.

Mr. CHABOT. Thank you, Mr. Chair.

I also—it's already been mentioned, but I want to thank the Witnesses for being here today as well. This is obviously not an easy thing that it is, to testify in public like this, and we certainly appreciate your bravery in doing this.

I think the behavior that's been discussed here is, obviously, outrageous and disgusting. Most of the individuals who you've been talking about on the other side ought to probably not only be sued or gone through arbitration, as the case may be, civilly but ought to be behind bars, because I think the behavior that's been discussed here is criminal.

I know that, as time passes and we as a society become more and more educated about this and how often it occurs, we take it more and more seriously, as we ought to. So, again, thank you for being willing to be here today and to tell us about this. As I say, most of these guys you're talking about ought to be in jail.

Now, that being said, obviously, we've had Federal arbitration, and there's arbitration at the State level; it's been around for a long, long time. It's one way to handle these types of things, not the only way. There obviously ought to be more thought given up front on both sides, about these contracts.

It's disturbing that such little time is given for an individual like yourself, who's signing on at that employment early on, as to what rights they may or may not be giving up. So, I think that's something else we need to take a strong look at, is let's find out what people are actually signing.

They tell you never sign anything unless you read the fine print, whether you're purchasing a car, whatever the case may be, and let's face it: We're all busy. They put this stuff in front of us, and we sign it.

Chair NADLER. Will the gentleman yield?

Mr. CHABOT. I'd be happy to yield.

Chair NADLER. Yeah, but isn't the whole point that these women and others similarly situated are given contracts to sign, "Here's your employment contract, and you may not 'X' out the arbitration clause or the NDA; take it or leave it"? That's what we're dealing with.

Mr. CHABOT. Yeah, reclaiming my time, I agree with that, and I'm saying that's something that we do need to educate the public, and we all ought to be involved. Yes, we've got Democrats and Republicans here, but this is an issue we ought to be united on and ought to be out there protecting women, or men in some cases, that are harassed either at the workplace or anyplace else.

This is my 25th year in Congress, and on this Judiciary Committee we handle an awful lot of very important issues. Most of us, on both sides, have supported programs and policies to protect individuals and assist victims of sexual exploitation either in the workplace or in other places. So, I think this is a timely discussion of this.

I've talked much longer than I wanted to. I wanted to get in a couple of questions.

So, obviously, the two rivaling principles here are getting justice, certainly, for a horrific thing that this individual has undergone, but doing it in a manner which, with all the lawsuits that are filed in this country, doing it in a timely way and doing it in a manner where you're going to get justice.

So, I'd like to ask Ms. St. John and Ms. Perry, you had mentioned—Parshall Perry—you had mentioned before about the time that you can get your case before the adjudicatory person, which

in this case would be an arbitration panel. Oftentimes, each side picks one, and those two arbitrators pick another arbitrator.

So, could you discuss that—you did somewhat in your testimony—about the benefits of going that route?

Is there anything that you would suggest in perhaps the discussion that I mentioned about having people more educated up front, when they sign these employment agreements, that they're actually giving up their rights?

I'd let either one of you take that.

Ms. ST. JOHN. I think that's exactly right. Not every employer has these mandatory arbitration provisions. I think if, going in, employees know that there are employers that have them, there are employers who don't, maybe some are willing to remove them or talk through them, that would be helpful.

Arbitration does tend to be a faster, cheaper, easier way of resolving disputes. That may be a way that is more beneficial to victims of sexual harassment and assault or any other workplace violation.

Ms. PARSHALL PERRY. Thank you for that question, Congressman. I would echo what Ms. St. John said as well.

Also, we need to refocus our analysis toward confidentiality and NDAs. When those accompany arbitration provisions, that is a particularly pernicious setup. In fact, five States have enacted legislation that indicates, in certain claims, under employment discrimination law, you may not use an NDA or a confidentiality provision. So, you are automatically given the opportunity to go immediately public even though you are still in the arbitration process.

I do think there's much to be said for investigating how we can look at the confidentiality provisions when they accompany arbitration itself.

Mr. CHABOT. Thank you.

My time has expired, Mr. Chair. I yield back.

Chair NADLER. The gentleman yields.

Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you.

Let me thank you all for your bravery and courage. I don't know how many words I can offer that would equate to what you have done not for this Committee but for America today. Each and every one of these persons, in normal circumstances, committed a crime, should be tried and incarcerated. Here we are, with a mystery that most of you did not realize was part of your contract. That, in and of itself, is not the American way.

So, I do want you to feel that you have contributed to a further understanding and empowerment of lawmakers to distinguish between what arbitration may be of value for and where it is wrong, ugly, and bad.

I do want to quickly—Ms. Spottiswoode, you indicated in your testimony that there was another young woman who was harassed and assaulted on an international trip. Do you believe Chishti has a pattern of luring young women out of the country and assaulting them, which changes the whole framework of your legal rights?

Ms. SPOTTISWOODE. I personally believe that. It's certainly—there were a lot of similarities between what happened to me and the other young woman who I learned about.

Yeah, whatever his pattern is, it won't ever be revealed if he can always set the rules of dispute resolution with his employees.

Ms. JACKSON LEE. Ms. Dushku, when Weatherly made a rape joke in front of the cast and crew—and I'm horrified by what you had to experience, film rolling, and your professionalism demeaned—how did that make you feel?

Ms. DUSHKU. I was horrified. I was embarrassed. I was ashamed in some strange way. It was just incredibly demeaning.

As somebody who had spent my life and my career establishing myself as sort of this strong, outspoken woman, I felt that it was intentionally directed at me to make me feel small and unable to defend myself.

Ms. JACKSON LEE. Almost taking your literal rights away as an independent—as an American. Thank you for that.

Ms. Newton, do you have an impression that Louis Vuitton felt responsible for doing due diligence? Or did they look like they had concern to really do a thorough investigation of what you spoke about and how you were demeaned, hurt, and harmed?

Ms. NEWTON. No, I don't think they had any consideration at all. Everything was done in a really shoddy manner with the intent of burying it.

Ms. JACKSON LEE. Ms. Henry, do you think the actions of your perpetrator should have really put him into the criminal justice system?

Ms. HENRY. Yes, ma'am, I do. The way things are there now, it's just a big secret. They can pay some money to the victim and move on and not even warn the next person that this may happen to. So, yes, I don't feel like justice has been—prevailed here at all.

Ms. JACKSON LEE. Professor Gilles, thank you for the research that you have done. You've heard the pain of these women and how, I believe, these allegations against these perpetrators would really throw them into the criminal justice system. Obviously, one incident happened out of the country.

Can you tell us how these incidences are, in fact—this policy presence, with arbitration, the implications of what they have for justice, or injustice now, in America?

Ms. GILLES. I think that you're hearing today the implications are significant. We have a group of incredibly strong women who were demeaned in the workplace. I think that that's injustice right there. I think it gets worse and worse.

So, my colleagues on the right have argued that courts are too busy, dockets are too full, and that's the reason to shunt these cases into arbitration, where they can allegedly be dealt with cheaper, faster, and easier. I just want to point out that, first of all, they're not being dealt with cheaper, faster, and easier; they're not being dealt with at all. Very few victims ever decide to go into arbitration.

So, the company line that the Chamber of Commerce likes to feed us, or some of us, is just false. So, that means that there's deep injustice and that we have a two-tiered system, right? We have a system for big companies, who get to go to court, and then we have a system for victims, who have to be forced into arbitration.

I'd also just say as an aside, if there really is a question about whether court dockets are too full, then this body should just appoint more judges, right? The way to deal with that problem is not to force people into a system that they don't want, they don't need, and is deeply unfair, but, instead, it's to just appoint more judges.

I also think, Representative Lee—I think this is an important point, and it'll be my last point. There's a deep problem and an injury that happens to the law itself when cases are not brought in public courts and are docketed on the public system. We lose something. We lose something about what makes this country great, which is law. Law has to have people, inputs, to develop, to move forward, and to evolve. Right now, a lot of cases are not getting before judges. They're not hearing those cases. What happens is that law itself starts to stagnate.

So, I think the harms are cascading. They're multiple; they're deep. It's time to put them to an end.

Ms. JACKSON LEE. Thank you.

Chair NADLER The gentlelady's time has expired.

Let me just say, Ms. Gilles, that, regardless of the topic of this hearing, I think you'll find considerable bipartisan support on this Committee for increasing the number of judges.

Mr. Jordan.

Mr. JORDAN. Thank you, Mr. Chair.

Ms. Parshall Perry, we've got a markup on this tomorrow. It sounds like—Ms. Gilles just talked about public this information being public, and these courageous individuals who came and shared their stories, that information being public. You indicated with Mr. Chabot that you felt the answer to this, to protect the benefits of everything here, the benefits of all, was to deal with the nondisclosure, confidentiality. You think that's the answer?

Because, like I said, tomorrow, we're going to be actually potentially passing this Bill out of the Committee, moving it to the House floor, and we'd like to do it right that's going to treat people who've had to go through the terrible things they've had to go through, we'd like to treat them the right away.

Ms. PARSHALL PERRY. Thank you for that question, Congressman.

I do believe confidentiality and those provisions that attach so often to arbitration agreements are precisely the problem that we're dealing with in the first place. The opportunity for individuals who are signing employment contracts to truly understand that what they'll go through may not ever see the light of day—the explanation—I almost wonder if there ought to be some disclaimers that we investigate, that if those particular claims are given an opportunity to be arbitrated, like any other employment claim, any other discrimination claim, anything in employment and labor, that there is attaching language saying that we will not utilize nondiscrimination—or nondisclosure agreements, confidentiality provisions, so that immediately upon entering arbitration the process itself is not private and it is not kept behind closed doors.

Mr. JORDAN. Yep.

Ms. PARSHALL PERRY. There are protections in the Federal Arbitration Act that make note of the fact that there are no confiden-

tiality provisions. The American Arbitration Association focuses singularly on the arbitrators, the goal being to protect privacy during negotiations, but it will be very long before those individuals and their claims actually see the light of day. I do think confidentiality is an issue.

Mr. JORDAN. Thank you.

I'm going to yield to the Congressman, or maybe Attorney General, of Texas the remainder of my time.

Mr. GOHMERT. Thank you.

Ms. Spottiswoode, sorry for not knowing, but your attacker, did he ever face criminal consequences?

Ms. SPOTTISWOODE. No. As far as I know, he's still the CEO of this company. I—yeah. In fact, I'm very much afraid of what will happen after this hearing.

Mr. GOHMERT. Well, that could well be a crime, if some retaliation is brought to bear against you. Now that you are public, please don't keep future crimes private. You know, you're out there. Might as well follow up.

The law-and-order side of me says somebody that attacks anybody like you were attacked needs to be responsible to the criminal justice system, not just keep it private, but it needs to be dealt with in a criminal court.

I, also, wonder if that might be something, whether it's sexual assault, anybody that has a crime committed against them shouldn't be limited to arbitration. It looks like you ought to be able to pursue that.

Perhaps, Ms. Gilles, I understand what you're saying, but in my time as a prosecutor and as a judge, sometimes we have women that really don't want to come forward. A side of me wants them to come forward, but—

Ms. GILLES. Then they shouldn't.

Mr. GOHMERT. I know you've dealt with that—

Ms. GILLES. We're on the same page. I just think they should have a choice.

Mr. GOHMERT. Exactly.

Ms. GILLES. So, I'm with you right?

Mr. GOHMERT. Yeah. Yeah.

Ms. GILLES. They shouldn't be forced into a system they don't want.

Mr. GOHMERT. Just because somebody's part of a labor union doesn't mean they ought to be forced into arbitration either, right?

Ms. GILLES. We're not here to talk about labor unions. That's a whole other hearing.

Mr. GOHMERT. Oh, yeah, but that's an exception.

Ms. GILLES. An exception to what?

Mr. GOHMERT. Labor unions will be able to negotiate arbitration agreements. So, it is something to discuss. You may not want to discuss it.

Ms. St. John, how do you feel about exempting out agreements made by labor unions from whatever law gets passed?

Ms. ST. JOHN. Well, I think it's inconsistent with the principles involved. If arbitration's okay for some claims, it should be okay for all claims. Same with—whatever process is available, it shouldn't be restricted based on whether an employee is in a union.

Mr. GOHMERT. Well, I can sure see, with a sexual assault, a need to give that choice to the victim after it happens and not agreeing before it happens.

So, I appreciate all of you being here, appreciate your sensitivity, and will look forward to dealing with this as a legislative matter.

Thank you. I yield back.

Chair NADLER. The gentleman yields back.

Mr. Johnson.

Mr. JOHNSON of Georgia. Thank you, Mr. Chair.

Ms. Parshall Perry, I've got legislation that would expand the United States District Courts by creating 203 additional judgeships. Do you believe that would create efficiencies that would enable more women to be able to bring cases of sexual assault in a Court of Law instead of in arbitration?

Ms. PARSHALL PERRY. Congressman, I think my primary concern would be filling the vacancies we currently have. Until we can get that figured out, I'm not a fan of expanding, unilaterally, the judiciary. I think that's a problematic avenue to pursue.

Mr. JOHNSON of Georgia. All right. Thank you.

If we could fill the vacancies, though, it would be great for justice in America. Isn't that correct?

Ms. PARSHALL PERRY. If we could fill the vacancies, yes, absolutely.

Mr. JOHNSON of Georgia. You have given up on the Senate being able to confirm judges?

Ms. PARSHALL PERRY. I have not. I do believe the Senate is still capable of following its edicts and making sure that those vacancies are filled. Before we go adding judges, let's fill the vacancies that we have first.

Mr. JOHNSON of Georgia. All right. Thank you.

Ms. Spottiswoode, the incident that you told us about that gave rise to the pictures that you have submitted into the record, that incident took place beyond the shores of America; is that not correct?

Ms. SPOTTISWOODE. That's right. Multiple times that I was assaulted it was on international trips.

Mr. JOHNSON of Georgia. Probably to keep you from being able to file a criminal action against Mr. Chishti, correct?

Ms. SPOTTISWOODE. Perhaps.

Mr. JOHNSON of Georgia. Yeah.

Professor Gilles, we've got this nasty little thing called Amendment 7 to the Bill of Rights. Can you talk to us about how important the Seventh Amendment is to the freedoms that were guaranteed to individuals under the Bill of Rights?

Ms. GILLES. I can.

The Seventh Amendment right is so fundamental. I teach law school, and right now I'm teaching civil procedure, for those of you who went to law school. In civil procedure, our entire course really focuses on this moment when we're going to get to a jury, right? We talk about the pleadings and discovery and all the pretrial process. The idea is that the jury is going to be the final determiner.

Now, very few cases end up in juries anymore, less than 2 percent by recent numbers. Representative Jordan mentioned how few cases get to a jury. That is still our idealized vision of justice.

So, the idea that one would waive the right, the Seventh Amendment right, in a contract where you're not even paying attention to the things you're signing, you're not reading the fine print, you're not understanding the fine print and despite these discussions about disclosures or disclaimers, none of that's going to do any good, because, frankly, when you first get a job and you get that packet of material, you're so excited to start your job. I mean, I'd sign just about anything, because that's the job I want, right?

Mr. JOHNSON of Georgia. That's why we call it "forced" arbitration.

Ms. GILLES. That's why we call it "forced" arbitration. No disclaimer in the world will sufficiently make me worried about the rights that I'm giving up, because I'm at the beginning of the relationship. I'm not thinking about the end of the relationship yet, right?

Mr. JOHNSON of Georgia. There's a power disparity between the employer and the prospective employee when it comes to the papers that need to be signed.

Ms. GILLES. Yeah. Yeah.

Mr. JOHNSON of Georgia. Does the employee actually have a choice?

Ms. GILLES. No, no choice at all. That is why we call it "forced" arbitration.

Mr. JOHNSON of Georgia. That arbitration process you talked about being so secret—and we've heard questions or insinuations that locations for arbitration proceedings are not secret. Can you shed a little light on that?

Ms. GILLES. I can't because they are secret, so I can't shed any light on it.

Mr. JOHNSON of Georgia. There's no notice?

Ms. GILLES. There's no notice. They're not publicly docketed, Representative Johnson. We have no idea where they take place.

Mr. JOHNSON of Georgia. So, the public doesn't have an opportunity—

Ms. GILLES. No, the public or press. None of these documents is available for any publicity.

Mr. JOHNSON of Georgia. How—and let me interrupt you.

Ms. GILLES. Yeah. Sorry.

Mr. JOHNSON of Georgia. How does this secrecy play into the serial offenders, the predators that keep doing this time after time? How does secrecy enable them to do that?

Ms. GILLES. Because it enables employers to shield them from any publicity, right? It keeps them on, right? They're still CEOs of companies. They're still heads of FOX News.

For years and years and years they engage in this activity. They're serial sexual predators in the workplace, and because each arbitration is private, nobody knows about the past issue. So, new women join these companies, and they have no idea what's been going on. It takes a lot for these women to finally come forward, as we're seeing today.

Mr. JOHNSON of Georgia. So many broken lives. You ladies who have appeared today have shared your life story with us—bravery, tenacity, and survival. You are wonderful people. I'm sorry that you went through what you had to go through. I appreciate you all coming and sharing your story with us today so that everyone can hear.

Thank you.

I yield back, Mr. Chair.

Chair NADLER. The gentleman yields back.

Mr. Issa.

Mr. ISSA. Thank you, Mr. Chair.

I'm going to start off with a question. Hopefully I can get a hand raise if it's a "yes."

Would all six, including our remote visitor, or Witness. Would all six of you agree—I'm sorry, I've got to get my count right—seven of you. Would all seven of you agree that, in fact, if nondisclosures were taken out of the binding arbitration process in the case of assaults, that this would be an improvement in the status quo?

Those who agree, raise your hand.

Okay. I get three out of seven.

So, let me just ask you now, yours is a case of a criminal attack outside the United States, and you were not bound by a nondisclosure, because you didn't go through the process. Is that correct?

Ms. SPOTTISWOODE. I had a nondisclosure in my original employment contract.

Mr. ISSA. Did you go through binding arbitration?

Ms. SPOTTISWOODE. Yes.

Mr. ISSA. At the end of binding arbitration, they compensated you for this wrongdoing in some way, and you, thus, were bound by a nondisclosure?

Ms. SPOTTISWOODE. I was bound by a nondisclosure before I even got to arbitration. I was compensated because I won my arbitration, which is so unusual because it's so—

Mr. ISSA. Okay. So, I just want to go through, why is it you think that taking that out wouldn't be an improvement? I didn't see your hand rise.

Ms. SPOTTISWOODE. Because secrecy isn't the only problem with forced arbitration.

Mr. ISSA. No, no. That isn't—

Ms. SPOTTISWOODE. It's also very unfair

Mr. ISSA. That isn't the question.

Ms. SPOTTISWOODE. I'm sorry.

Mr. ISSA. I understand you want more.

Ms. SPOTTISWOODE. Yeah.

Mr. ISSA. I want to get an answer to a critical part of the deliberative process here.

I've been hearing, and I think accurately—I'm going to ask you one more time, because a victim is the best person to ask, to a great extent.

If you had been able to tell your story not bound by a nondisclosure, would that have been better than being bound by one? That was the only question. Not does it make the system perfect, but would it be an improvement?

Ms. SPOTTISWOODE. It just sounds like I'm being offered a half-measure. The forced arbitration is so unfair—

Mr. ISSA. Okay.

So, I understand; you think forced arbitration is unfair. That's great. Most of the people on that side want to eliminate it for everything, not just situations like—

Mr. CICILLINE. Will the gentleman yield for a question?

Mr. ISSA. I will not. The reality is, your side's been running over by a minute, and I won't be given the same opportunity.

So, down to our two Witnesses on the left here. You raised your hand and said, yes, that getting rid of that would be helpful. In a sense, doesn't that eliminate what we heard in testimony as to the actual injury?

Almost everyone of our Witnesses was talking about the effects of secrecy, not the effects of the actual binding arbitration.

Please.

Ms. PARSHALL PERRY. Congressman, I would agree with you. I do believe, if we are going to institute piecemeal separations of particular claims in arbitration—which, as you rightly noted, is just another attempt to try to eviscerate the FAA, which for 30 years has been upheld by the Supreme Court as being as good as litigation, even including discrimination claims.

In this particular instance, if we are talking about sexual assault and sexual harassment and confidentiality is the primary concern, I would think language like that would solve the problem.

Mr. ISSA. That's what I've heard, and that's why I was asking.

Additionally, when I read the legislation, we'll be considering tomorrow, it puts a definition of "sexual harassment." Is there a definition similar to this, as far as you know, in the statute today that defines "sexual harassment" in the way this one is defining it?

Ms. PARSHALL PERRY. No, there is not.

Mr. ISSA. Okay. So, this would be not just about arbitration. This would be a new law that defines "sexual harassment," at least in the workplace, in a brand-new way with a single hearing.

Ms. PARSHALL PERRY. Correct.

Mr. ISSA. Okay.

The second one is a big one for me, and it hasn't been talked about here today. Under HIPAA, you can't talk about something that happens to somebody medically. If someone is raped, you can report it as a crime. As a matter of fact, if you're a healthcare professional, you're required to.

Should we, with this power, in fact make it to where the arbitrator or anyone else who becomes aware of the allegation of a crime which is credible be required to report it? Would that, too, eliminate some of what I think we heard today validly as a problem of binding arbitration?

Ms. PARSHALL PERRY. Absolutely. Arbitrators are supposed to implicitly and explicitly protect the privacy of negotiations, but when a crime has been committed, they absolutely ought to have to report it.

Mr. ISSA. Well, our Witness alleged a crime. Was that arbitrator wrong in not reporting that crime?

Ms. PARSHALL PERRY. Absolutely.

Mr. ISSA. Okay.

Thank you, Mr. Chair. I yield back.

Chair NADLER. The gentleman yields back.

Mr. Cicilline is recognized.

Mr. CICILLINE. Thank you, Mr. Chair.

I want to begin by just thanking the four survivors who have come forward to share their stories to this Committee and to the country. I know this is not easy, but I hope you know that your testimony will help us solve this problem by moving forward with legislation to fix this problem.

So, hearing those experiences was painful to listen to; I can't even begin to imagine what it was like to experience them. They were horrific, and I am in awe of your courage, all of you, for being here today and sharing your stories. So, thank you for that.

I want to first just ask a "yes" or "no" question. Ms. Parshall Perry made it sound like these forced arbitration clauses are so great everyone just wants them. People, of course, if that were true, they wouldn't be called "forced" arbitration, they wouldn't be hidden in an employment contract, and you would all know about it, and you'd be asking for them. Of course, that's not the truth at all.

So, my question for each of the survivors is, did your employer at any time when you were hired point out to you what was contained in your contract with respect to forced arbitration? You can just answer "yes" or "no."

Ms. SPOTTISWOODE. No.

Mr. CICILLINE. Ms. Newton?

Ms. NEWTON. No.

Mr. CICILLINE. Ms. Henry?

Ms. HENRY. No.

Mr. CICILLINE. Ms. Dushku?

Ms. DUSHKU. No.

Mr. CICILLINE. So, in each of these cases, you had employment contracts that had provisions that you didn't—the employer made no effort to have you understand you were actually giving up this very important right to have any claims heard.

I'd like to begin, Ms. Dushku, with you. If you could just speak a little bit about what the effects of your experience were. Your inability to speak about what had happened to you, how did that play out on the set where you worked, and how did it affect you in your life, both in your profession and just in your personal life?

Ms. DUSHKU. I would say that "sunlight is the best disinfectant." The inability to name something sort of increases the gaslighting around did this happen, is this appropriate, was this not appropriate, taking away our ability to share with our peers, our team, the systems, and the people that are supposed to be protecting us.

As I've learned from my own experience and even in my graduate studies around trauma and healing, there's the original—we're as sick as our secrets, as the saying also goes. There's the original offense of the crime, but then to add the silencing on top of it, it just kills your spirit, and it just takes your dignity.

As I've said, as somebody who's been known to be outspoken and speak up for others in the face of adversity, I can't describe what the last 4 years have felt like, to get nervous to go to a family dinner and speak to one of my own siblings about what I had experi-

enced. The silencing keeps us sick as individuals, as a society, and in our overall culture.

Mr. CICILLINE. Thank you.

Ms. Newton, you described how Members of the legal team at Louis Vuitton, including your direct supervisor and the general counsel, attempted to really brush aside your reports of the sexual harassment that you experienced. Do you think that contributed to the culture where sexual harassment is allowed to flourish, and victims are silenced?

What role do you believe that arbitration clauses—what role do they play in terms of individuals not knowing they're going to be held accountable in any meaningful way?

Ms. NEWTON. Right. So, when I first went to my colleague—because I'm part of the legal team myself, and told him about what was happening, it was first ignored. Then later, when I became insistent about it, I was told, "Well, I'm not HR, so I can't report this."

When things escalated and I filed the written report and I told my boss, the General Counsel, "This isn't being handled properly, and it needs to be," she asked me, "Have I done something to wrong you?" In other words, I was reporting this to bother her. It was a bother; it was a disturbance.

So, if I, as an attorney within this company, was basically shunned, dismissed, at every single turn and basically told, "You're a nuisance to us," by raising these claims of sexual harassment, I can't imagine what the marketing manager goes through, the intern goes through, or someone else. So, it creates this culture of, "Don't bring this to us, we don't want to hear it, we don't want to deal with it."

Mr. CICILLINE. Yeah. Thank you.

I just want to say in closing, the suggestion that we should wait until these incidents rise to level of crimes so that people can just report the crime, as if that's a solution, there's an enormous amount of behavior at issue here which may not, in fact, rise to a level of a crime that women and all individuals should be protected against in the workplace.

This is despicable behavior, and to the extent that we allow individuals responsible for this conduct to get away with it by these forced arbitration clauses, we should be ashamed of ourselves. We're going to fix that tomorrow.

With that, Mr. Chair, I yield back.

Chair NADLER The gentleman yields back.

Mr. Gaetz.

Mr. GAETZ. Thank you, Mr. Chair.

Ms. Parshall Perry, you mentioned in your testimony that it was the progressive leadership in the House and the Senate that's pursuing these changes to arbitration. I would just note for the record, they aren't alone. No one has confused me for a progressive, and I'm a proud Republican lead on Mr. Johnson's good legislation to reform these practices. I don't think this is a lens that we should evaluate through traditional political ideology.

You did cite some data that I wanted to delve into. You said that, in arbitration, the amounts awarded were double that of the traditional litigation process. What is that study?

Ms. PARSHALL PERRY. That's a study by NDP Analytics. They approached an analysis of 100,000 cases. That was a study that was done in 2004.

Mr. GAETZ. Did it analyze win rate, or just the amount awarded?

Ms. PARSHALL PERRY. I don't know. I'd have to go back and look at the study.

Mr. GAETZ. I think you could be misleading to cite just the amount awarded in absence of looking at the win rate. So, I did a little research on that subject that postdates the research you've cited.

Mr. Chair, I seek unanimous consent to enter into the record a study by the Economic Policy Institute, December 7, 2015, entitled "The Arbitration Epidemic."

Chair NADLER. Without objection.

[The information follows:]

MR. GAETZ FOR THE RECORD

EPI BRIEFING PAPER
ECONOMIC POLICY INSTITUTE • DECEMBER 7, 2015 • EPI BRIEFING PAPER #414

THE ARBITRATION EPIDEMIC

Mandatory arbitration deprives workers and consumers of their rights

BY KATHERINE V.W. STONE AND ALEXANDER J.S. COLVIN

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Executive summary

In the past three decades, the Supreme Court has engineered a massive shift in the civil justice system that is having dire consequences for consumers and employees. The Court has enabled large corporations to force customers and employees into arbitration to adjudicate practically all types of alleged violations of countless state and federal laws designed to protect citizens against consumer fraud, unsafe products, employment discrimination, nonpayment of wages, and other forms of corporate wrongdoing. By delegating dispute resolution to arbitration, the Court now permits corporations to write the rules that will govern their relationships with their workers and customers and design the procedures used to interpret and apply those rules when disputes arise. Moreover, the Court permits corporations to couple mandatory arbitration with a ban on class actions, thereby preventing consumers or employees from joining together to challenge systemic corporate wrongdoing. As one judge opined, these trends give corporations a "get out of jail free" card for all potential transgressions. These trends are undermining decades of progress in consumer and labor rights.

This report tracks these developments and presents the most recent research findings, summarized here:

- It is common for employees to be presented with terms of employment that include both a clause that obligates them to arbitrate all disputes they might have with their employer and one that prohibits them from pursuing their claims in a class or collective action in court.
- Employees subject to mandatory arbitration can no longer sue for violations of many important employment laws, including rights to minimum wages and overtime pay, rest breaks, protections against discrimination and unjust dismissal, privacy protection, family leave, and a host of other state and federal employment rights.
- On average, employees and consumers win less often and receive much lower damages in arbitration than they do in court.
- Employers tend to win cases more often when they appear before the same arbitrator in multiple cases, indicating that they have a repeat-player advantage over employees from regular involvement in arbitration.

Introduction: The problem

Over the past 25 years, it has become increasingly commonplace for corporations to insert arbitration clauses into their contracts with customers and employees. These clauses appear to be innocuous, or even beneficial, to consumers and employees, but they pack a powerful punch. They prevent customers and employees from going to court if they have a dispute. Instead, when there is an arbitration clause, consumers and employees are required to take their complaints to a privatized, invisible, and often inferior forum in which they are less likely to prevail—and if they do, they are less likely to recover their due. Moreover, once a dispute is decided by an arbitrator, there is no effective right of appeal.

At the time of contracting, most consumers and employees do not object to having an arbitration clause in their contracts. After all, who thinks they will have a dispute with their employer or their bank? Who would risk a valuable job opportunity or an important consumer financial transaction over an obscure procedural provision? And if a dispute should arise, who wants to go to court to resolve a dispute over a faulty product or nonpayment of overtime pay? Courts are slow, excessively technical, and intimidating to most people. To hire a lawyer to handle the case would usually cost more than most disputes are worth. Yet despite the seeming benefits of arbitration, there are serious pitfalls.

As the research cited in this report shows, consumers and employees often find it more difficult to win their cases in arbitration than in court. For one thing, arbi-

tration may not provide parties with the same extent of discovery that a court would. In certain types of cases, such as employment discrimination claims, it is practically impossible to win without the right to use extensive discovery to find out how others have been treated. In addition, while some arbitration agreements include due-process protections, others shorten statutes of limitations, alter the burdens of proof, limit the amount of time a party has to present his or her case, or otherwise impose constrictive procedural rules. In practice it is the corporation not the consumer or employee that gets to decide whether to include fairness protections in the arbitration procedure. Although a consumer or employee can try to challenge enforcement of unfair rules in court, the ability to challenge arbitration agreements has been substantially limited by the courts. Moreover, arbitrators are often reluctant to award generous damages to prevailing parties, and their awards are not appealable. On average, employees and consumers win less often and receive much lower damages in arbitration than they do in court. And in a new development, some arbitration agreements are requiring that the losing party pay all the arbitration fees, including the other side's attorney fees. The loser-pays clauses provide a powerful deterrent to workers or consumers asserting any claims.

The trend toward increasing use of arbitration in consumer and employment relationships threatens to undermine decades of achievements in worker and consumer rights. Over the past few decades, the courts have expanded the scope of arbitration, reduced the ability of individuals to avoid arbitrating their disputes, and narrowed the possibility of obtaining judicial review. They have adopted such sweeping pro-arbitration doctrines that arbitration clauses are almost always upheld when challenged in the courts, even when individuals can show that an arbitration clause was buried in fine print or incorporated by reference to an obscure and inaccessible source. Courts also uphold clauses even when an individual can show that an arbitration system is too expensive for him or her to use. The result has been that many important employment rights can no longer be brought to a court by employees subject to mandatory arbitration. These rights include rights to minimum wages and overtime pay, rest breaks, protections against discrimination and unjust dismissal, privacy protection, family leave, and a host of other state and federal employment rights.

The most pernicious development in arbitration involves the coupling of arbitration with class-action waivers. Major corporations began to insert class-action prohibitions into arbitration clauses for consumer transactions in the late 1990s. Indeed, in 1999, the 10 major banks that issue credit cards—including American Express, Citibank, First USA, Capital One, Chase, and Discover—formed a group called "the Arbitration Coalition" to promote the use of arbitration clauses that bar class actions. This group also funded and jointly drafted amici curiae briefs to convince the Supreme Court to uphold these clauses.[1] In part as a result of their efforts, courts generally permit arbitration to be coupled with prohibitions on class-action lawsuits, both for consumer and employment class actions. Thus today it is common for employees to be presented with terms of employment that include both a clause that obligates them to arbitrate all disputes they might have with their employer and one that prohibits them from pursuing their claims in a class or collective action. The legal developments have de facto stripped employees of many of the legal rights and protections that they have fought long and hard to obtain.

A quick primer on arbitration

Arbitration clauses are frequently included in the fine print that an individual is required to click through when making an online purchase. Arbitration clauses are also often included in the company orientation and personnel materials a worker receives when beginning a new job. Because these arbitration clauses are usually buried in a sea of boilerplate, many people who are subject to them do not realize that they exist or understand their impact. These terms are called mandatory or forced arbitration

because if the employee or consumer does not agree to arbitration, he or she will be denied employment or the ability to purchase the product or service. The employee or consumer has no real choice or ability to negotiate the terms of the arbitration clause. Mandatory arbitration in the consumer and employment setting is very different from arbitration clauses in contracts between two businesses or a company and a union; in those cases, the parties have voluntarily negotiated as equals and knowingly agreed to arbitrate disputes between them.

Unlike a court proceeding, there is no one form of arbitration. It is a term that describes a wide range of procedures that parties can design however they choose. In practice, however, arbitration typically takes place in a conference room, where parties are seated around a large table. Witnesses may or may not be in the room. Parties may or may not have lawyers. The arbitrator sits at the head of the table. He or she is not a judge and does not wear a judicial robe or other ceremonial garb. Rather, the arbitrator can be any person the parties have designated, although they frequently are lawyers. There is no court reporter or jury.

The arbitrator convenes the hearing and usually begins by explaining that it is an informal proceeding not subject to formal rules of evidence or procedure. Rather, he or she explains that the arbitrator's role is to hear any evidence that either side wants to submit and then render a binding decision. Instead of excluding inadmissible evidence based on objections from lawyers, the arbitrator will generally hear all the evidence and then decide how much weight to give it in reaching a decision. Witnesses are sworn in by the arbitrator and the proceeding begins. During the hearing, the party who initiated the proceeding tells his or her story and presents any documents or witnesses that support it. The other side has an opportunity to cross-examine. Then the defending party presents its case, also subject to cross-examination. The arbitrator may also ask questions of the witnesses. After the close of the hearing, the arbitrator considers the evidence presented and issues an award. Often the award takes the form of a simple statement of who won, and the amount of the recovery, if any. Sometimes the arbitrator issues a written decision explaining the outcome. Once the arbitrator has ruled, there is no realistic possibility for appeal.

The greater flexibility and informality of arbitration compared with court proceedings means that the parties are relying much more on the neutrality, expertise, and fairness of the arbitrator in reaching a just outcome. This can work well when two equal parties come together to design an arbitration procedure and choose an arbitrator who they both trust. However, for consumers or employees who are required to enter into mandatory arbitration with a large corporation in order to buy a product or service or to get a job, removing these formal protections leaves them vulnerable to unfair procedures and unjust outcomes.

An example of arbitration

One recent case illustrates the difficulties employees now face when trying to enforce their rights under basic employment statutes. In 2008, Stephanie Sutherland was hired by Ernst & Young to work as a "staff/assistant."[2] Her work involved relatively routine, low-level clerical work, for which she was paid a fixed salary of $55,000 per year. She routinely worked 45 to 50 hours per week, but because she was classified by her employer as exempt from overtime, she did not receive any additional compensation for overtime. By the time Ms. Sutherland was terminated in 2009, she had worked 151 hours of overtime, for which she should have been paid about $1,867, had the Fair Labor Standards Act (FLSA)[3] and New York state labor laws been observed. She filed a class-action lawsuit seeking to recover overtime pay for her work in excess of 40 hours a week and for other current and former nonlicensed Staff 1 and Staff 2 employees of the firm who worked overtime.

When Ms. Sutherland was hired, she was given an offer letter that also provided that "if an employment related dispute arises between you and the firm, it will be subject to mandatory mediation/arbitration under the terms of the firm's alternative dispute-resolution program, known as the Common Ground Program, a copy of which is attached." The arbitration agreement specified that claims arising under state and federal labor statutes, including the federal Fair Labor Standards Act, were subject to the arbitration program. It further specified that any dispute must be brought to arbitration and not to a court, and that all disputes must be brought on an individual basis.

In her lawsuit, Ms. Sutherland attempted to enforce her rights under state and federal minimum-wage and overtime laws. The federal Fair Labor Standards Act has a provision that expressly permits lawsuits for minimum-wage and overtime violations to be brought on a collective basis. Mr. Sutherland sought to use that provision, but to do so, she had to avoid the force of the arbitration clause that said she could only bring a case on an individual basis. To this end, she argued that if she had to arbitrate her claim on an individual basis, it would cost her $160,000 in attorney fees, more than $6,000 in other costs, and more than $25,000 in expert testimony. Overall, she claimed, she would have to spend nearly $200,000 to recover less than $2,000 in unpaid overtime. She argued that because she was unemployed and had substantial college debt, she could not afford to arbitrate on an individual basis, and thus should not be subject to the arbitration provision or the class-action waiver because together they operated to deprive her of rights under the FLSA.

The lower court was sympathetic to Ms. Sutherland's arguments, and held that the class-action waiver did not apply because it would prevent her from vindicating her rights under the Fair Labor Standards Act. However, the U.S. Court of Appeals reversed, relying on the 2013 Supreme Court decision in *American Express Co. v. Italian Colors*, 133 U.S. 2304, an antitrust case, in which the Supreme Court held that a class-action waiver in an arbitration clause was enforceable despite the high cost of bringing an individual action. In that case, Justice Scalia, speaking for the majority, wrote that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." On the basis of this precedent, the Court of Appeals denied Ms. Sutherland's right to bring her dispute to a court or arbitration on a collective basis, thereby effectively eliminating her right to overtime pay under the federal statute.

This case is not an anomaly. Rather, it reflects the current law of arbitration and illustrates the difficulties that ordinary workers face when they try to enforce their statutory employment rights. Below we map out the current law of arbitration and then present data on the extent of use of arbitration and the impact of arbitration on the ability of workers and consumers to enforce their rights.

Where did the arbitration epidemic come from?

The current arbitration epidemic is a result of judicial developments that began in the 1980s, when the U.S. Supreme Court reinterpreted a little-known federal law enacted in 1925 called the Federal Arbitration Act (FAA). The FAA provides that when a dispute involves a contract that has a written arbitration clause, a court *must*, upon motion, stay litigation so that the dispute can go to arbitration.[4] And after an arbitration proceeding is complete, the FAA gives courts extremely limited power to review arbitral awards, no matter how erroneous they might be. Under the statute, an award can only be set aside on four grounds: it was procured by fraud, the arbitrator was biased, the arbitrator refused to hear relevant evidence, or the arbitrator exceeded his or her power as set out in the parties' arbitration agreement. Each of these has been interpreted exceptionally narrowly. There is no provision for overturning an award based on errors of fact, contract interpretation, or law.

Initially, the drafters, commentators, and the courts assumed that the FAA applied only to a narrow range of commercial disputes—those brought in a federal court pursuant to its power to decide issues arising under federal law. However, in the 1980s the U.S. Supreme Court radically expanded the scope of the statute. Today courts interpret the statute to apply to disputes of all types, whether brought in a federal or a state court. Moreover, the Supreme Court has held that the FAA overrides any state law that runs counter to the pro-arbitration policies of the FAA. It is important to recount the path by which this transformation occurred because it shows how entrenched the current interpretation has become and how overwhelming are the obstacles to change under the statute as currently interpreted. This, in turn, explains why new congressional action is necessary.

The FAA from 1925 to the mid-1980s

Under the common law as it stood in the early 20th century, arbitration agreements were not specifically enforceable, so it was easy for a reluctant party to an arbitration agreement to avoid arbitrating a dispute. To get this changed and make arbitration agreements enforceable, the New York Chamber of Commerce and the American Bar Association's Committee on Commerce, Trade, and Commercial Law mounted a multipronged campaign to overturn the anti-arbitration policies of the common law. They drafted and successfully enacted the New York Arbitration Act of 1920. They then turned to Congress, and drafted the 1925 Federal Arbitration Act and lobbied intensely for its enactment. Their main ally in the battle for the federal statute was the Secretary of Commerce, Herbert Hoover, who saw the bill as fitting into his larger vision of promoting business self-regulation.

The stated purpose of both the New York and the federal statutes was to make written agreements to arbitrate enforceable. The key provision of the federal law, copied from the New York statute, was Section 2, which made written agreements to arbitrate in contracts involving commerce "valid, irrevocable, and enforceable, save on such grounds as exist in law or in equity for the revocation of any contract."[6] Other sections of the statute included a mandatory stay of judicial proceedings and the requirement that courts order parties to arbitrate when disputing parties have a written agreement to arbitrate. The FAA also provided for judicial enforcement of arbitration awards and specified extremely narrow grounds for a court to refuse to do so.

The drafters, legislators, and advocates of the FAA assumed that the statute applied only to business disputes. It was drafted with an eye toward trade association arbitration, not employment or consumer disputes. Indeed, the statute contains a specific exemption for "contracts of employment." Consistent with this understanding, between 1925 and the 1980s, courts interpreted the FAA as applying to a narrow set of cases—commercial cases involving federal law that were brought in federal courts on an independent federal ground. But in the 1980s, the U.S. Supreme Court turned the FAA upside-down through a series of surprising decisions. These decisions set in motion a major overhaul of the civil justice system. It is no exaggeration to call the Supreme Court's arbitration decisions in the 1980s the hidden revolution of the Reagan Court.

The expanding reach of the FAA after 1985

Between 1985 and 2015, there were more than two dozen Supreme Court decisions in arbitration cases, virtually all of which expanded the scope of the FAA and restricted the ability of states to maintain laws to protect consumers and employees and the ability of individuals to resist costly and unfair arbitration systems. In light of these decisions, the ability of a party to challenge an arbitration clause on the basis of state law has shrunken to a vanishing point.

First, in the 1980s, the Supreme Court adopted a presumption in favor of arbitration to use when deciding cases involving the FAA. It ruled in *Moses H. Cone Memo-*

rial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983), that when deciding whether a particular dispute comes within an arbitration clause, courts should resolve all doubts in favor of arbitration. It said that such a presumption furthered the "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." This declaration of federal policy has served as a fixture of arbitration law and provided a rationale for the extraordinary expansion of the FAA that followed.

Then, in 1984, in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the high court rejected the view that the FAA only applied to cases in federal courts. Rather, the Court held that the FAA also applied to disputes over contracts that were brought in state courts, so long as the dispute involved interstate commerce. The *Southland* decision was a major expansion of the scope of the statute. Moreover, despite direct evidence in the FAA's legislative history to the contrary, and despite language in Section 2 of the FAA preserving the role of state law to regulate arbitration, the Supreme Court majority held that the statute preempted any state laws with which it conflicted. Thereafter, any state efforts to regulate arbitration would be subject to preemption by the FAA.[7]

A third development of the 1980s concerned the types of disputes that were subject to the FAA. Whereas previously the FAA had been found to apply only to contractual disputes, in 1985, in *Mitsubishi Motors v. Soler Chrysler-Plymouth,* 473 U.S. 614 (1985), the Supreme Court held that the FAA also compelled arbitration of statutory disputes. *Mitsubishi* involved a business dispute in which one party alleged a violation of antitrust laws. Two years later, in *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987), the Supreme Court expanded on its holding to conclude that a dispute involving alleged violations of the anti-racketeering RICO statute (formally called the Racketeer Influenced and Corrupt Organizations Act) and federal securities laws was also subject to an ordinary boilerplate arbitration clause.

The *Southland* decision on preemption and the *Mitsubishi* decision on the arbitration of statutory claims in the 1980s vastly expanded the scope of the FAA. In 1991, the Court further expanded the range of statutes whose provisions were subject to arbitration by holding, in *Gilmer v. Interstate/Johnson Lane Corp*. 500 U.S. 20 (1991), that an employee's allegations that he had been subject to age discrimination in violation of civil rights laws had to be taken to arbitration. Thenceforth, most claims arising under federal statutes would be subject to arbitration. In the decades that followed, the Supreme Court further expanded the scope of the FAA in order to promote the liberal policy in favor of arbitration that it read into the 1925 statute.

At the same time, the Court repeatedly rebuffed attempts by states to enact legislation that would protect consumers and employees from unfair arbitration agreements. Beginning in the late 1980s and through the 1990s the Court struck down legislative efforts by states to protect consumers and employees from oppressive arbitration agreements. One case involved a 1985 Montana law requiring that arbitration agreements in consumer contracts appear on the first page of the contract in reasonable-sized type (Mont. Code Ann. § 27-5-114 (1993)). The purpose of the statute was to ensure that consumers knew that they were consenting to arbitration when they entered into a contractual relationship with a large corporation. In 1992, a Subway franchise owner and his wife in Montana sued, claiming that Subway had defrauded them by refusing to give them the preferred location they had been promised, causing their business to fail and their loan collateral—in this instance, their life savings—to be forfeited. Their franchise agreement with Subway had an arbitration clause that said all disputes must be arbitrated in Connecticut, far from Montana. To travel there and hire a Connecticut lawyer would have been exceedingly costly for the nearly bankrupt Casarottos. Moreover, the arbitration clause did not comply with the requirements of the Montana statutory notice provision: Rather than appearing prominently in the contract,

it had been buried in small type. The Montana Supreme Court refused to enforce the arbitration clause, but the U.S. Supreme Court reversed, holding in *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681 (1996) that the law was restrictive of arbitration and therefore preempted.

The Supreme Court has also made it difficult for consumers or workers to avoid arbitration on the grounds that it would be prohibitively costly for them to take their cases to arbitration. In 2000, in *Green Tree Financial Corp.-Ala. .v Randolph*, 531 U.S. 79, an individual who borrowed money to purchase a mobile home and who was subsequently saddled with exorbitant finance charges sued, claiming that the lender had violated the Truth in Lending Act—a statute intended to protect consumer borrowers from misleading terms in loans. Her loan agreement had a clause requiring an arbitration tribunal that would have imposed costs far beyond her ability to pay. The Supreme Court nonetheless enforced the arbitration clause, despite acknowledging that the projected costs of the arbitration would probably preclude Ms. Randolph from bringing her case at all. The Court said that a party who opposes arbitration on the grounds that it is too expensive to proceed to arbitration had the burden of showing that the costs of arbitration would be prohibitive.

The Court has also further cut back on the ability of consumers and employees to avoid arbitration on the grounds that a contract is illegal, unconscionable, or otherwise not enforceable. One might think that if a contract is unenforceable, a party cannot be required to arbitrate under it because the arbitration clause is part of the unenforceable contract. That was the law until 1967. But in 1967 the Supreme Court held, in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, that when a party claimed that a contract it had signed was induced by fraud, that party had to assert its claim in arbitration. That is, even if the entire contract (in that case, a commercial lease) was invalid, the arbitration clause survived because, the Court found, the promise to arbitrate was separable from the rest of the contract. This holding is called the "separability doctrine."

In 2006, the Supreme Court in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, extended the separability doctrine to illegal contracts, even though doing so meant that a party had to arbitrate an alleged violation even when the underlying contract that contained the arbitration agreement was entirely void. The only exception the Court recognized was when a party claimed that there was illegality, fraud, or some other recognized contractual defense in the arbitration clause itself.

One of the most frequently raised objections to arbitration clauses is that they are unconscionable. Unconscionability is a well-established contract-law doctrine that says that when a contract is grossly unfair in its terms and/or in the manner in which it was procured, it will not be enforced. Each state has developed its own definition of unconscionability over time. In 2010, in *Rent-A-Center West v. Jackson*, 561 U.S. 63, the Court expanded the separability doctrine in a way that eliminated many unconscionability challenges to arbitration clauses. In that case, the Court held that a party who claimed that the arbitration clause in his employment contract was unconscionable under his state law had to bring that claim to arbitration because the aspect of the arbitration clause he alleged was unconscionable was not the same aspect to which he objected. As Justice Stevens explained in dissent:

> Prima Paint and its progeny allow a court to pluck from a potentially invalid *contract* a potentially valid *arbitration agreement.* Today the Court adds a new layer of severability—something akin to Russian nesting dolls—into the mix: Courts may now pluck from a potentially invalid arbitration agreement even narrower provisions that refer particular arbitrability disputes to an arbitrator [emphasis in original].

In addition to expanding the scope of the FAA, the Court has narrowed the standard of review of arbitral awards, thus restricting the ability of parties to appeal an arbitral decision in court. In 2008, in *Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576, the Court held that parties cannot agree to have a court review the decisions of their arbitration tribunals. In that case, the parties to a commercial lease had an arbitration agreement that called for arbitration of all disputes but also specified that a court should vacate any award that was not supported by the facts or was based on an erroneous conclusion of law. Although arbitration is said to be a creature of the parties' contract, and the parties are supposed to be able to craft arbitration systems however they like, the Supreme Court refused to enforce the parties' agreement about the scope of review. Rather, it held that the national liberal policy favoring arbitration required limiting judicial review to the specific grounds enumerated in the FAA itself. In dicta, the Supreme Court also disparaged the long-settled principle that courts could refuse to enforce arbitration awards that were "in manifest disregard of the law." Thus, after *Hall Street*, the grounds for attacking an arbitral award have become extremely narrow.

Supreme Court decisions on arbitration of employment contracts

The arbitration of employment disputes has its own history, although one that parallels the general trends described above. The FAA contains a clause that appears to exclude employment disputes from the statute's coverage. Section 1 of the statute provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Despite this language, in 1991, in *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, the Supreme Court applied the FAA to an employment case, ruling that an employee was required to bring his age discrimination complaint to arbitration rather than to a court. The decision was ambiguous about the effect of the statutory exclusion for contracts of employment because, in that case, the arbitration clause was not in a contract between an employee and an employer, but rather was in a contract between an employee and the agency with which the employee was required to register to get the job. The Supreme Court clarified the ambiguity in 2001 in *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, interpreting the exemption for "contracts of employment" exceedingly narrowly. It ruled that the statute applied to all contracts of employment except those involving workers who, like seamen and railroad workers, were engaged in transportation that crossed state lines. Since then, courts have applied the FAA to numerous employment cases.

Legal issues in arbitration today: Arbitration and class-action waivers

The most controversial issue in arbitration law today grows out of the interaction between arbitration and class actions. Composite arbitration–class-action waivers have become common in contracts offered by credit card companies, banks, cell phone providers, and providers of other common services.[8] They are also used with increasing frequency in employment contracts.[9] Consumers and employees have challenged composite arbitration–class-action waivers on two grounds—that such composite clauses are unconscionable or that they make it impossible to vindicate statutory rights. Some state courts and lower federal courts have refused to enforce these composite clauses on both grounds, but recent decisions by the Supreme Court are calling these decisions into question.

The Supreme Court has addressed the issue of composite arbitration–class-action waivers several times in recent years. In 2011, in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), it held that a California law making class-action waivers in most consumer cases unconscionable was invalid because it was preempted by the FAA. In 2013, in *American Express Co. v. Italian Colors Restaurant*, the Court enforced a class-action waiver even though the plaintiffs had shown that without a class action, it would be impossible for them to vindicate

their legal rights. Although *Italian Colors* was not a labor case, it has significant ramifications for employees' rights under the labor laws. Both these cases will be discussed below.[10]

Preemption, unconscionability, and class-action waivers

In 2011, in *AT&T Mobility LLC v. Concepcion*,[11] the Supreme Court upheld a class-action waiver in a consumer contract against a challenge that the waiver was unconscionable under California state law. In that case, an AT&T customer brought a class action alleging that the company had engaged in fraudulent practices by charging sales taxes—approximately $15 per phone—to customers promised free cell phones in exchange for a two-year service contract. AT&T's customer agreement included an arbitration clause that also banned class actions and classwide arbitration. The plaintiffs wanted to bring their case as a class action, so they argued that the class-action waiver was unconscionable.

The Ninth Circuit applied California's three-pronged test, which determines that a class-action waiver in a consumer contract is unenforceable if (1) the agreement is a contract of adhesion—i.e., a form contract presented by a powerful party to a weaker party on a take-it-or-leave-it basis, (2) the dispute is likely to involve small amounts of damages, and (3) the party with superior bargaining power carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money. The Ninth Circuit found all three prongs of the test satisfied, and therefore denied AT&T's motion to compel arbitration on an individual basis.[12]

The Supreme Court reversed, holding that the California rule was preempted because it interfered with arbitration. Justice Scalia, writing for the majority, also disparaged the use of class arbitration. He enumerated the reasons he found class arbitration to be an unsatisfactory procedure. He stated that class arbitration would undermine the informality, efficiency, and speed that are the raison d'être for arbitration in the first place. He also stated that in class arbitration, an arbitrator would have to devise a method to afford absent class members notice, an opportunity to be heard, and a right to opt out. He then stated that class arbitration could impose great risks on defendants, who could receive a devastating judgment when numerous small claims were aggregated and yet would lose their right to interlocutory appeals or judicial review. For these reasons, he concluded that "[a]rbitration is poorly suited to the higher stakes of class litigation."[13]

Some lower courts initially limited the *Concepcion* decision to the consumer setting and refused to extend it to the employment cases, but over time, most courts have extended it.[14] Moreover, although the *Concepcion* case was about preemption of a specific state law, many courts have read it more broadly to disallow all unconscionability challenges to class-action waivers.[15]

The effective-vindication doctrine

Even though the *Concepcion* decision has been read to preclude most unconscionability challenges to arbitration in the employment setting, there is another line of argument some have used to invalidate waivers of the right to bring collective or class actions. That is the argument that a ban on class litigation would abrogate plaintiffs' substantive statutory rights.

The U.S. Supreme Court has long maintained that arbitration is only appropriate when it entails no loss of substantive statutory rights. The Court first expressed this principle in 1985 in *Mitsubishi Motors v. Soler Chrysler-Plymouth* discussed above, in which the Court held that a party was required to arbitrate a claim arising under the Sherman Antitrust Act.[16] In justifying its decision in *Mitsubishi,* the Court stated that arbitration could be ordered only if the litigant "may vindicate its statutory cause of action in the arbitral forum."[17] The Court further explained that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute."[18]

The effective-vindication-of-substantive-rights principle is essential if courts are to justify closing the courthouse door to otherwise qualified litigants. In a number of consumer and employment cases, plaintiffs have asserted that the enforcement of class-action waivers would force litigants to forgo their substantive rights, and hence that arbitration should not be required.[19] These cases were not controlled by *Concepcion* because, as explained above, the *Concepcion* decision involved a conflict between the FAA and state law, and the Court found the state law to be preempted. In contrast, the effective-vindication doctrine is of primary importance when there is a potential conflict between the FAA and a federal law.

Consumers have raised effective-vindication arguments against arbitration in cases in which it would be prohibitively expensive for them to arbitrate their claims. As we saw above, the Supreme Court has not been sympathetic to these arguments. Employees have raised effective-vindication arguments when arbitration combined with a ban on class actions would extinguish their substantive rights to engage in collective action.

Many effective-vindication cases arise under the Fair Labor Standards Act—a statute that explicitly provides that aggrieved employees can bring a "collective action."[20] Often these cases involved allegations of misclassification—for example, whether employees were improperly termed supervisors and thus improperly determined to be ineligible for overtime payments. In deciding FLSA class-action waiver cases, lower courts have to decide whether the provision in the FLSA statute for bringing "collective actions" is a procedural right or a substantive right. If it is a substantive right, then under *Mitsubishi,* it cannot be waived. Most courts that have considered this issue have held that the right to proceed in a collective action under the FLSA is procedural, and thus the composite arbitration and class-action waiver was required.[21]

While it might be reasonable to see the right to engage in a collective action to be a procedural right in the FLSA context, the same argument cannot be made concerning class-action waivers in claims arising under the National Labor Relations Act (NLRA). In the NLRA, the right to engage in collective and concerted action is the core right that the statute protects. Yet there is currently an open question as to whether a composite arbitration and class-action waiver clause would deprive workers of their substantive right to engage in collective action under the National Labor Relations Act. In *D.R. Horton*, *Inc.*, 357 NLRB No. 184 (2012), the National Labor Relations Board took the position that a mandatory arbitration clause in an employment contract that required all actions to be brought on an individual basis interfered with the employee's rights to engage in concerted activity under the labor laws. The *D.R. Horton* decision was overturned by the Fifth Circuit. There are several other similar cases pending in other circuits, and the issue may reach the U.S. Supreme Court.

Although the question raised by *D.R. Horton* has not yet been addressed by the Supreme Court, there is another recent Supreme Court case that bears ominously on the issue. In June 2013, the Supreme Court decided *American Express Co. v. Italian Colors Restaurant.*[22] The case arose when a group of merchants brought a class action alleging that American Express (AmEx) imposed on them an illegal tying arrangement that violated the Sherman Antitrust law. Each of the merchant's contracts with AmEx contained a clause that prohibited the merchant from bringing any dispute to a forum other than arbitration, and required that all disputes be arbitrated on an individual basis. AmEx moved to compel arbitration, and the district court granted the motion. The merchants contended that arbitration of the antitrust claim on an individual basis would cost hundreds of thousands of dollars, whereas the average recovery would be only $5,000. Hence, they claimed, without the ability to bring a class or collective action, they would lose their substantive rights. The Second Circuit agreed.[23]

The Second Circuit decision was overturned by the Supreme Court in June 2013. The Supreme Court upheld the class-action waiver despite irrefutable evidence that the cost of bringing an antitrust case was so high that without the ability to proceed as a class action, the case could not be brought. In doing so, Justice Scalia, writing for the majority, cast doubt on the effective-vindication-of-substantive-rights principle. He called the principle mere "dicta," and stated that, at most, it might apply to "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable."[24] He wrote, cryptically, "[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy."[25]

Justice Kagan delivered a strong dissent in *Italian Colors*. The overall effect of the opinion, she explained, is that "[t]he monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse."[26] She argued that the effective-vindication rule was essential to prevent stronger parties from using these and other kinds of means to eviscerate statutory protections. As she explained, "The effective-vindication rule [ensures that] arbitration remains a real, not a faux, method of dispute resolution. With the rule, companies have good reason to adopt arbitral procedures that facilitate efficient and accurate handling of complaints. Without it, companies have every incentive to draft their agreements to extract backdoor waivers of statutory rights."[27]

Although the *Italian Colors* case itself involved a dispute brought by merchants, the majority's decision has important consequences for employment cases. By narrowing the effective-vindication doctrine, the Court has potentially undermined challenges to class-action waivers in arbitration clauses. That is, just as *AT&T Mobility* knocked out most unconscionability challenges to unfair arbitration agreements on preemption grounds, *Italian Colors* threatens to eliminate most challenges brought on the basis of the effective-vindication doctrine. And in doing so, *Italian Colors* suggests that the arbitration law trends may signal the destruction of the legal protection for collective action that has been at the heart of labor laws for over 60 years.[28]

Other current issues: Severance, interpretation of arbitration agreements, and private attorney general actions

There are two arbitration cases that will be decided by the Supreme Court this term. One, *MHN Government Services, Inc. v. Zaborowski*, concerns whether a court, when presented with an arbitration agreement that is unconscionable in several respects, can invalidate an entire arbitration agreement or whether it must simply sever the unconscionable elements and enforce the rest.[29] The California courts have taken the position that when there are multiple unconscionable aspects to an arbitration clause, it can invalidate the clause in its entirety. This principle is important because it disincentivizes powerful parties from writing arbitration clauses with unduly harsh provisions. If a court would simply sever any unconscionable provision and enforce the rest of an arbitration clause, a powerful party might be tempted to include numerous harsh elements, knowing that even if some are deemed unenforceable, they can still require the counterparty to arbitrate. The principle is being challenged on the grounds that it is an arbitration-specific rule that disfavors arbitration and is therefore preempted by the FAA.

The other arbitration case currently before the Supreme Court involves a state court's ability to interpret arbitration clauses. It has generally been assumed that contract law is a matter of state law, and that it is for state courts, not federal courts, to interpret contracts. In a consumer arbitration class-action waiver case called *DIRECTTV, Inc. v. Imburgia,* an arbitration clause provided that, notwithstanding the arbitration clause, "If, however, the law of your state would find the agreement to dispense with class arbitration procedures unenforceable, then [the entire section requiring arbitration] is unenforceable."[30] The case arose in California at a time when class-action

waivers in consumer contracts of the sort in that contract were held to be unenforceable. Accordingly, the state court refused to enforce the class-action waiver. The Supreme Court has accepted review in order to determine whether the state's own interpretation of the contract conflicts with the FAA and hence should be overturned.

Another issue that is likely to come to the Supreme Court soon involves the waiver of rights under statutes that permit individuals to enforce laws enacted for the public benefit. In 2004, California enacted a statute called the Private Attorney General Act, or PAGA law, to assist in the enforcement of its Labor Code.[31] The purpose of the statute was to permit aggrieved employees to enforce the California Labor Code because the public enforcement agency lacked the resources to achieve maximum compliance with state labor laws.

In 2014, in *Iskanian v. CLS Transport*, a truck driver brought a class-action suit alleging failure to pay overtime and provide rest breaks.[32] In that case, the employee was subject to an employment agreement that contained both an arbitration clause and a waiver of class or representative action. The California Supreme Court found that the waiver was not enforceable as applied to PAGA claims. Relying on the settled proposition that "[a]nyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement," it found that PAGA actions were representative actions and thus the right to bring the suit to a court could not be waived.

The lower federal courts in California have been inconsistent in their willingness to follow *Iskanian* and prevent a compelled waiver of employment PAGA actions. Some lower courts have done so, but many others have rejected *Iskanian* on the grounds that its reasoning and result are inconsistent with *Concepcion*.[33] However, on September 30, 2015, the Ninth Circuit, in a divided opinion, affirmed the result in *Iskanian* and rejected a class-action waiver of PAGA claims.[34] It is likely that this issue will go to the Supreme Court.

The future of arbitration law

Arbitration law is a dynamic area of law. Because the Supreme Court decisions have made arbitration the only forum available for resolving disputes in many cases, the particular details of arbitration procedures need to be resolved. Hence the number of cases continues to grow, and new issues are continually arising. However, the trends are clear: Courts will not permit states to constrict arbitration, and they will enforce arbitration agreements in all but the rarest circumstances, no matter how much advantage they give to the stronger parties. In light of these rulings, it is not surprising that the use of arbitration by private-sector businesses and employers has grown enormously.

How mandatory arbitration works

The prevalence of mandatory arbitration and class-action waivers

Arbitration in employment

Until the 1990s, arbitration in employment was almost exclusively a creature of the labor contracts of unionized workplaces. In the unionized setting, labor arbitration provides a jointly established mechanism for enforcing the provisions of collective-bargaining agreements and providing industrial justice in the workplace. Labor arbitration has been one of the most enduring and successful features of the American industrial relations system because it has served the interests of both unions and management, and both parties are equally involved in establishing and administering the system. These arbitration cases are decided by a well-established cadre of professional neutral labor arbitrators whom both parties must consider fair and neutral to be selected to decide cases. By contrast, prior to the 1990s, arbitration was only rarely used in nonunion workplaces precisely because there was no union present to play the insti-

tutional role as the bilateral partner to the employer in establishing arbitration.

The picture of arbitration as a creature of the unionized workplace started to shift as the Supreme Court began allowing statutory employment rights to be subject to arbitration agreements in its 1991 *Gilmer* decision, discussed above. Beyond simply providing for arbitration of statutory claims, *Gilmer* gave the green light to employers to require employees to sign arbitration agreements as a mandatory term and condition of employment. The case and its progeny allowed employers to unilaterally introduce arbitration procedures to cover statutory employment rights and make these procedures mandatory in the sense that the employer would refuse to hire a job applicant who would not sign the arbitration agreement.

Since 1991, arbitration has grown rapidly in nonunion workplaces.[35] Many major corporations now use mandatory arbitration procedures, including Anheuser-Busch InBev, Citigroup, Darden Restaurants, Haliburton, J.C. Penney, Lowes, Oracle, Rent-A-Center, Securitas, Sysco, United Healthcare, and Wells Fargo.[36] As this list suggests, mandatory arbitration now covers a wide range of employees in many different industries.

How many employees are covered by mandatory arbitration procedures? This is a surprisingly difficult question to answer, in part because of the private nature of these arbitration procedures. There is no requirement that employers who require their employees to sign mandatory arbitration agreements report this to a government agency such as the Bureau of Labor Statistics (BLS). Nor are data on the incidence of mandatory arbitration gathered in any of the official government surveys of employers. As a result, while the BLS releases detailed data annually on the extent of union membership and representation, there is no official government estimate of the extent of mandatory arbitration.

In the absence of official government statistics on the extent of mandatory arbitration, our best estimates come from academic surveys that have looked at aspects of this question. The picture they show is one of substantial growth over the 1990s and 2000s. These studies are summarized below.

A 1992 survey of corporate use of dispute-resolution procedures found that only 2.1 percent of the employers surveyed used mandatory arbitration.[37] By comparison, a 1995 GAO survey of 1,448 establishments subject to Office of Federal Contract Compliance Programs (OFCCP) reporting requirements found that 7.6 percent of them had adopted mandatory arbitration procedures covering their employees.[38] More recently, a 2003 survey of 291 employers in the telecommunications industry that one of us (Colvin) conducted found that 14.1 percent had adopted mandatory arbitration procedures.[39] However, since the adopting employers tended to be the larger organizations, 22.7 percent of the nonunion employees in the organizations surveyed were covered by mandatory arbitration procedures. In that survey the focus was on procedures covering typical lower-level employees in the industry, such as customer service workers or technicians.

An important feature of the proliferation of mandatory arbitration procedures is that it has encompassed a broad range of lower-level employees. For example, use of mandatory arbitration is widespread in the retail industry, including in chains such as Macy's and Target. It is also used by many restaurant chains, such as Hooters, the Olive Garden, and Waffle House. If the growth trends have continued since that 2003 survey, it is reasonable to estimate that today, a quarter or more of all employees in nonunion workplaces are subject to mandatory arbitration agreements. Put differently, it is likely that the share of American workers who are subject to employer-initiated mandatory arbitration procedures is twice the rate of the now only 11.1 percent who are union members.[40]

Arbitration in consumer contracts

Arbitration has become even more common in consumer transactions than in employment. The most comprehensive and recent study of the prevalence of arbitration in consumer transactions was conducted by the Consumer Financial Protection Bureau (CFPB). The Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank) that established the CFPB also mandated that it conduct a study of the use of mandatory arbitration clauses in consumer financial contracts. In addition, it empowered the CFPB to issue regulations governing the use of mandatory arbitration in these contracts based on the results of this study.

The CFPB began its study in 2012, released preliminary findings in December 2013, and issued its final report in March 2015. The CFPB's Arbitration Study report documents that mandatory arbitration in consumer financial contracts is widespread and that mandatory arbitration clauses are included in a majority of contracts in many areas of consumer finance. The CFPB study found that credit card issuers representing 53 percent of the total credit card market include mandatory arbitration clauses. For prepaid cards, which tend to be used more by lower-income individuals, 92 percent of agreements include mandatory arbitration clauses. In student loans, 86 percent of the largest private lenders use mandatory arbitration clauses. The study found that in California and Texas over 99 percent of payday loan agreements include mandatory arbitration. Even among checking accounts, where use is lower, banks and credit cards that use mandatory arbitration represent 44 percent of insured deposits. In addition, the rate of use of mandatory arbitration in credit card agreements is likely to be temporarily depressed because the settlement of an antitrust lawsuit required four large banks to cease using mandatory arbitration for three-and-a-half years. Although these banks had not resumed using mandatory arbitration at the time of the study, which immediately followed the expiry of the settlement, if they were to resume using mandatory arbitration, this would raise the usage rate to over 90 percent for credit cards.

Regarding the content of these mandatory arbitration procedures, the most important finding of the CFPB study is that over 90 percent of them expressly prohibit class actions. Given the relatively small amounts of many consumer financial transactions and the similarity across claims, the availability of class actions is a crucial element in providing access to justice for consumer financial claims.

Another important finding of the CFPB study is that most consumers are unaware that they had entered into mandatory arbitration agreements. Three-fourths of the consumers surveyed in the study did not know that their credit card agreement included an arbitration clause. Misunderstandings were also widespread. Fewer than 7 percent of the consumers were aware that they were covered by an arbitration agreement that kept them from suing in court.

The CFPB study makes it clear that arbitration has largely displaced the civil justice system for most of the major transactions of ordinary people. A further question is whether this is a good thing. There is debate among researchers about whether consumers fare better in arbitration than in the courts. Some claim that consumers do better, and some claim the contrary.[41] The evidence involves individual claims, each with its own merits.

The CFPB found that most arbitration agreements in consumer transactions include a class-action waiver. This finding reinforces a 2007 survey that found that the most prominent firms in the telecommunications, credit, and financial service industries routinely insert arbitration clauses into their contracts with consumers (76.9 percent), but rarely use them in their other commercial agreements. (6.1 percent).[42] The authors of the survey opined that corporations preferred to have arbitration clauses in contracts with consumers because the clauses could be coupled with bans on class actions. In a similar

vein, a survey conducted in 2009 by one of the authors of this report, Katherine Stone, found that arbitration was a mandatory term in the service agreements of all four of the largest cell phone companies, five of the eight largest cable companies, six of the nine major credit card companies, and three of four large national retail banks, and that all of the arbitration clauses were accompanied by a ban on class actions.[43] Thus the detrimental impact of arbitration clauses on the ability of consumers to band together to pursue low-value claims seems undeniable. And it is only through collective efforts that consumer and employment rights can truly be protected.[44]

The arbitration process

Arbitration processes in general involve some form of private tribunal that adjudicates the issue in dispute. Arbitration procedures are typically a simpler, more informal version of court procedures, for example relaxing the formal rules of evidence. Underneath these generalizations, however, there is a great deal of variation in arbitration procedures. Different arbitration procedures vary considerably in their degrees of formality, similarity to court procedures, and amount of due process provided to the participants.

The arbitration agreement itself is the primary source of the rules governing the arbitration process. The parties to this private agreement are generally allowed to write into the arbitration clause whatever rules they wish to govern how disputes will be resolved. In practice this means that the corporation that chooses to make arbitration mandatory for its workers or consumers will write the rules of the procedure, and the worker or consumer will have no choice but to assent if they want to enter into an employment or consumer transaction.

Although corporations are free to craft whatever rules they wish for arbitration, many choose to incorporate by reference the rules of an established arbitration service provider. These arbitration service providers, such as the American Arbitration Association (AAA) or JAMS, will administer the arbitration, providing lists of arbitrators for the parties to select from, hearing rooms in which the arbitration can be conducted, and standard rules or procedures to be followed. Organizations such as the AAA and JAMS are important actors in the arbitration system. While they are established as private nonprofit entities, they are also well-known organizations that are subject to public pressures and provide legitimacy to the arbitration process.

In response to concerns about fairness in mandatory arbitration in the 1990s, a number of interested organizations jointly drafted a Due Process Protocol establishing basic fairness standards to be followed in arbitration. These included such important standards as the right to representation by counsel and disclosure of arbitrator conflicts of interest. However, in many other areas of procedure, such as how much discovery should be provided, the allocation of the arbitrators' fees, and whether arbitration should be mandatory or voluntary, the Due Process Protocol did not provide clear guidance. Despite its limitations, the Due Process Protocol did provide some degree of fairness protections, which were then incorporated into the procedures of both the AAA and JAMS. In some areas these organizations' procedures go beyond the protections provided in the Due Process Protocol. For example, whereas the protocol leaves the allocation of fees issue open, the AAA's employment arbitration rules provide that when arbitration is mandatory (i.e., "employer promulgated"), the employer is required to pay 100 percent of the arbitrator's fees.

The larger service providers administer many, but not all, mandatory arbitration cases. In a 2014 survey of plaintiff attorneys conducted by one of the authors of this report, Alexander Colvin, and Mark Gough of Penn State University, respondents were asked who had administered the most recent mandatory arbitration case they were involved in. The AAA was the largest service provider, administering 50 percent of cases. JAMS was second with 20 percent of cases. Another 15 percent of cases were

administered by other smaller service providers, which have not been subject to the same scrutiny or research attention as AAA or JAMS. Meanwhile a further 15 percent of cases were run on an ad hoc basis with no administering agency at all. In this latter category of ad hoc cases, it is the mandatory arbitration agreement itself that alone provides the rules establishing the procedures for arbitration. While we can look at the procedures of organizations such as the AAA and JAMS as providing some degree of due process protections for employees or consumers required to arbitrate under mandatory procedures, this research suggests that there is a high degree of variation in arbitration processes. The ability of corporations to set the rules of mandatory arbitration allows them, and not the workers or consumers, to choose whether to adopt the procedures of a reputable organization with due process protections or rules that violate basic principles of fairness.

A major new feature of mandatory arbitration agreements in both the employment and consumer settings is the inclusion of waivers of class-action claims. The Supreme Court's 2011 decision in *AT&T v. Concepcion* upholding the enforceability of class-action waivers is fueling the adoption of class-action waivers in arbitration agreements. A corporate-defense law firm recently estimated that the percentage of companies that include arbitration clauses with class-action waivers in their contracts grew from 16 percent in 2012 to 43 percent in 2014.[45]

Class-action waivers appear to be widely used in employment arbitration agreements. In a 2015 survey of 481 practicing employment arbitrators, Colvin and Gough asked the arbitrators about the provisions of the arbitration agreements in cases they had decided. The respondents reported that class-action waivers were included in 52 percent of the agreements in cases they had decided.[46]

Procedures provide only part of the story of how arbitration works. Under established arbitration law, if the arbitration agreement does not specify procedures to be used, then the arbitrator has plenary authority to decide how the case is conducted, with very limited grounds for review. As a consequence, the neutrality and fairness of the arbitrator is a central concern in ensuring the fairness of the arbitral process.

Colvin and Gough's 2015 survey of practicing employment arbitrators provides some insights into who the arbitrators are. Demographic diversity is limited; 74 percent are male and 92 percent are non-Hispanic white. Just under half (49 percent) are full-time neutrals. Most of the part-time neutrals who also serve as arbitrators are practicing attorneys, and these are twice as likely to normally represent employers (61 percent) as employees (30 percent) in their legal practices. Over half (59 percent) of all full- or part-time employment arbitrators had at some point in their career worked as legal counsel representing employers, whereas 36 percent had at some point represented employees or unions. It is certainly possible and indeed often happens that an arbitrator can become a genuine neutral despite having been an advocate representing one side or the other. But it is a major concern that a substantial majority of employment arbitrators come out of backgrounds representing employers.

Outcomes of mandatory arbitration

Mandatory arbitration is not just a theoretical limitation on worker and consumer rights; it has a major practical impact on the ability of workers and consumers to pursue their legal claims and to win their cases.

Impact of arbitration on workers' success rates and recovery amounts

Arbitration can be an effective alternative mechanism to the courts for resolving many disputes. Whereas the litigation system is often slow and costly, arbitration systems can be faster and cheaper. For example, labor arbitration has a long track record of success in unionized workplaces and is widely accepted as fair and effective by organized labor and employers. However, for workers and consumers, the question is whether mandatory arbitra-

tion unilaterally introduced by companies can be as effective as the courts at enforcing their statutory rights.

Investigating the outcomes of mandatory arbitration is challenging for researchers. Ideally we would like to conduct a double blind study in which cases are randomly assigned to either litigation or mandatory arbitration and the outcomes compared. However in practice this would be both impracticable and unethical when dealing with people with real cases. Nonetheless, even if we cannot compare randomly assigned cases under litigation with arbitration, we can get some information by looking generally at the outcomes of cases in the two forums and then analyzing similarities or differences between them.

Table 1 shows the results from a 2011 study comparing overall trial outcomes in mandatory arbitration and litigation. The comparison looks at the outcomes of 1,213 mandatory arbitration cases administered over a five-year period by the American Arbitration Association, the nation's largest arbitration service provider. These are compared with the outcomes of studies of employment discrimination cases in the federal courts and non–civil rights employment cases in state courts.

This comparison supports the idea that arbitration can avoid some of the delays of the litigation system. Whereas the average time to trial is almost two years in either federal or state court, it is just under a year under mandatory arbitration. However, the differences in the outcomes of trials are also stark.

Employee win rates in mandatory arbitration are much lower than in either federal court or state court, with employees in mandatory arbitration winning only just about a fifth of the time (21.4 percent), which is 59 percent as often as in the federal courts and only 38 percent as often as in state courts. Differences in damages awarded are even greater, with the median or typical award in mandatory arbitration being only 21 percent of the median award in the federal courts and 43 percent of the median award in the state courts. The most comprehensive comparison comes when we look at the mean or average amount recovered in damages across all cases, including those in which the employee loses and zero damages are awarded. When we make this comparison, we find that the average outcome in mandatory arbitration is only 16 percent of that in the federal courts and 7 percent of that in state courts. While there are additional factors to consider in comparing the two systems, at the outset it is important to recognize that in a simple aggregate comparison, mandatory arbitration is massively less favorable to employees than are the courts.

Evidence suggests that the picture has not changed much since 2011. A 2015 study of federal court employment discrimination litigation by Theodore Eisenberg found that the employee win rate has dipped in recent years to an average of only 29.7 percent.[48] At the same time, another 2015 study found that the employee win rate in employment arbitration had also dipped in recent years, to an average of only 19.1 percent.[49] Research has not shown whether a similar dip in employee win rates has occurred in state courts. Whatever the reason for the declining employee success rate in employment cases, these results indicate that while the gap between federal court and arbitration win rates has decreased, it is still the case that the employee win rate in arbitration is 35.7 percent lower than the employee win rate in federal court.

The data presented above only look at overall differences in outcomes. It is reasonable to wonder how much of the mandatory arbitration–litigation outcome gap is due to factors such as the type of cases reaching the trial stage. After all, most cases filed in court settle before they go to trial. So it is possible that settlement patterns could explain part of the difference between trial and arbitration outcomes.

We do not believe that settlement can explain the difference because both court cases and arbitration cases settle prior to trial or hearing in roughly similar proportions. A major study by Nielsen et al. found a 58 percent settlement rate in federal court employment-discrimination

TABLE 1

Comparison of outcomes of employment arbitration and litigation

	Mandatory employment arbitration (Colvin)	Federal court employment discrimination (Eisenberg and Hill)	State court non-civil rights (Eisenberg and Hill)
Mean time to trial (days)	361.5	709	723
Employee trial win rate	21.40% (n=1,213)	36.40% (n=1430)	57% (n=145)
Median damages	$36,500	$176,426	$85,560
Mean damages	$109,858	$394,223	$575,453
Mean including zeros	$23,548	$143,497	$328,008

Note: All damage amounts are converted to 2005 dollar amounts to facilitate comparison.

Source: The "Colvin" dataset draws on all employment arbitration cases based on employer-promulgated procedures administered by the American Arbitration Association from January 1, 2003, to December 31, 2007. Data are assembled by Colvin from reports filed by the AAA under California Code arbitration service provider reporting requirements. Alexander J.S. Colvin, "An Empirical Study of Employment Arbitration: Case Outcomes and Processes." *Journal of Empirical Legal Studies* 8(1): 1–23 at 5 (2011). The "Eisenberg and Hill" litigation statistics are reported in Eisenberg, Theodore, and Elizabeth Hill "Arbitration and Litigation of Employment Claims: An Empirical Comparison." *Dispute Resolution Journal* 58(4): 44–55 (2003).

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litigation,[50] while recent research on mandatory arbitration found a 63 percent settlement rate across all employment cases in that forum.[51] It may be that there are some differences in which cases settle, but overall it does not appear that differences in the likelihood of settlement before trial can explain the mandatory arbitration–litigation outcome gap.

Another factor that might explain some of the gap between arbitration and court outcomes is differences in pretrial disposition of cases. Many employment litigation cases are resolved through summary judgment motions. The cases that reach trial are often those that survive summary judgment and as a result represent stronger claims. Traditionally, summary judgment was not used frequently in arbitration. However, that picture is increasingly inaccurate, at least as far as mandatory employment arbitration is concerned.

In their 2014 survey, Colvin and Gough asked plaintiffs' attorneys about their most recent employment cases in litigation and mandatory arbitration.[52] In court, summary judgment motions were filed in 77 percent of the cases. However, and surprisingly, summary judgment motions were also filed in nearly half of the arbitration cases (48 percent). While this gap is not insignificant, summary judgment is more common in arbitration than often recognized. One way of looking at how much impact summary judgment has on outcomes is to compare cases across litigation and arbitration where no summary judgment motion was filed. Given the lack of any summary judgment motion in these cases, any differences between the two forums would not be the result of different use of summary judgment. Looking at this subsample of cases in arbitration and litigation where there was no summary judgment motion, Colvin and Gough found that the win rate was 32 percent lower in mandatory arbitration than in litigation. This result indicates that the gap in outcomes cannot be explained away as an effect of greater use of summary judgment motions in litigation.

It could also be argued that the extra time to reach trial might lead to higher damages in the litigation cases. In employment discrimination cases, an employee who is successful in proving discrimination is entitled to collect

damages for the economic loss suffered, including back pay and front pay. This would include losses from any period of resulting unemployment, taking into account the duty to mitigate losses by searching for and accepting alternate employment. The key point is that the damages are tied to the period of unemployment caused by the discriminatory employment decision, not to the period from taking a claim to trial. But even considering the possibility of some accumulation of additional damages while awaiting trial, for example due to ongoing psychological distress, the damages under litigation so far outstrip the time to trial that they cannot be explained by the time to trial. According to Table 1, the period to trial in litigation is only about twice as long as in arbitration, whereas the average damages in federal court are nearly four times as large and in state court well over five times as large as in mandatory arbitration.

Overall, the data show a very large gap in outcomes between cases in courts and under mandatory arbitration. The most important measure of overall outcomes is the average damages across all cases, including wins and losses so as to take both win rates and damage rates into account. These are the results reported in the final row of Table 1, which indicate that plaintiffs' overall economic outcomes are on average 6.1 times better in federal court than in mandatory arbitration ($143,497 versus $23,548) and 13.9 times better in state court than in mandatory arbitration ($328,008 versus $23,548). These are very large differences in outcomes, and attempts to explain away this gap have been largely unsuccessful.

Impact of arbitration on workers' access to justice and ability to get attorneys

The mandatory arbitration–litigation gap in outcomes has a direct effect on the ability of individual workers to recover compensation for the injuries they have suffered. The gap also reduces the liability exposure of corporations that adopt mandatory arbitration. However, equally important, the mandatory arbitration–litigation gap has a major impact on the ability of workers to make claims in the first place.

To effectively pursue legal claims, most employees rely on finding an attorney willing to take their case. Although individuals can file claims without using an attorney, few are willing to do so, and their success rates are much lower than those who have legal representation. Nielsen et al. found that only 22.5 percent of employees filing employment discrimination cases in the federal courts were unrepresented, and just over a third of those employees eventually obtained representation by legal counsel before the case was completed.[53] Some have argued that the greater simplicity and lower cost of arbitration would allow more employees to bring cases in that forum without legal representation. But in practice, we find that only 21.1 percent of employment cases in mandatory arbitration are brought by employees without legal counsel.[54]

How do employees obtain legal representation? Given that most consumers and low- or middle-income employees lack the financial resources to pay lawyers' typical hourly rates, the key mechanism for financing representation is the contingency fee, where the plaintiff's attorney receives 30–40 percent of the damages as a fee if successful, but charges no fee if the employee loses. In their study of plaintiffs' attorneys in employment cases, Colvin and Gough found that 75 percent typically represented employees under a contingency-fee arrangement, and a further 17 percent used a hybrid arrangement that combined contingency and hourly fees.

The mandatory arbitration–litigation outcome gap has a significant and pernicious effect on the ability to obtain legal counsel under these contingency-fee arrangements. The plaintiffs' attorney accepting employment cases knows that he or she will lose some of the cases and receive no fee for them, while receiving a fee based on the damages awarded in the successful cases. As a result, attorneys decide whether to accept a case based on their judgment about the likely outcome. But as we have seen, the average outcome is substantially lower in mandatory arbitration than it is for litigation: Damages from arbi-

tration are 16 percent of the average damages from federal court litigation and a mere 7 percent of the average damages in state court. Thus lawyers are reluctant to take cases that are subject to mandatory arbitration. Even if arbitration cases are easier and cheaper to process, the large differences in outcomes can substantially reduce the financial incentive and ability of plaintiffs' attorneys to accept cases brought by employees covered by mandatory arbitration.

In surveying plaintiffs' attorneys about their likelihood of accepting potential cases, Colvin and Gough found just such an effect. Whereas on average plaintiffs' attorneys accepted 15.8 percent of potential cases involving employees who could go to litigation, they accepted about half as many, 8.1 percent, of the potential cases of employees covered by mandatory arbitration. Thus, in addition to producing worse case outcomes than litigation, mandatory arbitration also reduces the likelihood of obtaining the legal representation that will help employees bring a claim in the first place.

Repeat player advantages in arbitration

In dispute resolution, the advantages accruing to repeat players in the system have long been a concern. A business or other organized group that frequently engages in litigation is likely to have advantages over an individual employee or consumer with no previous experience in resolving disputes.[55] Repeat players have advantages because they gain familiarity with the system and how to operate effectively in it. They may also be able to lobby for changes to the system that benefit them.

One of the advantages of the traditional labor arbitration system in unionized workplaces is that both the company and the union are repeat players in the system. That means that they are both likely to be involved in future cases, have experience with past cases, and are invested in the development of a fair, effective system of dispute resolution. This balanced bilateral system with repeat players on both sides means that an arbitrator who was not a genuine neutral, and instead began to favor one side, would soon become unacceptable to the other side and not be selected for future cases. This balance between two strong repeat players is a key feature allowing private arbitration systems to function effectively.

In employment and consumer arbitration, the employer is likely to be a repeat player whereas the employee or consumer is likely to be a one-shot player.[56] How then can the advantage of the repeat player be balanced? One possibility is that the legal counsel on each side serves as an effective repeat player in the system. A large sophisticated law firm representing the business could be balanced by an aggressive and sophisticated law firm representing the plaintiff. However, in practice legal representation for employees and consumers is much more fractured and of variable quality than that for businesses, which can generally afford to hire large and sophisticated corporate law firms to defend their cases. In a study of lawyers representing parties to employment arbitration, Colvin and Pike found that 76.6 percent of attorneys representing employers listed employment law as a primary practice area, compared with only 56.7 percent of attorneys representing employees.[57] Furthermore, in that study, 54.6 percent of employers were represented by a law firm that handled multiple cases in the study population, whereas only 10.7 percent of employees were represented by a law firm handling multiple cases. While attorneys and law firms can provide a type of repeat player in arbitration, this result indicates that it is employers who are far more likely than employees to benefit from representation by this type of repeat player.

Do we find repeat-player advantages in the outcomes of mandatory arbitration cases? In a study of 2,802 mandatory employment arbitration cases decided between 2003 and 2014, Colvin, one of the authors of this report, and Gough looked at the relationship between numbers of cases involving the same employer and outcomes.[58] They initially found that as employers were involved in more cases they tended to win more of these cases. This is not surprising and could arise from a range of fac-

tors, such as larger employers having better lawyers, more sophisticated human resource (HR) departments, and better internal systems for dealing with workplace conflicts. However, once they controlled for the number of cases involving the employer, they also found a significant effect for the number of cases in which the employer appeared before the same arbitrator. More specifically, the first time an employer appeared before an arbitrator, the employee had a 17.9 percent chance of winning, but after the employer had four cases before the same arbitrator the employee's chance of winning dropped to 15.3 percent, and after 25 cases before the same arbitrator the employee's chance of winning dropped to only 4.5 percent.[59] The study also found that this negative effect of a long-term employer/arbitrator relationship on an employee's chances of winning was stronger when the employee was self-represented, i.e., when there was no plaintiff lawyer available to balance the employer's repeat-player advantage.

What could explain the repeat-player advantage of employers appearing before the same arbitrator multiple times? One possibility is that arbitrators may feel pressure to rule in favor of the employer to be selected in future cases. Although this would go against arbitrator ethical standards and is something that genuinely neutral arbitrators would consciously resist, part-time or more marginal arbitrators without well-established neutral practices could be subject to greater pressures of this nature. While it is difficult to get firm data on this issue, it is noteworthy that some arbitrators in the recent *New York Times* series on mandatory arbitration admitted that these pressures favor repeat players.[60] Even absent any sort of arbitral bias, more sophisticated repeat-player employers may gain an advantage by getting to know particular arbitrators well and developing an understanding of their decision-making patterns and what types of arguments appeal to them. While this alternative explanation might exonerate arbitrators themselves of bias, it would nevertheless suggest that there is a bias in the system that gives employers an advantage over employees as repeat players in the system.

The use of arbitration as part of corporate HR

Mandatory arbitration in employment contracts is spreading as companies adopt it as part of their employment policies. Arbitration has become an important tool in the corporate arsenal to defend against legal claims. But it is also part of the overall human resources strategy of many companies and interacts with other HR policies. Most large companies that adopt mandatory arbitration also have internal dispute-resolution procedures to resolve organizational conflicts before they reach arbitration.

One well-known American company that has introduced this type of internal dispute-resolution procedure is Anheuser-Busch.[61] Its dispute-resolution procedure includes mandatory arbitration of employment law disputes. However, the procedure begins with local management review of employee complaints, followed by mediation of any potential legal dispute before the claim proceeds to arbitration. A study of this procedure by Bales and Plowman found that the vast majority of claims are successfully resolved in these earlier stages. From 2003 to 2006, 95 percent of claims were resolved at the initial local review stage. Of the 87 claims that proceeded to mediation over this period, 72, or 83 percent, were successfully resolved at that stage. Ultimately only 15 cases, or 1 percent of the total number of complaints filed under the procedure over the four-year period, reached arbitration. Mandatory arbitration is a part of the Anheuser-Busch procedure, but the overwhelming majority of the claims brought under this system are being effectively resolved through mediation and internal dispute-resolution procedures.

Other companies have adopted more elaborate internal dispute-resolution procedures. The diversified manufacturing company TRW adopted employment arbitration

after an upsurge of litigation in the early 1990s.[62] However, as part of developing a more comprehensive set of internal dispute-resolution procedures, it also introduced local management complaint procedures, peer review panels (in which peers of the complainant sit on a type of workplace jury to decide complaints), and mediation. The range of dispute-resolution options provided employees with alternative ways of resolving complaints. The result was that cases were resolved early in the process, with only 72 cases reaching mediation over the first three years of the program and only three of these cases reaching arbitration. Furthermore, when cases did reach arbitration, TRW set up the procedure to be binding on the company if they lost, but *not* binding on the employee if the company won. As a result, employees retained the right to go to court after arbitration. TRW's procedure is unusual in this respect, but it is a powerful example of the feasibility of resolving employment disputes through effective internal procedures without the necessity of mandatory arbitration procedures that bar employee access to the courts.

These examples show that multipronged dispute-resolution procedures can obviate the need to resort to arbitration under mandatory, binding procedures. However, under current law, the company gets to decide what procedures will be imposed on workers or consumers. The way in which this allows companies to control the legal environment under which they operate was illustrated recently by the conflicts around the ride-sharing company Uber.

There has been a great deal of attention in the courts and the media to the employment status of Uber drivers. The question is, should they be considered employees and thus entitled to the protections of employment law or, as the company alleges, should they be considered independent contractors and not entitled to any employment rights? Despite the publicity, it is less well known that, since 2013, Uber has required its drivers to sign mandatory arbitration agreements. As explained above, the arbitration clause means that a private arbitrator, not a court, will answer the crucial policy question of whether Uber drivers are employees or independent contractors. The question is important not only for Uber drivers, but for other workers in the so-called "gig economy," who provide on-demand services coordinated by entities that maintain service platforms.

In a recent decision, a California state court judge refused to enforce Uber's arbitration agreement on the basis that it was unconscionable.[63] Among the features rendering the agreement unconscionable was that it required the driver to pay half of any arbitrator's fees, creating a major barrier to access for low-income drivers. While the agreement did allow drivers to opt out of the arbitration clause within the first 30 days following signing on to drive for Uber, the opt-out language was buried in fine print toward the end of a long contract, leading the judge to describe it as "illusory because it was highly inconspicuous and incredibly onerous to comply with."[64] Although that judge declined to enforce the arbitration agreements used by Uber in 2013 and 2014, the case is under appeal. In practice Uber can easily redraft the mandatory arbitration agreement to correct the specific deficiencies identified by the judge, thereby making its arbitration agreement enforceable.

The Uber mandatory arbitration procedure requires that all claims be brought individually, not as class actions. As explained above, such a clause is allowable and usually enforceable, thereby preventing Uber drivers from banding together to get their legal claims and status determined, whether by an arbitrator or by a court. In the new world of combined arbitration and class-action waivers, an increasing numbers of workers and consumers are, like Uber drivers, trying to band together to protect their legal rights because to proceed solo would be prohibitively expensive. The status of the Uber class-action ban, as well as the Uber arbitration agreement, is currently on appeal.[65]

What can be done?

Arbitration Fairness Act

The most direct way to address mandatory arbitration would be for Congress to amend the Federal Arbitration Act to exempt consumer and employment arbitration, or to provide more protection for consumer and employee rights in arbitration. Whereas state-level legislative action to this effect would almost certainly be preempted by the FAA, legislation passed by Congress would encounter no such problem.

The most prominent effort to deal with mandatory arbitration at the federal level has been the proposed Arbitration Fairness Act (AFA). Although there have been various versions of the statute, the most recent version would amend the FAA to specify that "…no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute."[66]

If enacted, the AFA would effectively eliminate all mandatory arbitration in the employment or consumer realms, as well as in antitrust and civil rights cases. In its statement of congressional findings, the proposed AFA specifically refers to the problems of employees and consumers having little effective choice about entering mandatory arbitration agreements, the deleterious effect on the development of public law, and the lack of judicial review.[67]

The Arbitration Fairness Act has been repeatedly introduced in Congress, with versions proposed in 2009, 2011, and 2013. Most recently, the AFA was again proposed in 2015 by Sen. Al Franken (D-Minn.) and Rep. Hank Johnson (D-Ga.). However, it has not received a vote, and passage in the current Congress appears unlikely.

The Franken Amendment and the Fair Pay and Safe Workplaces Executive Order

In the absence of general action addressing mandatory arbitration, more progress has been achieved on specific limitations. In 2009, Franken successfully amended the annual Department of Defense Appropriations Act of 2010 to address the use of mandatory arbitration by defense contractors. The specific case motivating the amendment involved serious allegations of sexual assault, harassment, and discrimination of a female employee of Halliburton. The Franken Amendment barred any defense contractor with over $1 million in contracts from enforcing a mandatory arbitration agreement in any case involving claims under Title VII of the Civil Rights Act or tort claims relating to sexual assault or harassment. The Franken Amendment is a substantial restriction on the use of mandatory arbitration by defense contractors, but is limited to that sector and applies only to the limited set of claims specified in the amendment. For example, the amendment does not restrict use of mandatory arbitration for other statutory claims such as wage and hour claims under the Fair Labor Standards Act or any claims based on state employment statutes.

The approach taken in the Franken Amendment was subsequently extended to all federal contracts through the Fair Pay and Safe Workplaces Executive Order of 2014 (the FPSW order). The FPSW applies to all federal contractors with contracts of greater than $1 million. Similar to the Franken Amendment, it bars these contractors from enforcing mandatory arbitration agreements in claims based on Title VII or tort claims involving sexual assault or harassment. Although the FPSW is an important extension of the Franken Amendment to a broader set of employers, it suffers from the same limitation in that it applies only to a limited subset of potential employment cases. A federal contractor subject to the FPSW could continue to require its employees to sign mandatory arbitration agreements and simply decline to enforce the agreement for Title VII and the specified tort claims, while retaining the ability to use mandatory arbi-

tration as a shield against litigation based on FLSA, state laws such as the state antidiscrimination and wage and hour statutes, or other claims. A further limitation of the FPSW order is that it may well be subject to legal challenge on the basis that it contradicts the provisions of the FAA (as a statutory measure, the Franken Amendment would not be subject to this same argument).

Consumer Financial Protection Bureau

As discussed earlier, the Consumer Financial Protection Bureau has conducted a study of mandatory arbitration in the consumer financial industry as required by the Dodd–Frank Wall Street Reform and Consumer Protection Act. In addition to mandating this study, Dodd–Frank also gives the CFPB authority to restrict or ban mandatory arbitration in consumer financial contracts. The CFPB is considering whether to ban class action waivers in mandatory arbitration agreements based on the results of its study. If it does ban the use of mandatory arbitration, this would eliminate the practice in the consumer-finance industry and have a major impact on credit card and other consumer debt contracts.

While the potential action by the CFPB could have a major salutary effect in the consumer-finance contracts field, it is important to recognize the limits of its authority. Action by the CFPB would not extend to employment contracts. Nor would it extend to other types of consumer contracts. So whereas mandatory arbitration clauses might disappear from credit card contracts, they would still exist in restaurant employee contracts, software purchase agreements, medical services contracts, Uber driver agreements, and many other agreements that affect American consumers and workers on a daily basis.

Conclusion

In the past three decades, the Supreme Court has engineered a massive shift in the civil justice system that is having dire consequences for consumers and employees. The Court has enabled large corporations to force customers and employees into arbitration to adjudicate practically all types of alleged violations, including violations of laws to prevent consumer fraud, unsafe products, employment discrimination, nonpayment of wages, and countless other state and federal laws designed to protect citizens against corporate wrongdoing. By delegating dispute resolution to arbitration, the Court now permits corporations to write the rules that will govern their relationships with their workers and customers and design the procedures used to interpret and apply those rules when disputes arise. Moreover, the Court permits corporations to couple mandatory arbitration with a ban on class actions, thereby preventing consumers or employees from joining together to challenge systemic corporate wrongdoing. As one judge opined, these trends give corporations a "get out of jail free" card for all potential transgressions. These trends are undermining decades of progress in consumer and labor rights.

It is difficult to know the practical impact of the courts' broad delegation of dispute resolution to arbitration because arbitration is private and arbitration decisions are not generally published. However, research suggests that consumers and employees are less likely to win their cases when they are heard in arbitration, and when they do win, the amounts of damage awards are far less than would be forthcoming in a court. Moreover, there is considerable evidence that individuals who have suffered from corporate wrongdoing are deterred from bringing their claims altogether because arbitration can be too expensive and the results too risky for individual consumers or workers to undertake. The ban on class actions in particular makes it unlikely that many claims of corporate wrongdoing—particularly those that involve small sums for each in large groups of individuals—will ever be heard. As Justice Breyer opined, "Only a lunatic or a fanatic sues for $30."[68]

In the few years since the Supreme Court upheld the use of class-action bans coupled with arbitration clauses, this type of composite clause has become ubiquitous in

the small print governing employment, credit cards, cell phones, bank accounts, Internet providers, and countless other types of everyday transactions. The increase of arbitration clauses that require the losing party to pay the winning party's costs, including attorney fees, will have an even more profound dampening effect on the ability of ordinary citizens to have their day in court.

What can be done to reverse these trends? Arbitration providers tout their voluntary efforts to ensure that arbitration provides due-process protections and unbiased decision-makers. However, while voluntary efforts by arbitration service providers and corporations to enhance due process in their arbitration procedures are desirable, they do not address the fundamental problem that the current law of arbitration allows the corporation to decide what type of arbitration procedure to impose on its employees or customers. Voluntary measures cannot prevent corporations that want to protect their interests—at the expense of employees and customers—from introducing provisions such as class-action waivers and loser-pay clauses that cut off access to justice. Nor can they adequately police against repeat-player bias.

Some courts and state legislatures have tried to oppose the radical change in the civil justice system, but to little avail. The Supreme Court has stated that the Federal Arbitration Act embodies a liberal federal policy in favor of arbitration, and that the act must be applied by state and federal courts. The Court repeatedly holds that the act overrides any state law or judicial doctrine that obstructs arbitration.

In addition to efforts at the state level, two federal agencies are attempting to curtail the use of arbitration by large corporations to deprive consumers and employees of their legal rights. The Consumer Financial Protection Bureau is considering a ban on class action waivers in mandatory arbitration in consumer financial transactions. By focusing on this issue, the CFPB has attracted a response from the U.S. Chamber of Commerce, which has launched a well-funded campaign to curtail the CFPB's powers and possibly defund it altogether. At the same time, the National Labor Relations Board is attempting to curtail the use of class-action-barring arbitration agreements in the employment setting on the grounds that such agreements interfere with the core principle of labor law—employees' rights to engage in concerted action for mutual aid and protection. However, to date, the Courts of Appeals have rejected the NLRB's reasoning.

Despite the laudable efforts of the Consumer Financial Protection Bureau and the NLRB to protect consumers and employees from arbitrations, the legal trends suggest that agency action on this front will very likely be struck down. As a result, the only way to reverse these trends is to amend the statute itself.

The Arbitration Fairness Act currently before Congress is the best hope for stopping these trends and restoring justice to ordinary citizens. It is crucial that this act get the support of everyone who believes that consumer and employee rights are important and worth protecting.

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Endnotes

1. The history of the Arbitration Coalition is recounted in Ross v. American Express, 35 F. Supp. 3d 407 (S.D.N.Y. 2014) (failing to find antitrust liability despite the banks' concerted efforts to promote class action barring arbitration clauses), *aff'd sub nom*, Ross v. Citigroup., ___ F.3d ___ (Case No. 14-1610, 2d. Cir., Nov. 19. 2015).

2. Sutherland v. Ernst & Young, 726 F.3d 290 (2d Cir. 2013).

3. Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–219 (2006)).

4. 9 U.S.C. § 3. In order to come under the FAA, an agreement must involve commerce and include a written arbitration clause. 9 U.S.C. § 2.

5. The history and vision behind the enactment of the FAA is presented in Katherine V.W. Stone, "Rustic Justice: Community and Coercion Under the Federal Arbitration Act," *North Carolina Law Review* 77: 931 (1999).

6. 9 U.S.C. Sec. 2.

7. The holding in *Southland* was reinforced and expanded in *Perry v. Thomas* in 1987 482 U.S. 483 (1987).

8. See Katherine V.W. Stone, "Procedure, Substance, and Power: Collective Litigation and Arbitration of Employment Rights," *UCLA Law Review Discourse*: 61, 164 (2013).

9. See e.g., O'Conner et al. v. Uber Technologies, Inc. et al., (N.D. Calif. 2015); Mohamed v. Uber Technologies, Inc., (N.D. Calif., 2015).

10. There is another controversial issue that arises when parties are precluded from bringing a class action by virtue of an enforceable class-action waiver and they seek to arbitrate their claim on a class-wide basis. Courts agree that parties are free to specify whether their arbitration clause permits a class arbitration proceeding and if they do so, their intent will be controlling. However, in the majority of situations, an arbitration clause doesn't say anything about the availability of class-wide arbitrations. Courts have been divided on what should be the default rule when a contract is silent about the availability of class arbitration. See, generally, Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010). Courts are also divided on the predicate issue of whether a court or an arbitrator should decide whether the parties' agreement did or did not intend to permit class arbitration.

11. 563 U.S. 333 (2011).

12. Laster v. AT&T Mobility LLC, 584 F.3d 849, 855 (9th Cir. 2009), *rev'd sub nom. Concepcion*, 131 S. Ct. 1740.

13. Id. at 1752.

14. See Tory v. First Premier Bank et al., No. 10-C-7326, 2011 WL 4478437 (N.D. Ill. Sept. 26, 2011); Sanchez v. Valencia Holding Co., 132 Cal. Rptr. 3d 517 (Ct. App. 2011); see also Jerett Yan, "A Lunatic's Guide to Suing for $30: Class Action Arbitration, the Federal Arbitration Act and Unconscionability After AT&T v. Concepcion," *Berkeley Journal of Employment and Labor Law*: 32, 551, 559–61 (citing cases).

15. See, e.g., Chen-Oster v. Goldman, Sachs & Co., 785 F.Supp.2d 394 (2011) (S.D.N.Y. 2011); Owen v. Bristol Care, Inc., 702 F.3d 1051 (8th Cir., 2013).

16. Id. at 640.

17. Id. at 637.

18. Id. at 628.

19. See, e.g., Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547, 554 (S.D.N.Y. 2011) (holding that a clause barring class actions was unenforceable because it would require plaintiffs to forgo their substantive rights). But see Banus v. Citigroup Global Mkts., Inc., 757 F. Supp. 2d 394 (S.D.N.Y. 2010) (enforcing class action waiver).

20. See 29 U.S.C. § 216(b).

21. See, e.g., Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005); Carter v. Countrywide Credit Industries, Inc., 362 F.3d 294 (5th Cir. 2004); Adkins v. Labor Ready, Inc., 303 F.3d 496 (4th Cir. 2002). But see Raniere v. Citigroup, 827 F. Supp. 2d 294 (D. Conn. 2003) (refusing to enforce waiver of class action in a Fair Labor Standards Act action).

22. 133 S. Ct. 594 (2013).

23. *In re* Am. Express Merchs.' Litig., 554 F.3d 300, 320 (2d Cir. 2009), *vacated sub nom.* Am. Express Co. v. Italian Colors Rest., 130 S. Ct. 2401 (2010), *remanded to sub nom. In re* Am. Express Merchs.' Litig, 634 F.3d 187 (2d Cir. 2011), *aff'd on reh'g*, 667 F.3d 204 (2d Cir. 2012), *cert. granted sub nom. Am. Express Co.*, 133 S. Ct. 594.

24. Slip Op at 6-7 (Opinion of the Court).

25. Id.

26. Slip Op at 1 (J.Kagan dissenting).

27. Id. at 5.

28. See Yan, *supra* note 14 at 552 (noting that "[t]he unavailability of the class proceedings would have dire ramifications on employees seeking to vindicate their rights").

29. The lower court opinion is at 936 F. Supp. 2d 1145 (ND Calif. 2013).

30. The lower court opinion is at 225 Cal.App.4th 338 (2014).

31. Stats. 2003, ch. 906, § 1

32. The lower court opinion is at 173 Cal. Rptr. 3d 289.

33. See Nanavati v. Adecco USA, Inc., 2015 WL 1738152 (N.D. Calif. 2015), summarizing California lower court PAGA waiver cases after *Iskanian.*

34. Sakkab v. Luxottica Retail North America, slip. op. No. 13-55184 (9th Cir., September 28, 2015), reported in *National Law Journal*, October 5, 2015.

35. See Alexander J.S. Colvin, "Empirical Research on Employment Arbitration: Clarity amidst the Sound and Fury?" *Employee Rights and Employment Policy Journal*, 11(2): 405–447 (2008).

36. Although there is no public registry listing all the companies that require mandatory arbitration of their employees, the disclosure statements that arbitration service providers are required to make public include the names of the companies involved. The most complete and extensive case disclosures currently available are those provided by the American Arbitration Association: https://www.adr.org/aaa/faces/aoe/gc/consumer.

37. See Peter Feuille and Denise R. Chachere, "Looking Fair and Being Fair: Remedial Voice Procedures in Nonunion Workplaces." *Journal of Management* 21: 27–36 at 31 (1995).

38. Although the GAO survey initially found that 9.9 percent of respondents had adopted mandatory arbitration, when the agency followed up with the respondents to obtain copies of their procedures, a number indicated that they did not actually have mandatory employment arbitration and had made errors in their responses. When that correction is made, only 7.6 percent of the respondents remain as mandatory arbitration adopters. See General Accounting Office, *Employment Discrimination: Most Private Sector Employers Use Alternative Dispute Resolution,* GAO/HEHS 95-150, (1995).

39. Alexander J.S. Colvin, "Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?" *Employee Rights and Employment Policy Journal*: 11(2): 405–447 (2008).

40. "Union Members–2014," Bureau of Labor Statistics (2015).

41. See generally, Sarah Randolph Cole, "Of Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence." *Houston Law Review*, 48(3): 457–506 at 471–476 (2011).

42. Theodore Eisenberg, Geoffrey Miller, and Emily Sherwin, "Arbitration's Summer Soldiers," *University of Michigan Journal of Law Reform* 41(4): 871–896 at 886 (2008).

43. Katherine V.W. Stone, "Signing Away Our Rights," *The American Prospect* (April 2011) 20.

44. Katherine V.W. Stone, "Procedure, Substance, and Power: Collective Litigation and Arbitration of Employment Rights," *UCLA Law Review Discourse* 61: 164–181 (2013).

45. Carlton Fields Jorden Burt, *The 2015 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Risk and Managing Cost in Class Action Litigation.*

46. Alexander J.S. Colvin and Mark D. Gough, *Understanding the Professional Practices and Decision-Making of Employment Arbitrators*. Report to the National Academy of Arbitrators Research and Education Fund (2015).

47. Notes: All damage amounts are converted to 2005 dollar amounts to facilitate comparison.

The "Colvin" dataset draws on all employment arbitration cases based on employer-promulgated procedures administered by the American Arbitration Association from January 1, 2003, to December 31, 2007. Data are assembled by Colvin from reports filed by the AAA under California Code arbitration service provider reporting requirements. Alexander J.S. Colvin, "An Empirical Study

of Employment Arbitration: Case Outcomes and Processes." *Journal of Empirical Legal Studies* 8(1): 1–23 at 5 (2011).

The "Eisenberg and Hill" litigation statistics are reported in Eisenberg, Theodore, and Elizabeth Hill "Arbitration and Litigation of Employment Claims: An Empirical Comparison." *Dispute Resolution Journal* 58(4): 44–55 (2003).

48. Theodore Eisenberg, "Four Decades of Federal Civil Rights Litigation." *Journal of Empirical Legal Studies* 12: 4–28 (2015).

49. Alexander J.S. Colvin and Mark D. Gough, "Individual Employment Rights Arbitration in the United States: Actors and Outcomes." *ILR Review* 68(5): 1019–1042 (2015).

50. Laura Beth Nielsen, Robert L. Nelson and Ryon Lancaster, "Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States," *Journal of Empirical Legal Studies* 7(2): 175–201 (2010).

51. Colvin and Gough (2015), supra note 49.

52. Alexander J.S. Colvin and Mark D. Gough, *Comparing Mandatory Arbitration and Litigation: Access, Process, and Outcomes*. Report to the Robert L. Habush Endowment of the American Association for Justice (2014).

53. Nielsen et al. (2010) supra at 200.

54. Colvin and Gough (2015) supra at 1030.

55. Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." *Law and Society Review* 9(1): 95–160 (1974).

56. The problem of repeat-player effects in mandatory arbitration was first raised in a series of studies by Lisa Blomgrem Amsler (formerly Bingham), e.g., Lisa B. Bingham, "Employment Arbitration: The Repeat Player Effect," *Employee Rights and Employment Policy Journal* 1(1): 1–38 (1997); Lisa B. Bingham, "On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards." *McGeorge Law Review* 29(2): 223–259 (1998).

57. See Alexander J.S. Colvin and Kelly Pike, "Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?" *Ohio State Journal on Dispute Resolution* 29(1): 59–83 at 70 (2014).

58. See Colvin and Gough (2015), supra note 69.

59. Ibid at 1033–34.

60. Jessica Silver-Greenberg and Michael Corkery, "In Arbitration, a 'Privatization of the Justice System,'" *New York Times*, Nov. 1, 2015, p. A1.

61. See: Richard A. Bales and Jason N.W. Plowman, "Compulsory Arbitration as Part of a Broader Dispute Resolution Process: The Anheuser-Busch Example" *Hofstra Labor & Employment Law Journal*, 26(1): 1–32 (2008).

62. Alexander J.S. Colvin, "Adoption and Use of Dispute Resolution Procedures in the Nonunion Workplace." *Advances in Industrial & Labor Relations*, 13: 80–94 (2004).

63. Joel Rosenblatt, "Uber Loses Bid to Force Arbitration on California Driver," *BloombergBusiness*, Sept. 21, 2015.

64. Carolyn Said, "Judge Rejects Uber Forced-Arbitration Clause; 2 Cases Proceed," *San Francisco Chronicle*, June 10, 2015.

65. O'Connor v. Uber Technologies, Inc. et al.: Mohamed v. Uber Technologies

66. Section 3(a), Proposed "Arbitration Fairness Act of 2015," H.R. 2087.

67. Section 2, AFA.

68. Justice Breyer, dissenting in *AT&T Mobility LLC v. Concepcion*.

Mr. GAETZ. I'll just use my time to analyze that point of win rates. This is quoting from the study:

> "Employee win rates in mandatory arbitration are much lower than in either Federal court or State court, with employees in mandatory arbitration winning only about a fifth of the time, which is 59 percent as often as in Federal courts and only 38 percent as often as in State courts.
>
> "Differences in damages awarded are even greater, with the median typical award in mandatory arbitration being only 21 percent of the median award in Federal courts and 43 percent of the median award in State courts.
>
> "The most comprehensive comparison comes when we look at the mean or average amount recovered in damages across all cases, including those in which the employee loses, and zero damages are awarded. When we make this comparison, we find that the average outcome in mandatory arbitration is only 16 percent of that in Federal courts and 7 percent of that in State courts.
>
> "Mandatory arbitration is massively less favorable to employees than are the courts."

Are you persuaded that this evidence that postdates your study might inform on that analysis?

Ms. PARSHALL PERRY. It may. I am aware of the EPI study. That was a 2018 study.

I am also aware that there are connections between trial lawyers and the plaintiffs' bar and the EPI, who are, themselves, incentivized to make sure that cases are brought to litigation—

Mr. GAETZ. Very important point. Are there any connections between NDP Analytics and the business community?

Ms. PARSHALL PERRY. There may be.

Mr. GAETZ. Okay. So, I think we'd have to acknowledge that.

Eliza, I wanted to turn my remaining time to you.

I heard a colleague share with me a story of someone coming to them who took a job that was also an on-camera job, and that person was harassed and forced into arbitration and had a negative consequence there, deprived of their day in court.

My colleague in Congress asked that person who visited with them, would you have done it again? Would you have taken the job, and would you have signed that mandatory arbitration clause, knowing what could happen?

Upon reflection, that woman said to my colleague, "You know what? I wanted the job so bad—I craved this opportunity. It was my break in life. Even though I was mistreated, even though I was harassed and abused, I'd probably do it again."

Hearing that was heartbreaking to me, that in our country we would create conditions that force anyone into a circumstance like that.

Looking at the opportunity you had that most people would do just about anything on the planet Earth for, would you do it again?

Ms. DUSHKU. No. I can't knowing what I now have come to know. So, as far as my career since then, I've chosen not to Act professionally or in any other way, because I would never sign away my rights again. My understanding is that these provisions are part of

most Hollywood contracts at every major studio. They're a take-it-or-leave-it deals. There's no price for my dignity and my rights.

Mr. GAETZ. I really appreciate that perspective, but it just seems like such an abhorrent choice to put to anyone in the American workforce. You basically have to accept this contract of adhesion, or you have to deprive yourself of the most meaningful contribution you can make to the workforce and to the country.

I thank the Chair, and I yield back.

Chair NADLER. The gentleman yields back.

Ms. Bass.

Ms. BASS. Thank you, Mr. Chair.

Let me just take a minute to thank the Witnesses for being here. I can only imagine how difficult it is for you to share your stories, but just want you to know how important it is that you've had your day but also to educate us.

I wanted to ask Professor Gilles several questions.

I wanted to know if she could explain how the power dynamic between a prospective employer and an employee affect the validity of the arbitration clause in an employment contract. Or, put another way, what makes it forced?

One more question to you: Many Americans don't know what arbitration is, and many litigants have no idea they've signed an arbitration clause. How does this use of fine print and opaque wording add to the coercive nature of many employment arbitrations?

Ms. GILLES. Thank you. I'm happy to answer those questions.

So, first, on the power dynamics, which we've talked about a little bit already at today's hearing, and, frankly, Representative Gaetz just put it really well. I think the truth is that we want the job, we want the opportunity so badly that we are willing to sign away a lot of things to have that opportunity and to assume at the start of a relationship that everything will go pretty well.

So, I think the power dynamic exists. I think it's a structural imbalance that is always true in employment. I think employers are taking advantage of that structural imbalance by forcing their employees into arbitration.

On your second question, which is very related, I don't know if you've read an arbitration clause—I will try to send one so that you have one in the record—they are incredibly opaque. Even as a lawyer, I read them, and I have to reread them and reread them again to understand exactly what it is they're trying to do.

Maybe employers shouldn't be blamed for how opaque they are, because, after all, what they're trying to do is rewrite an entire procedural system, because they're foregoing the procedural system that we've already established in our courts and doing that takes a whole lot of time and energy, especially if you're just trying to maximize your interests.

So, these are really opaque and difficult to read. They often take pages and pages to describe. I think most people don't read them or certainly don't understand them if they try to read them. So, all of this is part of the problem.

Ms. BASS. Well, actually, can you take a few minutes to walk us through the history of arbitration in employment contracts? Why has this practice been allowed to continue?

Ms. GILLES. Thank you so much for that question, because I've been hearing things today that are making my blood boil a little bit.

The FAA was enacted in 1925, but it was enacted so that sophisticated businesspeople could negotiate for arbitration provisions and those provisions would be respected by courts. It was never intended to be imposed via standard form contract. In fact, if you read the legislative history, if you read the legislation, it excepts and exempts employees.

So, the idea that the FAA applies to employees is something that was created by a conservative majority of the Supreme Court in 1991 in a case called Circuit City—I'm sorry. First, actually, was Gilmer and then Circuit City. I can't keep all the bad cases straight.

Those are the cases in which the Court interpreted—I would say misinterpreted—the FAA to apply to employees like this, so that, now, employers can just stick these clauses into job applications and orientation materials. Even an innocuous email from HR can include a forced arbitration clause.

That was not what the 1925 Congress intended. They should be rolling in their graves. This is not what they intended. This is what a Supreme Court intent on protecting corporations intended beginning in the 1990s.

So, all I can tell you, Representative, is that from the 1990s until now we've just had worse and worse opinions. In 2018, the Supreme Court decided a case called Epic Systems, where it basically threw the NLRA under the bus and said that the FAA is more important than the right to collective action under the National Labor Relations Act.

A term later, in *Lamps Plus* v. *Varela*, the Court helped an employer who apparently couldn't write a cogent arbitration clause and sort of said, "Hey, we got what you meant, you meant that your employees can't bring class actions, we'll help you out there," and basically rewrote the agreement.

They will do anything, this five-member majority of the Supreme Court, to enforce these arbitration clauses because it protects Big Business.

I think that's not what this body should be doing. This body should be protecting these women and other women like them.

Thank you.

Ms. BASS. Thank you.

My time's expired.

Chair NADLER. The gentlelady's time has expired.

At this time, the Committee will take a very brief, 5-minute recess.

[Recess.]

Chair NADLER. The Committee will come to order.

At this time, I recognize Mr. Biggs for 5 minutes.

Mr. BIGGS. Thank you, Mr. Chair.

I appreciate every one of our Witnesses being here today. For some of you it just can't be a really easy experience, and appreciate your willingness to be here and share your experiences with us.

I am sincerely trying to understand this bill and whether it is the appropriate measure or whether it could be better or how to

design it. So, my questions are meant sincerely trying to get a handle on this.

I was a litigator, and I tried lots and lots and lots of cases, everything from arbitration to jury trials at every level. So, I have a lot of experience in this area. So, I've broken this down in my own mind. I think Mr. Issa was trying to get there. I am trying to make sure I understand it. There are three aspects of this bill that I think are interesting to me.

Number one is the nature of arbitration in and of itself. My experience as an arbitrator, it's a very small sample size, but it was very unsatisfactory as an arbitrator. There was pressure on me as an arbitrator from the side that appointed me, and that was very, very uncomfortable for me.

On other cases, where I was the attorney representing a plaintiff before the arbitrator, in some cases it was extremely—it was quick. It was short. It was easier. It was faster. Our reward was better than we had anticipated.

So, the question, of course, is the arbitration itself, is that really the issue? The forced aspect of this, the contract of adhesion aspect, that seems to be a huge problem here. I am a big advocate for—I hate to be forced to do anything, and I hate for people to be forced to do things. So, this contract of adhesion type of aspect is really disturbing to me.

Yet, at the same time, I'm a big believer that people should be allowed to enter into contracts, but I also understand there's a power discrepancy. So, we are trying to resolve that issue here as well.

Then the third thing for me is the transparency or lack of transparency or the nondisclosure or the secretive nature of these types of arbitrations.

So, Mr. Issa was trying to get at—and I don't want to steal what he was doing—this notion of, if you had transparency, if this were open and notorious, and you could bring it forward, would that resolve some of the problems? I think you said yes.

Professor Gilles, you indicated that might be helpful in some. You did not? You don't think transparency would be.

Ms. GILLES. The issues are that you're trying to fix a system by making it as close to court as possible. I guess I'm wondering, why don't we just let these women go to court? I don't understand—

Mr. BIGGS. So, don't get ahead of me.

Ms. GILLES. Yeah.

Mr. BIGGS. I'm trying to understand the three components I've raised here.

Ms. GILLES. Right.

Mr. BIGGS. So—

Ms. GILLES. You're saying that if we could make everything transparent. So, maybe if you could tell me—

Mr. BIGGS. No, I'm not saying that. What I'm saying is would transparency improve—

Ms. GILLES. Transparency of what? Why don't we try to—

Mr. BIGGS. The arbitration itself.

Ms. GILLES. The entire thing, so from the filing of the complaint, through the arbitration, through the award, the appellate process, and the confirmation in court, all this should be transparent?

Mr. BIGGS. Sure. Right.

Ms. GILLES. Okay. Then I just have to ask you, respectively, what's the difference between that and court?

Mr. BIGGS. First, the difference is—I'm sure you have litigated cases. It's huge.

Ms. GILLES. Okay. You know, the thing is—

Mr. BIGGS. A case in an Article III Court can take boundless amounts of time and boundless amounts of discovery.

Ms. GILLES. Yeah.

Mr. BIGGS. You have discovery in arbitration, but it moves so much quicker. It really does. That's been my experience.

So, when I'm talking about transparency and you're saying, well, you're building a whole new system, that whole new system has been in place for a hundred years.

Ms. GILLES. It has been in place for a hundred years for big commercial sophisticated companies. When you're an attorney arbitrating your case, Representative, just answer me this: Weren't you representing a company arbitrating against another company.

Mr. BIGGS. No. No, absolutely.

Ms. GILLES. Oh, really? An individual?

Mr. BIGGS. Yes, absolutely, individuals against individuals.

Ms. GILLES. Okay.

Mr. BIGGS. In my home State, that's not an unusual thing. That's my point. That's my point, is you're—and now we've taken too much time just getting to that.

I'm just trying to understand bit and bit and bit how we can improve a system, so we protect victims. Because no one should have to make the decision—I agree with Representative Gaetz—nobody should have to make the decision about whether you're going to be compelled to find a certain dispute resolution or take the job of your dreams.

I mean, that is really is what I'm trying to get at. I think there was some kind of defensiveness on your part, and it's unfortunate, because I really wanted to understand the transparency part of it and lack of it.

I have to yield back because my time is up.

Chair NADLER. The gentleman yields back.

Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chair. I appreciate your holding this hearing today. I'm sorry I was late, but my car did not start. It does that on occasion.

I thank you and all the Witnesses for being here and testifying before the committee, some with some personal difficulty, but I appreciate your willingness to come forth and put color on this issue.

It's truly sad that we have to even have a hearing. Arbitration is an issue that has come before this Committee in other instances. I'm against forced arbitration, but I can understand it in certain issues. When you have forced arbitration, where you have to deal with forced actions by your employer on you, then you have forced arbitration, that's what they call a hat on a hat. You don't do a hat on a hat. It's doubly bad.

So, I appreciate your being here.

Today's Witnesses and countless others have been sexually harassed or violated by people who thought they could get away with

it because they were the boss and the boss gets whatever the boss wants.

Especially if they have forced arbitration, they know about it. Sometimes you don't because you don't get into the contract. You want the job. You don't get into the nitty-gritty and the details, and I understand that. You have no choice. It's an adhesion contract. You get the job, or you don't.

So, you take it, and you expect you're not going to have that kind of conduct anyway, so it's no big deal. Then you have the conduct. They know they have got the forced arbitration, and so they feel comfortable harassing you because they know that they've got this forced arbitration and they're going to come out the winner. They have got the deck is stacked in their favor.

Professor Gilles, the structure of forced arbitration allows perpetrators to operate this way. Could you walk through for me the difference between the traditional legal system—you might have already done this while I was under my hood—and then forced arbitration?

Ms. GILLES. I'm sorry, I didn't hear the question. Sorry.

Mr. COHEN. I said the primary difference between the traditional legal system, plaintiff—

Ms. GILLES. Oh, I see. Yeah, totally fine.

So, in a traditional legal system, I go to court and I file a complaint, which is immediately publicly docketed, meaning I can search for it. It is a public document that other people in my workplace can read and learn about the allegations that I've made against an attacker or perpetrator or the employer.

All subsequent briefings and other filings are publicly docketed. The hearing is before the court. The public is welcome. The press is welcome.

That kind of transparency, I think Eliza called it sunshine is the best disinfectant, I think that's what our legal system is based on. We don't have many closed-door judicial proceedings because we believe that the best way to get justice is to make sure that everybody is watching.

I think in this space, in particular, people have to be watching, employers have to know that there will be consequences if they don't deal with toxic corporate culture.

Mr. COHEN. In forced arbitration, it's not necessarily in the open. It's private.

Ms. GILLES. It's private.

Mr. COHEN. Kept under covers.

Ms. GILLES. Right. Yeah.

Mr. COHEN. Protects the violator.

Ms. GILLES. Yeah. No written decisions. The arbitrator is not able to offer relief beyond, to deal with structural or pervasive problems.

Mr. COHEN. How has this structure impacted the success or lack of success of claims brought by victims of sexual assault?

Ms. GILLES. Well, first, the structure almost guarantees that very few victims will ever come forward. I think we're seeing a few very, very brave women who are able to come forward and go through arbitration. Because you have to arbitrate individually and because you have to play by the rules that the employer has writ-

ten, lots of people feel like the game is rigged before they even start.

Mr. COHEN. Right.

Who picks the arbitrator? I mean, are the arbitrators generally folks that have a record of being favorable toward business employers?

Ms. GILLES. So, just to disaggregate the question a little bit, the employer predesignates the arbitration provider, say the American Association of Arbitration or JAMS or some other group, and then the entities may pick the arbitrator.

Here's the problem. If I'm an individual employee trying to arbitrate against my employer, I don't know who those arbitrators are. I get a list of names. I don't know who they are. Whereas the employer definitely knows who they are because they are repeat-players in the system.

Mr. COHEN. Somehow it works out, according to my information, that in the last 5 years only 1.9 percent of victims have won their arbitration cases against their employer.

Ms. GILLES. Yes.

Mr. COHEN. That's worse than Congress getting its subpoenas enforced against the Trump Administration. It's bad numbers.

It's just amazing to me that we even have to have this hearing, that it shouldn't be permitted in these types of cases, because the person uses their power to try to bring pressure to get sexually harassed or sexually assault, and then they get to have a system that's in their favor where it's a 50:1 shot to win. It's absurd.

Thank you all for testifying. I appreciate it.

I yield back the balance of my time.

Chair NADLER. The gentleman yields back.

Mr. Raskin.

Mr. RASKIN. Thank you very much, Mr. Chair.

In the United States, in the 2lst century, the power that you have as a private boss does not include the right to sexually harass or stalk or grope or molest or rape your female employees. A private corporation is not a royal monarchy. It's not a totalitarian government. It's not a mafia state.

A private corporation exists because it gets a charter from the State. It's governed by the Constitution of the United States and by Federal law, including title VII, which defines sexual harassment as sex discrimination, illegal sex discrimination.

These four citizens of quite breathtaking strength and courage have just ripped the mask off the continuing regime of sexual harassment and sexual assaults by male bosses in certain corporate workplaces who operate with impunity and brazen contempt for the Rule of law in our country.

This regime is made possible by the pervasive corporate nullification of a constitutional right, specifically the Seventh Amendment, which states that the right of trial by jury shall be preserved.

I'd like to ask our Witnesses whether you think you lost something by the destruction of the constitutional right of jury trial and what you think might have happened if you had gotten a jury trial. I wonder if you could just speak briefly, because I have one other thing I need to ask Ms. Newton.

So, Ms. Spottiswoode.

Ms. SPOTTISWOODE. I absolutely feel like I lost something: A jury of my peers, full discovery, production of Witnesses who weren't able to—who my employer didn't produce, and just having the Rules of Civil Procedure, which were designed to protect people like me.

Mr. RASKIN. What an excellent answer. Thank you.

Ms. SPOTTISWOODE. Thank you.

Mr. RASKIN. Ms. Newton, I'm going to come back to you in a second.

Ms. Henry.

Ms. HENRY. Yes. It angers me that somebody in this position, Mike Gentry, who never has to go in front of a jury and explain his actions and why he did what he did or even—I feel like I'm not getting—it's not fair to me as the victim.

So, yes, I would like to see someone like this have to go in front of a jury.

Mr. RASKIN. Do you think there's some wisdom in what the Framers of our Constitution put in our Constitution?

Ms. HENRY. Absolutely.

Mr. RASKIN. Thank you very much.

Ms. Dushku, what about you?

Ms. DUSHKU. Thank you.

Again, I think accountability and transparency. The people who harass and assault have to become accountable to the public, to others aside from just those who are involved in the case. Accountability, is the only thing that changes behavior.

Mr. RASKIN. Awesome. Thank you.

Now, Ms. Newton, you got glowing accolades and perfect evaluations from your boss, who was the General Counsel of Louis Vuitton. He wrote that you reflect the highest degree of honesty and ethics in all that you do and that you achieve excellent results and that you are a client's dream.

You were promoted to Vice President of Legal Affairs. Is that right?

Ms. NEWTON. Yes, that's correct.

Mr. RASKIN. Okay. Then you were sexually harassed in the most grotesque and terrifying ways. When you reported it, you suddenly became the victim of what you call a campaign of retaliation and intimidation by the company, which was insulated by the forced arbitration agreement and felt it could cover up everything.

Now, amazingly, if I'm reading your testimony right, you are being sued for their attorney fees. Let me just see if I can recap this. Tell me if I get it wrong but: They moved to compel arbitration. You defended against that based on the New York State law which said that those forced arbitration agreements are no good in New York law. You won at the District court level, but then the Appeals court essentially changed the result by saying it's not retroactive to cases of sexual harassment that took place before the State legislature acted.

Now, they're coming after you for attorney's fees, this $330 billion company, with $60 billion in annual profits, whose employee subjected you to really vicious sexual harassment and assault. They want you to pay them how much money?

Ms. NEWTON. I don't know the exact amount, but I presume it's about half a million dollars.

Mr. RASKIN. Hundreds of thousands of dollars they're looking for.

Amazingly, along the way, Louis Vuitton tried to displace responsibility that they have as a corporation operating in New York State, in the United States, by saying that there was a difference between American and French culture, which is a great insult to the French, especially because your harasser was American, right?

Ms. NEWTON. Yes. When I worked in France, I was never sexually harassed or assaulted in France.

Mr. RASKIN. Well, they are just adding insult to injury at every turn here. I would hope that they're not stating that it is French culture, because I know sexual harassment is against the law in France as well.

I want to thank Mr. Gaetz for supporting the legislation against forced arbitration. This is not a partisan problem. The divide here is between those who think that corporate contracts can override the Constitution of the United States and Federal law and those of us who want to stand up for every citizen's right to go to work in dignity, free from assault and harassment.

So, I support this legislation very strongly.

I want to thank these remarkable Witnesses for their courage. It's amazing to me that two of you are lawyers, which I think just reflects the extent of this problem of forced arbitration agreements stuck into these contracts. If anybody might have caught it and been able to stop it, it would have been lawyers. You were not able to, and you guys speak for hundreds of thousands or millions of women and men, indeed, across the country.

I yield back.

Chair NADLER. The gentleman yields back.

Ms. Jayapal.

Ms. JAYAPAL. Thank you, Mr. Chair.

I want to just start by saying thank you so much to Ms. Spottiswoode, Ms. Newton, and Ms. Henry for your testimony and for giving courage to millions of women across this country. I know this isn't easy, and I'm sorry that this is what you have to go through.

I am a very proud co-lead of this bill, the bipartisan, bicameral legislation, the Ending Forced Arbitration for Sexual Assault and Sexual Harassment Act, which would preserve the right for sexual assault and harassment survivors to choose how they seek justice. So, you have my deepest, deepest appreciation.

Ms. Spottiswoode, I'm very grateful for your testimony, and I'm going to direct my questions at you. I am sorry to have to get into the details of this in the way that I am going to, but I think it's important for the country to hear your voice and to see your courage and to see what you had to deal with.

When Chishti sent you an email about him fantasizing about raping and strangling you, how did you react and how did you feel about your safety?

Ms. SPOTTISWOODE. I was appalled. I felt very unsafe. I was really afraid for my life and my well-being. I didn't think there was anyone I could go to because I had already spoken to the head of my office and asked other people on work trips to keep an eye out

for me. I just knew that nobody was going to intervene. Yeah, so I felt very alone.

Ms. JAYAPAL. That event occurred before the company trip to Brazil, correct?

Ms. SPOTTISWOODE. Which event? Sorry.

Ms. JAYAPAL. When you got the email—

Ms. SPOTTISWOODE. Oh, yes, correct.

Ms. JAYAPAL. —that occurred before your company trip to Brazil. You was responsible for the Brazil account, so it's fair to say that you had to go to Brazil, correct?

Ms. SPOTTISWOODE. I was the head data analyst on the accounts. So, yes, I had to go.

Ms. JAYAPAL. That was your job.

Ms. SPOTTISWOODE. Yes.

Ms. JAYAPAL. That was your job.

Do you believe that Chishti planned in advance to strangle, beat, and rape you in Brazil?

Ms. SPOTTISWOODE. I try not to think about what he was thinking. Yes, I would imagine so.

Ms. JAYAPAL. When you were on the Brazil trip, after you told Chishti that you were feeling unwell and heading to your room, what was your reaction when he said he was, quote, "coming to your room"?

Ms. SPOTTISWOODE. I just felt like I had run out of options. I thought I was trying to mitigate harm and not make him any angrier. If he was going to be showing up at my door angry because I hadn't responded, that seemed worse than—yeah, so I wanted to get—I wanted to not get hurt.

Ms. JAYAPAL. You believed that he would have forced his way into your room?

Ms. SPOTTISWOODE. I didn't know what would happen.

Ms. JAYAPAL. You felt that you would face even greater harm or injury if you had not gone there.

Ms. SPOTTISWOODE. Definitely.

Ms. JAYAPAL. It sounds like you were in survival mode at this point.

Were you afraid that Chishti might try to kill you, especially if you continued to ignore or resist him?

Ms. SPOTTISWOODE. I was. I wouldn't necessarily have put it that way at the time, but I was having nightmares, even before my experience in Brazil, and, yeah, panic attacks.

I think a lot of us are very good at compartmentalizing, because I wanted to do my job, I wanted to be really good at my job. So, I tried to put it away. Those things kind of rise to the surface from, yeah, in your subconscious.

So, yeah, I was very afraid.

Ms. JAYAPAL. The attack occurred overseas. Did you feel comfortable going to the Brazilian police? Would the law even had allowed you to seek help from American police?

Ms. SPOTTISWOODE. I did not feel comfortable going to the Brazilian police. It's not common for people to speak English there, and I was afraid of what would happen if I went to that authority there.

When I came back to the U.S. and consulted an attorney, they said that they thought that it was unlikely that criminal proceedings could be brought because the events had occurred abroad.

So, yeah, so I didn't really consider that an option.

Ms. JAYAPAL. Ms. Spottiswoode, your abuser went to great lengths to remove you from the country and away from your friends and family before forcing himself on you, and he repeatedly asked you for sex and put you in a position where you had to speak up to get him to stop.

Did you feel that he—did you feel that you had to apologize for repeatedly turning him down? How did his repeated advances and anger at your rejection affect your behavior?

Ms. SPOTTISWOODE. Absolutely. So, yeah, I think anyone who has experienced something like this knows that you don't just say the same thing every time someone asks you like this, because you try to say something else and convince them another way.

I didn't want to just repeatedly reject him in a way that would make him really angry, so I would come up with other reasons, like I would tell him that I had work and couldn't meet up or basically would just say anything else to get out of the situation.

I think women who are having these kinds of experiences just never think that anyone is going to be looking at a transcript and try to figure out what happened, so they're just doing whatever they can to try to get through an experience without getting hurt.

Ms. JAYAPAL. To survive.

Ms. Spottiswoode, nobody should have to go through this. I'm so grateful to you for your courage, for your bravery and your testimony.

Forced arbitration for sexual assault and harassment is a lose-lose scenario, and we are going to do everything we can to pass this bill and to protect women, like all three of you and millions around the country who are grateful to you today for your courage.

Thank you so much.

I yield back, Mr. Chair.

Ms. SPOTTISWOODE. Thank you so much.

Chair NADLER. The gentlelady yields back.

Ms. Demings.

Ms. DEMINGS. Thank you so much, Mr. Chair, and thank you to our Witnesses for being here today.

As someone who worked in the criminal justice system, I think the testimony that I have heard today, what has happened to you, is appalling. Our job is to make sure that it doesn't happen to other women.

I don't know if there's anyone who believes that forced arbitration should be okay in cases of sexual harassment and sexual assault.

As I listened to each of you testify today, there just seems like there is this recurring theme, that it's almost a culture. It's an incident that occurs. Okay. Let's deal with—I wish this was an isolated incident, but it seems like it's a culture where powerful people in powerful places believe that everything and everyone is on the table, and through forced arbitration, they almost in advance get the victim's permission.

Ms. Gilles, if you could speak a little bit about the culture. That's what really bothers me about this, the culture of it, because when something bad becomes so acceptable. If you could, Ms. Gilles, just talk about the culture.

Ms. Spottiswoode, you talked about how you were victimized in front of your coworkers. Like the culture, it was okay to let everybody see, because that's what happens here. To say that it's okay to just settle for forced arbitration, I think it's appalling.

So, Ms. Gilles, okay, please.

Ms. GILLES. I think you've hit it right on the head. I think forced arbitration allows employers to maintain a toxic culture. People are getting promoted. Ms. Newton tells a story about people getting promoted, her attacker getting promoted.

These sorts of things, people grabbing butts in front of people, this kind of thing—

Ms. DEMINGS. A culture.

Ms. GILLES. —is a culture.

Let's be clear, there's only one way to break down a toxic culture, and that's sunlight. We have to make it transparent what's happening. We have to make companies realize that there is accountability and possibly liability if they fail to fix the culture.

We can appeal to companies in all sorts of ways, and I know you all have tried to do this. It's not in their economic best interest to allow these things to go on. They lose money when women are not productive, when women are afraid for their personal safety. They lose time and productivity when men are just doing these crazy things.

We can appeal to that, and it does not change the culture. What changes the culture is accountability. That's why we have courts, not arbitration, and that's why we have courts, and they have done a very good job. Not good enough. These things are still happening.

I think we've gone back. When you think about it—and I'm old enough to know this—we've gone back to the 1980s in the way that corporate culture is allowed to just be bros, just people doing whatever they want.

Ms. DEMINGS. Ms. Spottiswoode, as we're talking about the culture—and I just so appreciate all of you for being here today to shine a light on this problem in our society.

Tell me about, I don't necessarily want to ask you how you felt, but to do it in front of others just like it was expected, it was okay. Could you talk a little bit about that moment, please?

Ms. SPOTTISWOODE. Of course, it was humiliating. I felt like an object and, yeah, you never want your coworkers to be thinking about your butt or thinking about you as sexual in any way, and that's what this does, is it forces you to be a sexual object in your workplace. It's someone else making that decision for you, and you never get to take that back from them.

Ms. DEMINGS. Thank you so much.

Finally, Ms. Henry, you talked about during your time and you were so glad to—all of you, for the opportunity in your dream jobs—but you were told it was just HR stuff, right, it was just HR stuff when you were signing the papers. We know that closed arbitration is often buried in the fine print.

If it's such a good thing, such a great option, why do you believe it's buried in the fine print and it was just told to you it was just HR stuff?

Ms. HENRY. I feel because they don't want you to know. They don't want anybody, I guess, to be held accountable for such actions. It's just easier to sweep it under the rug and let it go than try to make—nobody in the community knows. Customers coming in daily doesn't know what's happening behind the scenes. It's not fair, again, it's not fair to the victims. I had no idea what even arbitration was until I came here.

Ms. DEMINGS. Thank you again. Thank you all so very much for your testimony today and your bravery. Thank you.

Mr. Chair, I yield back.

Chair NADLER. The gentlelady yields back.

Ms. Fischbach.

Ms. FISCHBACH. Thank you, Mr. Chair. I appreciate the opportunity.

I just want to direct some comments to Ms. Perry and Ms. St. John. What's happened to so many women and others in the workplace is terrible, but I really am concerned that by involving the government in these contracts between adults in the area of sexual harassment and assault, we're opening a door for more government involvement in other areas of contracts.

I think, Ms. Perry, in your opening you pointed out some of the things that are going on already. There's over a dozen bills right now in the House which have government intervene in contracts.

Clearly, this bill is not being considered in a vacuum. There's a lot going on with this. There's a concerted effort in Washington, DC, to decide the contents of contracts between adults.

This is not what the competent and responsible adults of my district want, because they accept the fact that they're signing a contract.

Ms. Perry, do you think there's a danger in passing small, targeted bills like this one in opening the floodgates to government intervention in contracts? If you could speak to that?

Ms. PARSHALL PERRY. I absolutely do. In fact, the reason that I've mentioned confidentiality and NDA agreements, needing to make clear that if this bill goes forward, it needs a wider discussing things, like the inapplicability of NDAs.

That would be a protection, but what we've done is we've already cracked a hole in the dam to eviscerate whole cloth the FAA. I don't think there's anyone on this panel, other than potentially Ms. St. John and myself, who wants the FAA to stick around. That's absolutely not even considering a hundred years nearly of jurisprudence on the FAA.

What the Supreme Court has time and again reinforced—in fact, they just granted cert in yet another case. They will take up arbitration again for the third time in 3 straight years.

I do have problems when we come in and we make attempts to slice away certain provisions of longstanding Federal law because it does open the door to more government intervention, and that does bother me.

Ms. FISCHBACH. Ms. Perry—and maybe, Ms. St. John, if you have anything to add, please go ahead—but are any of the States addressing this? Or is this just an issue at the Federal level?

Ms. PARSHALL PERRY. There are actually five States that have already passed legislation stating that in certain types of employment discrimination claims NDAs, confidentiality agreements, cannot apply.

So, at the State levels we are actually seeing an increase in legislation designed to be protective, and rightly so. These are contracts, like any other contract, and there is absolutely nothing in Supreme Court history that says these particular contracts are coerced. In fact, the court has held universally exactly the opposite.

Ms. FISCHBACH. Well, and I would argue that you have—you sign it. It is not—even though we use that it's forced arbitration, as people are saying. It's not really. You have signed something that you have agreed to it.

Just kind of a little bit, I guess, of a hypothetical. Under current law, what prevents someone from suing, even if there's an arbitration agreement in there?

I understand that it could be thrown out, that there's issues like that. I know that part of the issue is bringing things into the light, and even a case that was dismissed would certainly bring that into the light, and there isn't anything that would prevent them from doing that.

Ms. PARSHALL PERRY. Multiple Federal Circuits and the Supreme Court have vacated remedies, awards, for material breach, for impartiality of arbitrators, for malfeasance, for imbalance of power, for adhesion. They will not enforce a contract that is deemed to be adhesive.

So, when Congressman Gaetz represented that these were contracts of adhesion, contracts of adhesion are not legally enforceable.

Ms. FISCHBACH. Thank you very much.

I know there is one example that I've heard over time, that even though there was an arbitration agreement in the contract, they sued the vendor separately and were very successful in that.

Is there anything else, Ms. Perry, that you would like to add that maybe we've missed, or you've heard that you would like to add something to?

Ms. PARSHALL PERRY. Well, we can quote battling statistics all day. The fact of the matter is we have a 40 percent increase in Federal filings. Our dockets are crowded. Justice delayed, particularly for women with these claims, is justice denied.

That right to a trial guaranteed by the Seventh Amendment has been interpreted by the Supreme Court to be as good in arbitration as through litigation with certain protections in place.

Ms. FISCHBACH. Thank you very much. I appreciate it.

Anything, Ms. St. John, if you have anything you would like to add?

Ms. ST. JOHN. I will just add that there have been examples where workers have asked for these clauses to be taken out of contracts and they have been successful. So, the idea that it is really forced I don't think is borne out by the facts.

Ms. FISCHBACH. All right. Thank you very much.

Mr. Chair, I yield back.

Chair NADLER. The gentlelady yields back.

Ms. Scanlon.

Ms. SCANLON. Thank you, Chair Nadler.

I want to thank all our Witnesses for testifying before us today, particularly, obviously, the survivors. I applaud your courage and your openness in discussing this deeply emotional and painful subject.

Like a majority of women in the workplace, I've experienced unwelcome sexual harassment and physical contact. While less horrific than the experiences you related today, I want to acknowledge how pervasive and corrosive this issue is and thank you for your courage again and your resolution in sharing your experiences to really shine a light on what we're actually talking about here, not some dry contractual provisions.

I would like to discuss with Professor Gilles a couple different topics, the nuts and bolts of why forced arbitration doesn't favor employees, how it is different, what we're seeing today than what Congress intended, and why it's a problem that the Supreme Court has so grossly expanded the Federal Arbitration Act.

So, first, the nuts and bolts of why forced arbitration doesn't favor employees. Several of our colleagues have mentioned litigation is very expensive. So, is arbitration, isn't it? These employees have to get a lawyer. Sometimes the arbitration is in a venue that they're not familiar with.

Can you speak a little bit to the costs of arbitration?

Ms. GILLES. The costs are high. When employees actually decide that they want to go into arbitration, they're doing it alone. So, they're not doing it as a collective. So, there's no pass the hat that we would see in a public court system because the arbitration clause prevents class and collective litigation. So, right off the bat, that's a lot for an employee.

When you think about where these claims are coming from, they're often sounding in sexual harassment and hostile work environment. Proving that is a pretty huge lift. I mean, lawyers have a very difficult time. We have some lawyers in the gallery who do this.

These are really difficult cases. I know there has been a lot said disparagingly about it's just going to be lots of plaintiff's lawyers getting rich. Plaintiff's lawyers don't get rich off employment discrimination cases because they're really expensive, they're expert heavy, and they require a lot of evidence. The same is going to be true in a successful arbitration.

Ms. SCANLON. Am I correct that companies that include these forced arbitration clauses in the fine print in nonnegotiable contracts are actually saving money, right? They don't include these clauses because it's the goodness of their hearts. It's a cost-saving ploy.

Ms. GILLES. It sure is. I just want to point out that Ms. St. John said earlier that having these clauses leaves money for companies to add to benefits of employees. I tried not to laugh out loud because that is not what's happening. It's not like my 401(k) plan is getting better matched because my employer has a forced arbitration clause.

They're keeping this money. They're saving all the money that they would spend on litigation or spend it on just making their work culture safer for women, and they're just using that to line the pockets of their shareholders.

Ms. SCANLON. So, we have seen a little bit. When the forced arbitration Act was originally passed in 1925, it was designed, as I understand it, to be an option for commercial entities of roughly equal bargaining power. In 1967, the Supreme Court even held that it was designed to include protections for captive customers and employees who don't have equal bargaining power and are faced with a "take it or leave it" contract.

What we have seen over time is that the Supreme Court has expanded the FAA beyond Congress' original intent, so that it does apply to everyday consumer and employment contracts. This seems like it should be an opportunity for Congress to intervene and say that's not what we intended; correct the judicial activism we've seen from the conservative Supreme Court.

Can you comment?

Ms. GILLES. You have been urged to by the late Justice Ginsberg. Twice she begged. She wrote dissents where she said—and she read them from the bench really signaling her displeasure. She said this has gotten to a tipping point and the only thing that is going to change this is congressional action.

I think she was right. So, I think the only thing that can do this is some change to Federal law.

Ms. SCANLON. It's not just progressives who are concerned about this expansion of the Federal Arbitration Act, right? We've heard from Attorney Generals from 50 States, DC, and territories saying this is a problem. Can you explain that?

Ms. GILLES. Well, so the AGs are very worried because they're getting tons of complaints, because these women can't bring actions on their own. They can't bring private litigation.

So, where do you turn? You turn to the public enforcer, because you don't want to go into arbitration and have your claim decided by some arbitrator, but never to be heard from again. You want to make change in your workplace forever more. So, you go to the public enforcer.

The problem is, especially in recent years, post-COVID, they don't have the staff for it. They don't have the resources. So, we can't rely on a public enforcer to do the work that Congress intended private individuals to do when they enacted title VII.

Ms. SCANLON. Thank you.

Ms. GILLES. Thank you.

Ms. SCANLON. I yield back.

Ms. FISCHBACH. Mr. Chair?

Chair NADLER. The gentlelady yields back.

Mr. McClintock.

Ms. FISCHBACH. Mr. Chair, I just really quickly wanted to ask, given that one of the Witnesses' names was used very directly, would they have the opportunity to respond?

Chair NADLER. Yeah, for 30 seconds.

Ms. FISCHBACH. It was Ms. St. John's whose name was referred to.

Chair NADLER. Okay.

Ms. FISCHBACH. Thank you.

Ms. ST. JOHN. Thank you.

When a business saves money in one area, it's going to invest the money somewhere else. I think it's perfectly reasonable to think that if the benefits are abbreviated for employees in one area, they're going to invest in another area on behalf of those employees.

Thank you.

Chair NADLER. Mr. McClintock.

Mr. MCCLINTOCK. Thank you, Mr. Chair.

First, to be clear, rape, sexual assault are serious, serious crimes, punishable by serious, serious penalties.

Is there anything in an arbitration agreement that prevents the perpetrator from being charged and prosecuted under these criminal laws, Ms. Perry?

Ms. PARSHALL PERRY. None whatsoever. They will always have the right of criminal redress in every one of these claims.

Mr. MCCLINTOCK. Would it ever be possible under our system of justice to write an arbitration clause that would forestall the ability of a prosecutor to bring charges for these serious crimes?

Ms. PARSHALL PERRY. No. It would be legally unenforceable.

Mr. MCCLINTOCK. Ms. St. John, do you agree?

Ms. ST. JOHN. Yes, absolutely.

Mr. MCCLINTOCK. The constitutional argument we hear is that the Seventh Amendment guarantees the right of a jury trial in common lawsuits over $20 dollars and that arbitration clauses violate this guarantee. The Constitution also recognizes the sanctity of contracts.

The fact of the matter is the First amendment guarantees us the freedom of speech, and yet nondisclosure agreements are often common in contracts as well.

I think every contract ultimately constrains and limits the rights of both parties. That's why you have a contract. One party gives up money; the other party gives up time.

Every condition of a contract requires either one or both of the parties to give up individual rights to reach a mutually agreeable outcome. If the net result of the agreement is not beneficial to either party, then the agreement simply doesn't take place.

This business of forced arbitration, well, force requires a gun. I believe we all can agree a gun is a bad thing to be brought into a voluntary agreement between two parties.

The fact of the matter is, it seems to me that once we start limiting the freedom of parties to contract with each other, we lose that mutual negotiation that produces an agreement that both sides benefit from.

What am I missing here?

Ms. PARSHALL PERRY. From my part, nothing.

Mr. MCCLINTOCK. Ms. St. John?

Ms. ST. JOHN. I agree with that. These are voluntary agreements.

Mr. MCCLINTOCK. Let me ask you this. If arbitration agreements are such a bad thing, why would we exempt unions from the provisions of this bill? Do either of you have an explanation for that?

Neither do I.

It seems to me, for my part, thinking as an employee, I would personally prefer an arbitration clause because, frankly, I can't afford an attorney. I can't afford the enormous costs of going to trial. I wouldn't want to wait years and years with something like that hanging over my head.

Now, that's just me. I make that choice when I approach an employer. The employer might prefer the same thing. He might not. If he doesn't, I might ask for something more or simply say the terms aren't acceptable to me, I will go elsewhere. If the employer says that he agrees, well, then, we have an agreement that's mutually beneficial.

I wonder, what gives Members of Congress the right to tell us that we can't enter such an agreement?

Ms. PARSHALL PERRY. I think you have stated the issue quite eloquently. This is a matter of State and common law. We have been overseeing contracts for years between private parties. The more we get involved at the Federal level, the more problematic the trend can become.

Again, these are not contracts of adhesion. If they are, they can be challenged in court. The outsized power, I believe, is most fully exercised during litigation, where a giant corporation, like LVMH, has multiple millions of dollars available for litigation—

Mr. MCCLINTOCK. As an employee, that would scare the hell out of me—

Ms. PARSHALL PERRY. It would me as well.

Mr. MCCLINTOCK. —going against their legal department with my meager resources.

Ms. PARSHALL PERRY. Absolutely.

Mr. MCCLINTOCK. There's a provision in there that provides for an opt-out once the dispute is established. What effect does that have on the parties?

Ms. PARSHALL PERRY. I would say, based on prevailing rhetoric, it is probably going to disincentivize someone to pursue arbitration. What we're hearing is that the only solution, the best solution is going to court.

At that point, the balance of power has changed most significantly. I find that problematic because there are different incentives, different driving factors. One with a low value claim will definitely want to take it to court. A high-volume claim would want to arbitrate.

There are so many intersecting interests at that point and so many disparities among the two individuals after a sexual assault or sexual harassment claim have been filed that it makes arbitration impractical, if not impossible.

Mr. MCCLINTOCK. Thank you.

Chair NADLER. The gentleman yields back.

Ms. Garcia.

Ms. GARCIA. Thank you, Mr. Chair.

I must say that, first, I want to thank the Witnesses for testifying today. I know it takes an incredible amount of courage to share such painful stories and to have to relive the words and bring back some of the memories of every circumstance that you have described. I think a couple of you brought a little tear in my eye right here because it's just so painful, and I can see that.

As a former judge, I have a very deeply held belief that everybody should have their day in court. Everybody should have their day in court. That is just the essence of justice for all in our country.

So, we're glad to be able to hear from you today on this bill so that we can act, as others have said, and do justice for all you.

I want to start a little bit with where Ms. Demings left off with Ms. Henry. When she was talking about the culture, it's interesting to me to see that all four of you are from very, very different sectors, different levels of professional work that you do, different environments, but yet it's the same culture, and it's the same kind of situation that happens to women across America.

I must admit that even I, even as a judge, was sexually harassed at the workplace. So, it happens to all of us. I know it's hard to relive the moments.

Ms. Henry, can you just tell me how you really felt? I mean, I know I remember how I felt. How did you feel when your employer even went to your home? Did you fear for your life?

Ms. HENRY. I really didn't know what to anticipate from the whole thing. It got to the point where it was out of control. Yes, I did fear there could be more. As the angrier he became, the more I turned him down and asked him to stop, I was worried for my safety.

I was also—I'm sorry.

Ms. GARCIA. Take your time. Take your time.

Ms. HENRY. I felt ashamed. I felt I'm a working woman, I've been in the workforce for a very long time, I didn't deserve this. I didn't deserve to be treated this way. I did feel like I was a strong woman. When someone treats you that way, they beat you down, and you feel like you have nobody to talk to.

So, I was afraid to even say anything, but it got to the point where maybe I was fearing. That's why I had finally tried to get some help.

Ms. GARCIA. Right.

How about you, Ms. Newton, can you share it?

Ms. NEWTON. I had similar feelings, yes, about how I felt. I was just demeaned. Sorry, I'm having trouble with my mask. I felt extremely demeaned and humiliated. I felt that I was being made an example of, that I was being used as a poster child of: Don't come to us with this type of thing, otherwise we will name you in an email by the CEO. We will sit you in the side and sit the harasser up front.

Similar to what Lora said, I felt very isolated. I think I have even written to friends: I feel beaten down. I have said that.

Ms. GARCIA. Thank you.

What about you, Ms. Dushku? It's surprising that even in your industry that people watched what your predator was doing and nobody did anything.

Ms. DUSHKU. Yes. I felt unprotected, and I felt angry. I felt confused, as all the other women have described. It's like a suffocating feeling, because just that, I mean, as human beings, to have our voice and be able to speak out when someone disrespects you, and as a grown woman, as an adult, as a human being, demeaning, suffocating. I just came home every night and could tell my husband.

It was, also, just so shocking that in this day and age, as you said, and as so many have spoken about, the culture, that the culture was accepting of that. While I don't blame some of the individuals because they, too, reported to their bosses and didn't want to lose their jobs, it starts from the head. When you have someone who's in such a high position of power and they're the boss, who confronts the boss if they don't expect, in some sense, that they could lose their job.

So, when these arbitration clauses protect the bosses, there's no justice for any of the employees in the culture.

Ms. GARCIA. Thank you.

I know we've heard a lot from the last Witness, and I know that you've talked about fear.

I think you said earlier that you didn't go to the police because you were in Brazil, right?

Ms. SPOTTISWOODE. Yes, that's right.

Ms. GARCIA. That you have to have a level of trust to be able to sit down and talk to law enforcement about this. I know that it is true for many rape victims.

Ms. SPOTTISWOODE. Absolutely. You need to speak the same language as them. So, there were a lot of reasons why I didn't go to the police.

Ms. GARCIA. Well, thank you.

Again, I see that my time is running short, but I just wanted to ask—well, I wanted to ask all of you, but my time is short, so I will start with you.

When did you—

Ms. FISCHBACH. I think she's gone over.

Chair NADLER. Yeah.

Ms. GARCIA. I'm sorry?

Chair NADLER. Yes, the gentlelady's time expired.

Ms. GARCIA. My time is up. I yield back.

Chair NADLER. Well, a minute and 17 seconds ago.

Mr. Tiffany.

Mr. TIFFANY. Thank you. Thank you, Mr. Chair.

Mr. Chair, I just arrived at this hearing. Is it correct that the collective bargaining provision excluding unions has been struck from this bill?

Chair NADLER. Yes.

Mr. TIFFANY. So, that provision in the bill in regard to collective bargaining agreements has been struck?

Chair NADLER. Yeah. It's going to be an amendment in the nature of a substitute doing that.

Mr. TIFFANY. Okay. Thank you very much, Mr. Chair.

First, before we start here, I want to thank all the Witnesses for being here today in what is I'm sure not an easy thing, to come before a Committee of the United States Congress. Thank you for attending today and giving your testimony.

Ms. Perry, Representative McClintock posed a question to you in regard to arbitration, and I got the impression that there was more that could be added.

Do you wish to add on to your testimony that you were giving in regard to Mr. McClintock's question in regard to, I think he used the phrase "arbitration impossible"?

Ms. PARSHALL PERRY. Ex post, after an offense has occurred, the interest of the parties has changed significantly. One is put in a status of being a victim and one is a perpetrator.

At that point, making arbitration a viable opportunity for the individual claimant is next to impossible. Getting to that agreement itself is going to be incentivized differently, particularly so by employers who, at that point, will most certainly want to keep it out of the public eye and, depending on the value of the claim, will figure it's faster and cheaper to go through arbitration in the first place.

So, an ex post provision on something like this is unlikely to have any meaningful effect.

Mr. TIFFANY. Do I hear in this process that you're talking about this actually could put the employer in a stronger position?

Ms. PARSHALL PERRY. Yes, it could. Absolutely.

Mr. TIFFANY. Significantly stronger?

Ms. PARSHALL PERRY. Yes.

Mr. TIFFANY. Would this process be better if the process was allowed to be public record, so everyone was on notice of the offenses, instead of striking arbitration all together?

Ms. PARSHALL PERRY. That's a very accurate assessment of my position on this, precisely. If we are going to get involved in longstanding precedent and Federal law that has been routinely upheld, let's do it to the narrowest extent possible and make sure that the entire premise for today's hearing, which is shielding bad actors, is removed altogether.

Mr. TIFFANY. Thank you.

I will yield back, Mr. Chair.

Chair NADLER. The gentleman yields back.

Ms. McBath?

Ms. MCBATH. Thank you so much, Chair Nadler.

Good afternoon to all our Witnesses today. Thank you so very much for being here, and just thank you for sharing your experiences surviving sexual violence and harassment in the workplace. I have read each of your testimonies, and I know this is not at all easy for any of you. So, I praise you all for your courage and your strength.

I also want to thank our experts who are here today, as you continue just to shine more light on these issues.

I know that one of the reasons it's so consequential that you're here before us, sharing your experiences, is because some of you are subject to arbitration clauses that were forced, really, upon you when you entered employment. I can only imagine that, when you first began to work for your company, you were filled with the excitement and all the eagerness, you know, for your new journey that lay before you. You could not have imagined, I'm sure, that you were also signing up to be silenced and suppressed at the same time.

No one should ever have to experience violence or harassment when they're just simply trying to put food on their family's table or doing the work that they love. If they are so cruelly subjected to that, then they should not then be forced to arbitrate their claims and coerced into silence.

The secretive and the confidential nature of arbitration, it always just kind of allows companies to prioritize protecting their own image instead of seeking justice and really seeking truth. This has allowed, as we're hearing today, countless stories of women and men's trauma that's been hushed and hidden.

I just want to say, but because of your strength, those of you that are before us today, in particular, all of the women that are sharing your stories, I hope that future survivors will not have to suffer in silence anymore. I'm so grateful for your being here today.

My questions are really actually for each of the survivors. I preface them by saying, please take your time, the time that you need, when answering them, but also, I'd really like to be able to hear from all of you.

So, if you can, just very succinctly how have your experiences enduring this horrific sexual violence and also arbitration and retaliation affected your physical and your mental health?

Ms. Newton, I'd like to start with you.

Ms. NEWTON. Thank you, Congresswoman.

For me, my physical health has been jeopardized constantly. I was hospitalized twice last year. I have been diagnosed with PTSD. I have now a team of medical advisors because of all the consequences I've suffered in having to deal with the amount of stress that this causes me, and I had to take medical leave earlier this year.

So, it's a constant source of damage to my emotional and mental and physical health as well.

Ms. MCBATH. Anyone else like to respond?

Ms. DUSHKU. I mean, I can speak to my experience just as far as I was coming into a time in my life where I was getting married; I had my first child. I just had my second child 3 months ago. Every single time I have to relive this experience and retell this experience, the retraumatization is very real.

My situation was not—there was not a physical assault, but the words leave me, to this day, with a feeling of hands on my throat. Like, you just feel like you can't breathe. It affects your relationships with your colleagues and your family. It's so isolating. The isolation is just maybe one of the most horrendous parts, because I think we heal through telling our story, we heal through connecting with others, and the inability to do that just leaves you in this isolated, lonely place.

The shame that people have talked about is very real. You're re-shamed. You're re-shamed by your harassers through the process. I was horribly re-shamed while in the process leading up to this by my employer and my harassers.

I want to leave the others time as well, but that's just—those are some examples.

Ms. MCBATH. Anyone else like to respond?

If not, my time is up.

Ms. SPOTTISWOODE. Just to respond quickly, I recovered very quickly from my physical injuries, but I have PTSD, and that affects my life every day.

In addition, the stress of being in ongoing litigation and knowing that, every time I talk to my parents, Chishti is an ongoing presence in our lives and costing us money and invading our time to-

gether. My relationships with my parents will never be the same. My relationships with other people—my trust is just shattered.

Ms. MCBATH. Thank you so, so very much, each of you.

My time is up.

Chair NADLER. The gentlelady yields back.

Ms. Spartz?

Ms. SPARTZ. Thank you, Mr. Chair.

I have a little bit different question. Maybe, Ms. Perry, I'll ask you. It's unfortunate and it's sad that things like that happen. It's a lot of brave women willing to step up and have this conversation. So, I think it's good to have conversation.

There are also situations where some women maybe might feel uncomfortable to go in the court of law and get an attorney. It's much longer process, much more public process. I can see some women would have a valid concern, if that arbitration process is not available, they might actually just either live with it or leave their job.

If we look at this bill—with very broad definitions, too. It could have some entrepreneurship with some attorneys. In all those cases I've seen—and nothing against lawyers, but a lot of cases I've seen, they are the only one ended up with the money, not the actually victims. It's also, companies wouldn't even offer that option, which actually could be a valuable option for some of the women.

So, my question would be for you: If you would look at arbitration process—and I am not an attorney, so I wanted to see, is there is something within the process that could be improved?

Also, if the arbitration company is not doing proper due diligence, what is the recourse? What recourse is available? Or maybe the recourse could be available from the standpoint if someone's really doing something wrong and is not really taking seriously the case or biased or is not doing a good job.

So, if you can just maybe list few of the things that maybe could be improved within the process.

Ms. PARSHALL PERRY. There are a number of remedies that are available to claimants here. One of them is a claim for material breach of the arbitration clause itself.

One of them is vacation of an arbitration award, when it's determined that the parties were in outsized influences of power, that contain terms that solely benefit an employer. The Fourth Circuit ruled that in a decision from 1999. It's been so held by the other Federal Circuits as well.

The FAA guarantees neutrality in the arbitrators, and if there is any evidence of impartiality, that, too, can be the vacation of an award. There are EEOC claims that can be brought simultaneously. The Supreme Court has universally held, we want to make sure individuals don't just go through arbitration, but they go through the EEOC, because we want to make sure that these claims are a Federal recordation of what's transpiring behind closed doors.

So, there are multiple avenues here that can still be pursued. There is nothing in the FAA that prevents individuals from going to appropriate law enforcement officers, filing an EEOC claim, bringing a claim for adhesive contracts, contracts that our outweighed/outbalanced.

Ms. SPARTZ. Uh-huh.

Ms. PARSHALL PERRY. So, there are options through the FAA that allow particular claimants like those here.

I want to stress, this is a uniquely female issue. The EEOC statistics from last year, only 16 percent of 6,500 claimants were men. This is a culture specifically, relatedly dealing with female harassment. Women bear the brunt of sexual harassment.

I was a plaintiff's lawyer representing women in claims against major corporations. I've also seen how outgunned they are when litigation is pursued as an option. Universally, they end up settling because they cannot carry the financial burden.

So, there are safeguards in place.

Chair NADLER. Would the gentlelady yield?

Ms. SPARTZ. Just a second.

If you would look at everything, what is there, if there is something that could be improved in the process—because you've been on that side, and, as I say, I'm not an attorney. I am trying to understand because it's a point of—if there is something that could be improved within legal framework that it is a system, as you know, give that option, but still have the transparency that's needed.

You know, if there are some things that you could State a few things, and then I'll yield to the—

Ms. PARSHALL PERRY. Yes. Confidentiality and the use of nondisclosure agreements. If we're going to carve out these exceptions for sexual harassment and sexual abuse claims, we need to copy them alongside with NDA and confidentiality provisions so that all the discussions we're having about transparency and perpetuation of bad actors can be solved.

If that is truly the issue, let's disclose everything. Let's modify the FAA only to the extent that bad actors in these particular claims can ultimately be brought to the light.

Ms. SPARTZ. Okay. Thank you.

I yield to Chair.

Chair NADLER. I thank the gentlelady for yielding.

I just wanted to point out that we have nothing against arbitration. If the woman in the case chooses arbitration, that's her choice. The point of the bill is that she should have that choice, rather than be bound by an arbitration clause that was—

Ms. SPARTZ. Yeah, I reclaim my time. I'm just saying that employers will have no incentive then to propose this in agreements. They will just say, completely take it out. Because there is no reason for them even to do that. That's my concern if the legislation passes. They don't have to propose it at all in these cases.

Chair NADLER. If the gentlelady would yield?

Ms. SPARTZ. My time has expired.

Mr. ISSA. I'd ask unanimous consent that the gentlelady be given 1 additional minute.

Chair NADLER Without objection. I thank the gentleman, and I thank the gentlelady.

Yeah, but the point is, she should be able to choose arbitration. If someone has a dispute with a company and she and the company are both for arbitration, fine. The point of the bill is that, very often, in employment contracts, which you have to sign if you want

to get a job, there's a mandatory arbitration clause, which means you have no choice. That's what we want to solve here.

Ms. SPARTZ. Well, I reclaim my time just quickly, but I understand. I'm just saying, that will give companies not to have even an option to offer then. Because they have no incentive then to offer arbitration as an option at all if you have them to put in—it has to be both of them.

That's what generally my concern, that they will not even have it. I'm, as an employee, going to come to this big company and say I want it, and they say, no, too bad. They don't have to, right? I don't have that negotiation power. So, if we want to resolve it, maybe we should look more on transparency.

I understand your point, so I yield back. My time has expired.

Chair NADLER. The gentlelady's time has expired.

Mr. Neguse.

Mr. NEGUSE. Thank you, Mr. Chair. I want to say thank you for hosting this hearing today, and I certainly am supportive of the underlying legislation.

I want to say thank you to each of the Witnesses. Thank you so much for appearing today and for your very brave testimony.

Professor Gilles, I'd like to point you to a 2016 letter released by the civil rights organization The Leadership Conference on Civil and Human Rights. In that letter, the organization says, quote, "Forced arbitration does not allow public scrutiny of alleged discrimination, nor does it allow for the creation of judicial opinions that help develop the law and provide further guidance on emerging trends. As a result, landmark civil rights laws, such as those protecting employees from race, gender, and age discrimination, have been rendered meaningless," end quote.

I wonder if you could opine as to whether you agree with that assertion, and, if so, perhaps elaborate on how protections against sexual harassment are sidelined by arbitration, in terms of the Conference's position.

Ms. GILLES. Thank you, Congressman, for the question. I totally agree with the letter. I feel like I've written words like that in articles about the impact of forced arbitration.

The reality is not that difficult to discern if claims are being shunted into a hermetically sealed, siloed, private regime where corporations write the rules, employees and consumers can't bring collective claims, and there's no written decision.

Despite some of the discussion—I won't call it out by name, but despite some of the discussion about how easy it is to go to court and have your arbitration clause deemed unenforceable, that's actually not the case. We've spent the last decade litigating all these arbitration clauses in court after court dutifully, following the Supreme Court has upheld arbitration clauses 9 times out of 10.

So, I think the problems are severe, and you're right to point out that they're particularly severe when we think about the most vulnerable groups in our society—minorities, women, low-wage workers, people who often lack political voice and for whom collective litigation is probably the only way that they're going to be able to resolve their disputes.

I also just want to take a moment, although the Representative has left, to just note that the discussion that was just being had is a little hard to keep on the record.

Post-dispute arbitration is fine. The truth is, if employers don't have an incentive to offer it after the dispute has arisen, then I don't understand why there's an incentive beforehand that's not completely unfair and illegal, right?

It's very possible, as the Chair said, that an employee and an employer could decide that they just want to resolve the dispute in arbitration once the dispute has arisen. The incentives are still there, if you believe them, which is that maybe it's faster, maybe it's cheaper, and maybe the secrecy or the privacy is a benefit to both parties. I don't understand the argument that an employer suddenly won't want to offer that as an option, and I think that is wrong.

Mr. NEGUSE. Well, I certainly share your confusion on that point. I wasn't going to address it, but I'm glad that you did and that the Chair did as well.

I couldn't agree with you more, and not to belabor the point, but I think your summation of the various reasons why arbitration can be so flawed, in terms of corporations writing the rules and victims, employees, and consumers being unable to pursue collective claims and ultimately a process devoid of any transparency, is all the more reason for us to move forward with the underlying legislation.

So, again, I thank you for your testimony. I thank all the Witnesses for their testimony today. With that, I will yield back to the Chair.

I yield back the balance of my time.

Chair NADLER. The gentleman yields back.

Mr. Bentz.

Mr. BENTZ. Thank you, Mr. Chair.

Thank you to the Witnesses for their strength and courage and certainly patience for being here today.

I'm tempted to talk about one of the remarks that was made, about the jury system being, quote, "the essence of justice for all." I'm a trial lawyer, not a very good one, but tried a lot of cases. I would just suggest there's a lot of room for improvement when it comes to jury trials, not to mention some of the things that give them their merit, which is the crucible of cross-examination. I would just suggest that many people that have gone through the horror and terror that you folks have would want to avoid that.

You're here today, and I'm very proud of you for being here.

I have a question for Ms. Perry. It goes to, what should be the default position in these contracts? If not arbitration, then what?

Because, as we know, at least as I understand from the research I've done in anticipation of this hearing, is that arbitration has evolved as a device to limit risk and to make more certain the future of the activities of a business or others. So, if we're not going to have arbitration as the default device, what would it be?

Ms. PARSHALL PERRY. That's an excellent question. I think the only other option would be litigation. Understanding what we're up against in terms of the costs and the delays associated with Federal litigation, you are looking at very much justice delayed in these particular circumstances.

What we're doing is we are forcing everything through an expensive, protracted process in which the imbalance of powers between individuals and their employers is significantly intensified. I would not want to face a multinational corporation bringing suit against me for attorneys' fees, because if I had the option to pursue it another way, with a neutral arbitrator, in tripartite litigation or arbitration, which is allowed under the FAA, I would certainly want to do that.

I would want to appoint my own arbitrator, the company would appoint its own, and there would be a neutral umpire arbitrator. That's really the ideal way to go forward on these cases.

Mr. BENTZ. One of the reasons the arbitration device has been embraced, if you will, by business and others is to avoid the runaway jury. If you look at one of the problems that goes with juries, it is there's that.

Ms. PARSHALL PERRY. Yes.

Mr. BENTZ. The old concept that you're going to get a balanced result isn't necessarily always true.

So, the challenge, I suppose, is that, if this bill passes, isn't it correct to say that we will see the cost of such a result spread about among all of us, as we see corporations resorting to what would then be the default—that is, litigation?

Is that a correct—by the way, I'm not trying to demean or belittle or suggest that anybody shouldn't receive proper recompense for whatever bad things have happened. They should. So, we're really debating here how best to do it. I think that was what Ms. Spartz was trying to get it.

Ms. PARSHALL PERRY. Yes.

Mr. BENTZ. Can we improve the arbitration device, or should we chuck it in the dumpster?

Your answer?

Ms. PARSHALL PERRY. I think we can improve it. I think those confidentiality provisions are front and center in this debate that's going on right now. If indeed confidentiality is perpetuating #*MeToo*, then we need to make sure that we eliminate those. I'm not even hearing that it is a suitable suggestion. Professor Gilles said specifically she still doesn't like that opportunity.

So, is it, in fact, that these sex harassment claims are subject to confidentiality provisions and, if we make sure that they are not implicated, everything will be fine? Or is it a piecemeal slice-and-dice of the FAA?

Mr. BENTZ. Correct. That would appear to be a good summary of where we are. Thank you so much.

I yield back.

Mr. ISSA. Would the gentleman yield?

Mr. BENTZ. Yes, I will.

Mr. ISSA. Thank you.

Following up on that, we have the question of nondisclosures at the end of the process. Because you've looked at this and studied it so much, if at some future time we're dealing with reform that is not this bill but something going forward, how would you deal with the fact that, in a normal litigation situation, the plaintiff gets the benefit of basically the whole company knowing about the allegation and, thus, people often come forward. In an arbitration, nor-

mally it doesn't become as public, and, therefore, you may be dealing piecemeal with different litigants over time.

What would be the best way for us to consider parsing that to get justice for someone so that they not be alone, as though they're the only one, if, in fact, there are multiples within the company, as they often are?

Ms. PARSHALL PERRY. Well, I'd naturally suggest class actions, but we know how the Supreme Court has ruled on that. They say, under the FAA, class actions are not—

Mr. ISSA. I was thinking more of how do we ensure that someone who feels they've been wronged can, in fact, make it public enough in advance? Because nondisclosures sometimes would create a situation in which it wouldn't—and I wonder that because I'm hoping that we're all taking this legislation seriously even if we oppose its current form.

Ms. PARSHALL PERRY. Yes. Again, at the risk of repeating myself, I go back to the privacy concerns and knowing that five States have successfully passed legislation to that effect, to make sure that these contracts, just like any other contract, make sure there is no coercion, there is no privacy, that these will be as public as a matter of public litigation. I think that's a suitable alternative to what we have now.

Mr. ISSA. Thank you.

Thanks to the gentleman for yielding.

Chair NADLER. The gentleman yields back.

Mr. Stanton.

Mr. STANTON. Thank you very much, Mr. Chair.

To our panel of Witnesses, my words cannot possibly express how deeply meaningful and impactful your testimony has been today, but I must begin by saying that I have a profound appreciation and sincere respect for each of you for sharing your stories, which are intensely personal, and for standing with moxie to expose behavior that is too often hidden from public view.

Forced arbitration agreements are a piece of the systems and procedures designed to silence critical voices, perpetuate abuse, and enable predators to hold on to their positions of power. We are taught that light exposes truth, and it is clear to me that justice is rarely done in secret.

So, I am pleased that this Committee and this Congress have made it a priority to address this issue in a bipartisan fashion to ensure that there are additional pathways to justice for those who experience sexual violence, harassment, and retaliation in the workplace.

I have a few questions for Ms. Newton.

Ms. Newton, you described the CEO of Louis Vuitton sending an email to the entire company a day after your complaint in court. How did that make you feel?

Ms. NEWTON. It felt awful.

Let me just briefly say, I work for the holding company LVMH, their American affiliate.

It felt humiliating. I was sitting at my desk when that email was sent, working. I was already afraid to have filed a complaint against my employer while working. Sitting at my desk, going

through my emails, doing my work, and I see it popped up. The whole email was basically about my case.

It totally discredited me. As an attorney, I pride myself on my credibility, and it's what we hold as our value as attorneys, and that was completely destroyed in a second.

Mr. STANTON. In your time at Louis Vuitton and the holding company, did the CEO ever issue this type of company-wide email?

Ms. NEWTON. Never. Nothing like it. Not attacking an employee about reporting sexual harassment or anything near it.

Mr. STANTON. Was it your impression at the time that the email was in retaliation for you filing the sexual harassment complaint?

Ms. NEWTON. Definitely. The extent that it went to, it wasn't just a bland email. It was several paragraphs long, several sentences long. The extent it went to mischaracterize what had happened and the nature of my complaint was definitely done with an intent to not only silence me but to send a message to other people: We will crucify you if you report—if you do things like this.

Mr. STANTON. Was it your impression this was damage control by the company?

Ms. NEWTON. Yes.

Mr. STANTON. If the CEO ever thought his behavior would be made public, do you believe he would've taken this action?

Ms. NEWTON. No. I think every single move they made was because they knew that eventually, as they succeeded to do, they would get this into a closed-door proceeding.

Mr. STANTON. Ms. Newton, you were asked to apologize to your harasser. Is that correct?

Ms. NEWTON. Unfortunately, yes.

Mr. STANTON. Did they explain why you had to do that?

Ms. NEWTON. They said that the stalker, he couldn't sleep, he couldn't eat because I had confronted him about the harassment, and he needed to be able to do his job, and, therefore, I should apologize to him.

Mr. STANTON. Has your standing at Louis Vuitton and the holding company been impacted since reporting your harassment?

Ms. NEWTON. Since reporting it, I've received negative reviews. My annual salary increase went down. My bonus went down. I've probably been passed over for promotions to subsidiary companies. My career has been stalled and has just been put on ice, really, and potentially damaged in the future.

Mr. STANTON. If employees were able to pursue a traditional lawsuit before a jury of one's peers, do you believe the company would be forced to take sexual harassment allegations seriously?

Ms. NEWTON. One hundred percent. I think the fact that they know that eventually this will be behind a closed door completely colors every single action that they take in responding to it. They know: We will never—this will never see sunlight; therefore, we can do whatever we want.

Mr. STANTON. Knowing what happened to you at Louis Vuitton and the holding company and the company's response, do you believe that other victims at the company will come forward to report sexual harassment or sexual violence in the workplace?

Ms. NEWTON. Sorry, just so I understand your question correctly, are you saying other employees at LVMH will come forward after they—sorry, could you just rephrase?

Mr. STANTON. No problem. I apologize. Knowing what happened to you and the knowledge of what happened to you—

Ms. NEWTON. I see.

Mr. STANTON. —what's going to be the impact on other employees who may have, sadly, similar-type claims?

Ms. NEWTON. Oh, yeah, I think this is going to stop them from ever coming forward. This type of crucifixion, making a public shame out of me, is nothing that anyone would want to go through. It's just devastating, humiliating, and degrading. I think they were showing other people: If you do this, you will go down like she did.

Mr. STANTON. Your courage is really amazing. Thank you for your testimony today.

I yield back.

Chair NADLER. The gentleman yields back.

Ms. Dean.

Ms. DEAN. Thank you, Mr. Chair.

It's been widely reported and every person, to a person, has shown that there is a culture in many workplaces, sadly. One in four women have experienced sexual harassment at work. Eighty-five percent of women report experiencing unwanted sexual behaviors in the workplace.

We've spoken in this Committee of the legal Black hole that is forced arbitration. Think of the words themselves, "forced arbitration." It's paradoxical. It's self-evident that there's a problem with this process. It protects companies; it hides predators in plain sight. Your stories have revealed that.

I want to use my time to hear a little more from you—I was debating whether to call you "victims" or "survivors." I've decided to call you "four women of strength." I thank you for your immense courage to share your stories. I'm humbled by your strength. We here in Congress need to be humbled by your strength. We are obligated to do better.

Ms. Henry, may I start with you? Something you said—many things you said in your testimony struck me. You shared with us that you, quote, "gathered all your courage that you could stomach and filed a lawsuit."

I think people don't have any clue what that moment is like, let alone the moment when the door got slammed on you when you learned about the forced arbitration. What was that moment like? What was the challenge there to come forward and say, I've got to sue over this?

Ms. HENRY. At that point, I was feeling defeated. I don't like to feel defeated, especially over something like this. I thought, I have to do this. I have to do this for other women; I have to do it for myself. I have to set an example for my son. It's very important to me just to show my courage and do this.

Ms. DEAN. Well, you've done that.

Ms. HENRY. Thanks.

Ms. DEAN. A woman of strength.

How did you feel when you read the motion to dismiss your lawsuit and learned of the forced arbitration clause buried in your paperwork?

Ms. HENRY. I was kind of just taken back because I had no idea what it was. I had no idea that something even existed. I thought in the workplace or even just in society, in general, that if someone does something against you that is wrong, illegally or however the case may be, I just thought I would have a right to not let this happen to me or anybody else in the future.

I just—I couldn't—I was just taken back. I still am. This is very—I just can't believe that people are allowed to just disrespect other human beings.

Ms. DEAN. In fact, you said, they stole my right to a jury trial. Your instinct is correct. As an American citizen, you have a right.

Ms. HENRY. Uh-huh.

Ms. DEAN. That right was taken from you.

To the lawyers, did you feel the same way? Did you feel as though your rights were stripped away from you? Not just the assaults, the attacks, the rape, but did you feel your constitutional right was taken from you?

Ms. Newton?

Ms. NEWTON. Definitely. In law school, constitutional law was my favorite course. My parents are immigrants here, and one of the things I think, coming from an immigrant family, that people admire all over the world is our judicial system. I remember my mom saying to me when we were young, in America you have this right; if something goes wrong, you have your right to a day in court. So, I felt like that was totally taken away from me, and no one even knew.

Ms. DEAN. You, armed with a law degree, had your right taken away from you.

Ms. NEWTON. Yes.

Ms. DEAN. Ms. Spottiswoode?

Ms. SPOTTISWOODE. Thank you for the question.

I just wanted to answer that by addressing something that a lot of people have said here, which is that jury trials are very slow and expensive. I don't actually know really what they're like, because I haven't experienced one, but I can tell you that my arbitration was very slow and very expensive.

The cheapest thing to do, rather than trying to unburden our courts by forcing victims like us into arbitration, would be to just not assault people and harass people in your workplace. If we had access to jury trials, maybe, instead of all of us having to go through this very slow process, people just wouldn't Act that way as much anymore.

Ms. DEAN. Thank you. Very wise words.

I just want to—oh, my time is up. Let me just quote Ruth Bader Ginsburg. In 2018, she said, "How treacherously we have strayed from the principle that arbitration is a matter of consent, not coercion." How far we have strayed.

I yield back.

Chair NADLER. The gentlelady yields back.

Mr. Jones.

Mr. JONES. Thank you, Mr. Chair.

I also want to thank my colleagues Representative Jayapal and Subcommittee Chair Cicilline for their leadership in introducing legislation to guarantee survivors of sexual assault and harassment their rights to justice in a court of law.

Most importantly, I want to thank all of you courageous survivors, described accurately by my colleague as four women of strength, for testifying before us today.

No one should have to experience what you have experienced. No one in your position or in any position should have their voice silenced. No one should have their access to justice vetoed by their assailants or by powerful corporations that back them. Thanks to you, we are closer than ever before to ensuring that no one is denied justice again.

Professor Gilles, thank you for joining us again to shine a light on the injustice of forced arbitration.

Throughout the day, we've heard harrowing testimony about the retaliation that so often accompanies sexual assault and harassment. As you know, there are both State and Federal laws protecting employees from retaliation for reporting harassment, yet it is plain that those laws have failed the survivors here with us today.

How does forced arbitration make it harder to enforce protections against retaliation?

Ms. GILLES. It makes it harder because we never know about their cases, right? You've had to subpoena these women to come here and tell you about these cases, because, otherwise, they would be barred from doing so by the provisions of their contract.

So, not only does the public at large not learn about these issues, but regulators, policymakers, never hear about these issues as well. Companies are able to sweep these matters under the rug and shield serial sexual predators that work in these spaces and often work in quite high places.

Mr. JONES. Thank you.

Are there any claims you've heard today that you would like an additional opportunity to rebut?

Ms. GILLES. Ah, thank you. Yes. So, many that I won't have time, although just a few, really, because I think a lot of what's been said has been wrong.

So, first, just to reiterate what Tatiana just said, there's been a lot said about how expensive litigation is. Arbitration is expensive, too. It's not as though the employer suddenly doesn't show up in arbitration. The employer shows up, and they show up with all their lawyers and all their money.

So, the structural imbalances that exist in the sort of David and Goliath situations that we see, those are going to be true in arbitration and true in litigation. So, I think it's wrong and I think it's misrepresentative to say that only litigation is a problem in terms of cost.

The other thing I'd like to just point out is on the freedom of contract argument, which I could only sort of follow. Because the protections in this bill, as I read this bill, are only triggered when a survivor files a lawsuit. So, that means that the contract remains—the employment contract is still fully enforceable. The only point is that, when a survivor files a lawsuit, the survivor has a choice

about whether to go into arbitration, which perhaps she chooses for whatever reasons are hers—she's autonomous; she can choose—or to go into litigation.

I think some of the rhetoric today has tried to distract us from that reality, but if you read the bill, that's what the bill says. I think that's what we should be talking about.

There are other things that have been said that I think are mischaracterizations, untruths, just distractions, right? This is a pretty easy question. These women are here to tell us that the system doesn't work for them, they don't want it, and so we ought to change it.

Mr. JONES. Thank you. I agree.

Mr. Chair, I yield—Madam Chair, I yield back.

Ms. DEAN. [Presiding.] Thank you very much.

The gentleman yields.

Now the gentlewoman from North Carolina, Ms. Ross, is recognized for 5 minutes.

Ms. ROSS. Thank you very much, Madam Chair.

Thank you to all the Witnesses for being here today. I know it's difficult to talk about this topic, but it is so important, and you are making a difference in the lives of other women. I'm moved by your bravery and all that you've done in choosing to share your stories with Congress.

In the United States, businesses and other institutions too often cover up sexual assault and harassment to maintain their reputations, at the risk of your reputation.

As we've heard today and previously, forced arbitration is one of the key strategies these businesses and institutions use to silence victims of sexual violence and harassment. As long as forced arbitration remains an option, businesses and institutions will be able to abuse this mechanism to put profits and their reputation over yours and silence survivors of assault and harassment.

Our laws should work to curb practices that enable the abuse of individuals like those we've heard from today.

As you can hear, there are bells, but that doesn't have anything to do with this hearing.

I'm glad that tomorrow, we are going to markup a bill to do just that.

I have a couple questions for Professor Gilles. The first question is, what affect does the low survivor win rate in employment arbitration have on companies' incentives to stop or prevent sexual misconduct?

Ms. GILLES. I think it must have—I don't work for a company, but I think if I were a company and very few women were even going into arbitration and the very, very brave few who did, who were able to go it alone and hire a lawyer to bring an arbitration and they still didn't win, I would start to feel like I could do whatever I wanted. I think that's probably what we're seeing.

Now, I don't know, I'm not invited into the rooms where those sorts of decisions are being made, but I think it's a safe bet that companies are feeling quite brave and brazen in the ways that they could cover up pervasive and systematic sexual assault and harassment and discrimination in the workplace.

Ms. ROSS. Just as a follow-up to that, do you think it has the same effect on predators, on people who commit sexual misconduct and violence against women?

Ms. GILLES. Again, I'm only inferring from the data that we have, but because, well, let me not infer. I have kids, and when my kids don't get in trouble, they just keep doing the same thing over and over again, right? The idea is that, if you don't hold someone accountable, they're just going to believe that the behavior is actually not so bad.

The examples the women here are sort of striking, because these were all men in positions of power who retained those positions and in one instance promoted, which indicates that these predators are learning nothing, right? They're getting a slap on the wrist. There's no public accountability.

Every company has these sexual harassment training sessions that I think are probably not well-attended and not really processed by the people who need them most. These people are not being taken aside and disciplined or, better yet, fired, right? They're not held accountable for what they've done. So, I imagine they, too, feel that they can do whatever they want.

Ms. ROSS. Thank you.

To our survivors and heroines here, what kind of message do you think this sends to more junior people in the businesses where you've worked and to other institutions about what kind of behavior will be tolerated?

Please pipe up as you wish.

Ms. NEWTON. I can start.

I think I had in mind those young people when I reported, because it was one thing for me to be going through this; I thought about all the girls that I've mentored over my life, those other students, my niece, my friends' children, and just thought about if I, a lawyer, an executive at a company, am not able to feel comfortable speaking up about these things and if I am shot down and attacked for doing that, what will they be able to do?

So, I think that what these companies do is meant to silence people and make them not complain and make them keep quiet and just allow the harassment to continue.

Ms. ROSS. Thank you so much.

I yield back.

Mr. JONES. [Presiding.] The gentlelady yields.

The Chair now recognizes the gentlelady from the great city of St. Louis, Missouri, Representative Bush.

Ms. BUSH. Thank you to the Chair for convening this hearing, and thank you as well.

I want to sincerely thank each of our Witnesses today. I want you to know that strength is not only moving, but also saving lives. The failures in accountability for the misconduct and abuses you have endured are tantamount to policy violence, because this body has a responsibility to legislate safety and character in your workplaces.

Like you, I am a survivor. I understand the trauma that you must relive in sharing your story. I'm proud of my colleagues for standing firm in demanding that these insidious arbitration laws

are prohibited. I am also aware of the lasting harms of the abuse you have been through.

You should have never had to decide between paying bills and speaking the truth. You should have never had to fear retaliation for saying what happened. You should have never had to worry about the impact of unwanted harassment on your personal lives. Know that our job as Members of Congress is to see you and stand with you to build a society where what you endured never happens again to another person.

Professor Gilles, how does the use of arbitration clauses in the workplace prevent a company from establishing procedures to totally investigate and meaningfully address reports of sexual harassment?

Ms. GILLES. Thank you for the question.

So, I think that what happens when an employee complains about sexual harassment on the job and it starts an arbitration, again, those are rare situations, but let's talk about those unicorn situations—the employer becomes aware that there's a problem. They're participating in the arbitration. Then Employee 2 comes forward sometime later and is complaining about the same sorts of pervasive, structural problems in the workplace. At that point, or maybe it takes until Employee 3 or Employee 4, but, at some point, one would imagine that an employer who is hearing these stories, understanding the dynamics of the office, would come to understand: We have a problem, and we need to do something about the problem.

I think the reality is that employers are forcing these issues into arbitrations so that they don't have to be accountable, so they don't have to change policies, so that they can just do things as they've always done them, business as usual. Because there's nothing that the arbitrator can do that can force an employer to take on any systemic changes in the workplace.

So, I think these provisions really do stop or halt or prevent any efforts to make the workplace safe for all people.

Ms. BUSH. Yes. Thank you. With that, we understand that is why these sexual harassment allegations need to reach to the public sphere. Thank you.

Ms. Henry and Ms. Dushku, both of you were sexually harassed or violated by a man who thought he could get away with anything. This behavior does not just occur in a vacuum, nor does it occur overnight, as colleagues have mentioned.

You haven't been allowed to tell your stories before today. I'd like to use my time to give each of you the opportunity to share what it means to you personally to finally have a chance to speak publicly about such personal and traumatic experiences, including the retaliation you suffered because of the arbitration clauses in your employment contracts.

Let me say before you start, I'm truly sorry for what you've had to endure.

Ms. Henry?

Ms. HENRY. I just want to make sure I understand the question. You're breaking up just a little bit.

Ms. BUSH. Oh, I'm sorry. Just being able to publicly share about your personal experience, being that this is the first day you've

been able to talk about it. Is there anything that you would like to say, that you would just share publicly, since this is your first time sharing your personal traumatic experience?

Ms. HENRY. I just hope at some point that the person that did this to me has to feel as humiliated as I feel and how ashamed that I felt during this whole process.

I am very honored to be here, and I really appreciate having this chance. Hopefully in the future no one has to endure such horrific acts as we have all sitting here today.

So, I just hope that he just can feel the pain that I have felt.

Ms. BUSH. Ms. Dushku, would you also—

Ms. DUSHKU. Yes. Thank you.

On the one hand, as Ms. Henry said, it's very liberating, and, at the same time, after so many years of being in silence, I have to say it affects me. I still don't, in some ways, know that I'm allowed to go on from here and continue speaking without fear of future retaliation even now.

As others have said, as Ms. Newton said as well, I am proud and I do feel re-empowered to be able to show my niece, my sons, and my three beautiful stepdaughters that you don't have to accept when the rules are stacked against you and you can try to change the rules. I hope that we can do that here today.

I'm just in awe of all the other women there today, and I hope to know you better. I know that we can all heal from this, but the healing will come from action to protect us and protect future survivors and victims.

Thank you.

Ms. BUSH. Thank you.

With that, I yield back.

Mr. JONES. The gentlelady yields.

This concludes today's very powerful hearing. I want to thank the Witnesses again for sharing your incredible stories and to express, yet again, how we are standing with you in this moment and moving forward.

Without objection, all Members will have 5 legislative days to submit additional written questions for the Witnesses or additional materials for the record.

Mr. JONES. Without objection, the hearing today is adjourned.

[Whereupon, at 2:12 p.m., the Committee was adjourned.]

APPENDIX

Eliza Dushku: I worked at CBS. I didn't want to be sexually harassed. I was fired

By Eliza Dushku **December 19, 2018**

The narrative propagated by CBS, actor Michael Weatherly, and writer-producer Glenn Gordon Caron is deceptive and in no way fits with how they treated me on the set of the television show "Bull" and retaliated against me for simply asking to do my job without relentless sexual harassment. This is not a "he-said/she-said" case. Weatherly's behavior was captured on CBS's own videotape recordings.

I feel compelled to chronicle what actually happened after The New York Timespublished a story about how CBS handled my allegations. I declined to be interviewed for that piece because I wanted to honor the terms of my settlement with the network. I was under the impression that Weatherly and Caron would also not respond per our settlement. Instead, both commented to the Times in what amounted to more deflection, denial, and spin.

Before I get into what actually happened, here is some background. CBS vigorously courted me for several network shows. When presenting the offer to co-lead on "Bull," CBS made the case to my team that the whole Dr. Jason Bull M.O. of bedding every female interest and winning every case needed strong female balance. CBS said it wanted to pivot to a classic "two-hander" (two main characters), a la "Moonlighting." After I accepted, the network even brought in Caron, who created "Moonlighting," as the new showrunner for "Bull." And so I was hired to finish the last three episodes of season one, with CBS's expressed intention of my beginning season two as a series regular with an option for up to six seasons.

In explaining his bad behavior, Weatherly, who plays Dr. Bull, claimed I didn't get his attempt at humor. That's how a perpetrator rationalizes when he is caught. For the record, I grew up in Boston with three older brothers and have generally been considered a tomboy. I made a name for myself playing a badass vampire slayer turned tough LA cheerleader; I have worked with numerous leading men, including Robert De Niro, Leonardo DiCaprio , even CBS's own David Boreanaz. I can handle a locker room. I have been on Howard Stern and was hired by Kevin Smith for a film where I wore a black leather cat suit and played a member of an international diamond-thief-gang-

ring. I do not want to hear that I have a "humor deficit" or can't take a joke. I did not overreact. I took a job and, because I did not want to be harassed, I was fired.

THE HARASSMENT

Weatherly harassed me from early on. The tapes show his offer to take me to his "rape van, filled with all sorts of lubricants and long phallic things." There was also his constant name-calling; playing provocative songs (like "Barracuda") on his iPhone when I approached my set marks; and his remark about having a threesome. He made the threesome remark to me about himself and me in a room full of people. Minutes later, a crew member sidled up next to me and, with a smirk, said in a low voice, "I'm with Bull. I wanna have a threesome with you too." For weeks, Weatherly was recorded making sexual comments, and was recorded mimicking penis jousting with a male costar — this directly on the heels of the "threesome" proposal — and another time referring to me repeatedly as "legs." He regularly commented on my "ravishing" beauty, following up with audible groans, oohing and aahing. As the tapes show, he liked to boast about his sperm and vasectomy reversals ("I want you to know, Eliza, I have powerful swimmers"). Weatherly had a habit of exaggerated eye-balling and leering at me; once, he leaned into my body and inhaled, smelling me in a dramatic swoon. As was caught on tape, after I flubbed a line, he shouted in my face, "I will take you over my knee and spank you like a little girl."

One day, when my now husband, Peter Palandjian, visited the set, Weatherly made us all watch as he pretended to urinate on an indoor office plant, then spun around pretending to shake himself off and pull up his zipper. The tapes show Weatherly routinely exclaimed "yellow card" after distasteful remarks. I learned from crew members that, because there had been previous harassment training on "Bull," Weatherly's delight in yelling "yellow card" was his way of mocking the very harassment training that was meant to keep him in line.

Weatherly also bragged about his friendship with CBS chief executive Les Moonves. He regaled me with stories about using Moonves's plane, how they vacationed together, and what great friends they were. Weatherly wielded this special friendship as an amulet and, as I can see now, as a threat.

Weatherly did all this. His conduct was unwelcome and directed at me. Watching the recordings in the settlement process, it is easy to see how uncomfortable, speechless, and frozen he made me feel. For Weatherly's part,

it looks like a deeply insecure power play, about a need to dominate and demean. In no way was it playful, nor was it joking with two willing participants. It was not "Cary Grant ad-libbed lines," an incredulous Weatherly excuse which, even if true, asks us to believe that Hollywood behaviors from 70 years ago might be acceptable today. What is hardest to share is the way he made me feel for 10 to 12 hours per day for weeks. This was classic workplace harassment that became workplace bullying. I was made to feel dread nearly all the time I was in his presence. And this dread continues to come up whenever I think of him and that experience.

There was daily undeniably demeaning conduct that is unacceptable in an absolute sense. Everyone should be allowed to work without harassment. Weatherly sexually harassed and bullied me day-in and day-out and would have gotten away with it had he not been caught on tape, and had the CBS lawyers not inadvertently shared the tapes with my counsel, Barbara Robb. Reflecting on the whole ordeal, it often makes me think with sadness of the majority of victims who do not have the benefit of the fortunate evidence — the tapes that I had.

THE RETALIATION

Weatherly never apologized to me. Instead, I was fired shortly after speaking with him.

After weeks of enduring Weatherly's harassment, I resolved to deal with it directly. I aimed to be my diplomatic best. This was not easy for me, since there were plenty of other things I would like to have said to him. Framing my request as a plea for "help" in setting a different tone on the set, I asked him to "be my ally" and to "help ease the sexualized set comments." Weatherly responded with, "Eliza, *no one*respects women more than I do," citing his many sisters and his professed history of being *"too* respectful of women."

After I left his trailer, I went straight back to my own trailer and wrote down everything I could remember about the conversation in a text to my manager, adding, "I hope he actually received it well & doesn't run back to the studio telling them to fire me lol." Then, as I came to learn months later in the settlement process, Weatherly texted CBS Television President David Stapf about 40 minutes after our conversation and asked for what amounted to my being written off the show. Specifically, Weatherly complained that I had a "humor deficit."

Retaliation is illegal, not to mention unfair and painful. After I addressed it, Weatherly doubled down and ratcheted up his retaliation. Following our conversation and up until the season wrapped weeks later, he barely spoke to me, making it clear he was icing me out. He made every remaining day on the set somehow more awkward and oppressive.

How did it end? With a final act of bullying.

After I addressed matters with Weatherly, he circulated a "memo" to the crew instructing not to comment on my appearance or beauty. I do not know if it was a written memo or a general verbal edict, but everyone called it "the memo." Weatherly's message was clear to all: Eliza Dushku was offended by comments on her looks. (For the record, I love a good compliment).

As it turned out, the "memo" was a prop for Weatherly's final act of retaliation against me. At the wrap party held on the last day of the season, Weatherly insisted that I stay for the champagne toast. It was odd to me for several reasons: Weatherly knew I was sober, and he had not spoken to me this warmly for weeks. Nevertheless, I also wanted to say goodbyes to friends and pay my respects to the crew. Weatherly emceed the toast. So when he called me up in front of the entire cast and crew to pick the winning party raffle tickets, Weatherly was actually going out of his way to humiliate me and said something along the lines of: "I need a *beautiful* woman to come pull this ticket." He laid it on thick. "A truly *beautiful*woman . . . hmmm, who could that be?" He was performing, pretending to search the room. I immediately clocked what was happening, my breath tightened. *"Eliza*! Yes, the most *beautiful* woman of all. Yes, Eliza, *you* have to come pull the raffle ticket!" he instructed, dripping with sarcasm and in direct violation of his own edict not to comment on my physical appearance. No matter that I've acted in more than 30 films and starred in two network series, Weatherly had to let everyone know he was the boss, that he had won and no one would come on that set and reject what he thought should be his unfettered right to do and say whatever he wanted. There are crew members on record as witnesses to corroborate what for me was one of the most cruel, most aggressive humiliations I have ever experienced. It was I who was mortified.

As for Caron, the "Bull" showrunner, he was undaunted to do Weatherly's bidding. The fact is that Caron wrote me off the show within 48 hours of my complaints about Weatherly. According to what top production brass at CBS told my agent, Caron had gotten rid of me without the knowledge or consent

of that CBS team. Caron personally fired me as I was filming on set one afternoon. It is highly unusual to get fired in the middle of a shooting. I immediately phoned my manager and agent, who in turn phoned the high-ups at CBS. The CBS execs were baffled. They said that they didn't believe that Caron had the authority to fire me this way and suggested that it could not be true. What's more, as was documented in several e-mails and texts, they and the production company, Amblin Television, were reportedly loving my work and called what I was doing for the show "fantastic" and that they "love this dynamic."

My talent representatives spoke to Caron about my firing months later. Caron defended Weatherly, explaining he had simply exhibited "frat" behavior and added, "What does [Eliza] expect, she was in Maxim." On the subject of my legal rights, Caron said to my manager, "If Eliza wants to be out of the business by suing CBS, she can be out of the business."

The boys' club remains in full force at CBS. The bullying continued. In the settlement process, CBS used as defense a photo of me in a bathing suit, pulled from my own Instagram, as if this suggested I deserved or was not offended by the sexual harassment I experienced.

CBS ultimately paid me $9.5 million earlier this year to settle the allegations — an amount that represented a portion of what I would have earned had I finished my potential six-year contract. But this wasn't just about money; I wanted a culture change. A significant settlement condition was my requirement that CBS designate an individual trained in sexual harassment compliance to monitor Weatherly and the show in general. CBS did not want to do this, but I wouldn't settle without this condition. Another condition I insisted on was that I be allowed to meet with Steven Spielberg, whose Amblin Television coproduces "Bull," so I could talk with him about what occurred on his set. I have not yet had my meeting with Spielberg, but I cannot help but wonder where the legendary Hollywood director was throughout all of this. I have been a lifelong fan and assumed that if anyone could make changes, it would be Spielberg. Watching the Golden Globes and seeing Spielberg front-and-center wearing a "Time's Up" pin shortly after my settlement made me especially eager to meet with him.

The condition CBS required of me was that I not speak about what happened. I really struggled with this and still do. Some online "posters" have called it hush money. Headlines have called it a "secret settlement." How was I to get paid? I have worked in this industry for close to 30 years. I faced a wrongful termination, the prospect of a three-to-five year lawsuit, and million-dollar

legal fees for a war with a massive corporation. And where would that war have been fought? According to the fine print in my contract with CBS, I was required to submit to a "confidential" arbitration, where all "proceedings will be closed to the public and confidential, and all records relating thereto will be permanently sealed." No judge, no jury, and no chance of anyone finding out what really happened (or so they hoped).

In the end, I found uneasy solace in the important conditions I imposed on CBS, and that I would get paid for at least some of my contract. I am still trying to make sense of how this could happen, especially in these times. The last thing I want at this point in my life is to be in the news. I am recently married and very happily finishing my college degree at home in Boston. But I do feel it is my duty to respond honestly and thoroughly to CBS, Michael Weatherly, and Glenn Gordon Caron's latest revisionist accounts.

Eliza Dushku is a producer and actress.



November 15, 2021

The Honorable Jerrold Nadler, Chairman
The Honorable Jim Jordan, Ranking Member
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Re: H.R. 445, the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021"

Dear Chairman Nadler and Ranking Member Jordan:

Independent Women's Law Center is pleased that you are holding this important hearing on whether to allow victims of workplace sexual harassment and assault unilaterally to opt out of pre-dispute arbitration agreements.

I write today to focus this Committee's attention on two dispositive questions:

1. *Are victims of workplace sexual misconduct better off in court than in arbitration?*

2. *Are workplace sexual misconduct claims fundamentally different from other employee claims, such that they must be adjudicated in a different forum?*

If the answer to either of these questions is "no," then there is no principled reason to exempt this narrow category of claims from otherwise valid workplace arbitration agreements, and I urge you to reject any legislation that would do so.

Are victims of workplace sexual misconduct better off in court than in arbitration?

The honest answer is, no.

As members of this Committee are well aware, an individual can pursue all of the same claims and remedies in arbitration that she can pursue in court. And she is able to reap the same amount of monetary damages in arbitration as in court. The only difference between arbitration and full-blown litigation is the setting.

Studies indicate that the arbitration setting, in fact, provides many advantages for employees,[1] including:

- **Cost**: When agreed to at the outset of the employment relationship, arbitration is typically paid for by the employer, making it far less expensive for the employee than litigation in court.
- **Speed:** Claims in arbitration are resolved more quickly than those in court.
- **Flexibility**: Arbitration is less formal and less adversarial than litigation.
- **Compensation**: Employees often receive higher monetary awards in arbitration than in litigation.[2]

What are the disadvantages?

Opponents of arbitration claim that it is a "secret tribunal" that "silences" victims and protects employers from unfavorable publicity. This is false. Although arbitration proceedings are, indeed, closed to the public, employees in arbitration may still tell their stories in public. Indeed, absent separate confidentiality agreements between the parties, employees who have been victims of sexual misconduct are free to hold press conferences, give interviews, write articles, author books, and otherwise speak about their experiences.

For many victims of sexual misconduct, however, the informal private setting of arbitration is preferable to a trial, as it allows them to tell their stories in their own words, rather than face public, formal interrogation in court. Legislation that effectively eliminates arbitration, as this legislation does, would eliminate privacy in these sensitive cases.

Are sexual misconduct claims fundamentally different from other forms of workplace misconduct?

They are not.

Employee sexual misconduct claims are, at their core, claims of workplace discrimination. Thus, there is no principled reason to treat them differently from, say, claims of racial harassment or discrimination. Indeed, all employees should be treated equally when it comes to their ability to resolve legal claims against their employer. Any attempt to carve out special rules for one type of claim or one class of employee overly complicates the adjudicatory process for employers and creates an unnecessary hierarchy of victimhood among employees.

So, why not allow all claimants to choose whether to take their case to arbitration or to court after a dispute arises? The answer is simple: Doing so would effectively eliminate employment arbitration altogether.

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[1] Independent Women's Law Center, LEGAL POLICY FOCUS: ARBITRATION AGREEMENTS IN THE #METOO ERA (Oct. 2019).

[2] Nam D. Pham, Ph.D. and Mary Donovan, NDP Analytics, FAIRER, BETTER, FASTER: AN EMPIRICAL ASSESSMENT OF EMPLOYMENT ARBITRATION 9-10 (May 2019).

Once a dispute arises, lawyers have financial incentives to encourage full-blown litigation in court—which takes longer, and, therefore, produces higher fees for them.

Moreover, it only makes economic sense for a company to agree to pay the costs of arbitration if it can rely on having all employment disputes resolved in that setting. This allows an employer to avoid the high costs of litigation and the potential for class action lawsuits and runaway juries. If, however, a company has to resolve disputes both in court *and* in arbitration, it is unlikely to agree to fund the arbitration system, as it will provide no overall savings.

The reality is that allowing sexual misconduct claimants to opt out of arbitration agreements *after* a dispute arises will, effectively, eliminate arbitration in such cases. This will benefit trial attorneys, who would rather take their chances in court, where one runaway jury can deliver a sky-high windfall. But it will be of no demonstrable benefit to the majority of victims.

Thank you for your consideration.

Sincerely,

Jennifer C. Braceras

Jennifer C. Braceras
Director
Independent Women's Law Center

November 3rd, 2021

The Honorable Dick Durbin
Chairman
Senate Committee on the Judiciary
711 Hart Senate Office Building
Washington DC 20515

The Honorable Chuck Grassley
Ranking Member
Senate Committee on the Judiciary
135 Hart Senate Office Building
Washington, DC 20515

The Honorable Jerrold Nadler
Chairman
House Committee on the Judiciary
2141 Rayburn House Office Building
Washington, DC 20515

The Honorable Jim Jordan
Ranking Member
House Committee on the Judiciary
2056 Rayburn House Office Building
Washington, DC 20515

Chairman Durbin, Chairman Nadler, Ranking Member Grassley and Ranking Member Jordan:

We are survivors of sexual harassment or assault and their allies. We write to ask you to end forced arbitration and the silence and abuse it enables. Some of our stories have been shared by others in the media, but our stories will never be heard in a courtroom. Case after case filed by survivors over the last 20 years prove that forced arbitration shields abusers and the institutions that employ them. With this letter, we hope to encourage Congress to put a stop to forced arbitration once and for all by passing the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.

S2342: https://www.congress.gov/bill/117th-congress/senate-bill/2342/text?r=3&s=3
HR4445: https://www.congress.gov/bill/117th-congress/house-bill/4445/text?r=1&s=2

Many of the signatories on this letter come from places of privilege and access; we are news anchors, investment bankers, journalists, attorneys, law students and activists, and yet we have no power in the face of forced arbitration. With this letter, we hope to shine a light on this issue, and to remind policy makers that for every one of us, there are millions more survivors in the shadows whose voices have been forever silenced by forced arbitration. Unlike millions of Americans, we can use our platforms to advocate for the passage of this bipartisan, bicameral legislation, which would simply return to survivors the choice of how to pursue accountability against abusers. We believe that survivors deserve the right to tell their own stories and to choose to tell them publicly in a court of law.

Forced arbitration is a secret process in which private companies hand selected by defendants are able to design a system that keeps survivors silent and allows sexual misconduct to go unchecked. What most people don't know when they start a job is that buried in the small print of their employee handbook or in the reams of forms, they are hurriedly asked to sign on their first day of work are words that will forever deprive them of the chance to seek justice if sexually

harassed or assaulted. If a survivor wants to bring a case in a public courtroom, why should an arcane federal law, passed in 1925 (before anyone ever used the phrase "sexual harassment" and intended to apply to business-to-business transactions only), preclude the survivor from bringing the case? The horror of forced arbitration is that when one survivor is silenced, countless others will unknowingly follow down the path of harassment and abuse by accepting employment with companies that protect and often promote sexual predators.

To their credit, a few major U.S. corporations have voluntarily agreed to stop invoking forced arbitration clauses, but those companies are few and far between. Please do not forgo your responsibility as legislators and leave survivors at the mercy of corporations to decide when and if to use forced arbitration when it suits them. Simply put, the practice must stop for ALL survivors. Please stand with survivors and pass The Ending Force Arbitration of Sexual Assault & Sexual Harassment Act.

Respectfully,

Gretchen Carlson, Co-Chair Lift Our Voices, Female Empowerment Advocate, Journalist, Author
Alison Accettola
Karen Sue Allen
Karlito Almeda
Ali Althaus
Jennifer Anderson Alonzi
Stephanie Arble
Michele Atha
Cheryl Auger, Owner of Ban SUP Refill
Tracy Avin, Troop HR
Jade Baker-LeFaive
Janet Becker
Alyssa Bell
Lisa Beebe
Juan Bell
Lisa Benner
Megan Beyer
Melissa Bickerton
Julia Birnbaum
Dacia Bridges
Asonya Brinson
Mary Bonaventure
Debra Bonomi
Gayle Brodie
Ginette Brouard
Saffron Burrows
Jill Bush
Kathleen Butcher
Sheryl Bybee

Julie Bye
Adele Camens
Beverly Canello
Shawn Carey
Cathy Carson
Scarlett Castro-Dixon
Ann Caylor
Cigdem Knebel, Skot & Bell Publishing
Kay Chase
Leng Leng Chancey
Kristie Cheek
Michell Chisham
Debbie Cohen
Jessica Craven
Tracy Cook
Phyllis Comeaux
Miriam Correa
Mary Dahmen
Judyth Daniels
Lisa Davis
Sue Daugherty
Sonia Delgado
Kathleen Deutch
Laurie Dhue, National Recovery Advocate, Former National TV News Anchor
Angela DiLemme
Eirene Donohue
Helen Fahey
Diana Falzone, Journalist
Rosa Faris, Galloway
Diane Fingar
Keaton Fletcher
Linda Frew
Joyce Frohn
Karin Garfin, Former Anchor for New York 1/ Charter Communications
Gretchen Garrigues
Tanuja Gupta, Google Program Manager, Founder of Googlers for Ending Forced Arbitration,
Anne Garcia
Lauren Garner
Mariam Ghaith
Sharita Grant
Geri Grey
Judith Gordon
Kate Grodd
Katherine Gunther
Erin Garcia
Jean Glaraton
Lidia Goldthorn
Kelly Giannetti

Sandra Garza
Gitte Hagensen, ENERVEX, Inc.,
Kelsey Honz
Marisa Hodgdon
Vanessa Hazlett Kasik
Roxanne Hanson
Cathy Helton
Rochelle Hardin
Leland Hanna
Dori Howard
Daria Hutchinson
Rihana Herbert
Hashi Hanta
Jordan Harff
Adrienne Jenkins
Tameka Jones
Lois Jordan
NJ Jennings
Deanna Johnson
Zada Johnson
LeDina Joy
Sabeen Kalyan-Masih
Jennifer Keene
Minna J. Kotkin, Professor of Law, Brooklyn Law School
Elise Kalfayan
Cathy Kinsey
Valerie Lohr
Stacy Lord
Paula lafferty
Joyce Lafon
Carol Lacks
Jennifer Lewis
Joelle Leslie Lewis
Kela Lige
Sheri Liguori
Gwen Lewis
Donna Lordandeau
Mita Mallick, Diversity, Equity and Inclusion Executive
Senator Sarah McBride, Delaware State Senator
Allie McGuire, Awareness Ties
Nola Miller
Shane Mitchell
Maya Morris
Joy March
Rachael Mason
Antoinette Montani
Leslie Miguel-Gomez
Joan Morrow

Nicolette Manzie
Lynda Monson
Candace McGinn
Kathleen Murphy
Carol Midboe
Marisa Mahler
Wanda Moore
Elizabeth Monroy
Andowah Newton
Kathryn Nalty
Betty McNiel
Deborah Neilsen
Carolyn Nuessen
Sheila Oliver, Current New Jersey Lt Governor.
Jackie Odell
Emily Ouckama
Laura Owens
Sandra Otero
Cynthia Otteson
Margaret O'Halloran
Jessica Pavone
Johanna Perry, People Experience Manager
Deborah Pasachoff
Linda Perez
Jamie Elyse Perez
Carol Pope
Keiona Pruitt
Ela Pete
Maris Pelkey
Mia Porter
Marie Paylich
Chelsea Prim
Tiffany Pfeiffer
Kayley Perkins
Billie Quist
M.Kathleen Quinnin
Amy Quiroz
Monica Ramirez, Justice for Migrant Woman
Elizabeth Randall, Former Rep Assemblywoman
Deanna Rich, Infinicept
Julie Roginsky, Co-Chair, Lift Our Voices
Tanya Roginsky
Kristin Ritter
Ester Rivera
Carrie Rinaldi
Alison Rolling
Maggie Rose
Marsha Roselli

Jane M Rein
Lissette Rodriguez
Erica Rosbe
Wendra Raley-Gonzalez
Ruth Riordan
Diane Rosen
Loraine Russo
Celeste Russell
Lisa Sales, ERA Coalition Advisory Council
Karen Said
Susan Sanders
Martha Savoie
Adrienne Schorr
Keanakay Scott
Sara Seberger
Jennifer Severns
Rachel Sheeran
Lily Silbert
Suzanne Shaughnessy
Rose Sheahen
Lonnie Sheinart
Julie Strandlie
Julie Strandle
Laurie Stricks
Sherry Marks Shpall
Amy Shargel
Jessica Stamen
Julia Smith
Mary Anne Smith
Stacy Sullivan
Rae Sustello
Julia Szlakowski
Patricia Teffenhart
Yvette Tessle,
Lorri Thornton
Marsha Thomason- Sykes
Loretta Timmerman
Lena Townend
Jessica Tardieu Haines
Mia Trachinger
Dawn Tarter
Jacquie Vannoy
Patricia Villarreal
Karen Ward, former Ernst & Young partner
Tracy Warren, Managing shareholder Buchalter San Diego/Sports Broadcaster
New Jersey Senate Majority Leader Loretta Weinberg
Catherine Weitnauer
Vivian Wallens

Alexandra Winder
Clara Wintermute
Jennifer Wood
Kelly Walker
Katie Watroba
Theresa Waverla
Christina Willis
Colleen Washington
Haeyoung Yoon
Judith Zaepfel

RALIANCE
Ending Sexual Violence in One Generation

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Washington, DC 20005
(202) 869-8550
RALIANCE.ORG

October 28, 2021

The Honorable Kirsten Gillibrand
478 Russell Senate Office Building
Washington, D.C. 20515

The Honorable Cheri Bustos
1233 Longworth House Office Building
Washington, D.C. 20515

The Honorable Richard Durbin
711 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Lindsey Graham
290 Russell Senate Office Building
Washington, D.C. 20510

Dear Senators Gillibrand, Durbin, Graham and Rep. Bustos,

On behalf of RALIANCE, a national partnership dedicated to ending sexual violence in one generation, and the 64 national, state, and local organizations signed below working in their communities every day to end sexual violence, we are writing to express our support for the Ending Forced Arbitration for Sexual Assault and Sexual Harassment Act.

We know sexual violence thrives in secrecy, and to end sexual violence we must bring sexual assault, abuse, and misconduct into the open and support survivors in seeking justice and healing. Survivors must have access to the courts and should never be silenced. These systemic problems cannot be hidden from public view, and survivors need every option for pursuing their cases available to them.

We are grateful to you for introducing the Ending Forced Arbitration for Sexual Assault and Sexual Harassment Act and look forward to supporting your efforts to ensure this legislation becomes law.

Sincerely,

Theresa K Poore

Terri Poore, MSW
Policy Director

National Organizations:

Futures Without Violence
Jewish Women International
National Alliance to End Sexual Violence
National Center on Domestic and Sexual Violence
National Coalition Against Domestic Violence
National Domestic Violence Hotline
National Network to End Domestic Violence
RAINN
Sexual Violence Prevention Association

State and Local Organizations:

Colorado:

Family Violence Law Center

Colorado Coalition Against Sexual Assault

Rocky Mountain Victim Law Center

Florida:

Florida Council Against Sexual Violence

Iowa:
Iowa Coalition Against Sexual Assault (IowaCASA)

Illinois:

Illinois Coalition Against Sexual Assault

Zacharias Sexual Abuse Center

WIRC-CAA, Victim Services

Rape Advocacy, Counseling, & Education Services

Sexual Assault Counseling and Information Service

Mujeres Latinas en Accion

VOICES of Stephenson County

Safe Journeys

Illinois Accountability Initiative
Zacharias Sexual Abuse Center

Kentucky:
Kentucky Association of Sexual Assault Programs

Louisiana:
Sexual Trauma Awareness and Response (STAR) Center

Massachusetts:

Sexual Violence Prevention Association

Maryland:

Maryland Coalition Against Sexual Assault

Minnesota:
Someplace Safe

Missouri:

MOCSA

NO ABUSE, NO VIOLENCE

Missouri Coalition Against Domestic and Sexual Violence (MOCADSV)

North Carolina:

NC Coalition Against Sexual Assault
NC Stop Human Trafficking

Nebraska:

Nebraska Coalition to End Sexual and Domestic Violence
Women's Fund of Omaha

New Hampshire:
New Hampshire Coalition Against Domestic and Sexual Violence

New Jersey:
New Jersey Coalition Against Sexual Assault (NJCASA)

Nevada:
Nevada Coalition to End Domestic and Sexual Violence

New York:
New York State Coalition Against Sexual Assault

Ohio:
A.L.I.V.E. Inc.

Crime Victim Services

Ohio Alliance to End Sexual Violence

The Nord Center

RCDV Safe Haven

Survivor Advocacy Outreach Program

Tri-County Help Center, Inc.

Women Helping Women

Oregon:

Oregon Coalition Against Domestic & Sexual Violence

Pennsylvania:
Pennsylvania Coalition Against Rape

South Carolina:

Tri County S.P.E.A.K.S.
Texas:

Texas Association Against Sexual Assault

Washington:

Washington Coalition of Sexual Assault Programs (WCSAP)
King County Sexual Assault Resource Center

Wisconsin:

Wisconsin Coalition Against Sexual Assault
Safe Harbor of Sheboygan County, Inc.

West Virginia:

West Virginia Foundation for Rape Information and Services

UOV SEXUAL ASSAULT HELP CENTER INC

Women's Resource Center

Rape Crisis Center

National Association of Attorneys General

PRESIDENT
Derek Schmidt
Kansas Attorney General

PRESIDENT-ELECT
Jeff Landry
Louisiana Attorney General

VICE PRESIDENT
Tim Fox
Montana Attorney General

IMMEDIATE PAST PRESIDENT
George Jepsen
Connecticut Attorney General

EXECUTIVE DIRECTOR
Chris Toth

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http://www.naag.org/

February 12, 2018

Hon. Paul Ryan
Speaker of the House
H-232, The Capitol
Washington, DC 20515

Hon. Nancy Pelosi
Minority Leader
H-204, The Capitol
Washington, DC 20515

Hon. Mitch McConnell
Majority Leader
317 Russell Bldg
Washington, DC 20510

Hon. Charles E. Schumer
Minority Leader
322 Hart Bldg.
Washington, DC 20510

Hon. Kevin McCarthy
Majority Leader
H-107, The Capitol
Washington, DC 20515

Hon. Steny Hoyer
Minority Whip
1705 Longworth Office Building
Washington, DC 20515

Hon. John Cornyn
Majority Whip
517 Hart Bldg.
Washington, DC 20510

Hon. Richard J. Durbin
Minority Whip
711 Hart Bldg.
Washington, DC 20510

RE:Mandatory Arbitration of Sexual Harassment Disputes

Dear Congressional Leadership:

As the duly-elected and appointed Attorneys General and chief legal officers of our respective States, District of Columbia, and territories, we ask for your support and leadership in enacting needed legislation to protect the victims of sexual harassment in the workplace. Specifically, we seek to ensure these victims' access to the courts, so that they may pursue justice and obtain appropriate relief free from the impediment of arbitration requirements.

Access to the judicial system, whether federal or state, is a fundamental right of all Americans. That right should extend fully to persons who have been subjected to sexual harassment in the workplace. Yet, many employers require their employees, as a condition of employment, to sign arbitration agreements mandating that sexual harassment claims be resolved through arbitration instead of judicial proceedings.

These arbitration requirements often are set forth in clauses found within the "fine print" of lengthy employment contracts. Moreover, these clauses typically are presented in boilerplate "take-it-or-leave-it" fashion by the employers. As a consequence, many employees will not even recognize that they are bound by arbitration clauses until they have been sexually harassed and attempt to bring suit.

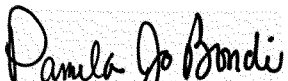
While there may be benefits to arbitration provisions in other contexts, they do not extend to sexual harassment claims. Victims of such serious misconduct should not be constrained to pursue relief from decision makers who are not trained as judges, are not qualified to act as courts of law, and are not positioned to ensure that such victims are accorded both procedural and substantive due process.

Additional concerns arise from the secrecy requirements of arbitration clauses, which disserve the public interest by keeping both the harassment complaints and any settlements confidential. This veil of secrecy may then prevent other persons similarly situated from learning of the harassment claims so that they, too, might pursue relief. Ending mandatory arbitration of sexual harassment claims would help to put a stop to the culture of silence that protects perpetrators at the cost of their victims.

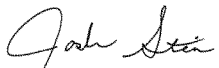
We applaud Microsoft Corporation for recently announcing that it will discontinue arbitration requirements with respect to sexual harassment claims and for supporting legislation to ensure that victims of sexual harassment be accorded the right of access to our judicial system. As Microsoft's President and Chief Legal Officer has fairly noted, "[b]ecause the silencing of voices has helped perpetuate sexual harassment, the country should guarantee that people can go to court to ensure these concerns can always be heard."

Congress today has both opportunity and cause to champion the rights of victims of sexual harassment in the workplace by enacting legislation to free them from the injustice of forced arbitration and secrecy when it comes to seeking redress for egregious misconduct condemned by all concerned Americans. We are aware that the Senate and the House are considering legislation to address this issue. Whatever form the final version may take, we strongly support appropriately-tailored legislation to ensure that sexual harassment victims have a right to their day in court.

Sincerely,



Pamela Jo Bondi
Florida Attorney General



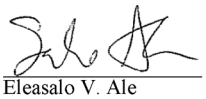
Josh Stein
North Carolina Attorney General



Steve Marshall
Alabama Attorney General



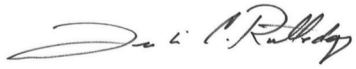
Jahna Lindemuth
Alaska Attorney General



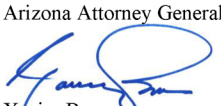
Eleasalo V. Ale
American Samoa Attorney General



Mark Brnovich
Arizona Attorney General



Leslie Rutledge
Arkansas Attorney General



Xavier Becerra
California Attorney General



Cynthia H. Coffman
Colorado Attorney General



George Jepsen
Connecticut Attorney General



Matthew P. Denn
Delaware Attorney General



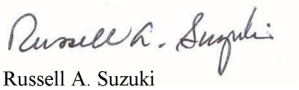
Karl A. Racine
District of Columbia Attorney General



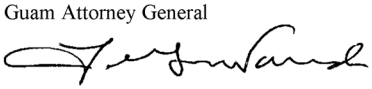
Christopher M. Carr
Georgia Attorney General



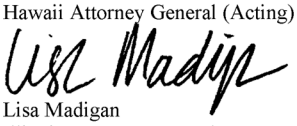
Elizabeth Barrett-Anderson
Guam Attorney General



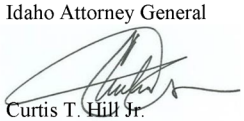
Russell A. Suzuki
Hawaii Attorney General (Acting)



Lawrence Wasden
Idaho Attorney General



Lisa Madigan
Illinois Attorney General



Curtis T. Hill Jr.
Indiana Attorney General



Tom Miller
Iowa Attorney General



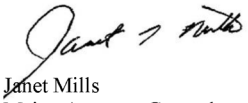
Derek Schmidt
Kansas Attorney General



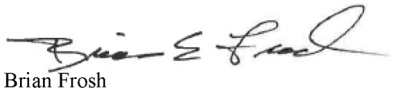
Andy Beshear
Kentucky Attorney General



Jeff Landry
Louisiana Attorney General



Janet Mills
Maine Attorney General



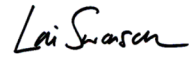
Brian Frosh
Maryland Attorney General



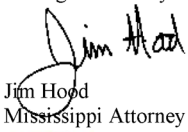
Maura Healey
Massachusetts Attorney General



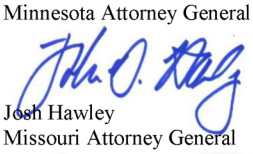
Bill Schuette
Michigan Attorney General



Lori Swanson
Minnesota Attorney General



Jim Hood
Mississippi Attorney General



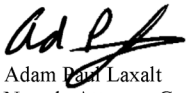
Josh Hawley
Missouri Attorney General



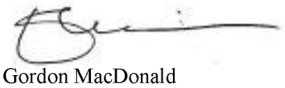
Tim Fox
Montana Attorney General



Douglas Peterson
Nebraska Attorney General



Adam Paul Laxalt
Nevada Attorney General



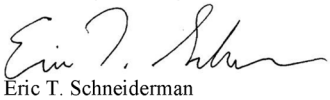
Gordon MacDonald
New Hampshire Attorney General



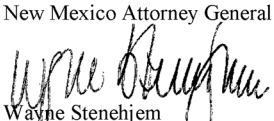
Gurbir S. Grewal
New Jersey Attorney General



Hector Balderas
New Mexico Attorney General



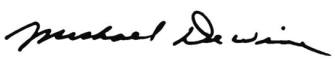
Eric T. Schneiderman
New York Attorney General



Wayne Stenehjem
North Dakota Attorney General



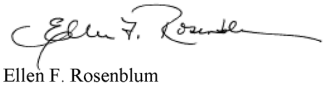
Edward Manibusan
Northern Mariana Islands Attorney General



Mike DeWine
Ohio Attorney General



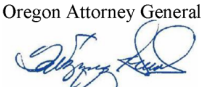
Mike Hunter
Oklahoma Attorney General



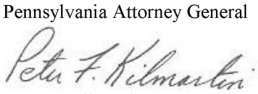
Ellen F. Rosenblum
Oregon Attorney General



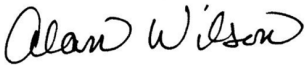
Josh Shapiro
Pennsylvania Attorney General



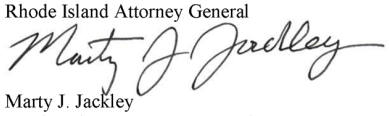
Wanda Vázquez Garced
Puerto Rico Attorney General



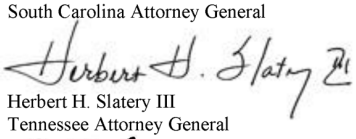
Peter F. Kilmartin
Rhode Island Attorney General



Alan Wilson
South Carolina Attorney General



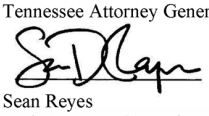
Marty J. Jackley
South Dakota Attorney General



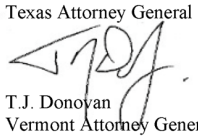
Herbert H. Slatery III
Tennessee Attorney General



Ken Paxton
Texas Attorney General



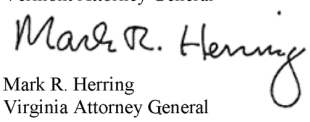
Sean Reyes
Utah Attorney General



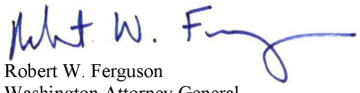
T.J. Donovan
Vermont Attorney General



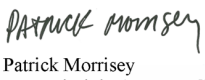
Claude Earl Walker
Virgin Islands Attorney General



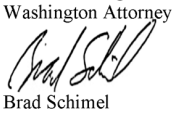
Mark R. Herring
Virginia Attorney General



Robert W. Ferguson
Washington Attorney General



Patrick Morrisey
West Virginia Attorney General



Brad Schimel
Wisconsin Attorney General



Peter K. Michael
Wyoming Attorney General