

SMALL PRINT, BIG IMPACT: EXAMINING THE EFFECTS OF FORCED ARBITRATION

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SMALL PRINT, BIG IMPACT: EXAMINING THE EFFECTS OF FORCED ARBITRATION

TUESDAY, APRIL 9, 2024

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice at 10 a.m., in Room G50, Dirksen Senate Office Building, Hon. Richard J. Durbin, Chair of the Committee, presiding.

Present: Senators Durbin [presiding], Whitehouse, Klobuchar, Hirono, Booker, Butler, Graham, Cotton, Tillis, and Blackburn.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Chair DURBIN. This hearing, Small Print, Big Impact: Examining the Effects of Forced Arbitration will come to order. The Seventh Amendment to the Constitution guarantees the right to a jury trial. However, for tens of millions of Americans, this constitutional right is an empty promise. Instead of having their day in court, people are forced into arbitration by the fine print, buried deep in employment contracts, product manuals, and terms of service.

I'd like to turn to a brief video featuring three individuals who were denied their day in court as a result of forced arbitration clauses that they didn't know very little, if anything about. Please proceed.

[Video is shown.]

Chair DURBIN. Forced arbitration is pervasive. It affects more than 60 million workers. An estimated 825 million consumer arbitration agreements were enforced in 2018, a number that undoubtedly has gone up since then. If you've activated a cell phone, signed up for a credit card, bought a mattress, television, countless products, you likely agreed to arbitrate any future disputes with the manufacturer or a service provider.

Don't be embarrassed if you're just learning that you likely waived your constitutional right to bring a claim in court. You're part of the 90 percent of American consumers who use popular products and had no idea they'd signed up for forced arbitration. All of us "agree" to forced arbitration, when we click that button or check that box accepting terms of service. We may have no idea we're agreeing to this process when we sign up.

The rules governing arbitration often limit the information victims can get from corporations making it even more difficult to prove their claims. The process is overseen by arbitrators who can

be biased in favor of one side or the other, usually corporations, because they want to ensure a steady pipeline of future work.

Those arbitrators aren't bound by precedent and their decisions are only subject to limited judicial review. The problems are compounded by the secretive nature of this process. Nowhere was this troubling combination more pronounced, than in cases of sexual assault and sexual harassment. For years, predators like Roger Ailes preyed upon women without fear because their employers would hide behind confidential arbitration proceedings to sweep abuse under the rug.

Thankfully, that's no longer the case. Brave survivors like Gretchen Carlson with us today—thank you for joining us—step forward to break this cycle of abuse. As a result of her unrelenting advocacy and this Committee's determination to do something on a bipartisan basis, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment was signed into law by President Biden in March of 2022.

As the name suggests, this law prohibits forced arbitration in cases of sexual assault or sexual harassment. While this marked a significant achievement, there's more to be done. We'll hear from witness Joanne Grace, how forced arbitration is used to cover up illegal age discrimination, an issue of great interest to the Senator from South Carolina.

The same is true of racial discrimination, abuse in nursing care and countless other harms. Joanne and others like her deserve their day in court. That's what the Constitution promises, that's what the Congress should provide.

I want to thank Ranking Member Graham and his staff for working with us on this bipartisan basis to select today's witnesses. And before I turn the microphone over to Senator Graham, I want to congratulate South Carolina and Iowa for their terrific basketball experience over the last 2 weeks. Senator Graham.

**OPENING STATEMENT OF HON. LINDSEY O. GRAHAM,
A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA**

Senator GRAHAM. Well, thank you. It was a heck of a ball game. Caitlyn Clark was a phenomenal college athlete. Personally, I'm glad she's going to the pros. She beat us last year, but we came back so it was a great game.

So what are we trying to do here? We're trying to level the playing field. I co-sponsored the bill with Senator Gillibrand about sexual harassment and sexual assault in employment contracts. When you go to work for somebody, you sign an employment contract, pretty much take it or leave it. And most of these employment contracts require mandatory arbitration, binding arbitration. It's, not really a level playing field. We learned that.

In the areas of sexual harassment and sexual assault, I think most Americans believe that you shouldn't sign away your rights to have your day in court. That's just too personally important and we passed the law to say you cannot require through binding arbitration in employment contract, you cannot deny the employee their day in court. And Ms. Carlson was instrumental in that.

So now we have the Protecting Older Americans Act. What's that all about? A lot of people are discriminated in the workplace in my

view because of their age because it's just so much cheaper to have a younger employee. We've seen that, you know there's articles about CVS and other companies that routinely engage in these kinds of practices where an older employee is under a lot of scrutiny and a lot of harassment, and the next thing you know they're terminated.

So what I want to do is to make sure that if you feel like you've been discriminated based on your age, that you can have your day in court. It's still the burden on you to prove you were, the company or the individual involved will have plenty of defenses. But I just think forced arbitration and that situation doesn't serve the public interest. And I hope after this hearing we can have a vote on Protecting Old Americans Act that would do away with binding arbitration in employment contracts.

And finally, arbitration is okay if you're seeking advice, you're in the investment business trying to, you know, go get some advice for investment. It's a business relationship. Two companies want to agree to arbitration, there's a level playing field. That's not my problem.

There is plenty of space in the American economy for arbitration, but what we've seen is these employment contracts pretty much are written to the advantage of the employer and in areas like sexual harassment, age discrimination, and a few other areas, it's gotten out of hand, and I want to level the playing field. So thank you for having this hearing.

Chair DURBIN. Thanks, Senator Graham. We both agreed on the four witnesses who I'll now introduce.

Gretchen Carlson, no stranger to the Committee and welcome back. Former CBS News and Fox News journalist and vocal advocate for women's rights, curbing the abuse of forced arbitration and non-disclosure agreements. Her 2016 sexual harassment lawsuit against *Roger Ailes* was one of the first high profile cases of the #MeToo movement.

In 2019, she co-founded Lift Our Voices a nonprofit organization to advocate for a ban on NDAs and forced arbitration in employment contracts.

Myriam Gilles, I hope I pronounced it correctly. Did I get it right? Law professor at Benjamin Cardozo School of Law. Professor Gilles specializes in class actions and aggregate litigation and has written extensively on arbitration, previously testified before our Committee. Welcome back.

Victor Schwartz, co-chair of the Public Policy Group at Shook, Hardy, & Bacon. Mr. Schwartz served as law professor and dean of the University of Cincinnati College of Law before his current position. He's previously testified before the Committee and we welcome him.

Joanne Grace of Columbiana, Ohio has served her community in a variety of nursing homes since 1976, including as a floor nurse, supervisor, manager, and the director of nursing services. Thanks for joining us today.

I'm going to swear in the witnesses and each will have 5 minutes for an opening statement, then the question periods 5-minute rounds for each senator. I'd ask the witnesses to please rise. Raise your right hand.

[Witnesses are sworn in.]

Chair DURBIN. Thank you. Ms. Carlson, you're first.

STATEMENT OF GRETCHEN CARLSON, JOURNALIST AND CO-FOUNDER, LIFT OUR VOICES, GREENWICH, CONNECTICUT

Ms. CARLSON. Thank you so much, Chairman Durbin, Ranking Member Graham, and distinguished Members of the Committee. Thank you for the opportunity to testify about my experience with forced arbitration and the work I'm doing to make workplaces safer in America.

In 2016, I found the courage to sue one of the most powerful men in the world, former Fox News chair and CEO Roger Ailes for sexual harassment. Toughest decision of my life. But after they fired me, I said to myself, "If I don't do it, who will?" My story certainly made headlines, but it could have easily been swept under the rug like countless others because of that forced arbitration clause in my contract.

No one starts a new job expecting harassment. I know I didn't. And few people can walk away from a job because of the fine print. I don't care who you are, most people have no idea what forced arbitration means. In my case, it showed up in my last contract with Fox. I was told not to worry because it was, "Becoming the way of the world." I could not have imagined how true that would prove to be.

Employees have no idea that signing on the dotted line accepting a forced arbitration clause can strip them of their rights for future justice. Back then, I could have never known that my story would help propel Congress to start examining forced arbitration in a meaningful way. Thanks to other courageous women, to the Members of this Committee, and to other champions in Congress hailing from both sides of the aisle, survivors of sexual misconduct can now seek justice.

Witnessing the President sign the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act 2 years ago, was one of the proudest moments of my life. Courage is contagious and this new law is already having significant impact.

Kirsten Tiger, a bartender at a country club who alleged she was sexually harassed by multiple members, was able to bring a harassment lawsuit against her employer last year. And even though her employer tried to still silence her by filing a motion to compel arbitration, the request was denied because of the new law.

A judge in Texas also declined to grant *Blaze Media's* motion to dismiss last year after employee Sydney Watson, alleged harassment in the workplace. Watson's case can also continue in court thanks to the new law.

While I feel endless gratitude toward this Committee for restoring the rights of sexual misconduct survivors like these, I'm now more sure than ever before that all Americans deserve this right. It's why I am a champion of the new bipartisan forced arbitration bill, the Protecting Older Americans Act, co-sponsored by Senators Graham and Gillibrand with endorsements by Chair Durbin and Senator Grassley too. Thank you.

And thank you Senator Booker for leading the effort to introduce the Ending Forced Arbitration of Race Discrimination Act. These

bills give Americans a choice about whether or how to seek accountability, a choice that should not be made by companies or the Government.

You're going to hear from Joanne about age discrimination in a moment, but let me tell you about two former Tesla employees, Jasmine Wilson and Kabiru Alowonle. They reported racist behavior at their California Tesla's plant, graffiti that read KKK, and the N word, but no action was taken when they went to HR and they were forced into arbitration.

Stephanie Weaver's grandmother went missing at a nursing home after being left unattended, and when the home called her to come look for her grandmother, she found her grandmother's dismembered body had been eaten by an alligator in a nearby pond. Stephanie fought all the way to the South Carolina Court of Appeals after the home tried to force her into arbitration. If your grandmother can be eaten by an alligator because she wasn't properly cared for, and a major employer like Tesla can be accused of rampant race discrimination, and in both cases, forced arbitration eliminates justice, something must be terribly wrong with our system.

For the naysayers out there, the U.S. Chamber claimed all hell would break loose if you let women file their assault and harassment cases in court, there'd be a slew of new cases and companies would go out of business. But none of that has happened. Instead, survivors are simply being empowered with a choice.

After my story at Fox News, a close friend said to me, "Gretchen, something good is going to come of this." At the time I couldn't see it, but something great has come of all of this. Thank you for holding this hearing and I hope when you consider the horrible stories currently being allowed to flourish within the secrecy of forced arbitration, you will agree that all Americans deserve this choice. Thank you.

[The prepared statement of Ms. Carlson appears as a submission for the record.]

Chair DURBIN. And thank you for stepping up. America's better because you had the courage to step up and say things which were painful. Thank you again.

Ms. CARLSON. Thank you, Chairman.

Chair DURBIN. Professor Gilles.

STATEMENT OF MYRIAM GILLES, PROFESSOR OF LAW, BENJAMIN N. CARDOZO SCHOOL OF LAW, YESHIVA UNIVERSITY, NEW YORK, NEW YORK

Professor GILLES. Chairman Durbin, Ranking Member Graham, distinguished Members of the Senate Judiciary Committee, thank you for inviting me to speak today about the harmful effects of forced arbitration clauses that are imposed on all of us in take it or leave it contracts, that shunt cases out of our public courts and into secret one-on-one arbitrations.

And I say all of us, because as we sit here today in this room, everybody in this room is subject to a forced arbitration clause. Everybody in this country is subject to a forced arbitration clause in some aspect of their lives.

As Senator Durbin noted, to use a credit card, to apply for a job, to open a checking account, to use a cell phone, to put your mom in a nursing home, you effectively have to sign away your freedom to decide for yourself how to exercise your rights.

Forced arbitration takes that power, that agency, away from each of us and hands it over to powerful corporations. What this means is that when there's a forced arbitration clause in effect, Americans often have no way of getting justice under Federal laws that would otherwise be enforced in court, whether they be consumer protection, antitrust privacy, or discrimination laws. Because forced arbitration essentially replaces the laws that this body enacts, with private legislation written by corporations into the fine print of contracts that nobody reads and nobody can negotiate.

One way of grasping the enormity of the problem we've come to talk to you about today, is to consider some recent cases where there was no forced arbitration clause in effect, and to think about the injustices that would still be happening if those cases have been blocked by forced arbitration.

I think we've all heard about the massive antitrust case brought against the real estate industry, which recently resulted in a jury verdict in favor of home purchasers and a settlement that promises to change the way Americans buy homes by reducing commissions and opening up competition among agents. It's total happenstance, Senators, that most real estate brokers simply didn't impose arbitration on their clients, because if they had this historic and industry changing settlement would never have come about.

And since we've been talking about the Protecting Older Americans Act, I want to tell you about another case. In 2016, a group of Hewlett Packard employees sued alleging the company violated the ADA by terminating them because of their age. Now about 140 of the laid off workers signed releases that included forced arbitration clauses, while another 320 refused to sign those arb free workers were allowed to continue in court, where last week, the judge agreed to a settlement for \$18 million, the highest per plaintiff settlement ever recovered in an age discrimination suit, while the workers who had the misfortune of signing releases with forced arbitration clauses, are out of luck. That makes no sense.

I could go on and on. There are many examples like this, but the point is simply this, Congress enacts laws to protect Americans. Many of those laws rely for their enforcement, on courageous individuals bringing lawsuits, challenging harmful, and sometimes longstanding policies and practices. Forced arbitration denies victims the right to bring such challenges, and it denies all of us the ability to know what's going on in the marketplace and in the workplace.

And for what? Why has this unjust regime of forced arbitration developed? Well, it's not because as the Chamber would tell us, that it's because forced arbitration is cheaper, faster, or easier. That's not it. If it were, companies wouldn't have to force us to do it, right? We'd want to do it. Instead, companies impose forced arbitration to squelch cases and to immunize themselves from public accountability.

And I think the evidence of this true motivation is now glaringly obvious in the recent phenomenon of mass arbitration, in which

victims simultaneously file thousands of individual arbitrations, basically forcing corporations to actually face claims of wrongdoing and make good on their contractual promises to pay the cost of arbitrating large numbers of single file claims.

No surprise, I think, that just about every company hit with a mass arbitration has gone running to court seeking relief from their own contracts. Also, no surprise that the Chamber of Commerce characterizes mass arbitration as extortion. Meanwhile, Federal judges faced with these cases have called it poetic justice.

Here's the point. However you—whatever you think about mass arb, the resistance that these companies have to individually arbitrating these cases after unilaterally forcing these provisions on their workers and consumers, makes clear that forced arbitration was never about fairness or efficiency, but about suppressing worker and consumer cases. Thank you so much.

[The prepared statement of Professor Gilles appears as a submission for the record.]

Chair DURBIN. Thank you, Professor. Professor Schwartz.

STATEMENT OF VICTOR E. SCHWARTZ, CO-CHAIR, PUBLIC POLICY PRACTICE GROUP, SHOOK, HARDY & BACON LLP, WASHINGTON, DC

Professor SCHWARTZ. Thank you. Yay. Today is April 9th, and I'll just mention one personal note. It was my dad's birthday. He died when I was 10, so I don't want to goof up too much today in case he's—

Chair DURBIN. Sure you won't.

Professor SCHWARTZ [continuing]. Hanging around somewhere.

There's a lot of myths and truths about arbitration. But a couple of things that I wanted to mention, because I had a minister named Albert Sikkelee and he taught me, something not in context is pretext. And you have to put arbitration in context with litigation, which I know about. I've lived it for 50 years. And I do write a case book that a lot of people have seen, "Prosser, Wade and Schwartz."

The cost of arbitration is far less than litigation. We have data that showed that it is much cheaper. There is in litigation a lot of delay. I mean, real delay. It may take a year, more than a year to get cases heard. Where with arbitration, you get heard right away. And that's an important, an important thing.

Claimants benefit because it's simpler. You cannot have to go to court. Learned Hand said, "After disease, nothing is worse than being in litigation." And I know what it is on both sides. You don't have to go to court, you don't have to disrupt your family. And that is a definite benefit because you work on your own time.

We'll submit data to show that the amount you receive in litigation is not less than you would in arbitration or the reverse. Not at all. And I mentioned the disruption that occurs with your life in litigation. It's just not good.

And then getting an attorney. Employment cases, it's almost impossible to get a plaintiff's attorney today unless the contingency fee is very, very substantial. A \$200,000 case, you're not going to get a plaintiff's attorney, unless he or she wants to volunteer not on the contingency fee system and it's proper.

They end up getting 100 dollars an hour and they don't want that. So you can't get an attorney. And all you've got, is arbitration itself. There are a lot of things said about predispute arbitration. There can be debates about it, but this is just this little fellow's point of view.

They, in most instances, it's really not forced. If you want to buy a phone, a lot of the phone companies require you to sign an arbitration agreement. Not all. There often is an alternative. Or you can say, "Hey, I don't want to do it at all."

Sometimes it's small print in a big long contract, but if it's too buried and it can't be seen, courts will deem that unconscionable. They have the power to undo it and they do it. So if the agreement has things that are just improper, State courts hold them improper under unconscionability.

About confidence. You can tell any public official about your agreement, you can tell them the result. Gag orders are strictly shrunken down by courts. And since this Committee has held hearings, it's been helpful because more State courts are doing that. And that is a important thing.

Some people say, we'll do it post arbitration—I mean, post dispute, that doesn't work. Because each side tries to rig it in its own way. And businesses don't prevail at a greater risk at a greater length with arbitration versus litigation.

And I'd be very happy to take your questions. I see the orange light, and for 50 years I have never gone beyond the orange light. So I've kept it up. Thank you.

[The prepared statement of Professor Schwartz appears as a submission for the record.]

Chair DURBIN. Well, you're the first witness that can say that. I thank you very much, Professor. At this point, Ms. Grace.

**STATEMENT OF JOANNE E. GRACE,
REGISTERED NURSE, COLUMBIANA, OHIO**

Ms. GRACE. Chairman Durbin, Ranking Member Graham, and distinguished Committee Members, it is truly an honor to be here. Thank you for giving me the opportunity to tell my story on how I was wrongfully terminated because of my age and how my former employer is using forced arbitration to steal my rights, my voice, and even my dignity.

I started my career as a registered nurse in 1976. I've dedicated my whole life to others. After working hard for almost 50 years as a floor nurse, a supervisor, a manager, and a director, my healthcare system was acquired by Steward Health System. Shortly thereafter, I became a patient advocate.

I loved being a patient advocate, because it allowed me to speak up when a patient wasn't being heard. This is the same purpose for which I am here today to speak for those who are being silenced with forced arbitration.

When Steward hired a new director of nursing in 2020, the overt ageism started. What was a second home to me, became a hostile work environment. Older employees were being replaced by younger employees. At least once a week, this director of nursing would say something to me like, "Why do you want to keep working at your age?" Or, "Why aren't you retiring?" She openly talked about

my age and even a medical condition in meetings just to embarrass me.

HR dismissed my discrimination. You know what HR told me? They called me an old warrior. "Joanne, you're an old warrior." Old. Old. Why would an HR representative feel so brazen and so shameless as to outright call me old to my face?

When I was out of work with COVID-19 Steward posted a new supervisor job online. The job description made it very clear to me that it was my position, just with a different title. Two days after I returned to work, one position was "reduced." One position. It was mine. Because my position legally needed to be filled, the hospital hired for that supervisor position, someone in their twenties who did not even meet the minimum experience requirements for a supervisor.

My reduction was a lie to force me out. I was devastated. In getting rid of more experienced nurses like myself, the hospital was putting patient safety at risk. I hired an attorney to sue Steward for age discrimination. It is not about the money. I love being a nurse. I want to protect other nurses and keep patients safe. I hope that my lawsuit can effectuate that change.

Steward moved to higher my lawsuit by forcing us into an arbitration agreement. Even though I had never signed any forced arbitration agreement, they, my employer, pointed to my name on an Excel list as having attended a training about arbitration. I didn't even attend that training. They said that by continuing to work after that training session, I lost my right to hold them accountable in court.

The wickedness did not stop there. This so-called forced arbitration agreement further rigs this process by allowing me only to call one witness from Steward and limits me to calling on and asking for 25 documents. In court, I could depose the director of nursing, the HR representative, those decisionmakers, and all the witnesses that witnessed my age discrimination.

In a forced binding arbitration, I can only call one witness. They claim this agreement allows the employer to pick the pool of potential arbitrators, which is mainly defense oriented attorneys. This means that a defense-oriented attorney is going to decide my case. If I somehow make it through this rigged process and win, no one will know, and no change can ever happen.

As long as Congress allows companies to sweep accountability under the rug, they will continue to do just that. I hope you now understand why an HR representative felt so brazen and shameless to call me old. The ability to use forced arbitration empowers companies to violate the law while hurting nurses and patients. As more older Americans remain in the workforce, our rights need to be protected. Older workers should not be forced into retirement, nor into forced arbitration.

Chair Durbin, Ranking Member Lindsey Graham, Committee Members, thank you for listening to how allowing forced arbitration really has destroyed my dignity. Legislation is needed to end this practice, and I'm happy to answer any questions that you may have.

[The prepared statement of Ms. Grace appears as a submission for the record.]

Chair DURBIN. Ms. Grace, thank you for being here. On behalf of an institution filled with seasoned warriors, we stand shoulder to shoulder with you in this effort. And thank you for telling your story for all of the country to hear. It's very important.

I take it from what you said, you never signed, checked a box, or in any way indicated that you were part of any forced arbitration agreement?

Ms. GRACE. No, I did not. And in fact, I as part of management at the director level through part of Steward Health acquisition, I saw other people go who were older. They signed the arbitration paperwork. At the end when they were terminated, in return for some kind of monetary agreement that they can receive, it was not—I never signed that, and I would never advocate for anybody to sign that.

Chair DURBIN. Professor Schwartz, this is a legendary moment in my life. Now I have discovered a man who is the author of "Prosser on Torts." One textbook which I purchased in law school at Georgetown, quite a few years ago. I was impressed not only with the contents, but by the weight of that book. I carried it around all year trying to learn from it, and I salute you for being the co-author of one of the most famous legal textbooks in America. I'm glad to learn you did this.

May I ask you, following up on the question with Ms. Grace. Recently—

Professor SCHWARTZ. Oh, I just want to thank you, sir. I can tell you one thing about that book you may not know. If you put it on the floor in your kitchen, you can reach the top shelf. A lot of people do not know that.

[Laughter.]

Chair DURBIN. That's good practical advice. Recently, a company called Roku, which is a streaming service, updated its dispute resolution terms. I pulled out the contract which they offer to people who wanted their services.

Despite not providing a description of what terms changed, the company wouldn't allow you to continue using a Roku device to stream your favorite shows unless you agreed to the terms on this contract. Assuming a user took time to read them, and they're pretty simple, they say, "Any disputes between us, meaning the consumer, and the company, will be settled by binding arbitration meaning we both give up the right to go to court."

Let's walk through what it takes to opt out of that provision in their contract. "You cannot opt out by email. Instead, you have 30 days to mail a letter to Roku's general counsel. The letter must include the name of each person opting out, their contact information, the specific Roku product, models owned, the software and the product, the software in the product, the services at issue, the email address you used to set up your Roku account, and if applicable, a copy of your purchase receipt. Opt out notices submitted in any other way, including email, are considered ineffective."

When you hear Ms. Grace's experience where they're trying to impute or infer that she's signed up for arbitration, and you see the rigamarole you have to go through at Roku to get out of it, Professor Schwartz, do you think that this is a contract that should be honored?

Professor SCHWARTZ. I'm sorry, sir. Could you repeat the question, please?

Chair DURBIN. It's a long question.

Professor SCHWARTZ. Right.

Chair DURBIN. I'm asking about the Roku company that has a forced arbitration agreement, and to opt out of it, you need to send an elaborate number of communications specified in a manner that they accept. And you've heard Ms. Grace sitting next to you talk about what she went through, where it was inferred that she had signed this agreement. Can you comment on that aspect of forced arbitration?

Professor SCHWARTZ. I think that forced—some people call it forced—but in that situation with age there should be an opt out. Age situations are different than your regular purchase of a product. And I think that it's an area where carefully drawn rules should regulate such contracts.

And in fact, in general, I would say to you, Senator, that this is an area where it's hard to find rules in the abstract. Having Federal regulation of these arbitration agreements, I think is a sound step to do, rather than leave it to the whim of State courts. Because some of the agreements may be unfair. They may be unfair with Ms. Grace, but it's very hard to do that in the abstract without specific knowledge of the specific contract.

So I'm suggesting a consideration of having regulation at the Federal level of these agreements, especially in areas of controversy like age, military, children, nursing homes.

Chair DURBIN. Thank you. Senator Graham.

Senator GRAHAM. That idea of, you know, some kind of regulatory scheme, we'll see where that takes us. I think it's a good suggestion to the Committee.

Ms. Grace, did you find it more of a common practice that the older you got, the more scrutiny you were under in terms of your employer?

Ms. GRACE. I did, sir. In the prior hospital system that I was at before it was bought—

Senator GRAHAM. What's the difference between your salary and the person that they hired to take your job?

Ms. GRACE. Much less. Because they hire by experience. And my salary was as a patient advocate, \$38 an hour, which is good money for a nurse. That supervisor probably who took on my job probably was making \$25.

Senator GRAHAM. Okay. Professor Gilles, in the age discrimination area, is it one of the common themes here that replacing an older employee with a younger employee saves money?

Ms. GRACE. Yes, because they believe it's been a long time belief in healthcare that—

Senator GRAHAM. No, I'm talking to Professor Gilles. I'm sorry.

Ms. GRACE. Pardon.

Senator GRAHAM. I'm directing this question to Professor.

Ms. GRACE. Oh, I'm sorry.

Senator GRAHAM. Sorry. Yes, my bad.

Professor GILLES. Excuse me. But I'm going to continue with what Joanne has just told us. Yes. I mean, the idea is that younger

workers can come in more cheaply. Seniority, you know, as many of us know, each promotion gets you more and more money.

So if you can get rid of those expensive, older, experienced workers and call it sort of a worker reshuffle and hire younger workers with less experience, you can do some more cheaply.

Senator GRAHAM. The idea of going to court and the burden is still on the plaintiff, right?

Professor GILLES. Oh my gosh, yes. I mean, let's not pretend here that getting rid of forced arbitration means that everybody's going to walk into court and get a check, you know, once they walk into court. The Federal judicial system has tremendous amounts of tools for Federal judges to use to make sure that the cases before them are valid, are meritorious, and they use them on a daily basis.

Senator GRAHAM. I think Rule 11 is one of those tools, right?

Professor GILLES. Well, that's one of those tools when we think that something has gone awry. But I would say that Rule 8, that tells us that, you know, you have to be able to plead your case in a way that shows that there's an actual there, there. That's a meaningful rule.

Rule 12(b)(6), which gives the victor the opportunity to represent his clients by seeking to dismiss claims that they think lack legal merit. So, a ton of stuff that lawyers and judges do to ensure that the system of laws operates the way that we want it to.

But forced arbitration basically says, let's just forget all that and forget all those cases and shunt them into a private system. So I think that that's the real problem here.

Senator GRAHAM. Ms. Grace indicated that she could only call one witness in the arbitration setting. Is that common?

Professor GILLES. Oh, I'm sorry. I'm sorry. You were still asking me?

Senator GRAHAM. Yes.

Professor GILLES. Yes. So the arbitral providers really limit discovery. That is one of the ways in which they can promise to their repeat clients that they will not have to spend very much money and not have many of their corporate executives have to sit down for depositions. So, yes, my understanding is the very tight limits on discovery.

Senator GRAHAM. Well, thank you.

Mr. Chairman, I think the Protecting Older Americans Act, I hope the Committee will take it up and we can pass it. And to Professor Schwartz, I think your idea about some Federal guidelines in this area makes some sense to me, and I'd like to continue this discussion.

There is a place for arbitration. I'm not against arbitration as a general concept. I just think the idea of leveling the playing field and the kind of services you seek matter. The more sophisticated the service, you know, the more level the playing field would be in my view.

So, at the end of the day, basic consumer engagements, we need to make sure that people are not left out to dry. When it comes to sexual harassment, age discrimination, and other areas of our lives, that people have a chance to have their day in court. But generally speaking, having arbitration is a good thing.

I think it, it is cheaper, it is more efficient, but there are circumstances where it really doesn't render justice. And that's what I'm looking for is try to find that balance. Thank you.

Chair DURBIN. Thanks, Senator Graham. Senator Whitehouse.

Senator WHITEHOUSE. Thanks very much. And thank you all for being here and for supporting this, I think, important cause. The Chairman mentioned the important role of the Seventh Amendment just as part of our Constitution, but you can go well back before the Seventh Amendment to Blackstone's commentaries, speaking about how the jury, the glory of the English legal system, which we inherited, had the benefit of being a bastion against the influence of the powerful and more wealthy—he used the word citizens. Now, I would say forces because our most powerful and wealthy influences right now tend to be corporate.

And so you can see the reason why corporate America would like to get out from the jury system. It's the place where you can't fix things. You can come to Congress and you can shower money around and send lobbyists all over the place. You can help presidents get elected and get favored treatment in the Oval Office.

But you try to pull stunts with a jury and you go to jail for jury tampering. And we've seen over and over again cases in which an honest courtroom has been the solution to lies and to bullying that were protected in the political space. So there's a lot going on when the Supreme Court tries to disable Americans' right to trial by jury and allow corporations to seize it and shunt them to binding arbitration.

Professor Gilles, this has had particular impact in the area of the high-volume, low-dollar frauds that are really only economically answerable by class actions. Could you talk a little bit about how the power to take away jury rights and force citizens into mandatory arbitration has impacted the ability of corporations to get away with low-dollar high-volume fraud?

Professor GILLES. Sure. I mean, and this is the very reason we're here, right? Because as the CFPB found in its 2015 study of forced arbitration, most arbitration provisions combine a class action ban, right? So the idea is, we would prefer these companies say not to be responsible or accountable for, as you describe it, Senator small per plaintiff injury.

So we can sort of spread the pain around lots and lots of individual Americans, and most of them are never going to individually arbitrate those claims because it's simply not worth it to do so, right? If you and I were—

Senator WHITEHOUSE. Let's say you add a fake \$15 fee onto all of your customer's bills, you might get some calls complaining, in which case you reverse it. But for the others you just bill them, but nobody will stop you because it's not worth anybody to go and hire a lawyer and litigate over a \$15 fee for them. But if you have 2 million customers, that's \$30 million that just robbed from the public.

Professor GILLES. Exactly, yes. And this is why the adopters of Rule 23 in 1966 decided that there needed to be a procedural pathway to allow small dollar claims into the court system, otherwise, corporations could run roughshod over all of our rights. And as you say, most of us would never even notice the \$15 overcharge.

And so it's really important to see that right now companies could be doing so many things, so many illegal things along the edges that are simply falling through the legal cracks, because class actions are impossible to bring, where a forced arbitration clause is in effect.

Senator WHITEHOUSE. And compared to the elaborate and well-developed procedural and substantive provisions that make sure a courtroom is fair, how has it worked out in arbitration chambers?

Professor GILLES. Well, that's a complicated question, but I'll give you a few bullet points. First off, and I just want to disagree with my esteemed colleague Victor Schwartz. Arbitration fees are dramatically higher than court fees. They're just higher. Arbitrators are paid a daily rate of somewhere between \$1,000 and \$2,000 an hour. Individuals do not have to pay judges to hear their cases.

The arbitral provider is picked by the very company that the worker or the consumer is complaining about. So I just want you to think, most of you in this room are lawyers, imagine if you could just pick your judge, right? So the repeat player bias there should not surprise us.

Third, as you mentioned, Senator Whitehouse, the arbitration clauses that we're seeing prohibit all forms of collective action, right? So, any form of collectivization, which means that for most people, that's, it's simply not viable.

We've talked about this with Ms. Grace, the rules of the arbitral bodies limit discovery and other attempts to obtain evidence. They do not employ the evidentiary rules and have very limited appellate rights, as in, almost zero appellate rights.

So for all of these reasons, we're talking about systems that were created by companies and look exactly like what a company would create. A system that protects them and doesn't protect the rest of us.

Senator WHITEHOUSE. Mr. Chairman, I'd just add that, back when I was Attorney General, one of my attorney general colleagues brought an action against one of these arbitration offices and caused them to shut down because they had been so crooked in their manipulation of the outcomes against the individuals and in favor of, in effect their corporate clients. So there's a long record here, and I appreciate your attention to this matter.

Chair DURBIN. Thank you, Senator. Senator Cotton.

Senator COTTON. Thank you all for appearing today. Mr. Schwartz, I have a series of questions I want to ask you just to establish some baseline facts about arbitration. But since the professor just mentioned you by name for disagreement, would you like to respond—

Professor SCHWARTZ. Yes.

Senator COTTON [continuing]. On the disagreement with you that arbitration, I think she said, arbitration fees are higher than court fees.

Professor SCHWARTZ. I'll submit the rules of the American Arbitration Association. The payment is not more than \$300, and there's one way fee sharing. If you win the arbitration, your, all your fees are reimbursed. I will submit the rules to the Committee, and I'd be happy to send a copy to the professor so she can look at the rules of the American Arbitration Association.

Senator COTTON. You said \$300. Is that \$300 a day?

Professor SCHWARTZ. No, it's an immediate fee. That's it. And I will submit the rules to the Committee. The rules don't lie, but people can speculate about them. Take a look at them, Senator.

Senator COTTON. Okay. Thank you. Now, I want to go through these questions that I have just to establish some baseline facts. The point of having a court system, Professor Schwartz, is so that people who have been wronged can have a fair and efficient system here and decide their claims, correct?

Professor SCHWARTZ. That's right.

Senator COTTON. Are State and Federal courts backlogged and overburdened—

Professor SCHWARTZ. Yes, they are.

Senator COTTON [continuing]. A matter of cases right now?

Professor SCHWARTZ. Before COVID, they were backed up. Now it's about 18 months until you can have your case heard. Meanwhile, you have medical expenses, you have other situations where you can't work, where arbitration can be heard much more quickly, sir.

Senator COTTON. Okay. Is it true that arbitration is typically faster at resolving those claims than taking some of those claims through the court system?

Professor SCHWARTZ. We can submit information to you and it's much, much faster. The courts are delayed in jury picking, and I want to mention something about class actions because this Committee should look into how class actions are used. In many situations, the lawyers end up with quite a bit of money, and the members of the class don't. And I see this every year where they're willing to settle, and frankly, sometimes defense lawyers settle because they want to get rid of the case. And the ones who get the benefit are the lawyers and not the victims who are supposed to be helped in the class.

So this Committee looks at different things. Class actions should have their original purpose of Rule 23 and not be abused.

Senator COTTON. Plaintiffs in arbitration can recover the same kinds and amounts of damages that they would get in a court?

Professor SCHWARTZ. We'll submit information that that is true. Stanford study shows the amount of damages don't vary between arbitration and court.

Senator COTTON. So academic studies show that the amount of recovery does not vary, it's not materially different between a court and an arbitration?

Professor SCHWARTZ. Stanford study, which is respectable, shows that.

Senator COTTON. Is it true that arbitration is more flexible than the court system, for example, that arbitration can occur at anytime and anywhere that's convenient for both parties, rather than a courtroom on the judge's schedule?

Professor SCHWARTZ. For people with regular jobs, it is much better with people, with families. Dragged into court is no fun. This can be done at a nearby place where people live at a time that's convenient for their job. And so I appreciate that question.

Senator COTTON. And, and claimants in arbitration, they can have a lawyer, they can get discovery, they can get relevant materials necessary to prove their claim?

Professor SCHWARTZ. Yes. Discovery is lengthy, costly, and disruptive of one's life. That's for sure. Because I've been involved in that for years, and I don't want to be the one on the wrong side of that one.

Senator COTTON. There's also been a lot of talk about NDAs, non-disclosure agreements, or secrecy agreements. Just to be clear, that arbitration agreements and non-disclosure agreements are not the same thing, correct?

Professor SCHWARTZ. That's correct. Non-disclosure agreements are a separate piece, and they're used in litigation. When you settle a case, you sign NDAs, but you can't muzzle somebody from giving the results of arbitration or complaining about it.

Senator COTTON. Okay my time is almost up, but it sounds like from your testimony, you believe that arbitration is less expensive and faster than Federal courts. That claimants tend to do just as well as they do in court. They can make their own decision whether to publicize or talk about their claims, and that in general, they're going to do better, based on your earlier testimony too, relative to what they would in court versus what the lawyer can take of their cut. Is all that correct?

Professor SCHWARTZ. From a practical reason, and it is important to remember that with many of these disputes today, you can't get a lawyer. So an employee who has a case that's \$100,000, lots of luck from them getting a lawyer, because the contingency fee system doesn't provide an adequate reward for the plaintiff's lawyer.

It's either arbitration or nothing. It's not comparing it to the court. I have made that point in my testimony, but I think it's important that it be in the record, sir.

Senator COTTON. And this is why, as the Supreme Court has acknowledged, that Federal law and policy has generally been favorable toward arbitration, going back almost a hundred years now to the passing of the Federal Arbitration Act.

Professor SCHWARTZ. Surprisingly, it's an area where the court's been in agreement. You know, they fight each other quite a bit, but in this area they've respected the Federal Arbitration Act.

Senator COTTON. Thank you.

Chair DURBIN. Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much Senator Durbin, and thank you to the witnesses today. I'm going to focus—I welcome Gretchen Carlson from the Great State of Minnesota. And I'm going to focus my questions today on antitrust.

And Professor Schwartz, I wrote a book on this that also can help you step on it to get to the top shelf. I'm going to ask Professor Gilles questions on this front because I think it's important thing that hasn't been touched on yet. And I'm Chair of that Subcommittee, work with Senator Lee on this extensively, as well as Senator Grassley.

And I'm concerned that some of the forced arbitrations are frustrating the purpose of our antitrust laws. Like I noted during one of the hearings on the topic in 2019, I was and still am disappointed to see that the Supreme Court allowed *American Express*

to force arbitration, even though doing so would make it difficult to enforce the law.

In her dissent in the case, Justice Kagan wrote that the forced arbitration provision in the employee's contract with *American Express* violated the Sherman Antitrust Act by depriving parties of a chance to challenge alleged monopolistic conduct. Meanwhile, large companies were able to negotiate better fees or arbitration clauses than smaller companies who are still forced into arbitration clauses.

You testified, thank you, both in 2019 and in your testimony today, that forced arbitration interferes with antitrust and other laws. Could you elaborate on that?

Professor GILLES. Thank you, Senator. I'm happy to. At that hearing, you might remember Alan Carlson the chef owner of Italian Colors restaurant, the named plaintiff in *American Express v. Italian Colors*, testified, I think—I mean, it was a striking piece of testimony. He told us that other companies, Walgreens, CVS, Safeway, were able to take *American Express* to trial because of course, they have a tremendous amount of market power.

So *American Express* could not bind those large companies to forced arbitration clauses, whereas it did so for all small businesses, including his restaurant, which meant that he could not actually hold *American Express* responsible for these antitrust—for the alleged antitrust violations.

And I think that, you know, when we think about small businesses as you all do all the time, small businesses do a tremendous amount for this country. And one of the things they do is they enforce laws, just like consumers and workers do. And they are often at the front lines of enforcing antitrust laws because they are often victims of antitrust violations, of anti-competitive behavior, which is what that case was all about.

Senator KLOBUCHAR. Exactly. And as we're seeing more consolidation in such a big way, and we're seeing issues as we all know with the tech companies, unfortunately, we've been stagnant here about changing those antitrust laws. We've gotten a number of bills through Committee, and I appreciate the Chairman's leadership on that.

They're all bipartisan every single one of them, but they're sitting there, and we had one victory at the end of 2022 to get more funding for the agencies given these huge cases, especially involving *Facebook* and *Apple* and *Amazon* and *Google*. And we got that done.

Senator Grassley and I did a change to the merger fees which was estimated for this year about 50 million more dollars, less merger fees for small mergers, bigger ones for big mergers. And then like poof we passed it 88-to-8 in an amendment, and then the money disappeared under some rock in the Federal Government.

And for the first time in 25 years, did not go to the antitrust division of the Department of Justice, after an attempt was made to delay them from getting the fees. What is this whole story about? It's a pretty outrageous story, which I've said, and I've been promised this is going to change in the future, but it's also about the importance of private enforcement of the antitrust laws. And I just want to make a case for that.

But I do want to end with Ms. Carlson who I've known for quite a while. And just asking about what you said in your testimony that the law we passed, and I thank my colleagues for their leadership, about ending forced arbitration of sexual assault and sexual harassment becoming law in December 2022. You stated this law is already making a significant impact in the lives of countless survivors. Can you describe in more detail the positive effects of this law?

Ms. CARLSON. Yes. Thank you so much, Senator Klobuchar, and always great to see you from our great State of Minnesota. I mentioned Kirsten Tiger. She was a bartender at a prestigious country club who was harassed by multiple members, allegedly, as well as by a security guard there allegedly.

And still employers are trying to force victims of sexual misconduct into arbitration because the onus is upon the employee to understand that this law has passed and that they do not have to go to arbitration. So I have not specifically spoken personally to Kirsten, but I speak to women every single day who say, "My company's still trying to force me into arbitration." And I say, "They can't do that anymore."

So Kirsten's is a case of that they went to a judge, her company filed a motion to compel arbitration, and the judge denied it specifically because of this groundbreaking law that had passed. A judge in Texas recently, *Blaze Media* tried to get a motion to dismiss against one of their employees, *Sydney Watson*, who alleged harassment allegedly by her co-anchor over a span of time. And that was also denied because of the law.

So what I have found over the last 2 years is that the biggest and the most important thing after passing this law is to educate people about it, because companies probably are not going to willingly tell you that you no longer have to be forced into arbitration for sexual misconduct.

And this is why it's so important for me to, to pass the Protecting Older Americans Act as well. Because it's my goal to be able to protect all human rights violations that happen at work, including Senator Booker's bill with regard to race discrimination and forced arbitration and any other protected class.

After my experience at Fox News and what I had to go through, and respectfully Professor Schwartz, nobody would've ever known about my story if I had been forced into arbitration. Nobody. And we arguably would not be in the #MeToo movement right now if that had happened to me. And so if that's not a compelling story enough to understand what happens with the secrecy of forced arbitration, I don't know what is. But it's time to do it for other people who are having their human rights violated at work and being shoved into secrecy.

Senator KLOBUCHAR. Thank you.

Chair DURBIN. Senator Blackburn.

Senator BLACKBURN. Thank you, Mr. Chairman. And thank you to each of you for being here today and for this hearing. And Mr. Chairman, I'm so pleased that you mentioned the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act. That is something that Senator Gillibrand and I put a good bit of time into.

It was a strong bipartisan effort, and it is something that was needed.

Now, I fully appreciate what it's like to be a female in a man's world. And I had great experiences, whether it was the Southwestern Company, the Castner Knott Company, or people that I did contract work for, and I know not everybody has that. And so, making certain that women were not going to be isolated and did have the ability to tell their story and to achieve what they feel like is justice, is something that is important.

And of course, Ms. Carlson, we just thank you for the work you did on that bill, and also, the Speak Out Act, the fact that those efforts have been invaluable. And I do think, though, as I sit here and I'll look at this issue, I agree with Senator Cotton, that there is a place and a role for arbitration.

And as he went through his questioning with you all, I know that it has been used as a beneficial tool, to be certain that you don't get trapped into lengthy and costly litigation. So I am appreciative of that. And I have to say, as we look very carefully at this, I am not in favor of expanding this prohibition on arbitration beyond that unique context that we found with sexual assault and harassment.

So while I'm glad that we prohibited forced arbitration agreements in those limited circumstances, I think we have to be very careful as we look at something that would expand these prohibitions. And I am so pleased that we have had the opportunity to hear from you all and to have this discussion today.

And Ms. Carlson, I agree with you that education to women when it comes to sexual harassment education, to employees on that prohibition and the opportunity that they have for that self-protection, is something that's important. So thank you all for being here. Mr. Chairman, thank you.

Chair DUBIN. Thank you. Senator Hirono.

Senator HIRONO. Thank You, Mr. Chairman, for having this hearing. After the Supreme Court's decisions that pretty much said arbitration clauses are okay, and that the 1925 Federal Arbitration Act would have basically the force of law, which it was.

But I'd like to ask, is it Professor Gilles? Is that how your name is pronounced? Yes.

Professor GILLES. Yes, it is.

Senator HIRONO. So isn't it practically legal malpractice not to counsel your corporate clients to have arbitration clauses in their employment contracts to cover just about every dispute that could arise?

Professor GILLES. I think so. I tell my students that. I tell them, "If you go out into practice and you're working in big law, you should make sure you put in a forced arbitration clause." Obviously, that's a statement against interest, but I do believe that at this point, it's probably the best way for corporations to immunize themselves from all legal liabilities.

Senator HIRONO. And this is why we in Congress find ourselves describing certain kinds of complaints and allegations that should be treated differently and not have forced arbitration applicable to them. Which I think is, maybe not quite the way to go, because there are—yes, in the case of sexual assault, these are instances

where it is very difficult, as we have heard from Ms. Carlson. And thank you, Ms. Carlson, for your advocacy and leadership to bring to light how difficult it is for people who experience sexual harassment, sexual assault in the workplace to come forward.

And there are many other instances where it is very difficult for people to come forward to lodge their complaints. So Professor Gilles, do you or any of the other people on the panel—thank you all for testifying—do you have other instances where you think that forced arbitration clauses make it very difficult for complainants to even come forward?

For example, in the instance of hate crimes within the workplace, if there's forced arbitration, there could be retaliation. There are various things that could happen. I led our effort to pass the COVID Hate Crimes Act 2 years ago, realizing that hate incidents are very difficult to be reported.

So anyone want to weigh in on other examples of behaviors where forced arbitration should not be applied?

Ms. CARLSON. I will, Senator. Thank you so much.

Senator HIRONO. Go ahead.

Ms. CARLSON. I think it that this boils down to the fact that people don't have the right to decide for themselves what's best for them. When you have forced arbitration, the decision's already been made for you, and the operative word is forced. If it's so great, why is it forced upon you?

Every study shows that the majority of Americans, when they're explained, when they understand what arbitration is, they disagree with it, because they want to be able to make the choice for themselves, whether or not they choose to seek accountability or not, they at least want to have that choice.

Senator HIRONO. And generally, in the arbitration instance, it's in the employment contract. Who selects the arbitrators or the chair of the arbitration panel, or however? Who makes those decisions? Anybody?

Professor GILLES. The company does, right? The company writes the rules and they write the rules in a way that's most beneficial to them, which of course is what we should expect.

Senator HIRONO. What if in an arbitration situation that the law requires that the parties involved get to select their own arbitrators, and possibly the arbitrators selected then select a chair? Would that make the process fairer?

Professor GILLES. No, I don't think it would, because the truth is that companies like the American Association for Arbitration jams, these are the big platforms that provide arbitration services. They have a sort of a stable of ex-judges and ex-defense lawyers. And these are people who even if I could, even if right now I could, you could give me a list of all of them, I wouldn't know who among them to choose.

If I have a strike list and I can strike people off that list as an individual, I don't know who to choose. Whereas the company as a repeat player knows exactly who the right arbitrators are to choose. So the power imbalance continues, even if you have a system where there's choice, if we're going to call it that, among a group of basically corporate minded potential arbitrators.

But I, I want to give you one example, Senator, if you don't mind. Brian Flores, who is the NFL coach, who was fired he tried to bring an arbitration along with a number of other NFL coaches who are fired alleging race discrimination.

And get this, it's not surprising, the NFL's arbitration clause says that the sole arbitrator is Roger Goodell, the commissioner of the NFL. I can't imagine anyone who would be less likely to find for Brian Flores or any of these Black coaches than Roger Goodell. Not because—I'm saying nothing bad about Roger Goodell, I've never met the man—but let's be honest, he basically works for the teams. So how could he possibly be unbiased in a case of race discrimination brought by former coaches? And I think that's essentially what we're seeing across the board.

Senator HIRONO. Do you think it's time to revisit the 1925 Federal Arbitration Act?

Professor GILLES. Well, I think you did revisit it when you amended, with Gretchen's help, amended the statute to add EFASASHA, which showed by the way that a hundred-year-old statute can withstand some congressional tinkering. So I congratulate you for that.

I think you should. I think the Fair Act that Senator Blumenthal has proposed, would essentially amend the statute to say that it does not apply to predispute forced arbitration provisions imposed upon consumers, workers, and small businesses.

Senator HIRONO. Yes. We've just been picking of different parts of behaviors, so it's probably time to look at the whole statute. Thank you, Mr. Chairman, for letting me go over.

Chair DURBIN. Thanks, Senator. Senator Booker.

Senator BOOKER. Thank you, Mr. Chairman. And I'm just so grateful for this panel and for the conversation that has been had today. I have always had this reverence for the American justice system, it's ideals and its values, and it's unique the principles we put forward when you travel the world and see how the rights and protections that our founders believed in, and this simple ideal, that justice should be a place where it's balanced, where justice is blind.

And what a lot of my career has been about living in a low income Black and brown community, is seeing, I think what Brian Stevenson once said, that unfortunately, the reality is you get better justice in America if you are rich and guilty than if you're poor and innocent.

And then comes the areas of employment law and seeing how the power of corporations has grown so dramatically. I'm often stunned at the levels of lobbyists that are down here advocating and fighting for things that will protect corporate power. But yet many of the people who are workers are losing a lot of their access to a balanced and fair system.

The work that's been done in this space has been extraordinary. And Ms. Carlson, you are heroic in my office. But more than that, you and the work that colleagues of mine have done for what now has been 2 years ending forced arbitration for sexual assault, has transformed the culture of our country.

And I think that's really important, this idea of what actually changes cultures in workplaces, cultures that are toxic, cultures

that are demeaning, cultures that are breaking laws, but more important, violating our values of human decency. And now that you've opened that up and been able to find ways, not just to get individual justice, but to expose these cultures to the light, to the disinfectant power of light is extraordinary.

And so what might be justice for one person in a discrimination suit actually affects millions of people in terms of what is a healthy culture. And all of the naysayers and the doomsayers who said that this was going to result in clogging up courts and, and exorbitant costs and dragging out disputes, is just because it's not true.

Corporations will find it cheaper to create cultures that are nourishing and nurturing, not just to their bottom line, but to the employees that there, it's far cheaper to go that direction and correcting those cultures and allowing them to continue. And so, this, to me, has been really exciting to see this change.

But Ms. Carlson, what has really made people in my office feel such gratitude, including myself, is the fact that you've said basically that you're not going to stop. "I will not stop," you said, "until we achieve the same rights for workers who have faced discrimination based on race, age, disability, gender, and sexual orientation."

In other words, forget all these lines, race, age, it's just justice. It's a matter of having justice. And Professor Gilles was talking about the examples of race discrimination that are so similar to the stories of discrimination in other areas, you know are stunning to me. And I could go through them. You brought up the NFL example. The stories I've heard from Tesla, for example, from Black workers, have been shocking, should shock everybody who believes in basic virtues and basic human decency.

And so, just Ms. Carlson, if you could just—why is this so passionate for you having achieved such an incredible change to still be in the trenches working to make sure it's affecting all workers?

Ms. CARLSON. Thank you so much, Senator Booker. I believe, because I don't believe that forced arbitration was ever supposed to be used to adjudicate human rights violations. You know, it was for small business disputes, and it was to unclog the court systems for, you know, if I knocked over my neighbor's fence and we're talking about 300 bucks, that's, you know, let's go to arbitration, right? Why should we clog the courts?

But not when somebody's racially discriminated against, not when somebody's sexually assaulted at work or let go, like Joanne, because she happened to be seasoned, right? And you brought up a really interesting point that I just also want to echo, which is, part of my hope in passing such landmark legislation was that it would actually change the culture as well. And you know why that happens? Because the power pendulum is like this, when you have forced arbitration, here's the company and here's the employee.

But if you give this person voice, and this person knows now, and so does this person, that you can't be forced into silence with forced arbitration, the behavior may also stop. And that, to me, is the most gratifying part of this whole experience, is knowing that we might actually start to change culture as well as changing laws.

And I've said this before, and it's a very profound statement. Changing culture in the most hyper political time of our generation is more difficult than passing bipartisan legislation.

Senator BOOKER. And Ms. Grace, I want to end with a question with you, but Ms. Carlson, just to say to you, the stories of humiliation and real financial catastrophe that has happened from people who've been discriminated against, is so agonizing to know that there are thousands, hundreds of thousands of Americans still dealing with this. And for us as a Senate to parse out, well, this time we'll deal with age, this time we'll deal with—as opposed to everything, is astonishing to me.

But Ms. Grace, I was hoping you can just end for a second and just say, what would it have meant to you to have the choice to decide whether to go into arbitration or have your day in court? And when she finishes, I will yield.

Ms. GRACE. Well, first of all, I think that having worked as long as I did in a particular field, you develop a real trust.

Chair DURBIN. Could you make sure your microphone is turned on and in front of you? Thank you.

Ms. GRACE. Okay, I'm sorry. I think if you work in a field as long as I have in one field, you develop a trust in your corporation, in your organization, that they will do right by you because you've given your whole life to them. And when you find out that that's not the case, then I think I want to have a right to say to other older Americans, you got to watch your own back. You got to make sure that they're not going to do the same thing to you that they have done to me.

And that of just blinding me, of not allowing me to speak. Because I think that that employees everywhere, older Americans that deserve the right to vote, they deserve the right to make their own—I'm sorry, to have their own representative or to give their voice, can't do it because we're old, older, and we can't—honestly, we just can't do it ourselves. We need to have the help.

That's when they offer arbitration. And arbitration is just a means not to change anything, but to hide everything. It's a form of secrecy to me that shouldn't have to exist in our country. Because if there's fairness on behalf of the corporation and to the employee, as I've been faithful to them, why would they do that to me? They wouldn't.

It would just be a more, as Gretchen said, it would be an even play. But if we're down here and they just decide at their whim, we're going to get rid of her for somebody younger, I can understand that they might think it's more efficient to have somebody that they can pay \$25 to an hour instead of \$38 an hour. But particularly in fields like nursing, you get what you pay for.

And the older person often has the wisdom, the knowledge, that a younger person can't possibly have yet. It takes years of experience to develop that. And what we know directly reflects to our patients and their safety and their health. So we affect a lot of things just as a nurse. And you're telling me that, "I'm just going to get rid of you because we have somebody younger, somebody that we know that we want to slide in here." And I don't have a voice to say, "Wait a minute, this isn't fair."

And other people seem to know it's not fair. This is America. My parents were both World War II veterans. They taught me to work hard. They taught me everything about America was wonderful. My mother was an immigrant from Russia, Poland. So to say now

that the justice system can just tie our hands behind our back and our, we're not allowed to speak, and they take our voice away, to me, that's not America anymore.

And I just want to see that come back. And if we can start, as they started with sexual harassment, I think older Americans, they've given their lives for this country, for their community, for their corporations, and they deserve just to have an even playing field back.

Chair DURBIN. Thank you, Ms. Grace. Senator Tillis.

Senator TILLIS. Thank you, Mr. Chairman. Ms. Carlson, it's good to see you. When did you first come before this Committee?

Ms. CARLSON. I don't know if I've ever testified actually before this Committee. But I've talked to you about supporting my legislation. I have testified before house judiciary before.

Senator TILLIS. Okay. And how long ago was that?

Ms. CARLSON. I believe I did it twice. I did it in person before COVID, and I did it virtually during COVID.

Senator TILLIS. I know it was some time. For some reason I thought you came before Senate judiciary, but——

Ms. CARLSON. Well, I've been here. I've been here waiting and watching for the votes.

Senator TILLIS. Maybe I've seen you here.

Ms. CARLSON. Of course, yes.

Senator TILLIS. I appreciate your tenacity, but it makes a point. I mean, you're still trying to accomplish what you set out to accomplish years ago, and there hasn't been any progress.

So I'm wondering, Professor Schwartz, I was here for the video, and I have to say that, you know, for people making employment decisions, you need to know whether or not a firm requires binding arbitration or not, let that be. You may have a right to due process, you don't have a right to a certain employment contract because the employer gets to set the terms. I hate to make that in cold hard terms, but that's the reality of it.

But there have been abuses, particularly and I think that age and sexual misconduct are two good examples. So, Professor Schwartz, how do we not just have this hearing 6 years from now, but fall far short of getting rid of binding arbitration, which I believe is a useful tool and should be still allowed.

So how do we bridge the gap versus have this discussion and never quite have you know, so one side wins, the other side loses. What are the experts thinking as a happy medium? And is there one, or is there just a camel's nose under the tent? You can't go that far.

How can we release some of the pressure to right some of the obvious wrongs that have occurred under the current system, but fall far short of what many of my colleagues on the other side of the aisle want to achieve?

Professor SCHWARTZ. Well, fortunately with regard to gag orders, State courts and I think led by the Chairman of this Committee have ruled gag orders unconscionable and not enforceable. And the record should show that. And I think that's important.

People should be able to discuss the results of their arbitration if they disagree with them as a matter of just basic free speech in our country. There's certain isolated areas, and I suggested to the

Chair and Ranking Member, that this Committee consider regulatory matters to address the specific areas where there's a problem, which has been so carefully advocated by Ms. Carlson.

So that you don't—I hate to use the throw the baby out with the bath water, but you don't get rid of—

Senator TILLIS. You just did.

Professor SCHWARTZ. Well, I think it's important in this Committee to try to contradict yourself at least once.

[Laughter.]

Professor SCHWARTZ. But so that's what I've always tried to do. So the hearings are the hearings. Followup, so we don't just have the same hearing over and over again. Consider regulation of these agreements because for the most part, they're helpful, they're cheaper, faster. And I know the litigation system, sir, and believe me, you don't want to get involved in it. It's delay, costly.

So in many cases, it's the only alternative for somebody is arbitration, and it isn't cruel. But the Committee, by looking carefully at the possibility of regulation, can avoid having the same hearing every 3 years and address these issues.

Senator TILLIS. Well, that's my point. Because I, you know, I believe past this prologue, and unless there's some sort of a sea change here, you're always going to have to have bipartisan agreement on this. And that's why things are falling short, which is why Ms. Carlson's having to spend more time up in DC.

Count me in as one of the people who actually want to get to what I think is a fair treatment. I believe that there are a lot of merits to arbitration, and to throw them out would be throwing the baby out with the bath water. But there are also some very—clearly, I mean, the one thing that I can say about the Committee leadership, they bring forth very sympathetic cases. And I get that. They're legit. How anyone could say that that's an acceptable outcome, it's just—I mean, I guess somebody could, I couldn't.

But I don't like—I've got few skills. One of them is a good memory, and all we're doing is covering ground that we've covered before. Thank you all for your preparation. I would like to actually find some way that we make progress so that Ms. Carlson can go do other things rather than have to spend time up here, unless she wants to come up here and report on it again.

So Professor Schwartz, we'll reach out to you, but I really do want to be a part of a group that actually makes progress, that provides, I think, some answer for the egregious examples that have been exhibited here in the Committee prep materials. But not this, just be a sea change in the way businesses use arbitration appropriately, far more often than situations that are being discussed today. So thank you all for being here.

Professor SCHWARTZ. I'd be pleased to help. I said earlier, lots of times when I'm here, it's a client money, but I'm not testifying by any client, not being paid. And I'm in a stage in life where I would like to be a little bit more helpful than I can.

Senator TILLIS. Well, we'd like to tap on your expertise. As long as you're not going to bill me for it, we will.

Professor SCHWARTZ. We wouldn't. Yes.

Senator TILLIS. Thank you.

Professor SCHWARTZ. That would be unfair at your salary.

Chair DURBIN. Thank you, Senator Tillis. Senator Butler.

Senator BUTLER. Thank you, Mr. Chair. And thank you to all of the witnesses here. There's been so much here that sort of has—that really has grabbed my both imagination, source of incredible frustration, but also tapped into a number of experiences that I've had across my career.

Professor Gilles, it's such a pleasure to hear you use the phrase collective action. As someone who spent 20 years in the labor movement, another tool that we have to give voice to workers is that of unionization. And in the space of unionization, there also is an arbitration process. There's an arbitration process that gives voice Ms. Carlson, to the point that you made that equalizes the voices and power of employers and employees through their chosen organizational representative or union.

And, you know, every experience of union arbitration that I've had, there was a jointly chosen panel, not an association that gave you a set of names to consider. Every instance that a worker's grievance or case went through to arbitration the union and the employer had to agree on who was going to be the arbitrator or panel of arbitrators. Everyone had strike ability to eliminate a name from that mutually chosen list.

So I do believe that there is a framework here in terms of how we can utilize and get the best benefits from arbitration and we just have to look to some of the models that we have created. I am not here to say that unionization is the only answer, but we do have models of fairness that we can call upon.

Ms. Carlson, it struck me in your written testimony, your reference to Tesla workers who have been—and a number of my colleagues have been working to support their unionization, their choice that they are making to choose to form a union there at Tesla. And we all know that there are certain categories of workers that today our labor laws don't allow to unionize.

So as I was listening and reading the testimony, one of the things that I was curious about has been referenced here. You have been relentless, you have committed that you are not going to quit. There are the category of workers that have available to them, the tool of unionization. There's the category of workers who only by antiquated laws, are traditionally excluded. What are some of the recommended evolved tools, new tools, contemporary tools that you would suggest that this Committee, this Senate really take up to advance the protection of human rights that you're so dedicated to?

Ms. CARLSON. Yes. So my strategy has been to try and take a bite out of the apple for each protected class, because as Senator Tillis mentioned, it has to be bipartisan and it should be bipartisan because we're talking about human rights violations. So that has been the strategy. It's why I'm now moving forward with the Protecting Older Americans Act, and I support Senator Booker's bill as well about race discrimination and forced arbitration.

But for me, giving workers' choice and not being forced into arbitration is what this is all about. You suddenly give them the option of being able to have a voice. And trust me, a lot of them will not choose to speak it, because I can tell you from personal experience, it ain't fun to come forward. And as the professor has also spoken about this morning, it is very hard to prove your case.

And so most of these cases are extremely relevant and sound if they actually get to court. And so that disproves the notion that we were going to suddenly have a flurry of cases when the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act—I need to get the monogram or the acronym from you. Yes. What do you call it?

[Laughter.]

Professor GILLES. EFASASHA.

Ms. CARLSON. Okay. That's even harder.

[Laughter.]

Ms. CARLSON. But anyway, it's a mouthful. So that's why I keep coming back to, if you give workers choice and their own liberty to make their own decisions, that to me is the fairest way to do this, and if you want to make arbitration an option, which it still is under the law then they can choose it. But I wouldn't recommend it.

Senator BUTLER. Yes. One last question, Mr. Chair, if I could. Professor Gilles, you talked a lot in your testimony about how forced arbitration exacerbates economic inequality in the country. Another gift of the labor movement and unionization is greater pay equity.

But it seems that in this space of forced arbitration, we continue to see those sort of—at least according to the data that you may reference to—greater economic inequality in the space. And so I'm curious. I just wanted to ask this question out of curiosity. I'm curious, is there any further information or greater detail that you can reveal for us about what the data shows relative to forced arbitration, particularly on women workers, and workers of color, just to try to pair the two, the conversation or the response that Ms. Carlson just gave?

Professor GILLES. Of course. And I appreciate the question. Obviously more data's always better, so we should do more studies. But the studies show us that women and minorities tend to work in fields where forced arbitration is employed far more often than other fields. So that's one good bit of evidence.

I think we also—to take a sort of historical view, and there have been some studies that take kind of a historical view—and the truth is that women and minorities are the least likely to bring claims in court even before forced arbitration, right? The fear of retaliation, the intimidation that comes with being the person who's bringing the claim have often silenced women and minorities.

And then I think we just have to be aware that, you know, poor people in this country, they bump into the corners of our law in all sorts of ways. And those are sharp corners, and they don't necessarily know who to go to how to get representation, how to get advice. And so many times they just end up lumping it, right? They can't afford to quit the job and find something else. And even if they did quit the job and find something else, everybody's doing it, mom, right? Everybody's forcing you into arbitration.

So I do think that, and I wrote this in my testimony. I mean, you know, for those of us who are really concerned about the rising levels of inequality, forced arbitration is just one additional tool that enables that chasm to continue to grow.

Senator BUTLER. Thank you. Thank you, Mr. Chair.

Chair DURBIN. Thank you, Senator.

I listened to the defense of forced arbitration, and what I heard was, I wrote down the words, it's easier, cheaper, it's faster, just as fair as a court. So if that's all true, why is it forced? If the employee or the person who's aggrieved thinks it's such a good idea, why don't you just make it an option?

Go ahead and pick arbitration if you like, but basically, we're not going to take away your constitutional right under the Seventh Amendment. It's your right as a citizen of the United States. So the argument about arbitration being a much better outcome, it may be in some cases, I don't know, but by and large, that decision should be made by the aggrieved party, by the worker, by the citizen. I think that's so fundamental and so basic.

Gretchen Carlson, thanks for coming back in an official capacity. Professor Gilles, Professor Schwartz, and especially Ms. Grace, thanks for telling your story. You are going to inspire us to have another hearing, maybe a markup pretty soon, maybe even a Federal law. Maybe you'll join Ms. Carlson and be able to point to something that changed America because you took the time to speak up and stand up.

You might get some written questions from Members of the Committee if you do, and please return them as quickly as you can.

Chair DURBIN. This meeting of the Senate Judiciary Committee stands adjourned.

[Whereupon, at 11:41 a.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

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**Hearing on
"Small Print, Big Impact: Examining the Effects of Forced Arbitration"
U.S. Senate
Committee on the Judiciary**

April 9, 2024

**Statement of Gretchen Carlson
Journalist and Co-Founder, Lift Our Voices**

Chairman Durbin, Ranking Member Graham, and distinguished members of the committee, thank you so much for the opportunity to appear today to testify about my experience with forced arbitration.

In 2016, I sued my boss, former Fox News chairman and CEO Roger Ailes, for sexual harassment. This was not an easy decision to make, but like most women who have encountered workplace harassment, I'd had enough and felt like I had no other choice. However, due to a forced arbitration clause in my employment contract, my story could easily have been swept under the rug.

No one starts a new job – particularly one so public facing – expecting sexual harassment. I know I didn't. And, in the face of a job opportunity, few people are willing or even able to walk away from a job because of the paperwork or the fine print in an employee handbook. Even in the very rare circumstance that an employee understands that a forced arbitration clause will strip him or her of their rights to make future decisions, they are still left with a false choice. An employer can refuse to hire people who do not sign or "agree" to forced arbitration clauses. How is that "choice" for any employee?

When a sexual assault or harassment case is forced into the rigged process of arbitration, there is no public accountability from the corporation and there is no justice for the victim or survivor. Most people don't realize that in forced arbitration, the corporation against which a person files a case hand picks the forced arbitration provider, there are virtually no appeals, there are severe limits on discovery which stop survivors from getting access to the information they need to prove their case, and arbitrators' rationales for their decisions aren't public. Worse, and perhaps the most inherent characteristic of the system, is that forced arbitration providers come back for repeat business from the corporations who handpick them – providers know they are only going to be chosen again if they cater to corporate interests. If we had judges openly and repeatedly handpicked by the same defendant, and that defendant were allowed to choose all the rules that applied in the courtroom, I'd imagine that every member of this committee would be outraged – and yet that's exactly what's being allowed to happen in forced arbitration.

After the secretive, one-sided process of forced arbitration is completed, the injustice does not stop there. Because the process was secret, the employee may find themselves blacklisted, demoted, or fired with little recourse. Worst of all, the perpetrator will likely get to stay on the job – free to harass again and again. This is how unspeakable sexual harassment and abuse was permitted to continue at major corporations across this country for years.

When I first learned that a forced arbitration clause in my employment contract could potentially stop me from seeking justice and speaking out, I began this quest to change the law for all survivors. My first step was to get my story and the truth out there in whatever way I could.

Public reaction to my lawsuit was swift. Fortunately, the backlash that I received for speaking out has been greatly surpassed by the overwhelming amount of public support that I have received over the last eight years. I could not have imagined in 2016 that my story would help propel Congress to start examining forced arbitration in a meaningful way.

Since my case, a tidal wave of women have joined me in courageously speaking out against workplace harassment and discrimination and thanks to the members of this committee and other champions in Congress hailing from both sides of aisle, survivors of sexual harassment and sexual assault are now empowered to seek justice, and brave survivors are now able to come forward as a result of the new law. Watching the President sign the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act into law was one of the proudest moments of my life.

An enduring lesson that I have learned from this journey is that courage is contagious, and the "Ending Forced Arbitration for Sexual Assault and Sexual Harassment" law is helping survivors of sexual harassment and sexual assault obtain justice and shine a light on sexual misconduct. This law simply allows survivors the choice of filing a case in court to hold employers and corporations accountable when they break the law, and it is already making a significant impact in the lives of countless survivors.

Last year, Kirsten Tiger a former bartender at a prestigious country club was able to bring a sexual harassment lawsuit¹ in court. Kirsten, who was just 24 years old when she began bartending at the country club alleged that she was subjected to sexual harassment by multiple club members as well as by a security guard. Her employer's attempt to silence her voice through a petition to compel forced arbitration was denied because of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act. Kirsten was able to hold her employer accountable in court, receive justice, and make workplace conditions safer for women in the future.

In August of last year, a federal judge in Texas declined to grant Blaze Media's Motion to Dismiss after one of its employees, political commentator Sydney Watson alleged sexual harassment in the workplace². Watson's sexual harassment case against her former employer, Blaze Media, is allowed to continue in court rather than forced arbitration thanks to the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act. While employed by Blaze Media, Watson reports facing continuous sexual harassment from her on air co-star. She alleges she routinely reported inappropriate behavior and was terminated around July of

¹ <https://www.ranchosantafereview.com/news/story/2023-06-27/former-bartender-receives-300k-settlement-in-sexual-harassment-lawsuit-against-rancho-santa-fe-country-club>

² <https://rbr.com/blaze-media-request-to-dismiss-sexual-harassment-claim-denied/>

2022. The judge who declined to grant Blaze Media's motion to compel forced arbitration ruled that she qualified for protection under the new law.

Indeed, survivors of harassment and assault across the country are now allowed the dignity of having the right to decide for themselves whether to file a case in court, go to arbitration, or take another path altogether. When someone's rights have been violated, it should be that person's right to decide for themselves whether, when, and how to seek justice. And while I feel endless gratitude towards this Committee for restoring the rights of survivors of sexual abuse, after spending years talking to victims of all types of abuse and discrimination, I am now surer than ever before that every American deserves this same right.

The same characteristics of forced arbitration that allowed decades of workplace sexual assault and harassment to continue in secrecy are the same characteristics that are currently denying the rights of black NFL coaches to take their claims of civil rights violations and discriminatory hiring practices into a public court of law, that are depriving countless families who have had their loved one die of horrific abuse and neglect in a nursing home of the dignity of being able to file a case in court, that are denying our service men and women like Kevin Ziober their right to file a case under the Uniformed Services Employment and Reemployment Rights Act, that are depriving the right of Tesla employees subject to constant and pervasive race discrimination and harassment to file a case in court, and that are denying any American over 40 the right to adjudicate age discrimination cases outside of the secrecy of arbitration. All Americans are equally deserving of the same rights now restored to sexual misconduct survivors.

This is why I am a champion for the bipartisan forced arbitration bill introduced last June - the Protecting Older Americans Act. I'm proud to say the bill is co-sponsored by the same bipartisan leaders in the Senate I've worked with for the last several years; Ranking Member Graham and Senator Gillibrand, with thanks to Chair Durbin, Senator Chuck Grassley, and many members of this committee for also co-sponsoring the bill. This is also why I'm so grateful to Senator Booker for introducing the Ending Forced Arbitration of Race Discrimination Act along with Senator Gillibrand.

The need for legislation to restore the rights of all Americans is dire. Consider, for example, the circumstance of when families are facing one of the most stressful and chaotic times in their lives - admitting a loved one into a nursing home. Should they be forced into unknowingly signing away their rights? If that facility causes the death, harm, or abuse of a loved one, it is families—not the federal government or the nursing home—that should be able to decide whether and how to seek accountability. And yet, Bonnie Walker's family had to spend additional time and resources, three years, just to fight forced arbitration before her case could even be heard in court.

From June to July 2016, case documents indicate that Bonnie was a resident of Brookdale Charleston, an assisted living facility in Charleston, South Carolina. Bonnie had a known history of wandering, sleepwalking, and she required constant monitoring and supervision. Yet on July 27, 2016, from 12:15 am until 7:15 am the following morning, rather than keeping

Bonnie safe, the Brookdale facility had no idea where Bonnie was. In fact, it was Bonnie's granddaughter who eventually discovered Bonnie's remains floating in the pond behind the facility - remains, which had been dismembered by an alligator. Instead of immediately being able to hold Brookdale accountable in court, Bonnie's family spent the next three years, from 2017 to 2020, fighting the facility's attempts to force them into arbitration. Both the lower court and the appeals court agreed that Bonnie's granddaughter who brought the case did not sign a forced arbitration clause, but this fight goes to show how long a powerful corporation with vastly more resources can choose to delay justice.³

And in a different example, if it weren't for the California Human Rights Commission's lawsuit in 2022, Tesla's reported racially hostile work environment might have remained hidden from the public because of forced arbitration. I want to share the stories of two out of many employees who've tried to bring cases against Tesla, Jasmine Wilson and Kabiru Alowonle. Both report experiencing racist treatment at the Tesla plant in California, including racist graffiti that said "KKK," the n-word, and swastikas. Despite reporting this conduct to supervisors and HR, no remedial action was taken. When Kabiru reports being put on a hiring panel with other management personnel, he immediately noticed and pointed out that African American candidates were not given the same opportunities despite being more qualified than other candidates. Again, Tesla reportedly did nothing about this, and Kabiru was never given an explanation. Instead, according to his case filings, he was told he acted "professional" and "well-spoken" which was unexpected of people like him, and people of color were regularly denied promotions.

Jasmine also reports experiencing many instances of cat-calling and racially offensive language while employed at Tesla. One of her managers reportedly told her to "get [her] black ass up" while another commented on her nails and eyelashes, saying "your type of girls love wearing long nails and eyelashes." When Jasmine reported these incidents, she reports that the retaliation began. Both Jasmine and Kabiru ending up resigning from jobs they very much wanted because they felt they had no other choice. And yet, when they, along with 12 other employees sued Tesla, they were forced into arbitration.⁴

If your grandmother can be eaten by an alligator because she wasn't properly cared for, and a major employer such as Tesla can be accused of rampant, ongoing race discrimination, and in both cases forced arbitration severely restricts or eliminates any path towards justice and accountability, then something must be terribly wrong with our system.

I thank you for holding this hearing and my hope is that when the members of this committee consider the stories of abuse, loss of life, and discrimination that is allowed to flourish within the secrecy and immunity forced arbitration ensures, you will recognize that this is an endeavor worth taking again, this time on behalf of all Americans.

³ See Complaint, *Weaver v. Brookdale Senior Living, Inc.*, No. 2017CP103130, 2017 WL 10350803 (S.C.Com.Pl. Sep. 28, 2017); *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020).

⁴ See Complaint, *Jasmin Wilson v. Tesla*, filed with California Superior Court on June 29, 2022.

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TESTIMONY BEFORE THE
U.S. SENATE COMMITTEE ON THE JUDICIARY

Small Print, Big Impact: Examining the Effects of Forced Arbitration

Prof. Myriam Gilles
Submitted April 8, 2024

Chairman Durbin, Ranking Member Graham, 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 written extensively about the harmful effects of pre-dispute mandatory arbitration clauses – forced arbitration clauses – on consumers, workers and small businesses. These traps hidden in standard-form contracts forfeit a person’s Constitutional right to a judge and jury, forcing them into a “privatized, invisible, and often inferior forum in which they are less likely to prevail.”¹ I have testified about the negative effects of forced arbitration before this Committee in [2013](#), [2017](#) and [2019](#), before the Senate Banking Committee in [2022](#), and the before the House Judiciary Committee in [February](#) and [November](#) 2021. Over this stretch of time, forced arbitration clauses have only grown more pervasive, as millions of Americans have been forced to sign away their right to choose for themselves whether to pursue claims for legal relief.

In my testimony, I hope to shed light on the ways that forced arbitration harms consumers and workers. Part I provides an overview of numerous studies revealing the prevalence of forced arbitration clauses, as well as their deleterious effects on consumers and workers. Part II steps back to examine the broader effects of forced arbitration on the rule of law, the development of legal precedents and Congressional intent in enacting legislation seeking to protect consumers, workers and military servicemembers. Part III describes the Ending Forced Arbitration in Sexual

¹ Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE, Dec. 2015.

Assault and Sexual Harassment Act (“EFASASHA”), passed by Congress in 2022. While this amendment to the Federal Arbitration Act (“FAA”) was undoubtedly a step in the right direction, its enactment reveals the need for a more comprehensive statutory exemption barring forced arbitration in all contracts of adhesion. The FAIR Act – legislation that would prohibit forced arbitration for all employment, consumer, antitrust, and civil rights disputes – would ensure that every American can access the civil justice system. Finally, in Part IV, I describe the recent phenomenon of “mass arbitration,” in which plaintiffs simultaneously file thousands of individual arbitrations, forcing corporate defendants to make good on their contractual promises to pay the cost of arbitrating large numbers of nominally individual claims. Forced to live up to their own contractual terms, companies have balked and run to court seeking relief. Accordingly, mass arbitration reveals that companies imposing forced arbitration clauses on their employees and consumers never intended these provisions to be actually used; instead, forced arbitration was intended to suppress cases where corporate wrongdoing harms large numbers of people who each suffer relatively modest injuries.

PART I FORCED ARBITRATION HARMS AMERICAN CONSUMERS & WORKERS

As the result of the Supreme Court’s recent and extraordinarily broad interpretation of law passed in 1925 – the Federal Arbitration Act (“FAA”) – companies now freely employ forced arbitration clauses in nearly every aspect of American life. Where arbitration was once limited what the 1925 Congress sought to foster, namely commercial contracts negotiated by equally sophisticated parties, today, these provisions are regularly included in “take-it-or-leave-it” contracts of adhesion – including contracts governing credit cards, bank accounts, cell phones, payday loans, insurance, loans, leases and myriad other consumer transactions.² Forced arbitration is imposed by most nursing homes, gyms, student loan providers, internet service providers and music streaming services – as well as in job applications, employment contracts and benefits packages.³ Forced arbitration clauses are literally everywhere, and when these provisions are given legal effect, they are used to silence individuals and deprive them of their choice of whether and how to pursue a remedy.

² Myriam Gilles & Gary Friedman, [*After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*](#), 79 U. CHI. L. REV. 623, 631 (2012) (“[A]bsent broad legal invalidation, it is inevitable that the waiver will find its way from the agreements of ‘early adopter’ credit card, telecom, and e-commerce companies into virtually all contracts that could even remotely form the predicate of a class action someday.”).

³ *Id.*

i. *The Effect of Forced Arbitration on Consumers*

The data reveals how prevalent forced arbitration has become in the marketplace. Back in 2015, the Consumer Financial Protection Bureau (“CFPB”) reported to Congress that nearly all mobile wireless providers imposed arbitration on their subscribers – meaning that nearly 290 million cell phone users were barred from going to court.⁴ The same was true for the vast majority of credit card users, checking account holders, payday borrowers, student loan recipients, and users of countless other consumer financial products.⁵

Today, the situation is significantly worse. One study found that 81 of the 100 largest U.S. companies use forced arbitration in connection with consumer transactions.⁶ And in 2020, the publication *Consumer Reports* estimated that over 60% of U.S. retail e-commerce sales are subject to forced arbitration.⁷

Meanwhile, most consumers have no idea they have signed away their right to hold companies accountable for wrongdoing. The 2015 CFPB Study found that only 13% of consumers who were directed to read a forced arbitration clause understood it prohibited them from participating in a class action lawsuit.⁸ More recently, a 2020 survey of over 1,000 American consumers further confirmed that a staggering 99% of individuals surveyed had no understanding or awareness of forced arbitration clauses when shown a checking account contract.⁹ This utter lack of awareness is no surprise, given that these rights-stripping clauses are often hidden in the boilerplate language that consumers either skim or ignore when making purchases.¹⁰ Indeed, companies intentionally impose these clauses in click-wrap, envelope-stuffers and other delivery methods intended to obscure or minimize the immensity of the rights that are being forfeited.¹¹ Further, forced arbitration clauses are imposed as a *precondition* to obtaining the product or service in question – i.e., they are imposed long before any dispute or problem arises. And since most people simply don’t contemplate dispute-resolution procedures at the point of sale, we simply lack the

⁴ CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), at 7 (2015) [hereinafter CFPB STUDY], https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

⁵ *Id.* at § 2, pp. 7-24.

⁶ Imre Szalai, *The Prevalence of Consumer Arbitration Agreements by America’s Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233 (2019).

⁷ Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPORTS, Jan. 30, 2020.

⁸ CFPB STUDY, § 3, pp. 19-24 (reporting that half of all respondents surveyed did not know whether they had the right to sue their credit-card issuer in court, and more than a third of those who were bound by forced-arbitration clauses still believed, incorrectly, that they could take the company to court).

⁹ Roseanna Sommers, *What Do Consumers Understand About Pre-dispute Arbitration Agreements? An Empirical Investigation*, PLOS ONE (2024).

¹⁰ See, e.g., Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPORTS, Jan. 30, 2020 (describing an arbitration clause located “about two-thirds of the way through 4,600 words of legalese” in the defendant Wayfair’s online terms of use).

¹¹ Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, NEW YORK TIMES, Oct. 31, 2015.

information necessary to place sufficient value on the rights we're giving up until it's too late.¹² But even if consumers did read and comprehend the fine print, none of us really has a choice of whether to accept or reject an arbitration clause.¹³ If 99% of mobile service providers impose arbitration, then there are no real market alternatives available to consumers wishing to avoid these provisions.

Once consumers realize they have unknowingly forfeited their right to a judge and jury, they are left with only two unattractive options: passively accept whatever harm they have suffered or enter the private forced arbitration forum chosen by the company, governed by a set of rules written by the company for its benefit. Faced with this unjust regime, it is little wonder most choose the former, refusing to take part in a process they did not choose and cannot win.¹⁴

Again, the data backs this up, revealing that only a tiny percentage of consumers file arbitrations annually.¹⁵ In 2017, the nonprofit group Level Playing Field examined the use of forced arbitration in the Wells Fargo identity-theft debacle.¹⁶ Compiling data from the AAA and JAMS, the country's largest forced arbitration providers, the report found that just 250 consumers arbitrated claims with Wells Fargo between 2009 and the first half of 2017.¹⁷ Given that the bank boasts over 70 million customers, the report observed that 250 was "a shockingly low number of

¹² Myriam Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 413 (2005) (arguing imposing arbitration long before a dispute arises is unfair because most consumers don't place sufficient value on the rights they are relinquishing until after a dispute has arisen).

¹³ Colvin & Stone, *supra* note 1 ("[T]he 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").

¹⁴ Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, NEW YORK 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."). See also Colvin & Stone, *supra* note 1 ("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.").

¹⁵ See, e.g., CFPB STUDY (finding that from 2010 to 2011, only a handful of consumers who filed individual arbitrations were awarded affirmative relief – while nearly 10 million consumers were represented in comparable class actions during the same period).

¹⁶ In 2016, media outlets reported that Wells Fargo employees had been opening fake accounts as far back as 2013. When injured customers tried holding the bank accountable for the identity theft, their claims were quickly forced into the black box of arbitration. See, e.g., Michael Corkery & Stacy Cowly, *Wells Fargo Killing Sham Account Suits by Using Arbitration*, N.Y. TIMES, Dec. 6, 2016. The profound secrecy afforded by arbitration allowed Wells Fargo to avoid both liability and bad press, and allowed wrongful conduct to continue undetected and unremedied long after such illegality would otherwise come to light. See Hearing of the Senate Banking Committee, Wells Fargo: One Year Later, available at <https://www.banking.senate.gov/hearings/wells-fargo-one-year-later> (Oct. 2017).

¹⁷ *Wells Fargo and Forced Consumer Arbitration*, Level Playing Field (2017).

arbitration claims” – all the more surprising given the “continued revelations of widespread unfair business practices” by Wells Fargo.¹⁸

Scholars and journalists have also sought to document the paucity of consumer arbitrations. For instance, in 2018, Professor Imre Szalai determined there were an estimated 826,537,000 consumer arbitration provisions in force.¹⁹ Yet, the AAA and JAMS recorded an average of only 6,000 consumer arbitrations per year.²⁰ Similarly, Professor Judith Resnik reported that only 134 individual arbitrations were filed against AT&T between 2009 and 2014 – despite the company having over 120 million wireless customers and being the subject of numerous investigations and public enforcement actions alleging widespread violations of consumer laws.²¹ And in 2019, journalist Alison Frankel examined data provided by the AAA, which revealed that in the first quarter, it had resolved only 895 consumer arbitrations – despite being the designated arbitral provider for the thousands of consumer companies.²²

Worse yet, those who individually brave these arbitral waters are unlikely to prevail due to the well-documented repeat-player bias that corporate clients enjoy in arbitration.²³ One study found that of the 30,000 AAA/JAMS consumer arbitrations conducted between 2014 and 2018, consumers prevailed in only 6.3%.²⁴ The CFPB Study revealed a similar tilt: the agency found that companies won relief in 93% of the business-initiated cases in which arbitrators reached a decision on the merits, and were awarded 98¢ for every dollar claimed; by contrast, arbitrators sided with consumers in just 27% of cases and awarded them an average of 13¢ for every dollar

¹⁸ *Id.*

¹⁹ Szalai, *supra* note 6.

²⁰ *Id.*

²¹ See Judith Resnik, [*Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*](#), 124 YALE L.J. 2680, 2812 (2015). Professor Resnik notes: “[t]he result has been the mass production of arbitration clauses without a mass of arbitrations. Although hundreds of millions of consumers and employees are obliged to use arbitration as their remedy, almost none do so – rendering arbitration not a vindication but an unconstitutional evisceration of statutory and common law rights.”

²² Alison Frankel, [*Consumer Arbitration is on the Rise -- But the Numbers are Still Pruny*](#), REUTERS, May 9, 2019.

²³ See, e.g., Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2356-57 (2012) (discussing how “selection bias” of the stronger party in a mandatory arbitration setting may prejudice the weaker party by selecting favorable arbitrators or arbitration groups); Katherine V.W. Stone and Alexander J.S. Colvin, [*The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*](#), (Economic Policy Institute 2015) (finding that, when an employer and employee both appeared before an arbitrator for the first time, the employee had a 17.9% of winning but if the employer had 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 appeared before the same arbitrator 25 times, the 26th employee only had a 4.5% chance of winning).

²⁴ American Association for Justice, [*The Truth About Forced Arbitration*](#) (2019).

claimed.²⁵ These findings substantiate decades of research on the “repeat-player” bias in forced arbitration – which posits 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.²⁶ This structural imbalance allows companies to “stack the deck” with arbitrators who will be favorable to their interests, while the secrecy surrounding these proceedings makes it impossible for individual consumers to discern or challenge potential arbitrator bias.²⁷

ii. *The Effect of Forced Arbitration on Workers*

Similarly disturbing trends are evident in America’s workplaces, as employers increasingly bury forced arbitration clauses in the paperwork that employees must acquiesce to if they want a job. These provisions silence aggrieved workers and eliminate corporate accountability for systemic workplace violations.²⁸ In 2018, the study by the Economic Policy Institute estimated that 56.2% of private-sector, non-union workers – nearly 60.1 million workers in all – were bound to forced

²⁵ CFPB STUDY at § 5, pp. 11-12. The agency found that, by contrast, 422 consumer class actions settled between 2008 and 2012 returned over \$440 million (after deducting attorneys’ fees and court costs) to an average of 6.8 million consumers each year. *Id.* at § 1, pp. 16.

²⁶ These studies have generally focused on repeat-player bias employment arbitration, but there is no reason to believe that consumers would suffer in similar fashion. *See, e.g.,* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPL. RTS. & EMPLOY. POL’Y J. 189, 198-99 (1997) (reporting on a study of 270 AAA employment arbitration awards from 1993-1994, finding that employees won only 16% of cases against repeat-player employers); Stone & Colvin, *supra* note 1 (reporting on a study finding that when an employer and employee both appeared before an 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).

²⁷ 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) (“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.”)

²⁸ *See* Lauren Weber, [More Companies Block Employees From Filing Suits](#), WALL ST. J., Mar. 31, 2015 (reporting that CVS, Kmart, Nordstrom, and Halliburton are “among the largest employers that require or ask employees to waive their rights to sue as a class”); Kriston Capps, [Sorry: You Still Can’t Sue Your Employer](#), CITYLAB, July 11, 2017 (reporting that Wells Fargo, Citibank, Comcast, AT&T, Time-Warner Cable, Olive Garden, T.G.I. Friday’s, Applebee’s, Macy’s, Target, Amazon, Uber, and Lyft all impose arbitration and class action bans in employment contracts).

arbitration clauses.²⁹ Labor economists now project that by year's end, more than 80% of private-sector non-union workers will be subject to forced arbitration.³⁰

Yet, despite the large chunk of the U.S. workforce bound to individually arbitrate their disputes, study after study shows that few workers initiate arbitrations.³¹ An EPI study estimated that only 1 in 10,400 workers subject to these provisions has filed a claim in arbitration.³² The remaining workers with potentially valid cases – somewhere between 315,000 to 722,000 each year – are left to suffer in silence, unwilling to shoulder the expense of individual arbitration and unable to be heard by a judge and jury.³³ One legal scholar estimates that, as a result of the unprecedented implementation of class-banning arbitration clauses, 98% of employment cases that would otherwise be brought in some forum are abandoned.³⁴ And when individual employees do bring arbitrations, they are far less likely to succeed against their employers: of the 11,114 AAA/JAMS employment arbitrations conducted between 2014-18, only 2.5% of cases resulted in an employee monetary award (that was not outweighed by an even larger employer award).³⁵ Here again, the repeat player advantage is strong. Not only do employers choose the arbitral provider and write the rules, they also “gain familiarity with the system and how to operate effectively in it, [and] may also be able to lobby for changes to the system that benefit them.”³⁶ As Professors Colvin and Stone observe, “[e]ven 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.”³⁷ Taken together, these elements bode poorly for workers should they wish to enter the arbitral regime, and may go a great distance in explaining why so few do so.

iii. *Forced Arbitration Exacerbates Economic Inequality*

The data reveals another troubling development: forced arbitration provisions are disproportionately imposed on low-wage workers and low-income consumers, exacerbating the yawning economic chasm in this country. One study estimates that low-wage workers (those paid \$13 or less per hour) suffered approximately \$12.6 billion in wage-related losses in 2019 due to

²⁹ Alexander Colvin, Economic Policy Institute, [The Growing Use of Mandatory Arbitration](#) (2018). See also CARLTON FIELDS 2015 [CLASS ACTION SURVEY](#), available at (finding that the percentage of companies using arbitration clauses to preclude employment class actions jumped from 16.1% in 2012 to 42.7% and that the number of employment class action suits filed decreased precipitously between 2011 and 2014).

³⁰ *Id.* (projecting that by the end of 2024, more than 80% of private-sector non-union workers will be subject to forced arbitration).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Cynthia Estlund, [The Black Hole of Mandatory Arbitration](#), 96 N.C. L. REV. 679 (2018).

³⁵ AAJ, [The Truth About Forced Arbitration](#), *supra* note 24.

³⁶ Colvin & Stone, *supra* note 1.

³⁷ *Id.*

minimum wage and overtime violations, employee misclassification and payroll fraud — but because the vast majority of these estimated 6.13 million workers are subject to forced arbitration, they can't access the courts to resolve these disputes or to deter future violations.³⁸ Other research has shown that minorities and women are more likely to work in fields that subject them to forced arbitration.³⁹ For instance, the construction industry — with its predominantly male workforce — has the lowest rate of forced arbitration, whereas education and health, industries with a more predominantly minority and female workforce, have the highest rate.⁴⁰ The disparate deployment of forced arbitration provisions contributes to economic inequality by denying low-wage workers access to justice enjoyed by other employees.⁴¹

Low-income consumers are also more vulnerable to the effects of forced arbitration. For one, low-income individuals face structural barriers to accessing traditional credit markets, which renders them more reliant on high-cost and abusive alternatives — such as payday loans, money orders, pawnshops, rent-to-own stores and high-interest-rate credit cards.⁴² These products are rife with forced arbitration provisions, preventing consumers from challenging illegal and exploitative practices.⁴³ Furthermore, studies show that low-income groups suffer the disproportionate burden of fraud, predatory lending, reverse redlining, abusive mortgages, exorbitant student loans, subprime car loans, and other unfair and deceptive practices.⁴⁴ These sorts of consumer harms are precisely the type best addressed through class and collective litigation — procedural devices which allow claimants to aggregate damages where individual suits

³⁸ Hugh Baran, [Forced Arbitration Enabled Employers to Steal \\$12.6 Billion From Workers In Low-Paid Jobs in 2019](#) (Nat'l Employment Law Project 2020).

³⁹ Colvin, *supra* note 29 (estimating that 57.6% of working women, 59.1% of African Americans, and 54.3% of Hispanic workers are subject to forced arbitration).

⁴⁰ *Id.*

⁴¹ See Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, Symposium: *The War on the Civil Justice System*, 65 EMORY L. REV. 1531 (2016); see also Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 90 (2014) (asserting that “mandatory arbitration exacerbates” existing inequalities in the workplace); Jean Sternlight, [Mandatory Arbitration Spies Progress Towards Justice in Employment Law: Where To, #MeToo?](#), 54 HARV. CIV. RTS.-CIV. LIB. L. REV. 155 (2019) (observing that people of color “stand to lose the most when arbitration is substituted for litigation”).

⁴² Nathalie Martin & Ozymandias Adams, *Grand Theft Auto Loans: Repossession and Demographic Realities in Title Lending*, 77 MO. L. REV. 41 (2012) (arguing for more regulations to protect lower class credit products); Brian Grow & Keith Epstein, [The Poverty Business](#), BLOOMBERG, May 20, 2007 (explaining that the payday-lending industry is concentrated in the poorest counties of the poorest states — luring “unsophisticated shoppers by the hundreds of thousands into a thicket of debt from which many never emerge”); CFPB STUDY at § 2, p. 7 (describing sampling data from California and Texas revealing that 83.7% of payday lenders covering 98.5% of the industry imposed arbitration clauses in their borrower agreements).

⁴³ Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, Symposium: *The War on the Civil Justice System*, 65 EMORY L. REV. 1531 (2016).

⁴⁴ Susan E. Hauser, *Predatory Lending, Passive Judicial Activism, and the Duty to Decide*, 86 N.C. L. REV. 1501, 1509 n. 43 (2008) (listing studies showing that lower-income groups are specifically targeted by a host of shady businesses for various other types of economic exploitation).

would be inefficient or disproportionately expensive.⁴⁵ But the rise of class-banning forced arbitration clauses has left low-income consumers without remedy for widespread wrongdoing.⁴⁶ The distributive implications of forced arbitration provisions are clear: companies that exploit the economic vulnerability of low-income groups pay no real price for bilking consumers, given that few will pursue claims in arbitration and those who do will be less successful.⁴⁷

PART II THE BROADER EFFECTS OF FORCED ARBITRATION

Contemporary forced arbitration clauses typically contain language which strips a person of their right to join together with others who've been harmed in a similar way to try and seek accountability through a class mechanism. The harm caused by class-banning forced arbitration clauses extends well beyond individual consumers and workers: we are *all* harmed when companies escape accountability and individuals are forced to forfeit their rights. In this Part, I offer a brief overview of just some of the harmful effects of these provisions on our system of laws.

i. *Concealing Misconduct Only Leads to More Misconduct*

Forced arbitration keeps consumer rip-offs and worker exploitation secret and largely out of public view. Confidentiality, of course, is core to the institution of forced arbitration and guaranteed by both the providers and the standard terms of contemporary forced arbitration agreements.⁴⁸ Accordingly, forced arbitration proceedings and decisions are confidential – i.e., arbitrators hear cases behind closed doors and render decisions without being bound to follow

⁴⁵ Helen Herschkoff, *Poverty Law and Civil Procedure: Rethinking the First-Year Course*, 34 FORDHAM URB. L.J. 1325, 1347 (2007); see also Gilles, *supra* note 43 (asserting that class and collective litigation often result in broad-based injunctive relief to reform problematic practices, which is particular benefit to low-income groups).

⁴⁶ See, e.g., Eric W. Macaux, *Limiting Representation in the Age of Private Law: Exploring the Ethics of Limited-Forum Retainer Agreements*, 19 GEO. J. LEGAL ETHICS 795, 806-07 (2006) (“the plaintiffs most likely to be disadvantaged” by forced arbitration clauses “are those least able to protect their interests: low-income individuals”).

⁴⁷ Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL'Y REV. 499, 515 (2017) (“The distributive implications of forced consumer arbitration are especially pronounced given that the primary users of payday loans and prepaid cards -- which include arbitration clauses at particularly high rates -- are low-income consumers, [which] suggests that those most vulnerable to exploitation by financial institutions are those most likely to lack effective redress.”); see also Abi Velasco and Remington A. Gregg, *Forced Arbitration Stacks the Deck Against Everyday People, Especially Against Workers and Consumers of Color*, Public Citizen, Feb. 23, 2022.

⁴⁸ See AAA CONSUMER DUE PROCESS PROTOCOL, Principle 12.2 (arbitrator must “maintain the privacy of the hearing to the extent permitted by applicable law”); AAA Commercial Rule 25 (directing arbitrators to “maintain the privacy of the hearings unless the law provides to the contrary”).

legal precedents and often without publishing a written decision that explains their reasoning.⁴⁹ This culture of secrecy prevents consumers and employees from learning whether others have experienced a similar problem before and how that problem was resolved. It also leads to arbitrary and inconsistent results in the arbitral forum because arbitrators, unlike judges, are not required to follow precedents created by earlier-decided cases with similar facts. This directly undermines the principles that are central to the rule of law, such as stare decisis and the development of legal precedents.⁵⁰ By forcing disputes into hermetically-sealed, secret proceedings, companies deny all citizens the transparency, openness and accountability necessary for the operation of a fair and democratic civil justice system.⁵¹ And, of critical importance to this lawmaking body, forced arbitration undermines law enforcement and deterrence because, once blocked from going to court as a group, most people drop their cases entirely. If Congress passes laws that can't be enforced in the real world, what good are those laws?

The Wells Fargo scandal illustrates this point: some Wells Fargo customers learned that their identities had been stolen by bank employees and fake accounts had been opened using their private information as early as 2013, but the company used its forced arbitration clause to keep the fraud quiet for as long as it could.⁵² Regrettably, the main lesson that Wells Fargo took from the identity-theft scandal was that forced arbitration is an effective way of concealing illegal conduct: in a completely different scandal involving its manipulation of debit card purchases to maximize overdraft fees,⁵³ the bank again tried to force customers into arbitration to avoid bad publicity and legal liability.⁵⁴ By compelling cases into secret proceedings, companies like Wells

⁴⁹ See, e.g., William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 238–39 (1979) (“[Arbitrators] may have little incentive to produce precedents...why should they make any effort to explain the result in a way that would provide guidance for future parties?”); Edward Brunet & Jennifer J. Johnson, *Substantive Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 459, 473 (2008) (“Written arbitration awards currently are the exception in arbitration, which normally operates behind a veil of privacy.”).

⁵⁰ See *id.*; see also Lillian Howan, *The Prospective Effect of Arbitration*, 7 BERKELEY J. EMP. & LAB. L. 60, 62 (1985) (“In contrast to the judicial doctrine of stare decisis, an arbitrator’s interpretation of the contractual relation is not technically binding on a future arbitrator. Instead, the arbitrator must exercise independent and impartial judgment in each case.”).

⁵¹ See AAA CONSUMER DUE PROCESS PROTOCOL, Principle 12.2 (arbitrator must “maintain the privacy of the hearing to the extent permitted by applicable law”); AAA Commercial Rule 25 (directing arbitrators to “maintain the privacy of the hearings unless the law provides to the contrary”). See also Michelle Andrews, [Signing a Mandatory Arbitration Agreement With a Nursing Home Can Be Troublesome](#), WASH. POST., Sept. 17, 2012 (reporting that nursing home arbitration hearings “are conducted in private and [these] proceedings and materials are often protected by confidentiality rules”).

⁵² Robert Weissman & Lisa Donner, [Why Wells Fargo Got Away With It For So Long](#), THE HILL, Sept. 20, 2016 (observing that if “early cases been allowed to proceed, others almost certainly would have followed, and Wells Fargo may have ended these pervasive abuses years ago”).

⁵³ See *Gutierrez v. Wells Fargo*, 2010 WL 1233885 (N.D. Cal. 2010) (ordering Wells Fargo to return approximately \$203 million to California customers who had incurred overdraft fees on debit card transactions as a result of its illegal practices).

⁵⁴ Kate Berry, [Wells is Last Bank Standing in Overdraft Litigation](#), AMERICAN BANKER, June 26, 2017 (reporting that Wells Fargo had repeatedly tried to use forced arbitration to block relief in the other 49 states and avoid

Fargo deny their customers the right to a fair and just system – but they also deny every citizen the right to learn about potential fraud, illegal fees, and other unfair business practices. Lacking this critical information, consumers cannot make educated choices about the myriad options available in the marketplace.

ii. *Stymying Public Participation and Common Law Development*

Our legal system relies for its legitimacy on publicity and transparency. Through the fair operation of law, “[t]he public participates in a transparent conversation about legal rights. To that end, citizens have some ownership, at least in spirit, of what happens within that system [because] the whole reason for a public dispute resolution system is that it operates for the benefit of the public.”⁵⁵ But when disputes are shunted into the hermetically-sealed vault of private arbitration, the public has no opportunity to “participate in a transparent conversation about legal rights” – quite the contrary, the public is barred from entry and arbitral outcomes are shrouded in secrecy.⁵⁶

Over the longer term, forcing consumers and workers into the black box of arbitration precludes the very development of common law doctrine.⁵⁷ In consumer, employment, antitrust and other areas where forced arbitration clauses have become routine, the imposition of forced arbitration clauses will cease common law development. By enforcing these provisions, we have, in essence “frozen the law... denying the courts the ability to develop and adapt the law as society and business changes.”⁵⁸

iii. *Undermining Congressional Intent, Including Consumer Protection, Civil Rights and Statutes Intended to Protect Servicemembers*

With no accountability and no transparency, forced arbitration clauses have been weaponized by businesses and employers to serve as a form of legal immunity, undermining the very laws and protections enacted by Congress. Shielded by forced arbitration, companies brazenly violate consumer protection laws, civil rights statutes, and Congressional efforts to protect active duty servicemembers.

repaying up to \$1 billion); Associated Press, [*Wells Fargo Wants Court to Toss Overdraft Lawsuits and Let it Use Arbitration*](#), LOS ANGELES TIMES, Aug. 24, 2017.

⁵⁵ Enk S. Knutsen, *Keeping Settlements Secret*, 47 FLA. ST. U. L. REV. 945, 959-60 (2010).

⁵⁶ Hon. Jennifer Walker Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH L. REV. 303, 324 (2012) (“Arbitrations with no public record do not develop the law in any way.”).

⁵⁷ See Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986) (“by diverting particular types of cases away from adjudication, we may stifle the development of law in certain disfavored areas of law”).

⁵⁸ S. 1782, Arbitration Fairness Act of 2007: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 110th Cong. 10 (2007) (statement of Richard Alderman).

For example, in its periodic amendments to the Servicemembers Civil Relief Act (“SCRA”) over the past century, Congress has evinced a clear intent to protect the rights of active servicemembers.⁵⁹ In 2003, Congress significantly modernized SCRA, expanding protections for service members and their families in areas such as rental agreements, mortgage foreclosure proceedings and more. And then in 2020, Congress passed Section 547 of the National Defense Authorization Act, amending the SCRA to provide that “[a]ny person aggrieved by a violation of [the SCRA] may in a civil action ... be a representative party on behalf of members of a class or be a member of a class, in accordance with the Federal Rules of Civil Procedure, notwithstanding any previous agreement to the contrary.”⁶⁰ Despite the unambiguous statutory text, robust legislative history and revered status of active-duty servicemembers, companies continue to financially prey on our military and then try to hide behind illegal arbitration clauses. Case in point: when servicemembers Jeremy Bell, Pablo Espin, Nicholas Padoa and Keith Taylor sought to challenge a Citibank-imposed “veteran penalty,”⁶¹ the bank – blatantly contravening the 2020 amendments to SCRA – moved to compel arbitration.⁶² The district court denied the bank’s motion, but it has vowed to appeal the decision – forcing these servicemembers to continue expending time and money fighting an illegal forced arbitration clause.

Forced arbitration undermines congressional intent across all sectors and protected classes, from the most vulnerable to the most impervious. Take former Miami Dolphins NFL Coach Brian Flores. In January 2022, Coach Flores was fired despite back-to-back winning seasons. Flores believed his dismissal was the result of racial discrimination, and along with ex-Arizona Cardinals head coach Steve Wilks and Tennessee Titans defensive coordinator Ray Horton, filed suit against the league.⁶³ But due to the forced arbitration clauses in their employment contracts, these and other claims of discrimination cases against the NFL have been forced into secret proceedings designating NFL Commissioner Roger Goodell as the presiding arbitrator.⁶⁴ It

⁵⁹ See, e.g., *Gordon v. Pete’s Auto Serv. Of Denbigh, Inc.*, 637 F.3d 454, 457 (4th Cir. 2011) (“The Servicemembers Civil Relief Act is part of a long record of congressional concern for the domestic affairs of those in military service.”); *Brewster v. Sun Tr. Mortg., Inc.*, 742 F.3d 876,879 (9th Cir. 2014) (observing that the “Supreme Court has unambiguously required courts to give a broad construction to the statutory language of the SCRA to effectuate the Congressional purpose of granting active-duty members of the armed forces repose from some of the trials and tribulations of civilian life”).

⁶⁰ 50 U.S.C. § 4042(a). Congress further stated that this amendment “shall not be construed to imply that a person aggrieved by a violation of such Act did not have a right to bring a civil action as a representative party on behalf of members of a class or be a member of a class in a civil action before the date of the enactment of this Act.” 116 P.L. 92, div. A, TITLE V § 547(b), 133 STAT. 1198 (2019).

⁶¹ *Espin et al. v. Citibank*, 2023 WL 6447231 at *1 (E.D.N.C. Sept. 29, 2023) (this penalty “refers to interest and fee increases imposed on servicemembers returning to civilian life”).

⁶² *Espin et al. v. Citibank*, No. 5:22-CV-383-BO-RN, Order Denying Motion to Compel Arbitration, Sept. 29, 2023.

⁶³ *Flores v. NFL*, 2023 WL 4744191 (S.D.N.Y. July 25, 2023).

⁶⁴ Notably, cases against the New York Giants, the Denver Broncos, and the Houston Texans for violations of the Rooney Rule (which requires teams to interview minority candidates) have been allowed to proceed in court because plaintiffs in those cases were not bound by forced arbitration clauses. See Daniel Kaplan, *Judge*

doesn't seem a stretch to believe Goodell is likely to be biased in favor of the team owners, rendering him the single most unsuitable person to act as a sole arbitrator in cases brought against the league. Without meaningful legal accountability, the discriminatory hiring practices Congress intended to stop through the Civil Rights Act have gone unchecked.⁶⁵

PART III THE ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2022

In 2022, Congress enacted the bipartisan Ending Forced Arbitration in Sexual Assault and Sexual Harassment Act (the “EFASASHA”), which amended the FAA by restoring the rights of sexual harassment and assault survivors to file a case in court, despite the presence of a forced arbitration clause. This was the first major legislative change to the FAA in nearly a century, revealing that the statute can withstand revision without damage to its core mission.

The EFASASHA provides in relevant part that “no pre-dispute arbitration agreement ... shall be valid or enforceable with respect to a case which is filed under Federal [or] State law and relates to the sexual harassment dispute.”⁶⁶ In effect, this amendment renders arbitration agreements voidable at the election of a plaintiff alleging sexual harassment or assault.⁶⁷

As of this writing, only a handful of federal district courts have had occasion to interpret the EFASASHA. Much of this early decisional law centers on the question of whether the statute permits a plaintiff with multiple claims for harassment to bring *all* her claims in court, or instead, demands that only claims for sexual harassment may escape arbitration. So far, the lower federal courts are divided on this issue. For instance, in *Johnson v. Everyrealm*, a case brought by a black male employee alleging both sexual and racial harassment in the workplace, the court denied defendant’s motion to cleave the case in two and dispatch the race claim to arbitration.⁶⁸

rules Brian Flores can pursue some discrimination claims in court, others sent to arbitration, THE ATHLETIC, March 1, 2023, available at <https://theathletic.com/4265892/2023/03/01/brian-flores-discrimination-case-nfl/>.

⁶⁵ Fred Bowen, *The NFL has only 3 Black head coaches. That needs to change*, WASH. POST, Sept. 29, 2022, available at <https://www.washingtonpost.com/kidspost/2022/09/29/nfl-has-only-3-black-head-coaches-that-needs-change/>; Tom Schad, *Often interviewed, never hired: How hot-shot NFL head coaching candidates go cold*, USA TODAY, Jan. 12, 2023, available at <https://www.usatoday.com/story/sports/nfl/2023/01/12/do-nfl-teams-head-coach-vacancies-shortchange-coaches-color/10994631002/>.

⁶⁶ PUB. L. NO. 117-90, 136 STAT. 26 (2022) (codified at 9 U.S.C. §402(a)). Note: the EFASASHA defines a “sexual harassment dispute” as “a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State Law.” *Id.*

⁶⁷ H.R. 4445; 168 CONG. REC. 27 (February 10, 2022) (statement of Senator Dick Durbin (D-IL)) (The EFASASHA “ensure[s] that every survivor has the choice to go to court” and “give[s] survivors a choice of whether or not to bring a claim in court after the sexual [] harassment claim has arisen, notwithstanding the presence of a forced arbitration clause.”).

⁶⁸ 2023 WL 2216173, at *7 (S.D.N.Y. Feb. 24, 2022). Alternatively, the defendants argued that – should the court find that plaintiff’s allegations of discrimination based on sex were subject to the EFASASHA – “those claims should be stayed pending the outcome of the arbitration” of the remainder of plaintiff’s claims. *See* Motion to

Reasoning that a “case,” as that term is used in the EFASASHA, encompasses an *entire* legal proceeding, the court held that once a claim of sexual harassment is plausibly pled, all of plaintiff’s claims remain in court.⁶⁹ In support of this conclusion, the court observed that Congress, in enacting the new law, “amended the FAA directly,” which:

reinforces Congress’s intent to override – in the sexual harassment context – the FAA’s background principle that, in cases involving both arbitrable and non-arbitrable claims, ‘the former must be sent to arbitration even if this will lead to piecemeal litigation.’⁷⁰

This outcome comports with the drafters’ deliberate intent *not* to divide cases by sending some claims from the same case into arbitration. Several senators addressed this precise issue during debates of the EFASASHA, stating that keeping cases whole “is exactly what we intended the bill to do.”⁷¹ For instance, Senator Gillibrand explained:

When a sexual assault or sexual harassment survivor files a court case in order to seek accountability, her single case may include multiple claims [but] it is essential that all the claims related to the sexual assault or harassment can be *adjudicated at one time* to ensure that a victim need not relive that experience in multiple jurisdictions.⁷²

By contrast, a handful of courts have been unperturbed by the specter of claim-splitting created by selective application of the statute.⁷³ Relying on Supreme Court decisions dating back to the 1980’s announcing that litigants may have to tolerate greater inefficiency, wasted resources

Compel Arbitration at 14-15 (“Arbitrable claims accordingly predominate the dispute. In light of the foregoing, the Court should, respectfully, stay any potential non-arbitrable claims while arbitration is pending.”).

⁶⁹ 2023 WL 2216173, at *7 (the court observed that the plain text of the EFAA clearly “keys the scope of the invalidation of the arbitration clause to the entire ‘case’ relating to the sexual harassment dispute [and] does not limit the invalidation to the claim or claims in which that dispute plays a part”); *see also id.* at *17 (“Congress, in enacting the EFAA, thus can be presumed to have been sensitive to the distinct meanings of the terms ‘case’ and ‘claim.’”). A handful of courts have adopted *Evergreen’s* approach. *See, e.g.,* *Tumer v. Tesla*, 2023 WL 6150805 (N.D. Cal. Aug. 11, 2023) (“while the two other claims are not strictly sexual harassment claims, their resolution is intertwined with the resolution of the sexual harassment claims. Accordingly, the EFAA renders the parties’ arbitration agreement unenforceable in Tumer’s entire case...”).

⁷⁰ *Id.*, citing *KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011) (holding that “if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation” because “[a] court may not issue a blanket refusal to compel arbitration merely on the grounds that some of the claims could be resolved by the court without arbitration”).

⁷¹ 168 CONG. REC. S627 (daily ed. Feb. 10, 2022) (statement of Sen. Kirsten Gillibrand).

⁷² *Id.*

⁷³ *Silverman v. DiscGenics, Inc.*, 2023 WL 2480054 at *3 (D. Utah Mar 13, 2023) (enforcing the parties’ arbitration agreement “even if doing so requires some claims to be resolved in arbitration while other closely related claims are litigated in court”); *Mera v. SA Hospitality Group LLC*, 2023 WL 3791712 (S.D.N.Y. June 3, 2023) (finding that plaintiff had to resolve his wage and overtime claims in arbitration, while his sexual orientation claims would remain in court pursuant to the EFAA).

and higher costs for the sake of arbitration, these courts have fragmented cases into separate judicial and arbitral parts – in seeming contradiction to congressional intent.⁷⁴

While questions surrounding the proper interpretation of the EFASASHA may continue to wend their way through the courts, these early decisions make clear that the drafters' well-intentioned effort to single out claims of sexual harassment and sexual assault is both insufficient and unjustified. In many cases, such as *Johnson*, the precise nature of the harassment is simply not known to the victim, whose diverse identities may preclude a single, distinct basis for alleging discriminatory action. Furthermore, there is no clear justification for differentiating between claims of sexual harassment and other forms of harassment – whether based on age, race, disability, religious or political affiliation, or any other protected category. *All* victims should have the right to access courts to seek justice for these injuries, not just those alleging harm based on sex. Indeed, there are currently a number of bills circulating in Congress that would apply the EFASASHA's basic structure to other disadvantaged groups⁷⁵ – an effort reminiscent of prior “piecemeal” legislation enacted to eliminate forced arbitration in certain instances or as against certain narrowly drawn claimants.⁷⁶ While the impetus behind these bills is understandable, I urge this body to enact the Forced Arbitration Injustice Repeal Act (“FAIR” Act), which would invalidate any pre-dispute arbitration clause imposed in an employment, consumer, antitrust or civil rights dispute.⁷⁷

⁷⁴ Silverman, 2023 WL 2480054 at *3, citing *Dean Witter*, 470 U.S. at 217 (holding that the FAA requires district courts to compel arbitration “even where the result would be the possibly inefficient maintenance of separate proceedings in different forums”); *Moses H. Cone*, 460 U.S. at 20 (“[R]elevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement.”).

⁷⁵ On May 2, 2023, Senators Cory Booker (D-NJ) and Representative Colin Allred (D-TX) introduced a bicameral bill that would end the practice of forcing individuals who have experienced racial discrimination into arbitration. [Ending Forced Arbitration of Race Discrimination Act of 2023](#), S. 1408, HR 3038 (118th Cong. 2023-4). A month later, Senators Kristen Gillibrand (D-NY), Lindsay Graham (R-SC) and Richard Durbin (D-IL), along with Representative Nancy Mace (R-SC), introduced another bill, the “Protecting Older Americans Act of 2023,” prohibiting arbitration of age discrimination claims. *See* [S.1979](#), Protecting Older Americans Act of 2023, 118th Cong. (2023-4).

⁷⁶ *See, e.g.*, The Franken Amendment, § 8116 of 2010 Defense Appropriations Act (prohibiting federal contractors who receive funds under the Act for contracts in excess of one million dollars from requiring their employees or independent contractors to arbitrate “claims involving Title VII of the civil rights act or any tort arising out of alleged sexual assault or harassment”); Military Lending Act, 32 C.F.R. § 232.8 (prohibiting mandatory arbitration in certain forms of credit extended to military service members and dependents); Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 1639c(e) (prohibiting mandatory arbitration in mortgage loan and manufactured home loan agreements); Fair Contracts for Growers Act of 2007, S. 221, 110th Congress (2007); Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, S. 1140, 107th Cong. (2011).

⁷⁷ Forced Arbitration Injustice Repeal (FAIR) Act, H.R. 1423, 116th Cong. (2019), <https://www.congress.gov/bills/116th-congress/house-bill/1423/text>.

PART IV
MASS ARBITRATION

Class action-banning forced arbitration clauses were not designed to achieve fair, expeditious or cost-effective resolutions – indeed, they were not designed to be used at all. Instead, companies and employers have imposed forced arbitration in order to deter victims from filing cases altogether. The proof of this is evident in the recent phenomenon of “mass arbitration,” in which victims simultaneously file thousands of individual arbitrations, forcing corporate defendants to confront claims of wrongdoing and make good on their contractual promises to pay the costs of arbitrating large numbers of individual claims.⁷⁸ The offer of financial subsidies helped buttress corporate advocates’ claims that arbitration is just as fair as the public legal system and less expensive to claimants.⁷⁹ But in reality, companies were simply betting that, even factoring in the subsidies, “consumers and employees would not think it worth the time and money to pursue their meritorious but likely monetarily-small claims.”⁸⁰

But now that some consumers and employees are filing thousands of nearly identical individual arbitration demands and companies are confronting their contractual obligation to incur millions of dollars in arbitral fees, a number of corporate defendants have balked at the prospect of individually arbitrating claims.⁸¹

Take, for example, the case of Twitter: after Elon Musk purchased the company and laid off a substantial portion of its workforce, a putative class of ex-employees filed suit alleging wrongful termination in violation of federal and state laws.⁸² The court compelled individual arbitration of these claims pursuant to the Twitter employment agreement, which designates JAMS as the arbitral provider. In turn, JAMS Rules governing employment arbitrations provide that employees are required to pay but a nominal filing fee (roughly the same amount that would be required for

⁷⁸ See Myriam Gilles, *Arbitration's Unraveling*, 172 U. PENN. L. REV. ____ (forthcoming 2024).

⁷⁹ See Myriam Gilles, *Killing Them With Kindness: Examining Consumer-Friendly Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825 (2012) (explaining in the immediate wake of *Concepcion* that companies seeking to protect their arbitration provisions from judicial scrutiny adopted “consumer-friendly” provisions limiting the financial responsibility of the individual claimant and promising to pay the bulk of costs).

⁸⁰ Lynda J. Grant, *Turnabout Is Fair Play: The Power of Mass Arbitrations*, VERDICT, vol. 29, No. 3 (July 2023) at 4.

⁸¹ See J. Maria Glover, *Mass Arbitrations*, 74 STAN. L. REV. 1283, 1314 n.8 (2022) (“claims that were rendered unmarketable by class-action waivers suddenly became capable of generating settlement pressure greater than that produced by class certification”). See also Sam Mellins, *How Corporate America's Favorite Legal Trick Is Backfiring*, THE LEVER, May 27, 2022 (reporting that one prominent mass arbitration firm, Keller Postman, “claims that it has secured more than \$200 million for its mass arbitration clients,” mainly through mass settlements).

⁸² *Comet et al. v. Twitter*, 2022 WL 18396334 (N.D. Cal., Dec. 14, 2022). Two other class actions were subsequently filed against Twitter by other groups of workers. See *Borodaenko v. Twitter, Inc.*, 2023 WL 3294581 (N.D. Cal. May 5, 2023); *Rodriguez v. Twitter, Inc.*, 2023 WL 3168321 (N.D. Cal. May 1, 2023).

filing a lawsuit in state court).⁸³ All other arbitration fees must be borne by the employer, including a \$2000 filing fee that “must be paid in full” at the commencement of proceedings, as well as all arbitrators’ hourly fees and JAMS administrative fees.⁸⁴

Following the court’s grant of Twitter’s motion to compel arbitration, nearly 2,000 ex-employees inundated JAMS seeking to initiate individual arbitrations. But Twitter refused to pay JAMS’ \$4 million non-refundable filing fee – much less the arbitral fees that would come later – and, after multiple attempts to secure payment, JAMS finally closed the delinquent file.⁸⁵ The ex-employees have now returned to court – this time to compel Twitter to abide by its own arbitration provision.

Likewise, in a bid to avoid paying \$91 million in filing fees for 31,500 individual consumer disputes, Uber sued the AAA in New York state court, claiming the “exorbitant” fees violated the provider’s commitment to “a fair, cost-effective process.”⁸⁶ The court was unimpressed, reminding Uber that it alone had “made the business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers, and [that the] AAA’s fees are directly attributable to that decision.”⁸⁷ Other courts have similarly rejected companies’ attempts to avoid the implications of their own arbitration provisions.⁸⁸

In the case of DoorDash, thousands of couriers filed individual arbitrations with the AAA, which informed the company that it owed about \$12 million in nonrefundable fees to launch these worker arbitrations.⁸⁹ Like Uber, DoorDash ran to court for help, but Northern District of California Judge William Alsup was unsympathetic: “Faced with having to actually honor its side of the bargain, DoorDash now blanches at the cost of the filing fees it agreed to pay in the

⁸³ JAMS Policy on Employment Arbitration, [Minimum Standards of Fairness](#) at p. 4, Std. 6 (“The only fee that an employee may be required to pay is the initial JAMS Case Management Fee. All other costs must be borne by the company, including any additional JAMS Case Management Fees and all professional fees for the arbitrator’s services...”). Further, JAMS Rules require that all employment-related arbitrations before JAMS “must comport with the JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness.” *Id.*

⁸⁴ *Id.*; see also *Comet*, *supra* note ___, 2023 WL 187498, at *3.

⁸⁵ [Fabien Ho Ching Ma v. Twitter](#), 23-cv-03301 (N.D. Cal., July 3, 2023), Petition to Compel Arbitration at ¶ 35 (“On June 30, 2023, following Twitter’s notice of its refusal to pay these fees, JAMS notified the parties that: ‘JAMS will close its file as JAMS will not proceed with cases that we have determined fall under our Employment Minimum Standards if Respondent will not abide by those standards.’”). See also Cyrus Farivar, [Ex-Employees Suing Twitter Say It’s Not Cooperating On Arbitration, Asks To Keep Case In Court](#), FORBES, Feb. 10, 2023.

⁸⁶ *Uber Tech., Inc. v. American Arbitration Assn., Inc.*, 2022 N.Y. Slip Op. 02503 (1st Dept., April 14, 2022).

⁸⁷ *Uber v. AAA*, 2022 N.Y. Slip Op. 02503 (unanimously affirming the trial court order rejecting Uber’s motion for preliminary injunction, in which Uber sought to enjoin the AAA from issuing any additional invoices).

⁸⁸ See, e.g., *Abemathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1068 (N.D. Cal. 2020) (“The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them.”).

⁸⁹ See, e.g., *Abemathy v. DoorDash, Inc.*, No. C 19-07545 WHA, 2020 WL 619785 (N.D. Cal. Feb. 10, 2020).

arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration.”⁹⁰

The resistance of these companies to individually arbitrating these cases — after unilaterally forcing these provisions on their workers and consumers — makes clear that the corporate preference for forced arbitration was never about fairness and efficiency, but about suppressing worker and consumer cases and avoiding accountability at all costs. This stunning hypocrisy underscores the need for legislative action, as corporate actors and their savvy defense counsel are already finding ways to avoid legal exposure by rewriting contractual provisions to repel mass arbitrations in various ways.⁹¹

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, when subject to forced arbitration, consumer and worker claims simply vanish. And along with those disappearing cases, we sacrifice the rights of all Americans to make decisions for themselves about the path to accountability, as well as deterrence, adherence to legal principles, and the development of the law itself.

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

⁹⁰ *Id.* (“This hypocrisy will not be blessed.”)

⁹¹ Myriam Gilles, [Arbitration’s Unraveling](#), 172 PENN. L. REV. __ (forthcoming 2024).

Joanne Grace

Testimony – U.S. Senate Committee on the Judiciary

Small Print, Big Impact: Examining the Effects of Forced Arbitration

April 9, 2024

Chairman Durbin, Ranking Member Graham, and distinguished committee members, it is truly an honor to be here. Thank you for the opportunity to tell you about how I was wrongfully terminated because of my age and how my former employer is attempting to use forced arbitration to further steal my rights, my voice, and my dignity.

As a nurse, starting my career in 1976, I have dedicated my life to helping others. If you, a spouse, a parent, or child has been in a hospital, you know what nurses do. Today, I am speaking for them.

After working hard for almost 50 years as a floor nurse, a Supervisor House RN, a Manager of Nursing Services, and the Director of Nursing Services, my health care system was acquired by Steward Health System. I continued as a Nurse Manager and then as a Patient Advocate. I loved being a Patient Advocate because it allowed me to speak up when a patient wasn't being heard. ... which is the same purpose I hope to serve here today – to speak for those that otherwise would be silenced by forced arbitration.

When Steward hired a new Director of Nursing in 2020, older nurses began experiencing overt ageism. What had once been a second home to me had now become a hostile work environment. Older employees were steadily being let go and replaced by younger employees. At least once per week, the Director of Nursing would ask me something like, "Why do you want to keep working at your age?" or "don't you think it would be a good time to retire?" She would address my age and medical conditions openly in meetings in an attempt to embarrass and shame me. As the frequency of the age harassment grew, I brought these issues to HR, which quickly dismissed my claims. Do you know what HR said? They called me an "old warrior." Old. It was a slap in the face.

Why would an HR representative feel so brazen and shameless to outright call me "old" and to not take my harassment seriously? After decades of service, in a career that I loved, I was actively being pushed out not because of my performance, but for no other reason than my age. I felt frustrated, ignored, and disrespected within a profession I hold so dear.

In February of 2022, I was hospitalized with Covid-19 and missed several weeks of work. Just before I returned to work, Steward posted a Nursing Manager position online. The job description made it very clear to me that this was my job, just with a different title. When I returned to work, I was told that my position had been "eliminated." Of course, mine was the only position which had been "reduced" as my former employer called it. But because the hospital needed someone in my position as a legal requirement, it was quickly filled by someone in their 20s, who did not even meet the baseline experience qualifications. My reduction in force was a simple lie to meet their goal of forcing me out.

In getting rid of more experienced nurses for no reason other than age, the hospital put patients' safety at risk. It also deprived younger nurses of learning from those of us who've seen every type

of situation you can imagine, and learn in a hands-on, experiential way from someone more seasoned.

I was devastated, confused, and heartbroken. Then I was mad. In getting rid of more experienced nurses, the hospital put patients' safety at risk. I hired a lawyer to help me file a lawsuit against Steward for age discrimination. I did not make the decision to file a lawsuit in order to get money – I love working, and I'd hoped to work as long as I could be useful and effective. I filed a case because I wanted to stop the pattern that I'd witnessed; I wanted to protect other older nurses and keep the patients safe. I'd hoped to effectuate change.

After we filed my age discrimination lawsuit in court, Steward moved to hide the claims by forcing everything into binding arbitration, even though I never signed a so-called "agreement" to arbitrate. We said, "show us a signed forced arbitration agreement." They could not. Instead, they pointed to my name on a list as having attended a training module about forced arbitration. I did not attend that training. They argued that by continuing to work after attending a training module, I lost my right to hold them publicly accountable and my right to have my case heard by a jury.

The wickedness of the alleged forced arbitration agreement did not stop there. They claim that the forced arbitration agreement allows my employer to pick the pool of potential arbitrators – which is made up of mainly defense oriented attorneys. They said that this forced arbitration agreement further rigs the process by only allowing me to call one witness from Stewart and limits me to requesting only 25 documents in order to prove my case. In court, I would be allowed to get information from the Director of Nursing, the HR representative, and the person that decided that a reduction in force was necessary. But in forced binding arbitration, I could call just one.

So, in summary, according to my former employer:

- I cannot find out what happened to prior nurses, because they were forced into secretive binding arbitration;
- I'm limited to less than 10 percent of the discovery I would get in court, which makes proving my case near impossible;
- My half-built case would likely be decided by a defense-oriented attorney; and
- If by chance I make it through this rigged gauntlet and win, no one will ever know and thus, no change can happen.

As long as Congress allows employers like Steward the ability to quietly sweep any accountability under the rug, they will; there will be no change; and nurses and patients will continue to suffer.

Now, I hope you understand why an HR representative feels so brazen and shameless to outright call me old. The ability to use the rigged system of forced arbitration empowers them to violate the law.

Through this experience, I've learned that forced arbitration is often used to silence employees, and shield corporations like Steward from public accountability. Because forced arbitration takes away my ability to hold Steward accountable for what they did to me, it essentially takes away the rights and protections you all – Congress – have passed into law to protect people like me. Forced arbitration takes away your power and it makes following the law optional. I never agreed to forced

arbitration, and yet, Steward now claims they get to decide how I can exercise my rights going forward.

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act was a landmark piece of legislation you passed into law last Congress that has finally returned power back to some victims of workplace harassment. Now it's time to restore the rights of the "old warriors" like me.

As more Americans remain in the workforce after reaching the age of 60 or 70, either because of financial concerns or simply because they desire to work, more needs to be done to ensure that our rights are protected. Older workers should not be forced into retirement or into arbitration – every American should be allowed the dignity to make those decisions for themselves.

Older Americans bring decades of experience and knowledge to the workplace that adds value. We add value. Unfortunately, instead of being appreciated and supported, many of us are subjected to ageism, pushed into retirement, and replaced by younger staff – many of whom we've trained and mentored.

I've worked long and hard enough to decide my own future. I wasn't ready to retire, but that didn't matter to Steward. They were ready to push me out. Ending forced arbitration for age discrimination leads to public accountability. Public accountability leads to changes in workplace culture that ensures protection for all workers, regardless of our age. I implore Congress to move forward legislation to end forced arbitration so older Americans who face age discrimination in the workplace can finally have our voices heard.

Thank you so much, Chair Durbin and Ranking Member Graham, for taking the time to hear my story today, for all your work supporting American workers, and thank you, Ranking Member Graham for your leadership on the Protecting Older Americans Act of 2023. I deeply appreciate the opportunity today to testify about why such legislation is needed and am happy to answer any questions you might have about my experience.

Testimony of

VICTOR E. SCHWARTZ
Partner, Shook Hardy & Bacon, L.L.P.

Before the
U.S. SENATE COMMITTEE ON THE JUDICIARY

Hearing on
“Small Print, Big Impact: Examining the Effects of Forced Arbitration”

Dirksen Senate Office Building, Room G50
April 9, 2024
10:00AM

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**TESTIMONY OF VICTOR E. SCHWARTZ
BEFORE THE
U.S. SENATE COMMITTEE ON THE JUDICIARY**

**Hearing on
“Small Print, Big Impact: Examining the Effects of Forced Arbitration”**

April 9, 2024

Chairman Durbin, Ranking Member Graham, and Members of this distinguished Committee, thank you for your most gracious invitation for me to testify today about pre-dispute arbitration agreements.

By way of background, for over fifty years, I have worked in and with our litigation system. I was privileged to do plaintiffs’ work for over a decade and defense work for over thirty years. I have been a law professor and served as dean of the University of Cincinnati College of Law. I am co-author of the most widely used torts casebook in the United States, *Prosser, Wade & Schwartz’s Torts: Cases and Materials* (15th ed. 2024). Currently, I am a partner at the law firm of Shook Hardy & Bacon, L.L.P. and co-chair the firm’s Public Policy Group.

As has been true each time I have testified before this distinguished Committee, the views expressed are my own.

* * *

On the previous occasion in which I testified before this Committee on the topic of pre-dispute arbitration, I began with a quote from the wisest minister I have ever known, Albert Sikkelee, who once said in a sermon that “something not placed in context is pretext.” While Reverend Sikkelee was speaking of selective uses of portions of the *Bible*, his words ring true with respect to the topic of pre-dispute arbitration agreements. To evaluate these agreements properly, they must be placed in the context of our civil justice system. With that mind, I thought it would be helpful to explain some of the benefits of pre-dispute arbitration agreements as means of dispute resolution as compared to civil litigation, as well as address some of the myths about these agreements to help provide a more complete context for the Committee.

Key Benefits of Binding Pre-Dispute Arbitration

A principal benefit of pre-dispute arbitration agreements, and arbitration generally, is that it provides consumers, employees, and other claimants with an efficient means to obtain redress for a large number of claims in which litigation is impractical. Pursuing a lawsuit can be a costly and time-consuming endeavor for anyone, and may simply be an unrealistic option where an alleged injury is of an individualized nature and too modest in potential value to attract the assistance of a lawyer.

For instance, some studies indicate that even around twenty years ago lawyers often would not take a case unless the expected value of the claim was at least \$60,000.¹ More recent reports suggest that some plaintiff's lawyers will not take a case valued at less than \$200,000.² This is totally understandable. Although some lawyers put economics aside on occasion, the reality for many claimants is that the only path to pursue a civil action is to hire a plaintiff's lawyer under a contingency fee agreement. These lawyers are paid only if they win, and even a recovery of a one-third or more in a case may not be enough to warrant their participation given the expected time, effort, and risk involved. Plaintiff's lawyers are not paid by the hour and generally do not take cases they do not expect to win; they are capitalists and must make wise investments to make a living.

Arbitration, in comparison, allows claimants to bypass the costs of the litigation system. Claimants, in general, can have their disputes adjudicated more quickly and more cheaply than in the courts. For example, under the American Arbitration Association's employment procedures, employees cannot be asked to pay more than \$300 in total arbitration costs; employers must shoulder all the remaining fees.³ In many instances,

¹ See, e.g., Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Resol. J. May-Jul. 2003, at 8, 10-11.

² See, e.g., Minn. State Bar Ass'n, *Final Report: Recommendations of the Minnesota Supreme Court Civil Justice Task Force* 11 (Dec. 23, 2011), http://www.mncourts.gov/mncourtsgov/media/assets/documents/reports/Civil_Justice_Ref_Task_Force_Dec_2011_Rpt.pdf.

³ Am. Arbitration Ass'n, *Employment/Workplace Fee Schedule: Costs of Arbitration* (effective Nov. 1, 2020), https://www.adr.org/sites/default/files/Employment_Fee_Schedule.pdf.

claimants pay nothing at all in arbitration.⁴ In the litigation system, the court fees alone to initiate a case may be \$400 or more, and that is before the payment of any fees to a lawyer who agreed to take the case.

The more costly litigation path is also plagued with problems that can significantly delay any adjudication and potential redress of a claim. Many state courthouses – which is where most civil claims are filed – are, quite simply, overburdened. Entire court systems may be grappling with significant budget cuts that stretch already scarce judicial resources and result in reduced services and lengthy delays. As the Committee is likely aware, even before the pandemic, many federal district courts experienced high caseloads and lengthy delays. The length of time to resolve a civil case in federal court is at a record high.⁵ Arbitration, on the other hand, can potentially shave months or even years off the resolution time of a claim.

In addition, claimants using arbitration benefit from a simpler, more convenient method of dispute resolution. As the U.S. Supreme Court has explained: “The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices.”⁶ The Court has further recognized that “the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”⁷

⁴ See, e.g., Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 802 (2003).

⁵ See Cara Bayles, *COVID Bottleneck Continues to Delay Federal Courts*, Law360, June 2, 2023 (“Civil cases, meanwhile, saw a decline in duration over the first year of the pandemic, hit prepandemic levels the following year and, in the 12-month period ending in March, lasted longer than they have in more than two decades.”).

⁶ *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)).

⁷ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011).

Such flexibility at lower cost can make real differences in claimants' lives. As the eminent jurist Learned Hand wisely observed nearly a century ago, a person "should dread a lawsuit beyond almost anything short of sickness and death."⁸ A claimant pursuing arbitration, in comparison, may never need to take time away from family or work to meet with a lawyer, sit for a deposition, or even make a personal appearance in a matter to obtain a recovery. Arbitration proceedings often require far less information than would be exchanged in traditional civil discovery and may be adjudicated on the basis of something as simple as a telephone call. In a world of increasingly busy lives, these are important benefits.

The combination of benefits gained from arbitration with respect to lower costs, greater efficiency, and increased availability of redress are reinforced by the fact that the arbitral process provides claimants with a fair, reliable, and effective means of dispute resolution. Numerous studies demonstrate that claimants receive even-handed justice in arbitration proceedings.⁹ As a study published in the Stanford Law Review explained, one commonality in its analysis of reports that suggested otherwise was that "the assertions of many arbitration critics were either overstated or simply wrong."¹⁰ It concluded "there is no evidence that plaintiffs fare significantly better in litigation" than arbitration, and "[i]n fact, the opposite may be true."¹¹

⁸ Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, Address Before the N.Y. City Bar Ass'n (Nov. 17, 1921), in 3 *Lectures on Legal Topics* 89, 93 (1926).

⁹ See, e.g., Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843 (2010); Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56 (Nov. 2003 - Jan. 2004); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 Disp. Resol. J. 44, 45, 47-50 (Nov. 2003-Jan. 2004); Hill, *supra* note 4, at 802; Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Resol. J. 9, 13 (May/July 2003).

¹⁰ David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1567 (2005).

¹¹ *Id.* at 1578.

The less formal nature of arbitration proceedings compared to traditional civil litigation does not mean that the independence of arbitrators is somehow relaxed. These individuals are professionals who take an oath to render objective decisions, not unlike a judge or other court officer. Many arbitrators are, in fact, former judges. The nation's leading arbitration providers, such as the American Arbitration Association (AAA) and JAMS, also have comprehensive rules and procedures to ensure independence among arbitrators and due process for claimants. The result is a system with significant advantages over the litigation system that benefit all involved.

Myths about Binding Pre-Dispute Arbitration

There are probably more myths about binding pre-dispute arbitration agreements than one can find in Aesop's fables. I would like to address six myths that I believe are particularly unhelpful to a thoughtful discussion of this topic, yet are often repeated.

Myth #1: Pre-dispute arbitration agreements are categorically unfair because they are entered into by consumers, employees, or other individuals with unequal bargaining power.

Despite opponents' rhetoric that pre-dispute arbitration agreements are "forced arbitration," it is important to appreciate that we are talking about contracts entered voluntarily by consumers, employees, and others. If a person feels strongly enough that he or she would not want to participate in arbitration should a disagreement arise, he or she can choose to not purchase the product or service at issue or pursue different job opportunities.

In many instances, though, there will be a marketplace alternative. For example, the *National Law Journal* has published an article on the use of pre-dispute arbitration agreements among law firms. The article stated that a number of large law firms require new attorneys to enter such agreements as a condition of employment whereas others do not.¹² Attorney applicants have the option of not seeking employment with firms that

¹² See Karen Sloan, *Big Law Is Targeted—In Person—By Law Students Opposing Mandatory Arbitration*, Nat'l Law J., Mar. 26, 2019, <https://www.law.com/nationallawjournal/2019/03/26/big-law-is-targeted-in-person-by-law-students-opposing-mandatory-arbitration/>.

include such agreements if so inclined. The same rationale applies to consumer agreements; a consumer is free to seek out (and presumably pay a premium for) products or services that do not include a pre-dispute arbitration agreement. If this is indeed something in which individuals place value, actors in a competitive marketplace will typically adjust and offer that option.

The notion that a voluntary contract is unfair just because it includes a provision on a “take it or leave it” basis ignores the fact that an individual can just “leave it.” Countless agreements include terms that are offered on such a basis; pre-dispute arbitration provisions are hardly unique in this regard.¹³ Prohibiting or otherwise limiting the use of pre-dispute arbitration provisions based on unequal bargaining power alone would do more harm to individuals in the aggregate by “forcing” them to face greater burdens, costs, and delay in seeking access to justice and experience worse outcomes – in essence, “forced litigation.”

Myth #2: Pre-dispute arbitration provisions are unsound because they are often written in “legalese” and “buried” in legal agreements.

The same point expressed previously that individuals should be accountable for the contracts they enter voluntarily bears repeating. This personal accountability extends to reading a contract and making an effort to understand its contents. Individuals should not be able to a benefit from choosing to rush through and execute an agreement without reading it first and then use that decision as a basis for invalidating all or part of the agreement. If a contract’s terms are overly burdensome, oppressive, or deceptive, individuals generally have a legal basis to challenge that provision. Contract terms are subject to an unconscionability analysis, and courts have invalidated various types of pre-dispute arbitration provisions on this basis.¹⁴ The mere inclusion of a provision such as a

¹³ *Cf. Concepcion*, 563 U.S. at 346–47 (“[T]he times in which consumer contracts were anything other than adhesive are long past.”).

¹⁴ *See, e.g., Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916 (9th Cir. 2013) (refusing to apply provision that required employee to pay unrecoverable portion of arbitrator’s fees “regardless of the merits of the claim”); *Willis v. Nationwide Debt Settlement Grp.*, 878 F. Supp. 2d 1208 (D. Or. 2012) (refusing to apply provision requiring arbitration to take place in inconvenient location in another state); *Adler v. Fred Lind Manor*, 103 P.3d 773 (Wash. 2004) (refusing to apply provision that unreasonably shortened statute of limitations).

pre-dispute arbitration provision, however, should not be rejected out-of-hand as unfair where a consumer has a reasonable opportunity to review it.

Myth #3: Pre-dispute arbitration agreements are unjust because they require confidential adjudication that denies claimants a public forum.

An arbitration proceeding does not necessarily foreclose public awareness of a dispute. Claimants are free to discuss their claims publicly and to report alleged wrongdoing to law enforcement officials.¹⁵ If an arbitration agreement purported to impose a “gag order,” that restriction would be invalidated in court.¹⁶ State laws further require disclosure of arbitration outcomes by arbitral forums such as the AAA,¹⁷ and courts consistently hold that the results of arbitration proceedings may be disclosed by either party.

To the extent arbitration proceedings are private, arbitration is by no means unique in limiting public awareness of a dispute. As this Committee is aware, many claims filed in civil court settle, and a settlement can result in less public disclosure than arbitration. Judges may also issue orders without written explanation of their reasoning, which may similarly result in less public exposure compared to an arbitration proceeding.

In addition, claimants may prefer arbitration precisely because the adjudication takes place in a less public setting than civil litigation. Many claimants choose not to pursue litigation in the courts because of the potential toll it might take on them within their community, or on their loved ones, if the dispute plays out in the “court of public opinion.” Thus, confidentiality can be something all parties welcome.

Myth #4: If there are benefits to binding pre-dispute arbitration agreements, consumers should be permitted to choose for themselves whether to resolve a dispute through post-dispute arbitration or civil litigation.

¹⁵ See Christopher C. Murray, *No Longer Silent: How Accurate are Recent Criticisms of Employment Arbitration*, 36 *Alternatives to the High Cost of Litigation* 65, 78 (2018).

¹⁶ See, e.g., *Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007), *overruled on other grounds by Kilgore v. KeyBank, Nat'l Ass'n*, 673 F.3d 947 (9th Cir. 2012); *Longnecker v. Am. Express Co.*, 23 F. Supp. 3d 1099 (D. Ariz. 2014).

¹⁷ See, e.g., Cal. Code Civ. Proc. § 1281.96.

The notion of supplanting pre-dispute arbitration agreements with post-dispute arbitration ignores the fact that parties' incentives change dramatically in the post-dispute setting. Unlike the pre-dispute arbitration context where both parties – regardless of position and strength of case relative to each other – agree to arbitrate any dispute, each party in the post-dispute context will insist on either arbitration or litigation where it provides the greatest expected benefit to them and them alone. Consequently, the adversarial parties are unlikely as a practical matter to agree on the same method of dispute resolution. This is why post-dispute arbitration agreements are virtually non-existent in the “real world.”

For example, if a company believes an individual's claim is below a certain amount that will make it difficult for that individual to obtain legal representation, the company would be less likely to agree to post-dispute arbitration because holding out would prevent the individual from pursuing the claim. Conversely, if the company believed the individual's claim might result in a substantial judgment, the company would probably prefer arbitration whereas the individual might be more inclined to pursue civil litigation in the hopes of obtaining a large jury award.

The benefit of binding pre-dispute arbitration is that both parties are on the “same page” regardless of the particulars of any subsequent dispute.

Myth #5: Businesses prevail at greater rates in arbitration proceedings, which suggests these proceedings are biased and “stack the deck” against claimants.

As discussed previously, empirical studies demonstrate that claimants are often better off having disputes adjudicated pursuant to pre-dispute arbitration agreements.¹⁸ Reports suggesting arbitration is biased in favor of businesses have been debunked or otherwise had flawed methodology exposed.¹⁹ In fairness to these efforts, designing a study to analyze outcomes in arbitration as compared to civil litigation is a challenging task. Simply looking at “win rates” for individuals or businesses in claims under either system

¹⁸ See *supra* note 9.

¹⁹ See *supra* note 10.

in isolation may not tell the full story – one needs to compare apples to apples to get an accurate picture.

For instance, there can be significant differences in the types of claims brought in arbitration versus civil litigation. As discussed, the use of pre-dispute arbitration agreements may provide an individual a forum to bring a modest claim of questionable value that, as a practical matter, would never see the light of day if pursued through the civil litigation system because no lawyer would take the case. A lawyer might decline to do so either because of the modest amount of recovery at issue or the questionable nature of the claim (or both). Here, the availability of arbitration is a testament to greater access to justice for the individual even though the defendant business may prevail in a comparatively greater number of these types of cases.

Settlement of claims brought in both civil litigation and arbitration is another factor that can muddy any direct comparison of “win rates.” Parties may settle civil cases as well as cases in arbitration for reasons that have little to do with a claim’s actual merits (e.g. nuisance value), which can distort what this information reveals. Businesses also have a strong incentive to settle claims in arbitration because they are on the hook for all the fees, and these settlements would not be captured in “win rates.”

What is clear, though, is that the empirical evidence that has developed over the decades-long study of the use of pre-dispute arbitration agreements supports the continued use of these agreements as a positive alternative to civil litigation.

Myth #6: Pre-dispute arbitration provisions unfairly preclude individuals from bringing class actions that allow for small damages claims to be aggregated for adjudication.

The argument that pre-dispute arbitration agreements inappropriately preclude claimants from accessing justice through the class action device is, in my view, overblown. Class actions in our civil litigation system are available only in discrete situations where people sustain injury in the same way at the same time (and can satisfy other requirements of Federal Rule of Civil Procedure 23 or analogous state rules). Class actions are not permitted where claims are highly individualized. Accordingly, a class action is generally

not available for most employment or consumer disputes, such as those involving a physical injury or particularized alleged economic harm (e.g. overcharge or improper payment) that pertains to a specific person.

Class actions are also not as beneficial to consumers as opponents of the use of pre-dispute arbitration agreements may suggest. Class actions are often enormously complex and expensive. They also typically take many years to revolve. These are all problems upon which arbitration improves.

In addition, members of a class action frequently end up receiving little or no benefit at the end of the litigation. The history of class action litigation in America is replete with examples of consumer class actions in which the vast majority of the class members remain absent and recover nothing at all.²⁰ For example, an analysis prepared by the Consumer Financial Protection Bureau (CFPB) reported a “weighted average claims rate” in class actions of just 4%.²¹ Perhaps the highest estimated came from the Federal Trade Commission in 2019, which found a “median” claims rate of 9%, but a “weighted mean” claims rate of 4%.²² Other studies report significantly lower rates of class member involvement.²³

²⁰ See U.S. Chamber Inst. for Legal Reform, *Unstable Foundation: Our Broken Class Action System and How to Fix It* 3-5 (Oct. 2017), https://instituteforlegalreform.com/wp-content/uploads/2020/10/UnstableFoundation_Web.pdf (analyzing studies of recoveries under class actions and discussing specific case examples).

²¹ See Consumer Fin. Pro. Bureau, *Arbitration Study: Report to Congress 2015* 30 (Mar. 2015).

²² Fed Trade Comm’n, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns* (Sept. 2019), https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf; see also Alison Frankel, *FTC’s Comprehensive Study Finds Median Consumer Class Action Claims Rate is 9%*, Reuters, Sept. 10, 2019 (reporting that the FTC’s claims rate may be higher than previous studies because it included class actions in which class members received direct notice of a settlement, which frequently does not occur in consumer cases).

²³ See, e.g., Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (Dec. 11, 2013), <https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf>.

These studies indicate that the true beneficiaries of class action litigation are not consumers or other claimants, but rather the plaintiff's lawyers who bring these cases and collect substantial attorney fees. Therefore, the notion that pre-dispute arbitration agreements have a major adverse impact on the ability of individuals to obtain redress for comparatively small claims is simply false. As explained, the evidence shows that these individuals fare better through arbitration; it is the plaintiff's lawyers who do not, which is why they are leading efforts to bar or limit the use of binding pre-dispute arbitration agreements.

Conclusion

Everyone knows the universal truth: nothing is perfect. Pre-dispute arbitration is not perfect, but I can assure this Committee that the litigation system is not perfect either. On balance, though, the benefits of pre-dispute arbitration agreements far outweigh any perceived concerns when the full picture is provided. The alternative of barring the use of pre-dispute arbitration agreements is not sound public policy. To the extent any bad apples exist in the marketplace, they should not spoil the entire bunch and can be addressed. Prohibiting the use of binding pre-dispute arbitration agreements would make worse off the very individuals such proposals seek to protect. These individuals would face greater burdens and costs in seeking access to justice, experience worse outcomes, and have disputes resolved at a far slower rate.

Thank you for the opportunity to testify today and I look forward to your questions.

Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Myriam Gilles
Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University
April 16, 2024

1. Mr. Schwartz testified that arbitration is a cheaper alternative to court litigation.

a. Do you agree with that testimony? If not, why not?

I do not agree with Mr. Schwartz's unsupported assertion because arbitration does not channel cases into an alternative system that is cheaper than our public courts. Instead, when subject to forced arbitration, consumer and worker claims simply vanish. Snuffing out meritorious claims may be "cheaper" for large corporations and employers, allowing them to escape legal responsibility for any wrongdoing, but it is very costly to the rest of society.

In 2015, the Consumer Financial Protection Bureau ("CFPB") completed a study on the use of arbitration in consumer financial transactions.¹ The Bureau was especially interested in determining whether there was any truth to claims (like the one Mr. Schwartz repeated without support in his testimony) that arbitration was a cheaper alternative to court. But it could find no evidence that adopting mandatory arbitration resulted in savings to consumers in the form of reduced prices, or on the flip side, that abandoning arbitration resulted in higher consumer prices.² For instance, the agency examined the total cost of credit paid by consumers after Bank of America, JPMorgan Chase, Capital One, and HSBC were forced to eliminate their arbitration clauses as a result of court-approved settlements – but found no evidence that these companies had increased prices or reduced access to consumer credit as a result of dropping their forced arbitration provisions.³ Similarly, the CFPB analyzed mortgage rates after Congress passed a law prohibiting the use of forced arbitration in mortgage contracts – but again, found no increase in rates.⁴

Moreover, if Mr. Schwartz is right that forced arbitration is cheaper than litigation, one would expect scores of consumers and workers to take advantage of this lower-cost option. Yet the empirical evidence confirms the opposite is true: shockingly few

¹ CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), at 7 (2015) [hereinafter ARBITRATION STUDY], https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

² *Id.* at §10, pp. 2-5 ("[E]ven a correlation between the use of pre-dispute arbitration clauses and price levels should not be construed as a causal relationship between the two, absent additional information.").

³ *Id.* at §1, p. 18.

⁴ *Id.*

disputants have initiated individual arbitrations. The CFPB Study, for instance, determined that in the 1,060 arbitrations cases initiated by consumers in 2010 and 2011, only 341 resulted in decisions by arbitrators – with consumers obtaining relief on their affirmative claims in only 32 arbitrations and debt forbearance in only 46. Likewise, a 2017 report by the nonprofit group Level Playing Field examined the use of forced arbitration in the Wells Fargo identity-theft debacle.⁵ Compiling data from the AAA and JAMS, the country's largest arbitration providers, the report found that just 250 consumers arbitrated claims with Wells Fargo between 2009 and the first half of 2017.⁶ Given that the bank boasts over 70 million customers, this is “a shockingly low number of arbitration claims” – but it is particularly surprising given the “continued revelations of widespread unfair business practices” at Wells Fargo.⁷ In a similar vein, Professor Imre Szalai's 2018 study determined there were an estimated 826,537,000 consumer arbitration provisions in force.⁸ Yet, the two largest arbitration providers (AAA and JAMS) recorded an average of only 6,000 consumer arbitrations per year.⁹ Professor Judith Resnik also reported that only 134 individual claims were filed against AT&T between 2009 and 2014 – despite the company having over 120 million wireless customers and being the subject of numerous investigations and public enforcement actions for violations of consumer laws.¹⁰ Reuters journalist Alison Frankel examined data provided by the AAA, which revealed that in the first quarter of 2019, it had resolved only 895 consumer arbitrations – despite being the designated arbitral provider for the thousands of consumer companies.¹¹

These studies confirm that forced arbitration is a sham. Companies intentionally hide these rights-stripping provisions in the small print of take-it-or-leave-it contracts, foisting

⁵ In 2016, media outlets reported that Wells Fargo employees had been opening fake accounts as far back as 2013. When injured customers tried holding the bank accountable for the identity theft, their claims were quickly forced into the black box of arbitration. See, e.g., Michael Corkery & Stacy Cowly, *Wells Fargo Killing Sham Account Suits by Using Arbitration*, N.Y. TIMES, Dec. 6, 2016. The profound secrecy afforded by arbitration allowed Wells Fargo to avoid both liability and bad press, and allowed wrongful conduct to continue undetected and unremedied long after such illegality would otherwise come to light. See Hearing of the Senate Banking Committee, Wells Fargo: One Year Later, available at <https://www.banking.senate.gov/hearings/wells-fargo-one-year-later> (Oct. 2017).

⁶ *Wells Fargo and Forced Consumer Arbitration*, Level Playing Field (2017).

⁷ *Id.*

⁸ Imre Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233 (2019).

⁹ *Id.*

¹⁰ See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2680, 2812 (2015). Professor Resnik notes: “[t]he result has been the mass production of arbitration clauses without a mass of arbitrations. Although hundreds of millions of consumers and employees are obliged to use arbitration as their remedy, almost none do so – rendering arbitration not a vindication but an unconstitutional evisceration of statutory and common law rights.”

¹¹ Alison Frankel, *Consumer Arbitration is on the Rise -- But the Numbers are Still Punny*, REUTERS, May 9, 2019.

them on an unsuspecting public.¹² But once victims learn of these provisions, most simply abandon their legal claims rather than pursue individual arbitrations. The only cost savings generated by this unfair regime are increased corporate profits generated by suppressing and concealing consumer and worker complaints.

b. What costs are associated with an arbitration proceeding and how, if at all, do these costs vary based on the rules governing the proceeding?

For most consumers and workers, the costs of arbitrating disputes are immense in relation to their likely recovery. This is because the vast majority of consumer and worker-related claims are individually small. When individual employees or consumers suffer small but discernible injury, joining a collective lawsuit to spread litigation costs and equal the playing field is often the only viable path to recovery. Through class and collective actions, citizens have recovered – in the aggregate – billions of dollars.¹³

But class and collective action bans incorporated into arbitration clauses prevent consumers and workers from banding together to share the costs of pursuing justice, eliminating the only cost-effective path that many claimants have. Under class-banning arbitration clauses, a consumer must bear 100% of all the costs charged to her in arbitration by herself; her claim cannot be joined with those of any other arbitral claimant as a way of distributing costs and risks. A consumer must bear her share of the hourly arbitrator fees (which generally range from a few hundred to several thousand dollars per hour), administrative fees (same), hearing costs, travel. And if her claim would benefit from expert testimony, she must pay that hefty cost herself. If her claim relies on the testimony of defendant's executives, she must foot the bill for those examinations. Unsurprisingly, rational consumers are unwilling to take on these immense costs only to recover de minimis damages, nor can they generally find attorneys to represent them.¹⁴ And companies are banking on this rational response: for example, in a consumer case alleging Fitbit sold defective devices, the company's lawyer admitted to a federal judge that it was betting that no rational litigant would pay arbitration fees, which start at \$750, to

¹² Mynam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 413 (2005) (arguing imposing arbitration long before a dispute arises is unfair because most consumers don't place sufficient value on the rights they are waiving until a dispute has arisen).

¹³ ARBITRATION STUDY at §1, p. 16 (reporting that between 2008-2010, over 34 million American consumers were represented in class actions that resulted in over \$2 billion in cash payments and more than \$600 million in in-kind relief).

¹⁴ *See, e.g.*, *AT&T v. Concepcion*, 584 U.S. 849 (2011) (Breyer, J. dissenting) ("What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim?"); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) ("[P]etitioner's individual stake in the damages award he seeks is only \$70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.").

litigate a claim over a \$160 device.¹⁵

c. How do these costs compare with the costs of litigation?

Litigation is less costly for the vast majority of consumers, workers and small businesses for the simple reason that, in our public court system, litigants are permitted to aggregate their claims via class and collective litigation, so long as certain requisites are met. Aggregating claims renders them marketable, spurring lawyers to invest time and money to litigate complex issues on behalf of a class of victims in return for a share of the class recovery.¹⁶ And, as described above, the right to bring a collective lawsuit spreads litigation costs, allowing weaker litigants to challenge the illegal practices of stronger parties. Accordingly, there is simply no question that for the vast majority of Americans, collective litigation is far less costly than a single-file system of forced arbitration.

2. Mr. Schwartz testified that arbitration is beneficial to claimants because it is faster and provides greater flexibility than district court litigation.

a. Do you agree with that testimony? If not, why not?

In its original form, arbitration was intended to provide equally sophisticated commercial entities an efficient means for resolving bilateral disputes without resorting to court litigation. But *forced* arbitration is a different beast altogether: these provisions are unilaterally drafted and imposed by a stronger party via standard-form contract long before any dispute has arisen, in a context without meaningful negotiation. Mr. Schwartz's testimony completely ignores this reality. By furtively inserting these provisions in the small print of job applications, employment contracts, and consumer transactions, his clients and other corporate executives have written their own rules, opting out of legal responsibility by shunting all claims against them into a private system of single-file arbitration, where they know most claims will simply be abandoned.¹⁷ Moreover, we (the public) have no idea whether arbitration is indeed "faster" or more "flexible," as Mr. Schwartz claims, because arbitration proceedings are a black box protected by secrecy rules that prevent the parties from disclosing any information about what happens within. One can only assume that Mr. Schwartz's tendentious testimony asks this body and the

¹⁵ See Alison Frankel, [Fitbit Lawyers Reveal "Ugly Truth" About Arbitration](#), REUTERS, June 4, 2018.

¹⁶ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.").

¹⁷ See, e.g., Jessica Silver-Greenberg & Robert Gebeloff, [Arbitration Everywhere: Stacking the Deck of Justice](#), NY TIMES, Oct. 31, 2015 ("By banning class actions, companies have essentially disabled consumer challenges to practices like predatory lending, wage theft and discrimination...[because o]nce blocked from going to court as a group, most people dropped their claims entirely.").

American people to take his word (or the word of the Chamber) that arbitration is faster and more flexible, without providing any evidence in support of this unfounded claim.

b. What are the negative aspects of forced arbitration in comparison to court litigation from the perspective of claimants?

Claimants forced into arbitration encounter a succession of injustices. First off, contemporary arbitration is coerced, not consented to.¹⁸ Most people have no idea they have signed away their right to hold companies accountable for wrongdoing.¹⁹ This is by design, as companies keep us in the dark by burying forced arbitration clauses in the fine print of standard-form contracts.²⁰ Second, even if we did read the fine print, none of us really has a choice of whether to accept or reject an arbitration clause because these provisions have become ubiquitous.²¹ Accordingly, where a pre-dispute forced arbitration clause is imposed as a precondition to obtaining product, service, or job, choice is illusory and that, in itself, is a grave injustice.²²

Once a dispute arises and a claimant learns that she has unwittingly forfeited her right to go to court, she will face grave difficulty finding a lawyer to represent her in an individual arbitration (for the reasons described above). Even if she is somehow able to secure counsel (or decides to pursue her claim pro se), the claimant will encounter a regime that is overtly biased in favor of corporate defendants. For one, companies write the rules and choose the arbitration provider.²³ The provider, in turn, chooses the pool of arbitrators it

¹⁸ See, e.g., *Epic Systems v. Lewis*, 138 S.Ct. 1612 (2018) (Ginsburg, J., dissenting) (“[a]rbitration clauses, the Court has decreed, may preclude judicial remedies even when submission to arbitration is made a take-it-or-leave-it condition of employment or is imposed on a consumer given no genuine choice in the matter”).

¹⁹ ARBITRATION STUDY at pp. 19-24 (reporting that half of all respondents surveyed did not know whether they had the right to sue their credit-card issuer in court, and more than a third of those who were bound by forced-arbitration clauses still believed, incorrectly, that they could take the company to court); see also Jeff Sovem et al., *“Whimsy Little Contracts” with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 M.D. L. REV.1 (2015) (reporting that in a survey of 668 consumers, less than 9% understood the implications of a forced arbitration provision).

²⁰ See, e.g., Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPORTS, Jan. 30, 2020 (describing an arbitration clause located “about two-thirds of the way through 4,600 words of legalese” in the defendant Wayfair’s online terms of use).

²¹ ARBITRATION STUDY, § 2, pp. 7-24 (reporting that forced arbitration clauses appeared in over 86% of private student loan contracts, 83.7% of payday lending contracts, 99% of cell phone agreements and over 90% of credit card agreements).

²² Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 413 (2005) (arguing imposing arbitration long before a dispute arises is unfair because most consumers don’t place sufficient value on the rights they are waiving until a dispute has arisen).

²³ Companies may designate any provider and write their own rules to govern the arbitration. See Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE, Dec. 2015 (“The ability of corporations to set the rules of mandatory arbitration allows

will make available in any given case. Claimants have no right to choose a different arbitration provider, nor do they have any say over the rules that govern the arbitration.²⁴ And while claimants may have some limited choice within the pool of arbitrators presented to them, this is illusory because claimants generally lack the information needed to make an informed decision about which arbitrator to choose (or strike). After all, there are no public records to search or prior decisions to read since arbitrators do not write publicly available decisions.²⁵

Once an arbitrator is “chosen” by the parties and an arbitration proceeding commences in earnest, claimants quickly lose the right to enforce most procedural rights guaranteed by public courts. This includes the right to full and fair discovery, impartial application of the rules of evidence and procedure, the ability to rely on precedent or *stare decisis*, the right to have their claim heard by a neutral authority, and the right to appeal the outcome in all but the most limited circumstances. In addition, some arbitration agreements shorten statutes of limitations, alter burdens of proof, limit the amount of time a party has to present his or her case, cap damages or require the losing party to pay all arbitration fees, including the other side’s attorneys’ fees.

Given these injustices, it should be no surprise that, when individuals seek to resolve disputes in arbitration, they tend to lose. Numerous studies confirm this finding. For instance, the CFPB’s 2015 study found that arbitrators sided with consumers in just 27% of cases and awarded them an average of 13¢ for every dollar claimed.²⁶ Similarly, the American Association of Justice reviewed 30,000 consumer arbitrations conducted by AAA and JAMS between 2014-18, and found that only 6.3% resulted in consumers winning a monetary award.²⁷ These findings substantiate decades of research on the “repeat-player” bias in arbitration – which posits that arbitrators tend to decide cases in favor of the party most likely to be in a position to appoint them to serve in a future case.²⁸

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.”).

²⁴ *Id.* (“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”).

²⁵ See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 238–39 (1979) (“[Arbitrators] may have little incentive to produce precedents...why should they make any effort to explain the result in a way that would provide guidance for future parties?”); Edward Brunet & Jennifer J. Johnson, *Substantive Fairness in Securities Arbitration*, 76 U. CINN. L. REV. 459, 473 (2008) (“Written arbitration awards currently are the exception in arbitration, which normally operates behind a veil of privacy.”).

²⁶ ARBITRATION STUDY at § 5, pp. 11-12.

²⁷ American Association for Justice, *The Truth About Forced Arbitration* (2019).

²⁸ These studies have generally focused on repeat-player bias employment arbitration, but there is no reason to believe that consumers would suffer in similar fashion. See, e.g., Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPL. RTS. & EMPLOY. POL’Y J. 189, 198-99 (1997) (reporting on a study of 270 AAA employment arbitration awards from 1993-1994, finding that employees won only

This structural imbalance allows companies to stack the deck with arbitrators who will be favorable to their interests, while the secrecy surrounding these proceedings makes it impossible for individual consumers or workers to discern or challenge potential arbitrator bias.²⁹

The advantages accruing to repeat players raise serious concerns about the neutrality and fairness of the arbitration system. Not only do companies choose the arbitral provider and write the rules, they also “gain familiarity with the system and how to operate effectively in it, [and] may also be able to lobby for changes to the system that benefit them.”³⁰ As Professors Colvin and Stone observe, “[e]ven 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.”³¹ Taken together, the overt unfairness of arbitration regimes bodes poorly for consumers and workers who wish to individually arbitrate their claims, and may go a great distance in explaining why so few do so.

3. Proponents of arbitration often state that it is a fairer system that produces better results for claimants than court litigation.

a. How do claimants’ success rates in litigation compare to their success rates in arbitration?

The CFPB’s 2015 Arbitration Study sought to compare claimants’ success rates in litigation vs. arbitration by examining 1,060 arbitrations initiated by consumers in 2010 and 2011. It found:

- Only 341 (32%) resulted in decisions by arbitrators, with consumers obtaining relief on their affirmative claims in only 32 arbitrations (3%) and debt forbearance

16% of cases against repeat-player employers); Stone & Colvin, *supra* note 23 (reporting on a study finding that when an employer and employee both appeared before an 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).

²⁹ 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) (“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.”)

³⁰ Colvin & Stone, *supra* note 23.

³¹ *Id.*

in only 46 arbitrations (4%)³²;

- By contrast, between 2008 and 2012, 422 consumer class action settlements returned over \$440 million (after deducting attorneys' fees and court costs) to at least 45 million consumers (or an average of 6.8 million consumers each year).³³

In addition, the CFPB conducted a case study of a multidistrict class action filed against 23 banks for illegally charging consumers millions of dollars in excessive overdraft fees.³⁴ In total, debit cardholders reached 18 settlements through the litigation, resulting in \$1 billion in cash relief for over 28 million consumers. Not all account holders were able to join the class, however, because nine of the defendant banks had arbitration clauses in their consumer contracts. Five of these banks successfully compelled the cases against them into arbitration, while four eventually chose to settle. But as of February 2015, CFPB could not verify that even a single one of the consumers forced to arbitrate had received any relief at all. Meanwhile, the 28 million consumers who had secured settlements through litigation saw money transferred directly to their bank accounts.³⁵

b. What difficulties exist in effectively evaluating this claim?

As noted above, confidentiality is core to the institution of forced arbitration and guaranteed by both the providers and the standard terms of contemporary forced arbitration agreements.³⁶ Accordingly, forced arbitration proceedings are conducted behind closed doors, making it nearly impossible for researchers to compare arbitration to litigation. This secrecy creates an impenetrable information gap, making it nearly impossible to compare public and private dispute resolution processes. Take, for example, the CFPB's case study comparing the outcomes in litigating vs. arbitrating overdraft fee disputes. This controlled-experiment comparison was only available because, at that time, some banks had instituted class action banning arbitration clauses and some had not. But such a comparison would not be possible today, as all banks now mandate arbitration in their consumer banking contracts.

³² ARBITRATION STUDY at § 5, pp. 41-42 (finding that "[t]he total amount of affirmative relief awarded was \$172,433 and total debt forbearance was \$189,107").

³³ *Id.* at § 1, pp. 16.

³⁴ *Id.* at § 8, at 39-46 (discussing *In Re Checking Account Overdraft Litig.*, MDL 2036. 685 F.3d 1269 (11th Cir. 2012)).

³⁵ *Id.* at § 8, at 40 & 45-46.

³⁶ *See* AAA CONSUMER DUE PROCESS PROTOCOL, Principle 12.2 (arbitrator must "maintain the privacy of the hearing to the extent permitted by applicable law"); AAA Commercial Rule 25 (directing arbitrators to "maintain the privacy of the hearings unless the law provides to the contrary").



April 16, 2024

The Honorable Dick Durbin
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20515

The Honorable Lindsey Graham
Ranking Member
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20515

Dear Chairman Durbin and Ranking Member Graham:

AARP, which advocates for the more than 100 million Americans age 50 and older, thanks you and the members of the Senate Committee on the Judiciary for holding this important hearing, "*Small Print, Big Impact: Examining the Effects of Forced Arbitration*." We look forward to working with you to protect older Americans whose rights are stripped away by forced arbitration of age discrimination claims.

Age discrimination remains prevalent in the workforce. According to AARP's [Value of Experience Survey](#), nearly two out of three workers age 40-plus reported having seen or experienced age discrimination in the workplace. This particularly affects women, of whom nearly two out of three age 50-plus say they regularly face age discrimination, according to a recent [AARP study](#). African American/Black workers age 40-plus confront the highest rate of age discrimination as about [three out of four](#) say they have seen or experienced age bias in the workplace.

While the federal Age Discrimination in Employment Act (ADEA) gives older Americans the right to remedy age bias in the workplace, forced arbitration clauses in employment applications, handbooks, and contracts strip them of the rights Congress gave them. AARP believes mandatory and binding arbitration should not be a condition of getting or keeping a job. Pervasive age bias in hiring already makes it extremely difficult for older applicants. They should not have to surrender their rights against age discrimination to get or keep a job.

The widespread use of forced arbitration by employers can embolden them to engage in age-discriminatory practices knowing that workers are less likely to make a complaint and that complaints could be kept secret from other workers and the public. AARP's [Work & Jobs data](#) series on age discrimination found that for those who did not take any action (i.e., talk with someone or make a formal complaint), the main reason was that they did not think it would make a difference. The story of Joanne Grace, who testified at the hearing about the brazen age harassment she endured, typifies the dilemma that forced arbitration causes older workers. Older workers often file ADEA lawsuits to protect other colleagues as well as themselves from age harassment and discrimination in the workplace. Arbitration proceedings can arbitrarily limit the evidence and procedural protections that a court hearing on an ADEA claim would otherwise provide, making it even more difficult for an older worker to make their case. The hurdles that workers must overcome in forced arbitration proceedings account for the low number of arbitration cases brought or won by workers.

AARP has endorsed the bipartisan Protecting Older Americans Act, which prohibits forced arbitration for age discrimination claims in the workplace. We look forward to working with you and your colleagues on both sides of the aisle to advance this legislation to protect older Americans.

Again, we are pleased that this Committee has held this hearing to examine forced arbitration. If you have questions, please feel free to contact me or have your staff contact Holly Biglow on our Government Affairs team at hbiglow@aarp.org or (202) 570-3760.

Sincerely,



Bill Sweeney
Senior Vice President
Government Affairs



Jim Nussle
President & CEO
202-508-6745
jnussle@americascrreditunions.org

99 M Street SE
Suite 300
Washington, DC 20003

April 9, 2024

The Honorable Dick Durbin
Chair
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Lindsey Graham
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Today's Hearing: Small Print, Big Impact: Examining the Effects of Forced Arbitration

Dear Chair Durbin and Ranking Member Graham:

On behalf of America's Credit Unions, I am writing regarding the Committee's hearing entitled, "Small Print, Big Impact: Examining the Effects of Forced Arbitration." America's Credit Unions is the voice of consumers' best option for financial services: credit unions. We advocate for policies that allow the industry to effectively meet the needs of their nearly 140 million members nationwide.

As member-owned cooperatives, credit unions have an established history of protecting their members' interests and providing high-quality service. An essential element of any modern financial institution is access to systems for quickly and amicably resolving disputes in the limited instances where they arise.

Arbitration can be an efficient means to resolve legal disputes between parties and the choice to include arbitration agreements in contracts is highly dependent on the credit union's policies, priorities, and resources. As arbitration is merely one dispute resolution tool amongst many, we would be concerned with any legislation attempting to arbitrarily restrict access to the arbitration system. The best empirical evidence shows that consumer claimants in arbitration fare better than or at least as well as consumer claimants in court.¹ In addition, most claims asserted by consumers are small and individualized; for those consumers, arbitration provides the best mechanism for redressing their claims. A recent study evaluating data from the Consumer Financial Protection Bureau (CFPB) shows that there is no connection between the use of arbitration and increased violations of law. The use of arbitration is not correlated with

¹ See Nam D. Pham & Mary Donovan, *supra* note 7; see also, e.g., Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 *Hastings Bus. L.J.* 77, 80 (2011); Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 *Ohio St. J. on Disp. Resol.* 843, 896-904 (2010); Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2005); Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 *Seattle U. L. Rev.* 433, 437 (1996).

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either increased consumer complaints or heightened enforcement activity by the CFPB.² Although arbitration may not be an appropriate forum in every dispute, it certainly can be the appropriate forum to resolve some disputes.

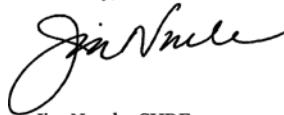
The threat of frivolous class action suits has grown rapidly over the past several years. In response, more credit unions are adopting arbitration agreements to minimize litigation risk and avoid the substantial financial impact of litigation on their membership. Despite the claims of the plaintiff's bar, class action litigation is time-intensive, inefficient, and costly. This is especially true for credit unions as class action lawsuits essentially put member-owners in a position of having to sue themselves and deplete the resources of the membership as a whole. Furthermore, in the rare situation that a group of credit union members feels a credit union is in the wrong, the group, as member-owners, already have direct recourse through their voting power as member-owners of the institution.

Credit unions regularly work with their members to provide refunds, work out payment plans, and find other solutions to resolve a legitimate dispute. Litigation, on the other hand, is a gamble for all parties, and often leads to minimal consumer relief at the highest legal cost. It is important, when considering laws that would ultimately limit options to resolve disputes, for Congress to recognize the substantial harm that expensive, protracted litigation levy on credit unions and their members.

Consumers' ability to access the high-quality, safe, and affordable products of credit unions would be put in jeopardy if credit unions are forced to reallocate considerable resources to defend against high-cost litigation due to the absence of a fair and efficient arbitration system.

On behalf of America's Credit Unions and the 140 million credit union members, thank you for holding this important hearing and considering our views on the subject.

Sincerely,



Jim Nussle, CUDE
President & CEO

cc: Members of the Committee on the Judiciary

² See Nam D. Pham & Mary Donovan, A Critique of the CFPB Proposed Rule: Companies That Use Arbitration Agreements Do Not Pose Any Greater Risks To Consumers Than Those That Do Not (Mar. 2023), <https://instituteoflegalreform.com/wp-content/uploads/2023/03/CFPB-Report-Final-March-29-2023.pdf>.

January 31, 2024

The Honorable Gary Gensler
Chair
U.S. Securities and Exchange Commission
Washington, DC

Re: Critical Need for Rulemaking to Prohibit Forced Arbitration

Dear Chair Gary Gensler

The undersigned organizations call upon the Securities and Exchange Commission (SEC) to adopt rules, pursuant to Section 921 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), to ban the use of mandatory pre-dispute arbitration agreements in investment adviser and broker-dealer contracts.¹ Broker-dealers and investment advisers commonly include mandatory pre-dispute arbitration provisions in their investor agreements. The provisions are poorly understood by investors, however, and, if a dispute later arises, they force investors out of court and into arbitration forums that are often unfair, opaque, and expensive, often resulting in lower recovery for investors who have suffered fraud or abuse.²

Investors should have the ability to choose, *after* a dispute arises, whether to opt for arbitration. They should not be forced to sign pre-dispute arbitration agreements as a condition of obtaining the services of an investment adviser or broker-dealer. Enacting a rule under Section 921 of the Dodd-Frank Act to prohibit the inclusion of mandatory *pre-dispute* arbitration provisions in investment adviser and broker-dealer contracts would strike a fair and equitable balance between protecting investors from being unfairly forced into arbitration on the one hand, while preserving their freedom to pursue arbitration after a dispute arises on the other. Such a rule would place parties in investment adviser and broker-dealer relationships on the fair footing necessary to facilitate equitable dispute resolution.³

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act (2010), 124 Stat. 1376.

² See generally Better Markets, *Forced Arbitration: Taking Away Your Rights and Your Money* (June 11, 2019) (detailing Better Markets advocacy surrounding arbitration), <https://bettermarkets.org/newsroom/forced-arbitration-taking-away-your-rights-and-your-money/>; Consumer Advocates Letter to The Honorable Rohit Chopra, Director, Consumer Financial Protection Bureau, Re. Critical Need for Action to Limit Forced Arbitration (Sept. 13, 2022), https://www.consumeradvocates.org/wp-content/uploads/2022/09/ConsumerCltntoCFPB_September_2022.pdf; Petition For Rulemaking: To Require Meaningful Consumer Consent Regarding the Use of Arbitration to Resolve Disputes Involving Consumer Financial Products and Services (Sept. 13, 2023), https://www.consumeradvocates.org/wp-content/uploads/2023/09/Petition_CFPB_1028Rulemaking092023.pdf.

³ See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1631-32 (2005) (“While arbitration has been used as a dispute resolution technique for thousands of years, in the past it has been agreed to knowingly and voluntarily, typically by two or more businesses. The involuntary imposition of arbitration in lieu of open court procedures is a new and most controversial phenomenon.”).

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I. The Commission has the clear authority to restrict the use of mandatory pre-dispute arbitration agreements in investment adviser and broker-dealer contracts.

Section 921 of the Dodd-Frank Act expressly empowers the SEC to take the requested action.⁴ That section authorizes the Commission to prohibit or limit the use of pre-dispute mandatory arbitration clauses in contracts that investors enter into with broker-dealers and investment advisors, if doing so is in the public interest and for the protection of investors. Section 921(a) provides:

The Commission, by rule, may prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors.⁵

Section 921(b) provides:

The Commission, by rule, may prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any investment adviser to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors.⁶

These provisions give the SEC clear authority to restrict mandatory pre-dispute arbitration clauses in broker-dealer and investment adviser contracts.

II. Mandatory pre-dispute arbitration agreements are pervasive in the financial services industry, incomprehensible to many investors, and forced on them through lack of bargaining power.

The use of mandatory pre-dispute arbitration agreements is pervasive. “An overwhelming majority of retail brokerage and many investment advisory agreements include language requiring all disputes between the customer and broker-dealer/investment adviser be resolved through

⁴ 15 U.S.C. § 78o(o), *Authority to restriction mandatory pre-dispute arbitration*; see also Barbara Black, *How To Improve Retail Investor Protection After The Dodd-Frank Wall Street Reform And Consumer Protection Act*, 13 U. PA. J. BUS. L. 59, 59 (2010) (“[S]ection 921 grants the SEC authority to prohibit the use of predispute arbitration agreements that would require investors to arbitrate future disputes arising under the federal securities laws and regulations or the rules of a self-regulatory organization.”).

⁵ 15 U.S.C. § 78o(o).

⁶ 15 U.S.C. § 80b-5(f).

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arbitration.”⁷ The SEC’s recent report on the use and abuse of mandatory pre-dispute arbitration agreements by registered investment advisers found that “approximately 61% of SEC-registered advisers that serve retail investors incorporated mandatory arbitration clauses into their investment advisory agreements.”⁸ Thus, “only in rare instances can an investor open a brokerage or investment advisory account without agreeing to submit to mandatory pre-dispute arbitration.”⁹

As a result, “unknowing, relatively powerless citizens enter into mandatory arbitration provisions routinely in order to conduct commonplace transactions in our consumer society.”¹⁰ Yet despite their pervasiveness, the evidence shows that few people read the arbitration clauses tucked away in fine-print contracts.¹¹ Among those who do, few understand their implications.¹²

⁷ William Alan Nelson II, *Take It or Leave It: Unconscionability of Mandatory Pre-Dispute Arbitration Agreements in the Securities Industry*, 17 U. PA. J. BUS. L. 573, 574 (2015).

⁸ RESPONSE TO CONGRESS: MANDATORY ARBITRATION AMONG SEC-REGISTERED INVESTMENT ADVISERS, AS DIRECTED BY THE HOUSE COMMITTEE ON APPROPRIATIONS H.R. REPT. NO. 117-393, at 4 (2023).

⁹ Nelson, 17 U. PA. J. BUS. L. at 575.

¹⁰ Thomas M. Madden, *Mandatory Pre-Dispute Arbitration: An Alternative Approach*, 2019 MICH. ST. L. REV. 1033, 1058 (2019).

¹¹ See Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014); Florencia Marotta-Wurgler et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEG. STUD. 1, 2 (2014) (conducting an empirical study to find that “only one or two in 1,000 shoppers access a product’s EULA [End User License Agreement] for at least 1 second.”); Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, INFO., COMM. & SOC’Y (2018) (describing an empirical study in which 93% of consumers agreed to a contract without noticing a “child assignment clause” that would have provided the consumer’s first-born child as payment); Yannis Bakos et al., *Does Anybody Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J. LEGAL STUD. 1, 2–3 (2014); Florencia Marotta-Wurgler, *Does Contract Disclosure Matter?*, 168 J. INSTITUTIONAL & THEORETICAL ECON. 94, 100–106 (2012).

¹² See Roseanna Sommers, *What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation* (forthcoming) (“[M]ost consumers misperceive the consequences of signing a predispute arbitration agreement. Most mistakenly believe that, after agreeing to terms and conditions mandating binding arbitration, they can still: choose to settle their dispute in court, have a jury decide their case, join a class action, and appeal a decision made based on a legal error. ... Indeed, less than 1% of respondents correctly understood the full significance of the arbitration agreement, as indicated by their responses to questions about whether they retained the rights to sue, have a jury decide their case, access the public courts, and appeal a decision based on a legal error.”); Mark L. Egan, Gregor Matvos & Amit Seru, *Arbitration with Uninformed Consumers*, NATIONAL BUREAU OF ECONOMIC RESEARCH, Working Paper 25150 (Oct. 2018) (“This paper studies the impact of the arbitrator selection process on consumer outcomes by examining roughly 9,000 consumer arbitration cases in the securities industry. ... We establish several facts that suggest that firms hold an informational advantage over consumers in selecting arbitrators, resulting in industry-friendly arbitration outcomes.”).

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A variety of sources confirm the point.¹³ For example, the Consumer Financial Protection Bureau (CFPB) analyzed the complexity of arbitration clauses found in credit card contracts by measuring the clauses' length, readability, and grade level.¹⁴ The CFPB found that the average arbitration clause comprised 14.1% of the words in the contract and consisted of 1,108.8 words.¹⁵ The average grade level (which translates total words, total sentences, and total syllables into the level of education required to understand the text) for the arbitration clauses averaged 15.6,¹⁶ indicating that the text is best understood by those with some college education. In contrast, the average grade level for the remainder of the contract was 11.6, which roughly corresponds to a high school-level education.¹⁷

The pervasive use of mandatory pre-dispute arbitration provisions in investment adviser and broker-dealer contracts, exacerbated by people's difficulty understanding them, is especially troubling because the provisions are written by and for the benefit of investment advisers and broker-dealers, at the expense of investors.¹⁸ Because of their "extreme inequality of bargaining power,"¹⁹ along with the difficulties in understanding these clauses, investors lack the ability to meaningfully consent to the arbitration provisions. And once investors become bound, the contracts typically do not allow the investor to opt out of the arbitration provisions or provide a limited opportunity to do so.

III. Mandatory pre-dispute arbitration agreements, especially those imposed by registered investment advisers, harm investors in multiple ways: through class action waivers, biased arbitrators, high costs, and limits on recovery.

Mandatory arbitration inflicts a variety of harms on investors. Although FINRA has improved the process in many respects for arbitration with broker-dealers, serious concerns remain in both the broker-dealer and investment adviser space. The problems are especially acute with respect to arbitration involving registered investment advisers.

¹³ See Roseanna Sommers, *What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation* (July 25, 2023), <https://ssrn.com/abstract=4521064> or <http://dx.doi.org/10.2139/ssrn.4521064>.

¹⁴ CFPB, *ARBITRATION STUDY, REPORT TO CONGRESS 2015*, at 27–29, https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See generally Barbara Black, *How To Improve Retail Investor Protection After The Dodd-Frank Wall Street Reform And Consumer Protection Act*, 13 U. PA. J. BUS. L. 59 (2010); Suzanne Barlyn, *Do Arbitration Pacts Go Against Clients' Best Interests?*, CHICAGO TRIBUNE (Feb. 13, 2013), <https://www.chicagotribune.com/news/ct-xpm-2013-02-13-sns-rt-us-arbitration-advisersb91c1fj-20130213-story.html>.

¹⁹ Madden, 2019 MICH. ST. L. REV. at 1058.

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The arbitration process is a private dispute resolution mechanism, typically run by or favoring the industry. Arbitrators serving on panels are often industry friendly; the governing rules provide for limited discovery, even though much of the evidence is in the hands of the broker or adviser; there is typically no decision explaining the findings; and rights of appeal, no matter how egregious the misapplication of the law may have been, are extremely limited. Indeed, “[a] June 2007 study of more than 14,000 FINRA arbitration awards over a ten-year period (1995–2004) found that investors with significant claims suing major brokerage firms could expect to recover only *twelve percent* of the amount claimed.”²⁰ While a number of factors may contribute to these outcomes, we highlight some special concerns below.

A. Class action waivers impose special burdens on investors in complex cases or those involving small claims shared by many people.

Many mandatory pre-dispute arbitration clauses both deprive investors of the right to seek relief in court and, often, foreclose investors’ right to pursue their claims collectively, as in class actions. Class actions are often a vital tool for seeking relief from wrongdoing that affected a large number of investors. “Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they employ the class action device.”²¹ Individual investors often lack the resources to bring complex securities claims on their own. As a result, “the effectiveness of the securities laws may depend in large measure on the application of the class action device.”²²

Nonetheless, firms routinely use arbitration provisions containing class-action waivers to force their clients to pursue claims individually if a dispute arises. Class-action waivers disempower would-be litigants from bringing claims, thereby insulating firms from accountability to investors. While FINRA does not allow broker-dealer members to impose class-action

²⁰ Nelson, 17 U. PA. J. BUS. L. at 575 (emphasis in original); see also AMERICAN ASSOCIATION FOR JUSTICE, THE TRUTH ABOUT FORCED ARBITRATION 6 (Sept. 2019), <https://facesofforcedarbitration.com/wp-content/uploads/2019/09/Forced-Arbitration-2019-FINAL.pdf> (reviewing 30,000 consumer arbitrations conducted by AAA and JAMS between 2014–2018 and finding that only 6.3% resulted in consumers winning a monetary award); CFPB, ARBITRATION STUDY: REPORT TO CONGRESS 2015, *supra* note 14, at 11–12 (finding that in business-initiated cases in which arbitrators reached a decision on the merits, companies won relief in 93% of cases and were awarded 98¢ for every dollar claimed; by contrast, arbitrators sided with consumers in only 27% of cases and awarded them an average of 13¢ for every dollar claimed). By contrast, the CFPB’s 2015 report on arbitration found that between 2008 and 2012, 422 consumer class action settlements returned over \$440 million (after deducting attorneys’ fees and court costs) to an average of 6.8 million consumers each year, on average. CFPB, ARBITRATION STUDY: REPORT TO CONGRESS 2015, *supra* note 14, at 16.

²¹ *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980).

²² *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir. 1985) (quoting *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir. 1970)).

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waivers,²³ investment advisors continue to use them. In those cases, class-action waivers foreclose a key means of seeking relief for wronged investors, while also eliminating “the deterrent effect of class actions . . . in accomplishing the objectives of the securities laws.”²⁴ Where an arbitration provision incorporates a waiver of class actions and class arbitration, the “only redress of the relatively powerless is often an economically irrational option to proceed with sole arbitration for de minimis individual wrongs that, in the aggregate, may yield tens or hundreds of millions of dollars for the wrongdoer.”²⁵ In that circumstance, “the aggregate check on large scale wrongdoing affecting individuals in minimal ways, yet reaping quite sizeable unjust rewards, is dead.”²⁶

B. Arbitration also inflicts harm on investors through the designated venue for the arbitration, the selection of the arbitrator, and the lack of written opinions.

The arbitrations that result from mandatory pre-dispute arbitration agreements disadvantage investors in a variety of other ways.²⁷ For example, the recent SEC Staff Study on arbitration among investment advisers found that, when designating a forum for dispute resolution, “97 percent designated a location that does not consider the client’s location or place of business. To the contrary, many of these agreements designed venue locations ‘of the adviser’s choosing’ or ‘wherever the adviser is located.’”²⁸ These venue provisions can impose huge and potentially insurmountable financial burdens on investors with claims against advisers in distant locations.

Firms also “hold an informational advantage over consumers in selecting arbitrators, resulting in industry-friendly arbitration outcomes.”²⁹ An arbitrator’s background has a significant impact on arbitration outcomes,³⁰ and many arbitrators come from an industry-friendly

²³ FINRA, *Regulatory Notice 21-16, Predispute Arbitration Agreements in Customer Agreements* (Apr. 21, 2023) (“FINRA rules do not allow class action claims in FINRA arbitration. Accordingly, FINRA rules prohibit member firms from incorporating provisions that would prevent customers from bringing or participating in judicial class actions by adding waiver language into customer agreements (class action waivers) and prohibit member firms from enforcing arbitration agreements against members of a certified or putative class action.”), <https://www.finra.org/sites/default/files/2021-04/Regulatory-Notice-21-16.pdf>.

²⁴ *Blackie v. Barrack*, 524 F.2d 891, 903 (9th Cir. 1975).

²⁵ Madden, 2019 MICH. ST. L. REV. at 1058.

²⁶ *Id.*

²⁷ See generally Michael S. Barr, *Mandatory Arbitration in Consumer Finance and Investor Contracts*, 11 NYU J. L. & BUS. 793 (2015); Catherine Moore, *The Effect of the Dodd-Frank Act on Arbitration Agreements: A Proposal for Consumer Choice*, 12 PEPP. DISP. RESOL. L.J. 503 (2012).

²⁸ SEC 2023 Arbitration Report, at 17.

²⁹ Edward S. O’Neal & Daniel R. Solin, *Mandatory Arbitration of Securities Disputes-A Statistical Analysis of How Claimants Fare* (2007), <http://www.sleg.com/pdf/workingpapers/Mandatory%20Arbitration%20Study.pdf>.

³⁰ See Stephen J. Choi et al., *The Influence of Arbitrator Background and Representation on Arbitration Outcomes*, 9 VA. L. & BUS. REV. 43 (2014).

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background.³¹ Investors often may not appreciate the significance of an arbitrator's industry connection. These facts reinforce the growing public perception that arbitration forums are fundamentally unfair to consumers and investors.³²

The process through which arbitrators issue decisions also harms investors. Arbitrators are not required to issue written opinions explaining their decisions.³³ This lack of transparency prevents parties and the public from understanding how the arbitrator made its decision, makes it harder to seek judicial review of an adverse arbitration award, and renders awards unpredictable and inconsistent since arbitrators lack of a body of precedent to guide their decisions.³⁴

C. Mandatory pre-dispute arbitration agreements harm investors because arbitration is costly and limits investors' ability to recover damages.

Arbitration can be very costly, especially in disputes with registered investment advisers (RIAs). Indeed, the fees paid by plaintiffs in arbitrations against investment advisers can be so exorbitantly high as to effectively prevent plaintiffs from bringing a claim in the first place:

³¹ See Barr, 11 NYU J. L. & BUS. at 802 ("There has long been some concern about the process by which FINRA selects its arbitrators. . . . Generally speaking, the pool of arbitrators has close ties to the financial industry, lacks diversity, and is infrequently updated."); Moore, 12 PEPP. DISP. RESOL. L.J. at 511 (noting the alleged bias of FINRA arbitration panels because at least one member of those three-member panels is a FINRA member and therefore part of the securities industry because FINRA members are securities traders and brokers).

³² See Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2 J. DISP. RESOL. 349, 389–91 (2008); Jill Gross, *The End of Mandatory Securities Arbitration?*, 30 PACE L. REV. 1174, 1177–78 (2010); Cheryl Nichols, *Arbitrator Selection at the NASD: Investor Perception of a Pro-Securities Industry Bias*, 15 OHIO ST. J. ON DISP. RESOL. 63 (1999); see also Moore, 12 PEPP. DISP. RESOL. L.J. at 511 ("It is significant that FINRA is the only arbitration provider for consumer-broker disputes given the nature of FINRA arbitration and what some consumers feel is a biased system that favors the interests of industry defendants over the interests of consumers."). FINRA has established some requirements surrounding the participation of "public" arbitrators, see FINRA Rule 12000, Code of Arbitration Procedure for Customer Disputes, but that hasn't solved the problem of industry bias, on the face of the rule or as a result of some practices in the arbitration arena.

³³ See *O.R. Sec., Inc. v. Prof'l Planning Assocs.*, 857 F.2d 742, 747 (11th Cir. 1988) (citing *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled on other grounds by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989)); Lynn Katzler, Comment, *Should Mandatory Written Opinions Be Required in All Securities Arbitrations?: The Practical and Legal Implications to the Securities Industry*, 45 AM. U. L. REV. 151, 193–94 (1995). Under FINRA rules, parties can jointly request an explained decision, which the arbitrator must provide, though this rule only applies when *all* parties join in the request. See FINRA Rules 12904(g) & 13904(g). Arbitrators may also exercise discretion to issue an explanation of the decision on their own, even absent such a request. See FINRA Rule 12904(f) ("The award *may* contain a rationale underlying the award.") (emphasis added).

³⁴ Barr, 11 NYU J. L. & BUS. at 809–10; see also Moore, 12 PEPP. DISP. RESOL. L.J. at 515 ("Should the SEC limit the enforcement of arbitration agreements, investors will have greater access to the court system which, unlike arbitration, allows for robust discovery, use of juries, precedent, and judicial review.").

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Unlike brokerage firms, which must designate FINRA as the arbitration forum, RIAs often require clients to file arbitration claims with privately run dispute resolution forums such as the American Arbitration Association or JAMS, where arbitrators set their own fees. It is not uncommon for an arbitrator to charge \$8,000 or more for a day's work. Arbitration costs can easily exceed \$64,000 for five days of hearings and three days of pre-hearing and post-hearing work. Triple that amount if there are three arbitrators hearing the dispute. Unlike FINRA, the privately run forums require the expected fees to be deposited prior to the case proceeding. This means that an investor may have to deposit tens of thousands of dollars just to have their claim move forward. RIAs, knowing the forum fees are cost-prohibitive for most clients use these types of arbitration clauses to shield themselves from liability for their misconduct.³⁵

In addition, mandatory pre-dispute arbitration agreements often include "loser pays" provisions that create a significant disincentive for an individual to bring a claim out of fear that they will be on the hook for the firm's attorney's fees if they do not prevail.³⁶ Those fees may be substantial. Furthermore, those potential fees come on top of the fees that the investor must pay their own attorneys. Although originally "intended to be a less costly, less time-consuming, less complex, just alternative to civil litigation, present-day arbitration in the big versus small context of employment, consumer finance, and investment contracts is largely a failure."³⁷ "It has become ever more expensive, more time-consuming, and more like the civil litigation it was intended to avoid."³⁸

In addition, arbitration limits investors' ability to recover damages in several ways. For instance, "[o]ftentimes, arbitration clauses preclude the award of punitive damages or consequential damages, or both. Alternatively, they may specify strict guidelines for the arbitrator to follow in calculating the award."³⁹ As the SEC found in its 2023 report to Congress, "eleven percent of agreements with mandatory arbitration clauses limited the types of damages available

³⁵ Christine Lazaro & Michael S. Edmiston, *Costly forced arbitration against RIAs harms investors*, PIABA (Jan. 14, 2022), <https://piaba.org/piaba-newsroom/oped-costly-forced-arbitration-against-riaharms-investors-christine-lazaro-and>; see also Press Release, PIABA, "It's A Broken System": Investment Fraud Victims Speak Out About Industry-Favored System of RIA-Forced Arbitration (July 25, 2023), <https://piaba.org/piaba-newsroom/press-release-its-broken-system-investment-fraud-victims-speak-out-about-industry>.

³⁶ See JERRY W. MARKHAM & THOMAS LEE HAZEN, *BROKER-DEALER OPERATIONS UNDER SECURITIES AND COMMODITIES LAW* § 12:30 ("Arbitration agreements may authorize the award of attorney fees to the prevailing party.").

³⁷ Madden, 2019 MICH. ST. L. REV. at 1056.

³⁸ *Id.*

³⁹ Barr, 11 NYU J. L. & BUS. at 811.

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to the investor—such as punitive, exemplary, treble and consequential damages.”⁴⁰ These damages limitations insulate firms from liability and limit investors’ ability to be made whole from the arbitration process.⁴¹ According to FINRA’s 2022 statistics, claimants were awarded damages in only 36% of cases.⁴²

IV. Conclusion and Recommendations

For the reasons discussed above, investors experience unfairness and dissatisfaction in arbitration.⁴³ Indeed, a 2008 survey of over 3,000 individuals who participated in an arbitration found that “seventy-one percent of investors were dissatisfied with the outcome of the arbitration.”⁴⁴

As the Department of the Treasury stated in its 2009 report *Financial Regulatory Reform, A New Foundation: Rebuilding Financial Supervision and Regulation*, “[a]lthough arbitration may be a reasonable option for many consumers to accept *after a dispute arises*, mandating a particular venue and *up-front* method of adjudicating disputes — and eliminating access to courts — may unjustifiably undermine investor interests.”⁴⁵ Importantly, the issue is *not* that investors may choose to arbitrate their claims *after* a dispute arises. Where arbitration provisions are forced upon investors at the outset, however, before any dispute arises, as a condition of establishing an investment adviser or broker-dealer relationship, those provisions effectively deprive investors of meaningful choice, in contravention of Congress’s concerns reflected in the Dodd-Frank Act. And

⁴⁰ SEC 2023 Arbitration Study, at 18.

⁴¹ We recognize that FINRA has partially restricted firms’ ability to limit the types of relief available under FINRA arbitration. See *FINRA Regulatory Notice 21-16* (Apr. 21, 2021) (noting several restrictions upon firms’ ability to limit the authority of arbitrators to issue an award), <https://www.finra.org/rules-guidance/notices/21-16>; *FINRA Rule 2268(d)* (“No predispute arbitration agreement shall include any condition that . . . limits the ability of arbitrators to make any award.”); *FINRA Notice to Members 95-16* (Mar. 01, 1995), <https://www.finra.org/rules-guidance/notices/95-16>; *FINRA Notice to Members 95-85* (Oct. 01, 1995), <https://www.finra.org/rules-guidance/notices/95-85>.

⁴² FINRA, Dispute Resolution Statistics, *Results of Customer Claimant Arbitration Award Cases*, FINRA.ORG, <https://www.finra.org/arbitration-mediation/dispute-resolution-statistics#howcasesclose>.

⁴³ See Madden, 2019 MICH. ST. L. REV at 1042-43 (2019).

⁴⁴ Nelson, 17 U. PA. J. BUS. L. at 576 (citing Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors’ Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 349, 386 (2008).

⁴⁵ DEP’T OF TREAS., FINANCIAL REGULATORY REFORM, A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 72 (2009) (emphasis added), <https://fraser.stlouisfed.org/title/financial-regulatory-reform-5123>.

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although FINRA has partially addressed some of arbitration's shortcomings, its forum remains problematic on a number of levels.⁴⁶

We therefore urge the Commission to exercise its authority under Section 921 of the Dodd-Frank Act to prohibit the inclusion of mandatory pre-dispute arbitration provisions in investment adviser and broker-dealer contracts. This prohibition, limited to *pre*-dispute arbitration provisions, would preserve investors' and firms' ability to choose arbitration *post*-dispute, while preserving all parties' right to access the civil justice system. "If [investors] are given the choice between arbitration or litigation, this competition could have the effect of correcting some of what [they] feel are shortcomings in the arbitration process."⁴⁷

In addition, we urge the Commission to prohibit investment adviser and broker-dealer contracts from restricting investors' ability to pursue class or collective actions. The prohibition should apply irrespective of whether the claims are pursued in court or in arbitration.

Thank you for your prompt consideration of our petition. If you have any questions or comments regarding this petition, please contact Brady Williams at bwilliams@bettermarkets.org or Martha Perez-Pedemonti at mperezpedemonti@citizen.org.

Respectfully,

American Federation of State, County and Municipal Employees (AFSCME)

Americans for Financial Reform

Better Markets

Center for Justice & Democracy

Consumer Action

Consumers for Auto Reliability and Safety

Consumer Watchdog

Earthjustice

Essential Information

Impact Fund

⁴⁶ We note that while FINRA has addressed some of the concerns about arbitration in the broker-dealer context, FINRA arbitration still suffers from a number of features that disadvantage investors, including, for example, the absence of transparency, juries, reliance on precedent, and meaningful rights of appeal.

⁴⁷ Moore, 12 PEPP. DISP. RESOL. L.J. at 523.

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National Association of Consumer Advocates

National Consumer Law Center (on behalf of its low income clients)

National Employment Law Project

People's Parity Project

Public Citizen

Public Justice

Revolving Door Project

April 8, 2024

Dick Durbin
Chair
U.S. Senator
224 Dirksen Senate Office Building
Washington, DC 20510

Lindsey Graham
Ranking Member
U.S. Senator
224 Dirksen Senate Office Building
Washington, DC 20510

RE: U.S. Senate Judiciary Committee Hearing - "Small Print, Big Impact: Examining the Effects of Forced Arbitration"

Dear Chair Durbin and Ranking Member Graham:

The HR Policy Association (Association) is submitting this letter to be included in the record of the U.S. Senate Judiciary Committee Hearing on Tuesday, April 9, 2024, regarding "Small Print, Big Impact: Examining the Effects of Forced Arbitration." The Association also respectfully requests that [this testimony](#) before the U.S. House of Representatives Committee on Education and Labor on November 4, 2021, entitled "Closing the Courthouse Doors: the Injustice of Forced Arbitration Agreements" be included in the record for this hearing.

The HR Policy Association is a public policy advocacy organization that represents the chief human resource officers of more than 350 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than 10 million employees in the United States – nearly 9 percent of the private sector workforce. Since its founding, one of HRPAs principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace. Many Association members utilize various types of arbitration procedures covering consumer/client issues, issues with third party vendors/supplies, and labor and employment issues. Such procedures have been in place for decades and fairly and expeditiously resolve matters that may be in dispute with third parties and employees.

GENERAL STATEMENT

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

[Arbitration] is usually cheaper and faster than litigation; it can have similar procedural evidentiary rules; and normally minimized hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regarding to scheduling times and places of hearing and discovery devices.¹¹¹

The Association fully endorses the thinking of former Justice Breyer. Indeed, the Association is concerned that numerous legislative proposals introduced in the current Congress and past Congresses are attempting to either prohibit or significantly lessen the utilization of arbitration procedures and related class action waivers. As Committee members are well aware, the arbitrable process in this country plays a significant role in resolving disputes that arise in various areas, including issues between employers and employees, between employers and clients/ customers, and disputes involving other third-party entities. Indeed, arbitration has been an important part of the dispute resolution procedures ancillary to our nation's judiciary system, dating back to the enactment of the Federal Arbitration Act in 1925. Unfortunately, however, there is an organized effort to either eliminate or dismantle such arbitrable system in favor of bringing claims through the courts, particularly by class action litigation. Such an approach, for the reasons listed below, is not a practical solution or a sound policy approach and should be rejected by this Committee and members of Congress.

Specifically, the Association believes that arbitration procedures should not be significantly curtailed or eliminated for the following reasons:

- Courts already have overcrowded dockets and are not in a position to expeditiously and efficiently handle the increased docket that would occur if pre-dispute arbitration procedures or arbitration, generally, is prohibited or significantly curtailed.
- The judicial process in general, and class action claims specifically, involve many roadblocks that prevent parties from achieving expeditious and equitable outcomes.
- Arbitration is less expensive and more expeditious in resolving disputes than judicial procedures.
- Arbitration, on the whole, provides better outcomes for claimants.
- Arbitration provides more specific attention to claimants' individual situations.
- Arbitration provides a better understanding by claimants of the procedure involved and the outcome.
- Arbitration procedures are less adversarial in nature.
- Claimants retain concerted activity rights in arbitration proceedings.
- The Supreme Court and other courts have consistently upheld mandated arbitration agreements.
- Federal and state courts provide protection from onerous arbitration agreements that infringe upon claimants' rights.
- Confidentiality and related arguments to support the elimination of mandated arbitration are without merit.

Chair Durbin and Ranking Member Graham, thank you for including the Association letter and my [previous testimony](#) on this matter in the record for the hearing.

Sincerely,

G. Roger King
Senior Labor and Employment Counsel
HR Policy Association

CC Sheldon Whitehouse

Amy Klobuchar

Chris Coons

Richard Blumenthal

Mazie Hirono

Cory Booker

Alex Padilla

Jon Ossoff

Peter Welch

Laphonza Butler

Chuck Grassley

John Cornyn

Mike Lee

Ted Cruz

Josh Hawley

Tom Cotton

John Kennedy

Thom Tillis

Marsha Blackburn

[\[1\]](#) *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995).

Testimony for the Record

Submitted by

Harry C. Katz, Jack Sheinkman Professor, School of Labor Relations, Cornell University

Lewis Maltby, President, National Workrights Institute

Theodore J. St. Antoine, James and Sarah Degan Professor of Law Emeritus, University of Michigan Law School

David Sherwyn, John and Melissa Ceriale Professor, Cornell University

Hearing on “Small Print, Big Impact: Examining the Effect of Forced Arbitration”

April 9, 2024

United States Senate Committee on the Judiciary

We are a group of academics and advocates who have conducted many studies of arbitration.

We do not believe consumers or employees should be forced into arbitration by “fine print”.

Even the smallest consumer online transaction generally contains long complicated fine print that most people don’t read nor can reasonably be expected to read. A large and growing number of employment agreements have arbitration clauses that are difficult to find.

Even consumers and employees who find and understand the arbitration clause have little choice. If they do not “agree” to waive their right to go to court and arbitrate, the merchant will not accept their order and their prospective employer will not hire them.

This is an injustice. The right to take legal disputes to court is the foundation of the rule of law.

We do not believe, however, that the solution is to eliminate arbitration agreements from consumer and employment contracts. The amount involved in most consumer disputes is far too small to support the expense of litigation. If consumers are required to take their disputes to court, most will never receive justice.

The same is true of employment contracts. By even the most conservative estimates, an employee must have at least \$40,000 in damages for an attorney to take their case. For nearly 40% of Americans, a year’s lost pay is not enough to afford to go to court.

Arbitration is much less expensive, making access to justice affordable for more consumers and employees. In our recent study, 38% of employees who prevailed in arbitration administered by the American Arbitration Association had less than \$40,000 in damages. The cost to a consumer to bring a case with AAA is only \$225.

Contrary to popular opinion, individuals in disputes with corporations do relatively well in arbitration. After the most comprehensive study on consumer arbitration ever conducted, the Consumer Final Protection Board allowed pre-dispute arbitration agreements, while prohibiting a waiver of class action claims. A study we recently completed found that employees prevail 19 times as often in arbitration with the American Arbitration Association as in federal court.

The federal government has used arbitration successfully, most notably in the AAA Automobile Industry Special Binding Arbitration Program, which was created with the House and Senate committees.

That does not mean that consumers should be forced to arbitrate. Arbitration reform is clearly needed.

The core provision of this reform are:

Voluntariness

All arbitration agreements should be voluntary.

This could best be achieved by:

- a. Making the arbitration provision a separate provision (box) that the consumer/employee must check. This ensures that the consumers and employees know that disputes are subject to arbitration
- b. Giving consumers and employees the option to opt out of arbitration either in the initial agreement or once the dispute arises. The American Arbitration Association allows consumers to opt out of arbitration and take their claim to small claims court. All consumers and employees should have this right without the limitation of being required to use small claims court.

Due Process

Consumer and employment arbitration should have strong mandatory due process standards. The specific standards can be found in the American Bar Association's Due Process Protocols for employment and consumer arbitration. They include:

A neutral and impartial arbitrator
 Equal voice in selection of the arbitrator
 Right to counsel
 Right to discovery
 Availability of all remedies available in court

Employer Pays Arbitration Fees

All arbitration fees in consumer and employment disputes should be paid by the vendor. AAA already requires the vendor to pay these fees except for a \$225 filing fee which the consumer can request be waived.

These reforms would be much preferable to removing arbitration clauses from consumer contracts.

We appreciate the opportunity to present this testimony and would be happy to work with the Committee and Congress in creating the needed reform.

**UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND LABOR**

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

**“Closing the Courthouse Doors: The Injustice of Forced Arbitration
Agreements”**

November 4, 2021

Testimony of G. Roger King¹

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

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

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

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

- H.R. 4841 is in conflict with decades of well-established U.S. Supreme Court arbitration precedent and incorrectly attempts to overturn the Court's most recent decisions in the consolidated cases of *Epic Systems*, *Ernst & Young*, and *Murphy Oil*.²
- The proposed legislation and related theories to completely ban pre-dispute arbitration are based on the false premise that pre-dispute arbitration agreements are inherently bad and that class action and collective action litigation should be the preferred approach to resolve disputes in the workplace.
- H.R. 4841 also incorrectly attempts to eliminate well-established definitions of independent contractor status under the National Labor Relations Act and classifies all workers as employees. The definition of independent contractor

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

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

- H.R. 4841 is internally contradictory by attempting to completely prohibit pre-dispute arbitration and class action waivers between employees and employers but concurrently permitting employers and labor organizations to continue to negotiate such agreements. This approach not only defies common sense but is also contrary to Supreme Court precedent.³
- H.R. 4841 fails to recognize the increasing trend to resolve workplace disputes through nonjudicial alternative dispute resolution procedures, including well-established, individualized arbitration procedures.
- The post-dispute arbitration procedures set forth in H.R. 4841 are unnecessarily complex, will lead to disputes and protracted litigation, and simply will prove to be unworkable – they are a poorly disguised attempt to severely limit, if not eliminate, all individualized arbitration of workplace disputes. Indeed, the legal system in this country is built upon the establishment of pre-dispute procedures such as the Federal Rules of Civil Procedure, similar state judicial procedure rules, and American Arbitration Association rules – that is how courts and arbitrators hear and decide cases.
- Post-dispute resolution procedures, to the extent H.R. 4841 even would permit them, are largely unachievable as the dispute in question already has arisen, and parties have significant disincentives to mutually agree upon procedures to resolve their disputes. Accordingly, to the extent H.R. 4841 relies upon post-dispute procedures to substitute for the complete elimination of pre-dispute procedures, it is flawed, and this approach should be rejected.
- H.R. 4841 would not only significantly increase class action litigation but also increase litigation under the National Labor Relations Act by creating new unfair labor practice charges against employers. The bill would also increase litigation by creating a private right of action for employees to file

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The complexity and legalese of this Section speaks for itself.

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

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

⁷ Fed. R. Civ. P. 23(b)

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

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

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

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

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

As Justice Breyer noted, such positive attributes include:

- **Speedy resolution of claims**

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

⁸ Brief for the National Academy of Arbitrators as Amicus Curiae Supporting Respondents, *Epic Sys. v. Lewis*, 138 S. Ct. 1612 (2018).

⁹ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)).

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

- **Less Expense**

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

- **Better outcomes for claimants**

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

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

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

¹⁰ See *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 686 (2010) (“In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”).

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

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

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

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

- **Less adversarial in nature**

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

- **Claimants retain concerted activity rights**

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

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

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

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

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

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

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

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

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

¹⁴ *EEOC v. Waffle House, Inc.*, 434 U.S. 279, 289 (2002).

¹⁵ *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011).

¹⁶ *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

¹⁷ *Id.* at 2308.

¹⁸ *Deposit Guar., Nat'l Bank of Jackson v. Roper*, 445 U.S. 326, 332 (1980). See also *Circuit City Stores, Inc. v. Admb*, 532 U.S. 105, 122-23 (2001); *Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 612 -13 (1997).

¹⁹ See *EEOC v. Waffle House, Inc.*, 534 U.S. 568 (1983).

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

Concluding Thoughts

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

- Secrecy in arbitration proceedings should, unless mutually agreed upon by all parties, be eliminated. This lack of transparency, especially in hostile work and sexual harassment cases, has unfairly detracted from the many positive attributes of arbitration. Specifically, the overuse of nondisclosure agreements should be reviewed. Indeed, some state jurisdictions have enacted legislation that prohibits or limits the use of NDA's.²⁰
- A thorough Congressional review should be undertaken regarding class and collective actions, particularly as class action litigation has proceeded under Federal Rule of Civil Procedure 23 and Section 216 (b) of the Fair Labor Standards Act (and also similar class procedures in state jurisdictions). I submit that if an objective review is undertaken of this area, a number of misuses and abuses of class and collective action procedures may be uncovered.
- This Subcommittee and other Congressional committees that have jurisdiction over arbitration issues should invest time and resources to

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

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

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

STATEMENT OF G. ROGER KING¹

“Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights”

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

February 11, 2021

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

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

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

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

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

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

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

Justice Breyer's opinion³ emphasizes certain of the numerous constructive features of arbitration. I hope that the Subcommittee would consider his thoughts and that of his fellow justices, and also carefully examine the important role that arbitration plays in our nation's jurisprudence and conflict resolution system. Arbitration from both a legal policy and practical administrative law perspective has tremendous merit and has served all stakeholders – except perhaps plaintiff class-action attorneys – exceedingly well. Unfortunately, there are a number of myths, misunderstandings, and erroneous assumptions associated with arbitration. Some of these involve the inappropriate intertwining of confidentiality and nondisclosure agreement issues in the discussion of the merits of arbitration. Confidentiality and nondisclosure agreement discussions present separate and distinct matters. Unfortunately, such discussions are being used as “weapons” to inappropriately undermine the numerous favorable aspects of arbitration. I will address confidentiality requirements, including review of the use of nondisclosure agreements, in my testimony.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- Claimants have access to all information reasonably relevant to their claims⁵

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

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

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

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

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

⁵ *Employment Arbitration under AAA Administration*, AMERICAN ARBITRATION ASSOCIATION, <https://adr.org/employment> (last visited Feb. 9, 2021).

⁶ See *JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness*, JAMS, (<https://www.jamsadr.com/employment-minimum-standards/>) (last visited Feb. 9, 2021).

⁷ See, e.g. *Ziglar v. Express Messenger Sys.* 2017 U.S. Dist. LEXIS 220460 (D. Ariz. 2019); *Ramos v. Superior Ct.*, 28 Cal. App. 5th 1042 (2018); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d (2006); see also Stephanie Greene & Christine Neylon O’Brien, *New Battles and Battlegrounds for Mandatory Arbitration After Epic Systems, New Prime, and Lamps Plus* 56 Am. Bus. L.J. 815, 830-38 (2019).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³ *Id.* at *9.

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

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

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

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

- (2013) (statement of Rep. Trent Franks, Chairman, Subcomm. on Const. and Civil Just. of the H. Comm. on the Judiciary).
- “The unfortunate continuing irony, however, is that in many class actions, particularly those that go on in state courts, the plaintiffs are not the real winners in the case. A number of high-profile cases continue to result in class members ‘winning’ coupons worth maybe a few dollars while the lawyers walk away with millions.” *Class Actions: A Distortion of Justice and Continued Threat to America’s Prosperity*, U.S. CHAMBER INST. FOR LEGAL REFORM (May 16, 2011), <https://instituteforlegalreform.com/class-actions-a-distortion-of-justice-and-continued-threat-to-americas-prosperity/>.
 - In one study, the average time of class action litigation from filing to settlement was found to be three years. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUDIES 811, 820 (2010).
 - “The data principally show that (i) only a small fraction of class members receive any monetary benefit at all from the settlements; (ii) class counsel are often given very large attorneys’ fee awards even when class members receive little to no monetary recovery.” *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010-2018)*, JONES DAY (2020).

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

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

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

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

Concluding Thoughts

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

¹⁴ See, e.g. *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns*, FTC (2019); *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010-2018)*, JONES DAY (2020); *Securities Class Actions in the United States*, MORGAN LEWIS (2016).

¹⁵ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011).

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

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



April 8, 2024

The Honorable Dick Durbin, Chairman
 The Honorable Lindsey Graham, Ranking Member
 Committee on the Judiciary
 United States Senate
 Washington, DC 20510

**RE: For the Hearing: Small Print, Big Impact: Examining the Effects of Forced Arbitration,
 Tuesday, April 9, 2024**

Dear Chairman Durbin, Ranking Member Graham, and Members of the Committee:

The National Association of Consumer Advocates, a national nonprofit organization engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means, strongly supports an end to the use of forced arbitration clauses in the terms and conditions for products and services, and employment. For too long, take-it-or-leave-it contracts have denied consumers and workers of a meaningful and informed choice about whether they want to resolve disputes with corporations through arbitration after the dispute arises.

Forced arbitration clauses, hidden in fine-print corporate contracts, block consumers, workers, and small businesses from seeking justice in open court and gives corporations the power to force legitimate complaints into secretive and biased arbitration proceedings. Corporations write the arbitration rules, including choosing the arbitration firm and location. The process encourages and facilitates arbitrator bias in favor of the more powerful party. Meanwhile, arbitrators' decisions are rarely appealable, even when arbitrators make clear and egregious errors.

Particularly heinous are forced arbitration clauses that prevent individuals from joining their claims together to seek accountability for wrongful corporate actions that cause widespread or systemic harm. Class and collection actions are a critical tool in the justice system for American consumers, workers, and small businesses to seek remedies when ripped off or exploited by sophisticated bad actors. They resolve widespread and systemic harm related to violations of state and federal consumer protection, civil rights, investor rights, workplace rights and fairness, fair competition laws, and other protections. For decades, consumers' and workers' ability to band together has effectively halted illegal corporate conduct, deterred risky behavior, and compensated injured victims.

The unconscionable costs of pursuing serious claims on an individual basis means the systemic wrongdoing goes unchecked, without little or no accountability. As a result, harmed consumers and workers are left without any remedies at all. Meanwhile, the illicit business practices can cause even more damage to people, the marketplace, and the economy. This results in inequities across the marketplace.

For example, in *Munoz v. Wells Fargo Bank*, when New Mexico consumers discovered that their state-issued debit cards were drained by fraudulent transactions, they asserted that the card issuer Wells Fargo and the program manager Conduent failed to properly investigate the fraud and recredit their accounts. They sought to act on behalf of themselves and others in a class action against the entities.¹ The court determined that the action against Conduent was allowed to proceed in a class action, but the claims against Wells Fargo would not be able to move forward in court due to a forced arbitration clause in the terms and conditions. According to that ruling, claims against Wells Fargo would have to go forward in private arbitration on an individual basis.²

In addition to class action bans, terms and conditions with forced arbitration often include other unfair provisions, such as terms that limit consumer relief, restrict their legal claims and remedies, or allow corporations to unilaterally amend the nonnegotiable terms at any time, which further obstruct consumers' access to justice.³ Meanwhile, study after study have confirmed that consumers are not aware of arbitration clauses, do not understand the meaning and consequences of them, and therefore are unable to meaningfully consent to these take-it-or-leave-it terms.⁴

The widespread use of forced arbitration clauses in the fine print grew with the expanded interpretation of the Federal Arbitration Act. The FAA was enacted in 1925 to ensure that certain corporations with equal bargaining power could use arbitration to resolve complex legal matters. The law was not originally envisioned to allow corporations to force arbitration and remove consumers' and workers' ability to choose how to get their complaints heard.

Congress has a key role to play to give consumers a meaningful choice over arbitration, to make it truly voluntary. Consumers and workers need legislation, such as the Forced Arbitration Injustice Repeal Act, to stop forced arbitration from deciding the outcome of consumer, civil rights, employment, or antitrust disputes. The FAIR Act would restore consumers' and workers' rights to choose to go before a judge and jury when they are harmed. It would not bar arbitration, but it would give individuals the right to meaningfully consent to any form of dispute resolution after disputes arise.

We urge this Committee to lead the effort to end the use of forced arbitration and restore some fairness to the fine print.

Sincerely,

Christine Hines
Senior Policy Director
National Association of Consumer Advocates

¹ *Munoz v. Wells Fargo Bank, N.A.*, 2024 U.S. Dist. LEXIS 44713 (D.N.M. Mar. 12, 2024).

² *Id.*

³ Hines, *Fine Print Traps, Terms in Corporate Form Contracts That Cause The Most Harm to Consumer Rights and Protections*, March 2024, https://www.consumeradvocates.org/wp-content/uploads/2024/03/NACA_fineprinttraps_mostharm032024.pdf.

⁴ See, Rosanna Sommers, *What do consumers understand about predispute arbitration agreements? an empirical investigation*, PLOS ONE, Feb. 23, 2024, <https://doi.org/10.1371/journal.pone.0296179>.



April 8, 2024

The Honorable Richard Durbin, Chairman
 Ranking Member Lindsay Graham
 Honorable Members, Committee on the Judiciary
 United States Senate
 224 Dirksen Senate Office Building
 Washington, DC 20515

Dear Chair Durbin, Ranking Member Graham, and Honorable Members:

On behalf of more than 500,000 members and supporters of Public Citizen across the country, we provide the following statement for your consideration relevant to the Senate Committee on the Judiciary hearing entitled “Small Print, Big Impact: Examining the Effects of Forced Arbitration” scheduled for April 9, 2024. We specifically write in support of the passage bills banning the inclusion of forced arbitration provisions in consumer and employment contracts, like the Forced Arbitration Injustice Repeal (FAIR) Act of 2023¹. We also support existing bills addressing specific issue-areas, like the Ending Forced Arbitration of Race Discrimination Act of 2023.²

We thank the Committee for holding a hearing on this important and pressing issue. Forced arbitration provisions can be found in employment agreements and in the terms of service agreement of consumer products and services. For example, they can be found in agreements for nursing home care³, cellular phone agreements⁴, ticket purchasing agreements⁵, online

¹ S.1376 - 118th Congress (2023-2024): Forced Arbitration Injustice Repeal Act, <https://www.congress.gov/bill/118th-congress/senate-bill/1376?s=1&r=93>.

² S.1408 - 118th Congress (2023-2024): Ending Forced Arbitration of Race Discrimination Act of 2023, <https://www.congress.gov/bill/118th-congress/senate-bill/1408/text?s=1&r=97>.

³ Paula Span, Arbitration Has Come to Senior Living. You Don't Have to Sign Up, New York Times (Sept. 2022), <https://www.nytimes.com/2022/09/24/health/assisted-living-arbitration.html>.

⁴ Alison Frankel, Column: Facing arbitration onslaught, Samsung changes the rules for consumer claims, Reuters (Apr. 2023), <https://www.reuters.com/legal/transactional/column-facing-arbitration-onslaught-samsung-changes-rules-consumer-claims-2023-04-11/>.

⁵ Lewis Kamb & Safia Samee Ali, Ticketmaster's 'Kafkaesque' arbitration process is rigged, lawyers say, nbcnews.com (Apr. 2023), <https://www.nbcnews.com/news/us-news/ticketmaster-live-nation-arbitration-process-rigged-lawyers-say-rcna78172>.

streaming services,⁶ child and pet care services⁷, public utility apps,⁸ and in buy now, and pay later agreements⁹. They can also be found in terms of service agreements for a wide variety of consumer goods like car purchases,¹⁰ and children's toys¹¹, among others. It is impossible to overstate the role these clauses play in keeping consumers from obtaining equitable and financial relief for corporate wrongdoings in the courts.

Forced arbitration clauses require consumers to resolve any disputes between them and the company or employer that might arise in the future through private arbitration, rather than in a public court. They also typically bar consumers from joining class action lawsuits – an especially onerous limitation in circumstances where a claimant has a small-dollar claim that is cost-prohibitive to file as a stand-alone case. Forced arbitration provisions almost always dictate the arbitration firm that will oversee resolution of any disputes between the corporation and the consumer. For this reason, in recent years, the number of class actions brought by or on behalf of low-income consumers has drastically dropped.¹²

Academic experts agree that empirical research demonstrates that consumers cannot meaningfully consent to arbitration clauses because consumers do not generally comprehend the terms.¹³ This may be for a number of reasons including the length and complexity of the contract,¹⁴ the manner in which consumer contract is presented to consumers (as a click-through

⁶ Devin Coldway, Roku disables TVs and streaming devices until users consent to new terms, *techcrunch.com* (Mar. 2024), <https://techcrunch.com/2024/03/05/roku-disables-tvs-and-streaming-devices-until-users-consent-to-forced-arbitration/>.

⁷ See, e.g.: Rover, Inc., Terms of Service (Feb. 2024), <https://www.rover.com/terms/tos/>; see also, e.g.: Care.com, Inc., Care.com Terms of Use, (March 2024), <https://www.care.com/about/terms-of-use/>.

⁸ See, e.g.: Ameren Services, Terms and Conditions (Dec. 2023), <https://www.ameren.com/terms-and-conditions>.

⁹ Candace Milner & Martha Perez-Pedemonti, Report: *Consumers' Fraught Journey into Forced Arbitration*, Public Citizen (Feb. 2024), <https://www.citizen.org/article/consumers-fraught-journey-into-forced-arbitration/>.

¹⁰ Jack Ewing, Tesla's Direct Sales Model Helps It Thwart Customer Lawsuits, *New York Times* (Dec. 2022), <https://www.nytimes.com/2022/12/19/business/tesla-class-action-lawsuit-arbitration.html>.

¹¹ See, e.g.: Lovevery, Inc., Terms and Conditions (Oct. 2023), <https://lovevery.com/pages/terms-and-conditions>.

¹² See, Myriam Giles, *Class Warfare: The Disappearance of Low-Income Litigants from The Civil Docket*, 65 *Emory Law J.* 1531 (2016). Giles posits that the privatization of the justice system is one of several factors for the observable drop in class actions brought by or on behalf of minority claimants. They further argue that the privatization of the justice system "ha[s] erected a near-impossible obstacles in the path to the courthouse for economically disadvantaged groups." *Id.* at 1537.

¹³ See, Prentiss Cox et. al., *Comments of Consumer Law Professors on Petition No. CFPB-2023-0047-0001* (Nov. 14, 2023), available at: <https://fingfx.thomsonreuters.com/gfx/legaldocs/zgvorxbxypd/frankel-cfpbrule-lawprofletter.pdf>.

¹⁴ See, Caroline Cakebread, *You're Not Alone, No One Reads Terms of Service Agreements*, *businessinsider.com* (Nov. 15, 2017, available at: <https://www.businessinsider.com/deloitte-study-91->

agreement or in small print),¹⁵ and the sheer impossibility of reading all of the terms of service agreements that consumers are presented with on a daily basis.¹⁶ For example, a July 2023 academic study found that over 97% of the study participants reported having opened an account with a company that requires disputes to be submitted to binding arbitration (e.g., Netflix, Hulu, and Cash App), yet most were unaware that they had agreed to arbitration. According to the study, over 99% of respondents who think they have never entered into an arbitration agreement have likely done so.¹⁷

Forced arbitration provisions funnel claimants away from public courts and into privatized judicial systems with no public oversight. Private arbitration firms follow their own general arbitration rules and procedures, have their own filing and fee structures, and have their own standards for assigning arbitrators to oversee matters.¹⁸

Because arbitration firms rely on a return-business model to make a profit, the arbitrator has an incentive to rule in favor of the corporation to cultivate a happy return-customer relationship.¹⁹ Even when ruling in favor of a plaintiff, arbitrators tend to award less money than juries award to successful plaintiffs.²⁰ Legal researchers have noted that structural features of arbitration firms make it difficult for arbitrators to be entirely unbiased in their decisions.²¹ For instance,

percent-agree-terms-of-service-without-reading-2017-

11#:~:text=A%20new%20Deloitte%20survey%20found,consequences%20in%20exchange%20for%20access.

¹⁵ See, The Editorial Board, *What Happens When You Click*, *nytimes.com*, available at:

<https://www.nytimes.com/2021/01/23/opinion/sunday/online-terms-of-service.html>.

¹⁶ See, David Lazarus, *Column: Want to read a tech company's user agreements? Got 90 minutes to spare?*, *latimes.com* (Aug. 24, 2021), available at: <https://www.latimes.com/business/story/2021-08-24/column-consumer-contracts>.

¹⁷ Roseanna Sommers, *What do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation*, *papers.ssrn.com* (Jul. 25, 2023), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4521064.

¹⁸ Silver-Greenberg, *infra*, note 6.; Michael Corkery, Jessica Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, *The New York Times* (Nov., 2, 2015).

¹⁹ Edmund L. Andrews, *Why the Binding Arbitration Game is Rigged Against Customers*, *gsb.stanford.edu* (Mar. 8, 2019), available at: <https://www.gsb.stanford.edu/insights/why-binding-arbitration-game-rigged-against-customers>. Experts cite a “repeat player bias” existing in these types of arbitrator-corporation relationships where the arbitrator’s bias works more favorably on behalf of the respondent corporations who are repeat players because they have been involved in multiple arbitrations before the same arbitrator. See, Pittman, *Arbitration and Federal Reform: Recalibrating the Separation of Powers Between Congress and the Court*, 80 Wash. & Lee L. Rev. 893, 901-02 (2023).

²⁰ See, Larry J. Pittman, *Arbitration and Federal Reform: Recalibrating the Separation of Powers Between Congress and the Court*, 80 Wash. & Lee L. Rev. 893, 902-03 (2023).

²¹ A 2021 American Association for Justice Report found that arbitrators at JAMS, AAA and other firms are “mostly male and overwhelmingly white.” Because most Americans are bound by forced arbitration agreements, it follows that arbitrator pools should reflect the demographics of consumers being forced before them. See, Meghan Leonhardt, *The Huge Diversity Issue Hiding on Companies’ Forced Arbitration*

from 2014-2018, only 6.3% of cases arbitrated by the American Arbitration Association (AAA) or JAMS, two of the largest arbitration firms in the United States, provided consumers with a monetary award.²² According to one report, “Americans are more likely to be struck by lightning than they are to win a monetary award in forced arbitration.”²³

Forced arbitration provisions allow corporations to pick the arbitration firm and the arbitrator, to the detriment of consumers. Academic commentators have observed that corporate entities tend not to select women and BIPOC arbitrators, even when more diverse pools are made available.²⁴ Intentional racism, implicit bias, stereotypes based on protected classes, and other harmful criteria may also contribute to limiting the number of women and BIPOC arbitrators serving on arbitrator rosters.²⁵ If not intentionally using bias in their favor, representatives for corporations may be using principles of risk-aversion to avoid choosing diverse arbitrators because “[d]eviating from the familiar can breed contempt if the result is a loss.”²⁶ In this scenario, if a corporation prevailed using a white-male-heterosexual arbitrator, the corporation is likely to choose a similar arbitrator the next time and the next. This repeat-use of arbitrators who rule in favor of the corporation has especially negative effects on claimants belonging to vulnerable and marginalized communities, not likely to have their claim heard by arbitrators with similar life experiences.

Although they have largely succeeded in tipping the scales of justice in their favor by turning away from the use of public courts, corporations continue to develop and insert language in their arbitration provision that further impedes consumers from even filing arbitration claims or banding together to obtain large-scale relief. For example, some corporations require consumers to engage in “informal” dispute resolution proceedings before they can officially file an arbitration claim.²⁷

Agreements, cnc.com (Jun. 7, 2021). See also, S. Puig & A. Strezhnev, *Affiliation Bias in Arbitration*, The J. of Legal Studies, Vol. 46, No. 2 (Jun. 2017) p. 372. See also, James Carstensen, *Legal Experts Say Bias In Arbitration is a Growing Problem*, LAW.com (Spt. 23, 2021).

²² Abi Velasco and Remington A. Gregg, *Forced Arbitration Stacks the Deck Against Everyday People, Especially Against Workers and Consumers of Color*, citizen.org (Feb. 23, 2022).

²³ *Id.*

²⁴ See, Sarah Rudolph Cole, *Arbitrator Diversity: Can It Be Achieved?*, 98 Wash. U. L. Rev. 965 at 984-985. “Even when provided with candidate lists that include diverse neutrals, businesses seem to default to arbitrators who are either judges or experienced litigators--frequently with backgrounds similar to those who select them. This approach predominantly results in the selection of older, white, male arbitrators because these arbitrators likely have the most experience and name recognition.”

²⁵ *Id.*, p. 959.

²⁶ See, Michael Z. Green, *Arbitrarily Selecting Black Arbitrators*, 88 Fordham L. Rev. 2255, 2273 (2020).

²⁷ Alison Frankel, *Could states block corporate tactics to avert mass arbitration? This law prof says yes*, Reuters (Mar. 2024), <https://www.reuters.com/legal/government/column-could-states-block-corporate-tactics-avert-mass-arbitration-this-law-prof-2024-03-13/>.

Other forced arbitration provisions contain confidentiality clauses prohibiting claimants from discussing the matter at arbitration, making it especially difficult for claimants to alert others about existing dangers or harms.²⁸ Still other provisions prohibit claimants from filing mass arbitration claims by inserting “batch arbitration” provisions which limit the number of consumers who can file similar claims while being represented by the same attorney or law firm. Even when consumers have managed to successfully file arbitration claims, some corporations have blatantly refused to pay the up-front fees required to initiate an arbitration claim, in accordance with their own arbitration provisions.²⁹

Impact of Forced Arbitration on Vulnerable Consumers

Low-income communities of color are already reluctant to engage the courts for assistance.³⁰ The problem of access to courts is made worse still by the prevalence of forced arbitration clauses in consumer contracts. Arbitration systems are further out of reach for low-income and otherwise vulnerable communities because they are procedurally inaccessible and lack the resources to accommodate vulnerable and marginalized communities. Financial service providers take advantage of the inaccessibility of arbitration forums.³¹

For example, an estimated 85% of all major credit cards use forced arbitration clauses in their terms of service agreements.³² Considering that in 2022 approximately 82% of adults in America had a credit card, forced arbitration agreements impact the vast majority of American consumers. The Consumer Financial Protection Bureau (CFPB) has reported that subprime cards³³ and private label credit cards (used widely by minorities and vulnerable communities

²⁸ See, e.g.: The Honest Company, Inc., Terms of Service (Jul. 2023), <https://www.honest.com/about-us/terms.html>.

²⁹ Alison Frankel, Column: Facing arbitration onslaught, Samsung changes the rules for consumer claims, Reuters (Apr. 2023), <https://www.reuters.com/legal/transactional/column-facing-arbitration-onslaught-samsung-changes-rules-consumer-claims-2023-04-11/>.

³⁰ See, Erika Rickard, *State Courts Seek to Address Racial Disparities in their Operations, Chief Justices Identify Ways to Implement Reforms as part of Modernization Efforts*, pewtrusts.org (Jan. 11, 2021), (“[C]ourt leaders have identified steps that should be taken to reduce racial disparities and acknowledge that people of color, particularly Black Americans, have historically been treated differently by the legal system than their White peers ... [s]evere racial disparities are not just an unfortunate byproduct of a race-blind system, but the manifestation of discrimination embedded in the system itself.”).

³¹ Edmund L. Andrews, *Why the Binding Arbitration Game is Rigged Against Customers*, gsb.stanford.edu (Mar. 8, 2019), available at: <https://www.gsb.stanford.edu/insights/why-binding-arbitration-game-rigged-against-customers>.

³² See, Martha Perez-Pedemonti, *Regaining the Right to Reject: Forced Arbitration Clauses in Credit Card Contracts, Out-Resourced Consumers are Overwhelmingly Forced into Biased Arbitration Proceedings*, Public Citizen, May 15, 2023, <https://www.citizen.org/article/regaining-the-right-to-reject-forced-arbitration-clauses-in-credit-card-contracts/>.

³³ The CFPB defines sub-prime borrowers as having a credit score between 580 – 619 and deep sub-prime borrowers as having a credit score below 580. See, Consumer Financial Protection Bureau, *Borrow Risk Profiles*, consumerfinance.gov, available at: <https://www.consumerfinance.gov/data-research/consumer->

with sub-prime credit scores) are more susceptible to late fee charges and that consumers residing in low-income areas (with a high concentration of Black residents) bear a disproportionate burden of late fees. A 2022 study, reported that low-income and Black consumers are more likely to pay credit card fees in comparison to white consumers³⁴ and low-income consumers of color are more likely to be offered credit cards at higher interest rates.³⁵

The lack of initial contract readership combined with claimants' inability to access public courts leaves vulnerable consumers and employees open to exploitation via the use of lengthy contracts filled with legalese.³⁶ Deceptive business practices are further likely to target non-English speaking communities who are more vulnerable due to a confluence of factors including their low bargaining power, limited or bad credit history, limited choices in financial providers, and obstacles to processing information (including language and accessibility barriers).³⁷

One of the most damaging effects forced arbitration clauses have on marginalized communities is that they keep lower-income consumers from joining in class actions, and other forms of aggregate litigation, as a means of bringing similarly situated, small-value, and cost-sharing litigation claims before the courts. Additional barriers exist for claimants who are indigent or who have accessibility needs. For instance, the AAA Consumer Arbitration Rules state that if a party "wants" an interpreter, they are responsible for making arrangements directly with the interpreter and are also responsible for paying for the costs of the service.³⁸

credit-trends/student-loans/borrower-risk.profiles/#:-:text=Deep%20subprime%20(credit%20scores%20below,scores%20of%20720%20or%20above). See also, *Id.*

³⁴ See, Oz Shy & Johanna Stavins, *Who Is Paying All These Fees? An Empirical Analysis of Bank Account and Credit Card Fees*, Federal Reserve Bank of Boston, bostonfed.org (2022), available at: <https://www.bostonfed.org/publications/research-department-working-paper/2022/who-is-paying-all-these-fees-an-empirical-analysis-of-bank-account-and-credit-card-fees.aspx>.

³⁵ See, Jump To, *Credit Cards: Pandemic Assistance Likely Helped reduce Balances, and Credit Terms Varied Among Demographic Groups*, U.S. Government Accountability Office, gao.gov (Sept. 29, 2023), pp. 25-31, available at: <https://www.gao.gov/products/gao-23-105269>.

³⁶ Myriam Giles, *Class Warfare: The Disappearance of Low-Income Litigants from The Civil Docket*, 65 Emory Law. J. 1537 (2016).

³⁷ *Id.* See also, Sonia Lin, Blog: Identifying and Addressing the Financial Needs of Immigrants, consumerfinance.gov (Jun. 27, 2022), <https://www.consumerfinance.gov/about-us/blog/identifying-and-addressing-the-financial-needs-of-immigrants/>. (Noting that "[w]ith limited or no access to mainstream financial services and products, many immigrants are driven to high-cost or even predatory service providers who charge exorbitant fees or otherwise engage in exploitative practices. Often, these actors target and mislead immigrant consumers with in-language marketing, convenient access, and familiarity with cultural norms, but without adequate disclosure of terms and conditions.").

³⁸ *Id.* AAA at note 45, R-28 Interpreters p. 22.

This means that, without access to the courts, marginalized communities are actively kept from accessing monetary and equitable relief for valid legal claims, becoming aware of existing pitfalls in consumer products and employment, and ultimately from obtaining monetary relief that may otherwise help them escape the cyclical poverty.³⁹

Although far from perfect, public courts offer vulnerable and low-income litigants access to important resources that assist them in engaging the legal system and pursuing valid legal claims. First, court proceedings are public and subject to scrutiny from legislators, the media, bar associations, and the public. Second, depending on the jurisdiction, civil litigants have access to civil legal assistance programs, court *pro se* resources, and language access assistance. Finally, although not quantifiable, there is an element of empowerment civil litigants, especially members of marginalized communities, experience when they are able to see and interact with other claimants also seeking to assert their rights and obtain relief for legal claims.

Conclusion

Banning the inclusion of forced arbitration provisions in terms of service and employment agreements is simply the right thing to do. One of the most pressing challenges Americans have in accessing justice is the increasing numbers of claimants being funneled into privatized judicial systems lacking basic resources for claimants and public oversight.

The only way to address the scourge of pre-dispute forced arbitration clauses in consumer and employment contracts is through the passage of legislation banning their use across the board. There are a number of bills Public Citizen has endorsed which would take steps towards this goal. They should be passed immediately:

- The Forced Arbitration Injustice Repeal (FAIR) Act of 2023, which would eliminate forced arbitration clauses in employment, consumer, and civil rights cases.⁴⁰
- The Ending Forced Arbitration of Race Discrimination Act of 2023, which would end the practice of forcing individuals who have experienced racial discrimination at work into arbitration.⁴¹

Moreover, because consumer and employment matters are increasingly being handled by privatized arbitration firms, these firms must be required to report on the demographics of their arbitrators, the cases they are hearing, and the outcomes of those cases (equitable and financial relief). This data is crucial to understanding the impact privatized arbitration is having on our

³⁹ See, *Id.* at 1550-1551.

⁴⁰ S.1376 - 118th Congress (2023-2024): Forced Arbitration Injustice Repeal Act, <https://www.congress.gov/bill/118th-congress/senate-bill/1376?s=1&r=93>.

⁴¹ S.1408 - 118th Congress (2023-2024): Ending Forced Arbitration of Race Discrimination Act of 2023, <https://www.congress.gov/bill/118th-congress/senate-bill/1408/text?s=1&r=97>.

most vulnerable communities and how we can hold corporations and arbitration firms accountable for their roles in inequitable outcomes.

Thank you for the opportunity to provide comment on this legislation. For questions, please contact Martha Perez-Pedemonti at mperezpedemonti@citizen.org or Lisa Gilbert at lgilbert@citizen.org.

Sincerely,

Public Citizen

