

FORCED ARBITRATION INJUSTICE REPEAL ACT

SEPTEMBER 13, 2019.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. NADLER, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1423]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1423) to amend title 9 of the United States Code with respect to arbitration, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Forced Arbitration Injustice Repeal Act” or the “FAIR Act”.

SEC. 2. PURPOSES.

The purposes of this Act are to—

- (1) prohibit predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes, and
- (2) prohibit agreements and practices that interfere with the right of individuals, workers, and small businesses to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute.

SEC. 3. ARBITRATION OF EMPLOYMENT, CONSUMER, ANTITRUST, AND CIVIL RIGHTS DISPUTES.

(a) IN GENERAL.—Title 9 of the United States Code is amended by adding at the end the following:

**“CHAPTER 4—ARBITRATION OF EMPLOYMENT, CONSUMER,
ANTITRUST, AND CIVIL RIGHTS DISPUTES**

⁴⁰¹ Definitions.

⁴⁰² No validity or enforceability.

“§ 401. Definitions

“In this chapter—

“(1) the term ‘antitrust dispute’ means a dispute—

“(A) arising from an alleged violation of the antitrust laws (as defined in subsection (a) of the first section of the Clayton Act) or State antitrust laws; and

“(B) in which the plaintiffs seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law;

“(2) the term ‘civil rights dispute’ means a dispute—

“(A) arising from an alleged violation of—

“(i) the Constitution of the United States or the constitution of a State;

“(ii) any Federal, State, or local law that prohibits discrimination on the basis of race, sex, age, gender identity, sexual orientation, disability, religion, national origin, or any legally protected status in education, employment, credit, housing, public accommodations and facilities, voting, veterans or servicemembers, health care, or a program funded or conducted by the Federal Government or State government, including any law referred to or described in section 62(e) of the Internal Revenue Code of 1986, including parts of such law not explicitly referenced in such section but that relate to protecting individuals on any such basis; and

“(B) in which at least 1 party alleging a violation described in subparagraph (A) is one or more individuals (or their authorized representative), including one or more individuals seeking certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law;

“(3) the term ‘consumer dispute’ means a dispute between—

“(A) one or more individuals who seek or acquire real or personal property, services (including services related to digital technology), securities or other investments, money, or credit for personal, family, or household purposes including an individual or individuals who seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law; and

“(B)(i) the seller or provider of such property, services, securities or other investments, money, or credit; or

“(ii) a third party involved in the selling, providing of, payment for, receipt or use of information about, or other relationship to any such property, services, securities or other investments, money, or credit;

“(4) the term ‘employment dispute’ means a dispute between one or more individuals (or their authorized representative) and a person arising out of or related to the work relationship or prospective work relationship between them, including a dispute regarding the terms of or payment for, advertising of, recruiting for, referring of, arranging for, or discipline or discharge in connection with, such work, regardless of whether the individual is or would be classified as an employee or an independent contractor with respect to such work, and including a dispute arising under any law referred to or described in section 62(e) of the Internal Revenue Code of 1986, including parts of such law not explicitly referenced in such section but that relate to protecting individuals on any such basis, and including a dispute in which an individual or individuals

seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or as a collective action under section 16(b) of the Fair Labor Standards Act, or a comparable rule or provision of State law;

“(5) the term ‘predispute arbitration agreement’ means an agreement to arbitrate a dispute that has not yet arisen at the time of the making of the agreement; and

“(6) the term ‘predispute joint-action waiver’ means an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

“§ 402. No validity or enforceability

“(a) **IN GENERAL.**—Notwithstanding any other provision of this title, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.

“(b) **APPLICABILITY.**—

“(1) **IN GENERAL.**—An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.

“(2) **COLLECTIVE BARGAINING AGREEMENTS.**—Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of a worker to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.”.

(b) **TECHNICAL AND CONFORMING AMENDMENTS.**—

(1) **IN GENERAL.**—Title 9 of the United States Code is amended—

(A) in section 1 by striking “of seamen,” and all that follows through “interstate commerce,” and inserting in its place “of individuals, regardless of whether such individuals are designated as employees or independent contractors for other purposes”,

(B) in section 2 by inserting “or as otherwise provided in chapter 4” before the period at the end,

(C) in section 208—

(i) in the section heading by striking “**CHAPTER 1; RESIDUAL APPLICATION**” and inserting “**APPLICATION**”, and

(ii) by adding at the end the following: “This chapter applies to the extent that this chapter is not in conflict with chapter 4.”, and

(D) in section 307—

(i) in the section heading by striking “**CHAPTER 1; RESIDUAL APPLICATION**” and inserting “**APPLICATION**”, and

(ii) by adding at the end the following: “This chapter applies to the extent that this chapter is not in conflict with chapter 4.”.

(2) **TABLE OF SECTIONS.**—

(A) **CHAPTER 2.**—The table of sections of chapter 2 of title 9, United States Code, is amended by striking the item relating to section 208 and inserting the following:

“208. Application.”.

(B) **CHAPTER 3.**—The table of sections of chapter 3 of title 9, United States Code, is amended by striking the item relating to section 307 and inserting the following:

“307. Application.”.

(3) **TABLE OF CHAPTERS.**—The table of chapters of title 9, United States Code, is amended by adding at the end the following:

“4. Arbitration of employment, consumer, antitrust, and civil rights disputes”.

SEC. 4. EFFECTIVE DATE.

This Act, and the amendments made by this Act, shall take effect on the date of enactment of this Act and shall apply with respect to any dispute or claim that arises or accrues on or after such date.

Purpose and Summary

H.R. 1423, the “Forced Arbitration Injustice Repeal Act” or the “FAIR Act,” would prohibit the enforcement of mandatory, pre-dispute arbitration (“forced arbitration”) provisions in contracts involving consumer, employment, antitrust, and civil rights disputes. This critically important measure would restore access to justice for millions of Americans who are currently locked out of the court system and are forced to settle their disputes against companies in a private system of arbitration that often favors the company over the individual. H.R. 1423 is supported by a broad coalition of more than 70 public interest, labor, and advocacy organizations, including Public Citizen, Consumer Reports, the American Association of Justice, the Communications Workers of America, the Leadership Conference on Civil Rights, and the American Antitrust Institute.¹

Background and Need for the Legislation

Over the past several decades, forced arbitration clauses have become virtually ubiquitous in everyday contracts.² Often buried deep within the fine print of employment and consumer contracts, forced arbitration deprives millions of Americans of their day in court to enforce state and federal rights.³ Because arbitration lacks the transparency and precedential guidance of the justice system, there is no guarantee that the relevant law will be applied to these disputes or that fundamental notions of fairness and equity will be upheld in the process.⁴

Unlike the judicial system—in which courts’ decisions are generally public and, by building on precedent, cumulatively create a body of law—the results of arbitration disputes are often secret.⁵ For example, the arbitration protocols for the American Arbitration Association state that the arbitrators of consumer disputes must “maintain the privacy of the hearing to the extent permitted by applicable law.”⁶ A coalition of state attorneys general—representing all 50 states, the District of Columbia, and several U.S. territories—have similarly noted that, within the context of the applica-

¹*Partners*, Fair Arbitration NOW, <https://fairarbitrationnow.org/coalition/> (last visited on Sept. 5, 2019); Letter from Fair Arbitration Now, Advocacy Coalition, to Reps. David N. Cicilline (D-RI), Chairman, and F. James Sensenbrenner (R-WI), Ranking Member, Subcomm. on Antitrust, Commercial & Admin. Law of the H. Comm. on the Judiciary (May 16, 2019), <https://docs.house.gov/meetings/JU/JU05/20190516/109484/HHRG-116-JU05-20190516-SD009.pdf>.

²Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking Deck of Justice*, N.Y. Times (Nov. 1, 2015), <https://nyti.ms/2k6cZ1z> (“[B]y inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies . . . devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.”).

³Consumer Fin. Prot. Bureau, Arbitration Study Rep. to Cong., Pursuant to Dodd Frank Wall Street Reform and Consumer Protection Act 1028(a) (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

⁴*See, e.g.*, Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371 (2016).

⁵*Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 1423, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 3–4 (2019) (statement of Gretchen Carlson; statement of Professor Myriam Gilles, Paul R. Verkuil Chair in Pub. Law, Benjamin N. Cardozo Sch. of Law, at 10).

⁶Consumer Due Process Protocol, Principle 12.2, Am. Arbitration Ass’n, [https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20\(1\).pdf](https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20(1).pdf).

tion of forced arbitration to workplace sexual harassment claims, the “veil of secrecy” required by arbitration may prevent similarly situated persons from learning of illegal conduct and seeking relief,⁷ referring to this phenomenon as a “culture of silence that protects perpetrators at the cost of their victims.”⁸

Forced arbitration also lacks many of the procedural safeguards of the justice system.⁹ For example, in forced arbitration, a company may increase the expense of bringing a claim,¹⁰ limit discovery,¹¹ or eliminate protections related to the geographic proximity of the resolution forum,¹² formal civil procedure rules, access to counsel,¹³ and the right to bring similar claims jointly.¹⁴ The company imposing arbitration often selects the presiding arbitrator or arbitration provider,¹⁵ creating a conflict of interest in which the purportedly neutral arbitrator may be motivated by the prospect of obtaining repeat business from the company rather than focused on fairly assessing the claim.¹⁶

As a result of the decline of enforcement of state and federal statutory protections, forced arbitration makes it more likely that corporate harms and abuse will go unchallenged. As Professor Myriam Gilles of Benjamin N. Cardozo School of Law testified at the hearing on forced arbitration before the Judiciary Committee’s Subcommittee on Antitrust, Commercial, and Administrative Law (ACAL), many companies’ arbitration clauses specifically identify federal protections that cannot be enforced in court, such as rights under the Civil Rights Act of 1964 and the Family Medical Leave Act.¹⁷ In this respect, as Professor Gilles observes, “forced arbitration is not an alternative regime for resolving claims, it is a means of suppressing legal claims altogether.”¹⁸ Judge William G. Young, who was appointed by President Ronald Reagan, likewise stated

⁷Letter from Nat’l Ass’n of Att’ys Gen. to Cong. Leadership (Feb. 12, 2018), [http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/\\$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf](http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf).

⁸*Id.*

⁹*Id.*

¹⁰Arbitration clauses may impose high costs on consumers such as requiring travel to a distant forum or selection of a high-fee arbitrator, possible expenses which a plaintiff filing in a local court would not have to incur. See Lisa B. Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration*, 67 *Law & Contemp. Probs.* 221, 234–35 (July 31, 2004).

¹¹See Katherine Palm, Note, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 *Elder L.J.* 453, 478 n.172 (2006).

¹²See Ziva Branstetter, *Nursing Home Policy Challenged*, *Tulsa World* (Mar. 4, 2002), https://www.tulsaworld.com/archives/nursing-home-policy-challenged/article_6131212f-481c-59c4-af51-7c2a188e37f9.html (Oklahoma nursing home’s arbitration clause requires residents to travel to New Mexico at their own expense for arbitration proceeding).

¹³The lower probability of victory and legal fees may discourage some attorneys from representing individuals in arbitration proceedings. See Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *Fordham L. Rev.* 761, 783–84 (2002).

¹⁴See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 *Wm. & Mary L. Rev.* 1, 6 (2000).

¹⁵The major arbitration providers include the American Arbitration Association and JAMS, which set their own procedures, contract with agencies and companies to arbitrate future disputes, and provide arbitrators and panels to hear disputes. Katherine V.W. Stone & Alexander J.S. Colvin, *Econ. Policy Inst., The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights 17* (EPI Briefing Paper No. 414, 2015), <https://www.epi.org/publication/the-arbitration-epidemic/>.

¹⁶See Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 *Ohio St. J. on Disp. Resol.* 19, 35–37 (1999).

¹⁷*Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 1423, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. 7 (2019) (statement of Myriam Gilles, Paul R. Verkuil Chair in Pub. Law, Benjamin N. Cardozo Sch. of Law).

¹⁸*Arbitration in America: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 1 (2019) (Responses to Questions for the Record of Professor Myriam Gilles, Paul R. Verkuil Chair in Pub. Law, Benjamin N. Cardozo Sch. of Law).

that the proliferation of forced arbitration clauses means that “business has a good chance of opting out of the legal system altogether and misbehaving without reproach.”¹⁹ Deepak Gupta, a leading public interest attorney, similarly testified that forced arbitration has undermined the enforcement of statutory rights.²⁰ He explained:

As the U.S. Supreme Court has itself acknowledged, the presence of a forced arbitration clause often means that Americans will have no effective method of asserting their rights or getting justice under federal laws that could otherwise have been enforced in a court—consumer protection or antitrust laws, for example, or prohibitions on sex or race discrimination. If Congress passes laws that can’t be enforced in the real world, what good are those laws?²¹

Although proponents of arbitration claim that it decreases litigation costs for consumers, consumers often do not receive any benefit of reduced costs through forced arbitration.²² Instead, arbitration clauses appear to dissuade consumers from adjudicating disputes altogether.²³ Moreover, the lower probability of victory, and meager legal fees associated with forced arbitration may also discourage attorneys from representing individuals in arbitration proceedings.²⁴ As Justice Stephen G. Breyer explained:

What rational lawyer would have signed on to represent the [plaintiffs] in litigation for the possibility of fees stemming from a \$30.22 claim . . . ? The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.²⁵

Supporters of forced arbitration also argue that doing away with it would lead to more class action lawsuits, the costs of which would ultimately be borne by consumers.²⁶ For example, Alan Kaplinsky, a senior prtner and Practice Leader at the Consumer Financial Services Group at Ballard Spahr LLP, who testified be-

¹⁹ Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking Deck of Justice*, N.Y. Times (Oct. 31, 2015), <https://nyti.ms/2k6cZ1z> (“[B]y inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies . . . devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.”).

²⁰ *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 1423, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 2 (2019) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC).

²¹ *Id.*

²² Consumer Fin. Prot. Bureau, *Arbitration Study Rep. to Cong., Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act 1028(a)*, at 10 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (“Using two measures of credit offered, we did not find any statistically significant evidence that companies that eliminated arbitration provisions reduced the credit they offered.”).

²³ *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 1423, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 3 4 (2019) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC).

²⁴ See Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *Fordham L. Rev.* 761, 783 84 (2002).

²⁵ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 365 (2011) (Breyer, J. dissenting).

²⁶ Alan S. Kaplinsky & Mark J. Levin, *The CFPP’s Final Arbitration Rule Run Amok*, *THE REG. REV.* (Sep. 11, 2017), <https://www.theregreview.org/2017/09/11/kaplinsky-levin-cfpb-arbitration-rule/siness/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

fore the Senate Judiciary Committee on April 2, 2019,²⁷ cited a study by the Consumer Financial Protection Bureau estimating that a proposed rule limiting arbitration clauses would cost financial services providers between \$2.62 and \$5.23 billion over a five-year period.²⁸ Professor Gilles, however, rejected this concern, noting that large companies that do not use forced arbitration in their consumer contracts such as Capital One and Bank of America have not experienced significant upticks in litigation.²⁹ Furthermore, businesses concerned with additional liability risk could address this concern by adhering to state and federal law.

In sum, forced arbitration has transferred the rights of workers and consumers to a secretive, closed, and private system designed by corporate interests to evade oversight and accountability.³⁰ Unsurprisingly, 84% of Americans across the political spectrum support ending forced arbitration in employment and consumer disputes.³¹

RECENT CASE LAW IGNORES THE LEGISLATIVE INTENT OF THE FEDERAL ARBITRATION ACT

On February 12, 1925, Congress codified the use of arbitration through the Federal Arbitration Act (FAA).³² The FAA was adopted to put arbitration agreements on equal footing with other contracts in certain disputes.³³ The legislative history of the FAA suggests that the law was intended to narrowly apply to disputes between merchants, not between a business and its consumers or workers.³⁴ In 1967, the Supreme Court characterized the FAA as “plainly designed” to include protections against “captive customers or employees.”³⁵ The Court noted that it was clear from congressional debate on the Act that Congress did not intend for parties with unequal bargaining power to be forced to arbitrate claims on a “take-it-or-leave-it basis”:

On several occasions [Members of Congress] expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power. Senator Walsh cited insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it-or-leave-it basis to captive customers or employ-

²⁷ Arbitration in America: Hearing Before the S. Comm on the Judiciary, 116th Cong. 6 (2019) (statement of Alan S. Kaplinsky, Partner, Ballard Spahr LLP).

²⁸ Id. at 4.

²⁹ *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 1423, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 11 n.59 (2019) (statement of Professor Myriam Gilles, Paul R. Verkuil Chair in Pub. Law, Benjamin N. Cardozo Sch. of Law).

³⁰ Jessica Silver-Greenberg & Robert Gebeloff, In Arbitration, ‘A Privatization of the Justice System,’ N.Y. Times (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

³¹ See Guy Molyneux & Geoff Garin, *National Survey on Required Arbitration*, Hart Research Assocs. (Feb. 28, 2019), <https://www.justice.org/sites/default/files/2.28.19%20Hart%20poll%20memo.pdf>.

³² Pub. L. No. 68–401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§1–16 (2019)).

³³ H.R. Rep. No. 68–96, at 1 (1924) (“The purpose of this bill is to make valid and enforceable [sic] agreements for arbitration . . . in the Federal courts.”).

³⁴ See, e.g., H.R. Rep. No. 68–96, at 1 (1924); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 Tex. L. Rev. 265, 305 (2015) (“The most important fact about the testimony, hearings, and reports leading up to congressional enactment of the FAA is that every witness, every Senator, and every Representative discussed one issue and one issue only: arbitration of contract disputes between merchants.”).

³⁵ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967).

ees. He noted that such contracts “are really not voluntarily (sic) things at all” because “there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court.” He was emphatically assured by the supporters of the bill that it was not their intention to cover such cases.³⁶

Furthermore, the Court emphasized that not only was the Act intended to apply only to merchant disputes, it was also intended to narrowly apply to “simpler questions of law” involving the routine performance of contracts, such as the passage of title or the existence of warranties.³⁷ Arbitration would not be used to resolve questions of statutory law, which would remain within the clear purview of courts.

Indeed, the drafters of the FAA had made clear that arbitration was not appropriate for substantive questions of law. Julius Henry Cohen, the law’s architect, emphasized that it was “not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes.”³⁸ Arbitration was also rarely invoked in state courts because it was widely considered not to preempt state law.³⁹ This consensus was supported by the legislative history of the FAA. During hearings on the measure, Cohen testified that “there is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement.”⁴⁰

In a series of decisions beginning in the 1980s,⁴¹ however, the Supreme Court drastically expanded the applicability of the FAA to arbitration clauses to everyday contracts, “push[ing] arbitration into the mainstream.”⁴² The Court has upheld the enforcement of arbitration clauses even when doing so prevents an individual from vindicating a state or federal statutory right.⁴³ Furthermore, by imposing arbitration on a “take-it-or-leave-it” basis, large companies have eviscerated the congressional intent of arbitration as a voluntary process agreed to between parties of equal bargaining power.⁴⁴

³⁶ Id. (quoting *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 6 (1923) [hereinafter 1923 Hearing on S. 4213 and S. 4214] (statement of Senator Walsh)).

³⁷ *Prima Paint Corp.*, 388 U.S. at 415 n.13 (quoting Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926)).

³⁸ Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 Cal. L. Rev. 1, 11 n.67 (2019) (quoting Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926)).

³⁹ David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. Rev. 1027, 1039 (2012).

⁴⁰ Id. at 1039 n.55 (citing *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 40 (1924)).

⁴¹ See, e.g., *Moses H. Cone Mem’l Hosp. v. Mercury Constr.*, 460 U.S. 1 (1983); *Justice Denied: Forced Arbitration and the Erosion of Our Legal System: Hearing on H.R. 1423, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. 25 29 (2019) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC).

⁴² Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 Cal. L. Rev. 1, 12 (2019).

⁴³ See, e.g., *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) (“When parties agree to arbitrate all questions arising under a contract, the [Federal Arbitration Act] supersedes state laws”); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

⁴⁴ During the passage of the Federal Arbitration Act, Congress did not even intend to allow binding arbitration agreements on individuals if the contracts were between parties of unequal

With respect to labor unions, the Supreme Court held in *Epic Systems Corp. v. Lewis* that the National Labor Relations Act (NLRA), which guarantees workers the right to organize unions and utilize collective bargaining, does not reflect a clearly expressed congressional intent to displace the FAA and to prohibit class and collective action waivers.⁴⁵ The Court held that arbitration agreements must be enforced as written and that “[w]hile Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA.”⁴⁶ Justice Ginsburg, in a dissent joined by Justices Breyer, Sotomayor, and Kagan, said the majority was “egregiously wrong,” and noted that the decision “subordinates employee-protective labor legislation to the Arbitration Act Congress, when it enacted the NLRA, likely meant to protect employees” joining together to engage in collective litigation.”⁴⁷

Forced Arbitration Undermines the Rights of Consumers

Forced arbitration is now widespread in consumer contracts.⁴⁸ In many cases, consumers are unaware of forced arbitration clauses in the contracts of commonly used goods and services.⁴⁹ These clauses are hidden inside of envelopes,⁵⁰ delivery boxes,⁵¹ and privacy policies.⁵² Because nearly 90% of mobile phone services contain a forced arbitration clause, it is virtually impossible to avoid them and still use a mobile phone.⁵³ This is also true for many financial services and products, such as student loans and credit cards.⁵⁴ As a result, if the consumer wants to use the service or product, accepting the arbitration clause is mandatory.⁵⁵

In 2015, the Consumer Financial Protection Bureau (CFPB) released a congressionally-mandated study on forced arbitration in fi-

bargaining power. *Prima Paint Corp.*, 388 U.S. at 414 (1967) (Black, J., dissenting) (citing 1923 *Hearing on S. 4213 and S. 4214*).

⁴⁵ *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1622–25 (2018).

⁴⁶ *Id.* at 1632.

⁴⁷ *Id.* at 1633, 1641 (Ginsburg, J., dissenting).

⁴⁸ *Justice Denied: Forced Arbitration and the Erosion of Our Legal System: Hearing On H.R. 1423, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 1–2 (2019) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC).

⁴⁹ See *Wash. Mut. Fin. Grp. v. Bailey*, 364 F.3d 260, 264–66 (5th Cir. 2004) (holding that an arbitration agreement was enforceable against illiterate consumers, even though they had no knowledge of the arbitration requirement); *Am. Gen. Fin. Servs., Inc. v. Griffin*, 327 F. Supp. 2d 678, 683 (N.D. Miss. 2004) (upholding arbitration agreement even though blind consumer had no knowledge of agreement); *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 916–18 (N.D. Tex. 2000) (finding that inserting an arbitration clause in monthly billing statements constituted sufficient notice).

⁵⁰ See *Ting v. AT&T*, 319 F.3d 1126, 1134 (9th Cir. 2003).

⁵¹ See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997).

⁵² See Stephanie Strom, *When ‘Liking’ a Brand Online Voids the Right to Sue*, N.Y. Times (Apr. 16, 2014), <https://www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html>.

⁵³ Brian Hardingham, *The FCC Should Stop Cell Phone Giants from Using Forced Arbitration Clauses as a Get out of Jail Free Card*, Pub. Justice: Blog (Jan. 13, 2017), <https://www.publicjustice.net/fcc-stop-cell-phone-giants-using-forced-arbitration-clauses-get-jail-free-card/>.

⁵⁴ *Credit Card Practices: Fees, Interest Rates, and Grace Periods: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. and Governmental Affairs*, 110th Cong. (2007) (statement of Alys Cohen, Staff Att’y, Nat’l Consumer Law Ctr.).

⁵⁵ Critics of arbitration label it “mandatory,” “compelled,” or even “cram down” arbitration. See, e.g., Carrie Menkel-Meadow, *Do the ‘Haves’ Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 Ohio St. J. on Disp. Resol. 19, 39 (1999); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wis. L. Rev. 33 (1997); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 638 (1996).

nancial products and services.⁵⁶ The study, which is the most comprehensive empirical study of arbitration to date,⁵⁷ found “[n]o evidence of arbitration clauses leading to lower prices for consumers.”⁵⁸ Instead, the CFPB found that arbitration has undermined the ability of consumers to seek redress for abusive, anti-consumer practices.⁵⁹ Richard Cordray, then-Director of the CFPB, explained that based on this research, the CFPB had concluded that “any prospect of meaningful relief for groups of consumers is effectively extinguished by forcing them to fight their legal disputes as lone individuals.”⁶⁰ As he stated, in recent years “many businesses have sought to use arbitration clauses not simply as an alternative means of resolving disputes, but effectively to insulate themselves from accountability by blocking group claims,” exceeding the original purpose of the Federal Arbitration Act.⁶¹

Heidi Shierholz, an economist at the Economic Policy Institute, notes that “not only do companies win the overwhelming majority of claims when consumers are forced into arbitration—they win big.”⁶² While consumers win nine percent of their disputes, companies win 93 percent of the arbitration claims they bring.⁶³ Strikingly, in arbitration involving financial institutions, “[b]ecause consumers win so rarely, the average consumer ends up paying financial institutions in arbitration—a whopping \$7,725.”⁶⁴

Forced Arbitration Deprives Employees of Fundamental Protections

According to a 2017 report by the Economic Policy Institute, 60.1 million workers the majority of non-union employees in the private sector have signed away their rights through forced arbitration clauses.⁶⁵ As this report notes, this trend has “weakened the position of workers whose rights are violated, barring access to the courts for all types of legal claims, including those based on Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Fair Labor Standards Act.”⁶⁶

When employees work under forced arbitration clauses, they are less likely to win in disputes with their employers,⁶⁷ or even to bring them at all.⁶⁸ Workers that do enforce their rights in the

⁵⁶ Consumer Fin. Prot. Bureau, Arbitration Study Rep. to Cong., Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §1028(a) (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

⁵⁷ *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 1423, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 15 (2019) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC).

⁵⁸ Consumer Fin. Prot. Bureau, Factsheet, Consumer Financial Protection Bureau Study Finds That Arbitration Agreements Limit Relief for Consumers 3 (Mar. 10, 2015), https://files.consumerfinance.gov/f/201503_cfpb_factsheet_arbitration-study.pdf.

⁵⁹ *Id.* at 2.

⁶⁰ Richard Cordray, Dir., Consumer Fin. Prot. Bureau, Remarks at Field Hearing on Arbitration Clauses (May 5, 2016), <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-field-hearing-arbitration-clauses/>.

⁶¹ *Id.*

⁶² Heidi Shierholz, Econ. Policy Inst., Forced Arbitration is Bad for Consumers (2017), <https://www.epi.org/publication/forced-arbitration-is-bad-for-consumers/>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Alexander J.S. Colvin, Econ. Policy Inst., The Growing Use of Mandatory Arbitration 2 (2017), <https://www.epi.org/files/pdf/135056.pdf>.

⁶⁶ *Id.* at 1.

⁶⁷ *Id.* at 3.

⁶⁸ *Id.* at 5–6.

workplace receive less in damages in arbitration than would have been available in court.⁶⁹

Worse still, forced arbitration clauses in employment contracts are often coupled with non-disclosure agreements,⁷⁰ ensuring minimal scrutiny of corporate misconduct. For example, the claims of hundreds of workers at Sterling Jewelers the parent company of Jared Jewelers and Kay Jewelers who were victims of “groping and sexual coercion and sexual degradation and rape” in the workplace over a period of years were forced into arbitration.⁷¹ More than 200 women filed statements describing “an atmosphere in which female employees endured unwanted sexual advances from male superiors at the company.”⁷² These statements from women across the country alleged, among other egregious forms of abuse and harassment, that male supervisors coerced their female subordinates into performing sexual favors for them in order to receive better jobs or higher pay.⁷³

The claims of these women and nearly 70,000 others who were part of a class action against Sterling were subject to forced arbitration,⁷⁴ however, denying their access to justice. Sterling, like many other American companies, subjects its employees to forced arbitration, requiring them to waive their rights to pursue their claims in court, including claims of discrimination and sexual harassment.⁷⁵ According to a *New York Times* investigation, this secretive process minimized the company’s exposure to additional claims or public scrutiny.⁷⁶ As the report explains:

Arbitration meant that instead of being heard in a public court, they had to proceed privately in Sterling’s in-house system, called Resolve. The first step of Resolve was an internal investigation. If the employee wasn’t satisfied by the results of that investigation, he or she could ask to be heard by a panel of the employee’s peers and an employment lawyer, all selected by Sterling. If the employee was still dissatisfied, the case was sent to arbitration. Sterling paid the arbitrator. The hearing’s proceedings were carried out with judicial oversight, but they were done in private, and their outcome was sealed. Afterward, if there was a settlement, the employee often had to sign a nondisclosure agreement that prohibited the employee

⁶⁹ *Id.*

⁷⁰ Laura Lawless Robertson, *Sexual Harassment Claims Put Non-Disclosure and Arbitration Agreements Under Scrutiny, Resulting in a Flurry of Legislative Action*, Nat’l L. Rev. (Dec. 7, 2017), <https://www.natlawreview.com/article/sexual-harassment-claims-put-non-disclosure-and-arbitration-agreements-under> (“Many employers require employees to sign [non-disclosure agreements] as a condition of employment in order to prevent the dissemination and misuse of companies’ confidential and proprietary information.”).

⁷¹ Taffy Brodesser-Akner, *The Company that Sells Love to America Had a Dark Secret*, N.Y. Times Mag. (Apr. 23, 2019), <https://www.nytimes.com/2019/04/23/magazine/kay-jewelers-sexual-harassment.html>.

⁷² Rebecca Hersher, *Parent Company of Kay Jewelers Accused of Wage Discrimination Against Women*, NPR: The Two-Way (Mar. 1, 2017), <https://www.npr.org/sections/thetwo-way/2017/03/01/517684117/thousands-allege-wage-and-promotion-discrimination-by-sterling-jewelers>.

⁷³ Drew Harwell, *Hundreds Allege Sex Harassment, Discrimination at Kay and Jared Jewelry Company*, Wash. Post. (Feb. 27, 2017), https://www.washingtonpost.com/business/economy/hundreds-allege-sex-harassment-discrimination-at-kay-and-jared-jewelry-company/2017/02/27/8dcc9574-f6b7-11e6-bf01-d47f8cf9b643_story.html.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Taffy Brodesser-Akner, *The Company that Sells Love to America Had a Dark Secret*, N.Y. Times Mag. (Apr. 23, 2019), <https://www.nytimes.com/2019/04/23/magazine/kay-jewelers-sexual-harassment.html>.

from speaking about the case again. The benefit of arbitration to the employee was that the claim was usually resolved more speedily. The benefit to the company was that it was resolved in secret. *The secrecy was the point [I]n arbitration, the proceedings are so secretive that the lawyers weren't allowed to tell other women in the suit what had happened to them.*⁷⁷

In light of these concerns, a coalition of state attorneys general—from all 50 states, the District of Columbia, and several U.S. territories have written Congress in support of ending forced arbitration in workplace disputes involving claims of sexual harassment.⁷⁸ As this bipartisan coalition notes, “Ending mandatory arbitration of sexual harassment claims would help to put a stop to the culture of silence that protects perpetrators at the cost of their victims.”⁷⁹

Following a series of high-profile disputes involving sexual and racial harassment, some companies have chosen to voluntarily limit the use of forced arbitration in employment contracts. Earlier this year, Google announced that it would no longer include forced arbitration clauses in its employment contracts, following a worldwide walkout to protest the company’s handling of sexual harassment claims.⁸⁰

FORCED ARBITRATION DEPRIVES AMERICANS OF THEIR CIVIL RIGHTS

According to an analysis of corporate legal settlements of civil rights complaints, U.S. corporations have paid more than \$2.7 billion since 2000,⁸¹ although the cases that reach settlement may only represent “the tip of [the] iceberg of corporate abuses.”⁸² Many victims of civil rights violations are unable to pursue their claims in court due to forced arbitration provisions imposed on them as a condition of employment or for using everyday goods and services.⁸³ The Leadership Conference on Civil and Human Rights, a coalition representing more than 200 civil rights groups,⁸⁴ explains:

Civil and human rights are especially vulnerable to the dangerous impact of forced arbitration. Forced arbitration clauses often preclude consumers and employees joining together to form a class action to enforce their civil rights, which results in claim suppression. Moreover, forced arbitration does not allow public scrutiny of alleged discrimination, nor does it allow for the creation of judicial opin-

⁷⁷ *Id.* (emphasis added).

⁷⁸ Letter from Nat’l Ass’n of Att’y’s Gen. to Cong. Leadership (Feb. 12, 2018), [http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/\\$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf](http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf).

⁷⁹ *Id.*

⁸⁰ Alexia Fernández Campbell, *Why Thousands of Google Employees Are Protesting Across the World*, VOX, (Nov. 1, 2018), <https://www.vox.com/2018/11/1/18051884/google-employee-walkouts-explained>; Nitasha Tiku, *Google Ends Forced Arbitration After Employee Protest*, Wired (Feb. 21, 2019), <https://www.wired.com/story/google-ends-forced-arbitration-after-employee-protest/>.

⁸¹ Michelle Chen, *Corporations Have Paid Out at Least \$2.7 Billion in Civil-Rights and Labor Lawsuits Since 2000*, The Nation (Feb. 1, 2019), <https://www.thenation.com/article/corporations-lawsuits-civil-rights/> (citing Philip Mattera, Good Jobs First, Big Business Bias: Employment Discrimination and Sexual Harassment at Large Corporations, (2019), <https://www.goodjobsfirst.org/sites/default/files/docs/pdfs/BigBusinessBias.pdf>).

⁸² *Id.*

⁸³ Heidi Shierholz, Econ. Policy Inst., Forced Arbitration is Bad for Consumers (2017), <https://www.epi.org/publication/forced-arbitration-is-bad-for-consumers/>.

⁸⁴ *Our Common Purpose*, Leadership Conf. on Civil & Human Rights (last visited on Sept. 5, 2019), <https://civilrights.org/about/the-coalition/>.

ions that help develop the law and provide further guidance on emerging trends. As a result, landmark civil rights laws such as those protecting employees from race, gender, and age discrimination have been rendered meaningless.⁸⁵

In addition to precluding the enforcement of the civil rights laws, the opacity of forced arbitration prevents others from learning of widespread misconduct. As Terri Gerstein, the Director of the State and Local Enforcement Project at the Harvard Law School Labor and Worklife Program, noted, the secretive nature of arbitration “has allowed outrageous violations, in some cases years of sexual harassment and predation, to remain hidden from view and therefore to continue.”⁸⁶ For example, Massage Envy, the country’s largest massage chain, has forced hundreds of women’s allegations of sexual assault into arbitration.⁸⁷ In one case, a customer who has alleged that she was sexually assaulted by one of the company’s therapists attempted for over a year to cancel her monthly membership to Massage Envy, but was refused unless she agreed to forced arbitration.⁸⁸ As one sexual assault survivor said, “I was mortified . . . It’s just horrifying that they would allow this to happen and then take steps to cover up what is happening” through forced arbitration.⁸⁹ As Gretchen Carlson, an advocate and former Fox News commentator, noted in her testimony during the ACAL Subcommittee’s hearing on forced arbitration:

These women put their trust into a company and its employees, only to suffer the trauma of being sexually assaulted and then continue to suffer as the company did little to help them and instead tried to silence them. Now that these women are seeking public accountability in court, the company is trying to force them into arbitration, because hidden in the fine print of the terms and conditions of the company’s app and iPads (used to check in for services) was a forced arbitration clause.”⁹⁰

FORCED ARBITRATION UNDERMINES THE ENFORCEMENT OF THE ANTITRUST LAWS

Forced arbitration clauses have also undermined the enforcement of the antitrust laws.⁹¹ As Deepak Gupta noted during the ACAL

⁸⁵ Letter from Leadership Conf. on Civil & Human Rights to U.S. Senators (Feb. 3, 2016), <http://civilrightsdocs.info/pdf/Arbitration-Letter.pdf>.

⁸⁶ Terri Gerstein, *Forced Arbitration is Unjust and Deeply Unpopular. Can Congress End It?*, Slate (Mar. 1, 2019), <https://slate.com/news-and-politics/2019/03/congress-forced-arbitration-fair-act.html>.

⁸⁷ See Brooks Jarosz, *Fears Loom that Sexual Assault Cases Involving Massage Envy Will Remain Private*, Fox KVTU (Dec. 21, 2018), <http://www.ktvu.com/news/fears-loom-sexual-assault-cases-involving-massage-envy-will-remain-private>.

⁸⁸ Terri Gerstein, *Forced Arbitration is Unjust and Deeply Unpopular. Can Congress End It?*, Slate (Mar. 1, 2019), <https://slate.com/news-and-politics/2019/03/congress-forced-arbitration-fair-act.html>.

⁸⁹ Brooks Jarosz, *Fears Loom that Sexual Assault Cases Involving Massage Envy Will Remain Private*, Fox KVTU (Dec. 21, 2018), <http://www.ktvu.com/news/fears-loom-sexual-assault-cases-involving-massage-envy-will-remain-private>.

⁹⁰ *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 1423, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 2–3 (2019) (statement of Gretchen Carlson, advocate and former Fox News commentator).

⁹¹ *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 1423, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin.*

Subcommittee’s hearing on forced arbitration, “[t]roublingly, firms that possess monopoly power can enact a sort of ‘double punch’ by imposing arbitration terms that insulate their abuse of that same power.”⁹² In 2013, the Supreme Court dictated this result in *American Express Co. v. Italian Colors Restaurant*.⁹³ In that case, a small but successful restaurant in Oakland, California banded with fellow merchants in a class-action lawsuit to challenge alleged anti-competitive conduct of American Express, including its exorbitantly high and hidden fees—as much as 30 percent more than other card companies.⁹⁴ The small businesses alleged that American Express’s conduct violated Section 1 of the Sherman Act.⁹⁵ In response, American Express moved to compel individual arbitration under the Federal Arbitration Act.⁹⁶

Notwithstanding the establishment of a private right of action in the Clayton Act, the Court held that the Federal Arbitration Act required the arbitration of claims under the antitrust laws.⁹⁷ As the Court noted, the antitrust laws do not “evince an intention to preclude a waiver’ of class-action procedure.”⁹⁸ Justice Elena Kagan, in a dissent joined by Justices Ginsburg and Breyer, warned that the majority’s interpretation of the FAA allows the monopolist “to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.”⁹⁹ As she explained, the Court’s decision would have sweeping ramifications for the vindication of rights established by statute:

In the hands of today’s majority, arbitration threatens to become . . . a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability. The Court thus undermines the FAA no less than it does the Sherman Act and other federal statutes providing rights of action.¹⁰⁰

Critics of the *Italian Colors* decision similarly note that it has “created the possibility that an entity engaging in monopolistic behavior could encourage and strengthen such behavior” by implementing forced arbitration clauses with merchants.¹⁰¹ Now that such clauses are enforceable, entities engaged in monopolistic behavior can insulate themselves from virtually any risk of antitrust liability.¹⁰² As Mr. Gupta explained at the ACAL Subcommittee’s hearing on forced arbitration, this behavior has two con-

Law of the H. Comm on the Judiciary, 116th Cong. 21 (2019) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC).

⁹²*Id.* at 20.

⁹³*Am. Express. Co. v. Italian Colors Rest.*, 570 U.S. 228, 231 (2013) (holding that the Federal Arbitration Act compels the enforcement of a contractual waiver of a plaintiff’s claim under a federal statute).

⁹⁴Luke Tsai, *Supreme Court Rules Against Oakland Restaurant in AmEx Suit*, East Bay Express (June 25, 2013), <https://www.eastbayexpress.com/WhatTheFork/archives/2013/06/25/supreme-court-rules-against-oakland-restaurant-in-amex-suit>.

⁹⁵*Italian Colors Rest.*, 570 U.S. at 231.

⁹⁶*Id.*

⁹⁷*Id.* at 234.

⁹⁸*Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

⁹⁹*Italian Colors Rest.*, 570 U.S. at 240 (Kagan, J., dissenting).

¹⁰⁰*Id.* at 253.

¹⁰¹Robert Ward, Note, *Divide & Conquer: How the Supreme Court Used the Fed. Arbitration Act to Threaten Statutory Rights & the Need to Codify the Effective Vindication Rule*, 39 Seton Hall Legis. J. 149, 162 (2015).

¹⁰²*See id.*

sequences.¹⁰³ First, antitrust enforcement suffers as a whole due to the decline of private enforcement.¹⁰⁴ Second, this decline also results in a wealth transfer from low-income to high-income individuals in the absence of open and competitive markets.¹⁰⁵

Alan Carlson, the owner of the Italian Colors Restaurant and the lead plaintiff in the case, urged Congress to “pass the FAIR Act to restore equal access to justice for small businesses and consumers.”¹⁰⁶ As he observed, forced arbitration “makes it impossible for businesses to hold large corporations publicly accountable.”¹⁰⁷ The FAIR Act, he concluded, “would give back to small businesses the right to go before a judge and jury against big corporations instead of being locked into a forced arbitration system that is too expensive to use.”¹⁰⁸

A coalition of antitrust law professors similarly note that the FAIR Act is essential to protecting consumers and small businesses by restoring the private enforcement of the antitrust laws. They explain:

Billions of dollars are lost by U.S. consumers and businesses to criminal antitrust conspirators, many of which are foreign corporations . . . While criminal enforcement is important for punishing and deterring antitrust conspiracies, private enforcement provides virtually the only way to compensate businesses and consumers that are victims of antitrust violations. . . . The FAIR Act would protect consumers and small businesses from being forced into individual, private arbitration for antitrust disputes. It would help preserve the strong private enforcement scheme that Congress established to protect competition and allow honest businesses to thrive.¹⁰⁹

The American Antitrust Institute and a coalition of other public interest organizations add that in the absence of legislation to end forced arbitration, “the proliferation of class action waivers in mandatory arbitration clauses will destroy a wide swath of the private antitrust rights afforded to the most vulnerable economic actors in the United States.”¹¹⁰

Hearings

For the purposes of section 103(i) of H. Res. 6 of the 116th Congress, the following hearing was used to develop H.R. 1423: Justice Denied: Forced Arbitration and the Erosion of Our Legal System,

¹⁰³ *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 1423, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 21 (2019) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing on H.R. 1423, H.R. 7109, and H.R. 2631 Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 6 (2019) (statement of Alan S. Carlson, Owner, Italian Colors Rest.).

¹⁰⁷ *Id.* at 5.

¹⁰⁸ *Id.* at 5–6.

¹⁰⁹ Letter from Robert H. Lande, Professor, University of Baltimore School of Law, et al., to Reps. Jerrold Nadler (D–NY), Chair, & Doug Collins (R–GA), Ranking Member, Comm. on the Judiciary (Sept. 5, 2019) (on file with Majority staff of the H. Comm. on the Judiciary).

¹¹⁰ Letter from the American Antitrust Institute, et al., to Reps. Jerrold Nadler (D–NY), Chair, & Doug Collins (R–GA), Ranking Member, H. Comm. on the Judiciary (Sept. 6, 2019) (on file with Majority staff of the H. Comm. on the Judiciary).

which was held on May 16, 2019 by the Committee's Subcommittee on Antitrust, Commercial, and Administrative Law. The hearing examined the rise of forced arbitration in disputes involving workers, consumers, small businesses, and victims of civil rights violations, among others, and the effect of forced arbitration on the vindication of state and federal statutory rights. The following witnesses testified in support of the measure: Gretchen Carlson; Professor Myriam Gilles, Professor of Law, Paul R. Verkuil Chair in Public Law, Benjamin N. Cardozo School of Law; Deepak Gupta, Founding Principal, Gupta Wessler PLLC; and Kevin Ziober, Lieutenant, U.S. Navy Reserves.¹¹¹

Committee Consideration

On September 10, 2019, the Committee met in open session and ordered the bill, H.R. 1423, favorably reported with an amendment, by a rollcall vote of 22 to 14, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 1423:

1. An amendment by Mr. Jordan of Ohio to strike from the bill the exemption for collectively bargained agreements was defeated by a rollcall vote of 15 to 20.

¹¹¹*Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing Before the Subcomm. on Antitrust, Commercial, and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. (2019).

Roll Call No.

Date: 9/10/19

COMMITTEE ON THE JUDICIARY

House of Representatives

AMEND 116th Congress

Amendment # 1 () to ANS HR 1423 offered by Rep. Jordan

PASSED

FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)		✓	
Zoe Lofgren (CA-19)		✓	
Sheila Jackson Lee (TX-18)		✓	
Steve Cohen (TN-09)		✓	
Hank Johnson (GA-04)		✓	
Ted Deutch (FL-02)		✓	
Karen Bass (CA-37)		✓	
Cedric Richmond (LA-02)			
Hakeem Jeffries (NY-08)			
David Cicilline (RI-01)		✓	
Eric Swalwell (CA-15)		✓	
Ted Lieu (CA-33)		✓	
Jamie Raskin (MD-08)		✓	
Pramila Jayapal (WA-07)		✓	
Val Demings (FL-10)			
Lou Correa (CA-46)			
Mary Gay Scanlon (PA-05)		✓	
Sylvia Garcia (TX-29)		✓	
Joseph Neguse (CO-02)		✓	
Lucy McBath (GA-06)		✓	
Greg Stanton (AZ-09)		✓	
Madeleine Dean (PA-04)		✓	
Debbie Mucarsel-Powell (FL-26)		✓	
Veronica Escobar (TX-16)		✓	
	AYES	NOS	PRES.
Doug Collins (GA-27)		✓	
James F. Sensenbrenner (WI-05)		✓	
Steve Chabot (OH-01)			
Louie Gohmert (TX-01)		✓	
Jim Jordan (OH-04)		✓	
Ken Buck (CO-04)		✓	
John Ratcliffe (TX-04)		✓	
Martha Roby (AL-02)		✓	
Matt Gaetz (FL-01)		✓	
Mike Johnson (LA-04)		✓	
Andy Biggs (AZ-05)		✓	
Tom McClintock (CA-04)		✓	
Debbie Lesko (AZ-08)		✓	
Guy Reschenthaler (PA-14)			
Ben Cline (VA-06)		✓	
Kelly Armstrong (ND-AL)		✓	
Greg Steube (FL-17)		✓	
	AYES	NOS	PRES.
TOTAL	15	20	

2. An amendment by Mr. Sensenbrenner of Wisconsin to exempt from the bill a predispute arbitration agreement and a predispute joint-action waiver providing certain disclosures regarding attorneys' fees for the plaintiff's counsel are submitted to the court was defeated by a rollcall vote of 14 to 20.

Roll Call No.

Date: 9/10/19

COMMITTEE ON THE JUDICIARY

House of Representatives

116th Congress

Amendment # 2 () to ~~AMWAK~~ ~~MSHR~~ ¹⁹²³ offered by Rep. Sensenbrenner

PASSED
 FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)		✓	
Zoe Lofgren (CA-19)		✓	
Sheila Jackson Lee (TX-18)		✓	
Steve Cohen (TN-09)		✓	
Hank Johnson (GA-04)		✓	
Ted Deutch (FL-02)		✓	
Karen Bass (CA-37)			
Cedric Richmond (LA-02)			
Hakeem Jeffries (NY-08)		✓	
David Cicilline (RI-01)		✓	
Eric Swalwell (CA-15)		✓	
Ted Lieu (CA-33)		✓	
Jamie Raskin (MD-08)		✓	
Pramila Jayapal (WA-07)		✓	
Val Demings (FL-10)		✓	
Lou Correa (CA-46)			
Mary Gay Scanlon (PA-05)		✓	
Sylvia Garcia (TX-29)		✓	
Joseph Neguse (CO-02)		✓	
Lucy McBath (GA-06)		✓	
Greg Stanton (AZ-09)		✓	
Madeleine Dean (PA-04)		✓	
Debbie Mucarsel-Powell (FL-26)		✓	
Veronica Escobar (TX-16)		✓	
	AYES	NOS	PRES.
Doug Collins (GA-27)	✓		
James F. Sensenbrenner (WI-05)	✓		
Steve Chabot (OH-01)	✓		
Louie Gohmert (TX-01)	✓		
Jim Jordan (OH-04)	✓		
Ken Buck (CO-04)	✓		
John Ratcliffe (TX-04)	✓		
Martha Roby (AL-02)	✓		
Matt Gaetz (FL-01)	✓		
Mike Johnson (LA-04)	✓		
Andy Biggs (AZ-05)	✓		
Tom McClintock (CA-04)	✓		
Debbie Lesko (AZ-08)	✓		
Guy Reschenthaler (PA-14)	✓		
Ben Cline (VA-06)	✓		
Kelly Armstrong (ND-AL)	✓		
Greg Steube (FL-17)	✓		
	AYES	NOS	PRES.
TOTAL	19	20	

3. An amendment by Mr. Sensenbrenner of Wisconsin to make the bill applicable to agreements entered into following the enactment of the bill was defeated by a rollcall vote of 14 to 21.

Roll Call No.

Date: 9/10/19

COMMITTEE ON THE JUDICIARY

House of Representatives

116th Congress

Amendment # 3 () to Amend ANS 1423 Offered by Rep. Sensenbrenner

PASSED

FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)		✓	
Zoe Lofgren (CA-19)		✓	
Sheila Jackson Lee (TX-18)		✓	
Steve Cohen (TN-09)			
Hank Johnson (GA-04)		✓	
Ted Deutch (FL-02)		✓	
Karen Bass (CA-37)			
Cedric Richmond (LA-02)		✓	
Hakeem Jeffries (NY-08)			
David Cicilline (RI-01)		✓	
Eric Swalwell (CA-15)		✓	
Ted Lieu (CA-33)		✓	
Jamie Raskin (MD-08)		✓	
Pramila Jayapal (WA-07)		✓	
Val Demings (FL-10)		✓	
Lou Correa (CA-46)			
Mary Gay Scanlon (PA-05)		✓	
Sylvia Garcia (TX-29)		✓	
Joseph Neguse (CO-02)		✓	
Lucy McBath (GA-06)		✓	
Greg Stanton (AZ-09)		✓	
Madeleine Dean (PA-04)		✓	
Debbie Mucarsel-Powell (FL-26)		✓	
Veronica Escobar (TX-16)		✓	
	AYES	NOS	PRES.
Doug Collins (GA-27)		✓	
James F. Sensenbrenner (WI-05)		✓	
Steve Chabot (OH-01)		✓	
Louie Gohmert (TX-01)		✓	
Jim Jordan (OH-04)		✓	
Ken Buck (CO-04)		✓	
John Ratcliffe (TX-04)		✓	
Martha Roby (AL-02)		✓	
Matt Gaetz (FL-01)			✓
Mike Johnson (LA-04)			
Andy Biggs (AZ-05)		✓	
Tom McClintock (CA-04)		✓	
Debbie Lesko (AZ-08)		✓	
Guy Reschenthaler (PA-14)		✓	
Ben Cline (VA-06)		✓	
Kelly Armstrong (ND-AL)		✓	
Greg Steube (FL-17)		✓	
	AYES	NOS	PRES.
TOTAL	14	21	

4. Motion to report H.R. 1423, as amended, favorably was agreed to by a rollcall vote of 22 to 14.

Roll Call No.

Date: 4/10/19

COMMITTEE ON THE JUDICIARY
House of Representatives
116th Congress

Final Passage on HR 1423

PASSED
 FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)	✓		
Zoe Lofgren (CA-19)	✓		
Sheila Jackson Lee (TX-18)	✓		
Steve Cohen (TN-09)	✓		
Hank Johnson (GA-04)	✓		
Ted Deutch (FL-02)	✓		
Karen Bass (CA-37)			
Cedric Richmond (LA-02)	✓		
Hakeem Jeffries (NY-08)			
David Cicilline (RI-01)	✓		
Eric Swalwell (CA-15)	✓		
Ted Lieu (CA-33)	✓		
Jamie Raskin (MD-08)	✓		
Pramila Jayapal (WA-07)	✓		
Val Demings (FL-10)	✓		
Lou Correa (CA-46)			
Mary Gay Scanlon (PA-05)	✓		
Sylvia Garcia (TX-29)	✓		
Joseph Neguse (CO-02)	✓		
Lucy McBath (GA-06)	✓		
Greg Stanton (AZ-09)	✓		
Madeleine Dean (PA-04)	✓		
Debbie Mucarsel-Powell (FL-26)	✓		
Veronica Escobar (TX-16)			
	AYES	NOS	PRES.
Doug Collins (GA-27)		✓	
James F. Sensenbrenner (WI-05)		✓	
Steve Chabot (OH-01)			
Louie Gohmert (TX-01)		✓	
Jim Jordan (OH-04)		✓	
Ken Buck (CO-04)		✓	
John Ratcliffe (TX-04)		✓	
Martha Roby (AL-02)		✓	
Matt Gaetz (FL-01)	✓		
Mike Johnson (LA-04)			
Andy Biggs (AZ-05)		✓	
Tom McClintock (CA-04)		✓	
Debbie Lesko (AZ-08)		✓	
Guy Reschenthaler (PA-14)		✓	
Ben Cline (VA-06)		✓	
Kelly Armstrong (ND-AL)		✓	
Greg Steube (FL-17)		✓	
TOTAL	AYES	NOS	PRES.
	22	14	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures and Congressional Budget Office Cost Estimate

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has requested but not received a cost estimate for this bill from the Director of Congressional Budget Office. The Committee has requested but not received from the Director of the Congressional Budget Office a statement as to whether this bill contains any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

Duplication of Federal Programs

No provision of H.R. 1423 establishes or reauthorizes a program of the federal government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1423 would promote access to justice by prohibiting: (1) the use of forced arbitration clauses in certain consumer, employment, antitrust, and civil rights disputes; and (2) agreements and practices that interfere with the right of individuals, workers, and small businesses to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1423 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short Title. Section 1 sets forth the short title of the bill as the “Forced Arbitration Injustice Repeal Act” or the “FAIR Act.”

Sec. 2. Purposes. Section 2 states that the purposes of the FAIR Act are to: (1) prohibit pre-dispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes, and (2) prohibit practices that interfere with the right of individuals and small businesses to participate in joint class or collective action related to an employment, consumer, antitrust, or civil rights dispute.

Sec. 3. Arbitration of Employment, Consumer, Antitrust, and Civil Rights Disputes. Section 3(a) amends title 9 of the United States Code by adding at the end “Chapter 4—Arbitration of Employment, Consumer, Antitrust, and Civil Rights Disputes.”

New Section 401 defines various terms used under new chapter 4.

The term “antitrust dispute” is defined as a dispute arising from an alleged violation of the antitrust laws, as defined in the first section the Clayton Act or State antitrust laws, and in which the plaintiffs seek certification under Rule 23 of the Federal Rules of Civil Procedure or a comparable state law.

The term “civil rights dispute” is defined as a dispute arising from an alleged violation of the Constitution of the United States or the constitution of a State or any Federal, State or local law that prohibits discrimination on the basis of race, sex, age, gender identity, sexual orientation, disability, religion, national origin, or any legally protected status in education, employment, credit, housing, public accommodations and facilities, voting, veterans or servicemembers services, health care, or a program funded or conducted by the Federal Government or a State Government, in which at least one party is one or more individuals, including individuals seeking class certification under Federal or State law.

The term “consumer dispute” is defined as a dispute between (A) one or more individuals who seek or acquire real or personal property, services . . . securities or other investments, money, or credit for personal, family, or household purposes, including individuals seeking class certification under Federal or State law, and (B) a seller or provider of such listed services, or a third party involved in the selling, providing of, payment for, receipt or use of information about, or other relationship to any such property, services, securities or other investments, money, or credit.

The term “employment dispute” is defined as a dispute between one or more individuals and a person arising out of or related to the work relationship or prospective work relationship, regardless of whether the individual is or would be classified as an employee or an independent contractor with respect to such work.

The term “pre-dispute arbitration agreement” is defined as an agreement to arbitrate a dispute that has not yet arisen at the time of the making the agreement, and the term “pre-dispute joint-action waiver” as an agreement, made before the dispute has arisen, that would prohibit, or waive the right of, one of the parties to participate in a joint, class or collective action concerning the dispute.

New Section 402 first provides that no pre-dispute arbitration agreement or pre-dispute joint-action waiver shall be valid or enforceable with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute. It further provides that a court, and not an arbitrator, shall determine, under federal

law, whether this chapter applies to an agreement to arbitrate, and the enforceability of that agreement. Section 402 also specifies that this chapter does not apply to any arbitration provision between an employee and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of a worker to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.

Section 3(b) makes a number of technical and conforming amendments to Title 9 U.S.C.

Sec. 4. Effective Date. Section 4 provides that the legislation takes effect on the date of enactment and applies to any dispute or claim that arises or accrues on or after the date of enactment.

Changes in Existing Law Made by the Bill as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, H.R. 1423 as reported, are shown as follows:

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

TITLE 9, UNITED STATES CODE

Chap.		Sec.
1.	General provisions	1
2.	Convention on the Recognition and Enforcement of Foreign Arbitral Awards	201
3.	Inter-American Convention on International Commercial Arbitration	301
4.	<i>Arbitration of employment, consumer, antitrust, and civil rights disputes</i>	

CHAPTER 1—GENERAL PROVISIONS

* * * * *

§ 1. “Maritime transactions” and “Commerce” defined; exceptions to operation of title

“Maritime transactions”, as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; “commerce”, as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or

any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract *or as otherwise provided in chapter 4.*

* * * * *

CHAPTER 2—CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Sec.
201. Enforcement of Convention.

* * * * *

[208. Chapter 1; residual application.]
208. *Application.*

* * * * *

§ 208. [Chapter 1; residual application] APPLICATION

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States. *This chapter applies to the extent that this chapter is not in conflict with chapter 4.*

CHAPTER 3—INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION

Sec.
301. Enforcement of Convention.

* * * * *

[307. Chapter 1; residual application.]
307. *Application.*

* * * * *

§ 307. [Chapter 1; residual application] APPLICATION

Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States. *This chapter applies to the extent that this chapter is not in conflict with chapter 4.*

CHAPTER 4—ARBITRATION OF EMPLOYMENT, CONSUMER, ANTITRUST, AND CIVIL RIGHTS DISPUTES

401. *Definitions.*
402. *No validity or enforceability.*

§401. Definitions

In this chapter—

(1) the term “antitrust dispute” means a dispute—

(A) arising from an alleged violation of the antitrust laws (as defined in subsection (a) of the first section of the Clayton Act) or State antitrust laws; and

(B) in which the plaintiffs seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law;

(2) the term “civil rights dispute” means a dispute—

(A) arising from an alleged violation of—

(i) the Constitution of the United States or the constitution of a State;

(ii) any Federal, State, or local law that prohibits discrimination on the basis of race, sex, age, gender identity, sexual orientation, disability, religion, national origin, or any legally protected status in education, employment, credit, housing, public accommodations and facilities, voting, veterans or servicemembers, health care, or a program funded or conducted by the Federal Government or State government, including any law referred to or described in section 62(e) of the Internal Revenue Code of 1986, including parts of such law not explicitly referenced in such section but that relate to protecting individuals on any such basis; and

(B) in which at least 1 party alleging a violation described in subparagraph (A) is one or more individuals (or their authorized representative), including one or more individuals seeking certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law;

(3) the term “consumer dispute” means a dispute between—

(A) one or more individuals who seek or acquire real or personal property, services (including services related to digital technology), securities or other investments, money, or credit for personal, family, or household purposes including an individual or individuals who seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law; and

(B)(i) the seller or provider of such property, services, securities or other investments, money, or credit; or

(ii) a third party involved in the selling, providing of, payment for, receipt or use of information about, or other relationship to any such property, services, securities or other investments, money, or credit;

(4) the term “employment dispute” means a dispute between one or more individuals (or their authorized representative) and a person arising out of or related to the work relationship or prospective work relationship between them, including a dispute regarding the terms of or payment for, advertising of, recruiting for, referring of, arranging for, or discipline or discharge in connection with, such work, regardless of whether the individual is or would be classified as an employee or an independent contractor with respect to such work, and including a

dispute arising under any law referred to or described in section 62(e) of the Internal Revenue Code of 1986, including parts of such law not explicitly referenced in such section but that relate to protecting individuals on any such basis, and including a dispute in which an individual or individuals seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or as a collective action under section 16(b) of the Fair Labor Standards Act, or a comparable rule or provision of State law;

(5) the term “predispute arbitration agreement” means an agreement to arbitrate a dispute that has not yet arisen at the time of the making of the agreement; and

(6) the term “predispute joint-action waiver” means an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

§ 402. No validity or enforceability

(a) IN GENERAL.—Notwithstanding any other provision of this title, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.

(b) APPLICABILITY.—

(1) IN GENERAL.—An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.

(2) COLLECTIVE BARGAINING AGREEMENTS.—Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of a worker to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.

Dissenting Views

I. INTRODUCTION

H.R. 1423, the “Forced Arbitration Injustice Repeal Act,” introduced by Rep. Hank Johnson, would render unenforceable provisions in millions of consumer, employment and other contracts that require, pre-dispute, mandatory binding arbitration of consumer, employment, civil-rights, or antitrust disputes between the parties, or that prohibit or waive the right of one of the parties to the agreement to participate in judicial, arbitral or administrative class

actions. The bill is the latest iteration of the former “Arbitration Fairness Act,” sponsored by Rep. Johnson in the 110th through the 115th Congresses. Each of these bills has sought to render unenforceable consumer and other broad classes of pre-dispute mandatory binding arbitration contracts, undermining freedom of contract and leaving those with relevant claims to judicial class actions or more costly individual judicial proceedings to resolve their claims. Eschewing the possibility of narrower reforms that on a bipartisan basis could preserve and improve the arbitration process for these categories of cases, the bill would wipe out the availability of arbitration while doing nothing to curtail the abuse of class actions which gave rise to increased use of arbitration in the first place.

II. BACKGROUND

A. GENERALLY

Arbitration is the classic alternative dispute mechanism available to those wishing not to bring their disputes before federal or state courts. The Federal Arbitration Act, 9 U.S.C. §1 *et seq.* (FAA), is the principal federal law affecting arbitration.

The thrust of the law, including federal law, has for some time been to encourage the use of arbitration and other alternative dispute resolution mechanisms as speedier, less expensive and more flexible means of dispute resolution than litigation. Indeed, in the landmark case of *Southland v. Keating*, 465 U.S. 1 (1984), the Supreme Court went so far as to declare that “[i]n enacting §2 of the [Federal Arbitration] Act, Congress declared a national policy of favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” *Id* at 10 (emphasis added)

One would expect the accessibility and relative efficiency of arbitration to be particularly useful in the realm of consumer contracts and other smaller-claim disputes. Consumers and other small claimants, on the one hand, stand to benefit from this quicker, less cumbersome and less expensive way of bringing disputes to resolution. Corporate and other defendants, meanwhile, stand to benefit from these same advantages, all the more so because consumer and other smaller claims often are likely to be fairly repetitive and may be large in number.

The rise of mandatory binding arbitration clauses in consumer and other contracts in recent years, however, seems to stem less from these factors than from abuses of a competing, judicial form of consumer dispute resolution—the class action. Particularly in response to the actual or perceived abuse of class action tort cases and class action lending disclosure suits, and due to the web of inconsistent substantive law and civil procedure in competing jurisdictions entertaining such suits, companies began more and more to resort to the use of pre-dispute, mandatory binding arbitration clauses in their contracts. In this way, companies sought to introduce a more orderly, less expensive and more consistent set of rules for the resolution of their disputes with their customers, employees and other smaller claimants.

Some consumer, employee and other advocates suggest that consumers, employees and other small claimants often lack the sophistication or bargaining power to understand and negotiate away

from contracts containing mandatory binding arbitration clauses. Thus, they advocate that the use of such clauses should be curtailed.

The concerns of these advocates, however, do not appear to be well founded. For example, due in large part to competitive pressures in intensely competitive sectors, such as the credit card and auto sales sectors, companies have increasingly offered consumers enhanced protections in arbitration settings by offering so-called “fair clauses.” In these clauses, the rules of mandatory binding arbitration are fashioned to prevent undue advantages to companies. Thus, mandatory binding arbitration clauses increasingly are crafted to include provisions that: comply with the consumer “due process” procedures of the major arbitrating services; allow either party to invoke arbitration; provide for the payment of the difference between court and arbitration fees; allow for fee-shifting to a losing company; permit requests from indigent consumers that companies pay the costs of arbitration, win or lose; and furnish an off-ramp to small claims court for claims that would qualify for those fora. In addition, consumer contracts are reported increasingly to include opt-out clauses that allow consumers, for a time after entering into a contract (e.g., 45 days), to opt-out of mandatory binding arbitration clauses while preserving the rest of the bargain represented in their contract.

B. RECENT SUPREME COURT DECISIONS REINFORCING THE ARBITRATION SYSTEM

The FAA was enacted in 1925, and since then has been considered by the federal courts in numerous cases. This includes a recent spate of cases in the Supreme Court, including at least ten since 2010. The case law in general, and throughout this recent string of Supreme Court precedents, has consistently preserved the arbitration system and espoused a favorable view towards it as a fair and important adjunct to the judicial system. Decisions from the most recent Supreme Court decisions, for example, included the following holdings:

Class waivers are enforceable under the FAA

- In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740 (2011), the Court held that the FAA bars States from refusing to enforce arbitration agreements that contain class action waivers.
- In *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 133 S. Ct. 2304 (2013), the Court held that nothing in the Sherman Act overrides the FAA’s protection of the enforceability of class waivers in arbitration agreements.
- In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the Court held that nothing in the National Labor Relations Act overrides the FAA’s protection of the enforceability of class waivers in arbitration agreements.

Decisions overturning state law restrictions on arbitration agreements

- In *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017), the Court held preempted by the FAA a state law rule imposing more stringent requirements for a power of attorney authorizing the holder of the power of attorney to enter into

an arbitration agreement than state law required for that holder to enter into other types of contracts.

- In *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), the Court held that the FAA preempts a state law interpretation of the phrase “law of your state” to mean state law without considering the preemptive effect of federal law, when that interpretation was adopted to invalidate an arbitration agreement.

- In *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 132 S. Ct. 1201 (2012), the Court held preempted by the FAA a state law rule invalidating arbitration agreements encompassing wrongful death and personal injury claims (in this specific case, claims against nursing homes).

Decisions relating to class arbitration

- In *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 130 S. Ct. 1758 (2010), the Court held that an arbitration agreement cannot be interpreted to require class arbitration based on the policy preferences of the arbitrator; rather, the parties must agree to class arbitration.

- In *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 133 S. Ct. 2064 (2013), the Court held that an arbitrator’s determination that an agreement authorized class arbitration could not be set aside under the FAA’s standard for limited judicial review of an arbitrator’s decisions.

- In *Lamps Plus, Inc. v. Varela*, 203 L.Ed.2d 636 (2019), the Court held that under the FAA an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration.

As one can see, the run of holdings in these cases evinces a vigorous disposition to protect the arbitration system against unwarranted incursions of various kinds. That being said, the Court has also not hesitated to hold that claims fall outside the arbitration system when that result clearly is required by the FAA. *See New Prime, Inc. v. Oliveira* (2019) (unanimous holding that the FAA’s exclusion for contracts of employment of certain transportation industry workers applied to those employed as independent contractors as well as ordinary employees).

C. CONSUMER AND EMPLOYMENT ARBITRATION

Consumer arbitration has historically been the main focal point of the Committee’s oversight and legislative activity concerning arbitration. Employment arbitration, either broadly or in specific sub-contexts, has also been examined on multiple occasions.

1. Empirical and Other Evidence on Consumer Arbitration

Empirical and other evidence concerning consumer arbitration points to the conclusion that the use of mandatory binding arbitration in consumer settings neither “denies justice” nor “erodes” our legal system. On the contrary, it benefits both consumers and companies, providing effective legal relief to both consumers and businesses, reducing the delay, expense and poor recovery performance that litigation—and particularly class action litigation—tends to yield.

a. The Searle Study—Phase 1

Perhaps the most important empirical evidence to date concerning consumer arbitration comes from a study published by Prof. Christopher Drahozal of the University of Kansas School of Law and the Consumer Arbitration Task Force of the Searle Civil Justice Institute. This study is entitled “Consumer Arbitration Before the American Arbitration Association.” It was the first phase of a two-part study performed by the Searle Institute in the late 2000s.¹

The Searle study reviewed a sample of American Arbitration Association case files involving consumer arbitrations; the primary dataset consisted of 301 AAA consumer arbitrations closed by award between April and December of 2007. Nearly ten percent of the cases in the sample concerned credit card disputes. Roughly 200 variables in the cases were examined by standard statistical methods; included among the variables were the characteristics of the arbitration clauses governing the cases. When complete, the study was both peer-reviewed by independent academic experts and reviewed by the Searle Institute’s Board of Overseers, which included general counsel, plaintiffs’ lawyers, defense lawyers, academics, and state and federal judges.

Phase 1 of the Searle study covered the two broadest sets of issues about credit card and other consumer arbitration: (1) the expense, speed and results associated with arbitration; and (2) the degree to which “Consumer Due Process” protocols are met in arbitration.

i. Arbitration expenses

As Prof. Drahozal testified before the Subcommittee in 2009, the Searle study’s results support the case for preserving mandatory binding arbitration in credit card and other consumer contexts. For example, with respect to costs, Prof. Drahozal’s written testimony stated as follows:

The Searle study found that the fees assessed to consumer claimants bringing small claims are on average below the levels specified in the AAA fee schedule, as a result of businesses agreeing in the arbitration agreement to pay a greater share of the costs and arbitrators reallocating consumer fees to businesses in the award. In cases with claims of less than \$10,000, consumer claimants were assessed an average of \$96 (\$1 administrative fee plus \$95 arbitrator fees). In cases with claims of between \$10,000 and \$75,000, consumer claimants were assessed an average of \$219 (\$15 administrative fees plus \$204 arbitrator fees). Thus, the effective fees for consumer arbitration in these cases were less than indicated in the applicable arbitration rules, and may have been less than court filing fees.²

This information rebuts one of the key criticisms of consumer arbitration, which is that the up-front fees associated with arbitration are too high, as compared to the up-front costs of litigation. Obviously, fees at this level are not prohibitive either up front or

¹A full reproduction of the Phase 1 study is available at https://masonlec.org/site/rte_uploads/files/Consumer%20Arbitration%20Before%20the%20AAA%20-%20Preliminary%20Rpt.pdf.

²Statement of Christopher R. Drahozal. *House Judiciary Committee Subcommittee on Commercial and Administrative Law Hearing on the “Federal Arbitration Act: Is the Credit Card Industry Using the Act to Slam Shut the Courthouse Door?”* at 3–4 (May 5, 2009).

in total; moreover, they are remarkably low compared to the costs of litigation. While it is true that the Searle study figures included administrative and arbitrator's fees, not attorney's fees, the latter must be paid in either arbitration or litigation, and likely mount higher in litigation.

ii. Procedural fairness

Modern-day arbitration clauses often incorporate procedural "due process" protocols, such as the protocol crafted by the American Arbitration Association. These protocols typically call for independent, impartial arbitrators; manageable costs; the provision of fora convenient to consumers; and the availability of remedies comparable to those that consumers could obtain in litigation. The due process protocols are taken quite seriously; AAA, for example, long ago committed to reject arbitration under arbitration clauses that do not comport with the AAA's due process protocol.

The Searle study found that 76.6 percent of consumer arbitration clauses in the sample complied fully with the AAA's Consumer Due Process Protocol at the time of filing. In addition, in virtually all cases in which initial non-compliance was found, the non-compliance was cured following AAA intervention (for example, through waiver or revision of the offending clause terms). Finally, the study found that over 1,550 businesses had clauses that comply with the AAA's protocol, as opposed to only 647 identified businesses for which the AAA will not take arbitrations on account of protocol non-compliance. (The most common non-compliance is refusal by a business to pay its share of arbitration fees.)³

iii. Quality of results

The Searle study also examined the degree to which arbitrations produce sound results for consumers. This has been a particularly fractious issue in the credit card context, given some earlier studies suggesting that companies fare better in arbitration than do consumers.

The Searle researchers, however, found that consumers received awards in 53.3% of the cases they filed, with average recoveries of \$19,255. That, obviously, is a healthy recovery rate. The Searle study also found that business claimants won relief in 83.6% of the cases they filed, with average recoveries of \$20,648. In addition, the study found that, on average, a successful consumer claimant recovered 52.1% of the amount he or she claimed, while successful business claimants recovered a higher average of 93% of the amounts they claimed. The investigators, however, found a reasonable basis for this difference, which is that virtually all business claims were for non-payment, while consumer claims more often sounded in the areas of non-delivery, breach-of-warranty, or violation of consumer protection laws. Thus, the overall picture that emerged was one of an arbitration system that delivered truly fair and reasonable results for consumers.⁴

³*Id.* at 5.

⁴*Id.* at 5-6.

iv. Repeat-arbitrator bias

The next concern addressed by the Searle study is the so-called “repeat-player” phenomenon in consumer arbitration. Consumer advocates commonly claim that businesses receive preferential treatment from arbitrators. Their theory is that, because businesses tend to generate continuous streams of fee-paying cases for arbitrators, the arbitrators reciprocate and grow their fee streams by skewing awards in businesses’ favor.

The Searle study, however, like previous studies, found that any “repeat-player” effect that may exist is actually the result of better case screening by companies who return again and again to arbitration. Moreover, the study found no statistically significant evidence of a repeat-player effect when applying a traditional definition of repeat-player business (*i.e.*, consumers won relief in 51.8% of cases against businesses that had repeat appearances in the data set, and 55.3% of cases against businesses that appeared only once). A very modest repeat-player effect was shown using a different definition of repeat-player-business, but that was largely the product of these players’ success rates at achieving settlements, suggesting that the phenomenon was a result of better case-screening, not arbitrator bias.⁵

v. Class Relief

Finally, the Searle study did not find a major problem with the use of class arbitration waivers in consumer arbitration clauses. Overall, only 36.5% of cases arose under arbitration clauses containing class arbitration waivers; the remaining 63.5% did not. In addition, the use of class action waivers varied significantly by sector; all credit card and cell phone arbitration clauses included class action waivers, few or none of the clauses in the mobile home, real estate and insurance sectors included waivers.

b. The Searle Study—Phase 2

Phase 2 of the Searle study focused on a comparison between arbitration consumer litigation cases. As a result, the complete study provided a sound, comparative study of both arbitration and litigation mechanisms for resolving consumer disputes.

Following up on his appearance at the Subcommittee’s May 5, 2009 hearing, Prof. Drahozal appeared on July 22, 2009, before the Committee on Oversight and Government Reform’s Subcommittee on Domestic Policy. At that hearing, Prof. Drahozal was able to discuss preliminary information from Phase 2 of the study. As Prof. Drahozal put it in that testimony, the Searle study’s results to that date provided a preliminary basis for comparing arbitration and litigation:

“Despite . . . limitations, the preliminary findings . . . appear to be inconsistent with the argument that high win-rates for businesses in debt collection arbitrations show that arbitration is biased in favor of those businesses. Instead, the win-rates, while high in absolute terms and higher than win-rates for claims brought by consumers in arbitration, appear similar to win-rates for

⁵ *Id.* at 6–7.

comparable claims brought in court. Thus, while the findings are only preliminary, they nonetheless suggest that business win-rates in debt collection cases may be due to the types of claims being brought and not to the forum in which they are adjudicated.”⁶

When the findings of the Searle Phase 2 study were published in November 2009, they reaffirmed these conclusions. Central findings included that:

- “[c]reditors won some relief in the court cases studied as often, or more often, than in the arbitration cases studied (*i.e., consumers prevailed more often in arbitration than in court*);”
- “[p]revailing creditors were awarded as high a percentage, or a higher percentage, of what they sought in the court cases studied than in the arbitration cases studied (*i.e., consumers fared better or at least no worse by this measure in arbitration than in court*);”
- “[t]he rate at which debt collection cases were disposed of other than by award or judgment (e.g., by dismissal, withdrawal, or settlement) did not appear to differ systematically between arbitration and litigation;”
- “[t]he rate at which consumers responded (*i.e., did not default*) also did not appear to differ systematically between arbitration and litigation;” and
- “[a]s a general matter, in the cases we studied, consumers fared at least as well in arbitration as in court.”⁷

To conclude, the two-phase Searle Study provided substantial evidence that consumer arbitration, is cheap, fair, effective, untainted by pro-business bias, and generally used without unfair restrictions on class action arbitration.

c. The Consumer Financial Protection Bureau study

Subsequent to the Searle study, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, required the newly constituted Consumer Financial Protection Bureau to perform a study of consumer arbitration and offer recommendations concerning to Congress. Perhaps most significantly, the CFPB’s study identified facts about class-action lawsuits that casts severe doubt over whether class-action lawsuits will be capable of providing adequate justice to consumer claimants, if those claimants are denied the alternative of arbitration. For example, the CFPB study found that:

- the substantial majority of class actions are resolved with no benefits flowing to absent class members;⁸

⁶*Arbitration or Arbitrary: The Misuse of Mandatory Arbitration to Collect Consumer Debts: Hearing Before the Domestic Policy Subcomm. of the Oversight & Government Reform Comm., 111th Cong. 1 (2009)* (statement of Christopher R. Drahozal, Professor of Law, University of Kansas School of Law); see also *id.* at 6–7 (businesses bringing debt collection cases in sampled federal and state court cases won relief in 99.7% of cases going to judgment).

⁷Consumer Arbitration Task Force, Searle Civil Justice Institute, *Creditor Claims in Arbitration and in Court: Interim Report No. 1* at 4, 27 (Nov. 2009) (emphasis added) (available at https://masonlec.org/site/rte_uploads/files/Creditor%20Claims%20Interim%20Report%2011%2019%2009%20FINAL.pdf).

⁸See Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress 2015* at Section 6, p. 37 (Mar. 2015) (CFPB Report) (available at https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf).

- the weighted-average claims rate was only four percent—*i.e.*, the vast majority of class members do not file claims for payment from class-action settlement funds;⁹
- the average settlement payment to class members was just \$32.35, while attorneys' fees averaged \$1 million per case;¹⁰
- the average fee paid to class-action plaintiffs' lawyers, as a percentage of the announced settlement, was 41%, with a median of 46%;¹¹ and
- class actions that produced class-wide settlements took an average of nearly two years to resolve.¹²

d. Earlier studies of consumer arbitration

Studies that preceded the Searle and CFPB studies also support conclusions favorable to arbitration. For example, during the 2000s, the National Arbitration Forum published a synopsis of independent studies and surveys concerning the benefits of pre-dispute consumer arbitration. The results of these studies, as concerns consumer interests, can be summarized as follows:

- individuals prevailed more often in arbitration than in court;
- consumers, more specifically, prevailed 20% more often in arbitration than in court;
- monetary relief for individuals was higher in arbitration than in lawsuits;
- individuals received a greater percentage of the relief requested in arbitration;
- arbitration was approximately 36% faster than litigation;
- sixty-four percent of American consumers would choose arbitration over a lawsuit for monetary damages; and
- ninety-three percent of consumers using arbitration found it to be fair.¹³

The results of these studies for business were similarly positive. For example, 78% of business attorneys found that arbitration provided faster recovery than lawsuits, and 83% of business attorneys found arbitration to be equally as fair or more fair than lawsuits.

Separately, in December 2004, Ernst & Young issued a more targeted study of the outcomes of contractual arbitration in consumer-initiated, lending-related cases. The results of this study were as follows:

- consumers prevailed in 55% of cases that went to an arbitration hearing—the same win-rate that consumers obtained in state court;
- consumers obtained favorable results in 79% of the cases that were reviewed;
- 40% of consumers who brought arbitration claims actually got their “day in court,” while only 2.8% of cases in state court ever reached trial; and

⁹ See *id.* at Section 8, p. 30.

¹⁰ See *id.* at Section 8, pp. 27–28.

¹¹ See *id.* at Section 8, p. 34.

¹² See *id.* at Section 8, p. 37.

¹³ National Arbitration Forum, *The Case for Pre-Dispute Arbitration Agreements: Effective and Affordable Access to Justice for Consumers, Empirical Studies & Survey Results* (2004).

- 69% of consumers surveyed indicated that they were very satisfied with the arbitration process.¹⁴

In April 2005, Harris Interactive released the results of an extensive survey of arbitration participants sponsored by the U.S. Chamber of Commerce's Institute for Legal Reform. The survey was conducted online among 609 adults who participated in a binding arbitration case (voluntarily, due to contract language or with strong urging by the Court, but not a court order) that reached a decision. The major findings were that:

- arbitration was widely seen as faster (74%), simpler (63%), and cheaper (51%) than going to court;
- two-thirds (66%) of participants say they would be likely to use arbitration again with nearly half (48%) saying they are extremely likely;
- even among those who lost, one-third said they were at least somewhat likely to use arbitration again;
- most participants were very satisfied with the arbitrator's performance, the confidentiality of the process and its length;
- predictably, winners found the process and outcome very fair and losers found the outcome much less fair. However, 40% of those who lost were moderately to highly satisfied with the fairness of the process and 21% were moderately to highly satisfied with the outcome;
- while one in five of the participants were required by contract to go to arbitration, the remainder were voluntary—suggested by one of the parties, one of the lawyers, or the court; and
- two-thirds of the participants were represented by lawyers.¹⁵

Other studies have also reached results supporting the conclusion that arbitration provides a fair and effective option for consumers and others arbitrating against businesses, such as employees. For example, RoperASW published a study of legal disputes in April 2009 concluding that 64% of individuals would choose arbitration over court litigation, 67% believed court litigation takes too long, and 32% believed court litigation costs too much. Likewise, a report on consumer and employee arbitration in California found that consumers prevailed 71% of the time in arbitration.¹⁶

e. Problems in National Arbitration Forum arbitration

On July 14, 2009, the Minnesota Attorney General sued the National Arbitration Forum (NAF) for a number of alleged infractions related to consumer debt arbitration. Allegations levied against the Forum included that NAF had, among other things:

- deceptively represented that it was independent and neutral, operated like an impartial court system, and was not affiliated with any party;

¹⁴Ernst & Young, *Outcomes of Arbitration. An Empirical Study of Consumer Lending Cases* (2004).

¹⁵U.S. Chamber Institute for Legal Reform, *Arbitration: Simpler, Cheaper, and Faster than Litigation—a Harris Interactive Survey* (2005) (available at <https://www.instituteforlegalreform.com/uploads/sites/1/ArbitrationStudyFinal.pdf>).

¹⁶See California Dispute Resolution Institute, *Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure* (August 2004) (available at http://www.mediate.com/cdri/cdri_print_Aug_6.pdf).

- paid commissions to executives to convince creditors to include mandatory arbitration clauses in customer agreements and use the NAF as their arbitrator;
- aligned itself with creditors and against consumer interests in its behind-the-scenes communications with creditors;
- constructed financial ties between the NAF and the debt collection industry through a web of relationships with hedge funds and debt collection law firms (according to the lawsuit, of the 214,000 consumer collection arbitration claims processed in 2006 by the NAF, 125,000 were filed by these law firms);
- “deselected” from eligibility for future cases arbitrators who had ruled for consumers, not awarded credit card companies attorneys’ fees, or required creditors to introduce evidence; and
- sought out arbitrators were “anti-consumer.”

On July 17, 2009, the NAF signed a consent judgment resolving the lawsuit. Pursuant to that judgment, the NAF withdrew from its consumer arbitration business lines, including arbitration of credit card debt, consumer loan, telecommunications, utilities, health care, and consumer lease claims.

Anti-arbitration advocates pointed to the NAF affair as evidence that consumer arbitration should be broadly restricted. The NAF, however, disputed the argument, claiming that it withdrew from consumer arbitration primarily because it: (1) lacked sufficient resources to defend against the increasing challenges to arbitration, including from state attorneys general and the organized plaintiffs’ trial bar; and (2) faced increased legislative uncertainty about the future of the arbitration system.

The allegations against the NAF were disturbing. To date, however, there is no evidence that other prominent arbitration providers, such as the American Arbitration Association and JAMS, have been involved in similar practices or relationships. Accordingly, the most important point to be drawn from the NAF experience is not that mandatory binding arbitration in and of itself is deeply or inherently flawed. Rather, it is that the arbitration sector and the arbitration provider that generated the most complaints about mandatory binding arbitration—consumer debt collection arbitration and the NAF—were cleaned up.

f. AAA moratorium on consumer debt collection arbitration and subsequent consumer and employment arbitration due-process protocols

i. Moratorium on consumer debt collection arbitration

In a related development, in June 2009, the American Arbitration Association (AAA) entered into a self-imposed moratorium on the arbitration of consumer debt collection cases. The AAA ascribed the moratorium to its desire to review and address fairness and due process concerns in the area of consumer debt collection arbitration.

Significantly, the AAA placed no moratorium on its arbitration of any other kind of dispute. According to the AAA, that was because its decades-long experience in consumer arbitration showed that arbitration presents a good alternative for the resolution of con-

sumer-related disputes.¹⁷ Consistent with this conclusion, the Searle Study highlighted that the AAA’s “landmark Consumer Due Process Protocol,” created more than ten years ago with “input from consumer, government, legal, business and academic experts . . . drawn from such organizations as the AARP, Consumers Union, Consumer Action, American Council on Consumer Interests, the Federal Trade Commission, the National Association of Attorneys General, and the National Association of Consumer Agency Administrators,” works well to protect consumers.¹⁸ In fact, the Searle Study concluded that “the AAA vigorously enforces the Protocol in each case, and that consumers win a majority of claims that they bring in arbitration before the AAA.”¹⁹

In light of the above, in 2009 the AAA endorsed the view that the NAF scandal presented a *sui generis* set of circumstances that did not support calls for broad reform of the arbitration system. The AAA, however, did call for reform of debt collection arbitration and a national policy committee to explore and identify solutions in that area.

ii. Current AAA consumer and employment arbitration due process protocols

Currently, the AAA has protocols in place for both consumer and employment arbitration to ensure the fairness of consumer arbitrations and employment arbitrations. The provisions of these protocols include the following:

Key Consumer Rules provisions:

- Either party may take a claim to small claims court in lieu of arbitration.
- A business using the AAA as an arbitral forum for consumer disputes must provide a copy of its contract to the AAA so that the AAA may review it for compliance with its rules and so that the contract may be publicly posted. The AAA will not provide a forum for arbitration of disputes unless the business has first complied with this requirement and the AAA has determined that the contract complies with AAA rules.
- In the absence of agreement by the parties on an arbitrator, the AAA will appoint the arbitrator.
- The arbitrator, as well as the parties and their representatives, must provide information to the AAA of any circumstances likely to raise justifiable doubt as to whether the arbitrator can remain impartial or independent.
- The AAA will disqualify an arbitrator who shows lack of independence, or partiality, or inability to perform the duties of an arbitrator.
- The arbitrator may require pre-hearing exchanges of information and identification of witnesses and exhibits, as well as other exchanges of information if needed to provide for a fundamentally fair process.
- Parties may be represented by counsel.

¹⁷ *Arbitration or Arbitrary: The Misuse of Mandatory Arbitration to Collect Consumer Debts: Hearing Before the Domestic Policy Subcomm. of the Oversight & Government Reform Comm. at 8, 111th Cong. 8 (2009)* (statement of Richard W. Naimark, Senior Vice President, American Arbitration Association).

¹⁸ Phase 1 Searle Study at 90.

¹⁹ *Id.*

- The arbitral hearing may be by telephone, in person or based on submitted documents.
- The arbitrator’s decision “shall provide the concise written reasons for the decision unless the parties all agree otherwise.”
- Consumer’s fees are capped at \$200 if the consumer initiates a case and at \$0 if the business initiates the case.²⁰

Key Employment Rules provisions:

- If the parties have not agreed on an arbitrator, the AAA will send both sides the same list of arbitrator candidates, so that each party can strike names and rank the remaining names. The AAA will then select the arbitrator from the unstricken names based on the ranking. If the parties’ submissions do not permit this process, the AAA may select the arbitrator from among other eligible arbitrators.
- “Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator’s impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives.”
- “The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.”
- The AAA will disqualify an arbitrator who shows lack of independence, partiality or inability to perform the duties of an arbitrator.
- Parties may be represented by counsel.
- Parties may waive an oral hearing.
- The award must be in writing, shall be signed by a majority of the arbitrators and shall provide the written reasons for the award unless the parties agree otherwise.
- Employee’s fees are capped at \$300 for claims filed by the employee, and employers pay all fees for claims filed by the employer.²¹

g. Other studies and issues concerning credit card arbitration

i. Public Citizen study

In addition to the above studies, there are a number of analyses bearing more specifically on credit card arbitration. This type of arbitration has long been at the core of concerns over consumer arbitration.

The first of the credit card studies was published in 2007 by Public Citizen; it is entitled *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (available at <http://www.citizen.org/documents/ArbitrationTrap.pdf>). Relying on disclosures by the National Arbitration Forum concerning its consumer arbitrations in California, Public Citizen assessed the results of 33,948 arbitra-

²⁰ American Arbitration Association, *Consumer Arbitration Rules* (2018) (available at https://www.adr.org/sites/default/files/Consumer_Rules_Web_0.pdf).

²¹ American Arbitration Association, *Employment Arbitration Rules and Mediation Procedures* (2017) (available at (https://www.adr.org/sites/default/files/Employment_Rules_Web2119.pdf)).

tions from 2003 to 2007. The vast majority of these cases were credit card cases, virtually all of them were brought by businesses against consumers. According to the study, about 43% of these cases settled or were dismissed before an arbitrator could be appointed. In those cases in which an arbitrator was appointed, businesses won almost 94% of the time. In the very few consumer-filed cases in the sample, businesses won over 60 percent of the time. The sample size, however, was too small to provide any reliable inferences. On the basis of these results, Public Citizen advocated strenuously during the 2000s that consumer arbitration, and particularly credit card arbitration, was unfair to consumers.

ii. Navigant study

In 2008, Navigant Consulting reexamined the data on which Public Citizen relied, in a study entitled *National Arbitration Forum: California Consumer Arbitration Data* (July 11, 2008) (available at <http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1212>). Navigant reported that, in the 26,665 arbitrations that did not settle, “consumer parties were reported to have prevailed outright or had the case against them dismissed in 8,558 cases (32.1%),” “claims against consumers were reduced by NAF in an additional 4,376 cases (16.4%),” “the median reduction was \$636 and the median percentage reduction was 8.6%,” the consumers had to pay arbitration fees in virtually none of the cases in which arbitration fees were paid, and, in the few cases in which consumers paid the fees, the media fee paid was \$75. Clearly, this information revealed a much different picture of the cases that Public Citizen examined.²²

In addition to Navigant, Professor Peter Rutledge of the University of Georgia School of Law criticized the Public Citizen study. As Professor Rutledge pointed out, Public Citizen’s study addressed a single arbitration provider and a single business sector. In addition, the kinds of claims involved, those in debt-collection actions, tend to present little to dispute, and not surprisingly generate high win-rates for businesses. As Professor Rutledge emphasizes, “[s]tudies of debt collection actions in major cities reveal that the lender typically wins between 96% and 99% of the time, right in line with the lender win-rate data cited in the Public Citizen Report.”²³

Accordingly, there is little reason to assign significant weight to the Public Citizen study, indeed, there is reason to believe from the Navigant and Rutledge analyses that credit card arbitration works relatively well for consumers and businesses.

D. EMPIRICAL AND OTHER EVIDENCE ON EMPLOYMENT ARBITRATION

1. 2019 Institute for Legal Reform Study

The most significant recent evidence concerning employment arbitration is contained in a study published this month by INDP Analytics and funded by the U.S. Chamber of Commerce’s Institute

²² Navigant Consulting, *Memorandum—National Arbitration Forum: California Consumer Arbitration Data* (2008).

²³ Prof. Peter Rutledge, *Arbitration—a Good Deal for Consumers: a Response to Public Citizen*, U.S. Chamber Institute for Legal Reform (2008) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1811133).

for Legal Reform.²⁴ In this study, the authors analyzed over 10,000 employment arbitrations and over 90,000 employment lawsuits in federal court between 2014 and 2018. This review showed that employment arbitration compares quite favorably with litigation as a manner of resolving employment disputes and actually delivers better, faster results than does litigation. The main results of the study are as follows:

- In both arbitration and litigation, three-quarters of disputes were resolved by settlements, not judgments.²⁵
- “[W]hen cases proceeded to adjudication, plaintiffs, who almost always were employees, were more likely to prevail in arbitration than in litigation.”²⁶
- “During 2014–18, in decided cases, employee-plaintiffs prevailed in more than 32% of arbitrations but only 11% of litigations.” In other words, “[e]mployees are three times more likely to win in arbitration than in court.”²⁷
- “Furthermore, prevailing employees typically won twice as much money in arbitration than in litigation.”
 - “The median award to employee-plaintiffs was \$113,818 in arbitration compared to \$51,866.”
 - “The average award to employee-plaintiffs was \$520,630 in arbitration compared to \$269,885 in litigation.”
 - “Furthermore, the award of the top 90 percentile was \$668,998 in employment arbitration compared to \$539,574 in litigation.”²⁸
- “Employment arbitration also was faster than litigation.”
 - “Employee-plaintiff arbitration cases that were terminated with monetary awards averaged 569 days (523 days in median).”
 - “In contrast, employee-plaintiff litigation cases that terminated with monetary awards required an average of 665 days (532 days in median).”²⁹

One other significant fact identified by the study bears special emphasis: “79% of employees who initiated employment arbitration earned less than \$100,000 a year.” For employees in this earning range, results that are faster and higher in amount—*i.e.*, results delivered by arbitration, not litigation—obviously are critical.

2. Other Studies of Employment Arbitration

In addition to the new INDP study, a study in the 1990s of employment arbitrations before the American Arbitration Association found that employees won 73% of the arbitrations they initiated and 64% of all employment arbitrations (including those initiated by employers). See Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Active Cases and Outcomes*, 6 Int’l J. Conflict Management 369, 378 (1995).

Also in the 1990s, Lewis Maltby, director of the American Civil Liberties Union’s National Task Force on Civil Liberties in the

²⁴ INDP Analytics. *Fairer, Faster, Better. An Empirical Assessment of Employment Arbitration* (May 2019).

²⁵ *Id.* at 4, 5.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

Workplace, conducted a study in which he compared the results in employment arbitration with the results in federal court during the same period of time, finding that 63% of employees won in arbitration compared to 15% of employees who won in federal court. Awards to employees in arbitration were on average 18% of the amount demanded versus 10.4% of the amount demanded in court. The study also demonstrated that while arbitration awards to employees are on average lower than judgments to employees in court, the outcome for employees is still better in arbitration because of their higher win-rates of arbitration and the shorter duration of arbitration compared to court proceedings. See Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rights L. Rev. 29, 46–48 (1998).

Numerous other studies also have found that employees, a group in many ways comparable to consumers, have fared well in arbitration.³⁰

E. PROBLEMS WITH THE ALTERNATIVE OF CLASS ACTIONS

Finally, it must be borne in mind that, if broad measures to preclude the use of mandatory-binding arbitration in consumer and other settings is adopted, for many, if not most, claimants of ordinary means, class-action lawsuits may be the only affordable alternative means of obtaining justice for any claims above the typically very small amounts allowed to be addressed in state small claims courts.³¹ As discussed above, the CFPB found numerous problems to be associated with reliance on class action lawsuits for recovery on consumer claims. But in addition, class action lawsuits also have presented other problems, including scandal involving fabricated testimony, bought and sold to support false claims.

For example, multiple renowned class action lawyers have been exposed and convicted of such behavior. One of them, William Lerach of Milberg Weiss, told the *Wall Street Journal* that illegal kickbacks to people recruited to file class action lawsuits is an “industry practice.”³² He and fellow trial lawyer Melvin Weiss engineered a \$250 million criminal scheme to pay people to sue companies, lied about it in court, and became federal prisoners. Another of American’s most prominent trial lawyers, Richard Scruggs of Mississippi, pled guilty in March 2008 to bribing a state judge to obtain more legal fees.³³

In light of this scandal, the Washington Post called in 2009 for “a sober discussion about how best to achieve a fairer, more balanced legal system through comprehensive tort reform.”³⁴

³⁰ See George W. Baxter, *Arbitration in Litigation for Employment Civil Rights?*, 2 Vol. of Individual Employee Rights 19 (1993–94); William M. Howard, *Arbitrating Claims of Employment Discrimination*, Disp. Res. J. Oct–Dec 1995, at 40–43; Theodore Eisenberg and Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, Disp. Resol. J. Nov. 2003–Jan. 2004, at 44; Michael Delikat and Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, Disp. Resol. J. Nov. 2003–Jan. 2004, at 56; Gary Tidwell, et al., *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations* (Aug 1999), available at http://www.nasd.com/wcb/groups/med_arb/documents/mediation_arbitration/nasdw_009528.pdf.

³¹ See Rocket Lawyer, *Small Claims Court Limits by State*, available at <https://www.rocketlawyer.com/article/small-claims-court-dollar-limits-by-state.rl> (vast majority of states have small claims limits of \$10,000 or less; most are at \$5,000 or less).

³² “I Was Guilty,” *Wall Street Journal* (Feb. 2, 2008) (available at <https://www.wsj.com/articles/SB120275552784659491>).

³³ A. Jones, P. Prada, “Richard Scruggs Pleads Guilty,” *Wall Street Journal* () (available at <https://www.wsj.com/articles/SB120550974632936815>).

³⁴ “A Fall and a Lesson,” *The Washington Post* (April 9, 2008) (editorial).

III. CONCLUSION

As the above demonstrates, the solution to concerns about the arbitration system is not to eliminate broad areas of jurisdiction from it and leave those areas to flawed class actions, but to improve the arbitration system further for any areas of jurisdiction that are of concern. To disregard the possibility of valuable reforms that on a bipartisan basis could preserve and improve the arbitration process for these categories of cases, rather than effectively wipe out the availability of arbitration without simultaneously curtailing the abuse of class actions, would be to deliver the worst result for Americans seeking justice.

DOUG COLLINS,
Ranking Member.

