

JUSTICE DENIED: FORCED ARBITRATION AND THE EROSION OF OUR LEGAL SYSTEM

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND
ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

THURSDAY, MAY 21, 2019

Serial No. 116-21

Printed for the use of the Committee on the Judiciary



Available via: <http://judiciary.house.gov>

U.S. GOVERNMENT PUBLISHING OFFICE

WASHINGTON : 2021

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JUSTICE DENIED: FORCED ARBITRATION AND THE EROSION OF OUR LEGAL SYSTEM

Thursday, May 21, 2019

HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to call, at 9:59 a.m., in Room 2141, Rayburn House Office Building, Hon. David Cicilline [chairman of the subcommittee] presiding.

Present: Representatives Cicilline, Nadler, JOHNSON of Georgia, Raskin, Jayapal, Scanlon, Neguse, Sensenbrenner, Collins, Buck, Armstrong, and Steube.

Staff Present: David Greengrass, Senior Counsel; John Doty, Senior Advisor; Madeline Strasser, Chief Clerk; Moh Sharma, Member Services and Outreach Advisor; Susan Jensen, Parliamentarian/Senior Counsel; Joseph Van Wye, Professional Staff Member; Lina Khan, Counsel; Slade Bond, Chief Counsel; Daniel Flores, Minority Chief Counsel; Andrea Woodard, Minority Professional Staff.

Mr. CICILLINE. The Judiciary Committee will come to order.

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

Good morning and welcome to today's hearing on the impact of forced arbitration on the fundamental rights of hard-working Americans and our system of laws.

I now recognize myself for an opening statement.

Buried deep within the fine print of everyday contracts, forced arbitration clauses block American consumers and workers from their day in court to hold corporations accountable for breaking the law before the disputes even arise. This private system does not have the same procedural safeguards of our justice system. It is not subject to oversight, there is no judge or jury, and it is not bound by laws passed by Congress or the states.

When forced arbitration is combined with non-disclosure agreements, it effectively silences the victims of rampant corporate misconduct. For example, according to a disturbing report by the Washington Post, hundreds of former female workers of Sterling Jewelers, the massive jewelry chain that owns Kay Jewelers and Jared, were, and I quote, "routinely groped, demeaned, and urged to sexually cater to their bosses to stay employed." According to numerous sworn statements, male executives and supervisors at all levels of the company engaged in a widespread pattern of abuse,

harassment, and discrimination. This misconduct included forcing women to perform sexual favors to receive better jobs or higher pay and retaliating against women who reported abuse within the company.

One store manager wrote in her declaration that male executives “prowled around like dogs that were let out of their cage, and there was no one to protect the female managers from them.” Although many of the women at Sterling Jewelers sought to hold the company accountable by banding together in a class action, Sterling covered up this abusive conduct for years by forcing its workers to waive their right to bring a lawsuit against the company in public courtrooms.

These arbitration proceedings were conducted in private, the outcome was sealed, and any settlements with the company were bound by confidentiality clauses. Not only did this massive cover-up shield the company from public accountability, it also blocked other victims of assault and harassment from coming forward until some of the stories finally became public years later. As Gretchen Carlson, one of our witnesses today, will testify, this is not an isolated incident. Far from it. Thousands of women across the country have suffered through similar pain and humiliation. They were isolated by predatory companies, they were silenced by forced arbitration clauses, and they were unable to hold wrongdoers accountable by having their day in court.

This is just one example of many areas where people’s legal rights have also been disarmed. They relate to veterans, to victims of civil rights violations, to service Members, and many others. This is nothing short of a corporate takeover of our nation’s system of laws, and the American people have had enough.

The overwhelming majority of voters, including 83 percent of Democrats and 87 percent of Republicans, support ending forced arbitration. It is time to act.

With that in mind, I thank our panel of distinguished witnesses for appearing at today’s important hearing and very much look forward to your testimony.

It is now my pleasure to yield the balance of my time to the distinguished gentleman from Georgia, the sponsor of the FAIR Act legislation with 200 cosponsors, that would prohibit the use of forced arbitration in consumer, worker, civil rights, and antitrust disputes. Mr. Johnson, you are recognized.

Mr. JOHNSON of Georgia. Thank you, Chairman Cicilline.

The issue of forced pre-dispute arbitration is very important to me, and it is a battle I have been fighting a long time.

Twelve years ago, when I was a freshman in Congress, I first introduced a bill that would render pre-dispute arbitration clauses unenforceable in certain employment, consumer, and civil rights cases.

I believe that when one party is vastly more powerful than another, it is just not fair or equitable to allow a bigger guy to slam the courthouse doors shut and force the smaller guy into a private, for-profit dispute resolution process when the little guy gets treated wrongfully.

Corporations and employers love forced arbitration because most of the time, they win. They get to choose the arbitrator, the Rule

of law does not necessarily apply, and there is no right to appeal the decision. In arbitration, the deck is stacked against the person and in favor of corporate interests.

The Federal Arbitration Act was meant to apply to businesses of equal bargaining positions, but today the U.S. Supreme Court is allowing corporations and employers to force consumers and workers to sign away their ability to file suit in court and have their cases decided by a jury of their peers, or to join a class-action lawsuit. This is unfair, and it is wrong. That is why Congress needs to pass the Forced Arbitration Injustice Repeal Act, which has 201 cosponsors.

As the horror stories about forced arbitration continue to affect millions, Americans are realizing how they are being tricked, and they are starting to fight back. My bill would help restore the right to the courthouse for Americans everywhere, and restore fairness to our justice system.

I thank the panelists for being here today.

With that, I yield back to the Chairman.

Mr. CICILLINE. I thank the gentleman.

It is now my pleasure to yield to the distinguished gentleman from Wisconsin, the Ranking Member of the subcommittee, Mr. Sensenbrenner, for his opening statement.

Mr. SENSENBRENNER. You will hear a different view from me.

Eliminating arbitration achieves one thing: it enriches trial attorneys. It does not help claimants. In fact, research is clear on this. When comparing arbitration and litigation in employment cases, claimants win more often in arbitration.

According to one study, when a case doesn't settle and goes the distance, plaintiffs win three times more often in arbitration. Not only are these claimants more successful, but the research also shows that they receive nearly double the monetary amounts in arbitration versus in court. Wiping out arbitration would not give employees a better deal.

What is a good deal is providing Americans fair access to justice? Taking a case to trial is costly and a time-consuming endeavor. Arbitration, by contrast, allows cases to be resolved in a much more affordable and timely manner.

As Justice Breyer explained in the 1995 *Terminix v. Dobson* decision, and I am paraphrasing, if a consumer with a small damages claim is only left with a court remedy, the cost, and delays of which could eat up the value of an eventual small recovery, eliminating arbitration would have a profound chilling effect on justice. For many claimants, the balance of whether their case is worth it, either for them or for an attorney, will often be tipped against them.

Killing arbitration will also harm businesses. Increased litigation means increased business cost, which will inevitably be passed on to the consumer. Rather than amassing lawyers' fees, businesses can use the more affordable arbitration. We should not make it more expensive for businesses or claimants to resolve their disputes when they arise.

Which brings me to my initial point. Eliminating arbitration only benefits the trial attorneys. So, the question for my colleagues on the Democratic side of the dais, why pursue legislation that puts the interests of trial attorneys over American workers, consumers,

and businesses? I fear I already know the answer to that question. A lot of the fear-mongering surrounding arbitration sounds like it was lifted from the talking points from the AAJ's annual flyer. The AAJ, or American Association for Justice, is the nice-sounding name of the plaintiffs' attorneys' lobbying organization. It also happens to be a huge donor to Democratic candidates, contributing millions of dollars each cycle to their campaigns.

So, let's not seek out faults in a functioning system to boost the bottom line of trial lawyers. Instead, let us ensure that Americans are given the opportunity to resolve their dispute, thus provide them with access to an affordable, workable, and successful means to resolve their disputes, and ultimately let's not deny them justice.

I yield back.

Mr. CICILLINE. Thank you, Ranking Member Sensenbrenner.

Mr. RASKIN. Mr. Chairman, point of order.

Mr. CICILLINE. What is your point of order?

Mr. RASKIN. Well, my question is just can we impute the policy positions that Members of the Committee take to campaign contributions? If so, I think I would be doing it a lot more frequently. I thought that is something that we don't do.

Mr. CICILLINE. Excellent point. I am sure Mr. Sensenbrenner didn't mean to communicate that in that way.

Mr. RASKIN. We would be hearing a lot more of that in our Committee if that is permissible. I am just curious. Maybe we can have somebody research that.

Mr. COLLINS. Will the gentleman yield?

Mr. CICILLINE. I think we don't need to engage in this colloquy. This is an important issue with strongly held beliefs on both sides.

Mr. COLLINS. I agree with the Chairman on this.

Mr. CICILLINE. I think everyone should avoid imputing motivations.

Mr. COLLINS. The gentleman from Georgia.

Mr. CICILLINE. All right. The Chair now recognizes the distinguished Chairman of the full committee, the gentleman from New York, Mr. Nadler, for his opening statement.

Mr. NADLER. Thank you, Mr. Chairman, for holding today's important hearing on forced arbitration.

I will call it forced arbitration.

Nearly a century ago, Congress enacted the Federal Arbitration Act to allow merchants to resolve run-of-the-mill contract disputes in a system of private arbitration that would be legally enforceable. The system the Congress envisioned was to be used voluntarily and only between merchants of equal bargaining power.

Thanks to a series of disastrous Supreme Court decisions, however, this system has been turned entirely on its head. Private arbitration has been transformed from a voluntary forum for companies to resolve commercial disputes into a legal nightmare for millions of consumers, employees, and others who are forced into arbitration and are unable to enforce certain fundamental rights in court.

Many companies use forced arbitration as a tool to protect themselves from consumers and workers who seek to hold them accountable for alleged wrongdoing. By burying a forced arbitration clause deep in the fine print of a take-it-or-leave-it consumer and employ-

ment contract, companies can evade the court system where plaintiffs have far greater legal protections and hide behind a one-sided process that is tilted in their favor.

For example, arbitration generally limits discovery, does not adhere to the rules of civil procedure, can prohibit class actions, and almost always does prohibit class actions, may have no right of appeal, and the proceedings and often even the results must stay secret.

For millions of consumers and employees, the precondition, whether they know it or not, of obtaining a basic service or product, such as a bank account or a cell phone or a credit card, or even a job, is that they must agree to resolve any disputes in private arbitration. That means that their ability to enforce civil rights, consumer, labor, and antitrust laws are subject to the whims of a private arbitrator who is not required to provide plaintiffs any of the fundamental protections guaranteed in the courts, and whose further employment may depend on how good a reputation he has among the commercial class as ruling in their favor.

We have a better principle in this country, and that is that all Americans deserve their day in court. We make a mockery of this principle, however, when we allow individuals to be stripped of this right and to be forced into private arbitration proceedings without the safeguards the judicial system affords. That is where we find ourselves today.

This problem began in earnest in the 1980s with a series of Supreme Court decisions that misapplied the clear legislative intent of Congress and dramatically expanded the ability of companies to limit the rights of consumers and workers through forced arbitration.

In 1984, the Court granted corporations the right to enforce arbitration clauses even when State law rendered them void. And strikingly, in 1985, the Court allowed arbitration proceedings to be used not just to settle contracts but also to interpret laws enacted by Congress to implicate fundamental rights, just as Sandra Day O'Connor criticized the Supreme Court's decision allowing arbitration clauses to preempt State law as a form of judicial revisionism that is, quote, "unfaithful to Congressional intent, unnecessary, and inexplicable."

Similarly, Professor Margaret Moses, a leading scholar in the field of commercial arbitration, has observed, "The courthouse, step by step, built a house of cards that has almost no resemblance to the structure envisioned by the original statute."

Most recently, a conservative majority on the Supreme Court reached new heights in misreading what Congress intended. Last year in a 5-to-4 decision in the Epic Systems case, the Court held that employers could combine forced arbitration clauses with class action bans to prevent workers from banding together to hold law-breaking employers accountable, despite clear authority for workers to bring their claims under the National Labor Relations Act.

That is why yesterday I reintroduced the Restoring Justice for Workers Act, legislation that would end forced arbitration in employment contracts and protect workers' rights to pursue work-related claims in court. As Justice Ruth Bader Ginsburg stated in her

dissent in Epic Systems, “A congressional correction is urgently in order.” I strongly agree.

That is why I also strongly support H.R. 1423, the Forced Arbitration Injustice Repeal Act, or FAIR Act, one of the few times when the acronym fits, introduced by the gentleman from Georgia, Mr. Johnson, which would prohibit forced arbitration in consumer, employment, civil rights, and antitrust disputes. I applaud Congressman Johnson for his leadership on this legislation, and I look forward to working with him and other Members who have introduced legislation addressing the crisis of forced arbitration to ensure that individuals can once again enforce the laws the Congress enacts.

The widespread use of forced arbitration is a serious threat to our entire legal system and the basic tenets of our democracy. For many companies, forced arbitration has become a get-out-of-jail-free card to circumvent the basic rights of consumers and workers. It is up to Congress to reverse this dangerous trend.

Let me just add here, we used to have a concept in law—when I went to law school, they still taught it—called contracts of adhesion, where a contract was unenforceable if one party had no choice in entering into it. All these arbitration clauses, almost, are contracts of adhesion. You try, when you want to get a credit card, try crossing out the fine print, if you can find it without the magnifying glass, that says that you will settle all disputes in arbitration. Cross it out. See if you get the credit card. See if you get the bank loan. See if you get the mortgage. See if you get the car loan.

You have no choice.

When the gentleman from Wisconsin talks about voluntary arbitration, if it were voluntary and it were between equals, that is what Congress meant in 1925. These are all contracts of adhesion. They are turning the Federal courts into simply collection agencies for rich people and making them unavailable, making State courts unavailable for most people for most of the kinds of disputes that they will get into.

It is up to Congress to reverse this dangerous trend, and I look forward to hearing from our distinguished panel of witnesses about how best to address this important issue.

I thank the Chairman for holding today’s hearing, and I yield back the balance of my time.

Mr. CICILLINE. I thank the gentleman.

Now I am pleased to recognize the Ranking Member of the full committee, the gentleman from Georgia, Mr. Collins, for his opening statement.

Mr. COLLINS. Thank you, Chairman Cicilline and Ranking Member Sensenbrenner, for holding this hearing.

Arbitration provides consumers a simpler, cheaper, faster path to justice than the judicial system does. This is what the evidence showed the last time the Judiciary Committee performed oversight of the arbitration system during the 111th Congress.

The evidence in favor of preserving access to arbitration since then has only increased. Companies are continuing to follow arbitration protocols that help to ensure due process is given to claimants against them. A string of new Supreme Court decisions has demonstrated the Court’s confidence in the arbitration system, and

the Consumer Financial Protection Bureau's 2015 study of arbitration highlighted problems consumers would face if they had no access to arbitration—this is the Consumer Financial Protection Bureau's study—but instead had to rely on flawed judicial class actions.

That is not to say that the arbitration system is, by any means, perfect. The arbitration system is generally good and should be preserved.

Bills have been introduced this term that would wipe out the use of arbitration in broad sectors of the economy. Rather than wipe out arbitration altogether, we should be considering ways to make it better still.

The Senate Judiciary Committee Chairman Graham suggested just that in the Senate Judiciary Committee hearing on arbitration earlier this year. He also suggested that while we look at ways to improve arbitration, we should also look at ways to improve litigation. I am encouraged by those suggestions.

The worst result would be to wipe out Americans' access to arbitration while leaving them only with an unimproved judicial system. You can't leave both untended. They have to be looked at together, and simply a blanket solution, as we found in this Committee many times, doesn't work. In fact, it creates more problems than it is worth.

So, I look forward to the witnesses here today. Thanks for being here this morning. It is good to see you.

Thanks, Mr. Chairman, for having this hearing. I yield back.

Mr. CICILLINE. Thank you, Mr. Collins.

It is now my pleasure to introduce today's witnesses.

Our first witness is Deepak Gupta, the Founding Principal of Gupta Wessler, PLLC. Mr. Gupta focuses on a wide range of issues, including constitutional law, class actions, and consumers' and workers' rights. He is a leading public interest attorney and advocate, has argued several cases before the Supreme Court, and has handled appeals before every Federal circuit and seven State supreme courts.

Mr. Gupta was Senior Counsel for Litigation and Enforcement Strategy at the Consumer Financial Protection Bureau. Before the CFPB, he spent seven years at Public Citizen, where he founded the Consumer Justice Project, and in 2010 he argued *AT&T Mobility v. Concepcion*, a landmark arbitration case, and has since played a leading role in the debate over forced arbitration.

Mr. Gupta earned his Bachelor of Arts at Fordham University and his law degree at Georgetown University Law Center.

Welcome.

Our second witness is Kevin Ziober, a Lieutenant Commander in the U.S. Navy Reserves, where he has served since 2008 and was deployed in Afghanistan in 2012 for 12 months. As a Lieutenant Commander, Mr. Ziober is responsible for the manning, training, and mobilization readiness of a 130-member Information Warfare Unit. Since 2016, Mr. Ziober has been a fierce advocate for stronger employment and reemployment rights for National Guard and Reserve Members under the Uniformed Services Employment and Reemployment Rights Act, USERRA.

Mr. Ziober earned his Bachelor of Science degree in Business and Finance from the University of Southern California's Marshall School of Business.

Welcome.

Our third witness is Gretchen Carlson, an acclaimed journalist, best-selling author, filmmaker, and advocate. Ms. Carlson hosted "The Real Story" and co-hosted "Fox and Friends" for more than seven years on Fox News. In 2016, Ms. Carlson was forced out of Fox after her workplace harassment complaint became public and has since focused her energy on advocating for important legislative changes to protect sexual assault and sexual harassment survivors. She has written two New York Times best-sellers and has been recognized by the New York Women in Communications, the National Organization for Women, and the YWCA of Greater Los Angeles for her advocacy work.

In 1989, Ms. Carlson became the first classical violinist to be crowned Miss America and is the first former Miss America to serve as chair of the organization. She received her Bachelor of Arts at Stamford University and serves as a National Trustee for the March of Dimes.

Welcome.

The fourth witness on our panel is Phil Goldberg, Managing Partner at Shook, Hardy & Bacon L.L.P. As co-chair of Shook's Public Policy Group, Mr. Goldberg has more than 25 years of experience addressing liability-related public policy and public affairs issues. His specialty is tort and product liability theories and defenses, and he regularly speaks at judicial and attorney conferences regarding liability issues.

Mr. Goldberg has filed amicus briefs with the Supreme Court, the U.S. Court of Appeals, and State courts at every level, and his scholarship has been cited by the Supreme Courts of New Jersey and Rhode Island. He was admitted to the American Law Institute in 2001, and in 2019 was named Special Counsel to the Manufacturers Accountability Project. He received his Bachelor of Arts from Tufts University and his law degree from the George Washington University School of Law.

Welcome, Mr. Goldberg.

Our fifth witness is Andrew Pincus. Mr. Pincus is a partner at Mayer Brown, L.L.P., with a focus on briefing and arguing cases before the Supreme Court and other appellate courts. He has argued 29 Supreme Court cases and has been the co-director of the Yale Law School Supreme Court Clinic since 2006, providing pro bono representation in 10 to 15 Supreme Court cases each year.

Prior to joining Mayer Brown, Mr. Pincus served as General Counsel of the United States Department of Commerce from 1997 to 2000, and as an Assistant to the Solicitor General in the Department of Justice from 1984 to 1988. He received his Bachelor of Arts degree from Yale University and his J.D. from the Columbia University School of Law.

Welcome, Mr. Pincus.

Our final witness is Professor Myriam Gilles, who has been the Paul Verkuil Chair in Public Law at the Benjamin Cardozo School of Law since 2003. Before being appointed as Chair, Ms. Gilles served as an Associate Professor and Lecturer of Law at the Ben-

jamin Cardozo School. She has taught courses on civil procedure, product liability, complex litigation, and contracts. Additionally, Ms. Gilles sits on the Boards of both the Justice Resource Center and Public Justice, where she is an executive Committee member of the Class Action Preservation Project.

She received her Bachelor of Arts at Harvard College and her law degree from Yale Law School.

Welcome, Ms. Gilles.

We welcome all our very distinguished witnesses and thank them for participating in today's hearing.

Now if you would please rise, I will begin by swearing you in. You must please raise your right hand.

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

Let the record show that the witnesses answered in the affirmative.

Thank you, and you may be seated.

To the witnesses, please note that each of your written statements will be entered into the record in their entirety. Accordingly, we ask that you summarize your testimony in 5 minutes. To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you have 1 minute to conclude your testimony. When the light turns to red, it signals that your 5 minutes has expired.

We will begin with Mr. Gupta.

TESTIMONY OF DEEPAK GUPTA

Mr. GUPTA. Thank you, Chairman Cicilline, Ranking Member Sensenbrenner, and distinguished Members of the subcommittee. Thank you for inviting me to testify and for holding this hearing.

As an advocate who has argued cases about forced arbitration before the U.S. Supreme Court, one thing has become clear to me, and that is that only Congress can solve this problem.

I have just a few basic points this morning.

First, forced arbitration is unavoidable and deeply unpopular. It is everywhere. You can't avoid it, not if you want to live in modern society, not if you want a mobile phone or a credit card or a bank account. Increasingly, you can't get a job unless you give up your right to hold your employer publicly accountable for sexual harassment or assault, for discrimination or wage theft.

It is stressful enough for a family to check a loved one into a nursing home. Now you also have to check your legal rights at the door.

A case in point involves Irene Morissette, an 87-year-old Catholic nun suffering from dementia who was raped in an assisted living facility in Alabama. After the facility failed to call the authorities, she was assaulted again. When Sister Irene's family filed a lawsuit against the nursing home, it invoked a forced arbitration clause, and her case was dismissed. 90 percent of nursing home chains across the country have forced arbitration clauses in their contracts. This means not only that families like Sister Irene's get denied justice, but it also means that patterns of wrongdoing don't come to light because arbitration mandates secrecy.

Americans hate forced arbitration. In our hyper-partisan times, that opposition is remarkably bipartisan. 80 percent or more of Republicans, Democrats, and Independents support legislation to end forced arbitration.

People might not understand all the technical legal details, but they know when the system has been rigged against them. That is why there is a movement afoot. It is why we saw Google workers around the world walk out, outraged at how these clauses shield sexual harassment. One of the walk-out organizers, Mr. Tanuja Gupta, is here today, and it is why law students, like Harvard student Molly Coleman, who is also here, are organizing to get law firms to drop these clauses.

The second point I want to make this morning is that forced arbitration is a fundamental threat to our democracy and to our shared constitutional values. As the Supreme Court has acknowledged, an arbitration clause often means that you will have no way of getting justice under Federal laws that would otherwise have been enforceable in court.

If Congress passes laws that can't be enforced in the real world, what good are those laws?

What forced arbitration really does is it replaces the laws that are written by Congress with private legislation written by corporations into the fine print of contracts that nobody reads and that nobody can negotiate. That is not what is supposed to happen in a democracy.

Forced arbitration also robs us of our constitutional right to a jury trial, and this is no technicality. The very reason we have a Bill of Rights at all is because the original Constitution lacked a right to a civil jury trial. Please take a moment to appreciate how far this takes us away from our founding ideals. John Adams once said that representative government and trial by jury are the heart and lungs of liberty. Without them, he said, we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds. He might have been talking about forced arbitration.

Third, the biggest problem with forced arbitration isn't simply that it is a biased or unfair process, it is that it kills people's claims entirely. If you remember only one thing from my testimony, I hope it is this: Forced arbitration does not do what its proponents say it does. It does not channel claims into some alternative system that is better, faster, or cheaper at resolving disputes. Instead, it makes sure that most consumers' and workers' claims simply disappear.

One way to see this is to ask what consumers actually get out of arbitration. Of the hundreds of millions of consumers that interact with banks and other financial companies, how many do you think won affirmative relief on claims of \$1,000 or less in arbitration? In a two-year period, for the nation's leading arbitration forum, that number was just 4—not 4 million, not 400,000, not even 400, just 4. Contrast that with the tens of millions of consumers who received more than \$2 billion in cash relief through the litigation system. These numbers expose the arguments on the other side as a bad joke.

Based on this kind of comparison, we can recognize forced arbitration for what it is, a mechanism that quietly transfers giant amounts of wealth from poor to rich.

Thank you.

[The statement of Mr. Gupta follows:]

STATEMENT OF DEEPAK GUPTA

Chairman Cicilline, Ranking Member Sensenbrenner, distinguished Members of the Subcommittee: Thank you for inviting me to testify today. My name is Deepak Gupta. I am the founder of Gupta Wessler PLLC, a law firm focused on Supreme Court and appellate advocacy. Over the past decade, I have represented parties in some of the U.S. Supreme Court's key cases interpreting the Federal Arbitration Act—including *AT&T Mobility v. Concepcion* and *American Express v. Italian Colors*. I teach arbitration as a Lecturer at Harvard Law School, have written about arbitration, *see, e.g., Arbitration as Wealth Transfer*, 5 Yale L. & Pol'y Rev. 499 (2017), and previously worked on arbitration issues as Director of the Consumer Justice Project at Public Citizen and as Senior Counsel at the Consumer Financial Protection Bureau.

My testimony today makes just a few basic points:

First, forced arbitration is unavoidable and deeply unpopular. We're all subject to forced arbitration and we have no real choice in the matter (which is why we call it "forced"). Forced arbitration clauses are in 86% of private student loans, 88% of mobile phone contracts, and 99% of storefront payday loans. Credit cards, bank accounts, TV and internet service, gym Memberships—they all require arbitration. Taking a job also increasingly requires you to give up your right to hold your employer publicly accountable for sexual harassment or assault, discrimination, or wage theft. It's difficult enough for a family to check a loved one into a nursing home. Now you also have to check your family's legal rights at the door—a practice that has been shown in numerous instances to shield shocking abuse and neglect from public scrutiny.

When Americans are polled about forced arbitration, they hate it. Despite our hyper-partisan times, this sentiment is widely shared by voters across the political spectrum. Overwhelming majorities of Republicans, Democrats, and independents—80% or more of each—support federal legislation to end forced arbitration. People might not understand all the technical legal details, but they know when the system has been rigged against them.

Second, forced arbitration is a threat to democracy and our shared constitutional values. 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?

Forced arbitration in effect replaces the laws that Congress enacts with private legislation, written by corporations into the fine print of contracts that nobody reads and that nobody can negotiate. That's not what's supposed to happen in a democracy.

Forced arbitration also robs us of our constitutional rights to a day in court and a civil trial by jury. This is no mere technicality. The very reason the U.S. Constitution has a Bill of Rights at all is because the original document lacked protection for the cherished Anglo-American right to a civil jury trial. Take a moment to appreciate how far this takes us away from our founding ideals. John Adams once said that "representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle and fed and clothed like swine and hounds."

Forced arbitration is also both *secret* and *slanted*: It shields lawbreaking, inhibits development of the law, and distorts outcomes in favor of those who write the contracts, who get to pick the arbitration forum they prefer. Forced arbitration thereby enables an incredibly broad range of harmful and illegal practices—from sexual harassment and assault to illegal discrimination, from wage theft to consumer-protection and antitrust violations—to go both unnoticed and unpunished.

Third, the biggest problem with forced arbitration is not simply that it's a biased or unfair process—it's that it kills most people's claims entirely. If you remember only one thing from this hearing, I hope it is this: Forced arbitration does not do what its proponents claim it does. It doesn't channel claims into an alternative system that's better, faster, or cheaper at resolving disputes. Instead,

under forced arbitration, claims of American consumers and workers simply disappear, cutting off compensation and deterrence as well as public accountability and the development of the law itself.

One way to see this empirically is to ask what consumers actually get out of arbitration. It should be no surprise that few consumers with low-value claims successfully advocate for themselves when forced to seek individual relief. But you might be surprised at how few. Of the hundreds of millions of consumers that interact with banks, credit cards, student loans, payday loans, debt collectors, and other companies, how many do you think have won affirmative relief on claims of \$1,000 or less in arbitration? A comprehensive study by the Consumer Financial Protection Bureau found that in 2010 and 2011, for the nation's leading arbitration forum (the American Arbitration Association), the number was just four.

Not four million, not 400,000, not even 400. Just four.

These numbers expose the efficiency arguments for forced arbitration of consumer claims as nothing more than a bad joke. By contrast, between 2008 and 2012, the CFPB, at least thirty-four million consumers of the same universe of companies received compensation through class actions. Four hundred twenty-two consumer financial class-action settlements garnered more than \$2 billion in cash relief for consumers and more than \$600 million in in-kind relief. Those numbers don't capture the additional benefits of industry-changing injunctions and deterrence of future bad practices. One case study comparing outcomes for consumers who had been swindled by banks through overdraft fees found that those without arbitration clauses were able collectively to recover hundreds of millions of dollars. Because the defendant was a bank, that money was deposited straight into the consumers' bank accounts. Meanwhile, while those facing enforceable arbitration clauses won back nothing.

Based on this kind of empirical comparison, we can recognize forced arbitration for what it is: A mechanism that quietly transfers giant amounts of wealth from poor to rich. You can see the same phenomenon play out when you look at how forced arbitration affects a range of wage-theft, consumer-protection, and antitrust claims—to name just a few examples.

Finally, forced arbitration is only possible because unelected federal judges have twisted the original intent of a law passed by Congress in 1925—which means that Congress has the power to fix the problem now.

In the 1920s, when the Federal Arbitration Act was passed, some legislators expressed concern that arbitration might let “the powerful people . . . come in and take away the rights of the weaker ones.” The architects of the FAA assured them this wasn't the case: “It is not intended this shall be an Act referring to labor disputes, at all. It is purely an Act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.” The Federal Arbitration Act expressly excludes all employment contracts from its reach, providing that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”

For much of the 20th century, arbitration under the FAA worked as Congress had intended: to resolve the garden-variety contractual disputes that arise between businesses. Federal statutory claims were categorically beyond the FAA's reach, as were all claims brought by workers and all claims in State court. The insertion of arbitration clauses into mass contracts with consumers or workers was unheard of. It wasn't until the 1980s and '90s that the Supreme Court even allowed federal statutory claims into arbitration. When it did so, it was always careful to insist on a critical “effective vindication” principle: Arbitration was permissible only so long as it didn't interfere with the parties' ability to effectively vindicate their Substantive rights. Remarkably, that limiting principle makes no appearance in the Supreme Court's most recent opinions. This essential limit—which was supposed to preserve the legitimacy of arbitrating statutory claims in the first place—now appears to have vanished entirely, without a trace.

I.

Forced arbitration is unavoidable. Forced arbitration clauses are everywhere, and they ensnare us in all facets of our lives, robbing us of our legal rights as consumers, as workers, as patients, as investors, and as small business owners. Amazon, AT&T, Comcast, Wells Fargo, Ticketmaster, Dropbox, Goldman Sachs, P.F. Chang's, and Uber are just some of the many companies that have modified their contracts with consumers or workers to include these terms.¹ Whether you're taking

¹ See generally Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration To Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309 (2015);

out a student loan or checking a loved one into a nursing home, forced arbitration is a fact of life.

The most comprehensive (and congressionally mandated) study of the prevalence and effects of arbitration found that over 83% of prepaid cards, 86% of private student loans, 88% of mobile wireless contracts, and 99% of storefront payday loans are now subject to forced arbitration.² Over 85% of contracts with arbitration clauses include class action bans.³ Market concentration, meanwhile, magnifies the effects. For example, although only 16% of credit card issuers include arbitration provisions in their contracts, over 50% of credit card debt is outstanding are subject to them.⁴ Were it not for an antitrust settlement requiring certain credit card issuers to drop their arbitration provisions, the share of debt subject to arbitration would have been 94%.⁵

Existing inequality both reflects and facilitates the growing prevalence of forced arbitration clauses. Economic concentration has handed a relatively small number of firms outsized influence over the contractual terms that govern most transactions. For example, Comcast and TimeWarner together control at least 57% of the national broadband market, and around 63% of Americans live in areas where they can choose only between these two providers.⁶ Some cities—including Boston and the Twin Cities—are served by only one company, leaving residents with no choice at all.⁷ One or two companies, as a result, now set the contractual terms for a significant share of U.S. broadband consumers. The same is increasingly true of local hospitals, commercial banks, and airlines, to name a few. Under such diminished competition, consumers have no bargaining power and largely sign contracts on a take-it-or-leave-it basis.

Taking a job in America also increasingly requires waiving your legal rights. Last year, the Economic Policy Institute estimated that more than half of nonunion private-sector employees in the United States are already subject to mandatory arbitration.⁸ That's roughly 60 million American workers—and that number has been climbing each year. Forced arbitration is more common in low-wage workplaces and among larger employers; it is also more common in industries that are disproportionately composed of women and in industries that are disproportionately composed of African-American workers.⁹

II.

Forced arbitration is deeply unpopular—and that sentiment is overwhelmingly bipartisan. Forced arbitration is still poorly understood by the public, which is why hearings like this are so important. When Americans are asked about what's happening in the fine print, their opinion comes through loud and clear.

One national survey from earlier this year showed that a whopping 84% of American voters support federal legislation to end forced arbitration for consumers and employees.¹⁰ And that support was overwhelmingly bipartisan, representing the view of 80% or more of Republicans, Democrats, and independents surveyed. Eighty-three percent of Democrats and 84% of Republicans polled strongly believe that consumers should have a choice between court and arbitration. Moreover, six in ten Americans understand that arbitration requirements mainly benefit corporations

Lina Khan, *Thrown Out of Court*, WASH. MONTHLY, June/July/Aug. 2014, http://www.washingtonmonthly.com/magazine/junejulyaugust_2014/features/thrown_out_of_court050661.php.

² Consumer Financial Protection Bureau, Arbitration Study, § 2, at 8 (2015) (“CFPB Study”).

³ CFPB Study, § 2, at 8.

⁴ *Id.*

⁵ *Id.* at § 2, at 9–11.

⁶ Shalini Ramachandran, *New FCC Broadband Benchmark Lifts Comcast's Share to Nearly 60%*, WALL ST. J. (Jan. 29, 2015, 5:17 p.m.), <http://blogs.wsj.com/corporate-intelligence/2015/01/29/comcast-bulks-up-on-broadband>. Others estimate their joint share could be as high as 75%. See William Conlow, *Quantifying Comcast's Monopoly Power*, TECHDIRT (Aug. 1, 2014), <https://www.techdirt.com/articles/20140726/10180428015/quantifying-comcasts-monopoly-power.shtml>.

⁷ Kate Cox, *Here's What the Lack of Broadband Competition Looks Like on a Map*, CONSUMERIST (Mar. 7, 2014), <http://consumerist.com/2014/03/07/heres-what-lack-of-broadband-competition-looks-like-in-map-form>.

⁸ Alexander J.S. Colvin, *The growing use of mandatory arbitration: Access to the courts is now barred for more than 60 million American workers*, ECONOMIC POLICY INSTITUTE (April 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>.

⁹ *Id.*

¹⁰ *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>.

over consumers or employees, and seven in ten oppose the ability of a company to select the arbitrator. A GOP polling firm found that substantial majorities of Republicans, independents, and Democrats alike supported action to limit forced arbitration of consumer contracts.¹¹ The evidence also suggests that forced arbitration is growing increasingly unpopular—perhaps as a result of increased public attention in the wake of the #MeToo movement and various financial scandals.¹²

III.

The main purpose and effect of forced arbitration is to kill people’s legal claims—plain and simple. If you have only one takeaway from this hearing, I hope it is this: The biggest problem with forced arbitration is that it kills people’s claims. Contrary to what forced arbitration’s proponents would have you believe, it doesn’t channel claims into an alternative system that’s better, faster, or cheaper at resolving individual disputes. Instead, under forced arbitration, the small-dollar claims of American consumers and workers simply disappear.

To see this in action, consider how forced arbitration plays out in three different areas: Wage-and-hour law, consumer law, and antitrust. In each area, the evidence shows that arbitration functions to transfer wealth upwards from individuals to those who draft the arbitration clauses.¹³

Wage theft. The growing prevalence of forced arbitration clauses in employee contracts decimates workers’ ability to hold their employers accountable for labor violations. At a time when, according to federal and State officials, “more companies are violating wage laws than ever before,”¹⁴ workers have found themselves increasingly unable to recover stolen wages from their employers.¹⁵

Wage theft occurs in several forms, and employers sometimes engage in multiple types of violation simultaneously. Some employers pay workers less than the legally required minimum wage, fail to pay workers legally required rates for overtime work, or wrongfully deduct pay. In other cases, employers commit “off-the-clock” violations, requiring workers to come in early or stay late while failing to compensate them for that additional time. Laws against wage theft are massively under-enforced,¹⁶ which means that joining a collective lawsuit is frequently a worker’s only means to recover money they earned but were never paid. Forced arbitration clauses and class action bans block this vital path for redress, enabling employers to steal workers’ wages with impunity.¹⁷ Because wage theft is already regressive, practices that enable it, like forced arbitration clauses, transfer wealth away from workers and towards big companies.

Experts estimate the sum of wages stolen nationally to be as high as \$50 billion a year, “a transfer from low-income employees to business owners that worsens income inequality.”¹⁸ In Los Angeles, for example, low-wage workers lose \$26.2 million in wage theft violations every week, or \$1.4 billion annually.¹⁹ In New York, meanwhile, wage theft is estimated to cheat 2.1 million workers across the State out of

¹¹ Sylvan Lane, *GOP polling firm: Bipartisan support for consumer bureau arbitration rule*, THE HILL, Oct. 5, 2017, <http://thehill.com/policy/finance/354143-gop-polling-firm-finds-bipartisan-support-for-consumer-bureau-arbitration-rule>.

¹² A poll of likely voters before the 2016 election found that 75% supported the right of bank customers to take complaints to court, rather than being forced into private arbitration. Americans for Financial Reform & Center for Responsible Lending, 1,000 Likely 2016 National Voters, Lake Research Partners (2015), <http://ourfinancialsecurity.org/wp-content/uploads/2015/07/Toplines.AFRCLpublic.070715.pdf>.

¹³ The following discussion is adapted from Deepak Gupta & Lina Kahn, *Arbitration as Wealth Transfer*, 35 Yale L. & Pol’y. Rev. 499 (2017), <https://ylpr.yale.edu/arbitration-wealth-transfer>.

¹⁴ Steven Greenhouse, *More Workers are Claiming “Wage Theft,”* N.Y. TIMES, Aug. 31, 2014, <http://www.nytimes.com/2014/09/01/business/more-workers-are-claiming-wage-theft.html>.

¹⁵ Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft is Costing Workers Hundreds of Millions of Dollars a Year*, Econ. Pol’y Inst. (Sept. 11, 2014), <http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds>.

¹⁶ *Winning Wage Justice: An Advocate’s Guide to State and City Policies to Fight Wage Theft*, Nat’l Emp’t Law Project 17–18 (Jan. 2011), <http://www.nelp.org/content/uploads/2015/03/WinningWageJustice2011.pdf>.

¹⁷ It is worth noting that some low-wage employers do not provide workers with contracts at all. These workers—usually the most vulnerable to wage theft—are therefore not directly affected by forced arbitration clauses and class action bans. The trend may still affect these workers in a broader sense, given that these contractual terms promote and normalize a general culture of impunity.

¹⁸ Meixell & Eisenbrey, *supra*.

¹⁹ Ruth Milkman *et al.*, *Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment and Labor Law for Low-Wage Workers*, INSTIT. FOR RESEARCH ON LABOR AND EMP’T (2010), <http://www.labor.ucla.edu/downloads/wage-theft-and-workplace-violations-in-los-angeles-2>.

a cumulative \$3.2 billion in wages and benefits.²⁰ Nor is the phenomenon isolated to a handful of firms or industries. A 2009 study that surveyed more than 4,000 workers in low-wage industries found that 76% had been underpaid or not paid at all for their overtime hours.²¹ The report found that wage theft is prevalent across sectors—including retail, restaurants and grocery stores, domestic work, manufacturing, construction, janitorial, security, dry cleaning, laundry, car washes, and nail salons.²²

Through class action lawsuits, workers have recovered millions of dollars in unpaid wages from their employers. In 2009, for example, Walmart agreed to pay \$40 million in unpaid wages as part of a settlement with thousands of former and current employees.²³ To resolve a class action dispute, Staples paid \$42 million in back pay to its assistant store managers,²⁴ and Schneider Logistics paid \$21 million to its workers.²⁵ In other recent examples, New Jersey truck drivers filed suit and recovered \$2 million in back wages,²⁶ New York car wash workers \$3.5 million,²⁷ and cheerleaders for the Oakland raiders \$1.25 million.²⁸

Once a company introduces a forced arbitration clause with a class action ban, these suits vanish. A worker's only chance at recourse then is individual arbitration, which studies suggest is stacked against workers. For example, a 2011 study found that employees win in arbitration far less often than in employment litigation trials, and that when employees do win, their average awards were "substantially lower" in arbitration than in court.²⁹ This in itself suggests that forced arbitration in the employee context transfers wealth upwards.

Yet comparing outcomes in litigation and arbitration actually underestimates the regressive effect, since it fails to capture individuals dissuaded from initiating action altogether. This sort of "claim suppression" is a primary effect of forced arbitration and class action bans.³⁰ Although some commentators argue that arbitration offers employees a more accessible venue for redress than litigation,³¹ "empirical evidence now shows that mandatory employment arbitration is bringing about the opposite result—eroding rather than boosting employees' access to justice by suppressing employees' ability to file claims."³² This evidence reveals that employees covered by forced arbitration provisions "almost never file arbitration claims."³³

As a result, the class action recoveries workers obtained even a few years ago are increasingly out of reach. Fewer workers file suit at all, and the claims of those who

²⁰ Aditi Sen, *By a Thousand Cuts: The Complex Face of Wage Theft in New York*, Ctr. for Popular Democracy (2015), <http://populardemocracy.org/sites/default/files/WageTheft%2011162015%20Web.pdf>.

²¹ Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in American Cities*, UNPROTECTED WORKERS, http://www.unprotectedworkers.org/index.php/broken_laws/index (last visited Jan. 11, 2016).

²² *Id.*

²³ Dave Copeland, *Wal-Mart Will Pay \$40m to Workers*, BOSTON.COM (Dec. 3, 2009), http://www.boston.com/news/local/massachusetts/articles/2009/12/03/wal_mart_will_pay_40m_to_workers.

²⁴ Donna Goodison, *Staples to Pay \$42m to Settle Wage Claims* (Jan. 30, 2010), http://news.bostonherald.com/business/general/view/20100130staples_to_pay_42m_to_settle_wage_claims.

²⁵ *Carrillo v. Schneider Logistics*, 823 F. Supp. 2d 1040 (C.D. Cal. 2011).

²⁶ Erik Ortiz, *Raymour & Flanigan Drivers Get \$2m for OT* (July 8, 2009), http://www.pressofatlanticcity.com/business/article_394857c209233c-517c-9dd2-fcf148daac8c.html.

²⁷ Libby Nelson, *Car Wash Chain to Pay \$3.4 Million in Back Wages*, N.Y. TIMES (June 30, 2009, 4:38 p.m.), <http://cityroom.blogs.nytimes.com/2009/06/30/car-wash-chain-will-pay-34-million-in-back-wages/>.

²⁸ Robin Abcarian, *Cheerleaders' Wage-Theft Lawsuit to Cost Oakland Raiders \$1.25 Million*, L.A. TIMES (Sept. 4, 2014), <http://www.latimes.com/local/abcarian/la-me-ra-raiders-settle-cheerleader-lawsuit-20140904-column.html>.

²⁹ Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011).

³⁰ As David S. Schwartz writes, "[t]he compelling logic of what is commonly called 'mandatory arbitration' is that it is intended to suppress claims," and "[n]othing is more claim-suppressing than a ban on class actions, particularly in cases where the economics of disputing make pursuit of individual cases irrational." David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 240, 242 (2012). See also Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015) ("The result has been the mass production of arbitration clauses without a mass of arbitrations. Although hundreds of millions of consumers and employees are obliged to use arbitration as their remedy, almost none do so—rendering arbitration not a vindication but an unconstitutional evisceration of statutory and common law rights").

³¹ See, e.g., Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001).

³² Sternlight, *supra*, at 1312.

³³ *Id.*

do are usually dismissed.³⁴ Employers annually steal, and will continue to steal, billions of dollars from workers—yet arbitration clauses will keep workers from claiming any of it back.

Consumer claims. Research shows that forced arbitration is widespread across consumer markets, in industries ranging from nursing homes and online retail to auto dealers and cell phone providers. For insight into the effects of arbitration in consumer markets, look to the CFPB's March 2015 study. Their report is based on filings with the American Arbitration Association (AAA), which administers the vast majority of consumer financial arbitration cases. Although the report examines just one segment of the economy, it is by far the most comprehensive empirical study to date on outcomes in consumer arbitration.

The CFPB found that a large share of financial products and services are now subject to forced arbitration, including 44% of checking accounts, 83% of prepaid cards, 86% of private student loans, 88% of mobile wireless contracts, and 99% of storefront payday loans.³⁵ Over 85% of contracts with arbitration clauses include class action bans. Market concentration, meanwhile, magnifies the effects. For example, although only 16% of credit card issuers include arbitration provisions in their contracts, over 50% of credit card loans outstanding are subject to them.³⁶ Were it not for an antitrust settlement requiring certain credit card issuers to drop their arbitration provisions, the share of loans subject to arbitration would be 94%.³⁷

This rise of forced arbitration eliminates what had been a key means of consumer redress. Between 2008 and 2012, 422 consumer financial class action settlements garnered more than \$2 billion in cash relief for consumers and more than \$600 million in in-kind relief.³⁸ These figures underestimate the consumer benefit generated by these class action suits, given that several settlements also required companies to change their business practices. As the CFPB notes, cases “seldom provided complete or even any quantification of the value of this kind of behavioral relief.”³⁹ Nor does monetary relief capture the deterrence value of class action suits, the threat of which can serve as a powerful check on corporate wrongdoing.

So how do consumers fare under the new regime? Although it can be difficult to compare litigation and arbitration outcomes, the CFPB's report includes a case study that resembles a controlled-experiment comparison. The study examines outcomes in a multidistrict class action, filed against twenty-three banks for illegally charging consumers millions of dollars in excessive overdraft fees.⁴⁰ In total, debit cardholders reached eighteen settlements through the litigation, resulting in \$1 billion in cash relief for over twenty-eight million consumers. Not all account holders were able to join the class, however, because nine of the twelve banks with arbitration clauses moved to enforce them. Five of the banks succeeded, getting their cases moved to arbitration, while four eventually chose to settle, giving individuals the chance to opt-out and arbitrate instead. As of February 2015, CFPB could not verify that even a single one of the consumers who had pursued claims in arbitration—either by choice or because banks had forced them to arbitrate—received any relief at all.⁴¹ In a class action against one of the banks that had forced arbitration, the arbitrator dismissed the consumers' contract and tort claims, and they were awaiting an answer on their federal statutory claims.⁴² Of the 242 opt-outs, no more than three consumers brought overdraft claims before an arbitrator, and zero were successful.⁴³ Meanwhile, the twenty-eight million consumers who had secured settlements through litigation saw money transferred directly to their bank accounts.⁴⁴

Because information on both the opt-outs and those forced to arbitrate is incomplete, we cannot say with total certainty that those who pursued arbitration received no money at all. The thirty-two consumers who won money awards from AAA

³⁴ *Id.*

³⁵ CFPB Study, § 2, at 8.

³⁶ *Id.* at § 2, at 10.

³⁷ *Id.* at § 2, at 9–11.

³⁸ *Id.* at § 1, at 16.

³⁹ *Id.*

⁴⁰ *Id.* at § 8, at 39–46 (discussing *In Re Checking Account Overdraft Litig.*, MDL 2036. 685 F.3d 1269 (11th Cir. 2012)).

⁴¹ Specifically, 173 consumers opted out of the settlement with Chase, thirty-four opted out of the settlement with M&I, and thirty-five opted out of the settlement with Compass Bank. *Id.* at App. A, at 108–09.

⁴² *Id.* at § 5, at 86–87.

⁴³ “No more than three” because CFPB does not know precisely whether the three opt-outs that did go on to file claims through arbitration had been involved in the overdraft litigation specifically, or some other class action suit. *Id.* at App. A, at 104.

⁴⁴ *Id.* at § 8, at 40 & 45–46.

arbitrators in 2010 and 2011 *could* have included victims of unfair overdraft fee practices. But even the most generous reading of these outcomes strongly suggests that arbitration is worse at achieving justice for wronged consumers than is class action litigation. That a maximum of *three* of the 242 opt-outs attempted to arbitrate, too, suggests that forced arbitration suppresses claims.⁴⁵

Moreover, arbitration seems to favor businesses over consumers not just relative to litigation, but in an absolute sense. The CFPB found that, within arbitration, companies are far more successful than consumers. According to the Bureau's report, businesses won relief in 93% of the business-initiated cases in which arbitrators reached a decision on the merits. In the disputes that businesses won, they received ninety-eight cents for every dollar they had claimed; taking into account the disputes where they lost, they recovered ninety-one cents for every dollar claimed. In disputes initiated by consumers, by contrast, arbitrators provided relief to consumers in 27% of cases and awarded them an average of forty-seven cents for every dollar claimed. Among consumer-initiated disputes as a whole, consumers won an average of thirteen cents for every dollar they had claimed.⁴⁶ While a host of factors may account for the disparity in outcomes, it is clear that businesses are more often satisfied with arbitrator decisions than are consumers.

The distributive implications of forced arbitration in consumer finance seem clear. As more cases are diverted into arbitration, consumers will likely win at lower rates and receive lower sums than they would through class action litigation. The cost of wronging consumers—whether by design or through negligence—will drop, given that consumers pursue claims through arbitration at far lower rates than they do through litigation, and those arbitration claims that are filed are less often successful. Moreover, because arbitration proceedings are private, businesses shed the risk of reputational damage. So long as wrongful acts are sufficiently lucrative, firms can build in the occasional arbitration payment as a cost of doing business. As financial institutions can acquire greater sums from consumers with greater impunity, wealth is transferred upwards.

Forced consumer arbitration has especially pernicious distributive effects given that the primary users of payday loans and prepaid cards—which include arbitration clauses at particularly high rates—are low-income consumers. This suggests that those most vulnerable to exploitation by financial institutions are the most likely to be deprived of effective means of redress.

Antitrust. One area of law especially vulnerable to the preclusive effects of arbitration is antitrust. A primary example of this dynamic was at play in *Italian Colors*, the Supreme Court case in which a small business owner alleged that American Express was illegally abusing its market power. Troublingly, firms that possess monopoly power can enact a sort of “double punch” by imposing arbitration terms that insulate their abuse of that same power. As Justice Kagan warned in her dissent in that case, “The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.”⁴⁷ In this way, “a company could use its monopoly power to protect its monopoly power, by coercing agreement to contractual terms eliminating its antitrust liability.”⁴⁸

In *Italian Colors*, American Express achieved just that, by coupling a forced arbitration clause with a class action ban. Because proving antitrust damages today requires costly economic analysis, private plaintiffs generally cannot bring suits unless they can split expenses, be it through joining as a class or sharing costs some other way. Since American Express had effectively prohibited all cost-sharing arrangements, upholding the arbitration clause would deprive the plaintiff of any economically viable way to pursue a claim. By ruling for American Express, the Supreme Court handed firms a tool to deflect private antitrust suits—a gift for monopolistic

⁴⁵ Anecdotes suggest that defense lawyers recognize the suppressive effect of arbitration clauses. As a recent news story reported, “[Lawyers believe] they may have found, in the words of one law firm, the ‘silver bullet’ for killing off legal challenges. In an industry podcast, two lawyers discussed the benefits of using arbitration to quash consumers’ lawsuits. The tactic, they said, is emerging at an opportune time, given that debt collectors are being sued for violating federal law. The beauty of the clauses, the lawyers said, is that often the lawsuit ‘simply goes away.’” Jessica Silver-Greenberg & Michael Corkery, *Sued Over Old Debt, and Blocked From Suing Back*, N.Y. TIMES, Dec. 22, 2015, <http://www.nytimes.com/2015/12/23/business/dealbook/sued-over-old-debt-and-blocked-from-suing-back.html>.

⁴⁶ These figures exclude cases in which consumers were disputing debts they were alleged to owe. Including outcomes in those disputes, consumers won some form of relief in 20% of cases and recovered an average of twelve cents for every dollar they claimed. CFPB Study, *supra*, at §5, at 41–45.

⁴⁷ *Italian Colors*, 133 S. Ct. at 2313 (Kagan, J., dissenting).

⁴⁸ *Id.* at 2314.

companies, who can use their market power to impose contractual terms that shield abuses of that same market power from liability.

Two consequences stand out: First, antitrust enforcement suffers as a whole, and second, this erosion of antitrust enforcement transfers wealth from low-income to high-income individuals.

Although the Court’s holding enables firms to deflect only private suits, there’s sound reason to think that a fall-off in private claims will injure enforcement as a whole. For one, private litigation has been a traditional mainstay of antitrust enforcement. Indeed, Congress designed the antitrust statutes in order to promote private suits, not only creating a private right of action but also awarding private parties treble damages and injunctive relief. As the Court has noted, Congress created these private rights “not merely to provide private relief” but “to serve as well the high purpose of enforcing the antitrust laws.”⁴⁹ Moreover, “Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws.”⁵⁰ Furthermore, private and public enforcement often work in conjunction, as public officials draw on information revealed through private suits to build their own cases.⁵¹ Anemic private enforcement undermines the antitrust statutes as a whole.⁵²

Weaker antitrust, in turn, exacerbates economic inequality by enabling wealth transfers from consumers, workers, and small businesses to the executives and shareholders of large corporations. While the connection between extreme market concentration and wealth distribution has been overlooked for decades, the current inequality crisis is drawing new attention to the ways in which undue market power transfers wealth upwards.⁵³

Abuse of market power contributes to inequality in a number of ways. Most obviously, monopolistic and oligopolistic firms often hike consumer prices. For example, a host of studies documents how consolidation across the healthcare industry has enabled hospitals, health insurers, and pharmaceutical companies to charge consumers more for the same goods and services.⁵⁴ Businesses also use their dominance to suppress workers’ wages. In 2006, for instance, around 20,000 registered nurses filed a class action suit alleging that hospitals in and around Detroit had colluded to keep their wages low. Three hospitals settled for more than a combined \$48 million; litigation against a fourth is still pending. Similarly, in 2010, a group of high-tech companies—including Adobe, Apple, Google, Intel, Intui, and Pixar—were found to have squashed competition by agreeing not to poach or solicit each other’s employees. Four of the firms ultimately settled a private suit for \$415 million, providing relief to 64,000 software engineers. Lastly, firms with monopoly power can extract wealth from smaller businesses. *Italian Colors* originated in a suit brought by Alan Carlson, the owner of a family restaurant in Oakland, California, who alleged that American Express had been using its monopoly power in premium and corporate credit cards to force merchants to accept ordinary cards at much higher rates than what rivals charged. An economist analyzing the excess fees charged to the *Italian Colors* plaintiffs estimated that the company’s tactics cost Carlson’s restaurant nearly \$500 a year—a transfer of income from his small business to American Express.⁵⁵

⁴⁹ *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 130–31 (1969).

⁵⁰ *Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co.*, 381 U.S. 311, 318 (1965).

⁵¹ Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1 (2013).

⁵² Einer Elhauge, *How Italian Colors Guts Private Antitrust Enforcement by Replacing It With Ineffective Forms of Arbitration*, 38 FORDHAM INT’L L.J. 771 (2015).

⁵³ See, e.g., Khan & Vaheesan, *supra*; Robert Reich, *The Political Roots of Widening Inequality*, AM. PROSPECT (Spring 2015), <http://prospect.org/article/political-roots-widening-inequality>; ROBERT REICH, *SAVING CAPITALISM: FOR THE MANY, NOT THE FEW* (2015); Dave Dayen, *Bring Back Antitrust*, AM. PROSPECT (Fall 2015), <http://prospect.org/article/bring-back-antitrust-0>; Jason Furman & Peter Orszag, *A Firm-Level Perspective on the Role of Rents in the Rise in Inequality*, NAT’L BUREAU OF ECON. RESEARCH, Oct. 16, 2015; Paul Krugman, *Challenging the Oligarchy*, N.Y. REVIEW OF BOOKS, Dec. 17, 2015, <http://www.nybooks.com/articles/2015/12/17/robert-reich-challenging-oligarchy/> (reviewing Robert Reich’s *Saving Capitalism: For the Many, Not the Few*).

⁵⁴ Zack Cooper et al., *The Price Ain’t Right? Hospital Prices and Health Spending on the Privately Insured*, HEALTH CARE PRICING PROJECT, Dec. 2015; Leemore Dafny et al., *More Insurers Lower Premiums: Evidence From Initial Pricing in the Health Insurance Marketplaces*, NAT’L BUREAU OF ECON. RESEARCH, Working Paper No. 20140, May 2014.

⁵⁵ Joint App. at 96, *Italian Colors*, 133 S. Ct. 2304 (2013) (No. 12–133), available at <http://guptaawessler.com/wp-content/uploads/2012/05/12-133ja.pdf>. While Carlson’s complaint focused on the swipe fee costs incurred by merchants—and hence the transfer of wealth from small businesses to credit card companies—the swipe fee system more generally institutes a systemic wealth transfer from low-income to high-income consumers. This is because credit card

Since forced arbitration clauses and class action bans tend to preclude private antitrust suits, the rise of arbitration will enable firms with monopolistic power to abuse that power with greater impunity. Insofar as anticompetitive behavior transfers income from consumers, workers, and small businesses to the owners and managers of larger firms, the expansion of arbitration will lead to regressive wealth distribution.

IV.

Forced arbitration is only possible because unelected judges have twisted the original intent of a law passed by Congress in 1925. Until the 1920s federal courts generally refused to enforce arbitration agreements. But in the early decades of the century, as the number of corporate transactions—and, by extension, disputes—grew, businesses wanted to give legal effect to arbitration agreements reached by businesses that wanted to keep their mutual disputes out of court.⁵⁶ Arguing that arbitration would relieve congested courts, business interests lobbied Congress to let them set up private solutions that would be faster and cheaper than public courts.

When officials expressed concern that arbitration would let “the powerful people . . . come in and take away the rights of the weaker ones,” supporters of arbitration legislation assured them that the device would be used only between consenting merchants of roughly equal bargaining power—not against workers or consumers.⁵⁷ The Federal Arbitration Act (FAA) passed Congress in 1925, expressly excluding workers from its reach.

For much of the twentieth century, arbitration largely worked as Congress had intended: To resolve the sorts of fact-based contractual disputes that arise between businesses in the course of routine transactions—concerning whether a party had complied with the terms of payment, for example, or delivered goods at the right place and right time.⁵⁸ Federal statutory claims were categorically outside the FAA’s reach, as were all claims brought by workers and all claims brought in State court. The insertion of arbitration clauses into mass contracts with consumers or workers was unheard of.

Starting in the 1980s, however, the U.S. Supreme Court issued a series of decisions that would begin to steer us down an entirely new path. One key moment came in 1983, when the Court declared that the FAA reflected a “federal policy favoring arbitration.”⁵⁹ The idea that Congress had intended arbitration as preferable to courts, rather than just as an alternative, was not founded in legislative history.⁶⁰ Still, the Court’s language suggested as much, and future judges would lean on it as they razed the walls that had kept arbitration in its place.

Two successive decisions cemented what might have been a quirky deviation into a major turning point. In 1984, the Supreme Court heard a case brought in California by 7–Eleven franchisees against their parent company, Southland, which had included in their contracts a binding arbitration clause.⁶¹ California outlawed these clauses, recognizing that franchisees usually lacked power to negotiate these terms. Yet Southland argued that its contract overrode State law. Drawing on the Court’s interpretation from the previous year—that Congress had intended a “federal policy favoring arbitration”—a 7–2 majority on the Supreme Court ruled for Southland, eroding the power of states to limit how companies use arbitration.

In a striking dissent, Justice Sandra Day O’Connor criticized the majority for ignoring legislative history. “Today’s decision is unfaithful to congressional intent, un-

use is strongly correlated with consumer income, and merchants pass on swipe fees in the form of higher retail prices to all customers. Cash buyers therefore end up subsidizing the cost of credit cards, while lacking access to the rewards and financial perks that credit card users enjoy. The Boston Federal Reserve estimates that the swipe fee system generates a yearly transfer of \$1,282 from the average cash payer to the average card payer. Scott Schuh *et al.*, *Who Gains and Who Loses From Credit Card Payments?: Theory and Calibrations*, FED. RESERVE BANK OF BOSTON PUB. POL’Y PAPER, No. 10–03, Aug. 31, 2010, <https://www.bostonfed.org/economic/ppdp/2010/ppdp1003.pdf>.

⁵⁶ Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006); IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* (Carolina Academic Press ed., 2013).

⁵⁷ *Moses*, *supra*, at 106–107.

⁵⁸ *Id.* at 111.

⁵⁹ *Moses H. Cone Mem’l. Hosp. v. Mercury Constr.*, 460 U.S. 1 (1983).

⁶⁰ *Moses*, *supra*.

⁶¹ *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

necessary, and . . . inexplicable,” she wrote. “Although arbitration is a worthy alternative to litigation, today’s exercise in judicial revisionism goes too far.”⁶²

It would soon go farther. In 1985, the Supreme Court heard *Mitsubishi v. Soler Chrysler-Plymouth*, a case in which a car dealer had sued the Japanese firm for violating antitrust laws, and Mitsubishi had pushed to arbitrate.⁶³ The car dealer noted that the FAA allowed companies to use arbitration only to settle disputes about contracts they had written, not to interpret laws Congress had passed, like the Sherman Antitrust Act. A five-justice majority—continuing its recent pattern of pro-arbitration decisions—sided with Mitsubishi. Arbitrators could now Rule on actual statutory law—civil rights, labor protections, as well as antitrust—despite having no accountability or obligation to the public.

In a powerful dissent, Justice John Paul Stevens warned that there were great dangers in allowing “despotic decision-making,” as he called it, to extend to law like antitrust. “[Arbitration] is simply unacceptable when every error may have devastating consequences for important businesses in our national economy, and may undermine their ability to compete in world markets,” he wrote.⁶⁴

In the span of these three decisions, the Supreme Court had drastically enlarged the scope of arbitration. Against the backdrop of a movement claiming excessive lawsuits were strangling small businesses, courts would continue to expand the realms in which companies could compel arbitration. In the 1995 case *Allied-Bruce*, the Supreme Court permitted the use of arbitration clauses by companies in routine consumer contracts.⁶⁵ This prompted Justice O’Connor to remark that, “over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.”⁶⁶ In 2001, the Court ruled against a group of Circuit City workers, holding that employers could use arbitration clauses in contracts with employees despite statutory language to the contrary.⁶⁷ In 2004, a court ruled that arbitration clauses were enforceable against illiterate consumers;⁶⁸ a separate court ruled that they were enforceable even when a blind consumer had no knowledge of the agreement.⁶⁹

Yet the real watershed came in 2011, in *AT&T Mobility v. Concepcion*. Vincent and Liza Concepcion had sued AT&T in federal court in California, alleging that the company had engaged in false advertising by claiming that their wireless plan included free cell phones—a practice that had shortchanged millions of consumers out of about \$30 each. When they tried to litigate as a class, AT&T pointed to the fine print in their contract, which included a class action ban.

The Concepcions pointed out that class action bans violated California law. Many State and federal courts had forbidden class action bans, on the grounds that individuals often had no practical way to make a claim unless they joined with other plaintiffs to share the cost of litigating. Allowing companies to eliminate this right in “take-it-or-leave-it” contracts would effectively let corporations violate laws with little risk of accountability.

The district court and the U.S. Court of Appeals for the Ninth Circuit both ruled for the Concepcions, holding that AT&T’s terms were unconscionable and that nothing in the FAA preempted this arbitration-neutral Rule of State law.⁷⁰ When the case reached the Supreme Court, eight State attorneys general, as well as a group of civil rights organizations, consumer advocates, employee rights groups, and prominent law professors, weighed in, arguing that permitting class action bans would enable companies to evade entire realms of law. The Supreme Court, in a five

⁶²*Id.* at 36 (O’Connor, J., dissenting).

⁶³*Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

⁶⁴*Id.* at 657.

⁶⁵*Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

⁶⁶*Id.* at 283 (O’Connor, J., concurring).

⁶⁷*Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). *This decision is impossible to square with both the statutory text and legislative history.* As one of the FAA’s architects explained in 1923:

“It is not intended this shall be an Act referring to labor disputes, at all. It is purely an Act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.”

A Bill to Make Valid and Enforceable Written Provisions or Agreements for Arbitration, Hearing Before the Senate Judiciary Committee, 67th Cong. 9 (1923).

⁶⁸*Wash. Mut. Fin. Grp. v. Bailey*, 364 F.3d 260, 264–66 (5th Cir. 2004).

⁶⁹*Am. Gen. Fin. Servs., Inc. v. Griffin*, 327 F. Supp. 2d 678, 683 (N.D. Miss. 2004).

⁷⁰*Laster v. T-Mobile USA, Inc.*, No. 05CV1167DMS AJB, 2008 WL 5216255, at Cal. Aug. 11, 2008) *aff’d sub nom; Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009) *rev’d sub nom. AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

to four split, ruled that AT&T's contract was enforceable, opening the door for companies to ban class actions routinely in their fine print.

At this point, one limit on class action bans remained: if a ban eliminated the only way someone could bring a case, it would be unenforceable. But in 2013, the Supreme Court razed even this protection in a case pitting a group of small merchants—including Italian Colors, the family restaurant—against American Express.⁷¹ This time around, the same five-judge majority ruled that arbitration clauses containing class action bans were enforceable—even when it meant citizens had no way to “effectively vindicate” their rights and were left with no recourse. Even for antitrust laws designed to police the very market power that enables big companies to insert these clauses in the first place.

In *AT&T Mobility v. Concepcion* and *American Express v. Italian Colors*, the Supreme Court gave companies a green light to use arbitration clauses to cut off collective claims by both consumers and small businesses, under both State and federal law. The latest Supreme Court decision in this vein, *Epic Systems v. Lewis*, sweepingly extends this dangerous trend by blocking workers from banding together to redress the full range of workplace legal violations as well.

Just last month, Justice Ginsburg took the unusual step of repeating her call for Congress to take action to bring the Federal Arbitration Act back in line with its original intent. “Congressional correction of the Court’s elevation of the FAA over the rights of employees and consumers to Act in concert,” she warned, is “urgently in order.”⁷²

There was a time when reasonable people might have believed that forced arbitration for consumers and workers was worth allowing as an experiment in cheaper, faster dispute resolution. As Americans wake up to the spreading reality of forced arbitration, and as the #MeToo movement and financial scandals expose its pernicious effects, that time has long since passed. Now the only question is when and how we’re going to fix it. I urge you to support and enact legislation to end forced arbitration.

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

Mr. CICILLINE. Thank you.

The Chair now recognizes Mr. Ziober for 5 minutes.

TESTIMONY OF LIEUTENANT COMMANDER KEVIN ZIOBER

Lieutenant Ziober. Chairman Cicilline, Ranking Member Sensenbrenner, and other distinguished Members of the committee, thank you for the opportunity to testify today.

I am a Lieutenant Commander in the Navy Reserves and a Federal employee, but I am here in my private capacity to share my own story as a Reservist who was fired on the eve of my deployment to Afghanistan and later forced to arbitrate my discrimination claim when I returned home.

I am here to speak for tens of millions of workers who have been forced to agree to arbitration as a condition of employment. I am here asking this Congress to pass legislation to help give all workers a real choice to enforce their rights in court or in arbitration.

Forced arbitration takes away the rights of all Americans, women and men, people with disabilities, veterans, consumers, Republicans, Democrats, and Independents. As a registered Republican for most of my life, I hope both parties will work together to restore the legal rights of all Americans, which are often eviscerated by forced arbitration agreements.

I am very grateful to you, Chairman Cicilline, for your leadership in holding this hearing and your efforts to protect service Members from forced arbitration. Your bill, the Justice for Service Members Act, would simply clarify that service Members cannot be required

⁷¹*Italian Colors*, 133 S. Ct. at 2304.

⁷²*Lamp Plus v. Varela*, slip op at 5 (S. Ct. 2019) (Ginsburg, J., dissenting).

to arbitrate their employment claims under USERRA, the Federal law that guarantees civilian employees can take military leave and later return to their jobs.

I also want to thank Chairman Nadler for his leadership with the Restoring Justice for Workers Act, and Congressman Johnson for sponsoring the FAIR Act, and other Members of this Committee for your support with these important bills.

In 2008, I joined the Navy Reserves to fulfill my lifelong dream of serving my country. One challenge all Reservists face is balancing their military and civilian careers, as many Members of Congress know personally. Unfortunately, I learned the hard way that some employers do not support their Reservist employees.

In July 2010, I was hired by BLB Resources, a Federal contractor in Irvine, California. I worked hard helping BLB grow from a staff of 18 to over 90 employees. Six months into my tenure, BLB asked me and other employees to sign an arbitration agreement as a condition of keeping our jobs. Like other employees who needed their jobs to make ends meet, I felt that I had no choice but to sign.

In November 2012, I received orders to deploy to Afghanistan for 12 months. On my last day of work, my colleagues greeted me with a standing ovation. My office was decorated with camouflage netting and Navy-colored balloons. Cards and gifts were stacked on my desk.

At noon, BLB held a surprise party in my honor where 40 co-workers gathered to wish me well on my deployment. There was even a large cake with an American flag decorated in red, white, and blue with the inscription, "Best Wishes Kevin."

Around 4:45 p.m. that same afternoon, I was called into a meeting in the HR Department, where I was fired and told my position would not be available to me after my deployment. The shock of being terminated on the eve of my deployment to a combat zone created an unimaginable amount of concern and anxiety about how I would support myself and my family when I returned home. That is exactly why Congress enacted USERRA, so that no service member who is asked to leave their job to fight for our country would ever have to worry about fighting for their job when they returned home.

When my deployment ended in 2014, I tried to enforce my USERRA rights in Federal court, but BLB moved to compel arbitration, and the district judge told me I had to arbitrate my case. The Ninth Circuit later upheld that ruling because it felt that USERRA's text was not clear enough in banning forced arbitration.

Thankfully, my story did not end there. In 2017, when I asked the Supreme Court to hear my case, 20 Members of Congress from both parties filed an amicus brief asking the Court to uphold Congress' intent that USERRA bars forced arbitration. Although the Supreme Court declined to hear my case, bipartisan Members of Congress have expressed support for legislation to end forced arbitration for service Members and veterans in cases like mine. I hope that this Congress will Act to protect service Members, veterans, and all Americans from forced arbitration.

Arbitration takes away so many rights that make our legal system fair, the right to an impartial judge and jury, a public and transparent forum, fair and consistent procedural rules, and a

meaningful right to appeal. For me, the choice is easy. I prefer my day in court. Others may prefer arbitration. We all should get to make this choice freely and only after a dispute has occurred.

As a service member, I try to remember that our service is not for ourselves but for every American, and in my view, no American should be denied the choice to enforce their rights. Thank you.

[The statement of Lieutenant Ziober follows:]

STATEMENT OF LIEUTENANT COMMANDER KEVIN ZIOBER

Before the United States House Subcommittee on Antitrust, Commercial and Administrative Law May 16, 2019

Chairman Cicilline, Ranking Member Sensenbrenner, and other distinguished Members of the House Subcommittee on Antitrust, Commercial and Administrative Law, thank you for affording me the opportunity to testify about my experience with forced arbitration and encourage Congress to pass legislation to protect servicemembers, veterans, and all Americans from forced arbitration.

In 2016, I testified before the Senate Committee on Veterans' Affairs in support of the Justice for ServiceMembers Act of 2016, a bipartisan bill to clarify that servicemembers and veterans cannot be required to arbitrate their claims under the Uniformed Services Employment & Reemployment Rights Act ("USERRA"). USERRA is the federal law that has made it possible for millions of Americans to serve in the guard and reserves, because the law guarantees that civilian employees can take military leave and return to their civilian jobs, and be free of workplace discrimination and retaliation related to their military service. *See* 38 U.S.C. §§ 4301 *et seq.*

I offered similar testimony in April of 2019 in the Senate Judiciary Committee in a hearing organized by Chairman Lindsey Graham and Ranking Member Diane Feinstein. During that hearing, a bipartisan consensus appeared to emerge that arbitration has gotten out of control and is undermining the rights of every American under the important laws that this Congress has passed over the past century. I heard about my fellow Americans being subjected to outrageous conduct—harassment, physical assault, and fraud—only to have their rights stripped away by arbitration agreements when they had no meaningful or informed choice about whether to sign those agreements. I heard Members of the Senate on both sides of the aisle coming together to identify specific areas where forced arbitration should not be permitted, including for servicemembers and veterans, harassment, and other forms of discrimination, and calling for barring all forced arbitration so that workers and consumers can decide how to enforce their fundamental rights.

I am honored to speak again today in support of millions of servicemembers and veterans whose rights are being taken away by forced arbitration when they need to invoke USERRA or the Servicemembers Civil Relief Act ("SCRA").¹ I am also honored to speak about how forced arbitration is jeopardizing the rights of all American workers and consumers, and to urge all Members of Congress to come together to fix this growing problem.

I am proud to have served my country in the United States Navy for more than a decade. Like all service Members, I joined the military and continue to serve because I care deeply about protecting the American people and our nation. And that is why I am here today, to seek to protect millions of servicemembers and veterans and hundreds of millions of Americans whose fundamental rights are being undermined by forced arbitration.

I also appreciate the opportunity to tell my own personal story about how on my last day of work before a one-year deployment to Afghanistan, my employer threw an office-wide party to celebrate my military service, but then fired me just before my deployment training began in violation of federal law. Almost seven years later, in large part because of forced arbitration, I am still fighting to enforce my rights and seek justice. Sadly, my story is not unique. It happens every day across America, not only to servicemembers and veterans whose rights are violated, but also to working people and consumers of all backgrounds.

¹Today, I am sharing my own views as a private citizen about the importance of USERRA. I am not speaking on behalf of any other person or institution. I accepted this invitation to speak and am testifying in my personal capacity. The views expressed in my remarks are my own and do not necessarily reflect the official positions of the U.S. Government, the U.S. Navy, or the Department of Defense. I am speaking on my own behalf and have no affiliation with public or private entities. Nor do I seek any financial or political gain by participating in this hearing.

Forced arbitration takes away the rights of all Americans—women and men; people of all racial, ethnic, and religious backgrounds; people with disabilities; servicemembers and veterans; consumers who buy all types of products and services; Republicans, Democrats, and Independents.

I hope that both parties in Congress will work together to reform the federal arbitration law for the benefit of all Americans. Though I have been a registered Republican for the vast majority of my life, I want to see our elected leaders find common ground to protect the rights that make our lives better—like consumer protection, civil rights, and veterans' rights.

I would like to personally thank all of the Members of this Committee who have introduced or sponsored legislation to reform our federal laws so that servicemembers and veterans can have their day in court, and several of you who filed an *amici curiae* brief in my case before the U.S. Supreme Court to tell the justices that Congress always intended to protect servicemembers and veterans from forced arbitration under USERRA.

I would also like to thank the countless Members of Congress who have personally served in the Armed Forces or whose family Members have served in the Armed Forces, and all of the Members of Congress who work in a bipartisan fashion to ensure that military families get the support that they need and deserve. You know the sacrifices that servicemembers and their families routinely make so that America can remain safe and free, and you understand why our federal laws must protect those who have honorably served.

Balancing Civilian and Military Careers

I grew up in California and now live in Orange County, California. After graduating from the University of Southern California with a degree in business/finance, I worked in the commercial finance, mortgage banking, and real estate industries where I enjoyed the opportunity to manage teams in sales, operations, underwriting, and production.

As my civilian career developed, I realized that my life-long desire to serve my country in the Armed Forces would soon close, due to the military's 40-year-old age restriction. I've always respected the great sacrifices that our courageous servicemembers have made to defend our nation, especially after the September 11, 2001 terrorist attacks on our homeland.

In 2008, I joined the Navy Reserves to serve my country and help protect America's liberties, freedoms, and security. I chose to serve in the intelligence field, because I wanted to support those servicemembers on the front lines who literally sacrifice life and limb to keep America safe and defend our national security interests around the world.

On July 4, 2008, on the flight deck of the USS Midway, I was commissioned as an Ensign in the Navy Reserves. It was a dream come true, and one of the proudest moments of my life. In 2010, I was promoted to the rank of Lieutenant Junior Grade. In 2012, I was promoted to the rank of Lieutenant and deployed to Afghanistan. In 2018, I was promoted to the rank of Lieutenant Commander. In my current duties, I oversee the manning, training, and mobilization readiness of a 130-member Information Warfare unit in San Diego.

When I joined the Navy Reserves in 2008, I understood that like more than 1 million reservists² I would need to balance my civilian career with a military career. I understood that on a moment's notice I could be called to active duty for weeks, months, or even years, and that my military service could take me across the United States or half-way around the globe.

Like all reservists, I hoped that my future employers would support my military service and understand that by allowing me to take military leave from my civilian job they were literally making it possible for me to serve our country in the Armed Forces. And while I believe that most employers want to do the right thing and comply with USERRA, many employers find it inconvenient when their employees take military leave, and regrettably some employers even take adverse action against reservists—such as terminating them or refusing to reemploy them after their military service is over.

Even though this type of adverse action violates USERRA, many employers believe that reservists will simply move on to the next job without taking any action to enforce their rights. And increasingly employers are requiring reservists to en-

²See Congressional Research Service, *Reserve Component Personnel Issues: Questions and Answers* at 3 (Oct. 4, 2018) (stating that 1,036,644 Americans are Members of the Select Reserve or Individual Ready Reserve/Inactive National Guard as of July 31, 2018), available at <https://fas.org/sgp/crs/natsec/RL30802.pdf>.

force their rights in secret arbitration proceedings that are often overseen by arbitrators selected by employers with a limited opportunity for reservists to discover the key facts in their cases. These employers hope that the secrecy of arbitration will prevent the public from learning about how they have mistreated reservists or veterans, even if it means taking away many of the key rights that Congress has bestowed upon reservists since the 1940s.

Fired the Day Before I Began a Deployment to Afghanistan

In July 2010, I was hired as a manager by BLB Resources, Inc. (“BLB”), a federal contractor headquartered in Irvine, California. From 2010 to 2012, I worked hard and helped BLB to grow from a staff of 18 employees to a workforce of over 90. I enjoyed my work and took pride in it, and I planned to build a career at the company.

Six months into my tenure at BLB, the company asked me and other employees to sign several legal documents, including an arbitration agreement as a condition of keeping our jobs. Like other employees who needed their jobs to make ends meet, I felt that I had no choice but to sign the papers. I had no intention of losing my livelihood. Plus, things were going well for me at the company, I didn’t foresee any legal issues arising, and I didn’t want to cause any problems, so I signed the paperwork and I moved onto doing my job to the best of my ability.

In November 2012, I received official orders from the Navy to deploy to Afghanistan for 12 months. (I had been on a short list for a mobilization for more than a year, and during that time my employer was aware that I would likely be deployed.) On my last day of work on November 30, 2012, I was greeted by my colleagues with a standing round of applause. My personal office was decorated with camouflage netting and Navy colored balloons. Cards and gifts were stacked on my desk. At noon, BLB held a surprise party in my honor, where 40 of my co-workers gathered to wish me well on my deployment. There was even a large cake with an American flag decorated in red, white, and blue, with the inscription “Best Wishes Kevin.” A picture of that farewell cake is attached to my testimony as Exhibit A.

Right after the party, I felt amazing. I even called my family to tell them about how moved I was that my colleagues had honored me and my military service. Around 4:45 p.m. that same afternoon, I was summoned to a meeting in the company’s human resources department. I didn’t receive any advance notice of the meeting, so I didn’t know what it was about. When I walked into the room, I saw three people: The director of human resources, my direct supervisor, and another person who I believe was the company’s lawyer or employment consultant. I was fired on the spot and told that my position would not be waiting for me upon my return from active duty.

The shock of learning that I was being terminated from my job on the eve of my deployment to a combat zone created an unimaginable amount of concern and anxiety about how I would support myself and my family when I returned home. In the course of a few hours, I went from feeling supported, proud, and focused on serving my country, to feeling embarrassed, confused, and concerned about the well-being of my loved ones.

No servicemember who is asked to leave his family and friends to fight for our country should ever have to worry about fighting for his job when he returns home. That was the primary reason why Congress enacted USERRA and the servicemember protection laws that came before USERRA and date back to the 1940s.³

Forced to Arbitrate My Claims Under USERRA

I never considered myself to be a litigious person and never thought that I would be involved in a lawsuit. When I returned home from Afghanistan in the spring of 2014, I made the decision to try to right the wrong that I believe BLB committed against me and my family when it terminated me on the eve of my deployment.

I talked to a lawyer and filed a USERRA action in federal court. Having been around the world, I am particularly grateful for the Rule of law and American

³When Congress enacted USERRA in 1994, it stated that the purposes of the law are: “(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service; (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and (3) to prohibit discrimination against persons because of their service in the uniformed services.” 38 U.S.C. § 4301(a).

courts. I firmly believe that the American justice system is the fairest and most impartial system in the world, and I placed my faith in that process.

However, BLB immediately filed a motion to compel arbitration, arguing that the paperwork that I was forced to sign six months into my employment took away my right to go to court. The judge granted the motion, dismissing my case and sending it to a private arbitration company for resolution.

I was surprised and disappointed to be denied my day in court like all Americans deserve. In arbitration, I would have no access to a federal judge nominated by the President and confirmed by the Senate, I would lose my Seventh amendment right to a jury trial, I would lose any meaningful right to an appeal, and I would lose my right to a public proceeding of any kind. Along with other servicemembers, I have fought to advance American ideals and values abroad, so it was particularly disheartening to lose these fundamental rights at home.

I appealed the decision to the United States Court of Appeals for the Ninth Circuit, which affirmed the district court's decision to compel me into arbitration. The Court "acknowledge[d] the possibility that Congress did not want 'Members of our armed forces to submit to binding, coercive arbitration agreements.'" *Ziober v. BLB Res., Inc.*, 839 F.3d 814, 821 (9th Cir. 2016) (quoting *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559, 564 (6th Cir. 2008) (Cole, J., concurring)). But it still held that I and all other reservists who work outside of the Federal Government could be forced to arbitrate our USERRA claims. *Id.*

One judge on the three-judge panel in my case issued a separate opinion to State that he had serious "doubts about whether [the Court was] reaching the right result." *Ziober*, 839 F.3d at 821 (Watford, J., concurring). He explained that USERRA voids any contract that "reduces, limits, or eliminates in any manner any right ... provided by" USERRA, and that the arbitration agreement in my case "certainly 'limits'—and for all practical purposes 'eliminates'—[my] right to litigate [my] claims in court." *Id.* at 821–822 (quoting 38 U.S.C. § 4302(b)). He also acknowledged that the Department of Labor in 2005 had issued regulations that interpret USERRA as prohibiting arbitration agreements that prevent reservists from filing actions in court. *Id.* (citing 70 Fed. Reg. 75246, 75257 (Dec. 19, 2005)). Nevertheless, this judge and the three-judge panel concluded that the text of USERRA was not explicit enough in prohibiting forced arbitration, based on binding Supreme Court precedent about what Congress must say to override the Federal Arbitration Act. *Id.* at 821–822.

I am grateful that one of the judges on the Ninth Circuit panel urged Congress to fix the law so that it makes clear that servicemembers cannot be forced to arbitrate their USERRA claims, and that he pointed to a previous case in 2008, when another appellate judge had similarly encouraged Congress to fix the law. *Id.* at 822–823 (Watford, J., concurring) (citing *Landis*, 537 F.3d at 564 (Cole, J., concurring)). As I describe below, many Members of Congress have heeded these judges' calls to amend USERRA so that it will forever be clear that servicemembers and veterans cannot be forced to arbitrate their claims.

In 2017, I asked the U.S. Supreme Court to hear my case to challenge the notion that employers can force servicemembers and veterans to waive their hard-earned USERRA rights.

Many people came to my side. In fact, 20 Members of Congress from both sides of the aisle, including a number of leaders of the House Judiciary Committee, filed a friend of the court brief asking the U.S. Supreme Court to hear my case and recognize that Congress intended to prohibit forced arbitration of USERRA claims when it enacted the law in 1994. *See* Brief of Members of Congress as Amici Curiae in Support of Petitioner, *Ziober v. BLB Resources, Inc.*, No. 16–1269, 2017 WL 2376427, at *9 (U.S. May 24, 2017) ("Amici Curiae Brief"). The members of the House of Representatives who signed the brief include House Judiciary Chairman Jerrold Nadler (D–NY), House Subcommittee Chairman David Cicilline (D–RI), former House Judiciary Committee Chairman John Conyers, Jr. (D–MI), House Ethics Committee Chairman Ted Deutch (D–FL), Hank Johnson (D–GA), Jamie Raskin (D–MD), Joe Wilson (R–SC), Walter Jones (R–NJ) Rep. Jackie Walorski (R–IN). In addition, the brief was signed by Senators Richard Blumenthal (D–CT), Patty Murray (D–WA), Sheldon Whitehouse (D–RI), Sherrod Brown (D–OH), and Senator Mazie Hirono (D–HI). *See* Amicus Curiae Brief Appendix.

These Members of Congress pointed out that when Congress unanimously passed USERRA, it stated that the law's anti-waiver provision "would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required," and that "even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law." Amici Curiae Brief at 9 (quoting H.R. Rep. No. 103–65, at 20 (1993)). They also noted that in 2005 Labor Secretary Elaine Chao had recognized the same

principle in the Department of Labor's regulations—that USERRA prohibits forced arbitration. *Id.* at 9–10.

Unfortunately, the Supreme Court declined to hear my case. This means that for servicemembers or veterans who work for private companies or State or local governments, their employers can require them to sign arbitration agreements as a condition of employment (or continued employment, like in my case), and they can effectively take away a range of rights— some of which exist under many laws and some of which are unique and longstanding under USERRA and its predecessor laws. On the other hand, federal employees cannot be forced to arbitrate their USERRA claims, because the Federal Circuit has interpreted the same language of USERRA to ban forced arbitration. *Russell v. MSPB*, 324 F. App'x 872, 874–875 (Fed. Cir. 2008) (per curiam). Given how many servicemembers and veterans work outside of the Federal Government, it is disappointing that so many men and women who have served can now be forced into arbitrating their USERRA claims.

Congress Should Reaffirm Servicemembers' and Veterans' Ability to Enforce Their Rights

I am here today to ask the Members of this Committee to step in where the federal courts have failed to follow Congress' clear intent to protect the rights of servicemembers and veterans against forced arbitration, and also to advocate for the principles that motivated many of us to volunteer for service in the first place: the right to choose how we go about exercising our rights and the right to access one of the greatest civil justice systems in the world.

All that Congress needs to do is to reaffirm what has been the law since the 1950s. In fact, in 1958, the Supreme Court held that servicemembers could not be required to arbitrate their reemployment rights claims under the law that later became USERRA. *McKinney v. Missouri-Kan.-Tex. R.R. Co.*, 357 U.S. 265, 268–270 (1958). As the Supreme Court wrote in *McKinney*, a person enforcing his rights under the reemployment statute “sues not simply as an employee,” “but as a veteran asserting special rights bestowed upon him in furtherance of a federal policy to protect those who have served in the Armed Forces.” *Id.* at 268–269. To require veterans to pursue private adjudication of their rights “would ignore the actual character of the rights asserted and defeat the liberal procedural policy clearly manifested in the statute for the vindication of those rights” in court. *Id.* at 269–270.

The procedures that the Supreme Court recognized in *McKinney* as contrary to arbitration include the right to file an action in any district where the employer has a place of business and that no fees or costs may be taxed against the servicemember in litigation (such as no filing fees). *See Id.* at 269 n.1. Those same procedures still exist to this day under USERRA. *See* 38 U.S.C. §§ 4323(c)(2), (h)(1). But These protections are routinely undermined by arbitration agreements that require servicemembers to pursue arbitration in the specific location that the employer chooses (even if the servicemember is deployed or lives across the country) or that impose significant fees or costs on servicemembers. There are additional protections in USERRA that are inconsistent with forced arbitration. For example, USERRA has no statute of limitations, but arbitration agreements often impose very brief limitations periods; USERRA is designed to avoid any delay in adjudicating servicemembers' rights, without any need to file a charge with an administrative agency, but arbitration agreements often require multi-step procedures to be exhausted before a person can obtain a hearing before an arbitrator.

Over the past decade, bipartisan Members of the United States Senate and House of Representatives have introduced legislation to reaffirm that servicemembers and veterans cannot be required to arbitrate their USERRA claims, unless they agree to arbitrate after the employment dispute has occurred. That legislation includes the following bills.

- In 2017, Subcommittee Chairman David Cicilline (D–RI), Rep. Henry C. “Hank” Johnson (D–GA), Rep. Joe Wilson (R–SC), Rep. Walter B. Jones (D–NC), Rep. Jackie Walorski (R–IN), and other House members sponsored H.R. 2631, the Justice for Servicemembers Act of 2017. A companion bill was sponsored in the Senate by Senators Richard Blumenthal (D–CT), Richard Durbin (D–IL), Sheldon Whitehouse (D–RI), Kirsten Gillibrand (D–NY), and Mazie Hirono (D–HI).
- In 2016, Subcommittee Chairman David Cicilline (D–RI), Rep. Henry Hank Johnson (D–GA), Rep. Joe Wilson (R–SC), Rep. Walter B. Jones (D–NC), Rep. Jackie Walorski (R–IN), and other House members sponsored H.R. 5426, the Justice for Servicemembers Act of 2016. A companion bill was sponsored in the

Senate by Senator Richard Blumenthal (D-CT), Senator Patrick Leahy (D-VT), Senator Richard Durbin (D-IL), and Senator Klobuchar (D-MN).

- In 2014, Senator Lisa Murkowski (R-AK), Senator Mark Pryor (D-AR), and Senator Richard Blumenthal (D-CT) sponsored S. 2392, the Servicemember Employment Protection Act of 2014.
- In 2012, Senator Robert Casey Jr. (D-PA), Senator Ron Wyden (D-OR), and Senator Mark Begich (D-AK) sponsored S. 3233, the Servicemembers Access to Justice Act of 2012.
- In 2009, Senator Robert Casey Jr. (D-PA), Senator Edward M. Kennedy (D-MA), and Senator Ron Wyden (D-OR) sponsored S. 263, the Servicemembers Access to Justice Act of 2009.

In 2016, the Senate Committee on Veterans' Affairs held a hearing to consider the Justice for Servicemembers Act of 2016. In advance of that hearing, The Military Coalition, a group of 32 military, veterans, and uniformed services organizations, endorsed the Justice for Servicemembers Act. Furthermore, all of these pieces of legislation identified above have enjoyed strong and unwavering support from the many organizations within The Military Coalition, including the Reserve Officers Association, the Military Officers Association of America, and the Military Order of the Purple Heart. Despite such strong and broad support, these bills to clarify that USERRA bans forced arbitration has never received a vote in a Committee or on the House or Senate floor.

I hope that 2019 is the year that Congress finally passes the Justice for Servicemembers Act. Millions of servicemembers and veterans who have rights under USERRA will benefit from this legislation, which will ensure that those of us who serve our country can turn to federal judges to protect our reemployment rights and benefits.

USERRA rights and enforcement are more important today than ever before. In its most recent report to Congress (covering Fiscal Year 2017), the Department of Labor's Veterans Employment and Training Service ("DOL VETS") stated that it had 1,098 pending cases in which DOL VETS was investigating USERRA complaints of servicemembers and veterans, including 944 cases that were opened in Fiscal Year 2017.⁴ When the base where my unit is located hosted trainings on USERRA in 2017, countless commanders and Members of various units had pressing questions about their USERRA rights and what they can do to ensure that their rights are protected. They were not inquiring because they wanted to file lawsuits, but because their USERRA rights help them balance their military and civilian careers and they want to ensure that their employers understand how to comply with the law and support our reservists.

Today, because of the increasing reliance on the Guard and Reserve to support the global activities of our Armed Forces, it is more important than ever to ensure that we have strong USERRA protections—so that Guard and Reserve Members can seamlessly transition between their civilian and military positions. A recent Congressional Research Service report highlights the way in which the role of the reserve components of the Armed Forces has changed over the past several decades, especially the increasing reliance on reservists for both combat and ordinary military operations. For example, between 1986 and 1989, reservists annually contributed about 1 million duty-days, whereas in 2002 they contributed 41.3 million days, in 2005 they contributed 68.3 million days, and in 2014 they contributed 17.3 million days.⁵

Congress Should Act To Protect the Rights of All Americans

My experience with forced arbitration stems from my status as a servicemember and the special rights that Congress has conferred upon servicemembers like me. But arbitration does not just impact servicemembers or veterans. The increasing and systemic use of forced arbitration is impacting every American and taking away our rights to enforce the federal and State laws that promote economic opportunity and security, protect our health and safety, and stamp out fraud.

⁴U.S. Department of Labor, Veterans' Employment and Training Service, Annual Report to Congress Fiscal Year 2017 at 22, available at https://www.dol.gov/vets/media/VETS_FY17_3Annual_Report_to_Congress.pdf.

⁵Congressional Research Service, *Reserve Component Personnel Issues: Questions and Answers* at 7-9 (Oct. 4, 2018) (stating that 1,036,644 Americans are Members of the Select Reserve or Individual Ready Reserve/Inactive National Guard as of July 31, 2018), available at <https://fas.org/sgp/crs/natsec/RL30802.pdf>.

Experts estimate that more than 60 million employees are bound by forced arbitration—constituting more than half of all non-union private sector employees.⁶ Forced arbitration has grown at a rapid pace, despite the fact that the vast majority of Americans, regardless of race, age, gender, or political affiliation, prefer to have the right to decide whether to arbitrate their disputes or go to court.

Earlier this year, a poll conducted by Hart Research Associates found that 84% of Americans believe that they should have the choice of whether to resolve their legal claims through arbitration or court, rather than being required to arbitrate their claims. Republicans (84%) and independents (89%) were more likely than Democrats (83%) to support the right of workers and consumers to choose between arbitration and court enforcement.⁷ In 2016, a Pew survey found that 90% of individuals supported being allowed to have their case heard by a judge and jury and 90% supported being able to appeal legal decisions—two things that arbitration agreements take away or severely limit.⁸ Another Pew study found that while about half of all consumers support what arbitration advocates say are its benefits, 88 percent of consumers disapprove of arbitration when the process is explained in greater detail.⁹ These studies demonstrate that the American people “overwhelmingly want a choice between going to court and entering arbitration.”¹⁰

There are good reasons why the vast majority of Americans believe that workers and consumers should be able to choose between a court of law and arbitration.

First, forced arbitration is incredibly unfair to ordinary people, who lack the power to decide whether to sign an arbitration agreement when starting a job or purchasing a consumer product. Employers don’t tell job applicants whether they will be required to sign an arbitration agreement. As a result, millions of workers show up on their first day of work, and they are told that they must sign an arbitration agreement or they can’t start the job. Let’s say that you’ve already resigned from your prior job to start a new job at a new company. What worker would realistically decline to sign the arbitration agreement on the first day of work at the new job, if that means leaving his or her family with no income or health care insurance? In my case, I was required to sign an arbitration agreement months after I had started my job at BLB. I had no effective choice to decide whether I wanted to sign the agreement. If I didn’t sign, I would be fired. No worker starts a job thinking that he will sue his or her employer, and no worker wants to disappoint his or her employer on the first day of work by refusing to sign the forms that he or she is told to sign. In other words, the decision to sign an arbitration agreement is unfair and coercive.

Based on my experience, it seems that the right time for a worker to decide whether he or she wants to agree to arbitration is *after* the dispute has occurred. When a worker realizes that his or her rights may have been violated, he or she can consult with an attorney and make an informed decision about whether it makes sense to go to court or arbitration.

Second, in arbitration, a single person—usually a lawyer, though in some cases it’s not even a lawyer—decides all of the legal and factual questions. But in court, in most cases Americans are entitled to have a jury of our peers decide the factual questions, and have an impartial judge decide the legal questions.

Third, arbitration is often conducted in confidential, secret proceedings, while our courts are open to the public. With arbitration becoming so prevalent, this means that the public is being denied important information about practices that affect so many of us and employees are routinely prevented from sharing their stories with others. For example, employees can be denied the opportunity to hear about executives—like Harvey Weinstein or Roger Ailes—who sexually harass employees. Workers can be denied information about which employers fail to pay the minimum wage or overtime, or which bosses steal their employees’ tips. The federal agencies who enforce critical laws may be denied the opportunity to learn about serious prob-

⁶Alexander J.S. Colvin, *The growing use of forced arbitration: Access to the courts is now barred for more than 60 million American workers*, Economic Policy Institute (Sept. 27, 2017), available at <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/>.

⁷Guy Molyneux & Geoff Garin, Hart Research Associates, *National Survey on Required Arbitration* (Feb. 28, 2019) (reporting on the results of a survey of 1,201 voters that was conducted between January 16 and 28, 2019), available at <https://www.justice.org/sites/default/files/2.28.19%20Hart%20poll%20memo.pdf>.

⁸CFPB to Act on Banking Dispute Resolution, Pew Charitable Trusts (Feb. 16, 2016), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2016/02/16/cfpb-to-act-on-banking-dispute-resolution>.

⁹Banking on Arbitration: Big Banks, Consumers, and Checking Account Dispute Resolution, November 2012, http://www.pewtrusts.org/media/assets/2012/11/27/pew_arbitration_report.pdf.

¹⁰*Id.* at 7.

lems—like federal contractors who discriminate against reservists, fail to pay prevailing wages mandated by federal law, or jeopardize the health and safety of their employees.

Fourth, arbitration agreements often limit what information employees or consumers can discover about their claims—even though it's usually the employer or company who possesses the key information that the worker or consumer needs to prove his claim. This is like holding a boxing match where one of the boxers has one arm tied behind his back for all 12 rounds. In comparison, our federal and State courts have consistent rules that put all parties on equal footing and that give every American the same rights to search for the truth.

Fifth, with arbitration employers dictate which arbitrators can be selected by the parties. This is the opposite of the American civil justice system, where one party cannot determine which judge will hear the case. The average worker or consumer will never arbitrate more than a single case in his or her lifetime. But large employers and companies may arbitrate hundreds or even thousands of claims. This creates an incentive for arbitrators to Rule in favor of employers and companies, so that they will be selected to arbitrate future cases. This is big business for the people who serve as arbitrators. Often arbitrators earn \$8,000 to \$10,000 per day. It would be foolish for an arbitrator to be hostile to the companies who select and pay them.

Sixth, arbitration agreements usually do not permit an employee or consumer to appeal an adverse decision—even if the decision clearly misinterprets the law, overlooks key facts in the case, or does not State a basis for the decision. Although the Federal Arbitration Act allows individuals to ask a court to vacate an arbitration award under very limited circumstances, it makes it so difficult to overturn the arbitrator's award that there effectively is no right to appeal an arbitrator's decision. In contrast, every litigant in court—a poor person, a rich person, a small business, or a massive corporation alike—has the same right to appeal and have an appellate court decide whether the district court misinterpreted the law or misunderstood the facts.

Seventh, arbitration agreements routinely limit the amount of time that individuals have to enforce their rights—sometimes to as little as six months from when the dispute arises. This is a major problem for servicemembers and veterans, given that USERRA does not have a statute of limitations period (Congress clarified this issue in a 2008 amendment that was unanimously enacted by Congress and signed by President George W. Bush). It's also a big problem for workers who are affected by wage theft or discrimination, given that civil rights and employment laws often provide more time for individuals to initiate their legal actions.

Finally, it is common for arbitration agreements to require employees or consumers to arbitrate their disputes in a single city or county, even if that location is far away from where the employee or consumer lives. Many federal laws allow employees or consumers to bring their legal actions in a broad range of places, in order to promote enforcement of the law and prevent companies from always litigating cases on their home turf. As I mentioned above, since the 1950s USERRA and its predecessor laws have allowed servicemembers to sue wherever the employer has a place of business, in recognition of the fact that servicemembers frequently change their place of residence or are deployed far from home.

To me, the choice is easy. I would always prefer to enforce my rights in a court of law, with a neutral judge, a jury of my peers, full and fair discovery, and a right to appeal. At the same time, I recognize that some people may prefer arbitration over court. I think that the people who prefer arbitration should have every right to make that choice. With all due respect, I believe that I and hundreds of millions of Americans should be able to choose to go to court rather than arbitration, and we should never be forced to arbitrate our claims.

Like most people, I value the independence and freedom that I have to make my own choices, particularly when it comes to enforcing my legal rights. My employer took that freedom away from me when it required me to sign an arbitration agreement on a take-it-or-leave-it basis. Arbitration might make sense for some people in some circumstances, but every individual should be able to make the choice for himself or herself.

The Forced Arbitration Injustice Repeal Act of 2019, H.R. 1423 (and S. 610 in the Senate), would give this choice to every American employee and consumer. This vital legislation would create a simple Rule that employees and consumers cannot be required to sign an arbitration agreement until the dispute occurs. Once the dispute occurs, the consumer or employee would be free to enter into an arbitration agreement if both of the parties want to arbitrate.

I thank Chairman Cicilline and Representative Hank Johnson for introducing the FAIR Act. I thank the 198 Members of the House of Representatives who have spon-

sored the Forced Arbitration Injustice Repeal Act of 2019, including many Members of the Judiciary Committee and this Subcommittee. I hope that all the other Members of the House will consider sponsoring or supporting the passage of this legislation. The goal of this legislation is not to create more legal actions, but to ensure that every American has the same ability to enforce his or her rights that already exist under federal and State laws.

As a servicemember, I try to remember that our service is not on behalf of ourselves, but on the behalf of every American. And, in my opinion, no American should be denied the opportunity to have their day in court and enforce the rights that this Congress or the states have given us.

Conclusion

I sincerely appreciate that the Committee is considering this important issue and legislation. Thank you very much for your time and consideration of my views.



Mr. CICILLINE. Thank you very much.
I now turn to Gretchen Carlson for 5 minutes.

TESTIMONY OF GRETCHEN CARLSON

Ms. CARLSON. Thank you for having me here today.

On July 6, 2016, my story about sexual harassment and Fox News Chairman and CEO Roger Ailes became public. It ran like wildfire across the Twitter feeds and across the media around the world. Back then, I could have never known or could have ever imagined that I would become one of the prominent faces fighting against forced arbitration, or that in the two-and-a-half years since my case, a tidal wave of women would have joined me in courageously speaking out about workplace harassment. Here is what I found out during that time, that courage is contagious, and the cultural revolution that we are experiencing right now is long overdue.

The first step for me was telling the truth. The next step was to work to change the system for all women and men across our country. So, I spent much of 2017, 2018, and now 2019 walking the halls of Congress, encouraging legislators to take real, meaningful action to help workplace harassment victims. In December 2017, I proudly joined legislators from both sides of the aisle—Congresswomen Bustos and Stefanik, and Senators Gillibrand and Graham—to introduce in both chambers the Ending Forced Arbitration of Sexual Harassment Act. On February 28th of this year, with a new Congress, the bill was reintroduced in the House, H.R. 1443, a bill to restore workplace harassment victims' constitutional 7th amendment right to a jury trial instead of the secrecy of forced arbitration.

So why is this bill so important to me? Because it is not about me. It is about the thousands and thousands of women across this country who reached out to me after my story became public, mak-

ing me realize that almost every woman in this country has a story. Over the past two-and-a-half years, these women have shared their pain and their humiliation with me, and what is the number-one thing that they tell me? That they have been mostly silenced because that is what forced arbitration helps to do. It turns out that silencing all of these women in our country ends up being the harasser's best friend.

Hypothetically, here is what happens to a woman being harassed on the job when she finally decides to muster up the courage to come forward. She goes to HR to complain, and if she has an arbitration clause, and she likely does, the HR rep may do this: "Phew. No one will ever know about this." Her case is promptly thrown into the secret chamber. In arbitration, she will find out there are limits on discovery, evidence gathering, limits on witnesses. There are no appeals. In many cases, the company even picks the arbitrator for you. It is called repeat business. In the process, she will probably be blacklisted, demoted, and fired from her job. She may get a paltry settlement, but our woman will probably never work again. No one else at her place of employment will know what happened to her. Worst of all, her perpetrator gets to stay on the job, because nobody knows about it. The whole process is secret, and that person is free to harass again and again. I ask you today, what is fair about that?

Sadly, that hypothetical story is not unique. For years, this happened at American Apparel. The chairman there was finally thrown out, the President of the company, but they all had arbitration clauses. Same thing with 180 women who reported being sexually assaulted at a company called Massage Envy. You heard about Sterling Jewelers earlier from the Chair.

So, none of us expect to start a new job and get into any kind of dispute like this. I know I didn't. So many Americans, they sign these forced arbitration agreements, they don't even know what they are signing or what the ramifications are with regard to their constitutional rights.

To be silenced after simply having the guts to come forward, that is unjust, that is un-American.

Now we are seeing the effects of people saying enough is enough. After we introduced our bill in 2017, Microsoft decided to take arbitration clauses out of their employment contracts. Then Uber, Lyft, and after the Google walk-out, Google, Ebay, Airbnb, Facebook, Fox Media, et cetera.

So, it turns out that courage is not only contagious, so is action, and the voices of workers across this country. Now it is time for us, in a bipartisan way, to come together and stop the silence. Let's do something together as a Nation for our women, our men, and our children.

Thank you.

[The statement of Ms. Carlson follows:]

STATEMENT GRETCHEN CARLSON

Chairman Cicilline, Ranking Member Sensenbrenner, and other distinguished Members of the House Subcommittee on Antitrust, Commercial and Administrative Law, thank you for providing me with the opportunity to testify about my experience with forced arbitration.

On July 6, 2016, my story about sexual harassment and Fox News Chairman and CEO Roger Ailes became public. And it ran like wild fire on twitter feeds and breaking news alerts all around the world. Back then, I could have never known I would become one of the prominent faces fighting against forced arbitration, or that in the 2½ years since my case, a tidal wave of women would have joined me in courageously speaking out against workplace harassment. Here's what I've found out: Courage is contagious ... and the cultural revolution we're experiencing right now ... is long overdue.

The first step for me was telling the truth. The next step ... was to work to change the system ... for all women and men across our country. So, I spent much of 2017, 2018, and now 2019 walking the halls of Congress, encouraging legislators to take real, meaningful action to help workplace harassment victims. In December 2017, I proudly joined legislators from both parties—Congresswomen Bustos and Stefanik and Senators Gillibrand and Graham—to introduce in both chambers the “Ending Forced Arbitration of Sexual Harassment Act.” On February 28th of this year, with a new Congress, the bill was reintroduced in the House—House Bill 1443—a bill to restore workplace harassment victims’ Constitutional 7th amendment right to a jury trial instead of the secrecy of forced arbitration.

So why is this bill so important to me?

Because this isn't about me. This is about the thousands of women across this country who reached out to me after my story became public—making me realize that almost every woman in our country has a story and that's shameful. Over the past 2½ years, these women have shared their emotional stories of pain and humiliation—but mostly about how they've all been silenced—because that's what forced arbitration helps to do. Turns out—that silencing is the harasser's best friend.

Sadly, my story is not unique. Sexual harassment of women and men in the workforce isn't a new problem, and unfortunately neither is the use of forced arbitration to cover up systemic sexual harassment. For years, Dov Charney, the founder and former CEO of American Apparel sexually harassed and assaulted employees of the company. These were young women, teenagers—some as young as 17 years old.¹ But, it wasn't until 2014 that Mr. Charney was held accountable for his actions and he was fired by the company's board. The sexual misconduct was able to be hidden for years because the company required all employees to sign employment agreements that included a forced arbitration clause.² The purpose of which was clear: To keep any disputes secret and away from public scrutiny. Had the company not used forced arbitration, they would have faced public accountability and been forced to Act years sooner and many of his victims would have been spared.

Another horrifying example is the more than 180 women who have reported being sexually assaulted by massage therapists at Massage Envy spas.³ 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.⁴ Take the case of Lilly Silbert from California, who I recently met and whose story I listened to. Lilly says that she was sexually assaulted by her Massage Envy therapist, but because she used the company's app to try and cancel her Membership after she was sexually assaulted, the company is trying to force her, and many women like her, into arbitration.

Recently, The New York Times covered the story of thousands of women who were employed by Sterling Jewelers who suffered widespread sexual harassment and pay discrimination for years.⁵ The article describes the conduct the women were sub-

¹Katie Baker, *Dov Charney “Sex Slave” Lawsuit Will Settle Out of Court*, Jezebel, March 22, 2012: <https://jezebel.com/5895487/dov-charney-sex-slave-lawsuit-will-settle-out-of-court>.

²Steven Davidoff Solomon, *Arbitration Clauses Let American Apparel Hide Misconduct*, July 15, 2014: <https://dealbook.nytimes.com/2014/07/15/arbitration-clauses-let-american-apparel-hide-misconduct/>.

³Katie Baker, *More Than 180 Women Have Reported Sexual Assaults at Massage Envy*, BuzzFeed News, November 26, 2017: <https://www.buzzfeednews.com/article/katiejmbaker/more-than-180-women-have-reported-sexual-assaults-at-massage-envy>.

⁴Brooks Jarosz, *Fears loom that sexual assault cases involving Massage Envy will remain private*, FOX KTVU, December 21, 2018: <http://www.ktvu.com/news/fears-loom-sexual-assault-cases-involving-massage-envy-will-remain-private>.

⁵Taffy Brodesser-Akner, *The Company That Sells Love to America Had a Dark Secret*, New York Times Magazine, April 23, 2019: <https://www.nytimes.com/2019/04/23/magazine/kay-jewelry-sexual-harassment.html>.

jected to—groping, sexual coercion, sexual degradation and even rape. For years, the conduct was covered up, with the women being forced into arbitration. As the article describes “[t]he benefit to the company was that it was resolved in secret. The secrecy was the point.”⁶ In 2008, many of the women decided to come forward and seek legal action against the company, filing a class action lawsuit which at one point was comprised of 69,000 women.⁷ However, because Sterling Jewelers required their employees to sign arbitration agreements the company has been trying to dismiss the lawsuit and force all of the women into private, secretive arbitration, on an individual basis—creating a wall of silence even between the women.⁸ This prevents women from having important evidence about a pattern of behavior, and from supporting one another in stressful litigation against a large corporation.

In all these cases, because of the secrecy that surrounds forced arbitration, it is impossible to know exactly how many women were sexually assaulted or harassed and came forward. What we also don’t know is how many women chose not to come forward, but to stay quiet, or quit, because they knew that they would be forced into arbitration where their voices would be silenced.

My going public shed a light on the scourge of more of this pervasive epidemic—the Weinstein allegations, the Bill Cosby allegations, the Bill O’Reilly allegations, the Les Moonves allegations, the Matt Lauer allegations, the Charlie Rose allegations, the Mark Halperin allegations . . . and more.

From the victim’s point of view . . . here’s what happens when a woman being harassed on the job finally decides to come forward. She goes to HR to complain and if she has an arbitration clause—and she probably does since 60 million Americans do—the HR reps probably says—phew! “No one will ever know about this!” Her case is promptly thrown into the “secret chamber.” More than likely she’ll be blacklisted, demoted or fired from her job. She may get a paltry settlement, but in arbitration she’ll find out there are no appeals, limits on discovery—which is evidence gathering—and on witnesses. Arbitrators come back for repeat business where they’ve been before. Individual employees do not provide repeat business for arbitrators—but a large corporation—like Sterling Jewelers with thousands of complaints—can keep an arbitrator paid for years. Our woman will probably never work again, and notably, no one else at her place of employment will know that harassment may be an issue, and worst of all, her perpetrator will likely get to stay on the job—because the whole process has been a secret—free to harass again and again.

None of us expect to start a new job and get into any kind of dispute. I know I didn’t. So many Americans sign forced arbitration agreements without even knowing what they are or thinking about what they mean for their Constitutional rights. The employer can refuse to hire people who won’t sign. What kind of “agreement” is that?

To be silenced after simply having the guts to come forward? That’s unjust and un-American.

Now we’re seeing the effects of people saying enough is enough. We’re seeing that the voices of women and men are being heard! Companies are taking notice!

After we first introduced our bill in 2017, Microsoft decided to be bold and take forced arbitration clauses out of their employment contracts. Then Uber and Lyft. Then after the Google walk out, Google, Ebay, Airbnb, Facebook, and Vox Media.

Turns out—It’s not just courage that’s contagious—**Action** is too. The voices of workers across this country matter—and they *are* being heard.

I want to thank the brave Members of Congress from both sides for already drawing a line in the sand. Thank you for doing what’s right for women.

Now its time for all Members of Congress to show the same kind of courage. It’s my hope Members from **both sides of the aisle** will stand up and speak up in support of this bill.

Sexual harassment *is not* a partisan issue. It knows no political or socio-economic boundaries. It’s our police officers, firefighters, teachers, lawyers, doctors, bankers, Congressional workers, and journalists. The consequences show no bounds. We’ve seen titans from both sides fall.

That is why we should all care.

⁶Taffy Brodesser-Akner, *The Company That Sells Love to America Had a Dark Secret*, New York Times Magazine, April 23, 2019: <https://www.nytimes.com/2019/04/23/magazine/kay-jewelers-sexual-harassment.html>.

⁷Drew Harwell, *Hundreds allege sex harassment, discrimination at Kay and Jared jewelry company*, Washington Post, February 27, 2017: http://wapo.st/2mEkm1F?tid=ss_mail&utm_term=.03d00fdedcd3.

⁸Nick Brown, *Sterling Motion to Disallow Class Action Rejected*, Law360, January 5, 2010: <https://www.law360.com/articles/141374/sterling-motion-to-disallow-class-action-rejected>.

In this cultural revolution, it's time to get something real done for women. It is my great hope that we will get it done in a bi-partisan way—for women, for men, for our children and our country.

Thank you.

Gretchen Carlson
Journalist, Author, Advocate

Mr. CICILLINE. Thank you, Ms. Carlson.

The Chair now recognizes Mr. Goldberg for 5 minutes.

TESTIMONY OF PHIL GOLDBERG

Mr. GOLDBERG. Thank you, Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the committee. Thank you for your invitation and allowing me to testify here today. It is a particular honor for me to be here before this committee. Twenty years ago, I worked for a member, Steve Rothman, who served on this committee, and I hold this Committee in incredibly high regard, as I do the civil justice system.

I am now a partner at the law firm of Shook, Hardy & Bacon, and a member of the American Law Institute, and since 2015 I have been the Director of the Progressive Policy Institute Center for Civil Justice. At PPI, we believe that the civil justice system is a public good. It is a keystone of American economic and political liberties because it is a forum where aggrieved individuals and businesses can peacefully resolve disputes. Unfortunately, we also recognize that it has its limitations and that it can be abused.

As is customary, today the views I express are my own.

The major reason why pre-dispute arbitration agreements are common today is because they provide these goals, a peaceful, quick, and conclusive dispute resolution, often better than the civil justice system for many claims.

It didn't escape me that the title for this hearing is about the erosion of the civil justice system. Mr. Chairman, the frustration has been that the civil justice system has been eroding for several decades. It has become more expensive. It has become less responsive to real people in many cases.

Pre-dispute arbitration agreements are increasingly filling those voids because it provides real people the ability to obtain meaningful redress, particularly with modest claims that are below the threshold for which someone can get a lawyer, or where relationships are at stake, that they want to maintain those relationships after the dispute is resolved.

Overall, people have found pre-dispute arbitration agreements more efficient because they have streamlined rules and are less formal. They are less costly. The defendant often pays the cost and attorney's fees in many situations. They are timely. You can get resolution in months rather than years. It is less adversarial than civil litigation, and the results, they are not all or nothing like civil litigation, but they focus on what is fair. The Supreme Court has said the process must be reasonable and fair. Trust me, courts will throw out unconscionable pre-dispute arbitration agreements.

For some, agreeing ahead of time to avoid the high costs and the high stakes of prolonged litigation can make the difference in the choice to pursue justice. Otherwise, those injuries will go uncom-

pensated and unaddressed, and the defendant will be held unaccountable.

This is particularly important in modest consumer, employment, and business disputes. If it is you as an individual and you have one of these more modest claims, there is no access to justice. Lawyers now generally do not take cases that have a value under \$100,000. The Minnesota task force recently concluded it is closer to \$200,000. If the claim is below this threshold, a pre-dispute arbitration agreement is the only chance at redemption.

Sometimes disputes can be brought as class actions, but as this Committee has heard time and again, the class actions are notoriously bad at real redress for real people in these types of claims. The resolutions, particularly in these areas, focus on lawyers' fees, coupon settlements—you have to buy more of the defendant's products—cy pres awards for third parties in which the victims get nothing, and redemption rates are anemic, not surprisingly; generally, between 1 and 4 percent of people participate when they are in the class. In a lot of class action settlements, real people get nothing, or they get practically nothing.

The latest abuse is this no-injury litigation where you have lawyers sort of dreaming up speculative ideas on how to sue companies, and there are no plaintiffs that are actually aggrieved.

Pre-dispute arbitration agreements are also important where relationships matter. Litigation is highly contentious and expensive, and for many people it is completely undesirable. You have the risk of ruining important relationships, not just with the defendant but with colleagues, business partners and customers, even when a company takes significant measures to protect employees from retaliation.

So, if you believe your benefits were wrongly calculated or you were unfairly denied a promotion or a raise, what does the average worker do if they want to stay at that company? If they don't have a pre-dispute arbitration agreement and they are scared off by the civil litigation system, then that is not good for anybody. It is not good for the companies who want to provide their employees with a good, safe place to go to work, and it is not good for the employees who just want to put in an honest day's work and be able to go home and spend time with their families.

Finally, litigation has become subject to too much abuse. It is no longer providing plaintiffs and defendants with access to justice. Discovery battles are incredibly expensive, lawyers are skilled at inflaming juries and escalating awards and exploiting weaknesses in the civil justice system, and plaintiffs, even when they can hire a lawyer, often lose half to the contingency fee and to expenses.

It is not surprising that both claimants and defendants find value in an alternative system that focuses on getting aggrieved individuals fairly compensated and not paying lawyers. These benefits cannot be achieved unless they are agreed to beforehand, because once the dispute arises, all gets thrown out the door. For many people, Mr. Chairman, a pre-dispute arbitration agreement is the only path for obtaining redress.

Thank you very much.

[The statement of Mr. Goldberg follows:]

STATEMENT OF PHIL GOLDBERG

Chairman Cicilline, Ranking Member Sensenbrenner, and Members of this distinguished Committee, thank you for your gracious invitation and allowing me to testify today about pre-dispute arbitration agreements. It is a particular honor for me to be here. While I was attending law school at night in 1998–1999, I worked during the day for a member of Congress who served on the Judiciary Committee. I have high reverence for this Committee and the judiciary.

Currently, I am a partner at the law firm of Shook Hardy & Bacon, L.L.P. and co-chair the firm's Public Policy Group and National Amicus Practice. In 2015, I became the Director of the Progressive Policy Institute's Center for Civil Justice. The PPI Center for Civil Justice believes that the civil justice system is a keystone of American economic and political liberty because it provides a forum for aggrieved individuals and businesses to peacefully resolve their disputes. This ability to resolve disputes quickly and conclusively undergirds free enterprise by protecting economic and social rights. As is customary, the views I express today are my own.

A major reason that pre-dispute arbitration agreements have become more commonplace in our society is because they achieve this goal of peaceful, quick and conclusive dispute resolution often better than the civil justice system for many types of claims. As I will discuss below, the civil justice system over the past few decades has become much more expensive for the parties involved and much less responsive to consumers and employees. Agreeing ahead of time to avoid the high cost and high stakes of prolonged litigation, which often serves the lawyers more than the parties, is increasingly making sense for many types of claims.

The Benefits of Pre-Dispute Arbitration vs. the Deficiencies of Litigation

The primary benefit of pre-dispute arbitration agreements, and arbitration generally, for consumers, employees and other claimants is that it provides them with a more efficient, less costly, and less adversarial means to obtain redress than civil litigation. Filing and waging a lawsuit is not for everyone. It has been described as being to everyday life like “war is to peacetime.”¹ It can be costly, time-consuming and draining. In many cases, the lawyers on both sides operate from a position of mutually assured destruction, where the battles are contentious, expensive and focused on exerting pain to the other side. So, for many people, if they sustain an injury, litigation may be unrealistic and undesirable. Knowing that a path to resolve such a dispute has already been agreed to where, by law, you must be given a reasonable and fair path to redress, can be the deciding factor to pursue justice. Without a pre-dispute arbitration agreement, that person's injury may go unaddressed and the defendant will not be held accountable.

Consumer, employment and business-to-business disputes often fall into the categories where pre-dispute arbitration provides the most benefits. An injury, no matter how important to the person, may be too financially modest to pursue in litigation. A lawyer may not have the financial interest in taking a low-stakes case if the injury is solely to an individual. About 20 years ago, studies found that lawyers may not take a case unless the expected value of the claim was at least \$60,000.² That number is now closer to \$200,000.³ Litigation has simply become a lot more expensive and time-consuming, and many lawyers who take claims on contingency bases want to make sure they are going to be compensated for their time. So, where the contingency fee used to be seen as a mechanism to allow people to hire lawyers for questionable or small claims, that is no longer true. Most skilled plaintiffs' lawyers treat the contingency fee like a certainty fee. When a claim is below that threshold, arbitration may provide the only chance at redemption, especially for very modest claims where the defendant pays the costs and fees involved.

In the consumer setting, some low dollar cases may be brought as class actions. This may entice a lawyer to take the case, but class actions over small-scale injuries have proven to be poor dispute resolution methods for the parties. Experience has shown that often, few Members of a class choose to redeem any award they may

¹ Janet Malcolm, *The Journalist and the Murderer* 63 (2011).

² See Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Resol. J. May–Jul. 2003, at 8, 10–11.

³ See, e.g., Minn. State Bar Ass'n, *Final Report: Recommendations of the Minnesota Supreme Court Civil Justice Task Force* 11 (Dec. 23, 2011), at http://www.mncourts.gov/mncourtsgov/media/assets/documents/reports/Civil_Justice_Ref_Task_Force_Dec_2011_Rpt.pdf.

be owed.⁴ For example, a study by the Consumer Financial Protection Bureau (CFPB) of consumer class actions reported a “weighted average claims rate” by class Members of only about 4%.⁵ Other studies report even lower rates of class member involvement.⁶ As a result, class actions generally end up focusing on lawyer fees, coupon settlements, and cy pres awards to third parties to justify their fees and releasing the claims against the defendant—not providing injured people with any actual recoveries.

Further, class lawyers are increasingly coming up with the legal theories for suing companies and then finding plaintiffs on whose behalf to sue, not the other way around.⁷ In these actions, the vast majority of the class has not experienced the harm alleged in the complaint, which is why they do not participate in any awards. In these cases, class litigation is becoming an abstract endeavor no longer focused on creating a path to compensate those who are actually injured. Also, the stakes for the litigation far outpace any actual harm. Plaintiffs’ lawyers have similarly become skilled at inflating noneconomic damages in other types of cases.⁸ Recent studies have shown that pain and suffering awards in the United States are more than ten times those in the most generous of other nations.⁹ In inflation-adjusted numbers, for example, product liability awards were five times higher in 2005 than in 1992.¹⁰ Pre-dispute arbitration agreements protect businesses from potential abuse and reduce the risk of losing a “jackpot” award, while at the same time allow actually aggrieved individuals to pursue justice and receive an appropriate recovery.

Further, arbitration is superior to litigation when it is important to try to resolve a dispute without compromising useful relationships that will need to endure after the dispute’s resolution. This may not be a critical factor for consumers, but it often is for employees and vendors who know the people they are suing. In deciding whether to pursue justice, they may weigh the potential that litigation will adversely impact key relationships—not just with the defendant, but with colleagues, business partners, and customers. These dynamics can exist even when companies take significant measures to protect their employees from retaliation and particularly when the suits involve small or family-run businesses. Litigation by its nature is adversarial and can be highly personal for the people involved, either as parties or witnesses. The person who was wronged may have to decide that a dispute is important enough to take these risks, let alone go through the cost, time and hardship of litigation. Relying on litigation alone may mean that small or medium size issues will never get reported or remedied. That is not good for anyone—neither the companies who want to provide employees with a good, safe place to go to work, nor employees who simply want to go to work and do their jobs.

Pre-dispute arbitration agreements provide a viable alternative to the civil justice system in each of these areas: it is focused on resolving disputes, not inflaming them. Arbitration is also much less expensive than litigation, which can allow claimants to keep more of any awards they are given. In employment cases, for example, the American Arbitration Association (AAA) procedures dictate that employees cannot pay more than \$300 in total arbitration costs.¹¹ In many situations, this fee is less than the filing fee in court. The employer pays all of the remaining fees. In fact, often the plaintiff or claimant pays nothing in arbitration and does not have to pay a 40% contingency fee to a lawyer.¹² Also, bearing the costs of the proceedings, which for employment litigation can include the employee’s attorney fees, can moti-

⁴See U.S. Chamber Inst. for Legal Reform, *Unstable Foundation: Our Broken Class Action System and How To Fix It* 3–5 (Oct. 2017), at https://www.instituteforlegalreform.com/uploads/sites/1/UnstableFoundation_Web_10242017.pdf (analyzing studies of recoveries under class actions and discussing specific case examples).

⁵See Consumer Fin. Pro. Bureau, *Arbitration Study: Report to Congress* 2015 30 (Mar. 2015).

⁶See, e.g., Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (Dec. 11, 2013), at <https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf>.

⁷See Victor E. Schwartz & Cary Silverman, *The Rise of Empty Suit Litigation*, 80 Brook. L. Rev. 599 (2015).

⁸See Melvin M. Belli, *The Adequate Award*, 39 Cal. L. Rev. 1 (1951) (observing the size of pain and suffering awards took its first leap after World War II as personal injury lawyers became adept at finding ways to enlarge these awards).

⁹See Stephen D. Sugarman, *A Comparative Look at Pain and Suffering Awards*, 55 DePaul L. Rev. 399, 399 (2006).

¹⁰See Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts*, 2005, at 10 tbl. 11 (Bureau of Justice Statistics, Apr. 9, 2009).

¹¹Am. Arbitration Ass’n, *Employment/Workplace Fee Schedule: Costs of Arbitration* (Oct. 1, 2017), available at https://www.adr.org/sites/default/files/Employment_Fee_Schedule.pdf.

¹²See, e.g., Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 802 (2003).

vate the company to settle quickly. That can be a good thing in many situations. Even when claims are taken through arbitration, they often reach conclusions far faster than had they pursued litigation. As this Committee can appreciate, many courthouses are overburdened, and after discovery battles, and escalating litigation tactics, it could take years to resolve disputes that arbitration can resolve in months. Discovery in arbitration is much more streamlined, the rules are less formal, and the claimant may never have to be deposed or testify. Again, the system is wired toward quick and fair resolutions.

Also, as pre-dispute arbitration has become more commonplace, the system has become more standardized and produces results often as good as litigation for the claimant. Arbitrators are generally skilled neutrals, many of whom are former judges. The AAA and JAMS have comprehensive rules and procedures to ensure independence and competence among arbitrators and due process for claimants. Rather than preside over litigation, which can be an all-or-nothing dispute resolution method, arbitrators can have other, varied options. An arbitrator can work with the parties to reach a fair resolution for both sides. A study published in the Stanford Law Review found that, contrary to what we hear from the other side, plaintiffs or claimants generally get the same or better outcomes in arbitration than in litigation.¹³ The U.S. Supreme Court has made these points in case law endorsing the use of pre-dispute arbitration agreements. “The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices.”¹⁴ Also, “the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”¹⁵

These benefits, though, cannot be achieved unless the arbitration path is agreed to before the injury or dispute arises. Once the parties become adversarial, they are unlikely to agree on a method for resolving their disputes. In addition to the hard feelings that are likely to infest these relationships, the parties’ incentives fundamentally change after a dispute has occurred, and they are diametrically opposed to each other. A business may not agree to arbitrate small claims because they know that the individual or other businesses may not want to take on the risks and burdens of litigation or be able to find a lawyer willing to take the case. The opposite may occur if the claim is for a substantial amount of money or if civil litigation, regardless of the merits or size of the claim, could create business and reputation risks for the company. Here, the company may prefer arbitration and the individual may not. This is why post-dispute arbitration agreements rarely occur, and when they do, it is often only when both sides are looking to buy down risks.

Conclusion

For many people, pre-dispute arbitration may be their only path for achieving justice for many types of claims. The civil justice system has become exceedingly expensive and time-consuming over the past few decades, particularly in the types of cases where pre-dispute arbitration agreements are most often used. The title of this hearing refers to the erosion of the civil justice system, and I would agree that the civil justice system has been eroding for many people in many situations. Many plaintiffs’ lawyers are highly skilled at trying to inflame juries and judges against corporate defendants, leverage out-of-court business and consumer pressures to generate settlements regardless of the merits of the claims, and use litigation gamesmanship and in-court techniques to drive up noneconomic and punitive damages. It is not a surprise that the parties—both claimants and defendants—find value in an alternative dispute resolution system that is not subject to this escalation and abuse, but focuses on ensuring aggrieved individuals get fairly compensated. There may be ways to improve the pre-dispute arbitration system, but it is providing the

¹³ See David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1578 (2005); see also Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843 (2010); Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56 (Nov. 2003–Jan. 2004); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 Disp. Resol. J. 44, 45, 47–50 (Nov. 2003–Jan. 2004); Hill, *supra* note 4, at 802; Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Resol. J. 9, 13 (May/July 2003).

¹⁴ *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97–542, at 13 (1982)).

¹⁵ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011).

access to justice for plaintiffs and defendants that they can no longer find in the civil justice system.

Again, thank you for the honor of testifying before you today. I would be pleased to answer any questions you may have.

Mr. CICILLINE. Thank you, Mr. Goldberg.

The Chair now recognizes Mr. Pincus for 5 minutes.

TESTIMONY OF ANDREW PINCUS

Mr. PINCUS. Thank you, Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the subcommittee. It is an honor to appear before you today to present the views of the U.S. Chamber Institute of Legal Reform. ILR strongly supports arbitration as a fair, less complex, and lower-cost alternative to our overburdened court system.

First, consumers and employees do as well or better in arbitration as in litigation. The just-released study commissioned by ILR compared the results of employment claims that were arbitrated and employment claims that were litigated in Federal court. It found that the overwhelming majority, around 75 percent, of the employment cases are settled in both arbitration and litigation. It is no surprise to lawyers that most cases settle.

For the cases that were decided either by the arbitrator or by the court, employee plaintiffs won three times as often in arbitration compared to wins in court, 32 percent compared to 11 percent.

Employee plaintiffs also recovered much larger amounts in arbitration than in a court. The median award in arbitration was around \$114,000, compared to around \$52,000 in court. The mean award was \$520,000 in arbitration, compared to around \$270,000 in court. These results are consistent with the findings of numerous other studies.

Second, arbitration is fair. The nation's largest arbitration providers, the AAA and JAMS, accept cases only when the governing arbitration agreement satisfies basic fairness standards regarding the selection of arbitrators, minimal costs for claimants, and the availability of discovery.

In addition, and I cite these cases in my written testimony, courts can and do invalidate arbitration agreements that specify unfair procedures such as unreasonable limits on discovery, unfair procedures for selecting arbitrators, excessive arbitration fees, requirements that arbitration take place in inconvenient locations, and "loser pays" provisions.

Third, arbitration procedures are much simpler than complex rules that apply in court. A claimant need not ever make a personal appearance to secure a judgment. Consumer claims, in particular, often can be and are adjudicated based solely on written submissions or on a telephone conference if the consumer chooses to proceed that way. The simpler procedures can be navigated by an individual with much less legal assistance, and therefore lower legal fees, or even without a lawyer. That flexibility and lower cost empowers consumers and employees, enabling them to obtain redress for small claims that could not practically be brought in court because of the inability to attract a lawyer. I think, as everyone knows, to proceed in court without a lawyer makes no sense and is very unlikely to result in any recovery.

Fourth, arbitration cannot be used to conceal wrongdoing. Claimants in arbitration are free to discuss their claims publicly and to report alleged wrongdoing to law enforcement officials. If an arbitration agreement purported to prevent the claimant from publicly disclosing his claim or misconduct, or from reporting that misconduct to law enforcement authorities, that restriction would be invalidated in court, and courts have invalidated those provisions.

The same is true of arbitrators' decisions. Indeed, State laws require disclosure of arbitration outcomes by arbitral forums such as the AAA, and courts consistently hold that the results of arbitration proceedings may be disclosed by either party.

Fifth, critics complain that arbitration agreements require resolution of disputes on an individual basis and preclude class-action lawsuits. Most claims that are asserted by consumers and employees are individualized and can't be brought as class actions. And the reality is when class actions are filed, they rarely provide benefits to class Members. The CFPB's own study found that 87 percent of the class actions studied provided no benefits whatsoever, and that the remainder benefitted, on average, only 4 percent of class Members.

Finally, as Justice Kagan recognized in her dissenting opinion in the *American Express* case, non-class-action options abound for vindicating small injuries through arbitration.

In sum, arbitration provides significant benefits to claimants as well as companies, and courts have the tools needed to prevent abuses of the arbitration process. For that reason, ILR believes that no legislation eliminating arbitration or restricting pre-dispute arbitration provisions is necessary and would harm consumers, employees, and businesses.

Thank you, and I look forward to answering your questions.

[The statement of Mr. Pincus follows:]

STATEMENT OF ANDREW J. PINCUS

Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the Subcommittee:

It is an honor to appear before you today to present the views of the U.S. Chamber Institute for Legal Reform ("ILR"). ILR is an affiliate of the U.S. Chamber of Commerce and is dedicated to making our nation's overall civil legal system simpler, fairer, and faster for all participants.

The Chamber and ILR strongly support arbitration as a fair, less-complex, and lower-cost alternative to our overburdened court system.

The arbitral process is overseen by impartial decision-makers, and subject to strict fairness rules. Courts are obligated to consider claims that an arbitration agreement contains provisions that are unconscionable under generally-applicable contract law, and they can and do invalidate arbitration agreements that specify unfair procedures.

Empirical studies show that consumers and employees do as well or better in arbitration as in litigation: they prevail on their claims at the same rate or more frequently, and they recover as much or more when they do prevail.

Arbitration is much simpler and less costly than court litigation—in terms of the money, time, and effort required by the dispute-resolution process. All parties benefit from the reduced expense and complexity—but, most importantly, consumers and employees are able to seek redress for claims that could not practically be brought in court.

Critics of arbitration contend that it enables wrongdoers to conceal their offenses by barring public discussion of claims and arbitrators' decisions. In fact, arbitration does not inherently impose a "gag rule": Employees and consumers are free to discuss their claims with law enforcement authorities, the public, and other employees

and consumers. Importantly, arbitration agreements that provide otherwise are typically invalidated by the courts.

Critics also cite the fact that arbitrations typically decide claims on an individual basis and that there generally are no class actions. As Justice Kagan has recognized, “non-class options abound” for vindicating small injuries through arbitration. Class actions typically deliver little to anyone other than lawyers, who reap huge fees.

In sum, arbitration provides significant benefits to claimants as well as companies, and courts already have the tools needed to prevent abuses of the arbitration process. For that reason, ILR believes that legislation eliminating or restricting pre-dispute arbitration provisions is not necessary and would harm claimants and companies.

Claimants in Arbitration Do Better—Or at Least as Well—As Plaintiffs in Court

One common assertion by arbitration critics is that claimants do worse in arbitration than in court, but the facts point strongly in the opposite direction. Multiple empirical studies have concluded that “there is no evidence that plaintiffs fare significantly better in litigation. In fact, the opposite may be true.”¹

Most recently, NDP Analytics compared results of employment claims that were arbitrated and employment claims that were litigated in federal court. The study examined more than 100,000 cases, using data from the nation’s leading arbitration providers and litigation data from the federal courts.

NDP Analytics found that employees won more often and won more money in arbitration than in court:

- The overwhelming majority (75%) of employment cases are settled in both arbitration and court litigation, but for the cases decided by the arbitrator or court, employee-plaintiffs won three times as often in arbitration compared to wins in court—32% compared to 11%.
- Employee-plaintiffs also recovered larger amounts in arbitration than in court: Employees whose claims were arbitrated generally recovered approximately double the amount recovered by employees in court. The median award in arbitration was \$113,818, compared to \$51,866 in court, and the mean award was \$520,630 in arbitration compared to \$269,885 in court.²

Studies of consumer arbitration have reached similar conclusions. For example, a 2010 study found that consumers won relief 53.3% of the time in arbitration, compared with a success rate of roughly 50% in court.³ And just as in court, plaintiffs who win in arbitration is able to recover not only compensatory damages but also “other types of damages, including attorneys’ fees, punitive damages, and interest.”⁴

In the healthcare industry, the Kaiser Foundation Health Plan uses arbitration to resolve disputes with its more than eight million California Members, and an independent review found that 96% of those who used the system said it was better than or the same as court. Awards to successful claimants ranged from \$4,500–\$3,469,778.⁵

Moreover, these studies probably understate the effectiveness of arbitration, compared with litigation, as a means of vindicating plaintiffs’ claims, because of “selection effects.” Arbitration claims typically come from middle-income claimants with claims too small to attract the legal representation needed to proceed in the court

¹David Sherwyn *et al.*, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1578 (Apr. 2005); *see also, e.g.*, Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 16 (2017).

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

³Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 896–904 (2010); Theodore Eisenberg *et al.*, *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 Seattle U. L. Rev. 433, 437 (1996); *see also* Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 Hastings Bus. L.J. 77, 80 (2011); Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2005).

⁴Drahozal & Zyontz, *Empirical Study*, *supra* n.3 at 902.

⁵Office of the Independent Administrator, *Annual Report of the Kaiser Foundation Health Plan, Inc. Mandatory Arbitration System* (2018), <https://www.oia-kaiserarb.com/2059/-reports/annual-reports/annual-report-for-2018>.

system—thus, studies that compare the average amount obtained by prevailing parties in arbitration and litigation probably tilt in favor of litigation. And, because of arbitration’s relatively streamlined procedures as compared with litigation, “relatively weaker claims . . . are more likely to go to an arbitration hearing on the merits than in litigation” given the additional procedural hurdles present in litigation.⁶

In short, the caricature of arbitration as a system rigged against plaintiffs simply isn’t accurate. Most claimants in arbitration do as well, and likely better, than in court.

Arbitrations Employ Fair Procedures

The legal rules governing arbitration require fair procedures. The nation’s largest arbitration providers accept cases for arbitration only when the governing arbitration agreement satisfies basic fairness standards. **Most importantly, courts invalidate arbitration agreements that contain unfair provisions.**

The American Arbitration Association (AAA), the country’s largest arbitration provider, developed fairness rules for employment and consumer arbitrations more than two decades ago. The AAA will not accept a case for arbitration unless the arbitration agreement complies with those due process standards.⁷ Specifically, these rules:

- Require that arbitrators must be neutral and disclose any conflict of interest and that both parties have an equal say in selecting the arbitrator;
- limit the fees paid by employees and consumers to \$200 for consumers and \$300 for employees—amounts that are less than the filing fee in federal court;
- empower the arbitrator to order any necessary discovery; and
- require that damages, punitive damages, and attorneys’ fees be awardable to the claimant to the same extent as they would be in court.

The AAA rules require that consumers be given the option of resolving their dispute in small claims court. JAMS, another leading arbitration provider, requires similar protections—as do other arbitration providers.⁸

The courts provide another layer of oversight. If an arbitration provision is unfair, courts can and do step in and declare the arbitration agreement unconscionable and unenforceable. For example, courts invalidate limits on recovery of damages that would not be permissible if the claim were litigated in court;⁹ excessive fees for accessing the arbitral forum;¹⁰ requirements that the arbitration take place in inconvenient locations for claimants;¹¹ attempts to shorten the applicable statutes of lim-

⁶See Samuel Estreicher *et al.*, *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 Rutgers U.L. Rev. 375, 389–93 (2018).

⁷Am. Arbitration Ass’n, *Employment Due Process Protocol* (May 9, 1995), perma.cc/93NR-TXQP; Am. Arbitration Ass’n, *Consumer Due Process Protocol Statement of Principles* (Apr. 17, 1998), perma.cc/VPW4-KXUV.

⁸JAMS, *JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness* (July 15, 2009), perma.cc/WC48-KP8G; JAMS, *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness* (July 15, 2009), perma.cc/HN4C-RN23; Nat’l Arbitration and Mediation, *Employment Rules and Procedures* (2017), perma.cc/F2XD-TCHJ.

⁹See, e.g., *Ziglar v. Express Messenger Sys. Inc.*, No. CV–16–02726–PHX–SRB, 2017 WL 6539020, at *3 (D. Ariz. Aug. 31, 2017), vacated on other grounds, 739 F. App’x 444 (9th Cir. 2018) (arbitration agreement was unconscionable because it purported to prevent employees from recovering treble damages under state employment law); *Smith v. D.R. Horton, Inc.*, 790 S.E.2d 1, 5 (S.C. 2016) (arbitration agreement that prevented claimants from recovering damages was unconscionable); *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256, 263 (3d Cir. 2003) (arbitration agreement that barred punitive damages was unconscionable); *Woebse v. Health Care & Ret. Corp. of Am.*, 977 So. 2d 630 (Fla. Dist. Ct. App. 2008) (same).

¹⁰The Supreme Court has held that a party to an arbitration agreement may challenge enforcement of the agreement if the claimant would be required to pay excessive filing fees or arbitrator fees in order to arbitrate a claim. See *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 90–92 (2000). Since *Randolph*, courts have aggressively protected consumers and employees who show that they would be forced to bear excessive costs to access the arbitral forum. See, e.g., *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923–26 (9th Cir. 2013) (refusing to enforce an arbitration agreement that required the employee to pay an unrecoverable portion of the arbitrator’s fees “regardless of the merits of the claim”); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013) (reaffirming that a challenge to an arbitration agreement might be successful if “filing and administrative fees attached to arbitration . . . are so high as to make access to the forum impracticable” for a plaintiff). Courts also have reached the same conclusion under State unconscionability law.

¹¹See, e.g., *Willis v. Nationwide Debt Settlement Grp.*, 878 F. Supp. 2d 1208 (D. Or. 2012) (travel from Oregon to California); *Coll. Park Pentecostal Holiness Church v. Gen. Steel Corp.*, 847 F. Supp. 2d 807 (D. Md. 2012) (travel from Maryland to Colorado); *Hollins v. Debt Relief*

itations that would be invalid if the claim were litigated in court;¹² “loser pays” provisions under which a claimant might have to pay the full costs of the arbitration;¹³ or must pay the drafting party’s costs regardless of who wins;¹⁴ unreasonable limits on discovery;¹⁵ and unfair procedures for selecting arbitrators.¹⁶

This judicial oversight ensures that companies have an incentive to craft arbitration agreements that are fair to their customers and employees—and that arbitration agreements that are not fair to claimants will not be enforced.

Arbitration Is Quicker and Easier To Navigate Than Court Adjudication

Everyone recognizes that litigation in court is extremely expensive, immensely time-consuming, and highly complicated. By contrast, as the Supreme Court has explained in an opinion written by Justice Breyer, arbitration “is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearings and discovery devices.”¹⁷

Flexibility is one of arbitration’s greatest advantages. An arbitration plaintiff need not ever make a personal appearance to secure a judgment; claims often can be adjudicated based solely on written submissions or on the basis of a telephone conference.¹⁸ In court, by contrast, a claimant is often obligated to appear, wait in line, and perhaps return another day if the court is unable to get through its docket. Even for those litigants who can afford to take time off from work or family obligations—and many cannot—these inconveniences can erode the benefits of any possible recovery.

Arbitrations are also resolved quickly—which means that claimants receive relief faster. The recent NDP study found that arbitration cases in which the employee-plaintiff prevailed took, on average, 569 days to complete, while cases in court required an average of 665 days. Ten percent of the court cases took an average of 1,283 days—50% longer than the longest 10% of arbitration proceedings.¹⁹ Another study found that awarded arbitrations took an average of just 11 months to decision, versus an average of 26.6 months to verdict in State court jury trial cases.²⁰

of Am., 479 F. Supp. 2d 1099 (D. Neb. 2007) (travel from Nebraska to Texas); *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364 (Va. Cir. Ct. 2001) (travel from Virginia to California).

¹²See, e.g., *Zaborowski v. MHN Gov’t Servs., Inc.*, No. C 12–05109 SI, 2013 WL 1363568 (N.D. Cal. Apr. 3, 2013); *Adler v. Fred Lind Manor*, 103 P.3d 773 (Wash. 2004) (180 days); see also *Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197 (Wash. 2013) (refusing to enforce arbitration agreement in debt-collection contract that required debtor to present claim within 30 days after dispute arose); *Alexander*, 341 F.3d at 256 (same, for an employee); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 138 (Cal. Ct. App. 1997) (rejecting provision that imposed shortened one-year statute of limitations).

¹³See *Gandee*, 293 P.3d at 1197; *Alexander*, 341 F.3d at 256; *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996).

¹⁴See, e.g., *In re Checking Account Overdraft Litig.*, 485 F. App’x 403 (11th Cir. 2012); see also *Samaniego v. Empire Today LLC*, 140 Cal. Rptr. 3d 492 (Cal. Ct. App. 2012) (attorneys’ fees).

¹⁵See, e.g., *Narayan v. Ritz-Carlton Dev. Co.*, 400 P.3d 544, 555 (Haw. 2017).

¹⁶See, e.g., *Chavarria*, 733 F.3d at 923–26 (arbitration agreement was unconscionable and unenforceable when it “would always produce an arbitrator proposed by [the company] in employee-initiated arbitration[s]” and barred selection of “institutional arbitration administrators”); *Ruiz v. Millennium Square Residential Ass’n*, 156 F. Supp. 3d 176, 182 (D.D.C. 2016) (refusing to enforce arbitrator selection provision that “gives [the claimant] no say in the arbitrator-selection process”); *Magno v. Coll. Network, Inc.*, 204 Cal. Rptr. 3d 829, 840 (Cal. Ct. App. 2016) (arbitration provision was unconscionable because, among other things, it allowed the defendant to select the arbitrator and “contain[ed] no assurances of neutrality”).

¹⁷*Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97–542, at 13 (1982)); see also, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011) (“[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”).

¹⁸See, e.g., Am. Arbitration Ass’n, *Consumer Arbitration Rules* 22 (Sept. 1, 2014) (“A hearing may be by telephone or in person.”), perma.cc/ESJN-FQE4.

¹⁹NDP Analytics, *supra* n. 2, at 11–12.

²⁰Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data From Four Providers*, 107 Cal. L. Rev. 1, 51 (2019).

Arbitration Expands Access to Justice by Enabling Consumers and Employees to Pursue Claims That They Would Be Unable To Litigate in Court

Arbitration's speed, efficiency, and flexibility make it a lower-cost means of resolving disputes—which, in turn, expands consumers' access to justice by providing a forum in which they can realistically prosecute low-dollar-value claims.

Most harms suffered by employees and consumers are relatively small in economic value and are individualized. A key obstacle to pursuing an individualized, small-value claim in court is the cost of hiring counsel. Unrepresented parties have little hope of navigating the complex procedures that apply to litigation in court, yet a lawyer's hourly billing rate may itself exceed the amount at issue in many claims. Many lawyers, especially those working on a contingency basis, are unlikely to take cases when the prospective of a substantial payout is slim. Studies indicate that a claim must exceed \$60,000, and perhaps \$200,000, in order to attract a contingent-fee lawyer.²¹

Arbitration thus empowers individuals because they can realistically bring a claim in arbitration without the help of a lawyer.²² Although a party always has the choice to retain an attorney, arbitration procedures are sufficiently simple and streamlined that in many cases no attorney is necessary.²³ And even if a consumer or employee retains a lawyer, costs may well be lower because of the increased speed and efficiency of arbitration. As the Supreme Court put it: “[a]rbitration agreements allow parties to avoid the costs of litigation, . . . which often involves smaller sums of money than disputes concerning commercial contracts.”²⁴

Indeed, a study of 200 AAA employment awards concluded that low-income employees brought 43.5% of arbitration claims, most of which were low-value enough that the employees would not have been able to find an attorney willing to bring litigation on their behalf.²⁵ These employees were often able to pursue their arbitrations without an attorney and won at the same rate as individuals with representation.²⁶

Without arbitration, as Justice Breyer explained in a Supreme Court opinion, “the typical consumer who has only a small damage claim (who seeks, say, the value of only a defective refrigerator or television set) [would be left] without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery.”²⁷

In short, for a very large percentage of the harms suffered by consumers and employees, arbitration is the only realistic opportunity for obtaining relief. One law professor explained why:

In a world without employment arbitration as an available option, we would essentially have a “cadillac” system for the few and a “rickshaw” system for the many. The unspoken (yet undeniable) truth is that most claims filed by employees do not attract the attention of private lawyers because the stakes are too small and outcomes too uncertain to warrant the investment of lawyer time and resources. These claims have only one place to go: Filings with administrative agencies where they essentially languish, for the agencies themselves lack the staffing (and often even the inclination) to serve as lawyers for average claimants. The people who benefit under a litigation-based system are those whose salaries are high enough to warrant the costs and risks of a lawsuit undertaken by competent counsel; these are the folks who are likely to derive benefit from the considerable

²¹Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 783 (2003). In some markets, this threshold may be as high as \$200,000. Minn. State Bar Ass'n, *Recommendations of the Minnesota Supreme Court Civil Justice Reform Task Force* 11 (Dec. 23, 2011), perma.cc/VJ8L-RPEY.

²²While one study found that pro se plaintiffs “struggle” in arbitration, see Chandrasekhar & Horton, *supra* n.20, at 2, 52, a pro se plaintiff who can afford a lawyer is nonetheless far better off in arbitration than litigation.

²³St. Antoine, *supra* n.1, at 15 (“it is feasible for employees to represent themselves or use the help of a fellow layperson or a totally inexperienced young lawyer”).

²⁴*Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (emphasis added).

²⁵Hill, *supra* n.21, at 794.

²⁶*Id.*

²⁷*Allied-Bruce Terminix Cos.*, 513 U.S. at 281.

upside potential of unpredictable jury awards. Very few claimants, however, are able to obtain a position in this “litigation lottery.”²⁸

As another commentator puts it in the context of employment disputes, “a substantial number of nonunion employees, particularly those with small financial claims, have a realistic opportunity to pursue their rights through mandatory arbitration that otherwise would not exist.”²⁹

Arbitration Agreements Cannot Prevent Consumers or Employees From Discussing Claims With Government Agencies or the Public—and Arbitrators’ Decisions Cannot Be Kept Secret

Critics of arbitration contend that arbitration imposes confidentiality obligations that allow wrongdoers to cover up their offenses. That is simply false. As a leading law professor has explained, “under U.S. law, the privacy of arbitration typically does not extend to precluding a party’s disclosure of the existence of the arbitration or even its outcome. Instead, it means that non-parties can be excluded from the hearing and that the arbitrator and arbitration provider cannot disclose information about the proceeding.”³⁰

Thus, claimants in arbitration are free to discuss their claims publicly and to report alleged wrongdoing to law enforcement officials.³¹ If an arbitration agreement purported to impose a “gag order,” or to prevent a claimant from publicly disclosing misconduct or reporting that misconduct to law enforcement authorities, that restriction would be invalidated in court.³²

The same is true of arbitrators’ decisions. Indeed, State laws require disclosure of arbitration outcomes by arbitral forums such as the AAA,³³ and courts consistently hold that the results of arbitration proceedings may be disclosed by either party.³⁴

In sum, the claim that arbitration allows businesses to avoid public disclosure of disputes with employees or consumers is simply false; consumers and employees retain the ability to make these disputes public even if they are resolved in arbitration.

Banning Pre-dispute Arbitration Agreements Will Eliminate All Arbitration

Arbitration critics often assert that if arbitration is beneficial for both sides of a dispute, businesses and employees will agree to arbitrate after disputes arise and that a ban on pre-dispute arbitration agreements therefore will not eliminate all arbitration. In reality, post-dispute arbitration agreements are as rare as unicorns.

The reasons for this are simple. Once a particular dispute has arisen, the parties “often have an emotional investment in their respective positions,” built up over the course of the events that led to the dispute.³⁵ And especially at the beginning of a dispute, parties are “reluctan[t] ... to evaluate their cases pragmatically.”³⁶ The

²⁸ Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. 559, 563 (2001).

²⁹ St. Antoine, *supra* n.1, at 16.

³⁰ Christopher R. Drahozal, *FAA Preemption After Concepcion*, 35 Berkeley J. Emp. & Lab. L. 153, 167 (2014). The American Arbitration Association’s rules provide that “[t]he arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary.” Am. Arbitration Ass’n, *Commercial Arbitration Rules and Mediation Procedures* 31 (Apr. 1, 1999), perma.cc/5U92-5PQF. This Rule applies only to the hearings themselves; nothing in the rules requires that the outcome be kept confidential.

³¹ See, e.g., Christopher C. Murray, *No Longer Silent: How Accurate are Recent Criticisms of Employment Arbitration*, 36 Alternatives to the High Cost of Litigation 65, 78 (2018). The only even possible exception is one-off arbitration agreements individually negotiated with highly-paid, high-ranking executives or similar employees, which could bar public disclosure of confidential information. But even in that context, confidentiality obligations face a high bar.

³² See, e.g., *Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1078 (9th Cir. 2007), overruled on other grounds by *Kilgore v. KeyBank, Nat’l Ass’n*, 673 F.3d 947 (9th Cir. 2012); *Longnecker v. Am. Express Co.*, 23 F. Supp. 3d 1099, 1110 (D. Ariz. 2014); *DeGraff v. Perkins Coie LLP*, No. c 12-02256 JSW, 2012 WL 3074982, at *4 (N.D. Cal. July 30, 2012).

³³ E.g., Cal. Code Civ. Proc. § 1281.96.

³⁴ Courts have invalidated on unconscionability grounds arbitration agreement provisions requiring that outcomes be kept confidential. See, e.g., *Larsen v. Citibank FSB*, 871 F.3d 1295, 1319 (11th Cir. 2017); *Davis*, 485 F.3d at 1079.

³⁵ Steven C. Bennett, *The Proposed Arbitration Fairness Act: Problems and Alternatives*, 67 Disp. Resol. J. 32, 37 (2012).

³⁶ Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 Wm. Mitchell L. Rev. 313, 326 (2003).

emotional investment in a case thus tends to skew the preferences of one party or another in favor of “refus[ing] to arbitrate”³⁷ and instead opting to litigate in court.

The lawyers for one or both sides also have financial incentives to induce their clients to opt for litigation in court rather than arbitration. Litigation in court—which takes much longer than arbitration and involves many more procedural hurdles—offers lawyers the opportunity to earn much higher fees than they could earn in arbitration. Consciously or not, they may advise clients to choose a judicial forum that is really in the lawyers’ own best interest rather than in the clients’ interest.

As one law professor explained: “I know, from personal experience representing clients and in my work drafting postdispute arbitration rules for the Center for Public Resources (a consortium of companies and lawyers that promotes various forms of ADR), that postdispute arbitration agreements are almost never negotiated. It is a chimerical alternative to predispute arbitration agreements.”³⁸ In reality, post-dispute arbitration agreements simply do not happen.

Finally, even if parties were willing to negotiate post-dispute arbitration agreements, it would not make economic sense for businesses to do so. Maintaining a top-quality arbitration system requires a business to shoulder virtually all of the costs of arbitration, including filing fees and arbitrator expenses. Companies willingly bear these costs because, on average, they pay less in legal fees to resolve disputes in arbitration than to litigate cases in court. If companies could not ensure that most or all of their dispute resolution proceedings would take place in arbitration rather than litigation, they would simply relegate all disputes to the court system—rather than paying both the high litigation costs for court proceedings and virtually all of the fees associated with arbitration. That result would be harmful to plaintiffs, who would lose the ability to access arbitration for low-value claims that cannot be brought in court.

Arbitration’s Individualized Process and Lack of Class Procedures Does Not Justify Banning Arbitration

Opponents of arbitration often complain that arbitration agreements require resolution of disputes on an individual basis and preclude class action lawsuits. But while the features of class actions—aggregation of claims and spreading of litigation costs over many class Members—may sound appealing in theory, these benefits are very rarely, if ever, realized. Most class actions provide little or no benefit at all to class Members. The indisputable beneficiaries of class actions, rather, are the plaintiffs’ attorneys who file them and receive large fees if the cases are settled.

Importantly, most claims asserted by consumers and employees are individualized and cannot be brought as class actions. When an employee argues that his or her pay or benefits were wrongly calculated, or that he or she was unfairly denied a raise or promotion, or claims injury from harassment, those claims in the overwhelming majority of situations cannot be brought as class actions. And on the consumer side, a study of claims asserted by consumers—and not by lawyers—found that the overwhelming majority could not be litigated in a class action.³⁹

Thus, while it is often claimed that class actions are necessary to allow certain low-value claims to be brought in court, the reality is that abandoning arbitration in order to allow for class actions would be the surest way to prevent many low-value claims from being prosecuted, because most low-value claims are not eligible for class treatment.

Moreover, the benefits of class actions are greatly overstated. Most class actions do not produce any recovery for absent class Members. Class action studies consistently find that the overwhelming majority of these cases are resolved with no benefit to class Members—87% in one study, 66% in another, and 60–80% in a third.⁴⁰

Even in the small percentage of cases that settle, the benefits for class Members are largely illusory:

³⁷ *Id.* at 327.

³⁸ Samuel Estreicher, *Saturns for Rickshaws*, *supra* n.28, at 567.

³⁹ Letter from David Hirschmann & Lisa Rickard to Monica Jackson, *Re: Notice of Proposed Rulemaking on Arbitration Agreements*, Dkt. No. CFPB–2016–0020–3941 at 3, Appendix A 13–14 (Aug. 22, 2016).

⁴⁰ Consumer Fin. Prot. Bureau, *Arbitration Study: Report to Congress 2015*, Section 6, Page 39 (Mar. 2015), perma.cc/8AX5-AYWN (hereinafter CFPB Study); Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (Dec. 11, 2013), goo.gl/3B27FQ (hereinafter Mayer Brown Study); Jason Scott Johnston, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions Under Federal Consumer Protection Statutes*, 2017 Colum. Bus. L. Rev. 1 (2017).

- Most class action settlements do not involve automatic distribution of settlement payments and the vast majority of class members do not file claims for payment from these settlement funds.
- One study reported a “weighted average claims rate” in class actions of just 4%—in other words, 96% of the class members got nothing.⁴¹
- That figure comports with academic studies, which regularly conclude that only “very small percentages of class members actually file and receive compensation from settlement funds.”⁴²
- A recent empirical study explains that “although 60 percent of the total monetary award may be available to class members, in reality, they typically receive less than 9 percent of the total.” The author concluded that class actions “clearly do[] not achieve their compensatory goals Instead, the costs . . . are passed on to consumers in the form of higher prices, lower product quality, and reduced innovation.”⁴³

While class Members get little benefit from class actions, the lawyers who file these cases profit handsomely. These payments to lawyers, of course, are subtracted from the funds available to class Members, and therefore are highly relevant in assessing the benefit that class actions provide to class Members. One study found that the average settlement payment was no better than \$32.35 per class member,⁴⁴ but attorneys’ fees averaged \$1 million per case.⁴⁵ And the average fee paid to plaintiffs’ lawyers—as a percentage of the announced settlement (not the smaller amount actually distributed to class Members)—was 41%, with a median of 46%.⁴⁶

Class actions also typically take significantly longer to resolve than arbitrations. That means employees must wait much longer to obtain relief. One study found that class actions that produced a class-wide settlement took an average of nearly two years to resolve.⁴⁷ And that two-year average duration, moreover, may not even include the time needed for class Members to submit claims and receive payment after a settlement is reached. Another study found that 14% of the class actions were still pending four years after they were filed, with no end in sight.⁴⁸

Moreover, arbitration can provide an efficient means of effectively litigating small injuries shared by a large number of employees or consumers. Parties with related claims can use the same lawyer and (if needed) the same expert in order to share costs. Justice Kagan (in an opinion for herself and Justices Ginsburg and Breyer) has recognized that groups of claimants can vindicate their rights in arbitration without class procedures—through “informal coordination among individual claimants, or amelioration of arbitral expenses,”⁴⁹ both of which are features of virtually all arbitration agreements. One study suggested that plaintiffs’ lawyers may be able to “create a simulacrum of the class action by initiating dozens or even hundreds of two-party arbitrations against the same defendant” and thereby pursue class-action style cases in the employment arbitration arena.⁵⁰

Thus, the notion that the only way for employees and consumers to band together to bring small claims is in class actions is incorrect—arbitration provides an effective way to Act collectively, while also giving employees with individualized claims the opportunity to bring those claims (an opportunity that class actions do not provide).

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

Mr. CICILLINE. Thank you, Mr. Pincus.

⁴¹FPB Study at Section 8, Page 30; *see also* Mayer Brown Study at 7 & n.20 (in the handful of cases where statistics were available, and excluding one outlier case involving individual claims worth, on average, over \$2.5 million, the claims rates were minuscule: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%).

⁴²Linda Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 Emory L.J. 399, 419 (2014).

⁴³Joanna Shepherd, *An Empirical Study of No-Injury Class Actions*, 2, 5, 21 (Emory Univ. Sch. of L., Legal Studies Research Paper Series No. 16–402, Feb. 1, 2016), perma.cc/TU9R-UDSM.

⁴⁴CFPB Study at Section 8, Pages 27–28; *see also* Statement of the U.S. Chamber of Commerce to House Committee on Financial Services, Subcommittee on Financial Institutions and Consumer Credit (May 18, 2016) at Appendix, page 5 (explaining calculation), perma.cc/TJ92-CE9G.

⁴⁵CFPB Study at Section 8, Page 33.

⁴⁶CFPB Study at Section 8, Page 34.

⁴⁷CFPB Study at Section 8, Page 37.

⁴⁸Mayer Brown Study at 1.

⁴⁹*Italian Colors*, 570 U.S. at 249 (Kagan, J., dissenting).

⁵⁰Chandrasekher & Horton, *supra* n.20, at 2, 9, 52–54.

The Chair now recognizes Ms. Gilles for 5 minutes.

TESTIMONY OF MYRIAM GILLES

Ms. GILLES. Thank you, Chairman Cicilline, Ranking Member Sensenbrenner, distinguished Members of the subcommittee. Thank you so much for inviting me here. It is a privilege to be before you.

In my few minutes, I would just like to explain how forced arbitration systematically strips us of our legal rights.

Forced arbitration clauses are everywhere. These provisions are buried in the boilerplate of take-it-or-leave-it consumer and employment contracts, and they require that all legal claims be resolved in private, one-on-one arbitrations.

What this really means is that, for example, if an employer rips off a group of employees, they can't sue that employer. They can't sue in court, they can't bring a group action, they can't bring a group action in arbitration. The only thing a given employee could do in that scenario is to take on all the burden and cost of going against the employer in a one-on-one arbitration.

If an individual employee only has, say, \$500 at stake, that is the amount that the employer ripped off, that is the amount of wage theft that we are talking about, he is not going to spend many times that amount in order to bring a claim. The game isn't worth the candle.

So nearly all claims like this where forced arbitration is in effect, the employee rationally abandons her claim, and that means that the employer has basically drafted for itself what Congressman Nadler described as a get-out-of-jail-free card. There is no accountability, no liability.

Given that reality, I think it is not surprising that forced arbitration is still popular, that over the past decade it is almost impossible to find a product, a service, an amenity of modern life that doesn't require us to sign away our rights. Over 60 million American workers are subject to forced arbitration. That is more than half the non-unionized workforce. The Economic Policy Institute predicts that in three to five years, 80 percent of all workers will be bound by forced arbitration.

I want that to sink in for just a moment. Eighty percent of workers are going to have to sign away their rights to have a fair workplace before they can even get a job. That just seems crazy.

In consumer transactions, 86 percent of student borrowers, 90 percent of the nation's credit card debt, 88 percent of mobile wireless providers, 99 percent of payday lenders—this is happening, and it is happening everywhere. Probably every single person in this room, and certainly every person in this country, is subject to a forced arbitration clause in some aspect of their lives, to apply for a job, get a credit card, get a checking account, get a loan, belong to a gym, send your kid to a camp, or put your parents in a nursing home. You must sign away your rights.

Take, for example, Richard Heggens, my fellow New Yorker who is here in the gallery today. Richard worked for Chipotle Restaurant in 2015. He tried to join a lawsuit brought by a group of Chipotle employees against the company for wage theft. The problem was that Richard had unknowingly agreed to a forced arbitra-

tion clause, and I am using the air quotes because the clause was buried in the fine print of an online welcome packet that Chipotle emailed to all its new employees requiring them to click “Agree” before they could start work. You didn’t actually have to read the documents to click “Agree,” and we have all been on those online sites, right? So, we can relate.

Richard didn’t read the arb clause, but that didn’t matter. His case was kicked out of court and sent into individual arbitration.

Now, what Chipotle was really banking on here was that Richard and the other employees, once blocked from going to court as a collective, would just drop their claims, because that is what typically happens. Again, it is usually not worth it for an individual employee to bring the claim. That is not what happened here.

The lawyers who were representing Richard and the other employees who have been pick-pocketed by Chipotle, they called Chipotle’s bluff, and they started to bring serial arbitrations, over 1,000 arbitrations. Do you know what Chipotle did? They cried uncle. They went back to Federal court and said please help us out of this mess.

What is the mess? The mess is actually having to defend itself against allegations of wage theft by their own employees.

I think it is clear in this example that Chipotle’s plan all along was to avoid any accountability to its workers. It was trying to use its forced arbitration clause as a shield, and it just couldn’t believe it when it didn’t work.

But Richard’s case is an exception, because I think that lots of companies use forced arbitration in this way and are able to suppress claims by using forced arbitration in this way. This is just not the way the civil justice system is supposed to work. This is not what I teach my students. This is not how it is supposed to go.

So, I do think that it is time for Congress to act. Last month, in the most recent contested decision by the Supreme Court on forced arbitration, Justice Ginsburg issued a clarion call to the Congress. She told you it is urgent that Congress Act to protect the rights of employees and consumers, and I really hope you do.

Thank you.

[The testimony of Ms. Gilles follows:]

STATEMENT OF MYRIAM GILLES

Distinguished Members of the House Subcommittee:

Thank you for inviting me to participate in this important hearing. I hope my testimony will help inform the discussion of the pernicious effects of class-banning forced arbitration clauses on consumers, employees and small businesses. In this written testimony, I (1) chronicle the rise and troubling consequences of forced arbitration, and (2) expose the reality behind the myths and talking points perpetuated by arbitration advocates—all to make clear that a legislative solution is desperately needed to solve this escalating crisis in access to justice. It my hope that today’s hearing will spur the Committee and the Congress to Act on the slate of proposed legislation seeking to amend the Federal Arbitration Act, including the Forced Arbitration Injustice Repeal Act (H.R. 1423/S. 610), the Restoring Justice for Workers Act (H.R. 7109), and the Justice for ServiceMembers Act (H.R. 2631).

INTRODUCTION

In 1925, the 68th Congress enacted the Federal Arbitration Act (“FAA”) to protect voluntary agreements to arbitrate, entered into by savvy businesses seeking a fast and economical alternative to the judicial system and a private forum where trade

secrets and other commercial matters would be kept confidential.¹ Not one member of that Congressional body could have imagined that this statute would someday be interpreted to permit companies to impose pre-dispute arbitration clauses in standard-form contracts with consumers and employees. Surely no one who supported the legislation thought for a second that, in enacting the FAA, they would be undermining private enforcement of consumer, antitrust, securities, employment and civil rights statutes that preserve and protect our shared rights.² clearly no member of the 68th Congress believed that casting a vote in favor of the FAA would render American citizens and small business owners unable to access public courts to resolve disputes, seek redress for grievances, or enforce State and federal laws.

Yet that is precisely where we find ourselves today, as the result of a series of flawed judicial decisions that have strayed far from the 68th Congress's original intent in enacting the FAA. The result has been a proliferation of mandatory, pre-dispute arbitration clauses and class action bans. Given the certainty that most consumers and employees cannot afford to arbitrate small-dollar claims individually, or attract counsel on a contingent fee basis, these provisions effectively eliminate access to justice and undermine rights guaranteed by federal and State law.³

Until now, debates over forced arbitration have largely been confined to academics and policymakers; but recent scandals have revealed the extent to which these provisions enable companies to cover up persistent wrongdoing. And polling reveals that citizens are now demanding change: 84% of voters—87% of Republicans and 83% of Democrats—support legislation to end forced arbitration.⁴ In other words, in this moment of partisan factionalism where we seem to agree on little, Americans across the political spectrum agree that closing the courthouse door is harmful. It therefore falls upon this 116th Congress to faithfully represent the interests of this vast majority by amending the FAA to make clear that it does not apply to pre-dispute, class-banning forced arbitration clauses imposed by powerful companies upon unknowing consumers, employees and other weaker counterparties.

I. The Ominous Rise of Forced Arbitration in America

In 2005, I began studying the effects of forced arbitration clauses on consumers, employees and small businesses. That year, I published an article about class-banning arbitration provisions and warning that these clauses could become ubiquitous, blocking citizens' access to judges and juries.⁵ Two important rulings by the United States Supreme Court of the United States brought to life all my dire predictions. In its 2011 decision in *AT&T Mobility v. Concepcion*, the Court held that the FAA preempts, not only State law rules that ban arbitration in some category of cases, but also any Rule that requires the availability of collective procedures for the resolution of disputes.⁶ This reading of the FAA has since preempted many subsequent attempts by states to regulate arbitration clauses in consumer and employment contracts.⁷

¹See, e.g., SEN. REP. NO. 536, 68TH CONG., 1ST SESS. 3 (1924) (the goal of promoting arbitration as an alternative to the judicial system “appealed] to big business and little business alike, to corporate interests as well as to individuals”).

²Indeed, even the FAA's primary draftsman, Julius Henry Cohen, warned that arbitration was not the appropriate forum “for deciding points of law of major importance involving constitutional questions or policy in the application of statutes.” Andrea Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 109 CAL. L. REV. (forthcoming 2019) (citing Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926)).

³See CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY (2015) at 10 [hereinafter, CFPB ARBITRATION STUDY] (“Across each product market, 85–100% of the contracts with arbitration clauses—covering close to 100% of market share subject to arbitration in the six product markets studied—include no-class arbitration provisions.”).

⁴The percentage of Americans against forced arbitration has risen steadily in the past few years. For example, in 2017, 67% of American—64% of Republicans and 74% of Democrats—supported the CFPB's Rule which would have banned forced arbitration clauses in consumer financial contracts. See Sylvan Lane, *GOP Polling Firm: Bipartisan Support for Consumer Bureau Arbitration Rule*, THE HILL, Oct. 2017. The more recent nationwide poll by Hart Research found even greater bipartisan support for an even broader federal ban on all forced arbitration clauses in consumer and employment contracts.

⁵Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005).

⁶563 U.S. 333 (2011).

⁷See, e.g., *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017); *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012).

The Court expanded the reach of the FAA in its 2013 decision in *American Express v. Italian Colors*.⁸ There, a class of small business owners brought an antitrust class action against American Express challenging various anticompetitive practices. The case had important implications for millions of small merchants who felt abused by Amex's high fees, and whose theory of antitrust injury sought important changes in the electronic payments industry. By dint of Congressional intent and statutory enactment, these are precisely the types of claims that small businesses are meant to pursue.⁹ Yet five Justices the Supreme Court enforced Amex's class-banning arbitration clause buried in its merchant service agreement, prohibiting these small businesses from pursuing their legal claims collectively.¹⁰ Given that the cost of an individual small business bringing an antitrust action against a huge company like American Express was prohibitive, this ruling all but ensured that Amex and other big companies that impose forced arbitration on small businesses are rendered immune from liability and free to engage in whatever anti-competitive conduct they want.¹¹

These decisions, widely viewed as illogical and incorrect interpretations of the FAA, set the Court upon a crooked legal path, leading it to uphold class-banning arbitration clauses in numerous circumstances that stray far from the original goals of the FAA.¹² In case after case, slim majorities have held that it does not matter that individual citizens are unable to vindicate their statutory rights in a one-on-one arbitration—i.e., that countless legal claims will “slip through the legal system,” leaving serious corporate wrongdoing unaddressed.¹³ As Justice Kagan wrote in her blistering dissent in Amex, “the nutshell version” of the majority view is simply this: “Too darn bad.”¹⁴

These Supreme Court decisions have given a green light to corporations looking to suppress legal claims and opt out of liability.¹⁵ Corporate actors, seeing that green light, have hit the gas, and the use of class-banning forced arbitration clauses has skyrocketed in recent years.¹⁶ These clauses have quickly spread from telecom and credit card contracts, to contracts with insurance companies, airlines, landlords, payday lenders, banks, gyms, rental car companies, parking facilities, schools, kids'

⁸ 559 U.S. 1103 (2013).

⁹ See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 634 (1985) (declaring the “fundamental importance [of antitrust law] to American democratic capitalism”); *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826 (2d Cir. 1968) (“A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.”); *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826–27 (2d Cir. 1968) (observing that an antitrust violation “can affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage,” such that arbitration of such “issues of great public interest” was ill advised).

¹⁰ 559 U.S. 1103 (2013).

¹¹ See Testimony of Alan Carlson, *Named Plaintiff in Italian Colors et al. v. American Express*, U.S. Senate Committee on the Judiciary, Dec. 17, 2013, available at <https://www.judiciary.senate.gov/imo/media/doc/12-17-13CarlsonTestimony.pdf> (“Normally, every American has the right to join with others to fight to hold corporate giants accountable. But I don't, because of a forced arbitration clause buried in the fine print of terms and conditions imposed upon me years after I started taking American Express cards. If I cannot be part of a class action to enforce my rights against American Express, I have no way of enforcing those rights. I don't have the money to take on American Express by myself.”).

¹² 9 U.S.C. § 2. Since 2010, the Supreme Court has decided fourteen cases interpreting the FAA. See, e.g., *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017); *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014); *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17 (2012); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012); *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287 (2010); *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *New Prime v. Oliviera*, 138 S.Ct. 1164 (Jan. 16, 2019); *Lamps Plus v. Varela*, No. 17–988, slip op. (U.S. Sup. Ct. October 2018).

¹³ *Concepcion*, 563 U.S. at 341.

¹⁴ *Amex*, 559 U.S. at 1111 (Kagan, J., dissenting).

¹⁵ See, e.g., Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Nov. 1, 2015 (“Corporations said that class actions were not needed because arbitration enabled individuals to resolve their grievances easily. But court and arbitration records show the opposite has happened: Once blocked from going to court as a group, most people dropped their claims entirely.”).

¹⁶ *Id.* (“By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies [have] 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.”).

camps, shippers—even HMOs and nursing homes.¹⁷ Today, nearly every American is subject to a class-banning forced arbitration clause in some aspect of their lives—and, going forward, we should expect that there will be few transactions and interactions that are not accompanied by these remedy-stripping provisions.

a. Consumers

Class-banning forced arbitration clauses have permeated every corner of the consumer universe. For example, the Consumer Financial Protection Bureau (“CFPB”) found that seven of the eight largest mobile wireless providers, covering 99.9% of subscribers, required arbitration in their customer agreements.¹⁸ This means an estimated 290 million cell phone subscribers are bound to service agreements that contain class-banning forced arbitration clauses. Likewise, credit card issuers representing more than 90% of all credit card debt impose arbitration clauses in their contracts with consumers.¹⁹ In the checking account market, banks representing 44% of insured deposits have arbitration clauses in their customer contracts, while 98.5% of payday lenders impose arbitration on borrowers.²⁰ As a result, tens of millions of consumers are, today, subject to these rights-stripping clauses.

Given the ubiquity of these provisions, one might expect some significant number consumers to arbitrate their disputes. But the opposite is true: Only a tiny percentage of consumers file arbitrations annually.²¹ For example, Yale Law professor Judith Resnik found that the American Arbitration Association (“AAA”), which is “designated by AT&T to administer its arbitrations,” reported that only “134 individual claims (about 27 a year) were filed against AT&T between 2009 and 2014.”²² During the same time period, Professor Resnik calculates AT&T had over 120 million wireless customers, and that the company was subject during these years to numerous investigations and public enforcement actions for violations of consumer laws.²³

More recent data provided by the AAA reveals that, in the first quarter of 2019, it resolved only 895 consumer arbitrations for the hundreds of companies for which it is a designated arbitral provider. Again, this is a miniscule number of claims when compared to the millions of American consumers who sign consumer contracts every year that require them to resolve disputes through individual arbitration. It is also tiny compared to the millions of consumers who would have benefited from class actions, when these procedures were available.²⁴

One reason consumers don’t arbitrate their claims is that it would be too costly to do so: under these class-banning arbitration clauses, a consumer must bear 100% of all the costs charged to her in arbitration by herself; her claim cannot be joined with those of any other arbitral claimant as a way of distributing costs and risks. Rational consumers are unwilling to take on the cost and hassle of an individual

¹⁷ Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 631 (2012) (“[A]bsent broad legal invalidation, it is inevitable that the waiver will find its way from the agreements of ‘early adopter’ credit card, telecom, and e-commerce companies into virtually all contracts that could even remotely form the predicate of a class action someday. After all, the incremental burden of including magic words in dispute resolution boilerplate—or even on point-of-sale purchase receipts or box-stuffer notices—is surely minimal in relation to the benefit of removing oneself from potential exposure to aggregate litigation.”).

¹⁸ See CFPB ARBITRATION STUDY, *supra* note 3. See also Theodore Eisenberg *et al.*, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REF. 871, 882–84 (2008) (reviewing internet, phone, and data service contracts finding that 75% contained mandatory arbitration clauses and 80% contained class action bans).

¹⁹ CFPB ARBITRATION STUDY, *supra* note 3, at 22–23. Specifically, the CFPB Arbitration Study noted that, at the time of its study, four major credit card issuers were subject to a federal court injunction under which they were temporarily barred from imposing their mandatory arbitration clauses. *Ross v. Bank of America, N.A.*, 2006 WL 2685082 (S.D.N.Y. 2010). If those four credit card issuers had continued their policy of requiring arbitration during the CFPB’s study period, the percentage of outstanding loans subject to mandatory arbitration would have risen to over 93%. *Id.* Indeed, a casual web check of those four issuers’ terms and conditions today shows they have reinstated their arbitration requirements.

²⁰ *Id.*

²¹ *Id.* (finding that from 2010 to 2012, only 411 consumers filed individual arbitrations to resolve disputes—while nearly 10 million consumers were represented in comparable class actions during the same period).

²² See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 24 YALE L.J. 2680, 2811 (2015).

²³ *Id.* at 2812.

²⁴ CFPB ARBITRATION STUDY, *supra* note 3 at pp. 29–31 (concluding that, in the time period it examined, millions of consumers were class Members while just hundreds brought claims in arbitration; and that consumers were awarded less than \$200,000 in arbitration compared to \$1.1 billion in class actions).

arbitration to recover de minimis damages, nor can they find attorneys to do so.²⁵ Indeed, in a recent case, a lawyer for the company Fitbit admitted to a federal judge that the company was betting that no rational litigant would pay arbitration fees, which start at \$750, to litigate a relatively small-dollar claim involving a defective device.

Another reason consumers don't arbitrate their claims is they have no idea that they have signed away their right to go to court before a jury of their peers. In a Congressionally-mandated study conducted by the Consumer Financial Protection Bureau in 2015, half of all respondents surveyed did not know whether they had the right to sue their credit-card issuer in court and more than a third of those who were bound by forced-arbitration clauses incorrectly believed that they could still go to court to resolve disputes.²⁶ This utter lack of awareness is no surprise, given that class-banning forced arbitration clauses are often hidden in the boilerplate language that consumers either skim or ignore when making purchases. Indeed, companies now regularly and intentionally impose these class-banning arbitration clauses in click-wrap, envelope-stuffers and other delivery methods intended to obscure or minimize the immensity of the rights that are being forfeited.

Further, these rights-stripping clauses are a *precondition* to obtaining the product or service in question—i.e., they are imposed long before any dispute or problem arises. And since most people simply don't contemplate dispute-resolution procedures at the start of any relationship—but especially not when transacting for a product or service—we simply lack the information necessary to place sufficient value on the rights we're giving up until it's far too late.

All this leaves American consumers without remedy for widespread wrong-doing and allows unscrupulous companies to engage in widespread misconduct with little fear of exposure or penalty. For example, forced arbitration allowed companies like Wells Fargo²⁷ and Equifax²⁸ to block consumer lawsuits that would have exposed their misconduct far sooner. In the case of Wells Fargo, injured customers began suing the company for opening fake accounts back in 2013—two years before press reports surfaced that employees had opened 3 million such accounts—but these claims were quickly forced into the Black box of arbitration.²⁹

b. Employees

In recent years, companies have also imposed class-banning arbitration clauses on their employees, silencing aggrieved workers and eliminating corporate accountability for systemic workplace violations.³⁰ Employer-drafted arbitration clauses require workers to resolve all disputes within the employment relationship in private arbitration, including payment of wages and benefits, provision of breaks and rest periods, rights in termination, and prohibitions against discrimination or harassment. Indeed, many companies go so far as to explicitly highlight federal statutes that they are denying their workers the right to enforce in court—listing, for example, that alleged violations of the Civil Rights Act of 1964, the Family Medical Leave Act, the American with Disabilities Act, and the Age Discrimination in Employment Act can only be resolved in private, one-on-one arbitration.

²⁵ *Concepcion*, 584 U.S. 849 (2011) (Breyer, J. dissenting) (“What rational lawyer would have signed on to represent the *Concepcions* in litigation for the possibility of fees stemming from a \$30.22 claim?”).

²⁶ CFPB ARBITRATION STUDY, *supra* note 3 at pp. 19–24 (reporting that half of all respondents surveyed did not know whether they had the right to sue their credit-card issuer in court, and more than a third of those who were bound by forced-arbitration clauses still believed, incorrectly, that they could take the company to court).

²⁷ See, e.g., Michael Corkery & Stacy Cowly, *Wells Fargo Killing Sham Account Suits by Using Arbitration*, NY TIMES, Dec. 16, 2016.

²⁸ See, e.g., Diane Hembree, *Consumer Backlash Spurs Equifax to Drop “Ripoff Clause” in Offer to Security Hack Victims*, FORBES, Sept. 9, 2017.

²⁹ See, e.g., Michael Hiltzik, *No Surprise: Wells Fargo Is Leveraging Its Arbitration Clause to Win an Advantageous Scandal Settlement*, LOS ANGELES TIMES, March 31, 2017; see also Col. Lee F. Lange, *I Served to Protect Our Rights; Don't Let Equifax Take Them Away*, MEDIUM (reporting that “only four arbitrations have been filed against Wells Fargo in Arizona despite up to 178,972 or more fake accounts in the state”).

³⁰ See Lauren Weber, *More Companies Block Employees From Filing Suits*, WALL ST. J., Mar. 31, 2015 (reporting that CVS, Kmart, Nordstrom, and Halliburton are “among the largest employers that require or ask employees to waive their rights to sue as a class”); Kriston Capps, *Sorry: You Still Can't Sue Your Employer*, CITYLAB, July 11, 2017 (reporting that Wells Fargo, Citibank, Comcast, AT&T, Time-Warner Cable, Olive Garden, T.G.I. Friday's, Applebee's, Macy's, Target, Amazon, Uber, and Lyft all impose arbitration and class action bans in employment contracts).

These provisions leave workers nowhere to turn when their rights are violated—a problem of growing magnitude as more employers impose class-banning arbitration clauses. A 2018 study by Cornell Professor Alexander Colvin estimated that over half the country's nonunionized workforce is now subject to these provisions—more than double the number in the early 2000s.³¹ Some of the country's best-known companies, including Amazon, Walmart, Starbucks, Macy's and McDonald's, now require all or most of their workers to sign class-banning forced arbitration clauses—some before they can even apply for a job.³² Further, Professor Colvin's study found that forced arbitration is more common in low-wage workplaces, and in industries (such as education and healthcare) that are disproportionately comprised of women and African-American workers.³³

Yet, despite the large chunk of the U.S. workforce bound to individually arbitrate their disputes, few workers do.³⁴ One study has estimated that only 1 in 10,400 workers subject to forced arbitration has filed a claim in arbitration—putting a lie to the claim that arbitration is preferable.³⁵ The remaining workers with potentially valid claims—somewhere between 315,000 to 722,000 each year³⁶—are left to suffer in silence, unwilling to shoulder the expense of individual arbitration and unable to be heard by a judge and jury.³⁷ One legal scholar estimates that, as a result of the unprecedented implementation of class-banning arbitration clauses, 98% of employment cases that would otherwise be brought in some forum are abandoned.³⁸

The scope and effects of forced arbitration are likely to worsen given the Supreme Court's 2018 decision in *Epic Systems v. Lewis*³⁹ and its recent decision in *Lamps Plus v. Varela*.⁴⁰ In *Epic Systems*, the Court upheld class-banning arbitration clauses notwithstanding the federally-guaranteed right to “collective action” protected by the National Labor Relations Act.⁴¹ In *Lamps Plus*, the Court ruled that workers are assumed to have “consented” to individualized arbitration even if their employment contract does not clearly waive the right to join in collective arbitrations.⁴² Observers expect that, given the breadth of these recent decisions, companies that have not yet imposed arbitration on their workers will quickly move to do so in order to take advantage of the immunity from liability promised by the Court's decisions.⁴³

II. The Troubling Consequences of Class—Banning Forced Arbitration Clauses

The costs of enforceable class-banning forced arbitration clauses are borne by the millions of consumers, employees and small businesses that are left without meaningful access to justice, as corporations escape accountability for all kinds of illegality and abuse. For example:

- Payday lenders are notorious for illegal, predatory practices: Some have made unauthorized debits from consumers' checking accounts or illegally renewed

³¹See Alexander Colvin, *The Growing Use of Mandatory Arbitration*, ECONOMIC POLICY INSTITUTE (April 6, 2018). See also CARLTON FIELDS 2015 CLASS ACTION SURVEY, available at (finding that the percentage of companies using arbitration clauses to preclude employment class actions jumped from 16.1% in 2012 to 42.7% and that the number of employment class action suits filed decreased precipitously between 2011 and 2014).

³²For example, when Gloria Marmolejo sought a janitorial position at an LA Fitness club, she filled out a job application that contained an arbitration clause. She got the job, but then, five years later (as she approached 50) was fired. When Marmolejo tried to challenge her termination, the court upheld the arbitration clause in the application—despite the fact that Marmolejo credibly claimed she had not understood when she was applying for the job that she was also signing away her rights to be treated fairly while in the position. See *Marmolejo v. Fitness Intl. LLC*, Civ. No. E064190 (Cal. Ct. App., March 7, 2018). There are countless similar examples of workers subjected to arbitration clauses in the process of applying for a job.

³³Colvin, *supra* note 31.

³⁴*Id.*

³⁵*Id.*

³⁶*Id.*

³⁷Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679 (2018).

³⁸*Id.*

³⁹138 S. Ct. 1612 (2018).

⁴⁰No. 17–988, slip op. (U.S. Sup. Ct. October 2018).

⁴¹138 S. Ct. 1612 (2018).

⁴²No. 17–988, slip op. (U.S. Sup. Ct. October 2018).

⁴³Jess Bravin, *Supreme Court Imposes Limits on Workers in Arbitration Cases*, WALL ST. J., May 21, 2018 (reporting that lawyers expect that companies will now impose forced arbitration clauses “on millions more” workers, and that the *Epic Systems* decision could affect “worker claims against Amazon, Grubhub, Lyft and Uber,” among other large companies).

debts without borrower consent;⁴⁴ others have used aggressive methods to collect debts—such as posing as federal authorities, threatening borrowers with criminal prosecution, trying to garnish wages improperly, or engaging in campaigns to harass borrowers. Rapacious profiteers trap low-wage workers and military personnel into “a thicket of debt from which many never emerge.”⁴⁵ Ordinarily, citizens could rely on a combination agency enforcement actions and private litigation brought by injured borrowers to detect and reform illegal payday lending practices.⁴⁶ Indeed, limited public resources and a preference for decentralized enforcement have resulted in significant reliance placed upon private litigation as the primary enforcement vehicle. But because nearly all payday lenders include forced arbitration clauses in their loan agreements to avoid liability exposure, the ability of private citizens to enforce their rights is hamstrung as never before.⁴⁷ The resulting enforcement gap leaves hundreds of thousands of unsophisticated borrowers exposed to these unscrupulous and largely unregulated lenders.⁴⁸

- Forced arbitration perpetuates the exploitation of women in the workplace by shunting victims into a private system where each is unaware of the other and where the arbitration provider (who is chosen and paid by the employer) lacks authority to remedy systemic and recurring workplace abuse. Media reports have shed light on the ways in which forced arbitration enabled high-profile companies, including Miramax and Fox News, to cover-up widespread workplace harassment.⁴⁹ Other less visible stories reveal the appalling ubiquity of the problem. For example, throughout the late 1990’s and 2000’s, hundreds of employees of Sterling Jewelers (parent company to Kay Jewelers and Jared Jewelers) were “routinely groped, demeaned and urged to sexually cater to their bosses to stay employed”—but their claims were forced into private arbitration to protect company executives, who were never held accountable, while those who spoke up were fired.⁵⁰ These examples reveal that sexual harassment in the workplace affects both the victim and the broader economy, because companies that are allowed to shroud illegal activity enjoy an unfair advantage in the marketplace that would not be afforded them had their practices been exposed to the public. Accordingly, last year 56 state attorneys general from both parties wrote this body, urging a federal ban on forced arbitration of sexual harassment claims.⁵¹
- Consumers today are more vulnerable than ever to identity theft and data breaches. The notorious fraud committed by Wells Fargo employees described above affected nearly 3.5 million customers, many of whom are still trying to get their money back and repair their credit. Similarly, the massive Equifax data breach exposed personal information of over 145 million people.⁵² Other major data breaches have exposed the personal and financial information of mil-

⁴⁴ See, e.g., *Gunson v. BMO Harris Bank, N.A.*, 43 F. Supp. 3d 1396 (S.D. Fla. 2014) (borrower claiming that bank had used an electronic debiting network to help lenders collect payday loan payments in violation of State and federal laws; motion to compel arbitration granted).

⁴⁵ Brian Grow & Keith Epstein, *The Poverty Business*, BLOOMBERG (May 20, 2007).

⁴⁶ See, e.g., *Kristensen v. Credit Payment Servs.*, 12 F. Supp. 3d 1292, 1308 (D. Nev. 2014) (certifying class action brought by consumers against payday lenders alleging violations of the Telephone Consumer Protection Act); *Mitchem v. GFG Loan Co.*, No. 99–C-1866, 2000 WL 294119, at *3, *6 (N.D. Ill. Mar. 17, 2000) (partial denial of motion to dismiss consolidated claims brought by borrowers against payday lenders under the Truth in Lending Act); *Purdie v. ACE Cash Express, Inc.*, No. Civ. A. 301CV1754L, 2003 WL 22976611, at *1 (N.D. Tex. Dec. 11, 2003).

⁴⁷ See CFPB ARBITRATION STUDY, *supra* note 3 (reporting that 98.5% of payday lenders impose arbitration on borrowers).

⁴⁸ See generally Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1542 (2016) (discussing the claim-suppressing effects of forced arbitration clauses and class action bans on borrower litigation against unscrupulous payday lenders).

⁴⁹ Emily Martin, *Forced Arbitration Protects Sexual Predators and Corporate Wrongdoing*, CONSUMER LAW & POLICY BLOG, Oct. 23, 2017.

⁵⁰ See, e.g., Drew Harwell, *Hundreds Allege Sex Harassment, Discrimination at Kay and Jared Jewelry Co.*, WASH. POST, Feb. 27, 2017; Drew Harwell, *Sterling Discrimination Case Highlights Differences Between Arbitration, Litigation*, WASH. POST, March 1, 2017.

⁵¹ As forced arbitration has expanded, State attorneys general have repeatedly warned that these provisions “erode the states’ ability to protect their citizens and economies.” See, e.g., *American Express v. Italian Colors*, Brief of the State of Ohio and 21 Other States as Amici Curiae in Support of Respondents.

⁵² See, e.g., Diane Hembree, *Consumer Backlash Spurs Equifax to Drop “Ripoff Clause” in Offer to Security Hack Victims*, FORBES, Sept. 9, 2017 (reporting that Equifax tried to limit its exposure by offering data breach victims “free” credit monitoring in exchange for agreeing to an arbitration clause containing a class action ban).

lions of Americans.⁵³ And forced arbitration has allowed companies that fail to protect their customer's data to block consumer lawsuits that would have exposed their misconduct far sooner.

But the damage caused by class-banning forced arbitration clauses extends far beyond those who are barred access to public courts: All citizens are harmed when the courthouse doors are closed and legal claims are suppressed. And that is precisely what these clauses accomplish by demanding that each claim be brought on one-on-one basis. As the CFPB Arbitration Study exposed, once blocked from going to court as a group, most people drop their claims entirely. This regime allows wrongful conduct to continue undetected and unremedied long after such illegality would otherwise come to light. Without public accountability through the court system, companies have less incentive to follow the law and treat workers and consumers fairly.

Class-banning forced arbitration clauses also undermine the principles central to the Rule of law, such as *stare decisis* and the development of legal precedents.⁵⁴ These provisions force disputes into hermetically-sealed, secret proceedings, denying citizens the transparency, openness and accountability necessary for the operation of a fair and democratic civil justice system.⁵⁵ By allowing companies to opt out of the court system, we have “frozen the law ... denying the courts the ability to develop and adapt the law as society and business changes.”⁵⁶

III. The Truth Behind Class—Banning Forced Arbitration Clauses

Class-banning forced arbitration clauses are not designed to achieve fair, expeditious or cost-effective resolutions. Rather, the entire point of these provisions is to make it nearly impossible for consumers and employees seeking redress for broadly distributed small-value harms to pursue one-on-one arbitrations. Let's face it: If private companies really wanted to create a fair arbitration regime, they could easily do so by (1) offering citizens arbitration as an alternative to litigation after a dispute has arisen; and (2) permitting class or collective arbitration so that an individual victim wouldn't alone shoulder the entire cost and exposure of arbitration. No company has done so—and indeed, faced with bad publicity over their forced arbitration clauses, companies like Google, Microsoft and others have instead chosen to eliminate arbitration altogether (or for some subset of claims) rather than expose themselves to more evenhanded processes.

Nonetheless, large corporations and lobbying groups like the Chamber of Commerce have spent a decade advocating for forced arbitration on grounds that it is “better, cheaper, faster” for ordinary Americans.⁵⁷ Their claims are based on a series of hackneyed misrepresentations and fact distortions:

a. The “Litigation Explosion” Myth

Arbitration advocates try to breed panic by claiming that, should Congress outlaw forced arbitration, the result will be a massive “litigation explosion” of frivolous civil

⁵³ See, e.g., *Orman v. Citigroup*, 2012 WL 4039850 (S.D.N.Y. 2012) (dismissing class action alleging that Citigroup failed to “adequately secure their computer systems against intrusion,” resulting in data breach and identity theft, because of class-banning arbitration clause).

⁵⁴ See, e.g., Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371 (2016); Lillian T. Howan, *The Prospective Effect of Arbitration*, 7 BERKELEY J. EMP. & LAB. O L. 60, 62 (1985) (“IN CONTRAST TO THE JUDICIAL DOCTRINE OF STARE DECISIS, AN ARBITRATOR'S INTERPRETATION OF THE CONTRACTUAL RELATION IS NOT TECHNICALLY BINDING ON A FUTURE ARBITRATOR. INSTEAD, THE ARBITRATOR MUST EXERCISE INDEPENDENT AND IMPARTIAL JUDGMENT IN EACH CASE.”).

⁵⁵ See AAA CONSUMER DUE PROCESS PROTOCOL, Principle 12.2 (arbitrator must “maintain the privacy of the hearing to the extent permitted by applicable law”); AAA Commercial Rule 25 (directing arbitrators to “maintain the privacy of the hearings unless the law provides to the contrary”). See also Michelle Andrews, *Signing a Mandatory Arbitration Agreement With a Nursing Home Can Be Troublesome*, WASH. POST., Sept. 17, 2012 (reporting that nursing home arbitration hearings “are conducted in private and [these] proceedings and materials are often protected by confidentiality rules”).

⁵⁶ S. 1782, Arbitration Fairness Act of 2007: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 110th Cong. 10 (2007) (statement of Richard Alderman).

⁵⁷ See, e.g., Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 91–93 (asserting that adhesion agreements to arbitrate are fair in that they allow companies to pass on savings in costs from standard forms to their customers and employees); Archis Parasharami, *Testimony Before Senate Committee on the Judiciary*, Dec. 17, 2013 (“Arbitration before a fair, neutral decision-maker leads to outcomes for consumers and individuals that are comparable or superior to the alternative—litigation in court—and that are achieved faster and at lower expense.”).

lawsuits that will harm corporate defendants and lead to higher prices for goods and services. There has never been, in our history, any credible data to support the claim that litigation rates have risen due to specious claiming, rather than population growth.⁵⁸ Put differently—we weren’t in the midst of a litigation explosion immediately prior to the rise of forced arbitration (circa 2012) and we won’t be thrown into one if forced arbitration is prohibited tomorrow. Moreover, companies that have eliminated forced arbitration have not, by their own account, experienced significant upticks in litigation that would threaten their overall financial condition.⁵⁹

More importantly, these fear tactics obfuscate a basic reality: eliminating all consumer, employment or other kinds of claims from the public court system is not a sensible way of screening meritless cases. Forced arbitration does not screen for merit—instead, it shunts all cases into an expensive, private system meant to deter claimants from seeking redress. Forced arbitration does not keep cases out of the court system that don’t belong there—instead, it guarantees that hundreds of thousands of important and worthy lawsuits will never be heard.

In any event, federal judges possess numerous procedural tools to rid dockets of frivolous cases—including rules that require plaintiffs to make it through a gauntlet of heightened pleading standards,⁶⁰ summary dismissals,⁶¹ justiciability doctrines,⁶² rigorous class certification requirements,⁶³ limited discovery,⁶⁴ and the narrowing of personal jurisdiction over multinational corporations.⁶⁵ Closing the courthouse doors before citizens have an opportunity to run this procedural gauntlet is not fair or efficient, but rather, tips the scales of justice in favor of the large and powerful.

b. Banning Forced Arbitration Doesn’t Prohibit All Arbitration

Make no mistake: no one argues that we should ban arbitration. When used knowingly by businesses as originally intended by the 1925 Congress that enacted the FAA, arbitration can be an effective alternative to our court system. It allows sophisticated entities to voluntarily agree to resolve complex disputes before an industry-expert neutral, allowing these entities to protect their trade secrets and maintain their important business relationships.⁶⁶ As Professor Christopher Leslie

⁵⁸For example, the National Center for State Courts reports that the number of civil cases filed in State courts decreased by 16% between 2007 and 2016. EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2012 STATE COURT CASELOADS, NATIONAL CENTER FOR STATE COURTS, 2014. Likewise, federal civil filings have decreased by 7.1% between 2009 and 2018. Federal Judicial Caseload Statistics 2014, Administrative Office of the United States Courts.

⁵⁹For example, both Capital One and Bank of America eliminated forced arbitration in their consumer contracts. Their most recent SEC Form 10-K filings state that management believes that any “loss contingencies arising from pending [litigation] will not have a material adverse effect on the consolidated financial position or liquidity of the Corporation.” Major tech companies have similarly concluded that ending forced arbitration would not affect the company’s bottom line. Microsoft (which ended forced arbitration for sexual harassment claims in 2017) and Google (which recently decided to end forced arbitration in all disputes) have each advised the SEC and their shareholders that any increase in litigation would not result in a material change to the overall liquidity of the company.

⁶⁰See, e.g., *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (announcing a new “plausibility” standard for determining the adequacy of pleadings at the motion to dismiss stage). See also Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193 (2014) (heightened pleading requirements in *Twombly* and *Iqbal* “had palpably negative effects on plaintiffs”).

⁶¹See Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 883 (2007) (“Over the 25-year period [from 1975 to 2000], the percentage of cases with one or more summary judgment motions granted in whole or in part doubled from 6 percent to 12 percent.”).

⁶²See, e.g., *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (determining whether statutory injury is sufficient to meet article III “particularized” and “concrete” harm requirement for standing to sue).

⁶³See, e.g., *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017) (finding due process does not permit exercise of specific personal jurisdiction in California over nonresident consumers’ claims); *J. McIntyre v. Nicastro*, 564 U.S. 873 (2011) (rejecting personal jurisdiction over a foreign company doing business in the United States and in the State where plaintiff was injured); *Goodyear Dunlop Tires Operations S.A. v. Brown*, 564 U.S. 915 (2011) (finding foreign corporations subject to general jurisdiction only where they are “at home”); *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014) (same).

⁶⁴See, e.g., F.R.C.P. 26(b)(1) (amended 2015 to require that discovery be “proportional”).

⁶⁵See, e.g., *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338 (2011) (elevating predominance requirement under Rule 23(a)); *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) (finding that economic models of antitrust injury must be common to the class).

⁶⁶See Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 970–71 (1999) (“[t]he merchant guilds established arbitra-

explains, “in relationships between commercial parties, buyers and sellers are similarly likely to be the plaintiff or defendant.”⁶⁷ Accordingly, these sophisticated parties can negotiate on a level field for arbitration procedures that they believe will fairly and efficiently resolve their disputes.

When pre-dispute arbitration clauses and class action bans are forced upon consumers and employees in take-it-or-leave-it, standard-form agreements, “the probability of litigation positions is highly asymmetrical: the seller is far more likely to be the defendant in any dispute, and the consumer the plaintiff.”⁶⁸ There is no negotiation, no choice, and the resulting arbitration procedures are not, in truth, intended to provide a forum to resolve claims. The one and only objective of forced, pre-dispute, class-banning arbitration clauses is to suppress and bury claims. The whole point is that consumers and employees seeking redress for broadly distributed small-value harms cannot and will not pursue one-on-one arbitrations.⁶⁹ Ever.

c. Unmasking the True Intent Behind Forced Arbitration

The actions of companies faced with large numbers of individual arbitrations expose the true intent behind class-banning arbitration clauses—namely, ensuring that individuals drop their claims altogether. For example, in 2015, a group of Chipotle employees alleged their employer had violating the wage-and-hour provisions of the Fair Labor Standards Act (“FLSA”).⁷⁰ Chipotle sought to enforce the class-banning arbitration clauses buried in the fine print of its online employee welcome pack—knowing that workers with backpay claims ranging from about \$100 to \$3000 would be unlikely to expend the resources filing an individual claim—and it won.

The plaintiffs’ lawyers then did something unexpected: instead of dropping these claims, they began filing individual arbitrations on behalf of injured employees. Chipotle soon found itself “facing thousands of individual arbitration cases spread across the country, almost all the expenses of which it may have to shoulder itself—potentially tens of thousands of dollars per case.”⁷¹ While “thousands of individual arbitrations” is precisely what Chipotle’s arbitration clause invites, the company balked: It returned to court and pleaded with the federal judge to suspend the arbitral filings and disqualify plaintiffs’ counsel.⁷² The judge *denied* both motions, chastising Chipotle for its “attempts to delay and obfuscate” the workers’ claims. In the wake of those rulings, Chipotle has reportedly prevented “the arbitrations from going ahead by failing to pay its \$1,100 share of the filing fee for each case.”⁷³

We see a similar crisis of confidence in arbitration at Uber, in the wake of serial arbitrations brought against the ride-sharing company by 12,501 individual drivers seeking to be classified as employees instead of independent contractors.⁷⁴ Uber was

tion tribunals because they felt that the courts were not sufficiently knowledgeable about commercial customs”).

⁶⁷ Christopher Leslie, *Conspiracy to Arbitrate*, 96 N.C. L. REV. 381, 393 (2018).

⁶⁸ *Id.*

⁶⁹ The CFPB’s Arbitration Study revealed that very few consumers arbitrate disputes. For example, of the nearly 80 million credit cardholders, checking account holders and payday borrowers who were subject to arbitration clauses as of the end of 2012, only 1241 consumers had filed arbitrations to resolve disputes with their credit card companies, banks, and lenders. CFPB Arbitration Study, *supra* note 3 at p. 63–64. Professor Colvin’s study of employment arbitration estimates that only 1 in 10,400 workers subject to forced arbitration actually files claim in arbitration. Colvin, *supra* note 29.

⁷⁰ *Turner v. Chipotle Mexican Grill, Inc.*, 123 F. Supp.3d 1300 (D. Co. 2015). A federal district judge in Colorado initially allowed 2,814 employees to proceed in a collective action, but while the action was pending, the Supreme Court issued its decision in *Epic Systems v. Lewis* upholding the legality of arbitration clauses that prohibit collective employment actions. *See infra*. Accordingly, the judge dismissed the claims brought by employees who had previously “agreed” to resolve their disputes through arbitration and granted defendant Chipotle’s motion to compel individual arbitration of these claims. *See* Dave Jamieson, *The Supreme Court Just Helped Chipotle Boot 2,814 Workers From a Wage Theft Lawsuit*, HUFFINGTON POST, Aug. 10, 2018. More than 7,000 employees who were not required to sign mandatory arbitration agreements remained in the federal court opt-in case.

⁷¹ Michael Hiltzik, *Chipotle May Have Outsmarted Itself by Blocking Thousands of Employee Lawsuits Over Wage Theft*, LOS ANGELES TIMES, Jan. 4, 2019.

⁷² Dave Jamieson, *Chipotle’s Mandatory Arbitration Agreements Are Backfiring Spectacularly*, HUFFINGTON POST, DEC. 20, 2018.

⁷³ *Id.*

⁷⁴ *Abadilla v. Uber Techs.*, No. 18–cv–7343–EMC (N.D. Cal. Dec. 5, 2018) (asserting that more than twelve thousand individual arbitration demands have been filed against Uber after the Ninth Circuit determined that Uber drivers were required to arbitrate, and that little progress has been made in arbitrating those claims).

so “overwhelmed” by the prospect of these individual arbitrations that, according to its designated arbitral provider, JAMS, the company initially refused to pay its share of the filing fees in an effort to stem the tide.⁷⁵ When that failed, Uber (in the height of hypocrisy) tried to argue that some issues were common across the cases and should therefore be decided in a consolidated proceeding—despite the fact that its arbitration clause prevents *any* consolidation of claims.⁷⁶ And when that gambit failed—and after calculating that it would cost more to defend itself in individual arbitrations—Uber ultimately settled the drivers’ claims en masse. The resistance by Chipotle, Uber and other companies to arbitrating these claims—after steering workers into arbitration—suggests that their policies were never really about fairness and efficiency, but about suppressing claims at all costs.

III. Legislation is the Only Solution to the Problem of Class— Banning Forced Arbitration

It is clear that legislation prohibiting class-banning forced arbitration of consumer, employment and civil rights claims is necessary to restore access to justice, corporate accountability, and the Rule of law by giving American citizens the choice of how to pursue their rights against a corporation. Indeed, the Supreme Court itself has made plain that it will continue to “rigorously enforce” all the remedy-stripping terms that private companies insert in their arbitration clauses—never mind the consequences—unless the FAA’s mandate is “overridden by congressional command.”⁷⁷

As the access-to-justice crisis grows more untenable, a chorus of judges of all party affiliations have expressed severe misgivings about the Court’s arbitration precedents—even as they are compelled to follow them. For example, in *CellInfo, LLC v. American Tower Corp.*, federal district Judge Young observed “that one-sided species of arbitration [are] unconscionably forced on vulnerable consumers and workers and almost universally reviled, enforceable only due to the mandate of a slim majority of the Supreme Court.”⁷⁸ The West Virginia Supreme Court accused the Justices of manufacturing FAA preemption out of whole cloth, explaining that “[w]ith tendentious reasoning, the United States Supreme Court has stretched the application of the FAA from being a procedural statutory scheme effective only in federal courts, to being a substantive law that preempts State law in both federal and State courts.”⁷⁹ And in a recent decision, a district court judge reluctantly granted a motion to compel arbitration in a racial discrimination claim, observing that responsibility for changing the law lies squarely with Congress:

“No matter one’s opinion of the widespread and controversial practice of requiring consumers to relinquish their fundamental right to a jury trial—and to forgo class actions—as a condition of simply participating in today’s digital economy, the applicable law is clear While th[e] result might seem inequitable to some, this Court is not the proper forum for policy objections to mandatory arbitration clauses in online adhesion contracts. Such objections should be taken up with the appropriate regulators or with Congress.”⁸⁰

These judges are duty-bound to follow Supreme Court precedent, even where they believe it wrong and misguided. Congress, on the other hand, is free to reverse the Court’s rulings in this area by prohibiting pre-dispute class-banning arbitration clauses in standard-form contracts with consumer, employment and small businesses. Indeed, Congress has already enacted legislation outlawing these clauses in payday loan and consumer credit contracts with military families, as well as amend-

⁷⁵ Alison Frankel, *JAMS to Uber: Our Rules and Your Contracts Demand Individual Arbitrations*, REUTERS, Jan. 25, 2019 (quoting JAMS notice to Uber that “[w]hile it is not our preference to force the parties to litigate these issues seriatim, our policies and procedures, absent party agreement otherwise, require that we collect a filing fee in each case to be pursued”).

⁷⁶ *Id.*

⁷⁷ *American Express*, 133 S.Ct. at 2309, citing *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 668–669 (2012). See also Gilles, 104 MICH. L. REV. at 395 (“[T]he Supreme Court’s arbitration jurisprudence over the past thirty years have evinced an incredibly expansive view of the FAA, and while the full import of this national policy favoring arbitration has been criticized by many—including Members of the Court itself—there is no reason to believe the Court will swing back to a more nuanced interpretation of the FAA.”).

⁷⁸ 352 F. Supp. 3d 127, 131 (D. Mass. 2018).

⁷⁹ *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250 (W. Va. 2011). The U.S. Supreme Court reversed in a terse, per curiam decision. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam).

⁸⁰ *Selden v. Airbnb*, 2016 WL 6476934 at *2 (D.C. 2016).

ments limiting the use of arbitration clauses in residential mortgage loans and automobile dealer franchise agreements.⁸¹ It is laudable that Congress has sought to safeguard the ability of military families and auto dealer franchisees to vindicate their rights—but it is well past time to extend that ability to all consumers, employees, and small businesses.

Mr. CICILLINE. Thank you, Ms. Gilles. Thank you to all of our witnesses for your testimony.

We will now proceed under the 5-minute Rule with questions. I will begin with the gentleman from New York, the Chairman of the full committee, Mr. Nadler, who is recognized.

Mr. NADLER. Thank you very much, Mr. Chairman.

Professor Gilles, Congress has enacted laws to protect American workers from discrimination, wage theft, and unsafe workplaces. These laws are ultimately meaningless if employers are able to sidestep accountability for breaking these laws by funneling workers into an arbitration trap that is expensive, time-consuming, and secretive.

What effect has forced arbitration had on the ability of workers to protect their rights to a safe workplace, to fair wages, and to be free from discrimination in the workplace?

Ms. GILLES. I think you have already heard a bit from Ms. Carlson and the other witnesses. Forced arbitration disables the right of employees to be able to bring claims, to bring group claims in particular. As Mr. Deepak says, it obscures patterns of misconduct, systematic wrongdoing, like sex discrimination that could be systematic in a workplace, because these are group claims, right? When you all enact laws to protect American citizens, many times you enact private rights of action, and you expect and imagine that these laws will be enforced through class actions, through collective litigation.

I realize that it is the job of Mr. Pincus and Mr. Goldberg to talk about how class actions are terrible for everyone. I mean, that is what they are paid to do. The truth is actually quite far from that. Class actions desegregated schools in America. They improved nursing homes in America. They have made life fair and equal for America. I am here probably because of a class action that was brought at some point.

So, this idea that people don't benefit, I think that is pretty ridiculous. I think when Mr. Pincus and Mr. Goldberg talk about benefits from class actions, they are talking about dollars that end up in people's wallets. It is true that the system might not be the most efficient way of getting dollars into consumers' pockets, and maybe we should fix the system. That doesn't mean we should abandon the entire civil justice system.

Mr. NADLER. Thank you. Some commentators have suggested that arbitration can facilitate a quicker and cheaper resolution of disputes than through the courts. What is your response?

Ms. GILLES. Well, take a look at Richard's example. I mean, it certainly didn't help him get a quicker result. The whole point of Chipotle's arbitration clause was that it would never have to be ac-

⁸¹ See 10 USC § 987(e)(3), (f)(4) (voiding arbitration clauses in payday loan or any consumer credit contracts—with the exception of residential mortgages and car loans—with Members of the military or their families); 15 USC § 1639c(e)(1) (barring arbitration clauses in residential mortgage loans); 15 USC § 1226(a)(2) (prohibiting automobile manufacturers from imposing predispute arbitration clauses in their franchise agreements with dealers).

countable to its workers. So, I don't buy the quicker, cheaper, faster, easier. I think it is good for the employer, good for the company. I think it is terrible for the consumer, period.

Mr. NADLER. Mr. Gupta, you described forced arbitration as a wealth transfer. How does arbitration contribute to economic inequality?

Mr. GUPTA. Well, it is not the only cause of economic inequality, right? Economic inequality is probably the big problem of our times, but it makes it a lot worse. And the way it does that is that in cases where people have small amounts of money that they are ripped off in large numbers, the only way meaningfully that you are going to get redress is through some sort of group litigation, right? A class action, a collective action, a mass action. As Professor Gilles explained, there is no way that a single worker is going to be able to go up against the company for those kinds of claims.

So, when you look at wage theft, which transfers billions of dollars from workers to employers, when you look at antitrust, when you look at consumer protection violations involving banks or lenders, the kinds of practices that brought down our economy and led to the financial crisis, those are the kinds of situations where you have to have some ability for people to band together and assert their legal rights. If you cut off that avenue, which is what forced arbitration, in my view, is principally designed to do, that is going to result in a massive transfer of wealth from the poor to the rich, and that is exactly what we see happening.

Mr. NADLER. Thank you. It also results in an unsafe condition which may have an arbitration award against the company being kept secret so they can keep repeating that unsafe condition all the time.

Let me ask, some people have said that Italian Colors demonstrates how forced arbitration and the failure to enforce antitrust laws hurts small businesses. Can you explain the importance of maintaining private antitrust suits to the enforcement of the antitrust laws? Has the Court decision in Italian Colors made it more likely that companies will be able to evade antitrust litigation through forced arbitration clauses?

Mr. GUPTA. Yes. Thank you for the question, Chairman Nadler. I represented the restaurant in that case, Italian Colors. It was an antitrust case that went all the way to the Supreme Court. Italian Colors, like many restaurants, they deal with these credit card swipe fees. It eats a lot out of their profits, and they don't have much bargaining power when it comes to dealing with the credit card companies.

So, they asserted that the credit card company, in that case American Express, was abusing its market power against small merchants, and all they wanted was their day in court to be able to prove that kind of claim.

Now, a small restaurant like Italian Colors is not going to be able to bring an antitrust suit on its own. That requires hiring economists, studying the marketplace, and figuring out whether there is an abuse of market power. So, the way meaningfully that a claim like that has to be brought is again for people to be able to band together and assert their claim.

The case went all the way to the Supreme Court. I think if the Members of this Committee are going to read one decision of the U.S. Supreme Court on this issue, you should read Justice Kagan's dissent in that case. She puts it better than I possibly could. She says that the Court isn't even hiding the fact that they are taking this one Federal law, the antitrust law, and they are taking another Federal law, the Federal Arbitration Act, that was supposed to ostensibly facilitate dispute resolution, they are putting the two laws together, and in some strange Act of judicial alchemy, people cannot resolve disputes under the antitrust clause. The cases just go away because it is not feasible to assert the dispute in one-on-one arbitration.

What Justice Kagan says is that the majority of the Supreme Court's response is "too darn bad." That is not an acceptable response, and I think that is why Congress needs to step in.

Mr. NADLER. Thank you. My time has expired.

Mr. CICILLINE. Thank you.

I now recognize the Ranking Member of the subcommittee, Mr. Sensenbrenner, for 5 minutes.

Mr. SENSENBRENNER. Thank you, Mr. Chairman.

I have a couple of questions for Mr. Pincus.

First, you testified that in arbitration, consumer and employee claimants actually do well or better than they do in court. Can you provide more detail on that?

Mr. PINCUS. Certainly, and I think one sort of idea being propagated here is that if a claim goes into arbitration, somehow it either disappears or the company automatically wins. As the study of employment claims that I referenced in my opening remarks shows, employees do better in arbitration than they do in court, and they win a substantial number of cases.

Another study of nursing home claims found that in nursing home claims, the average, comparing claims in arbitration, claims in court—the average recovery was only \$3,000 apart. There are numerous other studies that I have detailed in my prepared testimony that show when you compare like claims in arbitration to like claims in court, arbitration claimants do as well or better.

Mr. SENSENBRENNER. You also have suggested that consumers and employees need access to arbitration because too many of their claims cannot practically be brought in court, and that is largely because the amount in dispute is relatively low. Can you explain that in more detail?

Mr. PINCUS. Certainly. Mr. Goldberg mentioned, studies show that to get a lawyer, a claim has to be substantial. There is a debate, \$60,000, maybe \$200,000 at issue. Most claims that real people have don't rise to that level. So, if court is the only option for them and they can't get a lawyer, they are not going to have any way to recover. So, the question is what do you do in that situation?

Arbitration provides a viable option where: (A) The lawyer may be willing to take the claim for less because the time it is going to take is less because arbitration takes less time and less lawyer time; or (B) in many situations the employee or the consumer can push the claim on his or her own. Arbitration doesn't have the complicated rules in court that you need a lawyer to navigate. It is in-

formal. You can file your complaint online in a very user-friendly way. The arbitrator sets the procedures that work for the particular case.

So, for these large number of cases that we don't see in court at all because they are too small ever to get there, arbitration provides access to justice. There is a reason why we don't see a lot of decided arbitration claims, or even filed arbitrations, because in most cases, most arbitration provisions have a mediation process. Bring the claim to the company first for 30 days and see if it can be resolved. Many, many, many claims are resolved, thousands, if not hundreds of thousands, in that process, because arbitration provides leverage for the employee or the consumer, because when the arbitration claim is filed, there are limits on the fees that the consumer or the employee must pay in these large arbitration forums that handle most arbitrations, \$300 or \$200.

Upon filing, the employer or the company, if it is a consumer dispute, has to pay more than \$1,000. So, depending on what the amount in dispute is, it is pretty sensible for the company, unless it is a totally frivolous claim, to say we are going to make you whole, because if you file your arbitration claim, we are going to pay \$1,000 right away and even more later on. So that gives the claimant significant leverage.

Mr. SENSENBRENNER. A final question. You have litigated before the Supreme Court several cases about arbitration. Based on your experience and review of the case law, would you say that the Court appreciates the importance of having the arbitration system available so that the courts will do less work?

Mr. PINCUS. I think courts are worried about overcrowding, but I think they are also worried about what we were just discussing, that there are some claims that, as a practical matter, people can't vindicate in court. You quoted Justice Breyer speaking for the Court in the Allied-Bruce case. There are other instances in which justices have pointed out that arbitration is cheaper, less complex, and quicker, and enables small claims to be vindicated in a way that they can't be vindicated in court.

The Supreme Court has also said, the Chief Justice speaking for the Court in particular, that if arbitration provisions have unfair clauses, the general rules about unconscionability that apply to contracts of adhesion will invalidate those provisions, the kinds of provisions that I listed in my opening remarks.

Mr. SENSENBRENNER. Thank you very much.

My time is up.

Mr. CICILLINE. I thank the gentleman.

I recognize the gentleman from Georgia, Mr. Johnson, for 5 minutes.

Mr. JOHNSON of Georgia. Thank you. Again, thank you for the witnesses being here. Thank you for your testimony.

Mr. Ziober, thank you for your service to the nation. That must have been a heck of a day, to be honored by your fellow employees in such a way that you described. I was touched with that kind of celebration and seeing you off. That must have been a high point in your life. Then less than a few hours later, to be smacked in the face with a bat and told that when you come back, you won't have a job.

Then, Ms. Carlson, thank you so much for your courage and your sense of wanting to give back to the community and give back to people, particularly women without a voice who suffer silently in the workplace, undergoing what must be—I am a man, so I don't really know what you have to put up with. Millions of women around this country having to put up with a climate and a culture of sexual harassment, my heart goes out to you, and I want to thank you so much for your courage and sticking with this.

Mr. Pincus, you mentioned that the arbitrator often sets the procedure to accommodate the needs of the parties; correct?

Mr. PINCUS. Yes.

Mr. JOHNSON of Georgia. In fact, there is really no requirement that the arbitrator be trained in the law, no requirement that the arbitrator be a lawyer or a judge; is that correct?

Mr. PINCUS. I think it depends on the arbitral forum.

Mr. JOHNSON of Georgia. It depends on the arbitrator.

Mr. PINCUS. So, a lot of claims—

Mr. JOHNSON of Georgia. There is no requirement, though.

Mr. PINCUS. There is a requirement that the arbitrator be fair, and that the arbitrator be capable of rendering a fair decision.

Mr. JOHNSON of Georgia. There is certainly no requirement, if the arbitrator gets to select the procedure, there is no requirement that the rules of procedure apply, no requirement that there be a need for the rules of evidence to apply, no need for there to be an adherence to the Rule of law; in other words, statutes or case law that has decided similar issues. Isn't that correct? There is no requirement; yes or no?

Mr. PINCUS. Well, there is no requirement.

Mr. JOHNSON of Georgia. No requirement.

Mr. PINCUS. No particular rules apply, but there is a requirement that there be a fair opportunity to obtain discovery and that the rules applied be fair.

Mr. JOHNSON of Georgia. But, the arbitrator can decide whatever he or she wants for a particular case. That doesn't seem consistent with the Rule of law. That seems to be consistent with the whim of whoever is in charge, and it is usually the business interests that are in charge.

Now, it seems to me to be counter-intuitive that an employer or a nursing home operator, since you cited employer claims and nursing home claims, it would seem to be counter-intuitive to me that they would prefer arbitration when the studies that you cite show that they lose more, and the claimants are awarded more money. Can you explain why would an employer or nursing home operator prefer arbitration when the outcomes are worse than going to court?

Mr. PINCUS. Because the lion's share of the cost of a litigation are paying lawyers, and the legal fees are—

Mr. JOHNSON of Georgia. Most of those lawyers are defense lawyers, are they not?

Mr. PINCUS. Well, they are defense lawyers, and they are plaintiffs' lawyers.

Mr. JOHNSON of Georgia. Yes, but arbitration—

Mr. PINCUS. Most defense lawyers don't like arbitration because they make less money.

Mr. JOHNSON of Georgia. The corporate lawyers are charging \$950 an hour these days, and then the corporation that is paying them, like the NRA, gets a chance to write off the expense of paying the lawyer, who is a member of the same country club that they are. The poor claimant who has a \$500 claim—most lawyers don't want to get a percentage of that, and they know that it is going to take at least several hours to adjudicate the case. So, the \$500 claimants get left out. The \$100,000, \$200,000 claimants, Mr. Goldberg, there are always lawyers willing to take those cases on a contingent fee basis; would you not agree?

Mr. CICILLINE. The gentleman's time has expired, but the witness may answer the question.

Mr. GOLDBERG. Yes, and I think you are pointing to the exact problem as to why pre-dispute arbitration provides a viable path for someone with the \$500 claim who wouldn't be able to seek justice.

Mr. JOHNSON of Georgia. What about the \$100,000 or the \$200,000 claim? There are always going to be some lawyers out there who will take that for a percentage.

Mr. GOLDBERG. That is right.

Mr. JOHNSON of Georgia. I used to take them all the time myself as a private practitioner, a good little payday. Thank you.

Mr. CICILLINE. Thank you to the gentleman.

Now I recognize the gentleman from Maryland, Mr. Raskin, for 5 minutes.

Mr. RASKIN. Mr. Chairman, thank you very much. I am still trying to get over the *AT&T v. Concepcion* case, and I just want to re-live the gruesome details of this case. I don't mean to cause you any nightmares, Mr. Gupta, but as I understand it, California had a pro-arbitration State law.

Mr. GUPTA. That is right.

Mr. RASKIN. What it said was that you can build into a contract a clause which forbids class-wide arbitration, right? In other words—

Mr. GUPTA. That is right.

Mr. RASKIN. —all it was saying was your contracts cannot categorically block out a class-wide arbitration. It was challenged in State court under State and Federal Constitution laws, and in the Discover bank case, if I remember correctly, the California Supreme Court said it was totally fine.

So now we have a situation where, if the businesses really love arbitration, they can have both kinds. They can have individual, and they can have class-wide, but they went to court to sue against California's law to get it struck down, right? As preempted by the Arbitration Act, the Federal Arbitration Act, a massive assault on Federalism and on due process rights and the right of states to decide on their own civil justice systems, and so it was found preempted.

Why would the people who today are coming forward to say they love arbitration, that arbitration saves all this money, go to the Supreme Court to get a law struck down that was protecting arbitration? Can you answer that, Mr. Gupta?

Mr. GUPTA. Yes. Thank you for the question. Well, so, I can't get over the case either. My friend, Andy Pincus over here, he was my

opponent in the case, and I am sure he will have a different view. The reason is that the corporations are not really interested in arbitration. They are interested in claim suppression. So, the idea of having class arbitration, the idea of allowing people to band together and bring their claim in arbitration was the worst of all worlds for this company, because suddenly consumers would be able to assert their claims, and then the company would have no right of appeal. Then all the things we are complaining about arbitration, the company would be complaining about.

Mr. RASKIN. In your case, weren't people being hit up for a \$20 fee—

Mr. GUPTA. Exactly, yes.

Mr. RASKIN. —when they bought a cell phone? So, it wouldn't make sense for anybody to spend the money to get a lawyer, a couple of hundred bucks or \$500, \$1,000, to litigate over a \$20 fee themselves, but if you band everybody together—there were tens or hundreds of thousands of people in California—that is where a class-wide arbitration would make some sense. The State law tried to protect that, but the corporations came in and sued and said we think that this violates our rights to subject us to a class-wide arbitration.

Mr. GUPTA. Right, right. All the State law was trying to do—this was general contract law. I am surprised that Mr. Pincus mentioned unconscionability law because the whole effort in the Supreme Court has been to get rid of the traditional tools of unconscionability that police unfair contracts. All the State law was saying was, you can't have a get-out-of-jail-free card. You have to be able to let people with these kinds of small claims, as you mentioned, band together and assert their rights.

When you have a \$30 fee on your cell phone bill, that is sort of the prototypical example of a case for a class action. If AT&T can rip everyone off for \$30, and the people don't have the right to band together to assert those claims, they are going to get away with it and fraud will pay. So, you have to have a way to allow people to band together and assert these claims.

Mr. RASKIN. Okay. I want to give Mr. Pincus his fair—I think he is my constituent, and that is the only reason I am doing it.

[Laughter.]

Mr. RASKIN. Because I know he has a very big platform in the world. He is a brilliant lawyer, there is no doubt. If you could set aside all of your brilliance and your litigious cleverness and just tell us why would you be taking the position today that it is a good thing for everybody to have arbitration, and yet the whole point in the Supreme Court was to destroy a class-wide arbitration.

Mr. PINCUS. I love Maryland, but I am a citizen of the District of Columbia.

Mr. RASKIN. Oh, okay. Then I can use my time to talk to Ms. Carlson, then.

[Laughter.]

Mr. RASKIN. I will give you 15 seconds, but I do have a question for her.

Mr. PINCUS. Well, I think the critical issue in the *Concepcion* case was the fundamental nature of AT&T's clause. What AT&T did was to use arbitration to create an incentive for small claims

to be brought. What AT&T said is if you bring a claim, and in our pre-mediation or mediation process we don't settle, and on the merits you win even a penny more, you are going to get a minimum payment of \$5,000. Your attorneys' fees will be paid. That payment is now up to \$10,000, double attorneys' fees, and all your expert witness costs, because what AT&T—

Mr. RASKIN. Okay. I only have 10 seconds left, but I will go back and read the Supreme Court argument and look for an answer in there.

Ms. Carlson, if you could, tell us quickly what happened to you in the arbitration process. Can you tell us?

Mr. CICILLINE. The gentleman's time has expired, but the witness can answer the question.

Ms. CARLSON. So, I never got to that point after my lawyers figured out how to make my case public in a different way, by suing my alleged perpetrator independently and not the company. For the millions of Americans, especially women, who do have arbitration clauses with regard to sexual harassment, I would just ask this Committee to look at the word "forced," because if you actually have a choice, then why wouldn't we let the American people do that?

Mr. RASKIN. I see. It just so happened—forgive me, Mr. Chairman—that Mr. Ailes had independent means. You could sue him for what he had done to you. If you had somebody who wasn't a deep pocket like that and you had to sue your employer, you would have been forced into a dark room someplace where nothing would have ever come of it.

Ms. CARLSON. That is the whole problem with the way in which our country has chosen to deal with sexual harassment claims within the workplace. Because arbitration has become a tool to cover up a company's dirty laundry, nobody will ever know about all these women.

Mr. RASKIN. Thank you.

Mr. CICILLINE. Thank you.

I now recognize the gentlelady from Washington, Ms. Jayapal.

Ms. JAYAPAL. Thank you, Mr. Chairman.

I just want to say thank you to all the witnesses for being here, in particular, Ms. Carlson and Mr. Ziober—did I say that right, Mr. Ziober?—for sharing your stories and your work.

I have just watched this whole area with horror because it is exactly as you said, Ms. Carlson, that there are these ordinary people who are signing agreements to give up all kinds of rights to go to court, and they don't know that they are doing so, most of the time. These mandatory arbitration agreements, as we know, are often buried very deep in an employee handbook somewhere, or a credit card agreement, or an app's listing of terms and conditions. It is that prevalent.

Who benefits from these mandatory arbitration agreements? More often than not, it is the large and powerful corporations that put these agreements in there in the first place. These mandatory arbitration agreements I think pose a very dangerous threat to almost every regular person who would like to keep their rights intact, from consumers to small businesses to nursing home residents.

For years I have been particularly concerned about the harms that workers face with these mandatory arbitration agreements, and especially vulnerable workers. Workers of color are hampered from protecting their civil rights, even when they experience egregious racial discrimination. Survivors of sexual assault, as Ms. Carlson has been such a powerful spokesperson for this issue, can't join together because mandatory arbitration allows this toxic culture of secrecy to prevail and abuse to fester. Workers are prevented from speaking up and taking collective action.

So, Ms. Carlson, I am a very proud original co-sponsor of our bipartisan, bicameral bill together to end forced arbitration around sexual harassment. We were able to last session get a number of major companies to come on board. I thank you for your courageous voice and testimony and your advocacy on that.

Many other women from your workplace came forward with similar stories of sexual assault and mistreatment, and yet you couldn't join together with them. In fact, you can't even speak publicly about how you dealt with the mandatory arbitration clause in your contract. In your testimony you said very powerfully, "silencing women is the harasser's best friend." I was struck by that phrase.

Can you explain how a mandatory arbitration agreement undermined your rights and your ability to band with other survivors and seek remedy?

Ms. CARLSON. Yes. Unfortunately, because the other way in which we solve harassment cases in our country is settlements with NDAs, I cannot tell you specifics about my story. I can tell you hypothetically how it happens when women can't band together. Arbitration means that you have no way of knowing that anyone else is facing the same thing within the confines of the workplace structure. There is no way to know because the whole process is secret.

As I described during my testimony, if you do muster up the courage to go and complain and you have an arbitration clause, that is a good day for the company because no one will ever know anything about your story.

The worst ramification of all of this is that the perpetrator gets to stay in the job. I think one of the reasons that we have seen this cultural revolution that we are experiencing right now is because the American public was actually so angry about hearing about these stories, and they were wondering why didn't we know about this. The reason they didn't know about it is because of forced arbitration.

Ms. JAYAPAL. Thank you.

Professor Gilles, Mr. Pincus claimed in his testimony that arbitration is not secretive, and I just want to give you a chance to say whether you agree with that, and why or why not.

Ms. GILLES. So, this won't surprise you. I completely disagree. Mr. Pincus is right that California, the great State of California has enacted a statute that requires disclosure of arbitration outcomes. I have to say, I have tried, as a researcher, to access and use that database. It is pretty bloodless. It is very redacted. It is very hard to get real information, and that is not what we need.

If a court of law would just have to tell me the name, date, and winner of a case, that is not what we mean when we talk about

full and fair access to justice. I think Congressman Nadler said this earlier, we need to know what is going on in the court system. We need to know the types of claims that people are bringing. We need to know what systemic harms are going on in the workplace, as Ms. Carlson just noted. These disclosure statutes are not enough. We really need true public access.

Ms. JAYAPAL. You said earlier that 80 of workers will be subjected to mandatory arbitration.

Ms. GILLES. That is what the EPI is predicting, in three to five years.

Ms. JAYAPAL. That is a stunning number.

Ms. GILLES. When you think about it, though, why wouldn't they? I mean, the Supreme Court has just decided Epic Systems, which gives a green light to all employers, right? They are going to do it unless you stop them.

Ms. JAYAPAL. Right. Well, I thank you for your testimony.

I also want to just say thank you so much to Richard Heggens for taking on mandatory arbitration at Chipotle for wage theft. I also want to thank Molly Coleman for organizing law students to be aware and resist mandatory arbitration contracts. I don't know where you are, Molly, but thank you.

Mr. Chairman, I just think that these efforts are so important because I don't think the majority of Americans understand how this affects their daily life, their rights, and their access to due process.

Mr. CICILLINE. Hopefully, this hearing is going to help bring that—

Ms. JAYAPAL. Yes, thank you for doing this.

Mr. CICILLINE. Thank you.

I will now recognize the gentleman from North Dakota, Mr. Armstrong, for 5 minutes.

Mr. ARMSTRONG. Thank you, Mr. Chair.

As a preface, prior to getting here, I served in the State legislature, and two things we have done over the last six years is we have raised the small claims rate continually higher and higher, and one of the reasons for that is because, quite frankly, access to the court system is getting more and more expensive. So as a recovering attorney, I can place some blame on myself for that, and my profession.

Mr. Goldberg, if the arbitration system is wiped out, it really only leaves litigation as the solution, and you have suggested that for consumers' and employees' litigation has steadily become much more expensive, particularly in a State like North Dakota with really fast population growth. Our court systems across the State are overburdened, so less responsive over the last decade. Why is that?

Mr. GOLDBERG. I think in large part there is certainly a lot more litigation, and as you have seen over the past 20, 30, 40 years, litigation has just become a lot more expensive, and it is more of a battle between both sides over discovery and all these things that happen, which just makes it untenable for a lot of people both from their disposition, and then also from an economic perspective and the ability to actually get a fair outcome for themselves. I think what we are seeing in the worst aspects of this is in the class ac-

tion area, where you are seeing these no-injury cases and a bunch of class actions that have nothing to do with anybody being injured, without anybody being aggrieved. It is millions of dollars that go into litigating them and paying attorneys' fees, and the result ends up being either a cy pres award to a third party or a recovery that nobody really wants, and so nobody participates in it.

That is what is causing civil justice to erode, and that is where I think the pre-dispute arbitration agreements are providing a viable alternative in filling that void.

Mr. ARMSTRONG. You stated, and I think this figure probably differs somewhat region by region, but that lawyers may not take cases unless the value is \$200,000 or higher. So why do you think that figure is so high?

Mr. GOLDBERG. I think because litigation has become so expensive, and trial lawyers, just like anybody, they want to get paid for their work. I don't blame them for that. It takes more money and more effort to engage in litigation these days than it used to. Twenty years ago, that number, according to studies, used to be closer to \$60,000. Now it is upwards of \$100,000 to \$200,000. So, the people who fall below that line just don't have access to justice and to the civil justice system when it is a one-off case.

Mr. ARMSTRONG. So, if we get rid of arbitration in this realm, how many consumer and employee claims are going to be shut out altogether if arbitration isn't available, at least for smaller claims?

Mr. GOLDBERG. I don't have an exact number in terms of the number of claims, but most of the claims that would fall under those would not have access to justice. The pre-dispute arbitration agreement provides the only path where oftentimes the arbitration is paid for by the employer or by the company, and often attorneys' fees are available if the consumer or the employee prevail. So, it is a much more cost-effective and streamlined way for them to get the recovery that they are seeking. So even if it is a \$500 amount, they are going to get to keep more of that than they would if it were in litigation.

Mr. ARMSTRONG. I think you and Mr. Pincus both kind of agree on post-dispute arbitration agreements. What are the real-world barriers to those types of arrangements?

Mr. GOLDBERG. Well, once a dispute arises, agreeing to even the size of the table to sit at, let alone what path you are going to choose, is probably going to be a difficult endeavor. More to the point, the incentives change. So if it is a small dispute, if it is under that threshold we are talking about, the \$100,000 or \$200,000 threshold, the claimant may say, hey, I would rather go to arbitration because that is a fairer or better way for me to get justice, and then the company may say no, we are not going to arbitrate that claim because it is not to our—if you would not bring that claim another way, why would we engage in that? Then if the claim is larger, then the reverse may be true.

So, the only way to really make the system work is to offer it ahead of time. It creates a system, again, that is based on trying to get what is fair. It is not all or nothing, it is not as expensive, and it is trying to get a result that works, that is the right result given the situation at hand.

Mr. ARMSTRONG. With the limited time I have left, we have had a Bakken shale revolution, an oil boom in western North Dakota, and one of the big issues that comes up is landowner mineral rights versus oil company rights. Without some of the arbitration stuff that we have done at the State level, we would dramatically decrease access for farmers in the middle of western North Dakota that just simply don't have the resources to take on a medium, small, or large oil company. So, there are inverse situations where this is absolutely necessary.

With that, I yield back.

Mr. CICILLINE. I thank the gentleman.

I now recognize the very distinguished gentleman from the State of Colorado, Mr. Neguse, for 5 minutes.

Mr. NEGUSE. Thank you, Mr. Chairman.

I want to thank the witnesses for testifying today, in particular, Ms. Carlson and Mr. Ziober. Thank you for sharing your stories and for your courage. Certainly, we are hopeful that we can help others avoid the ways in which, I think, employers and a variety of corporations have abused this system of forced arbitration. It is why I am proud to be a sponsor of the FAIR Act, and I appreciate Representative Johnson and Representative Cicilline, and of course the Chairman, for their leadership on this front.

Mr. Goldberg, I have a line of questioning, but I could not resist the temptation of following up on my good friend and colleague, Mr. Armstrong's, questions, because it sounds like—and I will quote the words you used. The notion that claimants who may have a claim that is smaller, relatively speaking, lower than \$200,000 I think is the number that has been sort of tossed around today, that their "only path" absent forced arbitration would be arbitration. That is, if we get rid of the modern arbitration system, they would have no, I think in your words, access to justice.

I guess I am confused because my understanding as a lawyer is that claimants can pursue pro se actions in court. They would have to retain a lawyer; obviously, to the extent that they would like to retain one, they would have to pay for one. The same is true in the arbitration context, is that right? So, I am not understanding this argument or this notion that they have no access to justice if we remove forced arbitration as the mechanism today.

Mr. GOLDBERG. The civil litigation system is pretty burdensome and onerous, and—

Mr. NEGUSE. Let's talk about that.

Mr. GOLDBERG. Oftentimes—

Mr. NEGUSE. Reclaiming my time, you are familiar with small claims court, correct?

Mr. GOLDBERG. Absolutely.

Mr. NEGUSE. I happen to hail from the great State of Colorado. We have a small claims court system. Under \$7,500, you can go into court. You can file a simple form. I am sure that the same holds true in the State where you practice law. Sound about right.

Mr. GOLDBERG. Yes.

Mr. NEGUSE. You pay a small filing fee. I believe it is \$31 in Colorado, probably similar to what you pay in a small claims court in your jurisdiction. Fair?

Mr. GOLDBERG. Yes.

Mr. NEGUSE. There is a mediation option, actually, in our small claims court. I don't know if that happens to be a function of your system, but it certainly is the case in Colorado.

So, this is where I am struggling, because I understand if you want to make the case—in your testimony, the first page, I will quote. You say, “A major reason that pre-dispute arbitration agreements have become more commonplace in our society is because they achieve this goal of peaceful, quick, and conclusive dispute resolution.” I understand if you want to make the case that employers, corporations, businesses have concluded that, what I have just described. The notion that consumers and employees have made that judgment, I think, is just not the case. It is not supported by the facts, because ultimately consumers aren't making the choice. Employees aren't making the choice. I would hope you would agree, at least with respect to that quote that I just mentioned, this presupposition that somehow employees and consumers are the reason why these agreements are more commonplace. That is not what you are suggesting?

Mr. GOLDBERG. I think there is a large gap between the \$7,500 figure that you mentioned in terms of what caps you out at the small claims court and the \$100,000 to \$200,000 value of a claim that sometimes requires you to get a lawyer. Pro se plaintiffs, yes, you can pursue a claim pro se, and small claims court may be a very viable opportunity for people under that threshold. By and large, people are not going to be able to bring a claim if they are above that threshold, and they don't need a lawyer oftentimes if they are going through a small, pre-dispute arbitration path either.

So, it provides access for people above that, but below the threshold of where a lawyer may not take the claim, and it provides as good, if not better.

Mr. NEGUSE. I appreciate that. That is a little bit different. I just misunderstood the point that you were making, and Mr. Pincus made earlier, with respect to claims that are a couple of thousand dollars.

In any event, and not to belabor the point, but is it your position that these agreements have become more commonplace because employees and consumers have made that decision? I just want to make sure I am clear on that front. That is not your position.

Mr. GOLDBERG. I actually think that arbitration agreements are becoming more commonplace and people are using it more, as we heard from some of the testimony.

Mr. NEGUSE. Sir, they are not using them more because consumers aren't drafting these agreements. I mean, I presume you use Facebook, you go to an ATM, maybe you flew to Washington, DC to testify today, maybe you took an Uber or a Lyft to come and testify in front of this committee. You didn't draft any of those arbitration agreements, correct?

Mr. GOLDBERG. Correct.

Mr. NEGUSE. Yes. The corporations did, the employers did. That is my point. So again, I understand if you want to make the case about the values of arbitration. That is certainly your case to make. Let's not engage in this intellectual fantasy that somehow consumers and employees are making the choice, because anyone can pick up their phone and look up their Uber app or Lyft app or any

other similar app and see that the terms and conditions are very far deep within that app, and the notion that the consumers are making the choice to do so I just think is a fallacy.

The last thing I would note, Mr. Chair, because I do know that my time has expired, I know a number of folks will recognize the Pipeline Parity Project. We are joined today by some of the law students from that project. I appreciate their advocacy with respect to having law firms remove forced arbitration clauses from their contracts, and I appreciate, Mr. Goldberg and Mr. Pincus, that both of your law firms, I understand, have abandoned forced arbitration contracts for your employees. If that is not the case, you certainly have a chance to clarify that.

Mr. PINCUS. We never had one.

Mr. NEGUSE. Never had one. Well, I would hope that we could agree on legislation that would enable employers across the country to take that same approach, and I yield back.

Mr. CICILLINE. Thank you. Thank you very much.

I now recognize myself for 5 minutes.

Since the Second World War, Congress has expanded and strengthened laws that guarantee every veteran and active-duty service member, including those serving at the Reserves and National Guard, the right to be free from discrimination in the workplace based on their military service, and the right to their day in court to enforce these protections. As Mr. Ziober has testified, these laws are meaningless if they are not enforceable through the courts. He is not alone. The Military Coalition, which is a broad consortium of unified service and veterans' organizations representing more than 5.5 million current and former service Members, has referred to forced arbitration as, and I quote, "an un-American system wherein service Members' claims against a corporation are funneled into a rigged, secretive system in which all the rules, including the choice of the arbiter, are picked by the corporation," end quote.

Our brave men and women in uniform deserve better, and that is why I have introduced the Justice for Service Members Act that Mr. Ziober referred to that would prohibit the circumvention of their rights under laws designed to protect service Members and veterans.

I would ask you, Mr. Ziober, if you could just expand on what it was like and what impact it had on you as you were about to depart to a war zone in defense of your country to know that you were deprived of your right to contest your firing, even though Congress had expressly provided for that protection in Federal law.

Lieutenant Ziober. Mr. Chairman, first, I want to thank you for introducing the Justice for Service Members Act. I believe it was introduced yesterday. Thank you for your support in that endeavor.

In my case, as I mentioned in my testimony, at noon I am having a big party with the company, cards and gifts and a lot of support. You have a sense of patriotism and an appreciation for your service. Then at 5 o'clock you are sitting there getting fired, and you are trying to compartmentalize what just happened. You are confused, you are embarrassed, you have anxiety about what your future is going to hold.

I was leaving for pre-deployment training that following Monday, so my mind was set to be focused on training. Now, I am wondering how I am going to support myself and my family when I return home from my deployment.

You go do your mission. You do the best you can to support your mission and your teammates down range. That is what you are there for, to go do, but in the back of your mind your family back home, if you have a wife or kids, you are thinking how are you going to pay the mortgage when you get back? How am I going to provide food on the table? The kids need braces, whatever the case may be. So, it is not a position that service Members should be put into.

If I could just quickly say, I think there is a bigger picture here, too. I mean, in my case it hurt me, and I am here to advocate to not have other service Members feel the same type of pain. I think this is a military readiness issue. I mean, we draw on our Reservists so much, for strategic reserves, operational support nowadays.

USERRA is a law that lets service Members go from civilian to military duty and back to civilian jobs. The more that is weakened, I think that is going to discourage people who truly want to step up and serve their country in that regard, and they bring a lot of skills—medical, aviation, engineering. The diversity is really beneficial to our country.

Mr. CICILLINE. Thank you very much and thank you for your service.

Mr. Gupta, when Congress enacted the Federal Arbitration Act in 1925, it never intended for arbitration to serve as a corporate shield against the enforcement of our laws, or a sword to weaken protections, or to protect corporate wrongdoing. Far from it. As the Supreme Court noted in 1967 in the *Prima Paint* decision, the legislative history of the law makes clear 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.

How do you explain the Supreme Court's departure from decades of case law and the clear legislative intent in the Federal Arbitration Act and other laws that are designed to be enforced through the justice system? Is there any label for this other than judicial activism on behalf of corporate wrongdoers?

Mr. GUPTA. I don't think there is. It would be hard to identify another Federal statute passed by Congress where the Supreme Court has strayed so far from the original intent of the legislation. I have gone back and looked at the history of the Act from 1925. People weren't blind to the possibility of abuse. They raised these concerns before this committee, in fact, and the architects of the legislation were clear: This is about letting businesses of equal bargaining power that want to resolve their disputes out of court, letting them do that, and I have no objection to that. That makes perfect sense.

The drafters were clear: This is not about foisting this on people who don't consent through take-it-or-leave-it contracts. In fact, Congress put in a provision, section 1 of the Federal Arbitration Act, that says this shall not apply to any class of workers. Remarkably, the Supreme Court has read that language to mean precisely the opposite, and now it can apply to any class of workers.

So, we have strayed so far away from what Congress intended in 1925, and that is why only this body, Congress, can set things right.

Mr. CICILLINE. Thank you.

My very final question. It is really hard to understand, Professor Gilles, what Mr. Pincus argues, this idea that people want arbitration. We know it is deeply unpopular with Democrats, Republicans, Independents, so it is not a political thing. It is deeply unpopular with the American people, above 80 percent. Obviously, if it produced better outcomes, people could voluntarily pick it. Of course, they don't. They are forced into it by the other party in the disagreement, the corporation.

So is Mr. Pincus right, that people like arbitration, they want it, they are dying to be into it, or—

Ms. GILLES. The numbers don't support Mr. Pincus at all. I mean, we are all going to do some selective citing of studies, but I think mine are better.

[Laughter.]

Ms. GILLES. We know that, for example, only 1 out of every 10,400 employees ever files an arbitration claim. I think that when Mr. Pincus talks about how well employees do in arbitration, he is talking about high-value cases, cases that probably would have done fine in court but, for whatever reason, those employees decided, maybe for the privacy, because some claims are a little bit embarrassing, to have those claims in arbitration. That is all fine.

We are not talking about getting rid of arbitration altogether here, people. We are talking about making it voluntary. We are talking about making it post-dispute, so that they can decide. Despite what Mr. Goldberg says, I think the American people can handle that choice. I don't think it is going to create a ton of transaction costs. I think he is just worried that they won't take you up on the offer, right? They would prefer to be in court.

They wouldn't prefer to be in court because they want their lawyers to get paid. They would prefer to be in court because that is where claims belong, in public court, not in private arbitration. So, Mr. Pincus and I disagree.

Mr. CICILLINE. Thank you.

Ms. GILLES. Thank you.

Mr. CICILLINE. At this time, I now seek unanimous consent to add a number of letters and statements to the record from organizations in support of ending forced arbitration and passing the FAIR Act: A letter in support from George Slover, a Senior Policy Advisor with Consumer Reports, without objection, a letter in support of legislatively ending forced arbitration from Lisa Gilbert, the Vice President of Legislative Affairs of Public Citizen, without objection; a letter in support of the FAIR Act from Terry O'Neil, the Executive Director of the National Employment Lawyers Association, without objection; a letter supporting the FAIR Act from the Fair Arbitration Now, without objection; and a statement from Allen Carlson, owner of Italian Colors Restaurant, supporting the FAIR Act, without objection.

[The information follows:]

CICILLINE FOR THE RECORD



May 15, 2019

The Honorable David N. Cicilline, Chairman
 The Honorable F. James Sensenbrenner, Ranking Member
 Subcommittee on Antitrust, Commercial Law, and Administrative Law
 Committee on the Judiciary
 United States House of Representatives
 Washington, DC 20515

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

Consumer Reports is pleased you are holding a hearing on the important topic of the impact of imposing forced arbitration on consumer, employment, civil rights, and antitrust disputes. This is a spreading injustice in the marketplace, in which corporations are forcing consumers, workers, and small family businesses to relinquish fundamental legal protections as a pre-condition for obtaining a product, service, or even a job. We urge the Committee to correct this harm by approving H.R. 1423, the Forced Arbitration Injustice Repeal (FAIR) Act.

Forced arbitration is being slipped into the fine print of standard-form contracts and terms of service that are presented to consumers as a routine – but take-it-or-leave-it – pre-condition for obtaining such basic products and services as a credit card, bank loan, student loan, apartment lease, mobile phone, video subscription, or nursing home admission.

The Federal Arbitration Act was enacted in 1925 to give *businesses* – with relatively equal bargaining power – options for resolving their *business* disputes. But ill-conceived Supreme Court rulings¹ have warped that statute into a weapon that is being used against people who have *no* bargaining power. There is no meaningful sense in which these people have “agreed” to give up fundamental legal protections. Their only “choice” is to decline the product or service – or job – altogether. Many times, that’s just not a realistic option. And it is never fair.

When forced on consumers and workers in this way, the arbitration process, designed by corporations and their lawyers, inherently tends to be one-sided, tilted to favor the corporation that has arranged for it. The process is a “black hole,” where the law does not apply, there is no right of appeal, and too often, the outcome has to be kept secret. The arbitrator, chosen by the corporation, has the incentive to heed the interests of the corporation, in hopes of repeat business.

¹ AT&T Mobility v. Concepcion, 563 U.S. 333 (2011); American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013); DirecTV Inc. v. Imburgia, 136 S. Ct. 463 (2015); Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018).

The corporation can also choose where the arbitration will take place, what the rules will be, and how the costs will be borne. There are none of the fundamental safeguards that are the hallmarks of a fair, impartial, and accessible court proceeding to protect people and hold accountable a corporation that has committed widespread abuse, or has marketed an unsafe product or service.

Justice Ginsburg has stated that the Court's forced arbitration rulings "have predictably resulted in the deprivation of consumers' rights to seek redress for losses, and turning the coin, they have insulated powerful economic interests from liability for violations of consumer protection laws."²

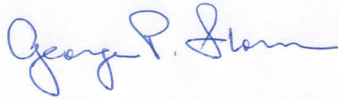
In an interview with the New York Times, former Federal District Judge William G. Young, appointed in 1985 by President Reagan, was even blunter: "Ominously," he said, "business has a good chance of opting out of the legal system altogether and misbehaving without reproach."³

The FAIR Act would prohibit the imposition of forced arbitration as a pre-condition for obtaining a product, or for obtaining or continuing service or employment. Once a dispute actually arises, and the stakes are clear, consumers (or workers or family businesses) could freely choose arbitration if they determined it to be actually fair, and to be a better option than the courts.

Isolated pledges by individual corporations to forswear forced arbitration in specific contexts are no substitute for a comprehensive law to prohibit it. Indeed, those isolated pledges reflect a recognition that forced arbitration is fundamentally unfair and needs to stop.

We look forward to working with you to correct this spreading injustice.

Sincerely,



George P. Slover
Senior Policy Counsel
Consumer Reports

cc: Members, Subcommittee on Antitrust, Commercial Law, and Administrative Law

² DirectTV Inc. v. Imburgia, 136 S. Ct. at 477 (Ginsburg, J., dissenting).

³ Jessica Silver-Greenberg and Robert Gebeloff, Arbitration Everywhere, Stacking the Deck of Justice, NY Times, Oct. 31, 2015, <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>.



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May 16, 2018

The Honorable David N. Cicilline
Chair
Subcommittee on Antitrust, Commercial
and Administrative Law
U.S. House Committee on the Judiciary
Rayburn Building
Washington, DC 20515

The Honorable F. James Sensenbrenner
Ranking Member
Subcommittee on Antitrust, Commercial
and Administrative Law
U.S. House Committee on the Judiciary
2142 Rayburn House Office Building
Washington, DC 20515

RE: Letter Supporting Hearing on How Forced Arbitration Erodes Legal Rights

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

Thank you for scheduling today's hearing to explore how forced arbitration erodes legal rights. Protecting workers, consumers, and small businesses from the practice of being forced into a secretive, privatized system of justice is an incredibly important issue that Congress must address.

Forced arbitration clauses and bans on class actions (forced arbitration clauses) use fine-print "take-it-or-leave it" agreements to abolish an individuals fundamental rights and remedies. Forced arbitration clauses have become ubiquitous in such varied settings as agreements governing bank accounts, student loans, cell phones, employment, and even nursing home admissions. These clauses deprive people of their day in court when they are harmed by violations of the law, no matter how widespread or egregious the misconduct may be. The contracts that contain forced arbitration clauses are written by corporate entities, so it is unsurprising that its terms are generally corporate friendly. Arbitration provisions generally:

- Limit the type of damages that a person can receive, such as punitive or compensatory damages;
- Prohibit individuals from banding together in a class or collective action, which may be the only realistic avenue for bringing small claims;
- Limit discovery and other attempts to obtain evidence;

- A Public Citizen report details that “54 percent of arbitration clauses discussed discovery or evidentiary standards, in most instances to ‘alert consumers that discovery may be limited and evidentiary standards may be relaxed by comparison to litigation’”;¹
- Include arbitration fees that are “are dramatically higher than court costs”² and may include a “loser pays” provision, which creates a significant disincentive for an individual to bring a claim out of fear that they will be on the hook for all fees if they do not prevail.

Justice Hugo Black summed up the unfairness of arbitration well:

“For the individual, whether his case is settled by a professional arbitrator or tried by a jury can make a crucial difference. Arbitration differs from judicial proceedings in many ways: arbitration carries no right to a jury trial as guaranteed by the Seventh Amendment; arbitrators need not be instructed in the law; they are not bound by rules of evidence; they need not give reasons for their awards; witnesses need not be sworn; the record of proceedings need not be complete; and judicial review, it has been held, is extremely limited.”³

If a worker, consumer, or small business brings a claim in arbitration and loses—and the odds are very likely that they will—an arbitrator’s decision is given “limited judicial review.”⁴ Rather, “[u]nder the [Federal Arbitration Act], courts may vacate an arbitrator’s decision ‘only in very unusual circumstances.’”⁵ These circumstances include:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

¹ Taylor Lincoln & David Arkush, *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration* 38 (2008), available at <https://www.citizen.org/sites/default/files/arbitrationdebatefinal.pdf>.

² *Id.* at 39.

³ *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 664 (1965) (Black, J., dissenting).

⁴ *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013).

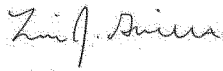
⁵ *Id.* (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)).

- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.⁶

Forcing everyday people into arbitration would deprive them not only of basic procedural rights that they are normally guaranteed in neutral, open court, but would all but prevent them from exercising their rights to appeal if they believe the arbitrator erred.

Public Citizen has been fighting for more than 45 years to protect the access to justice for all people. We stand ready to help you in any way as you explore this issue in greater detail.

Sincerely,



Lisa Gilbert
Vice President for Legislative Affairs
Public Citizen
Congress Watch Division



Remington A. Gregg
Counsel for Civil Justice and Consumer Rights
Public Citizen
Congress Watch Division

⁶ 9 U.S.C. § 10 (2012).



May 15, 2018

The Honorable David N. Cicilline
Chairman
Subcommittee on Antitrust, Commercial Subcommittee and Administrative Law
U.S. House Committee on the Judiciary
2138 Rayburn Building
Washington, DC 20515

The Honorable F. James Sensenbrenner
Ranking Member
Subcommittee on Antitrust, Commercial Subcommittee on Antitrust, Commercial and
Administrative Law and Administrative Law
U.S. House Committee on the Judiciary U.S. House Committee on the Judiciary
2142 Rayburn House Office Building
Washington, DC 20515

RE: Letter in Support of the Forced Arbitration Injustice Repeal Act

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

On behalf of the National Employment Lawyers Association (NELA), and its 4,000 circuit, state, and local affiliate members across the country, we write to express our strong support for the House Judiciary Committee, Subcommittee on Antitrust, Commercial Subcommittee on Antitrust, Commercial and Administrative Law and Administrative Law hearing tomorrow, Justice Denied, Forced Arbitration and the Erosion of our Legal System, and for passage of the FAIR Act.

NELA is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Our members litigate daily in every circuit, affording NELA a unique perspective on how employment cases actually play out on the ground and the profound impact of forced arbitration on the lives and on access to justice for working people.

We are writing to you today to voice our strong support of the Subcommittee's hearing to explore how forced arbitration erodes our legal system and curtails everyday people's access to justice. For more than two decades, NELA has called on Congress to end the insidious corporate practice of forcing workers and consumers to address disputes in secret, one-sided arbitration proceedings.

I. Forced Arbitration Harms Workers

Forced arbitration clauses are usually hidden in the fine print of “take-it-or-leave-it” agreements. These clauses deprive people of their right to seek justice in court before an impartial judge or jury. They are ubiquitous in employment contracts, and may be buried in job applications, the fine print of employee handbooks, or buried in a company’s updated policies, only available online via the corporation’s intranet. Corporations that place forced arbitration clauses in their standard contracts with private-sector non-union employees shield themselves from accountability for illegal practices and other wrongdoing. The contracts typically designate:

- Who will serve as the arbitration provider. The arbitration provider all too often relies on the company for repeat business and therefore has a financial incentive to rule in favor of the company;
- The arbitration rules. Typically, the rules by which arbitration is conducted provide none of the legal safeguards that protect individuals who use the courts, including their ability to obtain key evidence necessary to prove one’s case;
- The state in which the arbitration is to occur, which is always at the company’s convenience, not the harmed individual who may have to travel far to get there, and
- The payment terms, which might include exorbitant filing fees, as well as continuous fees for procedures such as motions and written findings, and “loser pays” rules that are prohibitive for many individuals.

The proceedings are secret and final with few rights to appeal. Studies have shown that those forced into arbitration are less likely to win, receive smaller awards, and are otherwise severely disadvantaged.¹

II. Forced Arbitration Clauses Are Everywhere and Are Not Voluntary

Since arbitration clauses are usually contained in non-negotiable contracts, employees are presented with a legal fiction that they actually have a “choice” when signing away their rights when in fact refusing to sign means forgoing employment altogether. **As a result, according to the Economic Policy Institute, 60.1 million workers, more than half of non-union, private-sector employees, have signed away their right to go to court if harmed by their employer.**² Among America’s *Fortune* 100—the wealthiest, most-powerful companies in the nation—52 use forced arbitration in their employment contracts, setting a disturbing example that one way to get ahead is to ensure employees are unable to vindicate their workplace rights.³

III. Forced Arbitration Clauses Allow Corporations and Employers to Evade Accountability for Illegal Misconduct

¹ Alexander J.S. Colvin, The Growing Use of Mandatory Arbitration, Economic Policy Institute (Sept. 27, 2017), <https://www.epi.org/files/pdf/135056.pdf>.

² *Id.*

³ Elizabeth Colman, Forced Arbitration: A Race To The Bottom, The Employee Rights Advocacy Institute For Law & Policy (June 2018), <http://employeerightsadvocacy.org/wp-content/uploads/2018/08/NELA-Institute-Report-Forced-Arbitration-A-Race-To-The-Bottom.pdf>.

Forced arbitration clauses allow employers to cheat workers out of the paycheck they earned, violate other workplace rights, and discriminate against working people with no accountability. These clauses allow companies to hide systemic harassment and discrimination, including sexual harassment. The addition of class action bans in forced arbitration contracts, virtually guarantee that isolated employees will drop valid claims for lack of resources. Indeed, recent research by New York University Law Professor Cynthia Estlund found that as many as 722,000 employment claims are never filed because of the effect of forced arbitration.⁴ In sum, forcing employees into arbitration has played a significant role in hiding systemic wrongdoing and allowing corporate wrongdoers to evade accountability for bad acts.

IV. Congress Must Act Promptly

Congress must rein in the overly expansive interpretation that courts have given to the Federal Arbitration Act. Forced arbitration weakens federal and state laws that are intended to protect employees by removing individuals' ability to enforce those laws in court. In 2011, the U.S. Supreme Court dealt a devastating blow to consumers and employees, ruling that companies could ban individuals from joining together to enforce their rights.⁵ In 2018, the Court held that workers may be forced, as a condition of employment, to waive their right to act collectively to enforce their legal rights.⁶ And just last month in *Lamps Plus Inc. v. Varela*, the Court dealt another blow to protecting access to the courts for those who have been harmed.⁷

Forced arbitration is a system that was intentionally developed by corporate America to avoid accountability and circumvent laws that were enacted to protect working people.

Workers who are forced to address disputes in private arbitration are denied fundamental fairness, due process, and transparency that are part of any court proceeding, while employers avoid liability as well as public accountability. Congress has enacted legislation to protect workers from wage theft, workplace harassment, and discrimination on the job but forced arbitration clauses prevent harmed employees from access to a court that has the power to enforce those laws. Until Congress acts to correct the legal fiction—that workers with little bargaining power have consented to the deprivation of their rights in exchange for a job—these clauses will continue to endanger individuals, the workplace, and the rule of law.

In February, Representative Hank Thompson and Senator Richard Blumenthal introduced the Forced Arbitration Injustice Repeal (FAIR) Act (H.R. 1423/S.R. 610). This important legislation would prevent corporations from forcing workers, consumers, and small businesses to resolve disputes in private, company-controlled arbitration systems, even when that company has engaged in illegal misconduct. The bill would specifically cover cases involving consumer, civil rights, employment, or antitrust violations, and it would ensure that federal and state laws enacted to protect legal rights in those cases are properly enforced.

⁴ Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679 (2018), <https://scholarship.law.unc.edu/nclr/vol96/iss3/3>.

⁵ *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

⁶ *Epic Systems Corp. v. Lewis*, 584 U.S. ____ (2018).

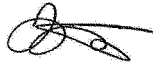
⁷ 587 U.S. ____ (2019) (holding that “an ambiguous agreement” does not provide the “necessary ‘contractual basis’” for concluding that the parties agreed to submit to class arbitration). *Lamps Plus* at 6.

The FAIR Act does not seek to eliminate arbitration and other forms of alternative dispute resolution agreed to voluntarily post-dispute. It would allow workers, consumers, and small businesses to choose arbitration in the aftermath of being harmed if there is agreement between the parties that arbitration would be beneficial for each. Nor would the FAIR Act affect collective bargaining agreements that require arbitration between unions and employers. Rather, the FAIR Act's sole aim is to end the practice of forcing consumers, workers, and small businesses into secretive, one-sided arbitration proceedings that tie the hands of individuals who have been wronged, long before they are harmed.

We strongly support the FAIR Act, which would re-open the courthouse doors and restore workers' access to America's civil justice system. According to a national survey, 84 percent of the public supports federal legislation that ends the practice of forcing consumers and workers into arbitration. Republicans support the legislation more than Democrats (87% to 83%).⁸ The FAIR Act is long overdue for your constituents—America's workers.

NELA urges you to swiftly pass the FAIR Act through the subcommittee so that all of your colleagues in the House of Representatives have an opportunity to be on record supporting everyday people's access to justice.

Sincerely,



James H. Kaster
NELA President



Terry O'Neill
NELA Executive Director

⁸ Guy Molyneux & Geoff Garin, Nat'l Survey on Required Arbitration, HART RESEARCH ASSOC. (Feb. 28, 2019), <https://www.justice.org/sites/default/files/2.28.19%20Hart%20poll%20memo.pdf>.



May 16, 2018

The Honorable David N. Cicilline
Chair
Subcommittee on Antitrust, Commercial
and Administrative Law
U.S. House Committee on the Judiciary
2138 Rayburn Building
Washington, DC 20515

The Honorable F. James Sensenbrenner
Ranking Member
Subcommittee on Antitrust, Commercial
and Administrative Law
U.S. House Committee on the Judiciary
2142 Rayburn House Office Building
Washington, DC 20515

RE: FAN Letter Supporting Hearing on How Forced Arbitration Erodes Legal Rights

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

The undersigned members of the Fair Arbitration Now coalition strongly support today's hearing exploring how forced arbitration erodes our legal system and curtails everyday people's access to justice.

I. Forced Arbitration Disadvantages Workers, Consumers, and Small Businesses

Forced arbitration clauses are usually hidden in the fine print of "take-it-or-leave-it" agreements. These clauses deprive people of their right to seek justice in court before an impartial judge or jury. They are ubiquitous in contracts governing bank accounts, student loans, cell phones, employment, small business merchant accounts, and even nursing home admissions. Corporations that place forced arbitration clauses in their standard contracts with consumers, non-union employees, and small businesses shield themselves from accountability for illegal practices and other wrongdoing. The contracts typically designate:

- The arbitration provider, who often rely on the company for repeat business and therefore may be biased in the company's favor;
- The arbitration rules, which provide none of the legal safeguards that protect individuals who use the courts, including their ability to obtain key evidence necessary to prove one's case;
- The state in which the arbitration is to occur, which is always at the company's convenience, not the harmed individual who may have to travel far to get there, and

- The payment terms, which might include exorbitant filing fees, as well as continuous fees for procedures such as motions and written findings, and “loser pays” rules that are prohibitive for many individuals.

The proceedings are secret and final with few rights to appeal. Studies have shown that those forced into arbitration are less likely to win, receive smaller awards, and are otherwise severely disadvantaged. According to the Economic Policy Institute, “Consumers obtain relief regarding their claims in only 9 percent of disputes. On the other hand, when companies make claims or counterclaims, arbitrators grant them relief 93 percent of the time—meaning they order the consumer to pay.”¹

II. Forced Arbitration Clauses Are Everywhere and are Not Voluntary

Since arbitration clauses are usually contained in non-negotiable contracts, the consumer, worker, or small business is presented with a legal fiction that they actually have a “choice” when signing away their rights when in fact refusing to sign means forgoing the goods, services, or employment. As a result, according to the Economic Policy Institute, 60.1 million workers, more than half of non-union, private-sector employees, have signed away their right to go to court if harmed by their employer.² In consumer contracts, a majority of credit cards, prepaid cards, storefront payday loans, cell phone companies, and private student loan contracts, along with a large segment of banks, include arbitration clauses in non-negotiable contracts. Many small businesses are also forced to agree to arbitrate disputes with larger companies, even when those companies steal money, price-fix, and otherwise violate antitrust laws that harm the small business.

III. Forced Arbitration Clauses Allow Corporations to Evade Accountability for Illegal Misconduct

Forced arbitration clauses allow banks and lenders to cheat customers with no accountability. They allow companies to hide systemic harassment and discrimination, including sexual harassment. They also prevent small businesses from enforcing their rights against companies engaged in illegal antitrust conspiracies, allowing criminals to keep ill-gotten gains and leaving small businesses with little or nothing.

In sum, forcing consumers, workers, and small businesses into arbitration has played a significant role in hiding systemic wrongdoing and allowing corporate wrongdoers to evade accountability for bad acts.

¹ Heidi Shierholz, *Correcting the Record*, Economic Policy Institute (Aug. 1, 2017), <https://www.epi.org/files/pdf/132669.pdf>.

² Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute (Sept. 27, 2017), <https://www.epi.org/files/pdf/135056.pdf>.

IV. Congress Must Act

Congress must rein in the overly expansive interpretation that courts have given to the Federal Arbitration Act. Forced arbitration weakens federal and state laws that are intended to protect consumers and employees by removing individuals' ability to enforce those laws in court. In 2011, the U.S. Supreme Court dealt a devastating blow to consumers and employees, ruling that companies could ban individuals from joining together to enforce their rights.³ In 2018, the Court held that workers may be forced, as a condition of employment, to waive their right to act collectively to enforce their legal rights.⁴ And just last month in *Lamps Plus Inc. v. Varela*, the Court dealt another blow to protecting access to the courts for those who have been harmed.⁵

Until Congress acts to correct the legal fiction—that workers, consumers, and small businesses have consented to the deprivation of their rights—these clauses will continue to endanger individuals and small businesses.

In February, Rep. Hank Thompson and Sen. Richard Blumenthal introduced the Forced Arbitration Injustice Repeal (FAIR) Act (H.R. 1423/S.R. 610). This important legislation would prevent corporations from forcing workers, consumers, and small businesses to resolve disputes in private, company-controlled arbitration systems, even when that company has engaged in illegal misconduct. The bill would specifically cover cases involving consumer, civil rights, employment, or antitrust violations, and it would ensure that federal and state laws enacted to protect legal rights in those cases are properly enforced.

The FAIR Act does not seek to eliminate arbitration and other forms of alternative dispute resolution agreed to voluntarily post-dispute. It would allow workers, consumers, and small businesses to choose arbitration in the aftermath of being harmed if they truly perceived arbitration to have benefits over proceeding in court. Nor would it affect collective bargaining agreements that require arbitration between unions and employers. Rather, the FAIR Act's sole aim is to end the practice of forcing consumers, workers, and small businesses into secretive, one-sided arbitration proceedings that bind people long before they are harmed.

We strongly support the FAIR Act, which would restore access to our civil justice system and preserve important civil rights, employment, and consumer protections, and according to [a national survey](#), 84 percent of the public supports federal legislation that ends the practice of forcing consumers and workers into arbitration. Republicans support the legislation more than

³ AT&T Mobility v. Concepcion, 563 U.S. 333 (2011).

⁴ Epic Systems Corp. v. Lewis, 584 U.S. ____ (2018).

⁵ 587 U.S. ____ (2019)(holding that “an ambiguous agreement” does not provide the “necessary ‘contractual basis’” for concluding that the parties agreed to submit to class arbitration). *Lamps Plus* at 6.

Democrats (87% to 83%).⁶ We urge you to quickly pass the FAIR Act through the subcommittee so that all of your colleagues in the House of Representatives have an opportunity to be on record supporting everyday people's access to justice. With questions, please contact Remington A. Gregg at rgregg@citizen.org and Christine Hines at Christine@consumeradvocates.org.

Sincerely,

Fair Arbitration Now (Organizations that support ending the predatory practice of forced arbitration in consumer and non-bargaining employment contracts:
<http://www.fairarbitrationnow.org/coalition/>).

Cc: Members of the Committee

⁶ Guy Molyneux & Geoff Garin, *Nat'l Survey on Required Arbitration*, HART RESEARCH ASSOC. (Feb. 28, 2019), <https://www.justice.org/sites/default/files/2.28.19%20Hart%20poll%20memo.pdf>.

Alan S. Carlson

*Owner, Italian Colors Restaurant, 2220 Mountain Blvd.,
Oakland, CA 94611*

My name is Alan Carlson and I am the chef and owner of Italian Colors Restaurant, a small business located in Oakland, California. I respectfully submit this statement for the record of the hearing held on May 16, 2019 in the House Subcommittee on Antitrust, Commercial and Administrative Law entitled, "Justice Denied: Forced Arbitration and the Erosion of our Legal System."

The Italian Colors Restaurant was the lead plaintiff in *Italian Colors v. American Express*, a class action lawsuit on behalf of merchants across the country who allege we are harmed by anti-competitive conduct engaged in by American Express in violation of the U.S. antitrust laws. In 2013, the Supreme Court held that we could not bring our antitrust claim because American Express used a forced arbitration clause in its contracts that prohibits its business customers from joining together to hold American Express accountable through the public court system. I strongly urge Congress to pass H.R. 1423, the Forced Arbitration Injustice Repeal Act (FAIR Act), to ensure that small businesses like Italian Colors have recourse when we are victims of predatory and illegal behavior by large corporations that take advantage of our situation.

I was born in suburban Detroit and have been working in the restaurant business in one way or another since I was 14 years old, when I started out washing dishes at a Greek diner. My passion for food grew into a career. In 1979, I graduated from the Culinary Institute of America in New York City. Afterwards, I traveled across America and worked with a number of chefs, absorbing new knowledge and skills from each opportunity. In the early 1980s, I settled in Oakland, California, and opened my first restaurant in 1986. Since then, I have started and run several restaurants in and around the San Francisco Bay area.

Twenty-six years ago I opened Italian Colors with my wife, Dee Carlson-Cohen, and business partner, Steve Montgomery. Our goal was to create the quintessential neighborhood restaurant, geared toward community, quality food, and great customer service. I am incredibly proud to say that over two decades later, we are still open, serving our community and employing more than 30 people.

However, like most local restaurants, our profit margins are razor thin. We survive through fostering client loyalty, keeping prices low, and cooking high quality food. Like so many other communities in the United States, we operate in a charge card and credit card-driven world and could not survive without accepting credit cards as payment.

To customers, one form of payment is as good as another, but for small businesses, that is far from the reality. In fact, American Express cards are pretty much the most expensive form of payment we must accept to survive.

A significant percentage of my restaurant's earnings comes from clients who use American Express cards. They are an extremely popular form of payment especially for diners who spend a lot of money at the restaurant because of all of the perks they offer. American Express imposes special rules and restrictions on restaurants and small businesses who must accept their cards as payment. For example, in order to accept *any* American Express card, my restaurant has to accept *all* types of American Express cards—even cards that carry rates and fees that are higher than all other forms of payment. In addition, American Express does not allow me to offer cash discounts or to encourage customers to pay with a form of payment that actually works better for my business. I cannot encourage my customers to pay in cash or debit cards by offering discounts or other incentives.

If I could offer discounts to my customers who use cash or their debit cards, or be able to say which cards make sense for me to accept, without being forced to accept all cards, I would be able to increase my earnings and decrease my costs—which means providing more services, having more employees.

Being forced to make a decision that is bad for my business isn't right. A number of years ago, after talking about what I was facing with a long-time customer, friend, and attorney, Edward Zusman, he talked to other anti-trust attorneys with whom he was acquainted and they decided to take up the cause. They believed that American Express was engaging in anti-competitive practices in violation of the antitrust laws.

When I started with American Express in the early 1990's my first agreement did not have a forced arbitration clause. To this day, I have not actually seen a forced arbitration clause, but I have been told that in the late 1990's they included forced arbitration as a term and condition of continued use of their cards. I did not know until the litigation commenced that that provision even existed.

Edward explained that forced arbitration means American Express cannot be held accountable in court, and that I will not be able to join with other small business owners to help defray the costs of enforcing our rights. Instead, if I want to hold American Express accountable, I would have to try to do it in an individual, private arbitration tribunal designed by American Express.

Needless to say, I was shocked. I honestly cannot recall ever even reading a forced arbitration clause, and certainly do not remember signing a contract that included one. But even if I knew the clause was in the fine print of the contract, my American Express contract was offered on a take-it-or-leave-it basis.

As we figured out how to move forward, we discovered that the cost of individual forced arbitration was so high that even if a small business won, it would lose. An expert economist explained in testimony that it would not be cost-effective for any small business owner in the same situation as me to pursue an individual arbitration claim against American Express. In fact, it would cost more to bring their claim than they could recover. This cost prohibitive system means that there is no way one small business can get justice alone.

Every American should have the right to join with others to fight to hold corporate giants accountable. But I don't, because of a forced arbitration clause buried in the fine print of terms and conditions imposed upon me years after I started taking American Express cards. And I have learned that the majority of consumers and workers have also signed forced arbitration clauses in just about every aspect of their lives. If we cannot be part of a class action to enforce our rights against companies like American Express, we have no way of enforcing those rights. I certainly don't have the money to take on American Express by myself.

I tracked my case through the courts and I was very pleased with the results at the lower courts. The case went all the way to the U.S. Supreme Court, where I thought surely justice would prevail. However, as you probably know, the Supreme Court ruled that I had to take my case to individual arbitration, even though the evidence presented showed that I would have to pay more in arbitration than I could ever recover, making that choice impossible for me and other small businesses. When the Supreme Court issued its decision in favor of American Express and forced arbitration, you can imagine my disappointment and shock. Essentially the Supreme Court was saying that it didn't matter that a small business couldn't pursue important rights against a big business.

I was surprised to learn recently that a number of very large companies, including Walgreens, CVS and Safeway, are taking American Express to trial this summer over the same issues I was not allowed to bring to court. It turns out that these huge corporations had enough bargaining power with American Express that they were able to negotiate contracts that did not include forced arbitration clauses. They will get their day in court. But small businesses throughout America, who are suffering from the exact same harmful business practices, do not have the same rights. We will never get our day in court because of forced arbitration. I believe this is unAmerican.

Because forced arbitration makes it impossible for small businesses to hold large corporations publicly accountable, those companies are able to continue their unfair business practices and small firms like mine continue to be harmed with no recourse. I have heard that there will be a "litigation explosion" if we end forced arbitration. I do not believe that. If we end forced arbitration, more companies will follow the law and everyone will benefit.

It has become clear to me that certain congressional actions can and must be taken to help protect the small businesses on "Main Streets" across America. Small businesses and consumers should have the same access to the justice system as large corporations, like American Express and Walgreens and CVS. And corporate Goliaths should never be able to take away our ability to hold them responsible for their actions.

Small businesses are the lifeblood of America and we play an essential role in creating good jobs. Small businesses, our customers, and really, our neighborhoods and communities are the ones who lose when big business gets to violate the law and get away with it.

There are many small business owners like me across the country who are struggling to stay in business and live the American dream. The FAIR Act 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. I urge you to pass the FAIR Act to restore equal access to justice for small businesses and consumers.

Mr. CICILLINE. One final thing I would like to do before we adjourn is just take a moment to recognize several people who have traveled from all over the country to attend today's hearing.

Tanuja Gupta, who has organized and led the Googlers for Ending Forced Arbitration and Google walk-out movements, which culminated in Google's decision to end its use of forced arbitration earlier this year.

Richard Heggens, a former Chipotle employee who is also with us today. Richard was forced to work off the clock without pay by his employer, along with several thousand other employees. Richard's attempt to hold his employer accountable for wage theft has been forced into individual arbitration.

Tara Zoumer, who is a former employee of WeWork, an office leasing start-up, who was fired for refusing to sign a forced arbitration clause in her employment contract. Since then, she has fought for the rights of millions of workers against forced arbitration.

Tom Troy, who is also with us. Tom is a partner at the Starbucks coffee company who filed an age discrimination complaint against the company and has fought to bring awareness to the public and other employees at Starbucks about the company's use of forced arbitration.

Finally, Molly Coleman, who is a student at Harvard Law School, who co-founded the Pipeline Parity Project, which has led a campaign to end forced arbitration at many of the biggest law firms in the world.

Very finally, Emanuel Schorsch, who works for Google and was part of Googlers for Ending Forced Arbitration, collecting, comparing, and analyzing arbitration clauses in employee contracts for companies across the tech industry.

I want to welcome you and thank you for being here.

This concludes today's hearing.

Again, I want to thank our witnesses for their very helpful testimony.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is adjourned.

[Whereupon, at 11:43 a.m., the hearing was adjourned.]

APPENDIX

**QUESTION FOR THE RECORD FOR ANDREW PINCUS
SUBMITTED BY REPRESENTATIVE KEN BUCK**

The Supreme Court case *AT&T Mobility v. Concepcion* was raised during the hearing by Representative Raskin. I know that you argued that case on behalf of AT&T. Please provide a full discussion of the case, including its underlying facts, what the Supreme Court decided, and how the ruling relates to the use of arbitration today.

The *Concepcion* case clearly illustrates the benefits to all parties of consumer arbitration agreements, especially when compared with the class-action system.

The *Concepcion* Lawsuit and District-Court Proceedings

The plaintiffs in *Concepcion*, Vincent and Liza Concepcion, were wireless customers of AT&T Mobility LLC who filed a putative class action against the company in the United States District Court for the Southern District of California in 2006. At that time, customers of most wireless carriers, including AT&T, typically purchased cell phones and subscribed to wireless service in a bundled transaction, in which the phone was free or steeply discounted in exchange for a commitment to maintain service for a specified term (often one or two years). But California law required that sales tax be paid on the full retail value of a phone when it is sold as part of a bundled transaction.¹ Despite this legal requirement, when the Concepcions were charged sales tax based on the full retail price of phones that were free or discounted, they sued AT&T, alleging that in addition to violating several common-law doctrines, AT&T had violated California's Unfair Competition Law ("UCL"),² False Advertising Law ("FAL"),³ and Consumer Legal Remedies Act ("CLRA"),⁴ and should be required to pay damages and restitution to consumers and attorneys' fees and costs to the Concepcions' lawyers.

The Concepcions' legal claims were of dubious merit.⁵ That is not unusual. Large companies frequently are targeted by consumer class actions by the plaintiffs' bar, on the theory that even claims with a low probability of success can be used to coerce what Judge Friendly famously characterized as a "blackmail settlement" from the company because of the sheer size of the aggregate potential liability.⁶

AT&T responded to the lawsuit by seeking to enforce the arbitration provision in AT&T's contracts with customers, including the Concepcions. That arbitration provision required that arbitration proceed in its traditional form—on a one-to-one, individual basis. And the provision included a number of features designed to make arbitration convenient and attractive for consumers with small claims:

- **Cost-free arbitration:** AT&T committed to pay all of the filing, administrative, and arbitrator costs for any claim that the arbitrator did not find to be frivolous under the same Federal Rule of Civil Procedure 11(b) standard applicable in federal court;
- **Independent arbitration administrator:** Arbitration would be administered by the independent non-profit American Arbitration Association, using rules it had designed to make arbitration easy for consumers, and its roster of retired judges and experienced arbitrators;
- **Convenient hearings:** Arbitration would take place in the county of the customer's billing address, and the customer had the sole right to choose whether the arbitrator would conduct an in-person hearing, a hearing by telephone, or dispense with a hearing and rule on the basis of the documents submitted by the parties;
- **Small claims court option:** Either party could bring a claim in small claims court in lieu of arbitration;
- **Full remedies:** The arbitrator could award the customer any form of individual relief (including statutory attorneys' fees, statutory or punitive damages, and injunctions) that a court could award;

¹ Cal. Code Regs. tit. 18, §§ 1585(a)(4), (b)(3).

² Cal. Bus. & Prof. Code §§ 17200 *et seq.*

³ Cal. Bus. & Prof. Code §§ 17500 *et seq.*

⁴ Cal. Civ. Code §§ 1750 *et seq.*

⁵ The California State courts dismissed a copycat class action for failure to state a claim—holding that the claim was legally insufficient. *Yabsley v. Cingular Wireless, LLC*, 98 Cal. Rptr. 3d 657 (Ct. App. 2009) (affirming order granting demurrer), *review granted*, 219 P.3d 151 (Cal. 2009), *review dismissed*, 328 P.3d 67 (2014); *see also* *Loefler v. Target Corp.*, 324 P.3d 50, 53 (Cal. 2014) (holding that "consumer-protection statutes ... cannot be employed" to challenge collection of "sales taxes" by retailers).

⁶ HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973).

- **Possibility to earn large bonus recovery:** If the arbitrator awarded a customer relief that was greater than AT&T's last written settlement offer before the arbitrator was appointed, the customer's minimum recovery would be either \$5,000 or (if greater) the jurisdictional maximum for the customer's local small claims court (which at the time in California was \$7,500); and
- **Possibility to earn double attorneys' fees:** If the arbitrator awarded a customer more than AT&T's last written settlement offer, then AT&T also would pay the customer's attorney, if any, twice the amount of attorneys' fees, and reimburse any expenses, that were reasonably accrued for investigating, preparing, and pursuing the claim in arbitration.

Despite these consumer-friendly features, the Concepcions resisted enforcement of their arbitration agreement on the ground that it was unconscionable under California law because it prohibited class procedures in arbitration.

In ruling on AT&T's motion, the district court noted the powerful incentives under the agreement for consumers to arbitrate individual claims: "If [AT&T] denies an informal claim"—that is, a complaint submitted to the legal department prior to the commencement of an arbitration, which can be as simple as a one-page letter—"or offers less than the [California] consumer requests," then "the amount of the consumer's award upon prevailing at arbitration jumps to \$7,500 . . . , plus double attorney's fees, if the consumer is represented by counsel."⁷ For the Concepcions, who were seeking only \$30 in damages—the amount of the sales tax on their phone—AT&T's arbitration provision gave them "the potential to recover two hundred fifty times [their] actual damages[.]"⁸

The district court also noted the corresponding incentives for AT&T to resolve claims. Because the agreement committed AT&T to pay all arbitration costs and obligated it to pay heightened recoveries to customers who recover more in arbitration than AT&T had offered to settle, the agreement "prompts [AT&T] to *accept liability* . . . during the *informal claims process*" that precedes arbitration, "even for claims of questionable merit and for claims it does not owe."⁹ As a consequence, under AT&T's arbitration provision, the district court found that "nearly all consumers who pursue the informal claims process are very likely to be compensated promptly and in full," with customers "virtually guaranteed a payment by [AT&T]."¹⁰

By contrast, the district court found, "consumers who are Members of a class [action] do not fare as well."¹¹ The court noted "studies that show class Members rarely receive more than pennies on the dollar for their claims, and that few class Members (approximately 1–3%) bother to file a claim when the amount they would receive is small."¹² The court found that "the record . . . establishes that a reasonable consumer may well prefer quick informal resolution with likely full payment over class litigation that could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars."¹³ The court held that AT&T's arbitration provision "sufficiently incentivizes consumers" to pursue "small dollar" claims and "is an adequate substitute for class arbitration[.]"¹⁴

The district court nonetheless held that AT&T's arbitration provision is unenforceable under California law. Under California's *Discover Bank* rule—named for the California Supreme Court decision that had announced it (*Discover Bank v. Superior Court*)¹⁵—"faithful adherence to California's stated policy of favoring class litigation and arbitration to deter fraudulent conduct in cases involving large numbers of consumers with small amounts of damages[] compel[ed] the Court to invalidate" AT&T's arbitration provision.¹⁶ The district court also rejected AT&T's arguments that the Federal Arbitration Act ("FAA") preempts California's *Discover Bank* rule.¹⁷

⁷ *Laster v. T-Mobile USA, Inc.*, 2008 WL 52162555, at *10 (S.D. Cal. Aug. 11, 2008), *affirmed sub nom. Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom. AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

⁸ *Id.*

⁹ *Id.* at *11.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at *12.

¹⁴ *Id.* at *11–12.

¹⁵ 113 P.3d 1100 (Cal. 2005).

¹⁶ *Laster*, 2008 WL 52162555, at *14.

¹⁷ *Id.* at *14 n.11.

AT&T's Appeal to the Ninth Circuit and Supreme Court

AT&T appealed the denial of its motion to compel arbitration. A three-judge panel of the Ninth Circuit affirmed the district court's rulings that California's *Discover Bank* Rule invalidates AT&T's arbitration provision and that the FAA does not preempt the *Discover Bank* rule.¹⁸ The Ninth Circuit concluded that although AT&T's arbitration provision "essentially guaranteed that the company will make any aggrieved customer whole who files a claim," this was insufficient to comply with California law because class proceedings were unavailable in arbitration.¹⁹ And the Ninth Circuit held that California's *Discover Bank* Rule was consistent with the FAA because it was "simply a refinement of the unconscionability analysis applicable to contracts generally in California" and therefore did not discriminate against arbitration agreements in violation of the FAA.²⁰

The Supreme Court then granted review to determine whether the FAA preempts California's *Discover Bank* rule. The Court then reversed the Ninth Circuit's decision.²¹

The Supreme Court began by noting that Congress enacted the FAA "in response to widespread judicial hostility to arbitration agreements."²² Section 2 of the FAA requires that written arbitration agreements be deemed to be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."²³ The Supreme Court explained that this nondiscrimination principle means that arbitration agreements may "be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."²⁴ In other words, courts cannot deem inherent characteristics of arbitration agreements—such as the lack of "judicially monitored discovery" or "disposition by jury"—to be unconscionable or against public policy.²⁵ The Court observed that these "examples are not fanciful, since the judicial hostility towards arbitration that prompted the FAA had manifested itself in a 'great variety' of 'devices and formulas' declaring arbitration against public policy."²⁶

The Supreme Court then held that California's *Discover Bank* Rule contravened this principle, because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."²⁷

First, the Court explained, "the switch from bilateral" (*i.e.*, individual) "to class arbitration sacrifices the principle advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."²⁸ For example, in a class proceeding, the arbitrator must decide "whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted."²⁹

Second, the Court noted, "class arbitration requires procedural formality," with class arbitration procedures "mimic[king] the Federal Rules of Civil Procedure for class litigation."³⁰

Third, "class arbitration greatly increases risks to defendants."³¹ The Court explained that "[a]rbitration is poorly suited to the higher stakes of class litigation" because judicial review of arbitral decisions is sharply limited under the FAA.³² Accordingly, the Court concluded, "[w]e find it hard to believe that defendants would bet the company with no effective means of review," and so if the *Discover Bank*

¹⁸ *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom. AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

¹⁹ *Id.* at 856 & n.10.

²⁰ *Id.* at 857–58.

²¹ *Concepcion*, 563 U.S. 351.

²² *Id.* at 339.

²³ 9 U.S.C. § 2.

²⁴ *Concepcion*, 563 U.S. at 339 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

²⁵ *Id.* at 341–42.

²⁶ *Id.* at 342 (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)).

²⁷ *Id.* at 344.

²⁸ *Id.* at 348.

²⁹ *Id.*

³⁰ *Id.* at 349.

³¹ *Id.* at 350.

³² *Id.*

Rule were allowed to persist, it would lead to the abandonment of arbitration, frustrating the FAA's purpose of "promot[ing] arbitration."³³

The Court therefore concluded that the class arbitration mandated by California's Discover Bank Rule "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by State law."³⁴

Finally, the Court rejected the criticism that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system."³⁵ The Court explained that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."³⁶ Moreover, the Court explained, given the pro-consumer features of AT&T's arbitration provision, AT&T customers "were better off under their arbitration agreement with AT&T than they would have been as participants in a class action, which could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars."³⁷

The Impact of *Concepcion* on Consumer Arbitration Agreements

The Supreme Court's decision in *Concepcion* is significant to consumer arbitration in a number of respects.

First, although the Court held that the FAA preempts California's *Discover Bank* rule, the Court emphasized the continued ability of courts to police consumer arbitration agreements for unfairness. "Generally applicable contract defenses," such as "fraud" and "unconscionability," remain available to courts to prevent overreaching by drafters of consumer arbitration agreements.³⁸ Today, courts routinely invalidate one-sided arbitration agreements or sever unfair provisions that impose excessive costs on consumers, unfairly limit a consumer's remedies, or improperly give the company control over the selection of the arbitrator.³⁹

Second, the decision in *Concepcion* encouraged companies to adopt more consumer-friendly arbitration programs, such as AT&T's provision, under which consumers may arbitrate most claims for free and might obtain greater remedies in arbitration than a court could award.

Specifically, a number of other companies have followed AT&T's lead and given consumers special rights in arbitration that are unavailable in court. For example, a number of companies give prevailing customers the right to recover their attorneys' fees.⁴⁰ By contrast, consumers who win a breach-of-contract claim in court generally cannot recover their attorneys' fees, because under the American rule, each party pays for its own attorneys unless an applicable fee-shifting statute applies.⁴¹ Other companies have agreed to pay heightened minimum recoveries to consumers to whom an arbitrator awards greater relief than the company's last settlement offer.⁴² And many companies fully subsidize the cost of arbitration for consumers, paying the consumer's already low filing fee under the consumer fee schedules of the American Arbitration Association or JAMS.

The ease and simplicity of using these arbitration programs to resolve disputes—which frequently result in mutually agreeable settlements, without the consumer having to go to the bother of actually commencing an arbitration—makes it easier than ever for consumers with small claims to obtain relief. Indeed, plaintiffs' law-

³³ *Id.* at 345, 351.

³⁴ *Id.* at 351.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 352 (internal quotation marks omitted).

³⁸ *Id.* at 339 (internal quotation marks omitted).

³⁹ See, e.g., *Ridgeway v. Nabors Completion & Prods. Servs. Co.*, 725 F. App'x 472, 474 (9th Cir. 2018) (holding that limitation on arbitrator's ability to award prevailing plaintiff discovery and expert witness costs must be severed from arbitration agreement); *Zaborowski v. MHN Gov't Servs., Inc.*, 601 F. App'x 461, 463–64 (9th Cir. 2014) (affirming denial of motion to compel arbitration under agreement that limited remedies and allowed the company to select the arbitrators).

⁴⁰ See, e.g., <http://www.t-mobile.com/responsibility/legal/terms-and-conditions-aug-22-2018+Dispute%20Resolution>.

⁴¹ See, e.g., *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015).

⁴² See, e.g., <http://www.verizonwireless.com/legal/notices/customer-agreement> (minimum recovery of \$5,00 and reasonable attorneys' fees and expenses to customers who best Verizon Wireless's settlement offer in arbitration); <http://www.frontier.com/media/corporate/terms/general-arbitration-provision.ashx> (minimum recovery of \$5,000 to customers who best Frontier Communication's settlement offer in arbitration); <http://www.microsoft.com/en-us/servicesagreement> (minimum recovery of \$1,00 and attorneys' fees and expenses to customers who best Microsoft's settlement offer in arbitration).

yers are increasingly agreeing to represent consumers in arbitration. And businesses have formed to help consumers bring arbitrations.

As *Concepcion* points out—rightly—consumers and businesses both benefit from the “informality,” and inexpensive, “efficient,” and “streamlined procedures” of arbitration.⁴³ Indeed, as the Supreme Court explained in a previous case, without arbitration, the “typical consumer who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set),” would be left “without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery.”⁴⁴

QUESTIONS FOR THE RECORD FOR ANDREW PINCUS SUBMITTED BY REPRESENTATIVE F. JAMES SENSENBRENNER

1. Several witnesses asserted that arbitration agreements prevent the disclosure of wrongdoing, but you testified that arbitration agreements cannot prevent injured parties from speaking publicly about their claims or discussing their claims with law enforcement officials. Please explain why you believe the other witnesses are wrong.

The other witnesses have their facts wrong. Courts have consistently held that arbitration agreements cannot prevent employees or consumers from talking publicly about their claims (with the possible exception of claims brought by a high-ranking employee) or prevent anyone from informing government officials of alleged wrongdoing.¹ And those government officials can pursue claims in court—including on behalf of consumers and employees—if they wish. Indeed, almost two decades ago, the Supreme Court held that arbitration agreements do not forbid government entities—in that case, the Equal Employment Opportunity Commission—from seeking relief on behalf of one of the parties to the agreement.²

And the same is true about the results of the arbitration: If an arbitration agreement does require parties to keep the results of arbitration confidential, courts have the power to sever a confidentiality provision or, if it cannot be severed, to invalidate the arbitration agreement. And courts have not hesitated to do so.³

Arbitral confidentiality relates only to the proceeding before the arbitrator—not to the claim or the arbitrator’s decision. As one commentator has noted, “while arbitrators themselves may be bound to a general obligation of confidentiality, the parties (and their counsel) are generally not so restricted, absent agreement or arbitral order.”⁴

It is true that arbitrators—just like judges—can enter protective orders requiring certain matters to be sealed, but those orders are typically limited to protecting an individual’s private information or trade secrets or sensitive intellectual property—not allegations of wrongdoing. And no one disputes that courts can and do have the exact same power to enter protective orders, and that they do so routinely.⁵

Finally, some of the rhetoric about secrecy that the witnesses were testifying about has nothing to do with arbitration and everything to do with non-disclosure provisions in settlement agreements. For decades, it has been common for parties who have reached settlement agreements—whether in court or in arbitration—to agree that the terms and nature of the settlement be kept confidential. That is something that parties agree to after a negotiation; it is not something inherent to the arbitration process. Indeed, when individual consumer and employee lawsuits in court are settled, plaintiffs and their lawyers routinely enter into confidentiality and non-disclosure agreements.

2. You testified about a new study indicating that employees who arbitrate their claims win more often and on average are awarded larger damages than employees who pursue claims in federal court. Are there other

⁴³ *Concepcion*, 563 U.S. at 344–45.

³⁷ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

¹ See, e.g., *Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1078 (9th Cir. 2007), *overruled on other grounds by Kilgore v. KeyBank*, Nat’l Ass’n, 673 F.3d 947 (9th Cir. 2012); *Longnecker v. Am. Express Co.*, 23 F. Supp. 3d 1099, 1110 (D. Ariz. 2014); *DeGraff v. Perkins Coie LLP*, 2012 WL 3074982, at *4 (N.D. Cal. July 30, 2012).

² *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

³ See, e.g., *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 1002 (9th Cir. 2010) (invalidating confidentiality provision in arbitration agreement); *Davis*, 485 F.3d at 1078–79 (same in employment agreement); *Ting v. AT&T*, 319 F.3d 1126, 1151–52 (9th Cir. 2003) (same in consumer arbitration agreement).

⁴ Steven C. Bennett, *Confidentiality Issues in Arbitration*, 68 Disp. Resol. J. 1, 1 (2013) (footnotes omitted).

⁵ See, e.g., Fed. R. Civ. P. 26(c)(1)(D)–(H).

studies comparing outcomes in arbitration and litigation? Please provide the Subcommittee with information regarding the results of those studies.

Yes, there are a number of other studies examining the outcomes of cases decided in arbitration versus litigation. And these studies, as one commentator has put it, demonstrate that “there is no evidence that plaintiffs fare significantly better in litigation. In fact, the opposite may be true.”⁶

One empirical analysis showed that employees who arbitrate are more likely to win their disputes than those who litigate in federal court (46% in arbitration as compared to 34% in litigation); that the median arbitral awards that the employees obtained were typically the same as, or larger than, the amount obtained in court; and their arbitrations were resolved 33% faster than in court.⁷

Another study examined American Arbitration Association awards in employment disputes and compared them to litigation outcomes. It determined that, for higher-income employees’ claims, there was no statistically significant difference in win rates or amounts between discrimination and non-discrimination claims.⁸ For lower-income employees’ claims, that study did not attempt to draw comparisons between arbitration and in litigation, because lower-income employees appeared to lack meaningful access to the courts—and therefore don’t have the ability to bring a sufficient volume of court cases to provide a baseline for comparison.⁹

Studies of consumer arbitration have reached similar conclusions. For example, a 2010 study found that consumers won relief 53.3% of the time in arbitration, compared with a success rate of roughly 50% in court.¹⁰ And just as in court, plaintiffs who win in arbitration are able to recover not only compensatory damages but also “other types of damages, including attorneys’ fees, punitive damages, and interest.”¹¹

In the healthcare industry, the Kaiser Foundation Health Plan uses arbitration to resolve disputes with its more than 8 million California Members, and an independent review found that 96% of those who used the system said it was better than or the same as court. Awards to successful claimants ranged from \$4,500–\$3,469,778.¹²

Lastly, it should be noted that these studies probably understate the benefits of arbitration, compared with litigation, as a means of vindicating plaintiffs’ claims, because of “selection effects.” Arbitration makes it feasible for consumers and employees to pursue claims that are too small to attract a contingency-fee lawyer and therefore cannot be brought in court. Thus, studies that compare the average amount obtained by prevailing parties in arbitration and litigation probably tilt in favor of litigation, where claims tend to be larger. And, because of arbitration’s relatively streamlined procedures as compared with litigation, “relatively weaker claims . . . are more likely to go to an arbitration hearing on the merits than in litigation” given the additional procedural hurdles present in litigation.¹³

3. A number of witnesses testified about the procedures used in arbitration. Does an arbitrator have unfettered discretion to employ whatever procedures he or she wishes, or are there constraints on how an arbitration is conducted?

To begin with, arbitrators are constrained by the rules of the organization administering the arbitration, and those rules have been developed with a view to ensuring fairness for consumers and employees. Most consumer and employment arbitra-

⁶David Sherwyn *et al.*, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1578 (Apr. 2005); *see also, e.g.*, Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 16 (2017).

⁷Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003–Jan. 2004).

⁸Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 Disp. Resol. J. 44, 45–50 (Nov. 2003/Jan. 2004).

⁹*Id.*

¹⁰Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 896–904 (2010); Theodore Eisenberg *et al.*, *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 Seattle U. L. Rev. 433, 437 (1996); *see also* Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 Hastings Bus. L.J. 77, 80 (2011); Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2005).

¹¹Drahozal & Zyontz, *Empirical Study*, *supra* note 10, at 902.

¹²Office of the Independent Administrator, *Annual Report of the Kaiser Foundation Health Plan, Inc. Mandatory Arbitration System* (2018), <https://www.oia-kaiserarb.com/2059/-reports/annual-reports/annual-report-for-2018>.

¹³*See* Samuel Estreicher *et al.*, *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 Rutgers U.L. Rev. 375, 389–93 (2018).

tion agreements select one of the major arbitration providers, such as the American Arbitration Association (“AAA”) or JAMS, to administer the arbitration. These arbitration providers have promulgated detailed procedural rules to govern arbitrations—and have tailored specific rules for consumer or employment disputes. For example, the arbitrator can permit online or telephonic hearings, and evidence is far simpler for consumers and employees to introduce than in court.¹⁴ Although parties can agree to modify the applicable procedures, these arbitration providers nonetheless require that all arbitrations they administer satisfy the organization’s standards for fairness, such as the AAA’s Consumer Due Process Protocol and its Employment Due Process Protocol.¹⁵

Of course, arbitrators (like judges) have some discretion in how to supervise the proceedings—and for good reason: This flexibility to tailor procedures to the needs of a particular case not only makes arbitration efficient, but also prevents consumers or employees from being tripped up by the sort of procedural errors that often lead to dismissal in court.

Existing law already provides strong protections against the imposition of unfair procedures in arbitration. The Federal Arbitration Act vests courts with broad power to invalidate arbitration agreements that contravene generally applicable principles of unconscionability.¹⁶ Thus, an arbitration agreement that requires the arbitrator to apply markedly unfair procedures would be invalidated by courts.

Finally, the Federal Arbitration Act provides additional safeguards. Courts may vacate an arbitration award if the arbitrator is “guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent or material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.”¹⁷ Accordingly, in the unlikely event that an arbitrator excludes such evidence that a consumer or employee wishes to present, the court can vacate the arbitrator’s award.

4. How realistic is the court system as a means of providing redress for consumers and employees given the complex procedures used by courts? Are small claims courts viable alternatives for consumer claims? How does arbitration interact with small claims courts?

Our current court system is simply incapable of providing redress for many of the harms that employees and consumers care about. Those harms are usually relatively small in economic value and individualized.

Litigation in court, with its formality and complicated procedures, simply is not a realistic option for resolving many of these claims. As the Supreme Court has explained, “[a]rbitration agreements allow parties to avoid the costs of litigation, *a benefit that may be of particular importance in employment litigation*, which often involves smaller sums of money than disputes concerning commercial contracts.”¹⁸ The same is true of many consumer disputes. For a very large percentage of claims, therefore, arbitration is the only realistic opportunity for obtaining relief.

For example, a study of 200 AAA employment awards concluded that low-income employees brought 43.5% of arbitration claims, most of which were low-value enough that the employees would not have been able to find an attorney willing to bring litigation on their behalf.¹⁹ These employees were often able to pursue their arbitrations without an attorney and won at the same rate as individuals with representation.²⁰

A key obstacle to pursuing an individualized, small-value claim in court is the cost of hiring counsel. Unrepresented parties have little hope of navigating the complex procedures that apply to litigation in court, yet a lawyer’s hourly billing rate may itself exceed the amount at issue for many claims. In any event, many individuals do not have the resources to hire counsel, and those that do often face the added

¹⁴ See, e.g., AAA Consumer Arbitration Rule R-32(b); *Id.* R-34(a).

¹⁵ See, e.g., AAA Consumer Arbitration Rule R-1(d); see also AAA Consumer Due Process Protocol, [http://www.adr.org/sites/default/files/document_respository/Consumer%20Due%20Process%20Protocol%20\(1\).pdf](http://www.adr.org/sites/default/files/document_respository/Consumer%20Due%20Process%20Protocol%20(1).pdf); Employment Arbitration Under AAA Administration, <https://www.adr.org/employment>; JAMS Consumer Arbitration Minimum Standards, <http://www.jamsadr.com/consumer-minimum-standards>.

¹⁶ See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011) (FAA’s “savings clause preserves generally applicable contract defenses” to enforcement of arbitration agreements).

¹⁷ 9 U.S.C. § 10(a)(3).

¹⁸ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (emphasis added).

¹⁹ Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 794 (2003).

²⁰ *Id.*

hurdle of having to locate and retain a lawyer before even setting foot inside a courthouse.

Meanwhile, many lawyers, especially those working on a contingency basis, are unlikely to take cases when the prospect of a substantial payout is slim. Research demonstrates that lawyers accept contingent-fee cases only if the claim promises both a substantial recovery—and hence a substantial percentage of that recovery as a legal fee. Studies indicate that a claim must exceed \$60,000, and perhaps \$200,000, in order to attract a contingent-fee lawyer.²¹

Arbitration empowers individuals because it is possible to realistically bring a claim in arbitration without the help of a lawyer.²² Although a party always has the choice to retain an attorney, arbitration procedures are sufficiently simple and streamlined that in many cases no attorney is necessary. As one academic observer of employment arbitration has put it, in an arbitral forum, “it is feasible for employees to represent themselves or use the help of a fellow layperson or a totally inexperienced young lawyer.”²³

To initiate an arbitration with the AAA, for instance, a plaintiff need only a brief statement explaining the nature of the dispute and why she is entitled to relief.²⁴ Indeed, studies show that parties who represent themselves in arbitration do as well, if not *better*, than represented parties. A study by two prominent law professors observed that in consumer arbitration, “self-represented plaintiffs were seven times *more* likely than represented plaintiffs to get an AAA arbitrator’s decision in their favor”—reinforcing the authors’ conclusion that “hiring an attorney offers little value to a [claimant in arbitration] and is often unnecessary.”²⁵

Even when claimants do retain a lawyer, moreover, arbitration’s streamlined procedures mean that the cost to the claimant is often less than if the employee had brought the same claim in court. For example, the AAA limits the fees paid by consumers and employees to \$200 for consumers and \$300 for employees—amounts that are less than the filing fee in federal court.²⁶

In sum, “a substantial number of” individuals, “particularly those with small financial claims, have a realistic opportunity to pursue their rights through mandatory arbitration that otherwise would not exist.”²⁷

Notably, many, if not most, arbitration agreements also allow a consumer or employee to file a claim in small claims court as an alternative to arbitration.²⁸ Businesses are amenable to resolving disputes in small claims courts because those courts are set up to offer parties some of the same procedural flexibility as arbitration. To be sure, small claims courts are somewhat less accessible to consumers than arbitration, given that many have overcrowded dockets. But they provide an alternative to arbitration for consumers or employees who personally prefer court litigation to arbitration.

5. Professor Gilles and Mr. Gupta testified that class actions provide significant benefits to class Members in the employment and consumer contexts. Does the evidence support their position?

No. Studies have shown time and again that most class actions are resolved with no benefit to class Members—the percentage of class actions resolved in this way was 87% in one study, 66% in another, and 60–80% in a third.²⁹ And even in the

²¹ *Id.* at 783. In some markets, this threshold may be as high as \$200,000. Minn. State Bar Ass’n, *Recommendations of the Minnesota Supreme Court Civil Justice Reform Task Force* 11 (Dec. 23, 2011), perma.cc/VJ8L-RPEY.

²² While one study found that *pro se* plaintiffs “struggle” in arbitration, see Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data From Four Providers*, 107 California L. Rev. 1, 52 (2019), a *pro se* plaintiff who can afford a lawyer is nonetheless far better off in arbitration than litigation.

²³ St. Antoine, *supra* note 6, at 15.

²⁴ AA Consumer Arbitration Rule R–2(a).

²⁵ Jason Scott Johnston & Todd Zywicki, *The Consumer Financial Protection Bureau’s Arbitration Study: A Summary and Critique* 25–26 (Mercatus Center at George Mason Univ., Working Paper, Aug. 2015) (emphasis added).

²⁶ See AAA Consumer Arbitration Rules, Costs of Arbitration, https://www.adr.org/sites/default/files/Consumer_Fee_Schedule_0.pdf; AAA Employment/Workplace Fee Schedule, https://www.adr.org/sites/default/files/Employment_Fee_Schedule1Nov19.pdf.

²⁷ St. Antoine, *supra* note 6, at 16.

²⁸ See Arbitration Agreements, 81 Fed. Reg. 32,830, 32,867 (May 24, 2016).

²⁹ Consumer Fin. Prot. Bureau, *Arbitration Study: Report to Congress* 2015 37 (Mar. 2015), perma.cc/8AX5-AYWN (“CFPB Study”); Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (Dec. 11, 2013), goo.gl/3B27FQ (“Mayer Brown Study”); Jason Scott Johnston, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions Under Federal Consumer Protection Statutes*, 2017 Colum. Bus. L. Rev. 1 (2017).

small percentage of cases that settle on a classwide basis, the benefits provided to individual class Members are usually paltry.

Most class action settlements do not involve automatic distribution of settlement payments to absent class Members. Settlements therefore routinely require a class member to affirmatively submit a claim form to receive any settlement payment. The vast majority of class Members do not file claims for payment from these settlement funds.

Both the CFPB and the FTC reported a “weighted average claims rate” and “weighted mean” claims rate in class actions of just 4%.³⁰ That figure comports with academic studies, which regularly conclude that only “very small percentages of class Members actually file and receive compensation from settlement funds.”³¹

Thus, the available evidence confirms that even in the small fraction of class actions that settle on a class-wide basis, most class Members receive no benefit—because they do not file claims to receive a settlement payment. A recent empirical study explains that “[a]lthough 60 percent of the total monetary award may be available to class Members, in reality, they typically receive less than 9 percent of the total.” The author concluded that class actions “clearly do[] not achieve their compensatory goals Instead, the costs . . . are passed on to consumers in the form of higher prices, lower product quality, and reduced innovation.”³²

Moreover, class actions typically take significantly longer to resolve than arbitrations. That means consumers and employees must wait much longer to obtain relief.

One study found that class actions that actually produced a class-wide settlement took an average of nearly two years to resolve.³³ And that two-year average duration, moreover, may not even include the time needed for class Members to submit claims and receive payment *after* a settlement is reached. Another study found that 14% of the class actions were still pending *four years* after they were filed, with no end in sight.³⁴ Arbitrations, by contrast, have been resolved on average in three and one-half months.³⁵

This difference matters in assessing whether and to what extent class Members benefit because, as one court has explained, even when a class action actually results in monetary relief, a long “delay . . . [can] make the relief eventually awarded the class worth much less in present-value terms.”³⁶ A rational assessment of arbitration and class actions must therefore account for the long duration of class actions.

In sum, the supposed benefits of class actions are in large part illusory. And to the extent they are not, any benefits do not come close to outweighing the advantages of arbitration—in particular the ability of employees to vindicate many more claims than they could if required to go to court.

6. Some witnesses suggested that invalidating pre-dispute arbitration agreements would give consumers and employees a choice between proceeding in arbitration or filing a lawsuit in court, and that employees and consumers could then decide which dispute resolution method they wished to use. Are they correct that employees and consumers would retain the ability to utilize arbitration whenever they wished?

Those witnesses are wrong. Without enforceable pre-dispute arbitration agreements, arbitration would not realistically be available at all. That is because, as commentators have recognized, post-dispute agreements to arbitrate are “rare.”³⁷

³⁰CFPB Study at section 8, page 30; Fed. Trade Comm’n, *Consumers and Class Actions: A retrospective and Analysis of Settlement Campaigns* 11 (Sept. 2019), <https://perma.cc/CM66-ZVCX>; see also Mayer Brown Study at 7 & n.20 (in the handful of cases where statistics were available, and excluding one outlier case involving individual claims worth, on average, over \$2.5 million, the claims rates were minuscule: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%).

³¹Linda Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 Emory L.J. 399, 419 (2014).

³²Joanna Shepherd, *An Empirical Study of No-Injury Class Actions* 2, 5 (Emory Univ. Sch. of L., Legal Studies Research Paper Series No. 16–402, Feb. 1, 2016), perma.cc/TU9R-UDSM.

³³CFPB Study at section 8, page 37.

³⁴Mayer Brown Study at 1.

³⁵See Cal. Dispute Resolution Inst., *Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure* 19 (Aug. 2004).

³⁶*Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 284 (7th Cir. 2002).

³⁷Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 Harv. Negot. L. Rev. 29, 31 (2017); see also, e.g., Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 Or. L. Rev. 861, 895 (2004) (same). One commentator who examined 301 arbitrations found that only 3.7% arose from post-dispute arbitration agreements. Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 10n. L. Rev. 289, 346 (2012).

The reason is a common-sense one: Once a dispute has arisen (and perhaps a lawsuit has been filed), the parties have become adversaries and suspicious of the other's intentions. If one party then proposes entering a post-dispute arbitration agreement, the other party inevitably will be skeptical, fearing that entering the agreement would mean ceding some advantage. It is only before the dispute has arisen—before the parties have become adversarial—that parties can readily contract for arbitration of disputes.

7. Opponents of arbitration sometimes point to the number of arbitrations as evidence that arbitration does not provide a realistic remedy. Is that a fair measure of arbitration's effectiveness?

No. The contention that a large number of consumer or employee arbitrations is the only proof that arbitration is an effective method of dispute resolution is just as mistaken as assuming that a high number of hospitalizations is the only proof that a health-care system is effective. An effective arbitration system is one that resolves disputes *before* arbitration—just as an effective health-care system forestalls the need for hospitalizations.

The Supreme Court addressed this issue in *AT&T Mobility LLC v. Concepcion*³⁸ when discussing AT&T's consumer arbitration program. As the Court explained, because AT&T must pay the cost of arbitration and committed itself to “pay claimants a minimum of \$7,5000 and twice their attorneys' fees if they obtain an arbitration award greater than AT&T's last settlement offer,” AT&T has a powerful incentive to “immediately settle[]” any colorable claim.³⁹ In other words, customers “would be essentially guarantee[d] to be made whole.”⁴⁰ Under that system, informal settlements before the filing of an arbitration demand are common and disputes that go all the way to arbitration are relatively rare, because AT&T (and companies with similar provisions) have powerful incentives to resolve claims quickly. For example, AT&T has explained that in a single year, it had provided over \$1.3 billion in credits to resolve customer complaints.⁴¹

8. At the hearing, the view was expressed the companies “get to choose the arbitrator, the Rule of law does not necessarily apply, and there is no right to appeal the decision.” How do you respond to each of these contentions?

All of these assertions are false, misleading, or both.

First, both parties typically are entitled to participate in choosing the arbitrator. Under existing law, courts can and do set aside any arbitration agreement that unfairly allows one side to pick the arbitrator.⁴² That is because the FAA authorizes courts to apply “generally applicable contract defenses”—including “unconscionability”—to arbitration agreements.⁴³ It is true that the party who drafts the agreement often identifies an arbitration organization to administer the arbitration (such as the AAA or JAMS), but that is not the same thing at all—contrary to the misleading implications of some of arbitration's opponents. Identifying the organization that will administer the arbitration is akin to identifying who will serve as the administrative clerk of a court; it is not the same as picking a judge.

In addition, it is well settled that arbitrators must follow the same governing law that courts do. In fact, if an arbitrator deliberately disregards applicable law, the FAA authorizes courts to set aside the award as an “exce[ss]” of the arbitrator's “powers.”⁴⁴ As the Supreme Court has explained, when an “arbitrator strays from” applicable law “and effectively ‘dispense[s] his own brand of industrial justice,’” the arbitrator's award is “unenforceable.”⁴⁵ To be sure, parties might disagree about whether an arbitrator properly interpreted the law or applied the law to the facts correctly. But the same is true of lawyers who lose a decision in court; one side or another often thinks that the judge got it wrong.

Finally, the assertion that there is no right to appeal an arbitrator's decision is overstated. Although judicial review of arbitral awards is limited, the FAA empow-

³⁸ 563 U.S. 333 (2011).

³⁹ *Id.* at 351.

⁴⁰ *Id.* (internal quotation marks omitted).

⁴¹ *Laster v. T-Mobile USA, Inc.*, 2008 WL 5216255, at *3 (S.D. Cal. Aug. 1, 2008), *aff'd sub nom. Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom. AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

⁴² *Zaborowski v. MHN Gov't Servs., Inc.*, 601 F. App'x 461, 463–64 (9th Cir. 2014) (affirming denial of motion to compel arbitration under agreement that limited remedies and allowed the company to select the arbitrators).

⁴³ *Concepcion*, 563 U.S. at 339 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

⁴⁴ 9 U.S.C. § 10(a)(4); see also, e.g., *Oxford*.

⁴⁵ *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (quoting *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

ers courts to set aside an award in four circumstances: (1) If it was “procured by corruption, fraud, or undue means”; (2) if “there was evident partiality or corruption in the arbitrator[]”; (3) if the arbitrator was “guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent or material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) if the “arbitrators exceeded their powers,” such as by manifestly disregarding the law.⁴⁶

9. Many at the hearing referenced the question of “secrecy” in arbitration. Is arbitration truly a secret process? To the extent that arbitration may be shielded from public view, how can Congress best address the confidential nature of any proceedings?

No, arbitration is not a “secret” process. As discussed above (in response to question 1), courts consistently invalidate arbitration agreements that impose any kind of secrecy requirement on individual consumers or employees—the only realistic exception in that context is one-off arbitration agreements with highly-paid, high-ranking executives or similar employees.⁴⁷

Arbitration claimants are free to discuss their claims publicly and to report alleged wrongdoing to law enforcement officials.⁴⁸ If an arbitration agreement purported to impose a “gag order,” that restriction would almost certainly be invalidated in court.

State laws also require disclosure of arbitration outcomes by arbitral forums such as the AAA,⁴⁹ and courts consistently hold that the results of arbitration proceedings may be disclosed by either party.⁵⁰

In short, as a leading law professor explained, “under U.S. law, the privacy of arbitration typically does not extend to precluding a party’s disclosure of the existence of the arbitration or even its outcome. Instead, it means that non-parties can be excluded from the hearing and that the arbitrator and arbitration provider cannot disclose information about the proceeding.”⁵¹ Because existing law already fully addresses criticisms of the purportedly “secret” nature of arbitration, congressional action on this point is unnecessary.

10. Professor Gilles testified that “forced arbitration strips us of our legal rights,” particularly when class action waivers are present. Specifically, it was claimed that, if individuals cannot bring a class or collective action, employees will be disincentivized to pursue small class-wide claims because “the game isn’t worth the candle,” and “the employee rationally abandons their claim.” How do you respond to that contention?

I disagree, for two reasons. First, there are many claims that employees and consumers have that could not be brought as class actions because they turn on facts specific to the particular individual’s situation. In those cases, arbitration expands, rather than restricts, employees and consumers’ access to justice, by providing them with a cost-effective means of bringing their claim that is simply not available in court.

Second, even for claims that theoretically could be prosecuted as part of class actions, it is simply not true that class actions are the only means of pursuing those claims. On the contrary, as Justice Kagan noted in her dissent in the *Italian Colors* case, “non-class options abound” for effectively vindicating legitimate claims in arbitration.⁵² Justice Kagan’s dissent (in which Justices Ginsburg and Breyer joined) expressly recognized that individualized arbitration enables claimants to vindicate legitimate claims effectively as long as the arbitration agreement “provide[s] an alternative mechanism to share, shift, or reduce the necessary costs”—which virtually all arbitration agreements do.⁵³ Many arbitration provisions allow for some combina-

⁴⁶ 9 U.S.C. § 10(a).

⁴⁷ See notes 1–3, *supra*.

⁴⁸ See, e.g., Christopher C. Murray, *No Longer Silent: How Accurate are Recent Criticisms of Employment Arbitration*, 36 *Alternatives to the High Cost of Litigation* 65, 78 (2018).

⁴⁹ E.g., Cal. Code Civ. Proc. § 1281.96.

⁵⁰ Courts have invalidated on unconscionability grounds arbitration agreement provisions requiring that outcomes be kept confidential. See note 1, *supra*; see also *Larsen v. Citibank FSB*, 871 F.3d 1295, 1319 (11th Cir. 2017).

⁵¹ Christopher R. Drahozal, *FAA Preemption After Concepcion*, 35 *Berkeley J. Emp. & Lab. L.* 153, 167 (2014). The American Arbitration Association’s rules provide that “[t]he arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary.” Am. Arbitration Ass’n, *Commercial Arbitration Rules and Mediation Procedures* 31 (Apr. 1, 1999), perma.cc/5U92-5PQF. This Rule applies only to the hearings themselves; nothing in the rules requires that the outcome be kept confidential.

⁵² *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 251 (2013) (Kagan, J., dissenting).

⁵³ *Id.* at 249.

tion of (i) incentive/bonus payments designed to encourage the pursuit of small claims, and (ii) the shifting of expert witness costs and attorneys' fees to defendants when the consumer or employee prevails on his or her claim. And those provisions that don't include these elements permit "informal coordination among individual claimants" to share the same lawyer, expert, or other elements required to prove the claim, which Justice Kagan also found to be sufficient.⁵⁴

11. A question arose during the hearing regarding whether arbitrators need to be trained in the law, but you did not have a full opportunity to respond because of time constraints. What is your full response to that question?

In the context of consumer and most employment arbitrations, arbitrators are trained in the law. The two most commonly used arbitration providers in the country, the AAA and JAMS, both employ arbitrators of the highest caliber, including former judges and accomplished attorneys. The AAA, for example, uses a thorough application process to evaluate arbitrators, selecting only those candidates with substantial expertise and qualifications.⁵⁵ There is no basis for suggesting that cases in arbitration are being decided by arbitrators who are unqualified to resolve the dispute.

The one exception is in the distinct arena of labor arbitration where, under certain collective bargaining agreements, some parties traditionally have agreed to have a non-lawyer experienced in the industry decide the dispute. Also, in certain industries, it is common to use non-lawyer specialists to resolve commercial disputes.

But outside those limited exceptions, arbitrators in virtually all consumer and employment arbitrations are trained in the law; they are either lawyers, retired lawyers, or former federal or State judges.

12. At the hearing, it was pointed out that in the Supreme Court's *Concepcion* case, AT&T moved to strike down a statute that permitted class-wide arbitration. It was suggested that there is an inconsistency between employers' purported preference for arbitration, on the one hand, but disfavor of class-wide arbitration, on the other hand. You were unable to complete your response because of time constraints. What is your full response to this suggestion?

There is no inconsistency between preferring arbitration and rejecting class-wide arbitration. That is because individualized, one-on-one proceedings are a traditional characteristic of arbitration.⁵⁶ As the Supreme Court has explained, imposing class-wide procedures on arbitration, "sacrifices the principle advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."⁵⁷

In traditional individual arbitration, the parties trade the opportunities for review and procedures of the courtroom for the swiftness and efficiency of arbitration. Class-wide arbitration instead takes the worst features of class-action litigation in court—the expense, burdens, and enormous stakes—and combines them with the lack of plenary appellate review.

Individual arbitration provides a better way of resolving disputes. It avoids the costs and burdens of the class-action system—which has an established track record of failure—while providing consumers and employees who have real disputes with a realistic opportunity to pursue their claims and achieve simple and inexpensive access to justice.



⁵⁴ *Id.* at 250.

⁵⁵ AAA, *Application Process for Admittance to the AAA National Roster of Arbitrators*, https://www.adr.org/sites/default/files/document_repository/application_process_for_admittance_to_the_aaa_national_roster_of_arbitrators.pdf.

⁵⁶ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018).

⁵⁷ *Concepcion*, 563 U.S. at 348.