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

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

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

Prof. Myriam Gilles
Submitted November 15, 2021

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

Thank you for inviting me to participate in this important hearing. My name is Myriam Gilles, and I am a law professor at the Benjamin N. Cardozo School of Law. Since 2005, I have been researching and writing about the harmful effects of forced arbitration provisions on workers and consumers. I testified on these issues before a subcommittee of this body in early [2021](#), as well as before the Senate Judiciary Committee in [2019](#), [2017](#) and [2013](#). Over this stretch of time, forced arbitration provisions have grown pervasive, as millions of Americans have been forced to sign away their rights to pursue claims in court. As just one measure of this escalation: in 1992, only 2% of non-unionized employers used forced arbitration clauses.¹ A decade later, the number had crept up to approximately 25%, and by 2018, had more than doubled to 54% -- representing over 60 million workers.² Experts now predict that, absent any change in the law, over 80% of the American workforce will be bound by mandatory arbitration clauses by 2024.³

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

¹ Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute (2018).

² *Id.* (also reporting in 2018 that 65.1% of large companies -- i.e., those with more than 1,000 employees -- imposed arbitration).

³ *Id.*

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

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

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

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

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

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

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

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

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

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

PART I

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

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

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

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

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

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

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

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

A. The Guaranteed Secrecy of Forced Arbitration

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

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

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

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

¹⁴ Emily Martin, [Forced Arbitration Protects Sexual Predators and Corporate Wrongdoing](#), CONSUMER LAW & POLICY BLOG, Oct. 23, 2017. See also Testimony of Alexander J.S. Colvin Before the Subcommittee on Health, Employment, Labor and Pensions, [“Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements.”](#) (Nov. 4, 2021) (“Most workers discover that they have entered into forced arbitration after the fact...they [go] see a lawyer [and] [a]fter asking some questions and reviewing documents, the lawyer explained that way back when they were hired, amidst the stack of paperwork we all sign at the start of a job, was a document stating that the worker agreed to resolve any future employment law claims against the employer through arbitration.”)

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

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

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

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

B. The Injustices Concealed by Secrecy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART II The Looming Preemption Problem

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

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

²⁷ See, e.g., North, *supra* note 11.

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

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

³⁰ 563 U.S. 333 (2011).

objectives.”³¹ This reading of the FAA has led the Court to reject subsequent state law efforts to regulate forced arbitration clauses in consumer and employment contracts, repeatedly reminding states of the predominance of federal policy favoring forced arbitration³² With each successive decision,³³ a thin majority of justices has expanded the size and reach of the FAA – so that, today, it has mushroomed into a “super-statute that preempts any state contract law that may frustrate its purpose to promote arbitration nationwide.”³⁴

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

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

³¹ *Id.* at 351.

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

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

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

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

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

³⁷ N.Y. C.P.L.R. § 7515.

³⁸ 2019 WL 2610985 (S.D.N.Y. 2019).

³⁹ *Id.* at *1.

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

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

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

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

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

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

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

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

⁴⁵ 2021 WL 1138144 (D.N.J. 2021).

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

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

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

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

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

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

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

⁵⁰ [A.B. 51](#), Sec. 3, 432.6(f).

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

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

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

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

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

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

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

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

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

⁵⁸ 138 S.Ct. 1612 (2018).

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

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

⁶¹ 139 S. Ct. 1407 (2019).

⁶² *Id.* at 1421.

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

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

Part III The Limits of Public Pressure

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

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

⁶³ *Id.*

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

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

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

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

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

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

So too did a number of national law firms face pressure from female law students and their allies demanding an end to the practice of forcing arbitration of sexual harassment claims.⁷⁰ For example, in 2018, a group of Harvard Law students created the “People’s Parity Project” to boycott one of the country’s highest-grossing law firms, Kirkland & Ellis, in protest of the firm’s policy of including forced arbitration clauses in its employment contracts. The firm quickly folded, announcing that it was ending the policy for associates,⁷¹ and after more public recrimination, for all attorneys and staff.⁷² Hoping to avoid a similar PR nightmare, other major law firms followed Kirkland’s example⁷³ and within the year, 92% of law firms surveyed stated that they no longer imposed forced arbitration clauses on their employees.⁷⁴

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸⁰ Colvin, *supra* note 1.

⁸¹ Stone & Colvin, *supra* note 21.

⁸² *Id.*

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

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

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

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

Conclusion

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

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

⁸⁶ Colvin, *supra* note 1.

⁸⁷ Estlund, *supra* note 83 at 688.

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

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