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(Forced) Arbitration in America: Suppressing Claims, Undermining Corporate Accountability, And Perpetuating Injustice

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TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE:

*(Forced) Arbitration in America:
Suppressing Claims, Undermining Corporate Accountability,
And Perpetuating Injustice*

Myriam Gilles
April 2, 2019

Chairman Graham, Ranking Member Feinstein, and other distinguished members of the Senate Judiciary Committee:

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. I also hope today's hearing will spur this Committee to act on the proposed Forced Arbitration Injustice Repeal Act ("FAIR Act," H.R. 1423/S. 610), a vital amendment to the Federal Arbitration Act ("FAA").

INTRODUCTION

This is the third time I have had the privilege of testifying before this Committee, each time urging its members to enact legislation aimed at protecting Americans from the scourge of class-banning forced arbitration clauses. Back in 2013, I provided [testimony](#) in support of the Arbitration Fairness Act, [S. 878](#). The 2013 version of the AFA was proposed in direct response to the Supreme Court's decisions in *AT&T Mobility v. Concepcion*¹ and *American Express v. Italian Colors*.² In those cases, consumers and small businesses challenged class-banning forced arbitration clauses as violations of public policy, and argued that these provisions – foisted upon them by powerful corporations long before any dispute had surfaced – prevented them from vindicating rights

¹ 563 U.S. 333 (2011).

² 559 U.S. 1103 (2013).

guaranteed by Congress and the States. Ignoring the policy implications, slim majorities of the Court interpreted the Federal Arbitration Act (“FAA”) to allow powerful companies to impose mandatory arbitration clauses containing class action bans in standard-form contracts. For the majority, it did not matter that claimants would be unable to vindicate their statutory rights in a one-on-one arbitration – *i.e.*, that countless legal claims would “slip through the legal system” and that serious corporate wrongdoing would go unaddressed.³ All that mattered was fidelity to the expansive language of the FAA.

But while five Justices felt compelled to block citizens’ access to justice based on the text of the FAA – a 1925 statute never intended to apply in the consumer or employment context – it should matter very much to this body whether the laws it enacts for the protection of consumers, employees and small businesses can be enforced. Indeed, when I testified back in 2013, many corporate defendants -- newly emboldened by *Concepcion* and *Italian Colors* -- were just beginning to insert class-banning forced arbitration clauses in their standard-form consumer and employment contracts. But I predicted then that widespread adoption of these clauses would ensue, and their effect would be to undermine enforcement of consumer, antitrust, securities, employment and civil rights statutes that preserve and protect our shared rights. Sadly, in the ensuing years, that prediction has come to pass: with alarming speed, forced arbitration clauses and class action bans have become commonplace in consumer and employment contracts, drastically curtailing the ability of private citizens to hold corporate wrongdoers accountable.

When appearing before this Committee in 2017, I again provided [testimony](#) detailing the costs and growing threats posed by class-banning mandatory arbitration clauses. By then, it was clear that the brunt of these costs is borne by the American citizens and small business owners who are no longer able to access courts to resolve disputes, seek redress for grievances, or enforce state and federal laws. And because nearly *every American* is today subject to a class-banning arbitration clause in some aspect of their lives, we all pay a hefty price. In addition, I explained to this Committee that nearly all forced arbitration clauses bar class and collective litigation -- procedures established for the very purpose of enabling victims of small-value harms to band together to

³ 563 U.S. at 341.

vindicate their rights.⁴ Accordingly, class-banning arbitration clauses effectively eliminate the defendant's liability for all types of wrongdoing.⁵

By 2017, it was also abundantly clear that mandatory, pre-dispute arbitration provisions pose a more enduring threat to our polity because these provisions force disputes into hermetically-sealed, secret proceedings -- denying the American public the transparency, openness and accountability that are central to our civil justice system.⁶ This utter lack of transparency undermines concepts central to the rule of law, such as stare decisis and the development of legal precedents.⁷ By enforcing mandatory arbitration provisions, we have, in essence “frozen the law... denying the courts the ability to develop and adapt the law as society and business changes.”⁸

Arbitral secrecy also generates grave inefficiencies. For instance, if an arbitrator finds that a company has engaged in systemic wrongdoing – say, failure to pay workers for break time -- she can only order redress for the specific claimant who appears before her. Other potential victims of the same illegal conduct are kept in the dark, and the arbitrator is forbidden by contract from ordering the company to reform its breaktime policies more broadly.⁹ Worse yet, with rare exceptions, arbitral decisions are not written down, recorded, or made available to other market actors – *i.e.*, there is no concept of “legal precedent” in arbitration -- which leaves similarly-situated entities unable to use

⁴ See 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.”)

⁵ 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.”).

⁶ 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”).

⁷ 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. 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.”).

⁸ 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).

⁹ See, e.g., Myriam Gilles, *Individualized Injunctions and No-Modification Terms: Challenging “Anti-Reform Provisions in Arbitration Clauses*, 69 U. MIAMI L. REV. 469, 472 (2015) (reporting that arbitration clauses increasingly feature provisions prohibiting “an individual arbitral claimant from seeking to end a practice, change a rule, or enjoin an act that causes injury to itself and to similarly-situated non-parties”).

information generated in arbitration to reassess their own conduct or adopt policies to avoid breaking the law.¹⁰

As a result of the profound secrecy it offers to entities eager to avoid both liability and bad press, forced arbitration allows wrongful conduct to continue undetected and unremedied long after such illegality would otherwise come to light.¹¹ For instance, forced arbitration allowed companies like Wells Fargo¹² and Equifax¹³ 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.¹⁴ Forced arbitration almost allowed Roger Ailes to evade revelations of decades-long sexual harassment; it was only because ex-Fox News correspondent Gretchen Carlson “resisted the clause through a creative legal theory that her allegations were made public – unleashing a tsunami of claims of sexual harassment by Ailes and others at Fox News.”¹⁵

In this written testimony, I chronicle (1) the rise and troubling consequences of forced arbitration, (2) explain why its advocates can no longer credibly claim that forced arbitration helps consumers or employees, and (3) outline the potential for the FAIR Act to finally restore rights guaranteed by federal and state law, as well as the constitutional right to a fair and impartial jury.

¹⁰ Hon. Jennifer Walker Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH. L. REV. 303, 324 (2012) (“Arbitrations with no public record do not develop the law in any way.”); *see also* Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 835 (2002) (noting that a hallmark of mandatory, binding arbitration is the “eliminati[on] [of] the claimant’s right to present claims to a judge or jury . . . preventing litigants from setting public precedents”).

¹¹ Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151, 200-06 (2000) (asserting that a lack of transparency in dispute resolution causes harm to the public by, among other things, allowing corporate actors to circumvent legal requirements and denying claimants their proverbial day in court).

¹² *See, e.g.*, Michael Corkery & Stacy Cowly, [Wells Fargo Killing Sham Account Suits by Using Arbitration](#), NY TIMES, Dec. 6, 2016.

¹³ *See, e.g.*, Diane Hembree, [Consumer Backlash Spurs Equifax to Drop ‘Ripoff Clause’ in Offer to Security Hack Victims](#), FORBES, Sept. 9, 2017.

¹⁴ *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”).

¹⁵ Emily Martin, [Forced Arbitration Protects Sexual Predators and Corporate Wrongdoing](#), CONSUMER LAW & POLICY BLOG, Oct. 23, 2017.

I.
THE OMINOUS RISE OF FORCED ARBITRATION

Class-banning forced arbitration clauses have become standard practice in all sorts of contexts, particularly in contexts that could form the predicate for class or collective litigation. For example, consumers all around the country in all sorts of transactions have found themselves without any access to justice when the products they use, the services they subscribe to, the homes they purchase, or the loans they seek cause them financial injury. 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.¹⁶ Likewise, credit card issuers representing more than 90% of all credit card debt impose arbitration clauses in their contracts with consumers.¹⁷ 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.¹⁸ As a result, tens of millions of consumers are, today, subject to these rights-stripping clauses.

Given that reality, one might expect some significant number of consumer arbitrations. But the opposite is true: only a tiny percentage of consumers file arbitration annually.¹⁹ Most cannot find lawyers to represent them in arbitration, or are themselves unwilling to take on the cost and hassle of an individual arbitration to recover de minimis damages.²⁰ Under these class-banning arbitration clauses, any claimant must bear 100% of all the costs of proceeding in arbitration by herself; her claim cannot be joined with those of any other arbitral claimant as a way of distributing costs and risks. This leaves consumers completely exposed to financial rip-offs, and allows unscrupulous companies to engage in widespread misconduct with little fear of exposure or penalty.

¹⁶ See CFPB ARBITRATION STUDY, *supra* note 5.

¹⁷ *Id.* 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.* And indeed, a casual web check of those four issuers’ terms and conditions today shows they have reinstated their arbitration requirements.

¹⁸ *Id.*

¹⁹ *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).

²⁰ *AT&T v. Concepcion*, 131 S. Ct. 1740, 1761 (2011) (Breyer 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?”).

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.²¹ 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. Female workers are especially vulnerable when companies use forced arbitration clauses to conceal pervasive sexual harassment, allowing sexual predators to operate with virtual impunity.

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. In 2018, Cornell Professor Alexander Colvin published a study with the Economic Policy Institute, estimating over half the country’s nonunionized workforce is now subject to these provisions – more than double the number in the early 2000s.²² 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.²³ Further, Professor Colvin’s study found that forced arbitration is more common in low-wage workplaces, and in

²¹ 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).

²² See 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).

²³ For 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.

industries (such as education and healthcare) that are disproportionately composed of women and African-American workers.²⁴

One legal scholar estimates that, as a result of the unprecedented implementation of these clauses, 98% of employment cases that would otherwise be brought in some forum are abandoned.²⁵ That aggrieved employees refuse to undertake a costly individual arbitration is no surprise.²⁶ Indeed, one study has estimated that only 1 in 10,400 workers subject to forced arbitration actually files claim in arbitration – putting a lie to the claim that arbitration is “cheaper, faster, better” than litigation.²⁷ The remaining workers with potentially valid claims -- somewhere between 315,000 to 722,000 each year²⁸ -- are left to suffer in silence, unwilling to shoulder the expense of arbitration and unable to be heard by a judge and jury.²⁹

Further, the incidents and effects of forced arbitration in the employment area are likely to worsen given the Supreme Court’s recent decision in *Epic Systems v. Lewis*.³⁰ There, a 5-4 Court upheld class-banning arbitration clauses notwithstanding the federally-guaranteed right to “collective action” protected by the National Labor Relations Act. According to Justice Gorsuch’s majority opinion, the law is clear: courts must “enforce arbitration agreements according to their terms – including terms providing for individualized proceedings.”³¹ Indeed, in 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 arbitration given the Court’s overbroad and

²⁴ Colvin, *supra* note 22.

²⁵ Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679 (2018).

²⁶ See Colvin, *supra* note 22 (finding that lawyers are less likely to take on clients who are subject to mandatory arbitration because arbitration claims are less likely to succeed than claims brought to court, and, when damages are awarded, they are likely to be significantly smaller than court-awarded damages).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Estlund, *supra* note 25.

³⁰ 138 S.Ct. 1612 (2018). *Epic Systems* grew out of a decision by the National Labor Relations Board (“NLRB”) that class-banning arbitration clauses violate the National Labor Relations Act’s guarantee of a right to “collective action.” D.R. Horton, 357 N.L.R.B. No. 184, at * 16 (2012) (holding that the employer’s forced arbitration agreement violated the National Labor Relations Act by leading employees reasonably to believe they cannot file charges with NLRB); see also *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (Oct. 28, 2014), *6 (reaffirming D.R. Horton). Circuit courts split over whether the NLRB’s ruling was correct. Compare *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) (disagreeing with the NLRB), with *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1159 (7th Cir. 2016) (affirming the NLRB’s logic). The Supreme Court granted certiorari to resolve the split.

³¹ 138 S.Ct. 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).

historically-unsupportable interpretation of the FAA.³² Observers expect that, given the breadth of the *Epic Systems* opinion, 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 decision.³³

To make matters worse, studies show that most Americans have no idea that they have signed away their right to go to court before a jury of their peers.³⁴ This is because class-banning forced arbitration clauses are often hidden in the fine print of employment contracts or orientation materials that employees receive when beginning a new job, or the boilerplate language that consumers either skim or ignore when making purchases. These days, 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.³⁵ Click on the “Terms & Conditions” link in any standard form web transaction and you'll surely find (in the very small print) a class-banning mandatory arbitration clause.

But given the ubiquity of these provisions and the absence of market options that do not impose arbitration, even if we did read the fine print, none of us really has a choice of whether to accept or reject an arbitration clause. If 99% of mobile service providers impose arbitration, there are no real alternatives in the marketplace available to consumers wishing to avoid these provisions. Further, these rights-stripping clauses are a *precondition* of obtaining the job, product or service in question – i.e., they arise long before any dispute or problem. And since most people simply don't contemplate dispute-resolution procedures at the start of any relationship, we simply don't place sufficient value on the rights we're giving up until it's too late.³⁶ Companies are banking on this

³² *Id.* Recently, the Justices unanimously agreed in *New Prime v. Oliveira* that transportation workers – independent contractors and employees alike – are exempt from the FAA. 138 S.Ct. 1164 (Jan. 16, 2019). The Court also held that it is for a court, not an arbitrator, to determine whether the FAA applies in the first place. *New Prime* is the sole Supreme Court decision limiting the reach of an arbitration clause in nearly a decade. See Mark Joseph Stern, [The Supreme Court Just Handed a Big, Unanimous Victory to Workers. Wait, What?](#), SLATE, Jan. 15, 2019.

³³ Jess 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).

³⁴ CFPB ARBITRATION STUDY, *supra* note 5 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).

³⁵ Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 413 (2005).

³⁶ *Id.* at 427 (“[I]t is not clear that consumers [] attach a negative value to the waivers at the time of contracting [because], viewed ex ante, the prospect of class litigation always appears very remote.”).

collective, irrational behavior -- but the American people are now beginning to grasp the impact of class-banning forced arbitration on their ability to protect their rights in the marketplace and in the workplace. Recent [polling](#) shows that 84% of voters -- 90% of Republicans and 83% of Democrats -- supporting a bill to end forced arbitration.³⁷ There are few issues in contemporary politics that voters from all stripes can agree on, and ending forced arbitration is one them.

a. How We Got Here: A Brief Review of Supreme Court Decisions Upholding Forced Arbitration

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.³⁸ 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.³⁹ This reading of the FAA has since preempted many subsequent attempts by states to regulate arbitration clauses in consumer and employment contracts.⁴⁰ The Court expanded the reach of the FAA in its 2013 decision in *American Express v. Italian Colors*.⁴¹ There, five Justices upheld class-banning arbitration clauses even where proving the violation of a federal statute in an individual arbitration would be impossible to pursue, as in a costly-to-prove Sherman Act antitrust claim brought by small business owners against a major credit card issuer.⁴²

³⁷ The 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.

³⁸ Gilles, *supra* note 35.

³⁹ 563 U.S. at 341. In a case covered by an arbitration agreement, a state law rule or statute providing for collective dispute resolution is preempted, on the theory that class action-like procedures are inconsistent with arbitration as provided for by FAA § 2.

⁴⁰ 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).

⁴¹ 133 S.Ct. 2304 (2013) (enforcing class actions bans in arbitration clauses, even where proving the violation of a federal statute in an individual arbitration would be so costly that no rational claimant would undertake it).

⁴² *Id.* (“[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.”).

In addition to these momentous decisions upholding class-banning arbitration clauses, the Justices have repeatedly held that the FAA preempts state efforts to regulate arbitration. For example, when both West Virginia and Kentucky tried to exempt nursing home lawsuits from arbitration, the Court declared these state policy determinations overridden by the FAA.⁴³ In case after case, a slim majority of the Court has held that it does not matter whether individual claimants are unable to vindicate their rights in a one-on-one arbitration; all that matters under the FAA is that the arbitration clause is enforced exactly as the company has written it up.⁴⁴ As Justice Kagan wrote in her blistering dissent in *Amex*, “the nutshell version” of the majority view is simply this: “Too darn bad.”⁴⁵

These Supreme Court decisions have given a green light to corporations looking to suppress legal claims and avoid liability. Corporate actors, seeing that green light, have hit the gas, and the use of class-banning forced arbitration clauses has skyrocketed in recent years.⁴⁶ These clauses have 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’ camps, shippers – even HMOs and nursing homes.⁴⁷

Now, sensing an opportunity and increasingly confident about enforceability, companies are moving beyond class action bans and are adding even more onerous provisions to their arbitration

⁴³ *Kindred Nursing Centers Ltd. P’ship*, 137 S. Ct. at 1426; *Marmet Health Care Ctr.* 565 U.S. at 532 (“The [FAA’s] text includes no exception for personal-injury or wrongful-death claims.”).

⁴⁴ 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); *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).

⁴⁵ *Amex*, 133 S.Ct. at 2313.

⁴⁶ *See Silver-Greenberg & Gebeloff, supra* note 5 (“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.”).

⁴⁷ 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.”).

clauses. In addition to prohibiting class and collective actions, arbitration clauses now commonly include provisions that:

- Mandate a venue likely to be geographically convenient only for the corporate defendant;
- Severely limit the consumer or worker’s right to appeal⁴⁸;
- Shift much of the cost of arbitration onto the worker or consumer⁴⁹;
- Restrict the evidence that the consumer or worker can obtain through discovery⁵⁰;
- Forbid plaintiffs from pursuing arbitration after a certain period of time has expired, even if the statute of limitations provided by law is longer⁵¹;
- Prohibit the arbitrator from awarding certain kinds of relief, such as punitive damages⁵² or injunctive relief to obtain prospective compliance with the law.⁵³

These onerous provisions, alongside class action bans, prevent citizens from vindicating their statutory rights and having their disputes resolved in open court before a jury of their peers.

⁴⁸ Christopher Leslie, *Conspiracy to Arbitrate*, 96 N.C. L. REV. 381, 395 (2018) (“Although judicial review of arbitration decisions is theoretically possible, it is functionally non-existent.”).

⁴⁹ See, e.g., *Amex*, 133 S.Ct. at 2316 (Kagan, J., dissenting) (“The agreement precludes any shifting of costs to Amex, even if Italian Colors prevails.”); *Gatton v. T-Mobile USA*, WL 21530185 at *1 (C.D. Cal. 2003) (“[E]ach party will pay the fees and costs of its own counsel, experts, and witnesses...”); see also Gilles & Friedman, *supra* note 47 (noting that fee- and cost-shifting provisions chill plaintiffs from bringing suit because the “financial burdens are so prohibitive as to deter the bringing of claims”); *Delta Funding Corp.* 912 A.2d at 112 (“The prospect of having to shoulder all the costs of arbitration could chill ...consumers from pursuing their statutory claims through mandatory arbitration.”).

⁵⁰ See, e.g., Mark Lemley & Christopher Leslie, *Antitrust Arbitration and Merger Approval*, 110 NW. U. L. REV. 1, 14-17 (2015) (describing limitations placed on discovery in arbitration – including less access to depositions, interrogatories, document requests, motions to compel, and third-party documents); Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. DISP. RESOL. 843, 850 (2010) (“arbitration is less formal than litigation, with less discovery and fewer motions, and appellate review of awards is limited”).

⁵¹ See, e.g., Leslie, *supra* note 48, at 399 (describing efforts to “contractually truncate the applicable statute of limitations” via arbitration clauses, which “prevent victims from pursuing meritorious claims”), citing Edward J. Underhill, *Statutes of Limitation and Arbitration: Limiting Your Client’s Exposure*, 101 ILL. B.J. 244 (2013) (“Contrary to what many lawyers think, its not safe to assume general statutes of limitation automatically apply to Illinois arbitration claims. That’s why you should consider including a clause limiting your client’s exposure in your arbitration agreements.”)

⁵² See CFPB Arbitration Study, *supra* note 5 at p. 47 (“Damages limitations in prepaid card contracts with arbitration clauses were frequent, and almost always precluded recovery for both punitive and compensatory damages.”); see also *Captain Bounce, Inc. v. Bus. Fin. Servs., Inc.*, 2012 WL 928412, at *2 (S.D. Cal. 2012) (“The arbitrator at such arbitration shall not be entitled to award punitive damages to any party, and the costs and fees of such arbitration shall be borne by the losing party.”).

⁵³ Gilles, *supra* note 7 (describing arbitration provisions that “prohibit an individual arbitral claimant from seeking to end a practice, change a rule, or enjoin an act that causes injury to itself and to other similarly-situated parties”).

b. The Troubling Consequences of Class-Banning Forced Arbitration Clauses

The result of this explosion of class-banning forced arbitration clauses is that Americans are left without access to justice, and 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 debts without borrower consent⁵⁴; 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.”⁵⁵ 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.⁵⁶ 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.⁵⁷ The resulting enforcement gap leaves hundreds of thousands of unsophisticated borrowers exposed to these unscrupulous and largely unregulated lenders.⁵⁸
- 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

⁵⁴ 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).

⁵⁵ Brian Grow & Keith Epstein, *The Poverty Business*, BLOOMBERG (May 20, 2007).

⁵⁶ 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).

⁵⁷ See CFPB Arbitration Study, *supra* note 5 (reporting that 98.5% of payday lenders impose arbitration on borrowers).

⁵⁸ 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).

arbitration enabled high-profile companies, including American Apparel and Fox News, to cover-up widespread workplace harassment.⁵⁹ 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.⁶⁰ 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.⁶¹

- 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.⁶² Other major data breaches have exposed the personal and financial information of millions of Americans.⁶³ 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.

⁵⁹ See generally Martin, *supra* note 15.

⁶⁰ 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.

⁶¹ 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](#).

⁶² 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).

⁶³ 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).

II. 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) allowing 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 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.⁶⁴ 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 enact the FAIR Act, the result will be a massive “litigation explosion” of frivolous civil 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.⁶⁵ Put differently – we weren't in the midst of a litigation explosion immediately prior to the Supreme Court's decision in *Concepcion* and we won't be thrown

⁶⁴ 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.”)

⁶⁵ For 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.

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.⁶⁶

But 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, as this Committee is well aware, federal judges possess numerous procedural tools to rid dockets of frivolous cases – including early dispositive motion practice.⁶⁷ In reality, the problem facing the civil justice system is not that there are too many frivolous lawsuits – but that *too few* meritorious claims are making their way to juries. Heightened pleading standards, increased reliance on summary dismissals, restrictive views on standing to sue, among other legal developments, place often-insurmountable obstacles in the path to the courthouse.⁶⁸

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.⁶⁹ As Professor Christopher Leslie

⁶⁶ For 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 does not believe that loss contingencies arising from pending [litigation] will 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 litigation would not result in a material change to the overall liquidity of the company.

⁶⁷ See, e.g., *Iqbal v. Ashcroft*, 556 U.S. 662 (2009) (imposing “plausibility pleading” standard at the FRCP 12(b)(6) stage of litigation).

⁶⁸ Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 304 (2013) (stating that the Supreme Court’s support of litigation reforms “seems to have placed a thumb on the justice scale favoring corporate and government defendants”).

⁶⁹ See 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 arbitration tribunals because they felt that the courts were not sufficiently knowledgeable about commercial customs”).

explains, “in relationships between commercial parties, buyers and sellers are similarly likely to be the plaintiff or defendant.”⁷⁰ Accordingly, these sophisticated parties can negotiate on a level field for arbitration procedures that they believe will fairly and efficiently resolve their disputes.

But 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.”⁷¹ 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.⁷² Ever.

III. THE FAIR ACT IS THE BEST SOLUTION TO THE PROBLEM OF CLASS-BANNING FORCED ARBITRATION

This body has, time and again, heard testimony and reviewed evidence demonstrating the pernicious effects of forced arbitration. The legislation currently before the House and Senate, the FAIR Act, would solve these problems by prohibiting class-banning forced arbitration of consumer, employment and civil rights claims. This legislation would 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.

Congress has already recognized the public policy implications of forced arbitration in enacting legislation outlawing these clauses in payday loan and consumer credit contracts with military families, as well as amendments limiting the use of arbitration clauses in residential mortgage loans and automobile dealer franchise agreements.⁷³ It is laudable that Congress has sought to

⁷⁰ Leslie, *supra* note 48 at 393.

⁷¹ *Id.*

⁷² 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 5 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 22.

⁷³ 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 §

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.

The Supreme Court has squarely placed this issue in the lap of this Congress and this Committee: “Too darn bad” really means “Tell it to Congress.” The Court has made plain that it will “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.”⁷⁴ Today, this Committee has the opportunity to accept that invitation and amend the FAA. In enacting the FAIR Act, this body will increase citizens’ access to justice, promote transparency and accountability in our legal system, and ensure that every American can vindicate her Seventh Amendment right to trial by civil jury.

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).

⁷⁴ *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 man – 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.”).