CARDOZO LAW

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Answers to Written Questions from Senator Patrick Leahy
Senate Judiciary Committee

Submitted by Myriam Gilles
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1. **What are some key procedural rights available to individuals in court but not afforded to them in arbitration proceedings? Can you give us a few examples where procedural rights available in court were essential to exposing corporate wrongdoing and other forms misconduct?**

Generally, individuals who are forced to arbitrate their disputes lose the right to enforce most if not all procedural rights otherwise available to them in court. This includes to the right to full and fair discovery, impartial application of the rules of evidence and procedure, the ability to rely on precedent or stare decisis, the right to have their claim heard by a neutral authority, and the right to appeal the outcome in all but the most limited circumstances. In addition, some arbitration agreements shorten statutes of limitations, alter burdens of proof, limit the amount of time a party has to present his or her case, cap damages or require the losing party to pay all arbitration fees, including the other side's attorneys' fees. To add insult to injury, individuals who are forced to arbitrate must take their claims of arbitrator bias or misconduct *to the arbitrator* to try and resolve. But merely listing these forsaken entitlements doesn't do justice to the due process rights, transparency, and accountability that are lost when claims are shunted into private arbitration.

To get a better sense, let's compare two hypothetical female ex-employees who believe they've were subject to sexual harassment and retaliation in their workplace. Let's assume for purposes of this comparison that Worker A was not forced to sign an arbitration clause and Worker B was.

Worker A would first hire an attorney, who would file a complaint with the Equal Employment Opportunity Commission ("EEOC") on behalf. The agency would

investigate Worker A's claims of sexual harassment and retaliation, and in most cases, provide her a "right to sue" letter allowing her to bring the claim in court. The agency would also retain records of Worker A's claims in case other, similar reports are later made by other employees.

Now consider Worker B's situation. She could still file with the EEOC, but is unlikely to do so because her arbitration clause prevents her from suing in court. (Indeed, the only reason Worker B might file with the EEOC is the hope that her case might be one of the handful of complaints the agency decides to take to court on behalf of workers.) Because she is bound by an arbitration clause, Worker B is also unlikely to find an attorney willing to represent her given the low likelihood she will succeed or recover a sufficient amount to cover the costs of arbitration.

Worker A, meanwhile, would proceed to file her complaint in the court of her choice – state or federal, far or distant. Her case would be randomly assigned to a judge not known or related to either party. Worker A's employer might move to dismiss her complaint on various grounds; and in deciding whether to grant this motion, the judge would hear arguments, read briefs, and finally, draft an opinion citing law and facts in support of his ruling. The pleadings, motions, briefs, and any judicial opinions would be publicly available, allowing others – including other employees who might share similar experiences with Worker A – access.

Compare this to Worker B: if she decides to arbitrate her claim, her employer gets to choose the arbitration firm that will hear the case – likely a firm the employer has retained for all its employment matters – creating a potential conflict of interest. After filing the complaint, both sides will be given a list of arbitrators to choose from. This list might contain some lawyers or former judges, but there is no requirement that arbitrators have any legal training at all; indeed, there are no laws regulating arbitrator qualifications or requiring arbitrators to disclose financial or other interests in the cases they oversee. If JAMS were the arbitral provider, for example, the arbitrator would not have to disclose to Worker B if he was one of the 107 JAMS neutrals who are also JAMS shareholders. Nor would the arbitrator have to reveal that JAMS shareholders receive up to 50% of fees from *all* arbitrations conducted by the company, not just the matters they arbitrate.

Back to Worker A: if her case proceeds past the initial pleadings and early motion practice, discovery would commence. Worker A would have the right to collect evidence, request documents or answers to written questions (interrogatories), and speak to witnesses. If she was suing in federal court, Worker A would have the right to a minimum of ten oral depositions of company executives or others knowledgeable about the culture, practices and policies of her employer. And, of

course, Worker A would be required to respond to similar requests from the defendant. She would also be required to prove to a jury, by a preponderance of evidence, that her boss violated the law. She would need to show that the harassment was "severe or pervasive" enough to create a hostile work environment for her, and that complaining about the alleged harassment was a motivating factor in why she was fired.

None of this is guaranteed for Worker B in arbitration. She may be given a few weeks to gather evidence and will be limited to one or two witnesses and one or two depositions, at most. She can't force her employer to share evidence through a court subpoena, and the arbitrator can decide what standard of proof she has to meet – it could be a higher burden or a lower burden than required by law. Impartial rules of procedure and evidence do not operate in arbitration, and arbitrators do not write opinions explaining their decisions.

Worker A will have her claims presented by her attorney in open court, before a jury of her peers. Worker B will have her claims heard in a conference room, with no jury and likely no attorney representing her. Worker A, in court, will wait for jurors to decide if she proved her case by a preponderance of evidence, and if so, what her award will be. If Worker A is unsatisfied with the outcome, she retains the right to appeal a decision of the trial judge. Worker B will wait 30 to 60 days to find out the arbitrator's decision, and any potential award, by mail.

Let's say Worker B is unsatisfied with the outcome – which is very possible, given that workers are less likely to win in arbitration than in court, and in cases where they do win, their monetary awards are smaller in arbitration. Her right to appeal the arbitrator's decision is extremely limited because the Supreme Court has ruled that the courts may only overturn an arbitrator's decision based on a "manifest disregard of the law," something most courts have interpreted as an intentional misapplication of the law. Accordingly, federal appeals courts will only overturn an arbitrator's decision if it involved fraud, evident partiality, misconduct, or exceeding of powers. Worker B is therefore bound by the outcome, even if she believes it was deeply flawed.

This comparison should make clear that, from the start, Worker B is trapped in an unfair, opaque process simply because she was forced to sign an arbitration clause as a condition of employment. That single moment results in far-reaching due process violations that make it far more difficult for employees to challenge illegal conduct. Worker B's employer has the upper-hand throughout this process because the arbitral provider works for the same companies over and over and the arbitrators have an incentive to bias their decisions toward the companies and

against individuals. Given the unjust, slanted process, it should be no surprise that so few workers who are subject to forced arbitration clauses choose to arbitrate their claims.

2. Do you believe there are any instances in which class action, employment or civil rights claims should be resolved through arbitration?

There are certainly scenarios where both parties may voluntarily agree to arbitrate their dispute after it has arisen, with full knowledge of the harm that has occurred and what rights they may be forgoing in arbitration. In those situations, the parties knowingly enter into arbitration and may also be able to mutually agree upon an arbitration provider – whether to preserve their privacy, maintain their existing relationship, or for any other reason – and agree to be bound by the arbitrator's decision, as well as the confidentiality that attaches to the process. While the information-forcing and deterrence functions of public legal proceedings is denied in this scenario, the rights of the parties to freely choose their method of resolving disputes should be respected above all.

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Answers to Written Questions from Senator John Kennedy
Senate Judiciary Committee

Submitted by Myriam Gilles
April 17, 2019

1. **I will be introducing the Stop Blaming Victims Act to address the problem of Nondisclosure agreements being used to protect government employees who sexually harass others. It would limit the ability of government employees to hide behind non-disclosure agreements. NDA's are dangerous because they are often mandatory elements of a settlement that prevent victims from speaking out later on when they see similar abuses repeated. How are mandatory NDA's used in forced arbitration? Are they also used to silence wronged parties who might seek to expose wrongdoing at a powerful company?**

Like pre-dispute forced arbitration, mandatory nondisclosure agreements ("NDAs") imposed as part of an employment agreement are terribly unfair. Like forced arbitration, NDAs bind victims to secrecy and prevent them from publicly revealing wrongdoing. According to the National Women's Law Center (NWLC), NDAs and forced arbitration have become standard practice used by employers to prevent their workers from taking legal action or disclosing sexual-harassment and assault charges.

To be clear: it's never easy for victims of sexual assault to come forward with these painful allegations. They may be fearful of retaliation, ashamed, or worried they won't be believed. The EEOC estimates, while "anywhere from 25% to 85% of women report having experienced sexual harassment in the workplace," more than 75% do not bring legal action. And studies show that women in low-wage jobs, like hotel cleaners and medical assistants, experience even higher levels of on-the-job harassment and even lower levels of reporting.

NDAs and forced arbitration significantly worsen this situation by contractually forcing victims to remain silent and powerless. These provisions keep victims isolated, making

them believe they are the only ones affected, and they insulate the perpetrator from any penalty. As we witnessed with high-profile allegations of sexual harassment brought against Harvey Weinstein, Roger Ailes and Bill O'Reilly, public-facing companies are willing cover up these problems for decades in order to protect their star employees. This is why companies prefer forced arbitration over open court, and why so many bar employees from disclosing any allegations, or risk financial penalty.

Sadly, there are many other examples where forced arbitration and NDAs have allowed a culture of harassment to continue unabated, enabling wrongdoers to believe they were impervious to legal rules and workplace norms. For example, the ex-CEO of now-defunct clothing company, American Apparel, Inc., engaged in a decade of sexual assault on employees. If the company "hadn't been able to use arbitration and confidentiality clauses to keep investors and the public in the dark," the wrongdoing would have been uncovered much earlier.

Lastly, there may be scenarios where both parties *voluntarily* agree to arbitrate their dispute, and in the course of settling, also *voluntarily* agree to nondisclosure, confidentiality or non-disparagement terms. As Ian Ayres has written, "Some survivors want privacy. Survivors can reasonably fear that being known as a person who makes sexual misconduct allegations will reduce their future employment prospects or lead to being accused or suspected of lying or a variety of other negative consequences. NDAs may also help protect those who are falsely accused or have a valid legal defense from the negative reputational consequences of having been accused and having paid to settle an accusation of sexual misconduct." As such, employees should be allowed to voluntarily submit to post-dispute arbitration and knowingly agree to nondisclosure provisions. But forcing these terms as a condition of employment – long before a dispute or issue ever arises – legally silences workers and allows sexual misconduct to continue.

The Stop Blaming Victims Act – which shares much in common with the now-defunct Fair and Safe Workplaces executive order – is a good start. But given that federal employees constitute less than 10% of the American workforce, and that this legislation would only bar NDAs but not forced arbitration, it's really just a start. I would urge this Committee to consider the workers left unprotected by this bill; their rights to a safe workplace are just as critical as those of government employees. Accordingly, I believe The Ending Forced Arbitration of Sexual Harassment Act of 2017, introduced by my Senator from New York, Kirsten Gillibrand, provides broader protection for all American workers by prohibiting forced arbitration of sexual harassment and sexual assault claims.

2. **Courts consistently rule that claims under the Uniformed Services Employment and Reemployment Rights Act, which protects the employment rights of members of the armed forces, are subject to arbitration under the Federal Arbitration Act.**

We should be ensuring that our military men and women are adequately protected. How is it fair that an employer can fire an employee who leaves for combat and often times their only recourse is arbitration? What in your opinion needs to be done to correct this?

Service members of the United States military protect our nation against both foreign and domestic threats, putting their lives on the line every day to preserve our freedom. While we can never fully repay our debt to these brave men and women, Congress has enacted numerous laws to provide service members important rights and protections. One such law is the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4302(b). Passed by Congress in 1994, USERRA protects the employment rights of members of the armed forces by preventing employers from discriminating against them in hiring, reemployment, or benefits. 38 U.S.C. § 4311(a). If an employer violates the statute's anti-discrimination provisions, USERRA allows the servicemember to hold the employer accountable in court. 38 U.S.C. § 4323(a)(2).

Importantly, §4302(b) of USERRA states that its mandate "supersedes any…contract, agreement, policy, plan, practice or other matter that reduces, limits or eliminates in any manner any right or benefit provided by" the law. In the 1990's, courts regularly interpreted this provision to bar employers from forcing USERRA claims into arbitration, reasoning that the "right or benefit provided by" USERRA was a servicemember's right to bring suit in federal court before a jury of his/her peers.

But in the wake of Supreme Court decisions upholding forced arbitration clauses in myriad contexts, some federal courts have rolled back USERRA's protections by forcing servicemembers' claims into arbitration. In *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006), for example, Circuit City fired a long-time manager, a reserve officer in the U.S. Marines Corps, when he returned to duty as the United States invaded Iraq. Although a district court found that USERRA §4302(b) expressed a "clear intent" that the right to a jury trial was "not subject to waiver in arbitration," the Fifth Circuit disagreed, holding that it was "not evident from the statutory language that Congress intended to preclude arbitration by simply granting the possibility of a federal judicial forum."[1]

The Sixth,[2] Ninth,[3] and Eleventh[4] Circuits have now followed the *Garrett* decision. These judicial decisions leave service members unsure of their employment rights. Corporations

[1] Notably, the 5th Circuit cast aside the legislative history of USERRA, and in particular, a House Committee Report on the bill which explicitly states that "this section would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required." H.R.REP. NO. 103–65, 1994, *as reprinted in* 1994 U.S.C.C.A.N. 2453.4.

[2] Landis v. Pinnacle Eye Care, LLC, 537 F.3d 559, 562–64 (6th Cir. 2008).

[3] Ziober v. BLB Resources, Inc., 839 F.3d 814, 818 (9th Cir. 2016).

[4] Bodine v. Cook's Pest Control, Inc., 830 F.3d 1320, 1325–26 (11th Cir. 2016).

should not be allowed to subvert the will of Congress and to undermine the rule of law by using fine print in take-it-or-leave-it contracts, but yet this is exactly what is currently happening to servicemembers.

Congress can easily remedy this situation by making clear that USERRA confers on service members the right to litigate in court, and that this right may not be waived in individual employment contracts. Indeed, the Justice for Servicemembers Act of 2017 (H.R.2631) specifically amends USERRA to provide that "any agreement to arbitrate a claim under this chapter is unenforceable, unless all parties consent to arbitration after a complaint on the specific claim has been filed in court or with the Merit Systems Protection Board and all parties knowingly and voluntarily consent to have that particular claim subjected to arbitration." This is the right approach to protect members of our military from employment discrimination.

3. In the past couple of years, more and more companies have eliminated forced arbitration. Over the last year, Uber, Lyft, Facebook, and Google and many others have scrapped their arbitration policy. Why do you think we are seeing this uptick in companies ending their forced arbitration policy?

First, while a handful of companies have recently retreated from forcing their employees to arbitrate all or some types of disputes, this is a far cry from "ending" forced arbitration altogether. Indeed, many of the nation's largest companies continue to force arbitration on their employees, consumers and other counterparties. Netflix, Amazon, Walmart, Starbucks, Macy's, Sprint, T-Mobile, Applebee's, McDonald's, and thousands of other companies impose these onerous provisions and there's absolutely no indication that they will voluntarily stop doing so. Indeed, nearly every American citizen is subject to forced arbitration in some aspect of their lives. 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.[5] Likewise, credit card issuers representing more than 90% of all credit card debt impose arbitration clauses in their contracts with consumers.[6] In the checking account market, banks representing 44% of insured deposits have arbitration clauses in their customer contracts, while 98.5%

[5] *See* CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY (2015) at 10 ("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.")

[6] *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.

of payday lenders impose arbitration on borrowers.[7] As a result, tens of millions of consumers are, today, subject to these rights-stripping clauses. In addition, over half the country's nonunionized workforce is now subject to these provisions – more than double the number in the early 2000s.[8] So – again – we are far, far from the point where we can comfortably rely on private corporations to eliminate forced arbitration of their own accord.

Second, the few companies that have eliminated forced arbitration have done so only for claims brought by *employees* alleging sexual harassment, assault or discrimination. Airbnb, for example, recently eliminated forced arbitration for discrimination claims brought by its employees – but the company continues to force its guests and hosts to settle sexual and discrimination claims through arbitration. For example, in 2015, an African-American guest tried to bring a class action against Airbnb for facilitating racial discrimination. The company responded to these allegations by pointing to a forced arbitration clause in the fine print of its seventeen-page terms of service -- which every Airbnb user must accept before signing up for the service. The clause prohibited class actions and required all disputes to be decided in individual, private arbitration. In November 2016, a federal judge granted Airbnb's motion to compel arbitration and the class action was dismissed. In doing so, the judge observed that responsibility for changing the law lies with Congress:

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

Third, what might explain the decision by a few companies to eliminate forced arbitration in narrow categories? One explanation is that forced arbitration hurts the bottom line, as companies have come to realize that these provisions can impose tremendous costs on both the company and its employees. First, sexual harassment can cause emotional trauma and missed career opportunities for victims. The EEOC has conservatively estimated that "as a result of sexual harassment, job turnover ($24.7 million), sick leave ($14.9 million), and decreased individual ($93.7 million) and workgroup ($193.8) productivity had cost the government a total of $327.1 million." In addition to these workplace costs, since 2010, employers have paid out approximately $698.7 million to employees alleging harassment

[7] *Id.*

[8] *See* Alexander Colvin, *The Growing Use of Mandatory Arbitration,* ECONOMIC POLICY INSTITUTE (April 6, 2018). *See also* CARLTON FIELDS 2015 CLASS ACTION SURVEY (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).

– though the number may actually be far higher because so many cases are settled privately and sexual harassment is still under-reported. Nonetheless, some sophisticated companies are realizing that, because forced arbitration allows sexual predators to continue their misconduct, these provisions may actually cost more long-term than they save.

Public pressure has also spurred some of these corporate decisions. The vast majority of Americans oppose forced arbitration, and public-facing companies are rightly concerned about the negative publicity of maintaining these unpopular provisions. For example, in the run-up to its much-anticipated initial public offering, Uber found it needed to improve its tarnished reputation. The #DeleteUber movement – which focused heavily on the company's forced arbitration clause and related safety concerns – caused hundreds of thousands to quit the service. So, not surprisingly, Uber announced it was eliminating forced arbitration agreements for employees, riders and drivers who make sexual assault or harassment claims against the company. But note: Uber still requires individual arbitration of labor disputes and is currently seeking to enforce this provision in litigation over driver classifications.

Google is another example of a company eliminating arbitration at least in part because of public pressure. In November 2018, 20,000 Google employees and TVCs (temps, vendors and contracts) walked out to protest discrimination, racism and sexual harassment perpetuated by the use of forced arbitration. Google responded by partially eliminating forced arbitration – but only for claims of sexual harassment or assault brought by full-time employees, not for TVCs that comprise over 50% of Google's workforce. It was only after more public pressure and negative media coverage that Google, in February 2019, eliminated forced arbitration for *all* its full-time employees and TVCs and for all claims of harassment, discrimination or wrongful termination. Yet, to this day, Google still hasn't demanded that the agencies who supply its temporary workforce change their terms. This means that an estimated 52% of Google's workforce remain bound by some form of forced arbitration. The group "Googlers for Ending Forced Arbitration" continues to call on the company to protect all of its workforce, and for Congress to provide the protections to all workers.

But lest this Committee assume that the Google policy change will lead to a flood of other companies abandoning forced arbitration – keep in mind how exceptional the Google situation really is. Google employees were uniquely situated to use their technical skills and access to the larger public via social media tools to raise consciousness of forced arbitration. Even the leaders of the Google walkout have openly acknowledged that, as skilled tech workers, they were able to engage in this protest because of their "position of privilege." Workers in other industries are not so fortunate, and the ease with which they could be replaced would chill similar efforts elsewhere. And frankly, workers shouldn't have to launch massive media campaigns in order pressure their employers to follow the

law. Instead, the responsibility for ensuring that federal laws are followed, misconduct is reported, and workers are protected in their workplace rests with this body and the Congress more broadly. And ff Congress has determined as a policy matter that class-banning forced arbitration clauses are wrong – that they violate constitutional rights, block citizens' access to justice, and undermine the rule of law – why wait for private companies to step up? This is an issue that should be solved at the level of federal law, applicable to all employers.

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Answers to Written Questions from Senator Blumenthal
Senate Judiciary Committee

Submitted by Myriam Gilles
April 30, 2019

1. The fight over forced arbitration clauses is often portrayed as a fight between plaintiffs and defendants. Your testimony suggests that this is too simple. Private litigants, in effect, serve as private attorneys general, protecting the rest of us from wrongdoing.

   a. Why should Americans who will never file a lawsuit nonetheless care about forced arbitration agreements?

   Forced arbitration harms *all* citizens, whether or not they ever file a lawsuit. It does so by shunting legal claims into a private regime and demanding that each be brought on one-on-one basis. As the CFPB Study exposed, once blocked from going to court as a group, most people drop their claims entirely. Accordingly, forced arbitration is not an alternative regime for resolving claims, it is a means of suppressing legal claims altogether.

   When legal claims are suppressed, all Americans suffer because wrongful conduct continues undetected and unremedied long after such illegality would otherwise come to light. Without public accountability through the court system, companies have less incentive to follow the law and treat workers and consumers fairly. And when companies can bestow upon themselves near-total immunity from liability, the rule of law is undermined and Americans are left more vulnerable.

   So even those who will never file a lawsuit suffer when other consumers, workers and small business owners 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.

2. Supporters of forced arbitration sometimes admit that many of the practices that are common in American arbitration today simply cannot be defended. But they claim that the solution is simply to fix forced arbitration.

   a. Could policymakers simply fix forced arbitration by changing the arbitration process while leaving Americans subject to forced arbitration agreements?

   The only way to "fix" forced arbitration is make it a voluntary choice offered to consumers and employees after a dispute has arisen. Providing the choice of post-dispute, voluntary arbitration would allow consumers and employees to make an educated decision about the rights they give up in arbitration. It might also present an opportunity for individuals to negotiate a fairer arbitration procedure – i.e., give consumers and employees some say in who arbitrates their claims and what rules should govern the process.

   But forcing weaker counterparties to agree to arbitrate their claims long before a dispute ever arises – as a condition to obtaining a job or a product -- and then demanding that all claims be brought in one-on-one arbitrations, is just bad policy. Forced, pre-dispute arbitration – as opposed to voluntary, post-dispute arbitration -- suppresses claims, shields wrongdoers from penalty, undermines deterrence and respect for law, and harms consumers, workers and small businesses in countless ways.

3. You have testified that large corporations have a great deal of influence over the structure and practice of arbitration. In general, if the customer has no power and the seller has lots of power, basic economics would suggest that the customer is going to get the raw end of the deal.

   a. Based on your research, do the corporations that force their customers into arbitration design arbitration programs with those customers' best interests in mind?

   My research reveals that the vast majority of companies do not design, much less provide notice of, their arbitration procedures with their customers' interests in mind. Rather, the intent seems clear: companies that employ class-banning forced arbitration clauses are seeking to suppress rather than incent legal claims, and they seek immunity from liability rather than a robust, fair arbitration regime.

   First, companies do all they can to obscure their forced arbitration provisions from consumers. These provisions are often hidden in the fine print or boilerplate language that consumers either skim or ignore when making purchases. These days, companies also impose arbitration via standard-form contracts, click-wrap, envelope-stuffers and other delivery methods intended to obscure or minimize the immensity of the rights that consumers are forfeiting. And these efforts are terribly effective: studies show that most

consumers have no idea that they have signed away their right to go to court before a jury of their peers.[1]

Second, the Supreme Court has broadly upheld class-banning forced arbitration clauses – with the conservative Justices sending clear signals that corporate America is free to impose whatever onerous obligations it wishes under the aegis of the Federal Arbitration Act ("FAA").[2] And these corporate actors have responded by inserting class-banning forced arbitration clauses in all types of standard-form contracts.[3] 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.[4]

As companies rightfully grow more confident about the enforceability of forced arbitration clauses, they are adding even more onerous provisions to their consumer contracts. Far from designing arbitration to be in the best interests of their consumers, companies now impose arbitration provisions that:

- Mandate a venue likely to be geographically convenient only for the corporate defendant;
- Severely limit the consumer right to appeal;
- Shift much of the financial burden of arbitration onto the consumer;
- Restrict the evidence that the consumer can obtain through discovery;
- Forbid consumers from pursuing arbitration after a certain period of time has expired, even if the statute of limitations provided by law is longer;
- Prohibit the arbitrator from awarding certain kinds of relief, such as punitive damages or injunctive relief to obtain prospective compliance with the law.

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

[2] *See, e.g., AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

[3] *See* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015 ("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.").

[4] 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.").

Third and finally, consumers and employees routinely ask to be released from arbitration so that they may bring their claims in public courts or in class or collective litigation. If companies truly cared whether their arbitration procedures were fair and adequate, they might listen to these pleas. Instead, companies litigate to the hilt to protect their unfair practices. And they do so because it benefits them to suppress legal claims – even where these claims involve systemic and on-going violations. For example, survivors of assaults by Uber drivers have implored the company to free them from forced arbitration so they could go public about their attackers and help women understand the risks. Uber's response has been to cover up these sexual assaults by forcing all sexual assault survivors into arbitration. Similarly, the top brass at Sterling Jewelers was long aware of claims by female employees alleging sexual assault and discrimination, but chose to force those claims into arbitration because "secrecy was the point." In yet another example, the ex-CEO of now-defunct clothing company, American Apparel, Inc., engaged in a decade of sexual assault on employees. If the company "hadn't been able to use arbitration and confidentiality clauses to keep investors and the public in the dark," the wrongdoing would have been uncovered much earlier.

In sum, companies that impose class-banning forced arbitration clauses are not interested in building a better mousetrap – their only goal is to conceal bad behavior and immunize themselves from liability.

4. In his testimony, Mr. Kaplinsky makes the case that arbitration is "faster, less expensive and far more beneficial to consumers." But if Mr. Kaplinsky were correct, it seems like consumers would leap at arbitration. Corporations could just wait until a dispute arises and then give consumers a free and clear choice between arbitration on the one hand and a judge and jury on the other.

   a. If corporations gave consumers this kind of free and clear choice after a dispute has arisen, would you be okay with that?

   So long as a consumer or employee is making a truly voluntary choice to proceed in arbitration after a dispute has arisen, her election is perfectly acceptable in most circumstances. To ensure the voluntariness, I would require that the consumer or employee indicate in writing that they understand the facts of their claim, the rights and remedies they are giving up by agreeing to arbitration, and that they are not being pressured, coerced or tricked into doing so.

   But note: there are some circumstances in which arbitration should never be allowed for policy reasons. For example, claims that an elderly person entering a nursing home or care facility "agreed' to arbitrate disputes with the facility should be presumptively suspect

(unless, perhaps, the elderly person is accompanied by a family member with full power of attorney or other legal guardian). Similarly, in the employment context, additional safeguards are warranted to ensure that employers don't coerce their workers into arbitration by threatening dismissal or other punitive measures if they go to court. And finally, class and collective litigation should never be forced into arbitration -- as the legitimacy of representative litigation depends upon a hearing in a public court with full authority to notice and bind absent class members, award remedies and issue broad injunctive relief, and disseminate written decisional law explaining its decisions. Because none of these public functions can occur in private arbitration, class-banning arbitration clauses should simply be prohibited.

5. In his testimony, Mr. Kaplinsky says that "courts rigorously protect consumers from unfair arbitration agreements."

a. If a consumer signs an arbitration agreement buried in a contract that she did not have a reasonable chance to read, would a court invalidate that agreement?

The argument for invalidating a forced arbitration provision on grounds that a consumer did not have a reasonable chance to read the standard-form contract is grounded in procedural unconscionability – a state law contract doctrine that has been severely weakened by the Supreme Court's FAA-preemption jurisprudence. Specifically, the Court's decision in *AT&T v. Concepcion* warned that such challenges are preempted whenever they single out arbitration for different or worse treatment, and therefore "stand as an obstacle to the accomplishment of the FAA's objectives."

Following this dictate, state and federal courts routinely reject unconscionability challenges to forced arbitration, upholding class-banning arbitration clauses even when confronted with clear evidence that the consumer did not read or understand the provision or the magnitude of the rights forfeited. *See, e.g.,* Larsen v. Citibank, 871 F.3d 1295 (11th Cir. 2017) (upholding arbitration provision in deposit account agreement over accountholder's objection that he "was not given the opportunity to review" the provision before opening the account); Zuver v. Airtouch Comm'ns, Inc., 103 P.3d 753, 761 (2004) (declining to find arbitration agreement "hidden" despite the fact that it was buried within "five other attachments"). Courts apply similar logic to employment agreements, writing off arguments by workers that they did not see the arbitration clause buried in the fine print of an employee handbook or other orientation materials given to new employees. *See, e.g.,* Pruter v. Anthem Country Club, Inc., 2013 WL 5954817 (D. Nev. 2013) (upholding arbitration clause despite plaintiff's claim that she "lacked a meaningful opportunity to agree to its terms because of unequal bargaining power, and because it contained fine print or complicated, incomplete, misleading language that failed to inform a reasonable person of the language's consequences"). As a result of these decisions, consumers are left powerless to challenge most class-banning forced arbitration clauses.

b. If she would never have signed the agreement had she been aware of the arbitration clause, would the courts invalidate that agreement?

Studies show that the vast majority of consumers are not aware of arbitration clauses in the standard-form contracts and terms and conditions that companies regularly impose upon them.[5] Despite this reality, courts have consistently rejected challenges to forced arbitration on the grounds that the consumer was unaware of the magnitude of the rights she was forfeiting. *See, e.g.,* Thomas v. Right Choice MWM, Inc., 2014 WL 1632946 (W.D. N.C 2014) (upholding arbitration provision over plaintiff's argument that "he did not agree to arbitrate because at the time he read and signed the contract he was 'unaware' that the clause would encompass an employment discrimination claim").

c. If her only alternative to signing the agreement was losing her job, her phone, or some other necessity of modern life, would the courts invalidate that agreement?

These days, it matters little whether a consumer or employee had any real choice in agreeing to arbitrate her disputes. Contemporary arbitration is coerced, not consented to. As Justice Ginsburg observed in her dissent in *Epic Systems v. Lewis*, "[a]rbitration clauses, the Court has decreed, may preclude judicial remedies even when submission to arbitration is made a take-it-or-leave-it condition of employment or is imposed on a consumer given no genuine choice in the matter." Justice Ginsburg was especially concerned about the "Hobson's Choice" facing employees: "accept arbitration on their employer's terms or give up their jobs." And, in her most recent dissent in *Lamps Plus, Inc. v. Varela*, Justice Ginsburg worried that, without "Congressional correction of the Court's elevation of the FAA over" the rights of employees and consumers to act in concert, access to justice would be denied in countless cases.

d. In your view, do courts "rigorously protect consumers from unfair arbitration agreements"?

In my view courts do not "rigorously" protect victims of forced arbitration. Numerous studies confirm this view. For example, The New York Times found that, of the 1,179 class actions that companies sought to force into arbitration between 2011 and 2014, judges ruled in their favor in four out of every five cases. In 2014 alone, judges upheld class-action bans in 134 out of 162 cases. Similarly, the National Law Journal analyzed lower court decisions in the wake of the Supreme Court's 2018 decision in *Epic Systems v. Lewis* and found that more than half compelled plaintiffs to arbitrate.

But to be fair, the Supreme Court's pro-arbitration jurisprudence leaves state and lower federal courts little choice but to uphold these onerous provisions. Indeed, a growing chorus of judges have expressed severe misgivings about the Court's arbitration precedents, even as they are compelled to follow them. For example, in *CellInfo, LLC v. American Tower*

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

Corp., federal district Judge Young observed "that one-sided species of arbitration [are] unconscionably forced on vulnerable consumers and workers and almost universally reviled, enforceable only due to the mandate of a slim majority of the Supreme Court."[6] The West Virginia Supreme Court, in the wake of *Concepcion*, accused the Justices of manufacturing FAA preemption out of whole cloth, explaining that "[w]ith tendentious reasoning, the United States Supreme Court has stretched the application of the FAA from being a procedural statutory scheme effective only in federal courts, to being a substantive law that preempts state law in both federal and state courts."[7] Other state courts have called the class-action bans a "get out of jail free" card, because it is nearly impossible for one individual to take on a corporation with vast resources.

So, while judges are perhaps not doing enough to protect consumers and employees from the clutches of forced arbitration, their hands are tied by stare decisis. Congress, on the other hand, is free to reverse the Supreme Court's rulings in this area by prohibiting pre-dispute class-banning arbitration clauses in standard-form contracts with consumer, employment and small businesses.

e. Can you give some examples of unfair arbitration agreements that were not invalidated by the courts?

Public interest organizations have worked to track and compile information about decisions upholding forced arbitration clauses and their deleterious effects on consumers, employees and small businesses. In particular, the Center for Justice & Democracy, Public Citizen and the National Consumer Law Center have continually updated their report on this important topic, which include some of the following accounts:

- *Colorow Health Care LLC v. Fischer*, Colo. S.Ct. Jul. 2, 2018: Family members brought a wrongful death lawsuit after 90-year-old resident Charlotte Fischer died from an assault allegedly committed by a Colorow employee. According to reports, a nurse's assistant allegedly threw her against a wall and fractured her hip; he was charged with third-degree assault and Fischer's death was ruled a homicide. When Fischer first entered the facility, her daughter filled out the admissions paperwork – including an arbitration agreement compelling arbitration for any claim arising from or relating to Fischer's relationship with the facility. Colorow filed a motion to compel arbitration of the family's wrongful death suit, which was denied by the lower courts on the grounds that the arbitration agreement was void because it didn't include the necessary bold-face type mandated by Colorado's Health Care Availability Act. In a split decision, the Colorado Supreme Court disagreed, ruling that only substantial compliance with the formatting requirements of the Act was needed and, as such, the case could be forced into arbitration.

[6] 352 F. Supp. 3d 127, 131 (D. Mass. 2018).

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

- *Henry v. Cash Biz*, LP, 551 S.W.3d 111 (Tex. S.Ct. Feb. 23, 2018): Four borrowers filed a class action alleging that payday lender Cash Biz sought to use the criminal justice system against them in seeking to collect unpaid debts. Cash Biz moved to compel arbitration pursuant to the loan agreement. The lower court denied Cash Biz's motion, agreeing with the borrowers that their allegations related solely to Cash Biz's use of the criminal justice system – which was not covered by the arbitration clause. An appeals court reversed that decision and the Texas Supreme Court affirmed, forcing the borrowers out of court and into individual arbitrations.
- *Orman v. Citigroup, Inc.*, 2012 WL 4039850 (S.D.N.Y. Sep. 12, 2012): Plaintiffs brought a class action alleging that Citigroup failed to "adequately secure their computer systems against intrusion" and, as a result, computer hackers accessed their financial information, leading to identity theft. Plaintiffs brought claims for "violation of state identity theft protection statutes, breach of the implied warranty of merchantability and fitness for a particular purpose, common law negligence, breach of state consumer protection statutes, fraudulent concealment, and unjust enrichment." But the district court granted Citi's motion to compel arbitration, essentially dismissing the case.
- *DeNicolo v. The Hertz Corp*, No. 19-210 (N.D. Ca. April 12, 2019): Rental car customers brought a class action against Hertz, which uses debt-collector Viking Credit Services to bill customers for any damage to rentals. Plaintiffs like DeNicolo allege that they received bills for thousands of dollars from Viking many months after returning undamaged rental cars. Hertz sought to compel arbitration because DeNicolo had "agreed to arbitration when he rented a car at an automated kiosk at the airport and selected 'I Agree' on a screen asking if he consented to Hertz's rental terms." The court agreed with Hertz, and ordered that customers submit their claims in individual arbitration.

This list could go on for many pages -- but suffice to say that tens of thousands of class-banning arbitration clauses have been enforced in the past decade. And when this happens, the claims usually disappear because employees and consumers forced to individually arbitrate their claims find it expensive, burdensome and difficult to do so. Most will abandon the effort, allowing corporate wrongdoers to completely escape any legal accountability.

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Answers to Written Questions from Senator Cory Booker
Senate Judiciary Committee

Submitted by Myriam Gilles
April 17, 2019

1. **A recent study published by the Economic Policy Institute examined the proliferation of forced arbitration clauses in employee contracts across industries. The study found that the industries with the highest rates of forced arbitration clauses—education and health—have a workforce with more female employees and employees of color than other industries. The study estimated that women and African American employees in particular are the most likely groups to be subject to forced arbitration.**

   The #MeToo movement has revealed the extent of sex-based harassment in the workplace, and a recent study by the National Women's Law Center confirmed that black women disproportionately experience sexual harassment at work.

   a. **Can you provide any relevant data regarding arbitration of sexual harassment and racial discrimination claims?**

The data on arbitration of sexual harassment and racial discrimination claims is difficult to gather given the secret nature of arbitration proceedings/outcomes. However, we do know that sexual harassment and discrimination in the workplace has become more prevalent in recent years. The EEOC reports that sexual harassment charges filed with Commission increased by more than 12% from FY2017-- the first increase in five years. And in 2018, EEOC lawyers filed 41 sexual harassment suits on behalf of employees, a 50% increase from FY2017. Since victims of sexual harassment and racial discrimination who are subject to forced arbitration do not need to first file complaints with the EEOC prior to commencing arbitration, its possible that the number of claims shunted into private proceedings is far greater than the EEOC statistics indicate.

But there are reasons to believe that the opposite is true – *i.e.*, that very few victims of sexual harassment or racial discrimination bring claims in arbitration. First, we know that few employees ever bring claims in arbitration for any violation of law. Professor Alex Colvin at Cornell has

estimated that over 60 million workers are subject to force arbitration, but only 1 in 10,400 workers ever files claim in arbitration. Second, we know that most incidents sexual harassment in the workplace already go unreported because victims are fearful of retaliation or worried they won't be believed. Forced arbitration all but ensures victims will not come forward by contractually forcing them to remain silent. Third, it is reasonable to expect that fewer victims will come forward to arbitrate claims of sexual harassment or discrimination, given that the decks are stacked against employees in these proceedings. Again, Professor Colvin's empirical research has shown that repeat-player employers win 83.1% of arbitrations, but only 41% of court cases. Fourth and finally, claims of sexual harassment and racial discrimination are typically group claims – they are allegations of severe, systemic wrongdoing that leads to a hostile work environment or allegations that race has been illegally used as a factor in employment decisions. The nature of these claims, as well as the fact that any individual plaintiff would spend far more litigating her case than she could expect to recover in damages, render them appropriate for class or collective treatment. But forced arbitration prohibits group litigation, and in doing so, keeps victims isolated and incapable of vindicating their civil rights.

b. At the hearing, Professor Gilles spoke about how forced arbitration siloes sexual harassment claims, keeping charges against a perpetrator secret from employees and removing the incentive for employers to address systemic sexual harassment. Can you provide further detail about how forced arbitration perpetuates workplace sexual harassment?

Even in the absence of forced arbitration, victims of sexual harassment and assault in the workplace face tremendous hurdles to coming forward with these painful allegations. They may be fearful of retaliation, wish to preserve their privacy, feel shame, or worry that they won't be believed. The EEOC estimates, while "anywhere from 25% to 85% of women report having experienced sexual harassment in the workplace," more than 75% do not bring legal action. And studies show that women in low-wage jobs, like hotel cleaners and medical assistants, experience even higher levels of on-the-job harassment and even lower levels of reporting.

Forced arbitration significantly worsens the under-reporting problem by contractually binding victims of sexual harassment to secrecy and legally preventing them from publicly revealing wrongdoing. Further, these provisions keep victims isolated, making them believe they are the only ones affected. Sequestering and disaggregating workers' claims weakens their legal rights, some of which can only be vindicated collectively. For example, a claim of sexual harassment requires proof that the misconduct was so "severe and pervasive" that it created a hostile work environment. Claims such as this are almost impossible for an individual to prove standing alone, as they generally implicate multiple incidents and systemic harms. But forced arbitration prohibits victims from bringing their claims as a group. Indeed, given the likelihood that employees not arbitrate these claims individually, find an attorney who can afford to take an individual claim

into arbitration,[1] these provisions effectively eliminate these groups' access to justice. Finally, even if an arbitrator were to determine in an individual case that sexual harassment was severe and pervasive enough to create a hostile work environment, she would only be authorized to order redress for the specific claimant who appears before her – i.e., she would be unable to impose injunctive or other company-wide relief to protect other workers from the same fate or to change the hostile work environment itself.

Finally, forced arbitration insulates perpetrators from any penalty and allows them to continue violating the law with impunity. And, as we witnessed with high-profile allegations of sexual harassment brought against Harvey Weinstein, Roger Ailes and Bill O'Reilly, public-facing companies are more than willing cover up allegations of sexual misconduct for decades in order to protect their star employees. Meanwhile, victims remain powerless to prevent future assaults and sexual predators operate without fear of discovery. This is surely not what Congress intended when it enacted the Civil Rights Act of 1964, making sexual harassment illegal in all workplaces and in every state.

c. How would you respond to the following argument? "If we make arbitration voluntary, courts will be overwhelmed with frivolous sexual harassment claims."

Inciting fear of a so-called "litigation explosion" is a favored trope of the business lobby. But it is pure myth: 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.[2] Put differently – we weren't in the midst of a litigation explosion immediately prior to the rise of forced arbitration clauses (circa 2012) and we won't be thrown into one if forced arbitration is prohibited tomorrow.

Indeed, for claims of sexual harassment more specifically, the number of complaints has remained close to constant since the 1990's: the EEOC received 5,607 sexual harassment complaints in 1992 and 6,870 in 2015. Moreover, companies that have eliminated forced arbitration for claims of sexual harassment and discrimination have not, by their own account, experienced significant upticks in litigation that would threaten their overall financial condition. For example, 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

[1] *See, e.g.*, Muhammad v. Cty. Bank of Rehoboth Beach, 912 A.2d 88, 100 (N.J. 2006) ("[C]lass-action waivers can functionally exculpate wrongful conduct by reducing the possibility of attracting competent counsel to advance the cause of action. Class-action waivers prevent an aggregate recovery that can serve as a source of contingency fees for potential attorneys."); Lauren Weber, *More Companies Block Staff from Filing Suits*, WALL ST. J., March 31, 2015, available at https://www.wsj.com/articles/more-companies-block-staff-from-suing-1427824287 (observing that where class actions are unavailable "workers frequently abandon claims because individual damages are too small to interest attorneys").

[2] 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.

that they do not expect litigation activity to result in any material change to their overall liquidity profile.

But let's take seriously for a moment the idea that eliminating forced arbitration will result in some greater number of claims being filed in federal and state courts alleging sexual harassment, assault or discrimination in the workplace. Those claims -- sharpened by the open and transparent adversary process of our public courts -- will be heard by experienced and neutral judges. These judges possess numerous procedural tools to rid dockets of frivolous (and not-so-frivolous) cases – including heightened pleading standards,[3] increased reliance on summary dismissals,[4] restrictive views on standing to sue,[5] tougher class certification requirements,[6] and the narrowing of personal jurisdiction over multinational corporations.[7] Indeed, there is evidence that federal judges are even more likely to use these tools to dismiss or limit claims of sexual harassment as compared to other legal claims. Further, the legal standard for making out a cognizable claim of harassment is high: the behavior must be "severe and pervasive" enough to create a hostile work environment for the victim. For these reasons, even prior to the rise of forced arbitration, only an estimated 3-6% of sexual harassment claims filed in court ever reached a jury.

In short: if forced arbitration is eliminated, there will be no tsumani of sexual harassment claims engulfing our courts. Instead, companies will respond precisely as they should: they will closely reevaluate existing policies prohibiting sexual harassment, better monitor and discipline problematic employees, provide more robust internal reporting systems, and respond to complaints with alacrity and care. This is what it means to follow the law.

2. The Forced Arbitration Injustice Repeal Act, introduced by Senator Blumenthal, would prohibit forced arbitration clauses for employment, consumer, antitrust, and civil rights disputes. It would also prohibit class-action waivers.

a. In your view, would a voluntary arbitration system address the problems raised by forced arbitration clauses? How so?

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

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

[5] *See, e.g.,* Spokeo, Inc. v. Robins, 136 S.Ct. 1540 (2016) (determining whether statutory injury is sufficient to meet Article III "particularized" and "concrete" harm requirement for standing to sue).

[6] *See, e.g.,* J. McIntyre v. Nicastro, 564 U.S. 873 (2011) (rejecting personal jurisdiction over a foreign company doing business in the United States and in the state where plaintiff was injured); Goodyear Dunlop Tires Operations S.A. v. Brown, 564 U.S. 915 (2011) (finding foreign corporations subject to general jurisdiction only where they are "at home"); Daimler AG v. Bauman, 134 S.Ct. 746 (2014) (same).

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

There certainly may be scenarios where both parties voluntarily and knowingly agree to arbitrate a dispute after it has arisen. Indeed, the 1925 Congress enacted the Federal Arbitration Act ("FAA") to protect voluntary agreements to arbitrate, entered into by businesses seeking a fast and economical alternative to the judicial system and a private forum where trade secrets and other commercial matters would be kept confidential.[8]

The enactment of the FAA naturally spurred the formation of numerous arbitral providers, such as the American Arbitration Association, JAMS, as well as more specialized companies. In a world where these firms compete with one another for business, economic theory predicts they will continue to improve their offerings and develop better, more efficient ways to provide arbitration services. But, as arbitration has changed -- from a matter of voluntary agreement between the parties to a term forced upon weaker counterparties -- arbitration providers no longer have any incentive to improve their product or to address some of the injustices that individuals face when forced into arbitration. Just as competition breeds excellence, so too do monopolies breed corruption and stasis. Accordingly, the current monopoly that arbitration providers enjoy over 60 million workers and many millions of consumers has resulted in few improvements to the provision of arbitral services to individuals rather than businesses.

In sum: voluntary, pre-dispute arbitration allows individuals to decide how and where they want to resolve disputes. But forcing weaker counterparties to agree to arbitrate their claims long before a dispute ever arises, and requiring that all claims be brought in one-on-one arbitrations, is bad policy. Forced, pre-dispute arbitration – as opposed to voluntary, post-dispute arbitration -- suppresses claims, shields wrongdoers from penalty, undermines deterrence and respect for law, and harms consumers, workers and small businesses in countless ways.

b. In his testimony to the Committee, Mr. Bland cited a study by the Consumer Financial Protection Bureau that found that few consumers read and even fewer understand arbitration clauses. Only approximately 13% of consumers who were directed to read a forced arbitration clause understood it prohibited them from participating in a class action lawsuit. What does "agreeing" to forced arbitration mean when one party to the agreement does not understand its consequences?

The 2015 CFPB Study cited by Paul Bland revealed that most Americans have no idea that they have signed away their right to go to court before a jury of their peers. In the Bureau's study, half of all respondents surveyed did not know whether they had the right to sue their credit-card issuer in court and more than a third of those who were bound by forced-arbitration clauses incorrectly believed that they could still go to court to resolve disputes. This utter lack of awareness is no surprise, given that class-banning forced arbitration clauses are often hidden in the boilerplate language that consumers either skim or ignore when making purchases. Indeed, companies now regularly and intentionally impose these class-banning arbitration clauses in click-wrap, envelope-

[8] *See, e.g.,* SEN. REP. NO. 536, 68TH CONG., 1ST SESS. 3 (1924).

stuffers and other delivery methods intended to obscure or minimize the immensity of the rights that are being forfeited.

But 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. This means that more than 240 million cell phone subscribers have service agreements that contain forced arbitration clauses – but did any one of them "choose" to relinquish their rights? The same is true for many essential goods and services where forced arbitration clauses have become pro forma: there is no bargaining, no negotiation, no searching the market for an alternative.
Further, these rights-stripping clauses are a *precondition* to obtaining the product or service in question – i.e., they are imposed long before any dispute or problem arises. And since most people simply don't contemplate dispute-resolution procedures at the start of any relationship, we simply lack the information necessary to place sufficient value on the rights we're giving up until it's too late. Companies are banking on this collective, irrational behavior – and they may call it "consent" or "agreement," but its clear that consumers have no idea what it is they are consenting or agreeing to.

3. This Committee has expressed deep concern with current antitrust law and enforcement priorities, and forced arbitration seems to perpetuate some contemporary monopolistic practices.

a. One major issue that economists have increasingly cited as harming consumers and workers is the lack of competition in the labor market. Labor monopsony allows firms in industries where the labor market is not competitive to unilaterally set terms of employment and reduce wages without losing workers to competing employers. Monopsony power can be generated and reinforced through mechanisms like no-poach agreements and non-compete contracts. Giving employers the power to set the rules of dispute resolution seems only to add to the asymmetric power imbalance. Please explain further how forced arbitration clauses contribute to this phenomenon.

Recent research on "monopsony power" -- the leverage enjoyed by employers to set their workers' pay – contributes to our understanding of the asymmetry inherent in labor markets. This growing body of literature suggests that growing market concentration has boosted the power of employers and suppressed wage growth, leading to a decrease in compensation to low- and moderate-wage workers and an increase to workers at the top of the pay distribution. Scholars hypothesize that monopsony helps explain the gapping income gap, and its myriad and negative effects.

In prior eras, employees themselves could join with others to bring private litigation to enforce the antitrust and fair labor laws in federal and state courts. But the rise of class-banning forced arbitration clauses has disabled the ability of workers to address these large-scale, systemic harms.

In the absence of class actions to efficiently and reliably aggregate numerous small claims, workers cannot remedy widespread violations of labor, employment and antitrust laws.[9]

b. Another antitrust issue addressed by this Committee is increased market consolidation and the inability of small businesses to compete and challenge monopolistic practices, as Mr. Carlson's experience demonstrates. How would prohibiting class-action waivers in consumer contracts like Mr. Carlson's address this concern?

Small businesses have traditionally served a vital role in enforcing state and federal laws in areas of great economic consequence, specifically antitrust and unfair competition.[10] And just as employees and consumers often cannot enforce their legal rights without joining together in collective litigation, so too do small businesses rely on the availability of class actions to level the playing field when seeking accountability from major corporations. Indeed, to ensure that small businesses have an adequate economic incentive to undertake costly antitrust litigation, the antitrust statutes authorize the award of treble damages, plus attorneys' fees, to prevailing plaintiffs.[11] Congress established this robust system of private enforcement to give antitrust victims an incentive to act as "private attorneys general" to enforce the law, recognizing the critical importance of free and fair competition to our economy.[12]

Prior to the ascendance of force arbitration, small and medium-sized businesses brought important class actions alleging price-fixing, monopolization, and other exclusionary conduct.[13] These cases advanced legal doctrine, delivered substantial damage awards, and brought about enduring changes to business practices.[14] Few, if any, of these cases could have been brought without a procedural device that enables small businesses to enforce their legal rights collectively.

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[9] *See, e.g.*, Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.").

[10] Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 625-6 (2012) ("Over the past fifty years . . . we have come to assume, quite correctly, that private actors will be the frontline enforcers in actions redressing broadscale securities fraud, consumer fraud and deceptive trade practices, antitrust violations . . . and many other areas.").

[11] 15 U.S.C. §15; *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985) (observing that the "treble-damages provision wielded by the private litigant [is]. . . a chief tool in the antitrust enforcement scheme," because it creates "a crucial deterrent to potential violators").

[12] *See, e.g.,* Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826 (2d Cir. 1968) ("A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.").

[13] *See, e.g.,* In re Air Cargo Shipping Services Antitrust Litigation, Case No. 06-md-1775 (E.D.N.Y); In re Bulk [Extruded] Graphite Products Antitrust Litigation, Case No. 02-CV-06030 (D.N.J.); In re Dynamic Random Access Memory (DRAM) Antitrust Litigation, MDL No. 1486 (N.D. Cal.); In re Graphite Electrodes Antitrust Litigation, MDL No. 1244 (E.D. Pa.); In re TFT-LCD (Flat Panel) Antitrust Litigation, MDL No. 1827 (N.D. Cal.); In re Insurance Brokerage Antitrust Litigation [Zurich Settlement], Case No. 04-5184 (D.N.J.); In re Linerboard Antitrust Litigation, MDL No. 1261 (E.D. Pa.); Sullivan v. DB Investments, Inc., Case No. 04-cv-2819 (SRC) (D.N.J.); In re Puerto Rican Cabotage Antitrust Litigation, Case No. 08-md-1960 (D.P.R.).

[14] *See id.* These class actions have resulted in per-plaintiff damages ranging from $5,000 to more than $2 million to small- and medium-sized businesses.

For this reason, when small businesses are subject to forced arbitration clauses, they lose their ability to effectively enforce laws and redress harms.

Consider the antitrust class action brought by small businesses, including Mr. Carlson, against American Express challenging various anticompetitive practices. This case had important implications for millions of small merchants who felt abused by Amex's high fees, and whose theory of antitrust injury sought important changes in the electronic payments industry. By dint of Congressional intent and statutory enactment, these are precisely the types of claims that small businesses are meant to pursue.[15] Then, in *American Express v. Italian Colors,* the Supreme Court enforced the arbitration clause and class action ban buried in Amex's merchant service agreement, prohibiting these small businesses from pursuing their legal claims collectively.[16] Given that the cost of an individual small business bringing an antitrust action against a huge company like American Express was prohibitive, this ruling all but ensured that Amex and other big companies that impose forced arbitration on small businesses are rendered immune from liability and free to engage in whatever anti-competitive conduct they want.[17]

Indeed, Justice Scalia thumbed his nose at Congressional authorization of private rights of action intended to enable small businesses to enforce the nation's antitrust laws, writing that "[t]he antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[18] But without small businesses seeking to protect their legal rights to a market free of anticompetitive conduct, we lose a critical enforcement tool and the laws on the books are rendered null. Eliminating class-banning forced arbitration clauses would solve this enforcement problem, and restore the role of small businesses in supplementing public enforcement actions by seeking monetary damages for victims of anticompetitive conduct.

4. In 2015, California enacted a law requiring private arbitration companies that administer consumer arbitrations to make public certain information about each arbitration it conducts. In your view, what data should be collected about forced arbitration to ensure the practice is transparent to lawmakers and the public?

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

[16] American Express Co. v. Italian Colors Rest., 559 U.S. 1103 (2013).

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

[18] Am. Express Co., 133 S.Ct. at 2306. *See also id.* at 2311 ("[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 the wake of the Supreme Court's 5-4 decision in *AT&T v. Concepcion,* striking down California's public policy exception to forced arbitration clauses as preempted by the FAA, that state continued its efforts to try to regulate arbitration and provide its citizens access to courts. For example, in the immediate wake of *Concepcion*, the California legislature briefly considered an outright legislative ban on forced arbitration clauses containing class action waivers.[19] But the bill died in committee due to the likelihood of FAA preemption. Another California bill sought to circumvent *Concepcion* by providing that denials of motions to compel arbitration were unappealable until final judgment is entered.[20] But, again, legislators worried that this law would be perceived as a direct effort to limit appellate review in order to allow class actions to go forward, even in the face of forced arbitration clauses.

Ultimately, the California legislature enacted a simple disclosure statute requiring arbitral providers of a certain size to disclose information about the claims resolved in arbitration. *See* CAL. CIV. PRO. § 1281.9(3). The goal of this legislation was not to side-step *Concepcion*'s preemption ruling or to ban forced arbitration clauses. Rather, the goal of § 1281.9(3) was to create greater transparency in the process and provide critical information to policymakers about the types of claims, litigants and outcomes that are generated in arbitration.

Accordingly, § 1281.9(3) requires arbitral providers to disclose (1) the names of the parties to the arbitration; (2) the date of the arbitration award; (3) the identity of the prevailing party; (4) the names of the parties' attorneys; and the (5) amount of monetary damages awarded, if any. Yet, despite its lofty goals, observers have noted the law generally honored in the breach and much of the required information goes unreported.[21] For example, Professor Judith Resnick has observed that while "California's disclosure law requires providers to "'collect, publish . . . , and make available to the public' information about parties, categories of disputes, time to disposition, and outcomes," many "providers do not, however, provide comprehensive data" in any or all these categories.[22]

In reexamining disclosure laws such as § 1281.9(3), the first order of business is to ensure that they are fully enforced, so that critical information about arbitration is available to legislative bodies, policymakers, and researchers. Second, there are additional categories of information about the arbitration process that should be subject to disclosure, including: (1) the nature and size of the claim; (2) the amount of discovery that was requested and allowed; (3) the nature of the evidence heard by the arbitrator; (4) the standard of proof the arbitrator applied to the claim;

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[19] *See* S. 491, 2012 LEG., REG. SESS. 1 (Cal. 2012).

[20] California Legislature, 2011–12 Regular Session (Feb 18, 2011), available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1051-1100/ab_1062_bill_20110901_amended_sen_v96.pdf.

[21] *See* W. Mark C. Weidemaier, *From Court-Surrogate to Regulatory Tool: Re-Framing the Empirical Study of Employment Arbitration*, 41 U. MICH.J. L. REFORM 843, 869 (describing the serious limitations of the California arbitration database).

[22] Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers, 125 HARV. L. REV. 78, 108, 108 n.156 (2012).

(5) whether there were any related claims based on similar conduct or against the same party, and how those related claims were handled; (6) whether injunctive relief was requested and the arbitrator's determination of her authority to grant such relief, if appropriate; (7) whether punitive damages were requested and the arbitrator's determination on that request; (8) whether the arbitrator supplied the parties with a written decision including findings of fact and decisions of law; (9) whether either party sought to appeal the arbitrator's decision and the outcome of those appeals, if any was heard; (10) the arbitrator's decision record, including whether the arbitrator has previously decided claims involving either party; and (11) the arbitrator's financial relationship with the arbitral provider – i.e., does she own shares in the firm and if so, how many. In addition, this data should be fully searchable, and maintained on a website accessible to the public.

Third, and importantly, the purpose of disclosure statutes such as § 1281.9(3) is to create greater transparency. While this is an admirable goal, it only gets us so far. Increased transparency will not transform arbitration into a system akin to our public courts – it will not guarantee parties procedural safeguards or even a neutral decisionmaker, and transparency alone does not render forced arbitration more fair or voluntary. I would urge this Committee not focus on mere "window dressing" to try to improve forced arbitration, but instead, to eliminate the problem altogether.

5. At the hearing, several witnesses disagreed about how arbitrators are selected and whether defendant employers can fairly be characterized as selecting arbitrators. Please explain the process for selecting an arbitrator in an individual case and determining the rules by which an arbitration is governed. What changes would you suggest to this process?

Despite efforts by the Chamber of Commerce and the business lobby to suggest otherwise, it is clear as a matter of contract that defendant employers and defendant corporations *always* get to choose the arbitration provider (AAA, JAMS, etc.). The arbitration provider, in turn, chooses the arbitrator or pool of arbitrators it will make available in a given case, as well as the rules that govern the proceeding. Employees, consumers and small business do not get to choose a different arbitration provider, nor do they have any say over which rules shall apply to the resolution of their dispute. While these weaker parties may have limited choice within the pool of arbitrators presented to them, this is illusory because they have no information with which make such a choice. After all, there are no public records to search (because arbitrators do not write publicly-available decisions) and arbitration providers do not require arbitrators to explain their reasoning for any ruling or resolution.[23] Accordingly, consumer, employees and small business cannot make reasoned choices among arbitrators; large, repeat-player corporations, on the other hand, hold all the cards.

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

This is because corporations typically contract with a single arbitration provider for all arbitrations involving consumers and employees. As discussed above, studies have shown that, where the arbitration provider stands to gain significant repeat business from the corporation, the provider has a major financial incentive to gain and keep the corporation's business. The repeat-player bias is real, and its harmful.

For example, Wells Fargo has specified the AAA in the arbitration clause imposed on credit card holders. This means that the AAA – specified in 70 million customer credit card agreements -- receives potentially significant income from Wells Fargo. This inevitably creates a financial incentive for AAA arbitrators to rule more favorably for Wells Fargo in order to ensure that the company continues to use AAA as their provider, rather than choosing another arbitrator provider for their large customer base. When injured customers began suing Wells Fargo for opening fake accounts back in 2013, these claims were quickly forced into the black box of arbitration – where AAA arbitrators protected the company from public exposure.

People who have served as arbitrators confirm that they felt pressure to resolve claims in favor of large corporations. For example, Victoria Pynchon, a corporate lawyer who formerly worked as an arbitrator with AAA, has described being fearful that, if she ruled against a big company, she wouldn't be chosen to arbitrate future claims: "The word among arbitrators when I first started arbitrating was, you never want to award punitive damages against a corporate entity because you will never get rehired."

Another example is Wall Street giant Morgan Stanley, which subjected over twenty-thousand employees in the U.S. to the CARE program, an internal arbitration program mandating that all arbitrations be conducted by JAMS. An article published last year questioned the fairness of this program: "Morgan Stanley's frequent use of JAMS — which describes itself as the world's largest alternative dispute resolution company — gives it a 'repeat player' advantage, and the bank's payment of the fees introduces the appearance of potential bias in proceedings, which should be impartial."