Senator Dick Durbin
Chair, Senate Judiciary Committee
Written Questions for Myriam Gilles
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1. Mr. Schwartz testified that arbitration is a cheaper alternative to court litigation.

   a. Do you agree with that testimony? If not, why not?

   I do not agree with Mr. Schwartz's unsupported assertion because arbitration does not channel cases into an alternative system that is cheaper than our public courts. Instead, when subject to forced arbitration, consumer and worker claims simply vanish. Snuffing out meritorious claims may be "cheaper" for large corporations and employers, allowing them to escape legal responsibility for any wrongdoing, but it is very costly to the rest of society.

   In 2015, the Consumer Financial Protection Bureau ("CFPB") completed a study on the use of arbitration in consumer financial transactions.[1] The Bureau was especially interested in determining whether there was any truth to claims (like the one Mr. Schwartz repeated without support in his testimony) that arbitration was a cheaper alternative to court. But it could find no evidence that adopting mandatory arbitration resulted in savings to consumers in the form of reduced prices, or on the flip side, that abandoning arbitration resulted in higher consumer prices.[2] For instance, the agency examined the total cost of credit paid by consumers after Bank of America, JPMorgan Chase, Capital One, and HSBC were forced to eliminate their arbitration clauses as a result of court-approved settlements – but found no evidence that these companies had increased prices or reduced access to consumer credit as a result of dropping their forced arbitration provisions.[3] Similarly, the CFPB analyzed mortgage rates after Congress passed a law prohibiting the use of forced arbitration in mortgage contracts – but again, found no increase in rates.[4]

   Moreover, if Mr. Schwartz is right that forced arbitration is cheaper than litigation, one would expect scores of consumers and workers to take advantage of this lower-cost option. Yet the empirical evidence confirms the opposite is true: shockingly few

[1] CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), at 7 (2015) [hereinafter ARBITRATION STUDY], https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[2] *Id.* at §10, pp. 2-5 ("[E]ven a correlation between the use of pre-dispute arbitration clauses and price levels should not be construed as a causal relationship between the two, absent additional information.").

[3] *Id.* at §1, p. 18.

[4] *Id.*

disputants have initiated individual arbitrations. The CFPB Study, for instance, determined that in the 1,060 arbitrations cases initiated by consumers in 2010 and 2011, only 341 resulted in decisions by arbitrators – with consumers obtaining relief on their affirmative claims in only 32 arbitrations and debt forbearance in only 46. Likewise, a 2017 report by the nonprofit group Level Playing Field examined the use of forced arbitration in the Wells Fargo identity-theft debacle.[5] Compiling data from the AAA and JAMs, the country's largest arbitration providers, the report found that just 250 consumers arbitrated claims with Wells Fargo between 2009 and the first half of 2017.[6] Given that the bank boasts over 70 million customers, this is "a shockingly low number of arbitration claims" – but it is particularly surprising given the "continued revelations of widespread unfair business practices" at Wells Fargo.[7] In a similar vein, Professor Imre Szalai's 2018 study determined there were an estimated 826,537,000 consumer arbitration provisions in force.[8] Yet, the two largest arbitration providers (AAA and JAMS) recorded an average of only 6,000 consumer arbitrations per year.[9] Professor Judith Resnik also reported that only 134 individual claims were filed against AT&T between 2009 and 2014 – despite the company having over 120 million wireless customers and being the subject of numerous investigations and public enforcement actions for violations of consumer laws.[10] Reuters journalist Alison Frankel examined data provided by the AAA, which revealed that in the first quarter of 2019, it had resolved only 895 consumer arbitrations – despite being the designated arbitral provider for the thousands of consumer companies.[11]

These studies confirm that forced arbitration is a sham. Companies intentionally hide these rights-stripping provisions in the small print of take-it-or-leave-it contracts, foisting

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[5] In 2016, media outlets reported that Wells Fargo employees had been opening fake accounts as far back as 2013. When injured customers tried holding the bank accountable for the identity theft, their claims were quickly forced into the black box of arbitration. *See, e.g.,* Michael Corkery & Stacy Cowly, *Wells Fargo Killing Sham Account Suits by Using Arbitration*, N.Y. TIMES, Dec. 6, 2016. The profound secrecy afforded by arbitration allowed Wells Fargo to avoid both liability and bad press, and allowed wrongful conduct to continue undetected and unremedied long after such illegality would otherwise come to light. *See* Hearing of the Senate Banking Committee, Wells Fargo: One Year Later, available at https://www.banking.senate.gov/hearings/wells-fargo-one-year-later (Oct. 2017).

[6] Wells Fargo and Forced Consumer Arbitration, Level Playing Field (2017).

[7] *Id.*

[8] Imre Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233 (2019).

[9] *Id.*

[10] *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights,* 124 YALE L.J. 2680, 2812 (2015). Professor Resnik notes: "[t]he result has been the mass production of arbitration clauses without a mass of arbitrations. Although hundreds of millions of consumers and employees are obliged to use arbitration as their remedy, almost none do so – rendering arbitration not a vindication but an unconstitutional evisceration of statutory and common law rights."

[11] Alison Frankel, *Consumer Arbitration is on the Rise -- But the Numbers are Still Puny*, REUTERS, May 9, 2019.

them on an unsuspecting public.[12] But once victims learn of these provisions, most simply abandon their legal claims rather than pursue individual arbitrations. The only cost savings generated by this unfair regime are increased corporate profits generated by suppressing and concealing consumer and worker complaints.

b. What costs are associated with an arbitration proceeding and how, if at all, do these costs vary based on the rules governing the proceeding?

For most consumers and workers, the costs of arbitrating disputes are immense in relation to their likely recovery. This is because the vast majority of consumer and worker-related claims are individually small. When individual employees or consumers suffer small but discernible injury, joining a collective lawsuit to spread litigation costs and equal the playing field is often the only viable path to recovery. Through class and collective actions, citizens have recovered – in the aggregate – billions of dollars.[13]

But class and collective action bans incorporated into arbitration clauses prevent consumers and workers from banding together to share the costs of pursuing justice, eliminating the only cost-effective path that many claimants have. Under class-banning arbitration clauses, a consumer must bear 100% of all the costs charged to her in arbitration by herself; her claim cannot be joined with those of any other arbitral claimant as a way of distributing costs and risks. A consumer must bear her share of the hourly arbitrator fees (which generally range from a few hundred to several thousand dollars per hour), administrative fees (same), hearing costs, travel. And if her claim would benefit from expert testimony, she must pay that hefty cost herself. If her claim relies on the testimony of defendant's executives, she must foot the bill for those examinations. Unsurprisingly, rational consumers are unwilling to take on these immense costs only to recover de minimis damages, nor can they generally find attorneys to represent them.[14] And companies are banking on this rational response: for example, in a consumer case alleging Fitbit sold defective devices, the company's lawyer admitted to a federal judge that it was betting that no rational litigant would pay arbitration fees, which start at $750, to

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[12] Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 413 (2005) (arguing imposing arbitration long before a dispute arises is unfair because most consumers don't place sufficient value on the rights they are waiving until a dispute has arisen).

[13] ARBITRATION STUDY at §1, p. 16 (reporting that between 2008-2010, over 34 million American consumers were represented in class actions that resulted in over $2 billion in cash payments and more than $600 million in in-kind relief).

[14] *See, e.g.,* AT&T v. Concepcion, 584 U.S. 849 (2011) (Breyer, J. dissenting) ("What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?"); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) ("[P]etitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.").

litigate a claim over a $160 device.[15]

c. How do these costs compare with the costs of litigation?

Litigation is less costly for the vast majority of consumers, workers and small businesses for the simple reason that, in our public court system, litigants are permitted to aggregate their claims via class and collective litigation, so long as certain requisites are met. Aggregating claims renders them marketable, spurring lawyers to invest time and money to litigate complex issues on behalf of a class of victims in return for a share of the class recovery.[16] And, as described above, the right to bring a collective lawsuit spreads litigation costs, allowing weaker litigants to challenge the illegal practices of stronger parties. Accordingly, there is simply no question that for the vast majority of Americans, collective litigation is far less costly than a single-file system of forced arbitration.

2. Mr. Schwartz testified that arbitration is beneficial to claimants because it is faster and provides greater flexibility than district court litigation.

a. Do you agree with that testimony? If not, why not?

In its original form, arbitration was intended to provide equally sophisticated commercial entities an efficient means for resolving bilateral disputes without resorting to court litigation. But *forced* arbitration is a different beast altogether: these provisions are unilaterally drafted and imposed by a stronger party via standard-form contract long before any dispute has arisen, in a context without meaningful negotiation. Mr. Schwartz's testimony completely ignores this reality. By furtively inserting these provisions in the small print of job applications, employment contracts, and consumer transactions, his clients and other corporate executives have written their own rules, opting out of legal responsibility by shunting all claims against them into a private system of single-file arbitration, where they know most claims will simply be abandoned.[17] Moreover, we (the public) have no idea whether arbitration is indeed "faster" or more "flexible," as Mr. Schwartz claims, because arbitration proceedings are a black box protected by secrecy rules that prevent the parties from disclosing any information about what happens within. One can only assume that Mr. Schwartz's tendentious testimony asks this body and the

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[15] *See* Alison Frankel, *Fitbit Lawyers Reveal "Ugly Truth" About Arbitration*, REUTERS, June 4, 2018.

[16] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.").

[17] *See, e.g.,* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere: Stacking the Deck of Justice*, NY TIMES, Oct. 31, 2015 ("By banning class actions, companies have essentially disabled consumer challenges to practices like predatory lending, wage theft and discrimination…[because o]nce blocked from going to court as a group, most people dropped their claims entirely.").

American people to take his word (or the word of the Chamber) that arbitration is faster and more flexible, without providing any evidence in support of this unfounded claim.

b. What are the negative aspects of forced arbitration in comparison to court litigation from the perspective of claimants?

Claimants forced into arbitration encounter a succession of injustices. First off, contemporary arbitration is coerced, not consented to.[18] Most people have no idea they have signed away their right to hold companies accountable for wrongdoing.[19] This is by design, as companies keep us in the dark by burying forced arbitration clauses in the fine print of standard-form contracts.[20] Second, even if we did read the fine print, none of us really has a choice of whether to accept or reject an arbitration clause because these provisions have become ubiquitous.[21] Accordingly, where a pre-dispute forced arbitration clause is imposed as a precondition to obtaining product, service, or job, choice is illusory and that, in itself, is a grave injustice.[22]

Once a dispute arises and a claimant learns that she has unwittingly forfeited her right to go to court, she will face grave difficulty finding a lawyer to represent her in an individual arbitration (for the reasons described above). Even if she is somehow able to secure counsel (or decides to pursue her claim pro se), the claimant will encounter a regime that is overtly biased in favor of corporate defendants. For one, companies write the rules and choose the arbitration provider.[23] The provider, in turn, chooses the pool of arbitrators it

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[18] *See, e.g.,* Epic Systems v. Lewis, 138 S.Ct. 1612 (2018) (Ginsburg, J., dissenting) ("[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").

[19] 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); *see also* Jeff Sovern et al., *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV.1 (2015) (reporting that in a survey of 668 consumers, less than 9% understood the implications of a forced arbitration provision).

[20] *See, e.g.,* Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPORTS, Jan. 30, 2020 (describing an arbitration clause located "about two-thirds of the way through 4,600 words of legalese" in the defendant Wayfair's online terms of use).

[21] ARBITRATION STUDY, § 2, pp. 7-24 (reporting that forced arbitration clauses appeared in over 86% of private student loan contracts, 83.7% of payday lending contracts, 99% of cell phone agreements and over 90% of credit card agreements).

[22] Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 413 (2005) (arguing imposing arbitration long before a dispute arises is unfair because most consumers don't place sufficient value on the rights they are waiving until a dispute has arisen).

[23] Companies may designate any provider and write their own rules to govern the arbitration. *See* Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE, Dec. 2015 ("The ability of corporations to set the rules of mandatory arbitration allows

will make available in any given case. Claimants have no right to choose a different arbitration provider, nor do they have any say over the rules that govern the arbitration.[24] And while claimants may have some limited choice within the pool of arbitrators presented to them, this is illusory because claimants generally lack the information needed to make an informed decision about which arbitrator to choose (or strike). After all, there are no public records to search or prior decisions to read since arbitrators do not write publicly available decisions.[25]

Once an arbitrator is "chosen" by the parties and an arbitration proceeding commences in earnest, claimants quickly lose the right to enforce most procedural rights guaranteed by public courts. 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.

Given these injustices, it should be no surprise that, when individuals seek to resolve disputes in arbitration, they tend to lose. Numerous studies confirm this finding. For instance, the CFPB's 2015 study found that arbitrators sided with consumers in just 27% of cases and awarded them an average of 13¢ for every dollar claimed.[26] Similarly, the American Association of Justice reviewed 30,000 consumer arbitrations conducted by AAA and JAMS between 2014-18, and found that only 6.3% resulted in consumers winning a monetary award.[27] These findings substantiate decades of research on the "repeat-player" bias in arbitration – which posits that arbitrators tend to decide cases in favor of the party most likely to be in a position to appoint them to serve in a future case.[28]

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them, and not the workers or consumers, to choose whether to adopt the procedures of a reputable organization with due process protections or rules that violate basic principles of fairness.").

[24] *Id.* ("the corporation that chooses to make arbitration mandatory for its workers or consumers will write the rules of the procedure, and the worker or consumer will have no choice but to assent if they want to enter into an employment or consumer transaction").

[25] *See* 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…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. CINN. L. REV. 459, 473 (2008) ("Written arbitration awards currently are the exception in arbitration, which normally operates behind a veil of privacy.").

[26] ARBITRATION STUDY at § 5, pp. 11-12.

[27] American Association for Justice, *The Truth About Forced Arbitration* (2019).

[28] These studies have generally focused on repeat-player bias employment arbitration, but there is no reason to believe that consumers would suffer in similar fashion. *See, e.g.,* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPL. RTS. & EMPLOY. POL'Y J. 189, 198-99 (1997) (reporting on a study of 270 AAA employment arbitration awards from 1993-1994, finding that employees won only

This structural imbalance allows companies to stack the deck with arbitrators who will be favorable to their interests, while the secrecy surrounding these proceedings makes it impossible for individual consumers or workers to discern or challenge potential arbitrator bias.[29]

The advantages accruing to repeat players raise serious concerns about the neutrality and fairness of the arbitration system. Not only do companies choose the arbitral provider and write the rules, they also "gain familiarity with the system and how to operate effectively in it, [and] may also be able to lobby for changes to the system that benefit them."[30] As Professors Colvin and Stone observe, "[e]ven absent any sort of arbitral bias, more sophisticated repeat-player employers may gain an advantage by getting to know particular arbitrators well and developing an understanding of their decision-making patterns and what types of arguments appeal to them."[31] Taken together, the overt unfairness of arbitration regimes bodes poorly for consumers and workers who wish to individually arbitrate their claims, and may go a great distance in explaining why so few do so.

3. Proponents of arbitration often state that it is a fairer system that produces better results for claimants than court litigation.

   a. How do claimants' success rates in litigation compare to their success rates in arbitration?

   The CFPB's 2015 Arbitration Study sought to compare claimants' success rates in litigation vs. arbitration by examining 1,060 arbitrations initiated by consumers in 2010 and 2011. It found:

   - Only 341 (32%) resulted in decisions by arbitrators, with consumers obtaining relief on their affirmative claims in only 32 arbitrations (3%) and debt forbearance

16% of cases against repeat-player employers); Stone & Colvin, *supra* note 23 (reporting on a study finding that when an employer and employee both appeared before an arbitrator for the first time, the employee had a 17.9% of winning -- but if the employer had previously appeared before the arbitrator four times, the employee in the fifth case only had a 15.3% chance of winning, and if the employer had previously appeared before the same arbitrator 25 times, the 26th employee had only a 4.5% chance of winning).

[29] Testimony of Professor Elizabeth Bartholet Before the U.S. Senate Committee on the Judiciary, *Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations* (July 23, 2008) ("The big corporate players were [] free to select arbitration providers who would provide them a sympathetic forum, and to design an arbitration process that would serve their interests, since the employees and consumers would again not be in any position to bargain or even to think about these things at the point they were applying for jobs or credit cards.")

[30] Colvin & Stone, *supra* note 23.

[31] *Id.*

in only 46 arbitrations (4%)[32];

- By contrast, between 2008 and 2012, 422 consumer class action settlements returned over $440 million (after deducting attorneys' fees and court costs) to at least 45 million consumers (or an average of 6.8 million consumers each year).[33]

In addition, the CFPB conducted a case study of a multidistrict class action filed against 23 banks for illegally charging consumers millions of dollars in excessive overdraft fees.[34] In total, debit cardholders reached 18 settlements through the litigation, resulting in $1 billion in cash relief for over 28 million consumers. Not all account holders were able to join the class, however, because nine of the defendant banks had arbitration clauses in their consumer contracts. Five of these banks successfully compelled the cases against them into arbitration, while four eventually chose to settle. But as of February 2015, CFPB could not verify that even a single one of the consumers forced to arbitrate had received any relief at all. Meanwhile, the 28 million consumers who had secured settlements through litigation saw money transferred directly to their bank accounts.[35]

b. What difficulties exist in effectively evaluating this claim?

As noted above, confidentiality is core to the institution of forced arbitration and guaranteed by both the providers and the standard terms of contemporary forced arbitration agreements.[36] Accordingly, forced arbitration proceedings are conducted behind closed doors, making it nearly impossible for researchers to compare arbitration to litigation. This secrecy creates an impregnable information gap, making it nearly impossible to compare public and private dispute resolution processes. Take, for example, the CFPB's case study comparing the outcomes in litigating vs. arbitrating overdraft fee disputes. This controlled-experiment comparison was only available because, at that time, some banks had instituted class action banning arbitration clauses and some had not. But such a comparison would not be possible today, as all banks now mandate arbitration in their consumer banking contracts.

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[32] ARBITRATION STUDY at § 5, pp. 41-42 (finding that "[t]he total amount of affirmative relief awarded was $172,433 and total debt forbearance was $189,107").

[33] *Id.* at § 1, pp. 16.

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

[35] *Id.* at § 8, at 40 & 45-46.

[36] *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").