"Justice Denied: Forced Arbitration and the Erosion of Our Legal System"
House Committee on the Judiciary
Subcommittee on Antitrust, Commercial, and Administrative Law
May 16, 2019

Questions for the Record for Andrew Pincus
Submitted by Representative F. James Sensenbrenner

1. Several witnesses asserted that arbitration agreements prevent the disclosure of wrongdoing, but you testified that arbitration agreements cannot prevent injured parties from speaking publicly about their claims or discussing their claims with law enforcement officials. Please explain why you believe the other witnesses are wrong.

The other witnesses have their facts wrong. Courts have consistently held that arbitration agreements cannot prevent employees or consumers from talking publicly about their claims (with the possible exception of claims brought by a high-ranking employee) or prevent anyone from informing government officials of alleged wrongdoing.[1] And those government officials can pursue claims in court — including on behalf of consumers and employees—if they wish. Indeed, almost two decades ago, the Supreme Court held that arbitration agreements do not forbid government entities—in that case, the Equal Employment Opportunity Commission—from seeking relief on behalf of one of the parties to the agreement.[2]

And the same is true about the results of the arbitration: If an arbitration agreement does require parties to keep the results of arbitration confidential, courts have the power to sever a confidentiality provision or, if it cannot be severed, to invalidate the arbitration agreement. And courts have not hesitated to do so.[3]

Arbitral confidentiality relates only to the proceeding before the arbitrator—not to the claim or the arbitrator's decision. As one commentator has noted, "while arbitrators themselves may be bound to a general obligation of confidentiality, the

[1] *See, e.g.*, *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1078 (9th Cir. 2007), *overruled on other grounds by Kilgore v. KeyBank, Nat'l Ass'n*, 673 F.3d 947 (9th Cir. 2012); *Longnecker v. Am. Express Co.*, 23 F. Supp. 3d 1099, 1110 (D. Ariz. 2014); *DeGraff v. Perkins Coie LLP*, 2012 WL 3074982, at *4 (N.D. Cal. July 30, 2012).

[2] *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

[3] *See*, *e.g.*, *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 1002 (9th Cir. 2010) (invalidating confidentiality provision in arbitration agreement); *Davis*, 485 F.3d at 1078-79 (same in employment agreement); *Ting v. AT&T*, 319 F.3d 1126, 1151-52 (9th Cir. 2003) (same in consumer arbitration agreement).

parties (and their counsel) are generally not so restricted, absent agreement or arbitral order."[4]

It is true that arbitrators—just like judges—can enter protective orders requiring certain matters to be sealed, but those orders are typically limited to protecting an individual's private information or trade secrets or sensitive intellectual property—not allegations of wrongdoing. And no one disputes that courts can and do have the exact same power to enter protective orders, and that they do so routinely.[5]

Finally, some of the rhetoric about secrecy that the witnesses were testifying about has nothing to do with arbitration and everything to do with non-disclosure provisions in settlement agreements. For decades, it has been common for parties who have reached settlement agreements—whether in court or in arbitration—to agree that the terms and nature of the settlement be kept confidential. That is something that parties agree to after a negotiation; it is not something inherent to the arbitration process. Indeed, when individual consumer and employee lawsuits in court are settled, plaintiffs and their lawyers routinely enter into confidentiality and non-disclosure agreements.

2. You testified about a new study indicating that employees who arbitrate their claims win more often and on average are awarded larger damages than employees who pursue claims in federal court. Are there other studies comparing outcomes in arbitration and litigation? Please provide the Subcommittee with information regarding the results of those studies.

Yes, there are a number of other studies examining the outcomes of cases decided in arbitration versus litigation. And these studies, as one commentator has put it, demonstrate that "there is no evidence that plaintiffs fare significantly better in litigation. In fact, the opposite may be true."[6]

One empirical analysis showed that employees who arbitrate are more likely to win their disputes than those who litigate in federal court (46% in arbitration as compared to 34% in litigation); that the median arbitral awards that the employees

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[4] Steven C. Bennett, *Confidentiality Issues in Arbitration*, 68 Disp. Resol. J. 1, 1 (2013) (footnotes omitted).

[5] *See, e.g.*, Fed. R. Civ. P. 26(c)(1)(D)-(H).

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

obtained were typically the same as, or larger than, the amount obtained in court; and their arbitrations were resolved 33% faster than in court.[7]

Another study examined American Arbitration Association awards in employment disputes and compared them to litigation outcomes. It determined that, for higher-income employees' claims, there was no statistically significant difference in win rates or amounts between discrimination and non-discrimination claims.[8] For lower-income employees' claims, that study did not attempt to draw comparisons between arbitration and in litigation, because lower-income employees appeared to lack meaningful access to the courts—and therefore don't have the ability to bring a sufficient volume of court cases to provide a baseline for comparison.[9]

Studies of consumer arbitration have reached similar conclusions. For example, a 2010 study found that consumers won relief 53.3% of the time in arbitration, compared with a success rate of roughly 50% in court.[10] And just as in court, plaintiffs who win in arbitration are able to recover not only compensatory damages but also "other types of damages, including attorneys' fees, punitive damages, and interest."[11]

And in the healthcare industry, the Kaiser Foundation Health Plan uses arbitration to resolve disputes with its more than 8 million California members, and an independent review found that 96% of those who used the system said it was better than or the same as court. Awards to successful claimants ranged from $4,500 - $3,469,778.[12]

Lastly, it should be noted that these studies probably *understate* the benefits of arbitration, compared with litigation, as a means of vindicating plaintiffs' claims, because of "selection effects." Arbitration makes it feasible for consumers and

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[7] Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003-Jan. 2004).

[8] Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 Disp. Resol. J. 44, 45-50 (Nov. 2003/Jan. 2004).

[9] *Id.*

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

[11] Drahozal & Zyontz, *Empirical Study*, *supra* note 10, at 902.

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

employees to pursue claims that are too small to attract a contingency-fee lawyer and therefore cannot be brought in court. Thus, studies that compare the average amount obtained by prevailing parties in arbitration and litigation probably tilt in favor of litigation, where claims tend to be larger. And, because of arbitration's relatively streamlined procedures as compared with litigation, "relatively weaker claims . . . are more likely to go to an arbitration hearing on the merits than in litigation" given the additional procedural hurdles present in litigation.[13]

3. A number of witnesses testified about the procedures used in arbitration. Does an arbitrator have unfettered discretion to employ whatever procedures he or she wishes, or are there constraints on how an arbitration is conducted?

To begin with, arbitrators are constrained by the rules of the organization administering the arbitration, and those rules have been developed with a view to ensuring fairness for consumers and employees. Most consumer and employment arbitration agreements select one of the major arbitration providers, such as the American Arbitration Association ("AAA") or JAMS, to administer the arbitration. These arbitration providers have promulgated detailed procedural rules to govern arbitrations—and have tailored specific rules for consumer or employment disputes. For example, the arbitrator can permit online or telephonic hearings, and evidence is far simpler for consumers and employees to introduce than in court.[14] Although parties can agree to modify the applicable procedures, these arbitration providers nonetheless require that all arbitrations they administer satisfy the organization's standards for fairness, such as the AAA's Consumer Due Process Protocol and its Employment Due Process Protocol.[15]

Of course, arbitrators (like judges) have some discretion in how to supervise the proceedings—and for good reason: This flexibility to tailor procedures to the needs of a particular case not only makes arbitration efficient, but also prevents consumers or employees from being tripped up by the sort of procedural errors that often lead to dismissal in court.

Existing law already provides strong protections against the imposition of unfair procedures in arbitration. The Federal Arbitration Act vests courts with broad power to invalidate arbitration agreements that contravene generally

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

[14] *See*, *e.g.*, AAA Consumer Arbitration Rule R-32(b); *id.* R-34(a).

[15] *See*, *e.g.*, AAA Consumer Arbitration Rule R-1(d); *see also* AAA Consumer Due Process Protocol, http://www.adr.org/sites/default/files/document_respository/Consumer%20Due&20Process%20Protocol%20(1).pdf; Employment Arbitration Under AAA Administration, https://www.adr.org/employment; JAMS Consumer Arbitration Minimum Standards, http://www.jamsadr.com/consumer-minimum-standards.

applicable principles of unconscionability.[16] Thus, an arbitration agreement that requires the arbitrator to apply markedly unfair procedures would be invalidated by courts.

Finally, the Federal Arbitration Act provides additional safeguards. Courts may vacate an arbitration award if the arbitrator is "guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent or material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced."[17] Accordingly, in the unlikely event that an arbitrator excludes such evidence that a consumer or employee wishes to present, the court can vacate the arbitrator's award.

4. How realistic is the court system as a means of providing redress for consumers and employees given the complex procedures used by courts? Are small claims courts viable alternatives for consumer claims? How does arbitration interact with small claims courts?

Our current court system is simply incapable of providing redress for many of the harms that employees and consumers care about. Those harms are usually relatively small in economic value and individualized.

Litigation in court, with its formality and complicated procedures, simply is not a realistic option for resolving many of these claims. As the Supreme Court has explained, "[a]rbitration agreements allow parties to avoid the costs of litigation, *a benefit that may be of particular importance in employment litigation*, which often involves smaller sums of money than disputes concerning commercial contracts."[18] The same is true of many consumer disputes. For a very large percentage of claims, therefore, arbitration is the only realistic opportunity for obtaining relief.

For example, a study of 200 AAA employment awards concluded that low-income employees brought 43.5% of arbitration claims, most of which were low-value enough that the employees would not have been able to find an attorney willing to bring litigation on their behalf.[19] These employees were often able to pursue their arbitrations without an attorney and won at the same rate as individuals with representation.[20]

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[16] *See*, *e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011) (FAA's "savings clause preserves generally applicable contract defenses" to enforcement of arbitration agreements).

[17] 9 U.S.C. § 10(a)(3).

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

[19] Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 794 (2003).

[20] *Id*.

A key obstacle to pursuing an individualized, small-value claim in court is the cost of hiring counsel. Unrepresented parties have little hope of navigating the complex procedures that apply to litigation in court, yet a lawyer's hourly billing rate may itself exceed the amount at issue for many claims. In any event, many individuals do not have the resources to hire counsel, and those that do often face the added hurdle of having to locate and retain a lawyer before even setting foot inside a courthouse.

Meanwhile, many lawyers, especially those working on a contingency basis, are unlikely to take cases when the prospect of a substantial payout is slim. Research demonstrates that lawyers accept contingent-fee cases only if the claim promises both a substantial recovery—and hence a substantial percentage of that recovery as a legal fee. Studies indicate that a claim must exceed $60,000, and perhaps $200,000, in order to attract a contingent-fee lawyer.[21]

Arbitration empowers individuals because it is possible to realistically bring a claim in arbitration without the help of a lawyer.[22] Although a party always has the choice to retain an attorney, arbitration procedures are sufficiently simple and streamlined that in many cases no attorney is necessary. As one academic observer of employment arbitration has put it, in an arbitral forum, "it is feasible for employees to represent themselves or use the help of a fellow layperson or a totally inexperienced young lawyer."[23]

To initiate an arbitration with the AAA, for instance, a plaintiff need only a brief statement explaining the nature of the dispute and why she is entitled to relief.[24] Indeed, studies show that parties who represent themselves in arbitration do as well, if not *better*, than represented parties. A study by two prominent law professors observed that in consumer arbitration, "self-represented plaintiffs were seven times *more* likely than represented plaintiffs to get an AAA arbitrator's decision in their favor"—reinforcing the authors' conclusion that "hiring an attorney offers little value to a [claimant in arbitration] and is often unnecessary."[25]

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[21] *Id* at 783. In some markets, this threshold may be as high as $200,000. Minn. State Bar Ass'n, *Recommendations of the Minnesota Supreme Court Civil Justice Reform Task Force* 11 (Dec. 23, 2011), perma.cc/VJ8L-RPEY.

[22] While one study found that pro se plaintiffs "struggle" in arbitration, *see* Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 California L. Rev. 1, 52 (2019), a *pro se* plaintiff who can afford a lawyer is nonetheless far better off in arbitration than litigation.

[23] St. Antoine, *supra* note 6, at 15.

[24] AAA Consumer Arbitration Rule R-2(a).

[25] Jason Scott Johnston & Todd Zywicki, *The Consumer Financial Protection Bureau's Arbitration Study: A Summary and Critique* 25-26 (Mercatus Center at George Mason Univ., Working Paper, Aug. 2015) (emphasis added).

Even when claimants do retain a lawyer, moreover, arbitration's streamlined procedures mean that the cost to the claimant is often less than if the employee had brought the same claim in court. For example, the AAA limits the fees paid by consumers and employees to $200 for consumers and $300 for employees—amounts that are less than the filing fee in federal court.[26]

In sum, "a substantial number of" individuals, "particularly those with small financial claims, have a realistic opportunity to pursue their rights through mandatory arbitration that otherwise would not exist."[27]

Notably, many, if not most, arbitration agreements also allow a consumer or employee to file a claim in small claims court as an alternative to arbitration.[28] Businesses are amenable to resolving disputes in small claims courts because those courts are set up to offer parties some of the same procedural flexibility as arbitration. To be sure, small claims courts are somewhat less accessible to consumers than arbitration, given that many have overcrowded dockets. But they provide an alternative to arbitration for consumers or employees who personally prefer court litigation to arbitration.

5. Professor Gilles and Mr. Gupta testified that class actions provide significant benefits to class members in the employment and consumer contexts. Does the evidence support their position?

No. Studies have shown time and again that most class actions are resolved with *no* benefit to class members—the percentage of class actions resolved in this way was 87% in one study, 66% in another, and 60-80% in a third.[29] And even in the small percentage of cases that settle on a classwide basis, the benefits provided to individual class members are usually paltry.

Most class action settlements do not involve automatic distribution of settlement payments to absent class members. Settlements therefore routinely require a class member to affirmatively submit a claim form to receive any settlement payment. The vast majority of class members do not file claims for payment from these settlement funds.

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[26] *See* AAA Consumer Arbitration Rules, Costs of Arbitration, https://www.adr.org/sites/default/files/Consumer_Fee_Schedule_0.pdf; AAA Employment/Workplace Fee Schedule, https://www.adr.org/sites/default/files/Employment_Fee_Schedule1Nov19.pdf.

[27] St. Antoine, *supra* note 6, at 16.

[28] *See* Arbitration Agreements, 81 Fed. Reg. 32,830, 32,867 (May 24, 2016).

[29] Consumer Fin. Prot. Bureau, *Arbitration Study: Report to Congress 2015* 37 (Mar. 2015), perma.cc/8AX5-AYWN ("*CFPB Study*"); Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (Dec. 11, 2013), goo.gl/3B27FQ ("*Mayer Brown Study*"); Jason Scott Johnston, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions Under Federal Consumer Protection Statutes*, 2017 Colum. Bus. L. Rev. 1 (2017).

Both the CFPB and the FTC reported a "weighted average claims rate" and "weighted mean" claims rate in class actions of just 4%.[30] That figure comports with academic studies, which regularly conclude that only "very small percentages of class members actually file and receive compensation from settlement funds."[31]

Thus, the available evidence confirms that even in the small fraction of class actions that settle on a class-wide basis, most class members receive no benefit—because they do not file claims to receive a settlement payment. A recent empirical study explains that "[a]lthough 60 percent of the total monetary award may be available to class members, in reality, they typically receive less than 9 percent of the total." The author concluded that class actions "clearly do[] not achieve their compensatory goals . . . . Instead, the costs . . . are passed on to consumers in the form of higher prices, lower product quality, and reduced innovation."[32]

Moreover, class actions typically take significantly longer to resolve than arbitrations. That means consumers and employees must wait much longer to obtain relief.

One study found that class actions that actually produced a class-wide settlement took an average of nearly two years to resolve.[33] And that two-year average duration, moreover, may not even include the time needed for class members to submit claims and receive payment *after* a settlement is reached. Another study found that 14% of the class actions were still pending *four years* after they were filed, with no end in sight.[34] Arbitrations, by contrast, have been resolved on average in three and one-half months.[35]

This difference matters in assessing whether and to what extent class members benefit because, as one court has explained, even when a class action actually results in monetary relief, a long "delay . . . [can] make the relief eventually awarded the class worth much less in present-value terms."[36] A rational assessment

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[30] *CFPB Study* at section 8, page 30; Fed. Trade Comm'n, *Consumers and Class Actions: A retrospective and Analysis of Settlement Campaigns* 11 (Sept. 2019), https://perma.cc/CM66-ZVCX; *see also Mayer Brown Study* at 7 & n.20 (in the handful of cases where statistics were available, and excluding one outlier case involving individual claims worth, on average, over $2.5 million, the claims rates were minuscule: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%).

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

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

[33] *CFPB Study* at section 8, page 37.

[34] *Mayer Brown Study* at 1.

[35] *See* Cal. Dispute Resolution Inst., *Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure* 19 (Aug. 2004).

[36] *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284 (7th Cir. 2002).

of arbitration and class actions must therefore account for the long duration of class actions.

In sum, the supposed benefits of class actions are in large part illusory. And to the extent they are not, any benefits do not come close to outweighing the advantages of arbitration—in particular the ability of employees to vindicate many more claims than they could if required to go to court.

6. Some witnesses suggested that invalidating pre-dispute arbitration agreements would give consumers and employees a choice between proceeding in arbitration or filing a lawsuit in court, and that employees and consumers could then decide which dispute resolution method they wished to use. Are they correct that employees and consumers would retain the ability to utilize arbitration whenever they wished?

Those witnesses are wrong. Without enforceable pre-dispute arbitration agreements, arbitration would not realistically be available at all. That is because, as commentators have recognized, post-dispute agreements to arbitrate are "rare."[37]

The reason is a common-sense one: Once a dispute has arisen (and perhaps a lawsuit has been filed), the parties have become adversaries and suspicious of the other's intentions. If one party then proposes entering a post-dispute arbitration agreement, the other party inevitably will be skeptical, fearing that entering the agreement would mean ceding some advantage. It is only before the dispute has arisen—before the parties have become adversarial—that parties can readily contract for arbitration of disputes.

7. Opponents of arbitration sometimes point to the number of arbitrations as evidence that arbitration does not provide a realistic remedy. Is that a fair measure of arbitration's effectiveness?

No. The contention that a large number of consumer or employee arbitrations is the only proof that arbitration is an effective method of dispute resolution is just as mistaken as assuming that a high number of hospitalizations is the only proof that a health-care system is effective. An effective arbitration system is one that resolves disputes *before* arbitration—just as an effective health-care system forestalls the need for hospitalizations.

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[37] Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 Harv. Negot. L. Rev. 29, 31 (2017); *see also*, *e.g.*, Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 Or. L. Rev. 861, 895 (2004) (same). One commentator who examined 301 arbitrations found that only 3.7% arose from post-dispute arbitration agreements. Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 Tenn. L. Rev. 289, 346 (2012).

The Supreme Court addressed this issue in *AT&T Mobility LLC v. Concepcion*[38] when discussing AT&T's consumer arbitration program. As the Court explained, because AT&T must pay the cost of arbitration and committed itself to "pay claimants a minimum of $7,5000 and twice their attorneys' fees if they obtain an arbitration award greater than AT&T's last settlement offer," AT&T has a powerful incentive to "immediately settle[]" any colorable claim.[39] In other words, customers "would be essentially guarantee[d] to be made whole."[40] Under that system, informal settlements before the filing of an arbitration demand are common and disputes that go all the way to arbitration are relatively rare, because AT&T (and companies with similar provisions) have powerful incentives to resolve claims quickly. For example, AT&T has explained that in a single year, it had provided over $1.3 billion in credits to resolve customer complaints.[41]

8. At the hearing, the view was expressed the companies "get to choose the arbitrator, the rule of law does not necessarily apply, and there is no right to appeal the decision." How do you respond to each of these contentions?

All of these assertions are false, misleading, or both.

First, both parties typically are entitled to participate in choosing the arbitrator. Under existing law, courts can and do set aside any arbitration agreement that unfairly allows one side to pick the arbitrator.[42] That is because the FAA authorizes courts to apply "generally applicable contract defenses"—including "unconscionability"—to arbitration agreements.[43] It is true that the party who drafts the agreement often identifies an arbitration organization to administer the arbitration (such as the AAA or JAMS), but that is not the same thing at all—contrary to the misleading implications of some of arbitration's opponents. Identifying the organization that will administer the arbitration is akin to identifying who will serve as the administrative clerk of a court; it is not the same as picking a judge.

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[38] 563 U.S. 333 (2011).

[39] *Id.* at 351.

[40] *Id.* (internal quotation marks omitted).

[41] *Laster v. T-Mobile USA, Inc.*, 2008 WL 5216255, at *3 (S.D. Cal. Aug. 1, 2008), *aff'd sub nom. Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom. AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011),

[42] *Zaborowski v. MHN Gov't Servs., Inc.*, 601 F. App'x 461, 463-64 (9th Cir. 2014) (affirming denial of motion to compel arbitration under agreement that limited remedies and allowed the company to select the arbitrators).

[43] *Concepcion*, 563 U.S. at 339 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

In addition, it is well settled that arbitrators must follow the same governing law that courts do. In fact, if an arbitrator deliberately disregards applicable law, the FAA authorizes courts to set aside the award as an "exce[ss]" of the arbitrator's "powers."[44] As the Supreme Court has explained, when an "arbitrator strays from" applicable law "and effectively 'dispense[s] his own brand of industrial justice,'" the arbitrator's award is "unenforceable."[45] To be sure, parties might disagree about whether an arbitrator properly interpreted the law or applied the law to the facts correctly. But the same is true of lawyers who lose a decision in court; one side or another often thinks that the judge got it wrong.

Finally, the assertion that there is no right to appeal an arbitrator's decision is overstated. Although judicial review of arbitral awards is limited, the FAA empowers courts to set aside an award in four circumstances: (1) if it was "procured by corruption, fraud, or undue means"; (2) if "there was evident partiality or corruption in the arbitrator[]"; (3) if the arbitrator was "guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent or material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) if the "arbitrators exceeded their powers," such as by manifestly disregarding the law.[46]

9. Many at the hearing referenced the question of "secrecy" in arbitration. Is arbitration truly a secret process? To the extent that arbitration may be shielded from public view, how can Congress best address the confidential nature of any proceedings?

No, arbitration is not a "secret" process. As discussed above (in response to question 1), courts consistently invalidate arbitration agreements that impose any kind of secrecy requirement on individual consumers or employees—the only realistic exception in that context is one-off arbitration agreements with highly-paid, high-ranking executives or similar employees.[47]

Arbitration claimants are free to discuss their claims publicly and to report alleged wrongdoing to law enforcement officials.[48] If an arbitration agreement purported to impose a "gag order," that restriction would almost certainly be invalidated in court.

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[44] 9 U.S.C. § 10(a)(4); *see also*, *e.g.*, *Oxford*

[45] *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (quoting *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

[46] 9 U.S.C. § 10(a).

[47] *See* notes 1-3, *supra*.

[48] *See, e.g.*, Christopher C. Murray, *No Longer Silent: How Accurate are Recent Criticisms of Employment Arbitration*, 36 Alternatives to the High Cost of Litigation 65, 78 (2018).

State laws also require disclosure of arbitration outcomes by arbitral forums such as the AAA,[49] and courts consistently hold that the results of arbitration proceedings may be disclosed by either party.[50]

In short, as a leading law professor explained, "under U.S. law, the privacy of arbitration typically does ***not*** extend to precluding a party's disclosure of the existence of the arbitration or even its outcome. Instead, it means that non-parties can be excluded from the hearing and that the arbitrator and arbitration provider cannot disclose information about the proceeding."[51] Because existing law already fully addresses criticisms of the purportedly "secret" nature of arbitration, congressional action on this point is unnecessary.

10. Professor Gilles testified that "forced arbitration strips us of our legal rights," particularly when class action waivers are present. Specifically, it was claimed that, if individuals cannot bring a class or collective action, employees will be disincentivized to pursue small class-wide claims because "the game isn't worth the candle," and "the employee rationally abandons their claim." How do you respond to that contention?

I disagree, for two reasons. First, there are many claims that employees and consumers have that could not be brought as class actions because they turn on facts specific to the particular individual's situation. In those cases, arbitration *expands*, rather than restricts, employees and consumers' access to justice, by providing them with a cost-effective means of bringing their claim that is simply not available in court.

Second, even for claims that theoretically could be prosecuted as part of class actions, it is simply not true that class actions are the *only* means of pursuing those claims. On the contrary, as Justice Kagan noted in her dissent in the *Italian Colors* case, "non-class options abound" for effectively vindicating legitimate claims in arbitration.[52] Justice Kagan's dissent (in which Justices Ginsburg and Breyer joined) expressly recognized that individualized arbitration enables claimants to vindicate legitimate claims effectively as long as the arbitration agreement

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[49] *E.g.*, Cal. Code Civ. Proc. § 1281.96.

[50] Courts have invalidated on unconscionability grounds arbitration agreement provisions requiring that outcomes be kept confidential. *See* note 1, *supra*; *see also Larsen v. Citibank FSB*, 871 F.3d 1295, 1319 (11th Cir. 2017).

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

[52] *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 251 (2013) (Kagan, J., dissenting).

"provide[s] an alternative mechanism to share, shift, or reduce the necessary costs"—which virtually all arbitration agreements do.[53] Many arbitration provisions allow for some combination of (i) incentive/bonus payments designed to encourage the pursuit of small claims, and (ii) the shifting of expert witness costs and attorneys' fees to defendants when the consumer or employee prevails on his or her claim. And those provisions that don't include these elements permit "informal coordination among individual claimants" to share the same lawyer, expert, or other elements required to prove the claim, which Justice Kagan also found to be sufficient.[54]

11. A question arose during the hearing regarding whether arbitrators need to be trained in the law, but you did not have a full opportunity to respond because of time constraints. What is your full response to that question?

In the context of consumer and most employment arbitrations, arbitrators are trained in the law. The two most commonly used arbitration providers in the country, the AAA and JAMS, both employ arbitrators of the highest caliber, including former judges and accomplished attorneys. The AAA, for example, uses a thorough application process to evaluate arbitrators, selecting only those candidates with substantial expertise and qualifications.[55] There is no basis for suggesting that cases in arbitration are being decided by arbitrators who are unqualified to resolve the dispute.

The one exception is in the distinct arena of labor arbitration where, under certain collective bargaining agreements, some parties traditionally have agreed to have a non-lawyer experienced in the industry decide the dispute. Also, in certain industries, it is common to use non-lawyer specialists to resolve commercial disputes.

But outside those limited exceptions, arbitrators in virtually all consumer and employment arbitrations are trained in the law; they are either lawyers, retired lawyers, or former federal or state judges.

12. At the hearing, it was pointed out that in the Supreme Court's *Concepcion* case, AT&T moved to strike down a statute that permitted class-wide arbitration. It was suggested that there is an inconsistency between employers' purported preference for arbitration, on the one hand, but disfavor of class-wide arbitration, on the other hand. You were unable

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[53] *Id.* at 249.

[54] *Id.* at 250.

[55] AAA, *Application Process for Admittance to the AAA National Roster of Arbtitrators*, https://www.adr.org/sites/default/files/document_repository/application_process_for_admittance_to_the_aaa_national_roster_of_arbitrators.pdf.

to complete your response because of time constraints. What is your full response to this suggestion?

There is no inconsistency between preferring arbitration and rejecting class-wide arbitration. That is because individualized, one-on-one proceedings are a traditional characteristic of arbitration.[56] As the Supreme Court has explained, imposing class-wide procedures on arbitration, "sacrifices the principle advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[57]

In traditional individual arbitration, the parties trade the opportunities for review and procedures of the courtroom for the swiftness and efficiency of arbitration. Class-wide arbitration instead takes the worst features of class-action litigation in court—the expense, burdens, and enormous stakes—and combines them with the lack of plenary appellate review.

Individual arbitration provides a better way of resolving disputes. It avoids the costs and burdens of the class-action system—which has an established track record of failure—while providing consumers and employees who have real disputes with a realistic opportunity to pursue their claims and achieve simple and inexpensive access to justice.

[56] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018).

[57] *Concepcion*, 563 U.S. at 348.