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TESTIMONY BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON ANTI-TRUST, COMMERCIAL, AND ADMINISTRATIVE LAW

## **Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights**

Prof. Myriam Gilles  
Submitted February 9, 2021

Chairman Cicilline, Ranking Member Buck, and distinguished members of the subcommittee:

Thank you for inviting me to participate in this important hearing. My name is Myriam Gilles, and I am a Professor at the Benjamin N. Cardozo School of Law. I have spent sixteen years of my academic career researching and writing on the effects of class-banning forced arbitration provisions on consumers, employees, and other groups, and offer my testimony in support of the Forced Arbitration Injustice Repeal (“FAIR”) Act.

I testified in support of the FAIR Act in 2019 and was gratified to see this Chamber pass that bill on September 20, 2019, giving effect to the strongly held views of a majority of the American public. Americans across the political spectrum believe that the cases of employees, consumers and small businesses should rise or fall based on whether those cases have merit, and not based on the fine print Terms & Conditions that big companies incorporate in their standard form contracts, agreements, or terms and conditions. That is what this legislation about. Forced arbitration is nothing more than a “get out of jail free” card for companies that have enough market power to get employees, consumers and small businesses to sign or click “agree” to their standard form contracts.

I am proud to once again testify in support of this legislation. First, the bill accomplishes precisely what it promises: it eliminates forced arbitration, restoring the rights of millions of Americans to enforce the laws meant to protect them. Second, the data clearly show that this legislative intervention is crucial to stemming the tide of forced arbitration clauses. Today, more than [60 million](#) U.S. workers and untold millions of consumers are subject to these rights-stripping provisions. Workers, for example, are [less likely](#) to bring their

cases in arbitration, less likely to win the cases they do bring, and in the small number of cases they win, tend to be awarded [far lower](#) compensatory awards than they would recover in court. Consumers face similar obstacles: as the [Consumer Financial Protection Bureau](#) reported to Congress, of the tens of millions of American consumers that entered into transactions between 2010-2011, only 52 brought individual arbitrations and *only four* were awarded relief by arbitrators. By contrast, between 2008 and at least thirty-four million consumers of the same universe of companies received over than \$2 billion in cash relief and more than \$600 million in in-kind relief.

None of these data points is particularly surprising. When individual employees or consumers suffer small but discernible and serious injuries, joining a [collective lawsuit](#) to spread litigation costs and equal the playing field is often the only viable path to attaining corporate accountability. Through class and collective actions, citizens have recovered – in the aggregate – [billions](#) of dollars wrongly stolen from workers and consumers and, perhaps most important, the threat of litigation has deterred companies from engaging in wrongful conduct in the future. Class-banning forced arbitration clauses undermine these rights by eliminating the only cost-effective path that many claimants have, which is collective litigation, and by forcing litigants to resolve their cases in a forum with no judge, no jury, and practically no oversight. By furtively imposing these provisions in the small print of job applications, employment contracts, and consumer transactions, corporate executives have written their own rules, [opting out](#) of liability by [shunting](#) all cases against them into a private system of single-file arbitration, where they know most cases will simply be [abandoned](#).

In this moment of partisan factionalism where we seem to agree on little, the vast majority of Americans all across the political spectrum oppose forced arbitration, and [support](#) legislation that would restore rights protected under the 7<sup>th</sup> amendment, as well as countless federal and state laws. In the last Congressional term, this body passed H.R. 1423, the [FAIR Act](#), by a sound majority. The need for legislative action is even more dire today, as forced arbitration clauses have grown more pervasive and audacious.

Accordingly, I offer for your consideration my views on this critical topic. Part I reviews the Supreme Court decisions misinterpreting and vastly expanding the Federal Arbitration Act of 1925 (“FAA”) that have brought about the current crisis in American law. Part II describes how companies have exploited forced arbitration clauses to deny consumers their legal rights, and Part III focuses on the plight of the over 60 million American workers now subject to these rights-stripping provisions. Finally, Part IV briefly sketches the response by some companies when workers or consumers try to bring serial, individual arbitrations – a response that reveals that claim suppression rather than cost-effective dispute resolution is at the heart of this debate.

I.  
THE OMINOUS RISE OF FORCED ARBITRATION

In 2005, I began studying the effects of forced arbitration clauses on consumers, employees and small businesses. That year, I published an article warning that class-banning arbitration provisions could become ubiquitous, blocking citizens' access to judges and juries.<sup>1</sup> Three split decisions by the Supreme Court of the United States brought to life all my dire predictions. In its 2011 decision in *AT&T Mobility v. Concepcion*, a 5-4 Court held that the FAA preempts, not only state law rules that ban arbitration in some category of cases, but also any rule that requires the availability of collective procedures for the resolution of disputes.<sup>2</sup> This misreading of the FAA has forestalled many subsequent attempts by states to regulate arbitration clauses in consumer and employment contracts.<sup>3</sup>

The Court expanded the reach of the FAA in its 2013 divided decision in *American Express v. Italian Colors*.<sup>4</sup> There, a class of small business owners brought an antitrust class action against American Express challenging various anticompetitive practices. The 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.<sup>5</sup> Yet five Justices the Supreme Court enforced Amex's class-banning arbitration clause buried in its merchant service agreement, prohibiting these small businesses from pursuing their cases collectively.<sup>6</sup> 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.<sup>7</sup>

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<sup>1</sup> Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005).

<sup>2</sup> 563 U.S. 333 (2011).

<sup>3</sup> See, e.g., *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012).

<sup>4</sup> 559 U.S. 1103 (2013).

<sup>5</sup> See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-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).

<sup>6</sup> 559 U.S. 1103 (2013).

<sup>7</sup> See Testimony of Alan Carlson, Named Plaintiff in *Italian Colors et al. v. American Express*, 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

Finally, in its May 2018 decision in *Epic Systems v. Lewis*, a 5-4 Court extended this dangerous trend by blocking workers from banding together to redress the full range of workplace legal violations.<sup>8</sup> In *Epic*, employees sought to band together to hold their employers accountable for wage theft -- cases that are impossible to pursue on an individual basis. But a 5-4 Court upheld the class-banning arbitration clauses in their employment contracts, notwithstanding the federally-guaranteed right to “collective action” protected by the National Labor Relations Act.<sup>9</sup> According to the majority’s view, it “makes no difference” whether a plaintiff argues that a forced arbitration clause is “‘illegal’ as a matter of federal statutory law [or] ‘unconscionable’ as a matter of state common law” – incredibly, neither argument is sufficient to overcome a contractual arbitration provision drafted by the defendant employer.<sup>10</sup> Among her last dissents, in *Lamps Plus v. Varela*, Justice Ginsburg recognized that the Court’s misreading of the FAA had reached a critical tipping point, and “urgently” pled for “Congressional correction of the Court’s elevation of the FAA over the rights of employees and consumers to act in concert.”<sup>11</sup>

Justice Ginsburg was right: the Court’s endorsement of class-banning arbitration clauses has strayed far from the original goals of the 1925 statute.<sup>12</sup> In case after case, slim majorities have held

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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.”).

<sup>8</sup> The drafters of the FAA clearly did not intend this statute to reach the claims of workers, as both the text and legislative history make clear. See FAA §1 (“nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce”); see also A Bill To Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Hearing on S. 4213 and S. 4214, 67th Cong. 9-10 (1923) (statement W.H.H. Piatt, American Bar Association) (“It is not intended this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.”).

<sup>9</sup> *Epic Systems* grew out of a decision by the National Labor Relations Board (“NLRB”) that class-banning arbitration clauses violate the National Labor Relations Act’s guarantee of a right to “collective action.” D.R. Horton, 357 N.L.R.B. No. 184, at \* 16 (2012) (holding that the employer’s forced arbitration agreement violated the National Labor Relations Act by leading employees reasonably to believe they cannot file charges with NLRB); see also *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (Oct. 28, 2014), \*6 (reaffirming D.R. Horton). Circuit courts split over whether the NLRB’s ruling was correct. Compare *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) (disagreeing with the NLRB), with *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1159 (7th Cir. 2016) (affirming the NLRB’s logic).

<sup>10</sup> 138 S.Ct. at 1619 (“In fact, this Court has rejected every such effort to date ... with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act.”) (internal citations omitted).

<sup>11</sup> *Lamps Plus v. Varela*, 139 S.Ct. 1407 (2019) (Ginsburg, J., dissenting). The majority in *Lamps Plus* held, illogically, that workers are assumed to have “consented” to individualized arbitration even if their employment contract does not clearly waive the right to join in collective arbitrations.

<sup>12</sup> 9 U.S.C § 2. By my count, since 2010, the Supreme Court has decided seventeen cases interpreting the FAA. See, e.g., *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421 (2017); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014); *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17 (2012); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012); *CompuCredit*

that it does not matter that individual citizens are unable to vindicate their statutory rights in a one-on-one arbitrations – *i.e.*, that countless cases will “slip through the legal system,” leaving serious corporate wrongdoing unaddressed.<sup>13</sup> As Justice Kagan wrote in her blistering dissent in *Amex*, “the nutshell version” of the majority’s approach to the reality that forced arbitration is being employed to suppress cases brought by injured consumers and workers is simply this: “Too darn bad.”<sup>14</sup>

These Supreme Court decisions have enabled companies to suppress legal claims and avoid liability by simply adding a few magic words to their standard-form contracts – knowing full well that most people simply won’t comprehend the magnitude of what they’ve surrendered in the fine print.<sup>15</sup> And corporate America has been paying attention: observers note that, in recent years, companies that had not yet imposed arbitration on their consumer or employees have quickly done so in order to take full advantage of the immunity from liability promised by the Court’s decisions.<sup>16</sup> Forced arbitration clauses now appear in job applications, employee handbooks, nursing home admissions forms, credit card and cell phone bills, insurance contracts, leases, and myriad other “agreements.”<sup>17</sup> Today, nearly every American is subject to a class-banning forced arbitration clause in some aspect of their lives -- and, going forward, we should expect that there will be few transactions and interactions that are not accompanied by these remedy-stripping provisions.

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Corp. v. Greenwood, 565 U.S. 95 (2012); KPMG LLP v. Cocchi, 565 U.S. 18 (2011); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Granite Rock Co. v. Int’l Bhd. of Teamsters, 561 U.S. 287 (2010); Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63 (2010); Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 559 U.S. 662 (2010); New Prime v. Oliveira, 138 S.Ct. 1164 (Jan. 16, 2019); Lamps Plus v. Varela, 139 S.Ct. 1407 (2019); Henry Schein, Inc. v. Archer & White Sales Co., 139 S.Ct. 534 (2019).

<sup>13</sup> *Concepcion*, 563 U.S. at 341.

<sup>14</sup> *Amex*, 559 U.S. at 1111 (Kagan, J., dissenting).

<sup>15</sup> CONSUMER FINANCIAL PROTECTION BUREAU, [ARBITRATION STUDY: REPORT TO CONGRESS](#) (2015) at pp. 19-24 (reporting that “less than 7% of consumers whose credit card agreements included pre-dispute arbitration clauses stated that they could not sue their credit card issuers in court” and most consumers bound to these clauses “wrongly believe that they can participate in class actions.”). See also Amy J. Schmitz, “*Consideration of ‘Contracting Culture’ in Enforcing Arbitration Provisions*,” 81 ST. JOHN’S L. REV. 123, 160 (2007) (when researcher pointed consumers to a class-banning arbitration clause and asked them to read it, only “approximately 13% understood that the contract they had just been shown prohibited them from participating in a class action lawsuit”).

<sup>16</sup> Jess Bravin, [Supreme Court Imposes Limits on Workers in Arbitration Cases](#), WALL ST. J., May 21, 2018 (reporting that lawyers expect that companies will now impose forced arbitration clauses “on millions more” workers, and that the *Epic Systems* decision could affect “worker claims against Amazon, Grubhub, Lyft and Uber,” among other large companies).

<sup>17</sup> 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.”); Jean Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309 (2015) (reporting that Amazon, AT&T, Comcast, Wells Fargo, Ticketmaster, Dropbox, Goldman Sachs, P.F. Chang’s, and Uber are just some of the many companies that have modified their contracts with consumers or workers to include these terms).

## II. RESTORING THE RIGHTS AND REPAIRING THE TRUST OF CONSUMERS

Over the past decade, class-banning forced arbitration clauses have permeated every corner of the consumer universe. Back in 2015, the Consumer Financial Protection Bureau (“CFPB”) reported to Congress that nearly all mobile wireless providers imposed forced arbitration on their subscribers – meaning that nearly 290 million cell phone users were barred from going to court.<sup>18</sup> The same was true for the vast majority of credit card users, checking account holders, payday borrowers, student loan recipients, and users of countless other consumer financial products.<sup>19</sup>

Today, the situation is significantly worse. One study found that 81 of the Fortune 100 U.S. companies use forced arbitration in connection with consumer transactions, virtually all of which ban class actions.<sup>20</sup> Similarly, Consumer Reports examined the top-selling brands in the 10 product categories that received the most traffic on its website and, of the 117 brand/category combinations examined, 60% foist arbitration clauses on consumers.<sup>21</sup> Of the most popular products on the Consumer Reports website, over two-thirds came with forced arbitration as a term of purchase. Nor should we expect this trend to abate as more American consumers shop online: today, over 60% of U.S. retail e-commerce sales are subject to forced arbitration, and that number is on the rise.<sup>22</sup> Indeed, online transactional activity increases the risks of identity theft and data breaches; but even in this instance, forced arbitration clauses blocked consumer lawsuits against companies that negligently exposed the personal information of millions of Americans.<sup>23</sup>

Given the ubiquity of these provisions, one might expect some significant number of consumers to arbitrate their disputes. But the opposite is true: only a tiny percentage of consumers file arbitrations annually.<sup>24</sup> In 2018, there were an estimated 826,537,000 consumer arbitration

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<sup>18</sup> See CFPB ARBITRATION STUDY at 22. See also Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REF. 871, 882–84 (2008) (reviewing internet, phone, and data service contracts finding that 75% contained mandatory arbitration clauses and 80% contained class action bans).

<sup>19</sup> *Id.*

<sup>20</sup> Imre Szalai, [The Prevalence of Consumer Arbitration Agreements by America’s Top Companies](#), 52 U.C. DAVIS L. REV. 233 (2019).

<sup>21</sup> Scott Medintz, [Forced Arbitration: A Clause for Concern](#), CONSUMER REPORTS (2020).

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., *Orman v. Citigroup*, 2012 WL 4039850 (S.D.N.Y. 2012) (dismissing class action alleging that Citigroup failed to “adequately secure their computer systems against intrusion,” resulting in data breach and identity theft, because of class-banning arbitration clause). See also Diane Hembree, [Consumer Backlash Spurs Equifax to Drop ‘Ripoff Clause’ in Offer to Security Hack Victims](#), FORBES, Sept. 9, 2017 (reporting that Equifax tried to limit its exposure by offering data breach victims “free” credit monitoring in exchange for agreeing to an arbitration clause containing a class action ban).

<sup>24</sup> See, e.g., CFPB ARBITRATION STUDY (finding that from 2010 to 2011, only a handful of consumers who filed individual arbitrations were awarded affirmative relief – while nearly 10 million consumers were represented in comparable class actions during the same period); 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) (reporting 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).

provisions in force. Yet, the two largest arbitration providers (AAA and JAMS) recorded an average of only 6,000 consumer arbitrations per year.<sup>25</sup> Even data provided by the AAA reveals that, in the first quarter of 2019, it resolved only 895 consumer arbitrations for the thousands of companies for which it is a designated arbitral provider.<sup>26</sup> Worse yet, consumers who individually brave these arbitral waters are unlikely to prevail due to the well-documented repeat-player bias that corporate clients enjoy in arbitration.<sup>27</sup> Of the 30,000 AAA/JAMS consumer arbitrations between 2014-18, only 6.3% resulted in consumers winning a monetary award.<sup>28</sup>

One reason consumers don't arbitrate their disputes is that it would be too costly to do so: 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. Rational consumers are unwilling to take on the cost and hassle of an individual arbitration to recover de minimis damages, nor can they find attorneys to represent them.<sup>29</sup> Companies are banking on this rational response: for example, in a consumer case against Fitbit alleging it 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 litigate a claim over a \$160 device.<sup>30</sup>

But these cases can involve much higher stakes and far more egregious conduct. Take, for example, the recent trading frenzy involving shares of video game retailer, GameStop. An army of traders using the Robinhood trading app drove a meteoric rise in GameStop's stock price and upending the short-selling strategy of some hedge funds and institutional investors.<sup>31</sup> Just when trading was reaching record highs, Robinhood – whose website promises to “democratize finance”

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<sup>25</sup> See Szalai, *supra* note 16.

<sup>26</sup> See Alison Frankel, [Consumer Arbitration is on the Rise -- But the Numbers are Still Puny](#), REUTERS, May 9, 2019.

<sup>27</sup> See, e.g., CFPB ARBITRATION STUDY, at 41-45 (reporting that businesses won relief in 93% of the business-initiated cases in which arbitrators reached a decision on the merits and received ninety-eight cents for every dollar they had claimed; in disputes initiated by consumers, by contrast, arbitrators provided relief to consumers in 27% of cases and awarded them an average of thirteen cents for every dollar claimed); whole, consumers won an average of thirteen cents for every dollar); Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2356-57 (2012) (discussing how “selection bias” of the stronger party in a mandatory arbitration setting may prejudice the weaker party by selecting favorable arbitrators or arbitration groups); Katherine V.W. Stone and Alexander J.S. Colvin, [The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights](#), (Economic Policy Institute 2015) (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 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 appeared before the same arbitrator 25 times, the 26th employee only had a 4.5% chance of winning).

<sup>28</sup> American Association for Justice, [The Truth About Forced Arbitration](#) (2019).

<sup>29</sup> *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?”); see also *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.”).

<sup>30</sup> See Alison Frankel, [Fitbit Lawyers Reveal “Ugly Truth” About Arbitration](#), REUTERS, June 4, 2018.

<sup>31</sup> Juliette Chung, [Short Bets Pummel Hot Hedge Fund Melvin Capital](#), WALL ST. JOURNAL, Jan. 22, 2021.

and “make trading accessible” to everyone – halted trading of GameStop on its app.<sup>32</sup> Robinhood claims the stoppage was necessary to raise enough capital to cover certain clearing requirements associated with the trades, but many of its users believe the company was merely giving hedge funds and other large institutional investors time to fix their positions before suffering greater losses. Multiple legal actions have been filed against Robinhood. In one, injured investors allege that, by halting trading “for no legitimate reason,” the company “purposefully and knowingly [...] manipulate[d] the market for the benefit of people and financial institutions who were not Robinhood’s customers.”<sup>33</sup> But the arguments made by individual investors may never see the light of day because, buried deep in Robinhood’s online, click-through “terms and conditions” agreement is a forced arbitration provision that prevents individual investors’ cases from being heard in court and all but ensures that thousands of individuals will never be able to enforce their rights.<sup>34</sup> Robinhood is just the latest example of a company using forced arbitration to immunize itself from legal accountability to its consumers, and in so doing, rendering the laws enacted by this body and its state counterparts worthless.

### III.

#### IMPROVING CONDITIONS FOR AMERICAN WORKERS

In recent years, thousands of companies have imposed class-banning arbitration clauses on their employees, silencing aggrieved workers and eliminating corporate accountability for systemic workplace violations.<sup>35</sup> In 2018, the study by the Economic Policy Institute estimated that 56.2% of private-sector, non-union workers – nearly 60.1 million workers in all – were bound to forced arbitration clauses.<sup>36</sup> Today, economists project that by 2024, more than 80% of private-sector non-union workers will be subject to forced arbitration and class/collective-action waivers.<sup>37</sup>

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<sup>32</sup> See, e.g., Marcia Brown, [How the Supreme Court Protects Robinhood](#), THE AMERICAN PROSPECT, Feb. 2, 2021.

<sup>33</sup> Nelson v. Robinhood Financial LLC et al., No. 21-cv-00777 (S.D.N.Y., Jan. 28, 2021).

<sup>34</sup> Robinhood Financial, LLC & Robinhood Securities, LLC Customer [Agreement](#) at Section 38 (effective as of June 22, 2020) (“By signing an arbitration agreement, the parties agree as follows: (1) All parties to this Agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed.”). Under the applicable FINRA arbitration regime, class actions may be exempted from the arbitration requirement. However, the class device is arguably not realistic in a case where some investors benefited from the defendants actions (e.g. because they would only have purchased more stock at the top of the bubble) and others were harmed.

<sup>35</sup> See Lauren Weber, [More Companies Block Employees From Filing Suits](#), WALL ST. J., Mar. 31, 2015 (reporting that CVS, Kmart, Nordstrom, and Halliburton are “among the largest employers that require or ask employees to waive their rights to sue as a class”); Kriston Capps, [Sorry: You Still Can’t Sue Your Employer](#), CITYLAB, July 11, 2017 (reporting that Wells Fargo, Citibank, Comcast, AT&T, Time-Warner Cable, Olive Garden, T.G.I. Friday’s, Applebee’s, Macy’s, Target, Amazon, Uber, and Lyft all impose arbitration and class action bans in employment contracts).

<sup>36</sup> A.S. Colvin, Economic Policy Institute, [The Growing Use of Mandatory Arbitration](#) (2018). See also CARLTON FIELDS 2015 [CLASS ACTION SURVEY](#), available at (finding that the percentage of companies using arbitration clauses to preclude employment class actions jumped from 16.1% in 2012 to 42.7% and that the number of employment class action suits filed decreased precipitously between 2011 and 2014).

<sup>37</sup> Kate Hamaji et al., Center for Popular Democracy & Economic Policy Institute, [Unchecked Corporate Power: Forced Arbitration, The Enforcement crisis, and How Workers are Fighting Back](#) (2019).



Disturbingly, the costs of forced arbitration are disproportionately borne by lower-wage workers and those working in critical, frontline jobs (such as education and healthcare) that are largely comprised of women and African-American workers.<sup>38</sup> One study estimates that low-wage workers (those paid \$13 or less per hour) suffered \$12.6 billion in wage theft in 2019 — but because the vast majority of these estimated 6.13 million workers are subject to class-banning forced arbitration, they can't access the courts to resolve these disputes.<sup>39</sup> So, too, do these provisions enable companies to cover-up widespread workplace sexual misconduct, protecting serial harassers.<sup>40</sup>

Not only have we witnessed an unprecedented rise in employer-drafted arbitration clauses, fueled by the Supreme Court's decision in *Epic Systems*, but so too have these clauses become increasingly draconian. A typical arbitration clause today requires workers to resolve all disputes in individual private arbitration, including payment of wages and benefits, provision of breaks and rest periods, rights in termination, and prohibitions against discrimination or harassment. But many companies go further, explicitly highlighting federal statutes that they are denying their workers the right to enforce in court — listing, for example, that alleged violations of the Civil Rights Act of 1964, the Family Medical Leave Act, the American with Disabilities Act, and the Age Discrimination in Employment Act can only be resolved in private, one-on-one arbitration. Others preclude workers from bringing private attorney general claims under state employment protection laws.<sup>41</sup>

Yet, despite the large chunk of the U.S. workforce bound to individually arbitrate their disputes, study after study shows that few workers initiate arbitrations.<sup>42</sup> An EPI study estimated that only 1 in 10,400 workers subject to these provisions has filed a claim in arbitration — putting a lie to the claim that arbitration is preferable.<sup>43</sup> The remaining workers with potentially valid cases — somewhere between 315,000 to 722,000 each year — are left to suffer in silence, unwilling to shoulder the expense of individual arbitration and unable to be heard by a judge and jury.<sup>44</sup> One legal scholar estimates that, as a result of the unprecedented implementation of class-banning arbitration clauses, 98% of employment cases that would otherwise be brought in some forum are abandoned.<sup>45</sup> And when employees do bring individual arbitrations, they are far less likely to succeed against repeat-player employers: of the 11,114 AAA/JAMS employer arbitrations between 2014-18, only 2.5% of

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<sup>38</sup> Colvin, *supra* note 33 (estimating that 57.6% of working women, 59.1% of African Americans, and 54.3% of Hispanic workers are subject to forced arbitration); *see also* Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1542 (2016) (discussing the claim-suppressing effects of forced arbitration clauses and class action bans low-income workers).

<sup>39</sup> Hugh Baran, [Forced Arbitration Enabled Employers to Steal \\$12.6 Billion From Workers In Low-Paid Jobs in 2019](#) (Nat'l Employment Law Project 2020).

<sup>40</sup> *See, e.g.*, Emily Martin, [Forced Arbitration Protects Sexual Predators and Corporate Wrongdoing](#), CONSUMER LAW & POLICY BLOG, Oct. 23, 2017; Drew Harwell, [Sterling Discrimination Case Highlights Differences Between Arbitration, Litigation](#), WASH. POST, March 1, 2017.

<sup>41</sup> *See* Myriam Gilles & Gary Friedman, [The New Qui Tam: A Model for the Enforcement of Group Rights in a Hostile Era](#), 98 TEX. L. REV. 489 (2020).

<sup>42</sup> Colvin, *supra* note 33.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Cynthia Estlund, [The Black Hole of Mandatory Arbitration](#), 96 N.C. L. REV. 679 (2018).

cases resulted in an employee monetary award (that was not outweighed by an even larger employer award).<sup>46</sup>

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The damage caused by class-banning forced arbitration clauses extends far beyond individual consumers and employees: we are *all* harmed when corporations escape accountability and the cases of individuals are silenced. For one, forced arbitration keeps crucial cases of worker protection and consumer rip-offs secret and largely out of public view.<sup>47</sup> A key characteristic of most forced arbitration clauses is that the proceedings and decisions are confidential – i.e., arbitrators hear disputes behind closed doors and render decisions without being bound to follow legal precedents and often without publishing a written decision that explains their reasoning.<sup>48</sup> This culture of secrecy prevents consumers and employees who are having a dispute from learning whether others have experienced a similar problem before and how that problem was resolved. It also leads to arbitrary and inconsistent results in the arbitral forum because arbitrators, unlike judges, are not required to follow precedents created by earlier-decided cases with similar facts. This directly undermines the principles that are central to the rule of law, such as *stare decisis* and the development of legal precedents.<sup>49</sup> By forcing disputes into hermetically-sealed, secret proceedings, companies deny all citizens the transparency, openness and accountability necessary for the operation of a fair and democratic civil justice system.<sup>50</sup> And, of critical importance to this lawmaking body, forced arbitration undermines law enforcement and deterrence because, once blocked from going to court as a group, most people drop their cases entirely. If Congress passes laws that can't be enforced in the real world, what good are those laws?

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<sup>46</sup> AAJ, [The Truth About Forced Arbitration](#), *supra* note 25.

<sup>47</sup> A particularly notorious example is the fraud committed by Wells Fargo employees in 2017, which effected nearly 3.5 million customers -- some of whom are still trying to get their money back and repair their credit. Injured customers began suing the bank for opening fake accounts as far back as 2013, but these 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.

<sup>48</sup> *See, e.g.*, Myriam Gilles, [The Day Doctrine Died: Private Arbitration and the End of Law](#), 2016 U. ILL. L. REV. 371 (2016).

<sup>49</sup> *See id.*; *see also* Lillian Howan, *The Prospective Effect of Arbitration*, 7 BERKELEY J. EMP. & LAB. L. 60, 62 (1985) (“In contrast to the judicial doctrine of *stare decisis*, an arbitrator’s interpretation of the contractual relation is not technically binding on a future arbitrator. Instead, the arbitrator must exercise independent and impartial judgment in each case.”).

<sup>50</sup> *See* AAA CONSUMER DUE PROCESS PROTOCOL, Principle 12.2 (arbitrator must “maintain the privacy of the hearing to the extent permitted by applicable law”); AAA Commercial Rule 25 (directing arbitrators to “maintain the privacy of the hearings unless the law provides to the contrary”). *See also* Michelle Andrews, [Signing a Mandatory Arbitration Agreement With a Nursing Home Can Be Troublesome](#), WASH. POST., Sept. 17, 2012 (reporting that nursing home arbitration hearings “are conducted in private and [these] proceedings and materials are often protected by confidentiality rules”).

Despite these collective harms, large corporations and lobbying groups like the Chamber of Commerce have spent over a decade advocating for forced arbitration on the grounds that it is “better, cheaper, faster” for ordinary Americans.<sup>51</sup> As the next section reveals, these arguments have been proven false as many big-name companies have recently sought to evade their own unilaterally-imposed arbitration provisions.

#### IV.

#### THE PROOF IS IN: COMPANIES DO NOT WANT TO ARBITRATE DISPUTES

Class-banning forced arbitration clauses are not designed to achieve fair, expeditious or cost-effective resolutions. And proof is in the pudding, or rather, is visible in the dodginess of companies faced with large numbers of costly individual arbitrations.<sup>52</sup> For example, in 2015, a group of Chipotle employees alleged their employer had violated the wage-and-hour provisions of the Fair Labor Standards Act (“FLSA”).<sup>53</sup> Chipotle sought to enforce the class-banning arbitration clauses buried in the fine print of its online employee “welcome pack” – knowing that workers with backpay claims ranging from about \$100 to \$3000 would be unlikely to expend the resources filing an individual claim. The company won its motion to compel arbitration, but the plaintiffs’ lawyers then did something unexpected: instead of dropping these cases, they began filing individual arbitrations on behalf of injured employees. Chipotle soon found itself “facing thousands of individual arbitration cases spread across the country, almost all the expenses of which it may have to shoulder itself – potentially tens of thousands of dollars per case.”<sup>54</sup> While “thousands of individual arbitrations” is precisely what Chipotle’s arbitration clause invites, the company balked at the expense and time involved: it returned to court and pleaded with the federal judge to suspend

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<sup>51</sup> See, e.g. Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 91-93 (asserting that adhesion agreements to arbitrate are fair in that they allow companies to pass on savings in costs from standard forms to their customers and employees); Archis Parasharami, [Testimony before Senate Committee on the Judiciary](#), Dec. 17, 2013 (“Arbitration before a fair, neutral decision-maker leads to outcomes for consumers and individuals that are comparable or superior to the alternative—litigation in court—and that are achieved faster and at lower expense.”)

<sup>52</sup> As background, most forced arbitration clauses delegate the AAA or JAMS as the arbitral provider. These entities, in turn, have promulgated rules governing individual consumer arbitrations, and recognizing that the costs associated with pursuing arbitration could discourage individual plaintiffs from filing claims, have imposed higher arbitral fees be paid by corporate defendants than individual plaintiffs. See, e.g., AAA Consumer Arbitration [Rules](#), Costs of Arbitration, at 33 (imposing \$200 filing fee upon individual claimant and total of \$3,200 in fees to be paid by Business-respondent).

<sup>53</sup> *Turner v. Chipotle Mexican Grill, Inc.*, 123 F.Supp.3d 1300 (D. Co. 2015). A federal district judge in Colorado initially allowed 2,814 employees to proceed in a collective action, but while the action was pending, the Supreme Court issued its decision in *Epic Systems v. Lewis* upholding the legality of arbitration clauses that prohibit collective employment actions. Accordingly, the judge dismissed the cases brought by employees who had previously “agreed” to resolve their disputes through arbitration and granted defendant Chipotle’s motion to compel individual arbitration of these claims. See Dave Jamieson, [The Supreme Court Just Helped Chipotle Boot 2,814 Workers From a Wage Theft Lawsuit](#), HUFFINGTON POST, Aug. 10, 2018. More than 7,000 employees who were not required to sign mandatory arbitration agreements remained in the federal court opt-in case.

<sup>54</sup> Michael Hiltzik, [Chipotle May Have Outsmarted Itself by Blocking Thousands of Employee Lawsuits Over Wage Theft](#), LOS ANGELES TIMES, Jan. 4, 2019.

the arbitral filings and disqualify plaintiffs' counsel.<sup>55</sup> The judge denied both motions, chastising Chipotle for its "attempts to delay and obfuscate" the workers' claims.<sup>56</sup>

Executives at Uber faced a similar crisis in the wake of serial arbitrations brought against the ride-sharing company by 12,501 individual drivers seeking to be classified as employees instead of independent contractors.<sup>57</sup> Uber was so "overwhelmed" by the prospect of these individual arbitrations that, according to its designated arbitral provider, JAMS, the company initially refused to pay its share of the filing fees in an effort to stem the tide.<sup>58</sup> When that failed, Uber (in the height of hypocrisy) tried to argue that some issues were common across the cases and should therefore be decided in a consolidated proceeding – despite the fact that its own arbitration clause prevents *any* consolidation of claims.<sup>59</sup> And when that gambit failed -- and after calculating that it would cost more to defend itself in individual arbitrations -- Uber ultimately settled the drivers' cases en masse.

Similar efforts by plaintiffs' lawyers to bring mass, individual arbitrations have plagued Postmates and DoorDash.<sup>60</sup> In the case of DoorDash thousands of couriers filed individual arbitrations with the AAA, which informed the company that it owed about \$12 million in nonrefundable fees to launch its workers' cases. Like Uber, DoorDash ran to court for help, but Northern District of California Judge William Alsup was unsympathetic: "Faced with having to actually honor its side of the bargain, DoorDash now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration."<sup>61</sup> Consumers too have filed arbitrations en masse when blocked from going to court.<sup>62</sup> But, lest we grow confident that en masse arbitrations are the wave of the future, large corporate actors and their savvy defense counsel are already finding ways to avoid their exposure,

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<sup>55</sup> Dave Jamieson, [Chipotle's Mandatory Arbitration Agreements Are Backfiring Spectacularly](#), HUFFINGTON POST, Dec. 20, 2018.

<sup>56</sup> Turner et al. v. Chipotle Mexican Grill, Inc., No. 1:14-cv-02612 (D. Co. 2018).

<sup>57</sup> Abadilla v. Uber Techs., No. 18-cv-7343-EMC (N.D. Cal. Dec. 5, 2018) (asserting that more than twelve thousand individual arbitration demands have been filed against Uber after the Ninth Circuit determined that Uber drivers were required to arbitrate, and that little progress has been made in arbitrating those claims).

<sup>58</sup> Alison Frankel, [JAMS to Uber: Our Rules and Your Contracts Demand Individual Arbitrations](#), REUTERS, Jan. 25, 2019 (quoting JAMS notice to Uber that "[w]hile it is not our preference to force the parties to litigate these issues seriatim, our policies and procedures, absent party agreement otherwise, require that we collect a filing fee in each case to be pursued").

<sup>59</sup> *Id.*

<sup>60</sup> See, e.g., Adams v. Postmates, Inc., 414 F. Supp. 3d 1246 (N.D. Cal. 2019); Abernathy v. DoorDash, Inc., No. C 19-07545 WHA, 2020 WL 619785 (N.D. Cal. Feb. 10, 2020).

<sup>61</sup> *Id.* ("This hypocrisy will not be blessed.")

<sup>62</sup> See, e.g., Alison Frankel, [FanDuel Wants NY State Court to Shut Down Mass Consumer Arbitration](#), REUTERS, Jan. 14, 2020.

rewriting contractual provisions to designate different arbitration providers that are even more friendly to corporate interests<sup>63</sup> or unilaterally terminating contracts containing forced arbitration.<sup>64</sup>

The resistance by Chipotle, Uber, DoorDash and other companies to individually arbitrating these cases — after unilaterally forcing these provisions on their workers and consumers — makes clear that their alleged preference for arbitration was never about fairness and efficiency, but about suppressing legal claims and avoiding accountability at all costs. This stunning hypocrisy underscores the need for immediate legislative action. The Supreme Court has made plain that it will continue to “rigorously enforce” all the remedy-stripping terms that private companies insert in their arbitration clauses — never mind the consequences — unless the FAA’s mandate is “overridden by congressional command.”<sup>65</sup> Only this body can act to remedy the obvious injustice of class-banning forced arbitration.

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

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<sup>63</sup> See Amir Alimehri, [The Table-Turning Rise of Mass Arbitration](#), Lowey Dannenberg, Mar. 30, 2020 (reporting that DoorDash’s counsel, Gibson Dunn has worked with the International Institute for Conflict Prevention & Resolution “to develop a mass arbitration system that would be friendly to corporations” and DoorDash has now “changed its terms of service to require couriers to agree to arbitrate all disputes using the new CPR rules, instead of the AAA rules that would require DoorDash to pay a larger share of fees”).

<sup>64</sup> See Alison Frankel, [Cbeeg Tries New Way to Avert Mass Arbitration: Cancel Users’ Contracts](#), REUTERS, July 2, 2020.

<sup>65</sup> *American Express*, 133 S.Ct. at 2309, citing *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 668–669 (2012). See also Gilles, 104 MICH. L. REV. at 395 (“[T]he Supreme Court’s arbitration jurisprudence over the past thirty years have evinced an incredibly expansive view of the FAA, and while the full import of this national policy favoring arbitration has been criticized by many — including members of the Court itself — there is no reason to believe the Court will swing back to a more nuanced interpretation of the FAA.”).