
CONGRESSIONAL TESTIMONY

**“Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment
in the Shadows”**

**Testimony before
House Committee on the Judiciary**

Chairman Jerrold Nadler

United States House of Representatives

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Statement of Sarah Parshall Perry, legal fellow
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Mr. Chairman Nadler, ranking member Jordan, and members of the committee:

Thank you for giving me the opportunity to appear before you today. I commend the committee for holding a hearing on this important topic.

My name is Sarah Parshall Perry. I am a Legal Fellow in the Meese Center for Legal & Judicial Studies at the Heritage Foundation. I am also former senior counsel to the Assistant Secretary for Civil Rights at the Department of Education, former in-house counsel and business director for a small Maryland company, and a former plaintiff's lawyer specializing in employment discrimination law and Title VII, among others.

Today's hearing is--to quote the great Yogi Berra--*déjà vu* all over again.

I. The Supreme Court Has Repeatedly Enforced the Federal Arbitration Act (FAA) Against Challenges.

Since the 1980's, the liberal leadership of this and the Upper Chamber has sought to curtail the protections of the Federal Arbitration Act (FAA)¹ of 1925, a law designed to recognize arbitration as a lawful method of dispute resolution and ensure that state and federal courts enforce and uphold arbitration agreements to the same extent as any other type of contract.

Congress's aims in enacting the FAA included redirecting employment disputes away from congested court dockets and towards arbitrators who specialize in labor and employment law. So congested are these court dockets, in fact, that between 2019 and 2020, the number of civil filings in federal district and circuit courts increased by more than 40%.² For year ending 2020, filings in federal circuit courts of appeal were up 5%, filings of civil cases in the U.S. district courts were up 16%, and pretrial services cases activated in the past 12 months increased 5%.³

Judicial delay is one of the largest problems in our legal system, for as scholars have pointed out: "In the last several decades, the state and federal courts have seen increasing caseloads and have resolved disputes at slower and slower rates. . . the median civil case now takes over seven months to be resolved, and many cases take more than three years to reach a resolution."⁴ Claims that arbitration somehow removes an employee's right to a jury trial are therefore exaggerated given how few civil cases ever reach a jury. By contrast, employees in arbitration are much more likely than plaintiffs in court to have their story heard in person by a neutral factfinder. Virtually "every study considering the issue has concluded that results in arbitration are far swifter than those in litigation."⁵

Arbitration is the most common process for American workers' rights—in both the public and private sector—to be adjudicated and enforced. Time and again, the Supreme Court has interpreted section

¹ Current at: 9 U.S.C. §§ 1 *et seq.* (2015).

² United States Courts, Statistical Tables for the Federal Judiciary, June 2020.

³ United States Courts, Federal Judicial Caseload Statistics, March 2020.

⁴ Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2352 (2012).

⁵ S. 1782: *The Arbitration Fairness Act of 2007: Hearing of the Subcomm. on the Constitution, S. Comm. on the Judiciary*, 110th Cong. (Dec. 12, 2007) (statement of Peter Rutledge).

two of the FAA to be a substantive commitment to a federal pro-arbitration policy,⁶ and in 1983, the Supreme Court, led by Chief Justice Warren Burger, declared that the FAA evinces a “liberal federal policy favoring arbitration.”⁷

Soon thereafter, the Court ruled that the FAA requires enforcement of agreements to arbitrate not only contract claims, but statutory claims as well.⁸ In 1991, the Court—in a decision directly applicable to today's hearing—concluded⁹ that the FAA requires enforcement of agreements to arbitrate claims arising under an antidiscrimination statute.¹⁰ As recently as 2018, the Supreme Court in *Epic Systems Corp. v. Lewis*¹¹ clarified that the FAA pre-empted the National Labor Relations Act.¹² In 2019, in its most recent pronouncement on the continued viability of the FAA, the Court in *New Prime Inc. v. Oliveira*¹³ unanimously ruled that when contracts include mandatory arbitration clauses, employees still have the right to seek court oversight to determine if their employment falls within the exceptions in section one of the FAA related to employees involved in interstate commerce.¹⁴ And just yesterday

⁶ See, e.g.: *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 341–43 (2011) (In evaluating a California Supreme Court decision holding that class action waivers in adhesive consumer contracts were unconscionable unless the party seeking arbitration demonstrated that bilateral arbitration was an adequate substitute for the deterrent effects of class actions, Justice Antonin Scalia's majority opinion clarified that: “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA”).

⁷ *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (involving an arbitration agreement between a hospital and a construction contractor).

⁸ See e.g., *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987).

⁹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

¹⁰ In *Gilmer*, the anti-discrimination provision at issue was the Age Discrimination in Employment Act (ADEA) of 1967.

¹¹ *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018).

¹² While criticized as having dealt a blow to the “me too” movement and transparency of sexual harassment claims (see, e.g., Michelle Gilman, *Supreme Court ruling against class action lawsuits is a blow for workers — and #MeToo*, SALON (May 22, 2018), https://www.salon.com/2018/05/22/supreme-court-ruling-against-class-action-lawsuits-is-a-blow-for-workers-and-metoo_partner/), the Court in *Epic Systems Corp. v. Lewis* addressed solely whether an employee seeking to bring a class action based on unlawful wage and hour violations was required to adhere by the terms of his arbitration agreement under the FAA, or whether class action lawsuits or group arbitration were available to claimants under the National Labor Relations Act (NLRA). The Court held that in the FAA, Congress had instructed that arbitration agreements providing for individualized proceedings must be enforced, and neither the FAA's saving clause nor the NLRA suggested otherwise.

Indeed, the hysteria surrounding the #MeToo movement, and particularly the sturm und drang that followed the Supreme Court's opinion in *Lewis* does a tremendous disservice to the campaign of awareness of an enduring culture of sexual harassment in the upper echelons of power. The mischaracterization of the Court's holding and its purportedly direct relationship to women in the workforce, as well as the blame shifting away from Congress as the source of any problem that might stem from the Federal Arbitration Act, does more to damage the #MeToo movement than the judicial restraint exhibited by the justices in the majority in the Court's 2018 opinion. Adherence to longstanding rules of statutory interpretation benefit employees, consumers, and businesses of all stripes. Law and judicial restraint from policymaking are not enemies of justice and democracy, but rather their fundamental prerequisites.

¹³ *New Prime Inc. v. Oliveira*, 139 S.Ct. 532 (2019). In *New Prime*, the Court extended judicial review protections on interstate commerce exceptions to the FAA to not only employees, but to independent contractors as well. Particularly noteworthy is the fact that the Court, comprised of a conservative majority often criticized for its restrictive view of the FAA, chose to interpret the law in a way that expands worker's rights. See e.g., *US Supreme Court Unanimously Rules in Favor of Workers, Holding Trucking Company's Arbitration Agreement Exempt From Federal Arbitration Act*, IX NATL. L.REV. VOLUME 15 (January 2019), <https://www.natlawreview.com/article/us-supreme-court-unanimously-rules-favor-workers-holding-trucking-company-s>.

¹⁴ In 1995, the Court analyzed the FAA's “involving commerce” language in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), concluding that it covers more than “only persons or activities within the flow of interstate commerce,” and that the phrase is broad enough to reflect Congress' intent to exercise to the fullest its Commerce Clause

the Supreme Court granted cert. in *Morgan v. Sundance, Inc.*¹⁵ to determine whether an arbitration-specific requirement that the proponent of a contractual waiver defense prove prejudice violates the Supreme Court’s instruction¹⁶ that lower courts must “place arbitration agreements on an equal footing with other contracts”.

In its body of FAA case law, the Supreme Court routinely assumes that litigation and arbitration are equally acceptable methods for resolving disputes.¹⁷ This assumption is well founded, as approximately 1% percent of all civil cases filed in federal court are resolved by trial — the jury trial disposition rate is approximately 0.7%, and the bench trial disposition rate is even lower.¹⁸ Employees subject to arbitration provisions in their employment contracts therefore, are in a much better place through arbitration, with the opportunity to participate in a faster, more efficient, and more thorough adjudication of their claims than they would be in civil litigation, where civil trials have been rendered all but extinct.

II. Old, Repetitive Anti-arbitration Talking Points Are Unsupported by the Evidence

Despite a lengthy history of jurisprudence supporting the preeminence, enduring application, and pro-arbitration presumptions of the FAA, attacks on the law and the arbitration process generally have abounded on Capitol Hill for years. Critics recycle the same talking points, claiming that arbitration is unfair, biased in favor of businesses, and provides inadequate remedies. Detractors also claim inaccurately that the FAA was meant to apply only to disputes between commercial entities¹⁹ and has therefore been misinterpreted by the Supreme Court, contrary to congressional intent.

Anti-Arbitration Legislation

These criticisms have launched a torrent of litigation designed to gut the long-standing FAA through attempts at piecemeal eliminations of its purpose and effect. Among just a few of these bills:

- (1) the Arbitration Fairness Act²⁰ (introduced in the 112th and the 115th Congress, which would have rendered pre-dispute arbitration agreements unenforceable and invalid in employment, consumer, antitrust, and civil rights disputes, and specifying that courts--not arbitrators--could determine the validity and enforceability of agreements to arbitrate);

powers—extending to both direct and indirect connections to interstate commerce, not just what the parties intended at the time of agreement.

¹⁵ *Morgan v. Sundance, Inc.*, No. 21-328, ___ U.S. ___ (2011).

¹⁶ In: *AT&T Mobility LLC*, *supra* note 6.

¹⁷ David Horton, *Clause Construction: A Glimpse into Judicial and Arbitral Decision-Making*, 68 DUKE L.J. 1323, 1329 & n.33 (2019). The federal circuit courts have rightly applied these assumptions when faced with arbitration challenges and application of the FAA to various disputes. *See, e.g., Benson v. Casa de Capri Enterprises, LLC*, 980 F.3d 1328 (9th Cir. 2019).

¹⁸ Jeffrey Q. Smith and Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICATURE 4 (Winter 2017), <https://judicature.duke.edu/articles/going-going-but-not-quite-gone-trials-continue-to-decline-in-federal-and-state-courts-does-it-matter/>.

¹⁹ The Supreme Court has explained that the phrase “involving commerce” was enacted with an intent “to exercise Congress’s commerce power to the full.” *See: Allied-Bruce Terminix Cos.*, *supra* note 14, at 27.

²⁰ *See: S. 878 and H.R. 1844*, 113th Cong. (2013). *See also H.R. 4181*, 112th Cong. (2012) (barring arbitration agreements in employment contracts) and *S. 2915*, 111th Cong. (2009–10) (making an agreement between an employer and employee to arbitrate a claim of rape unenforceable).

- (2) the Arbitration Fairness for Students Act²¹ (which would have prohibited colleges and universities that participate in federal student assistance programs from including pre-dispute arbitration agreements in student enrollment contracts);
- (3) the Consumer Mobile Fairness Act²² (which would have invalidated pre-dispute arbitration clauses in contracts involving consumer mobile services or mobile broadband Internet access service);
- (4) the Fairness in Nursing Home Arbitration Act²³ (which would have invalidated pre-dispute arbitration clauses between long-term care facilities and their residents);
- (5) the Consumer Fairness Act (which would have amended the Consumer Credit Protection Act to define pre-dispute arbitration clauses in consumer contracts to be an unfair and deceptive trade practice);²⁴
- (6) the Restoring Statutory Rights and Interests of the States Act²⁵ (which would have amended Section two of the FAA to provide that the Act’s requirements on the enforceability of arbitration agreements would not apply to specific claims brought by individuals or certain small businesses that arise from a violation of federal or state statutes, the U.S. Constitution, or a state constitution, unless a written arbitration agreement is entered into by both parties); and
- (7) the Forced Arbitration Injustice Repeal Act (FAIR Act)(which would have amended the FAA to prohibit pre-dispute arbitration agreements that forced arbitration of future employment, consumer, antitrust, or civil rights disputes; and prohibited agreements and practices that interfere with the right of individuals, workers and small businesses to participate in litigation).²⁶

In 2009, legislation introduced by Senator Al Franken (D-MN) aimed specifically at eliminating "forced" arbitration of sexual assault and sexual harassment claims, after a story concerning a particularly horrific sexual assault of a female Halliburton employee made national headlines.²⁷ As ultimately determined by a federal court of appeals, her claims for assault and battery; intentional infliction of emotional distress; negligent hiring, retention, and supervision; and false imprisonment were not "related to" her employment and therefore fell "outside the scope of the arbitration provision" of her Halliburton contract.²⁸ But neither the fact that she was not actually required to arbitrate her claims, nor the flimsiness of those claims in the first place prevented arbitration opponents from using her story to seek elimination of arbitration clauses specifically in employment contracts.

In the end, her claims were determined to be entirely fabricated. But even as her story unraveled, bills that took aim at arbitration as a long-standing method of contractual enforcement in employment continued to proliferate in Congress.

²¹ S. 3557, 112th Cong. (2012).

²² S. 1652, 112th Cong (2011), a bill taking direct aim at the Supreme Court’s holding in *AT&T Mobility LLC.*, *supra*, note 6.

²³ H.R. 6351, 112th Cong. (2012).

²⁴ H.R. 991, 111th Cong. (2009).

²⁵ H.R. 1396, 115th Cong. (2017).

²⁶ H.R. 963, 117th Cong. (2021).

²⁷ As the #MeToo movement rose to national prominence, then-Senator Franken was one of many high-profile male figures accused of sexual harassment. MJ Lee, *Woman says Franken inappropriately touched her in 2010*, CNN (November 20, 2017), <https://www.cnn.com/2017/11/20/politics/al-franken-inappropriate-touch-2010/index.html>

²⁸ *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009).

Employees Do Better in Arbitration

The basic premise of all limiting legislation—that arbitration is somehow unfair to or bad for employees and consumers—is false, and the evidence shows precisely the opposite: arbitration’s speed and low costs empower consumers to bring many claims that they would otherwise be unable to pursue. Empirical studies also show that employees do as well or even better in arbitration than they do in litigation and that they prevail at the same rate or more frequently and recover as much or more through arbitration as they would in litigation.

Most recently, economics research firm NDP Analytics compared the results of employment claims that were arbitrated and employment claims that were litigated in federal court. The study examined more than 100,000 cases, using data from the nation’s leading arbitration providers and data from the federal courts. The claims of employee-plaintiffs that were arbitrated generally recovered approximately double the amount recovered by employee-plaintiffs in court. Specifically, the median award in arbitration was \$113,818, compared to \$51,866 in court, and the mean award was \$520,630 in arbitration compared to \$269,885 in court.²⁹

Opponents of arbitration argue that its use should be curtailed or eliminated because it is unfair to employees who are “forced” to accept arbitration in their contracts, is too expensive, favors businesses, and interferes with the class action rights of consumers. Most of these claims originate from a 2007 report by *Public Citizen* that claimed that arbitration is “rigged” and that the system “stacks the deck to favor corporate interests” over individuals.³⁰ But the empirical research does not support the *Public Citizen* claim. A study of over 200 AAA employment arbitrations over a three-year period found no evidence that employers were being systematically favored.³¹ To the extent that there is any “repeat-player” effect in arbitration (insofar as arbitrators might be incentivized to favor business clients because they are repeat players in arbitration),³² research shows that it is likely the result of “case selection and settlement rather than systematic bias” because businesses are “better able to screen meritorious cases and, thus, will settle them rather than proceed to the award stage.”³³

The FAA's Neutrality Guarantee

Other claims of bias in arbitration can also be answered by the FAA's clear requirement of neutrality

²⁹ 2 *NDP Analytics, Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration* 5-10 (May 2019). These results are consistent with other empirical analyses of employment arbitration. See 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).

³⁰ *The Arbitration Trap: How Credit Card Companies Ensnare Consumers*, PUBLIC CITIZEN 4 (Sept. 2007), available at <http://www.citizen.org/documents/ArbitrationTrap.pdf>. A reviewer of the *Public Citizen* report noticed that it “ignores almost all of the existing literature bearing on this question.” See: Prof. Peter B. Rutledge, *Arbitration—A Good Deal for Consumers: A Response to Public Citizen*, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM 6 (April 2008).

³¹ Lisa Bingham, *On Repeat Players, Adhesive Contracts and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 *MCGEORGE L. REV.* 223 (1998).

³² This is a critique proffered recently by the *Washington Post*. See Christopher Ingraham, *There’s a little-known employment contract provision enabling billions of dollars in wage theft each year*, WASHINGTON POST, February 13, 2020, <https://www.washingtonpost.com/business/2020/02/13/theres-little-known-employment-contract-provision-enabling-billions-dollars-wage-theft-each-year/>.

³³ Rutledge, *supra*, note 29, at 21.

in selection of arbitrators. In one provision—9 U.S.C. § 5—Congress anticipated the potential for subjectivity in the arbitration process, and therefore provided for an arbiter selection process that is equally neutral for both parties.

In cases where the parties' agreement is silent on arbitrator selection, a court, acting under its section five authority, can implement that agreement by appointing an arbitrator to hear the dispute. Section five also specifies that in such cases “the arbitration shall be by a single arbitrator[,]” “unless otherwise provided in the agreement”³⁴ If the parties have agreed to arbitrate according to provider rules, those rules typically specify how arbitrators are to be selected, the number of arbitrators, and what their qualifications must be. Single arbitrators are required under the FAA to be neutral unless the parties otherwise agree.³⁵ In tripartite arbitration (where three arbitrators are selected), one arbitrator (usually designated the umpire or chair) is ordinarily required to be neutral, while party-appointed arbitrators are presumed to be non-neutral, except to the extent otherwise required by the parties' arbitration agreement.³⁶ Arbitration provider rules, which govern arbitrator qualifications in appropriate cases, often provide that all three arbitrators of a tripartite panel are required to be neutral.

Additionally, section 10(a)(2) of the FAA—which authorizes federal district courts to vacate arbitration awards “where there was evident partiality . . . in the arbitrators”—imposes and enforces these neutrality requirements.³⁷ Section 10(a)(2) establishes that parties who agree to arbitrate can legitimately expect that neutral arbitrators will meet a certain minimal standard of arbitral impartiality, and that arbitrators not appointed as neutrals can, in appropriate circumstances, be held to a substantial, material breach of a stipulated arbitrator qualification requirement related to neutrality.³⁸

Material Breach as a Remedy

There are also remedies that exist in law to invalidate arbitration agreements in certain scenarios, protecting employee claimants when the balance of power has clearly been weighted in favor of an employer. For example, a material breach of an arbitration agreement by the party attempting to enforce it can justify a refusal to compel arbitration at the outset of any claim. In *Hooters of America, Inc. v. Phillips*,³⁹ Hooters had the obligation to promulgate adequate rules in arbitration provisions signed by all employees. The Fourth Circuit found that the rules Hooters promulgated were entirely one-sided and were calculated to produce biased proceedings.

Among other problems, the rules required the employee to provide, at the outset, information describing “the nature of the claim” and “the specific acts or omissions which are the basis of the claim,” while Hooters had no such information disclosure requirement. The employee also had to provide a list of all fact witnesses with a brief summary of the facts known by each; Hooters was not

³⁴ 9 U.S.C. § 5 (2015).

³⁵ See, e.g., *Morelite v. N.Y.C. Dist. Council Carpenters*, 748 F.2d 79, 81-85 (2d Cir. 1984).

³⁶ See *Certain Underwriting Members London v. Florida Dep't of Fin. Serv.*, 892 F.3d 501, 510-11 (2d Cir. 2018); *Sphere Drake Ins. v. All American Life Ins.*, 307 F.3d 617, 622 (7th Cir. 2002); *Trustmark Ins. Co. v. John Hancock Life Ins. Co. (U.S.A.)*, 631 F.3d 869, 872-74 (7th Cir. 2011).

³⁷ The requirement that an arbitrator be “neutral” can be divided into three components. The arbitrator must be (a) impartial; (b) disinterested; and (c) independent. Section 10(a)(2) authorizes a court to vacate an award if an arbitrator is “guilty” of “evident partiality.” 9 U.S.C. § 10(a)(2) (2015).

³⁸ See *Certain Underwriting Members*, 892 F.3d at 510-11; *Sphere Drake*, 307 F.3d at 622; *Trustmark*, 631 F.3d at 872-74.

³⁹ *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

so obligated. And perhaps most egregiously, the employee could only select an arbitrator from a company-approved list. Hooters was allowed to expand the scope of the arbitration to any matter, regardless of whether it related to the employee's claim, but the employee could only raise matters included in the notice of claim. The company also had the right to cancel the agreement to arbitrate upon 30-days' notice, and also had the right to modify the rules whenever it wished, without any notice. The court found that Hooters had materially breached its obligations under the arbitration agreement and thus held that the plaintiff employees were excused from having to arbitrate their claims.⁴⁰

Forcing Litigation Would Crater Small and Mid-Sized Businesses.

Employment arbitration is preferred by American employers of all sizes, and across a variety of industries in lieu of lengthy and expensive traditional court litigation.

Specifically:

53.9% of nonunion private-sector employers have mandatory arbitration procedures
59.3% of employers with 500-999 employees have mandatory arbitration
61.8% of employers with 1,000-4,999 employees have mandatory arbitration, and
67.7% of employers with 5,000+ employees have mandatory arbitration.⁴¹

Employers across both public and private sectors prefer arbitration to litigation largely for its timeliness and cost-effectiveness. But as a rule, the greater the monetary value of the claim, the greater the monetary loss associated with the delay of forced litigation. A study conducted by economic research firm Micronomics illustrates this point vividly⁴²

The study authors explain:

During the period required to resolve disputes, resources at issue between litigants can be thought of as removed from circulation. When litigation takes longer to resolve, these resources remain unavailable in the sense that neither party can count on receiving them and putting them to use. By way of example: A dispute between a supplier and purchaser in which the supplier claims the purchaser owes \$1 million leaves both supplier and purchaser uncertain as to which party will retain the funds after the dispute has been adjudicated. The purchaser

⁴⁰ Id. at 940-41. See also, *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370 (6th Cir. 2005) (following *Hooters* in a case in which defendant selected an arbitration provider for which it supplied 42% of the provider's business). The material breach principle was also applied in *Brown v. Dillard's Inc.*, 430 F.3d 1004 (9th Cir. 2005)(Dillard's required Brown to agree to arbitrate any employment-related claims she had. After Brown was fired, Dillard's attempted to compel arbitration, but the 9th Circuit held that the company could not do so because it was in material breach of the arbitration agreement by failing to arbitrate earlier).

⁴¹ See: Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECONOMIC POLICY INSTITUTE (April 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>.

⁴² Roy Weinstein, Cullen Edes, Joe Hale, & Nels Pearsall, *Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings*, MICRONOMICS ECONOMIC RESEARCH AND CONSULTING (March 2017), http://www.micronomics.com/articles/Efficiency_Economic_Benefits_Dispute_Resolution_through_Arbitration_Compared_with_US_District_Court_Proceedings.pdf.

cannot comfortably invest the \$1 million to hire new employees since it may be required to pay the supplier once the dispute has been adjudicated. Likewise, the supplier cannot use the funds to purchase new equipment because it may never receive the money. Both parties are thus constrained; the funds are unavailable to either; both parties experience a loss until the dispute is resolved.

These direct losses due to delay represent unrealized investment income from funds at risk for longer duration at trial than arbitration. In the example above, these would be supply chain interruptions, hiring freezes, or the like. Based on minimum average estimated amounts at issue in federal district court cases, and on a corresponding minimum amount for arbitration cases, direct losses attributable to the lengthier adjudication time of trial were calculated at approximately \$10.9 - \$13.6 billion between 2011 and 2015 (or, more than \$180 million per month). The direct minimum losses associated with the additional time required for possible appeal of district and circuit court cases compared with arbitration were approximately (including direct minimum costs attributable to trial) \$20.0 - \$22.9 billion over the same period (or, more than \$330 million per month).⁴³

But those direct losses are only the beginning. Economists have recognized that a given change in economic activity (such as the type of “direct” lost resources, calculated above) produces costs beyond just that initial change. As the authors of the Micronomics study clarify, these are often referred to as “multiplier effects,” and reflect secondary economic impacts beyond the direct costs. These secondary losses associated with resources unavailable to litigants due to delay are referred to as “indirect” losses. These indirect losses represent decreases in spending on goods and services by organizations involved in a dispute, and who have already suffered a direct loss (unrealized investment income, above). The halting of this spending power has a ripple effect on the larger American economy.

When “direct” losses and indirect losses are added together, they reflect an estimate for the overall negative impact to society of the commonplace delays associated with the district court system as compared to arbitration. When totaling both sets of losses associated with trial over arbitration, estimated total losses were calculated at approximately \$28.3 - \$35.3 billion between 2011 and 2015 (or, more than \$470 million per month). When calculated for additional time through appeal, the losses were calculated at an astronomical \$51.9 - \$59.2 billion over the same period (or, more than \$860 million per month).⁴⁴

Costs like these, borne by small and mid-sized businesses as often as their larger corporate counterparts, not only have an impact on the economy in the aggregate, but force employers to pass on the cost of goods and services to consumers, while simultaneously forcing cutbacks in staffing, business operations, and employment opportunities. The less small and mid-sized companies can arbitrate, the more likely a possible shuttering of these businesses--those that form the backbone of the American economy, and which are still beleaguered by their continued recovery efforts following the COVID-19 shutdowns.

III. Employee Arbitration Clauses are Unrelated to the Problem of Corporate Malfeasance and Cultures of Harassment.

⁴³ *Id.* at p. 4.

⁴⁴ *Id.*

For years, interest groups have identified arbitration clauses as untenable in large part because they claim it creates confidential proceedings that remove bad corporate actors from the sanitizing light of open litigation and allow them to hide wrongdoing.⁴⁵ This view of arbitration subjects the power of the law to regulate business conduct and prevent wrongdoing to the shield of something akin to an arbitration "invisibility cloak."

However, the American Association of Arbitration makes clear in its due process protocols setting forth employment arbitration rules, only that: "The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary."⁴⁶ This is a rule of conduct aimed at ensuring arbitrator's meet their obligations of confidentiality. Nothing more.

In fact, neither the Federal Arbitration Act nor the Uniform Arbitration Act⁴⁷ imposes any obligation of confidentiality on the parties to an arbitration agreement, the arbitrator, or the arbitration administrator. Both are also silent on the privacy of the arbitration process. While the public cannot attend arbitration hearings, and an arbitrator and arbitration administrator cannot disclose information about the arbitration, the parties to the contract are under no such obligation.

In arbitrating an employment claim, for example, an employee can still disclose the facts underlying the dispute they may have with an employer. They may also disclose information obtained in the arbitration process or any resulting award. Only if the parties have entered into a confidentiality agreement are they restricted from disclosing information about the arbitration. Otherwise, claimants may still report, communicate, and disclose the disposition of their Title VII discrimination claims, as well as harassment, retaliation, and sexual abuse claims. And there remains the legal right to communicate with appropriate federal and state agencies, and file charges of discrimination and other violations of employee rights and protections with those agencies.

In addition, if uncovered in arbitration hearings, any criminal conduct or widespread sexual harassment purportedly subject to a non-disclosure or confidentiality agreement advanced by an employer to protect its interest can be set aside by the courts. In the alternative, safeguards can be incorporated into arbitration agreement procedures that would permit the claimant, the arbitrator, or a court to void or disregard the non-disclosure agreement (NDA) in question in specific circumstances. Some states have already enacted legislation on this issue, passing laws that limit the use of NDAs in employment agreements or otherwise providing protections against potentially problematic use of NDAs.⁴⁸

⁴⁵ For example, in its publication, *Arbitration Activism*, the Alliance for Justice stated: "Open court proceedings can expose corporate misconduct in the public record, but through arbitration, corporations can prevent negative publicity [and] keep their wrongdoing secret . . ." (See: ALLIANCE FOR JUSTICE, *Arbitration Activism: How the Corporate Court Helps Business Evade our Civil Justice System*, 5 (2013)).

⁴⁶ AMERICAN ARBITRATION ASSOCIATION, *Employment Arbitration Rules and Mediation Procedures*, Amended and Effective November 1, 2009 (introduced revised on October 1, 2017), https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf.

⁴⁷ UNIF. ARB. ACT §§ 1-25 (1956).

⁴⁸ Among these states are New Jersey, Tennessee, California, Vermont, and Washington, which have all enacted legislation prohibiting or limiting the use of NDAs in certain employment contexts. Later questions on federal preemption of the FAA may arise if these laws are found to conflict with the terms of the Act, however.

The view of this committee, then, may be based on a misunderstanding of the confidential nature of arbitration. Under U.S. law, arbitration is *not* truly a confidential process, but a *private* one. Because an arbitration clause does not include an implied obligation of confidentiality under U.S. law, any confidentiality obligation must come from either administrator rules or the parties' separate agreement to maintain confidentiality.

So, it is not that arbitration clauses are dangerous, but rather perhaps that confidentiality provisions are.⁴⁹ By focusing on arbitration clauses, we are misdirecting public sentiment on a what has proven to be a useful, effective, and longstanding means of dispute resolution, when, in fact, our attention would better be directed elsewhere—whether that be in restricting non-disclosure agreements or facilitating tort reform.

In fiscal year 2020, over 6,587 sexual harassment charges were filed with the U.S. Equal Employment Opportunity Commission (EEOC), representing monetary claimant recoveries of over \$65 Million.⁵⁰ As one might suspect, male sexual harassment complainants constituted a relatively minor 16.7% of those charges. These numbers are but a cold representation of the personal trauma experienced by those who might appear to the objective eye as nothing more than numbers in a database.

There is--to be sure--a culture of sexism within certain halls of power. The dynamic is as old as time immemorial. But the nation is only newly aware of its prevalence because of a series of high-profile cases. And rightly so. The Larry Nassars and the Harvey Weinsteins in our country must be called to account, and I commend the personal bravery of their accusers who were so fundamental to the service of justice for not only themselves, but for so many others like them.

Unfortunately, the very premise of this hearing - that arbitration keeps victims of sexual violence and sexual harassment in the shadows - suggests a solution to the problem of sexual harassment and discrimination that is ultimately misguided.

The Supreme Court has held that anti-discrimination claims, such as the Age Discrimination Employment Act are arbitrable and has been applied by the federal circuits in dispositions of various other anti-discrimination claims, like Title VII.⁵¹ Our Constitution and civil rights cannon recognizes the equality of all individuals, and their equal entitlement to the protections of federal anti-discrimination law. Picking and choosing among immutable characteristics by disclosing one remedy for one claimant, and a different remedy for another claimant, does a disservice to civil rights and anti-discrimination law overall. It creates a path dependency in bills like H.R. 4445⁵² that will

⁴⁹ For an excellent analysis of confidentiality vs. privacy in arbitration, see: Christopher R. Drahozal, *Confidentiality in Consumer and Employment Arbitration*, 7 Y.B. ARB. & MEDIATION 28 (2015).

⁵⁰ U.S. Equal Employment Opportunity Commission, *Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010 - FY 2020*, available at: <https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2020>

⁵¹ For example, the U.S. Court of Appeals for the Fifth Circuit has expressly held that Title VII claims, like ADEA claims, are arbitrable. *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991). More recently several cases have made clear that other employment-related claims are not immune from arbitration. See, e.g., *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (“We thus find unpersuasive the Carter Appellants’ contention that FLSA claims are not subject to arbitration.”); *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006) (provisions of USERRA do not preclude enforcement of agreement to arbitrate such disputes).

⁵² H.R. 4445, “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021,” (117th 2021).

automatically result in the elimination of arbitration clauses whole cloth, not just for certain classes of claims.

Eliminating arbitration as a method of dispute resolution for certain claims should not be the path forward.

Arbitration agreements are not mandatory. They are voluntary. No one is forced to sign a contract. Indeed, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion.⁵³ If employees don't like individual arbitration agreements, they are free to bargain collectively to change them, resign from their positions, or choose another job.

They are also free to pursue a claim through the EEOC, and initiate and investigation in the public interest through a private firm specializing in such Investigations. Both these avenues may be undertaken regardless of whether the parties have entered into an enforceable arbitration agreement. The Supreme Court has explained that an arbitration agreement does not preclude an individual's right to file a charge of discrimination or harassment, and have the case investigated by the EEOC.⁵⁴ The Supreme Court has also held that an arbitration agreement between an employer and employee does not bar the EEOC from pursuing victim-specific relief in litigation on behalf of an employee who files a timely charge of discrimination.⁵⁵

It's for this reason that on December 17, 2019, the EEOC rescinded⁵⁶ its 22-year-old policy statement against mandatory employment arbitration agreements for workplace claims. The agency's decision to retract this policy was in direct response to numerous U.S. Supreme Court rulings that support the use of arbitration overall, and specifically as concerns claims of discrimination.

IV. CONCLUSION

Arbitration works. Its enforcement has been consistently upheld by the Supreme Court and the federal Circuit courts. And it's a timely, efficient, cost-effective, and thorough way to protect the interests of both parties to a contract. Relegating businesses to the expensive and protracted prospect of litigation as the only available means for settling disputes--whether related to sexual harassment or otherwise--ultimately results in a burdening of the judicial system, a delay of justice for those aggrieved, and a lining of the pockets of the plaintiffs' bar who themselves provide the data on why arbitration "doesn't work."

⁵³ See *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173 (2d Cir. 2021).

⁵⁴ *Gilmer v. Interstate/Johnson Lane Corp.*, *supra* note 3, at 28 (holding that an ADEA claim was subject to compulsory arbitration but explaining that "an individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC.")

⁵⁵ See: *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

⁵⁶ U.S. EQUAL OPPORTUNITY EMPLOYMENT COMMISSION, *Recission of Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment* (2019), <https://www.eeoc.gov/wysk/recission-mandatory-binding-arbitration-employment-discrimination-disputes-condition>. The EEOC's 1997 Policy Statement on "Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment" opposed the use of such "mandatory" arbitration agreements: "[T]he use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment harms both the individual civil rights claimant and the public interest in eradicating discrimination."

Even for those claimants alleging violations of statutory law--violations that strike at the very nature of personal safety, security, and bodily autonomy in the workplace--arbitration has proven to be a better option than going to court. In the end, legislation curtailing access to arbitration would injure the very people that Congress has sought to protect for nearly a century.