Written Testimony of
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Before the U.S. House of Representatives Committee on the Judiciary

Hearing on "Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the Shadows"

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Dear Chairman Nadler, Ranking Member Jordan, and distinguished Members of the Committee:

Thank you for the opportunity to appear before you today. I serve as president of Hamilton Lincoln Law Institute, a non-profit public interest law firm whose Center for Class Action Fairness represents class members *pro bono* against abusive class action settlements. The organization is dedicated to safeguarding consumers and the general public against abuses in the civil justice system. I have studied and seen first-hand the ways in which alternative dispute resolution systems such as arbitration allow parties to avoid certain shortcomings in our court system to obtain remedies for wrongdoing against them.

This testimony addresses in particular the use of arbitration and how individuals and legal entities can choose arbitration to resolve disputes through a process that is typically faster and less expensive than traditional litigation without losing their substantive rights, even when serious harms such as sexual harassment and assault are at issue.

I. Arbitration can be an advantageous dispute resolution process for consumers and employees.

Arbitration is a form of dispute resolution that may be voluntarily chosen by the parties to a dispute. The parties agree, usually in advance through a contract, to submit their conflict for a legally binding and enforceable decision by a third party, with the adjudication taking place outside of the court system. It thus provides an alternative to having a judge or jury decide the dispute. The proceedings themselves remain adjudicative in nature. Each party presents his or her evidence through an attorney or on his or her own behalf to the arbitrator or panel of arbitrators and presents argument at a hearing. The arbitrator or panel of arbitrators then issues a written decision. This decision is final with only certain, limited exceptions, such as fraud or an arbitrator exceeding his or her powers. Arbitration is a more informal

process. For example, it is not subject to the traditional rules of evidence, discovery processes, the constraints of precedent, or restrictions against parties changing their claims and arguments, and it allows more flexibility in scheduling of times and places of hearings.[1] It also allows the parties in a particular case to obtain a more equitable remedy that a court might not have had the authority to order.

Congress provided federal recognition of and legitimacy to arbitration as a lawful method of dispute resolution nearly 100 years ago, when it passed the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA") in 1925. Among other things, the FAA requires both state and federal courts to enforce and uphold arbitration agreements to the same extent as other types of contracts.[2] "The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered."[3] It reflected a "liberal federal policy favoring arbitration agreements,"[4] which "is at bottom a policy guaranteeing the enforcement of private contractual arrangements."[5]

Organizations such as the American Arbitration Association ("AAA") and the Judicial Arbitration and Mediation Services, Inc. ("JAMS") have formed to support arbitration and provide continuity and uniformity to the proceedings. Both organizations have developed arbitration procedures and due process guidelines specifically tailored for employment disputes and will accept cases for arbitration only when the underlying arbitration agreement meets certain standards of fairness. Employers regularly engaged in arbitration agree to pay a disproportionate share of the expenses given the cost savings when compared to traditional litigation. The AAA has an Employment/Workplace Fee Schedule under which the filing fees for an employee who files a dispute against an employer are capped at $300, while the employer pays thousands of dollars in additional fees and expenses, including $1900 of the filing fee and the arbitrator's compensation.[6]

Unlike in litigation, the parties can choose their arbitrators, meaning that they can choose those with specialized knowledge or expertise in particular areas of the law. This feature can save the parties the significant expense of having to hire expert witnesses because the arbitrator is already knowledgeable about issues that a jury or judge with more generalized experience would not be. Another advantage

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[1] *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)).

[2] *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (courts must "place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms").

[3] *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

[4] *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

[5] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

[6] American Arbitration Association, "Employment/Workplace Fee Schedule" (Nov. 1, 2020), *available at* https://www.adr.org/sites/default/files/Employment_Fee_Schedule.pdf.

is that arbitrators often have more time to devote to the matter, compared to a judge overburdened by a heavy docket of other civil and criminal cases. And because of the limited scope of appealable issues, arbitration resolves disputes without the lengthy, uncertain, and often expensive appeal process that may follow litigation in court.

Empirical studies confirm that arbitration tends to be both faster and less expensive than litigation, and results in higher awards for employees and consumers. A study focused on employment disputes that terminated in 2014 to 2018 found that nearly 75% of all disputes were settled, with about half of the remaining cases terminating with monetary and/or non-monetary awards and the other half either dismissed, abandoned, or withdrawn.[7] Showing the range of claims available for arbitration, the employees' claims ranged in value from several thousands of dollars to tens of millions of dollars.

The study found that employees are three times more likely to win in arbitration than in court, and when they prevailed, employee-plaintiffs won about twice the monetary award in arbitration that employees won in court. The average award to employee-plaintiffs in arbitration was $520,630, compared to $269,885 in court. Meanwhile, the average time spent from initiation to termination of proceedings that resulted in monetary awards was months shorter for arbitration. Given these numbers, it is not surprising that the study also found that employees across salary levels used arbitration to resolve their employment disputes.[8] The study concluded that employment arbitration is simpler, shorter, and more flexible than the longer, more formal, and burdensome litigation process in court and yielded better results for employee-plaintiffs.[9]

Another study published in 2020 focused on consumer-initiated arbitration and similarly found that consumers achieved both mean and median awards in arbitration that were significantly higher than in court.[10] Consumers initiated and won in 44% of all consumer arbitrations that ended during the period 2014 to 2020,

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[7] *See* Nam D. Pham & Mary Donovan, "Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration," NDP Analytics (May 2019), *available at* https://instituteforlegalreform.com/wp-content/uploads/2020/10/Empirical-Assessment-Employment-Arbitration.pdf.

[8] *See id.* at 13 (citing U.S. Census Bureau, Households by Total Money Income, Race, and Hispanic Origin of Household: 1967 to 2017).

[9] Earlier studies also show that employees succeed more frequently in arbitration than in court. *See* David Sherwyn, Samuel Estreicher, & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1568-69 (2005); National Workrights Institute, *Employment Arbitration: What Does the Data Show?* (2004).

[10] *See* Nam D. Pham & Mary Donovan, "Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration," NDP Analytics (Nov. 2020), *available at* https://instituteforlegalreform.com/wp-content/uploads/2020/11/FINAL-Consumer-Arbitration-Paper.pdf.

while they prevailed in consumer-initiated litigation only 30% of the time. The average award in consumer-initiated arbitration was significantly more than the award in litigation, while the average length of such arbitrations was shorter by over four months. Review of the empirical evidence thus shows that "most measures—raw win rates, comparative win rates, comparative recoveries, and comparative recoveries relative to amounts claimed—do not support the claim that consumers and employees achieve inferior results in arbitration compared to litigation."[11]

While these studies demonstrate benefits for employees and consumers, arbitration likewise benefits businesses that rely on the process to provide a fair and efficient resolution of workplace disputes and eliminates the costs and burdens to all parties of litigating in court. By agreeing with employees in advance to arbitrate, businesses can be certain of lower dispute resolution costs and thus can allocate those funds to reduce costs to consumers, increase benefits for employees, or other uses. It is no wonder that the Supreme Court recognizes "real benefits to the enforcement of arbitration provisions" and has "been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context."[12]

Arbitration also allows consumers and employees to avoid the use of class actions when they are among a large number of people who have experienced a common injury. Just as in comparison to bilateral litigation, arbitration tends to be less expensive and faster, with fewer hurdles to putting greater relief in the hands of the injured plaintiff, while reducing the disproportionate benefit to the attorneys.[13] Class actions are typically characterized by "procedural complexity and slow pace," while they recover only a small percentage of a claimant's damages which then must be distributed through an often ineffective claims process.[14]

II. Allowing individuals to choose arbitration before a dispute arises is pro-employee and -consumer.

A federal law that takes away individuals' right to agree to arbitrate claims relating to sexual harassment and assault pre-dispute raises concerns. It removes decisionmaking about these issues from those personally affected by them and

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[11] Peter Rutledge, *Whither Arbitration?*, 6 Geo. J.L. & Pub. Pol'y 549, 560, 571 (2008) (reviewing empirical studies).

[12] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001).

[13] *See* Ted Frank, "Class Actions, Arbitration, and Consumer Rights: Why *Concepcion* Is a Pro-Consumer Decision," Legal Policy Report at 4-5 (Feb. 2013), *available at* https://media4.manhattan-institute.org/pdf/lpr_16.pdf.

[14] *See* John C. Coffee, Jr., *Understanding Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 710 (1986).

transfers it to the federal government, which imposes a one-size-fits-all, top-down approach that denies victims access to a valid and often advantageous dispute resolution process to obtain damages for the harm inflicted on them.

A common argument in support of banning pre-dispute arbitration is that it protects employees and consumers from more powerful corporate interests and employers. This argument is often directed specifically to claims of sexual harassment and assault. Allegations of sexual harassment and assault of course should be taken seriously, and accusers afforded the full protections of the law as they seek to hold those responsible to account. Removing one form of dispute resolution, however, does not further these goals.

As described above, arbitration often provides a faster, cheaper, less daunting process for resolving disputes than a formal court case and is more favorable, on average, for employees. Courts have "remain[ed] attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'"[15] States, too, "remain free to take steps addressing the concerns that attend contracts of adhesion."[16] The market reflects an availability of choice, as studies have found that only about half of private, non-union employers have mandatory arbitration clauses, and technology and financial services companies recently have removed mandatory arbitration clauses from employment contracts.[17]

Importantly, a pre-dispute agreement to arbitrate does not devalue or otherwise alter one's substantive rights under the law. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."[18] Underscoring the judiciary's confidence in arbitration, the Supreme Court has upheld pre-occurrence agreements to arbitrate even claims involving wrongful death and other grave injury.[19]

Removing arbitration as a form of dispute resolution will push sexual harassment and assault victims into a court system that is already overburdened and has pre-complaint procedures unique to the employment context that may be

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[15] *Mitsubishi Motors Corp.*, 473 U.S. at 627 (quoting 9 U.S.C. § 2).

[16] *Concepcion*, 563 U.S. at 347 n.6.

[17] *See* S.M., "The Supreme Court sides with companies over arbitration agreements," The Economist (May 23, 2018), *available at* https://www.economist.com/democracy-in-america/2018/05/23/the-supreme-court-sides-with-companies-over-arbitration-agreements; *see also IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989 (7th Cir. 2008) (as long as there is a competitive market, "[employers] must adopt terms that [employees] find acceptable").

[18] *Mitsubishi Motors Corp.*, 473 U.S. at 628.

[19] *See Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012).

difficult to navigate.[20] A longer proceeding not only delays a remedy; it also enriches the trial lawyers bringing these claims, as they increase their number of billable hours or strengthen their justification for a higher percentage of a monetary recovery. Requiring formal litigation in court is less likely to help employees than it is to unfairly transfer wealth from employees to wealthy attorneys.[21] Even with fee-shifting, as a matter of economic reality, a defendant will settle for a total settlement amount that then must be divided between the employee-plaintiff and her attorney such that higher attorneys' fees reduce the plaintiff's recovery. While sexual harassment and employment claims often involve individualized facts that cannot meet the commonality and other requirements for class actions under Federal Rule of Civil Procedure 23, an aggregate resolution is unlikely to provide a better result than arbitration when it is available because of the high transaction costs (including attorneys' fees) and slow and complex procedures.[22]

Even if arbitration is prohibited only pre-dispute, scholars have found that parties are unlikely to agree to arbitrate after a dispute arises—not because litigation in court is in their best interest but because they fear that suggesting arbitration will signal weakness to the opposing party or because they have built up an emotional or other irrational investment in their position.[23] Post-dispute, the parties' attorneys also have a self-interest, even if only sub-consciously, in encouraging their clients to litigate in court because of the longer process and increased opportunity for attorneys' fees that such a resolution offers.

Banning pre-dispute arbitration also increases costs. If employers no longer have the certainty that disputes will be resolved through arbitration, they may be less willing to shoulder a disproportionate share of arbitration costs when they also are subject to the high costs of litigating in court. They may opt instead for the certainty that all disputes will be litigated in court and abandon arbitration entirely. Such a result does not help employees or consumers. Real-world examples show that when consumers have a choice between contracting for a lower-priced

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[20] *See* U.S. Courts, "Judiciary Seeks New Judgeships, Reaffirms Need for Enhanced Security" (Mar. 16, 2021) (pre-pandemic, district court case loads had increased 47% since the last judgeship bill in 1990), *available at* https://www.uscourts.gov/news/2021/03/16/judiciary-seeks-new-judgeships-reaffirms-need-enhanced-security; *see also* U.S. Equal Employment Opportunity Comm'n, "What You Should Know: What to Do if You Believe You Have Been Harassed at Work" (describing steps for "filing a charge of discrimination with the EEOC to complain about the harassment"), *available at* https://www.eeoc.gov/laws/guidance/what-you-should-know-what-do-if-you-believe-you-have-been-harassed-work.

[21] Frank, *supra* note 13, at 14.

[22] *See generally id.*

[23] *See* Steven C. Bennett, *The Proposed Arbitration Fairness Act: Problems and Alternatives*, 67 Disp. Resol. J. 32, 37 (July 2012); Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 790 (2008); David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 Berkeley J. Emp. & Lab. L. 1, 68 (2003).

product or service with a mandatory arbitration clause and paying a higher price not to pre-commit to arbitration, they tend to choose the former.[24] Employees are likely to similarly choose a contract with arbitration that provides better benefits and less costly dispute resolution than one without an arbitration clause. Just as employers, as a matter of economic reality, would reduce salaries or other employee benefits to pay for a mandate that they must pay for their employees' lunch every day, they will similarly reduce employee salaries and benefits to pay for the increased dispute resolution costs that a prohibition on pre-dispute arbitration imposes on them.

Finally, while those not involved in the dispute may see value in exposing allegations of sexual harassment and assault publicly, particularly after the Me Too movement's society-wide impact, those most intimately affected by the underlying misconduct may prefer the greater anonymity and confidentiality that arbitration provides compared to a public court case. Victims may wish to resolve the matter privately for any number of reasons, such as avoiding potential negative effects to their day-to-day lives, family relationships, and career. They may be less likely to pursue a formal remedy at all if a public lawsuit is the only available option.

A public proceeding with the attendant media coverage may benefit high-profile, high-earning women, but the same is not true for countless women in more routine situations who also experience such harm. Unlike the few high-profile cases in which the victims recover substantial sums of money and are afforded lucrative post-litigation opportunities, the average claimant is more likely to want to resolve her claims quietly so as to avoid any unfortunate stigma as she moves forward with her life and career. Enacting a federal law barring individuals from seeking a private remedy turns these women into unwilling pawns, leveraging their private difficulties in pursuit of public policy objectives that don't actually benefit them. There is little reason to believe that it is desirable or beneficial to the vast majority of sexual harassment and assault claimants to force them to pursue their claims in the public limelight.[25] Arbitration offers the option of a more private resolution for these sensitive claims made by those who never chose to be subjected to the wrongdoing in the first place.

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I appreciate the opportunity to appear before this Committee, and I welcome any questions you may have.

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[24] *See* Frank, *supra* note 13, at 2 & n.10.

[25] *See* Gloria Allred, "Assault victims have every right to keep their trauma and their settlements private," Los Angeles Times (Sept. 24, 2019), *available at* https://www.latimes.com/opinion/story/2019-09-23/metoo-sexual-abuse-victims-confidential-settlements-lawsuits.