

# CARDOZO LAW

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TESTIMONY BEFORE THE HOUSE SUBCOMMITTEE ON  
ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW:

## **Justice Denied: Forced Arbitration and the Erosion of our Legal System**

Myriam Gilles  
Submitted May 14, 2019

Distinguished members of the House Subcommittee:

Thank you for inviting me to participate in this important hearing. I hope my testimony will help inform the discussion of the pernicious effects of class-banning forced arbitration clauses on consumers, employees and small businesses. In this written testimony, I (1) chronicle the rise and troubling consequences of forced arbitration, and (2) expose the reality behind the myths and talking points perpetuated by arbitration advocates – all to make clear that a legislative solution is desperately needed to solve this escalating crisis in access to justice. It my hope that today’s hearing will spur the Committee and the Congress to act on the slate of proposed legislation seeking to amend the Federal Arbitration Act, including the Forced Arbitration Injustice Repeal Act (H.R. 1423/S. 610), the Restoring Justice for Workers Act (H.R. 7109), and the Justice for Servicemembers Act (H.R. 2631).

### INTRODUCTION

In 1925, the 68<sup>th</sup> Congress enacted the Federal Arbitration Act (“FAA”) to protect voluntary agreements to arbitrate, entered into by savvy businesses seeking a fast and economical alternative to the judicial system and a private forum where trade secrets and other commercial matters would be kept confidential.<sup>1</sup> Not one member of that Congressional body could have imagined that this

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<sup>1</sup> See, e.g., SEN. REP. NO. 536, 68TH CONG., 1ST SESS. 3 (1924) (the goal of promoting arbitration as an alternative to the judicial system “appeal[ed] to big business and little business alike, to corporate interests as well as to individuals”).

statute would someday be interpreted to permit companies to impose pre-dispute arbitration clauses in standard-form contracts with consumers and employees. Surely no one who supported the legislation thought for a second that, in enacting the FAA, they would be undermining private enforcement of consumer, antitrust, securities, employment and civil rights statutes that preserve and protect our shared rights.<sup>2</sup> And clearly no member of the 68<sup>th</sup> Congress believed that casting a vote in favor of the FAA would render American citizens and small business owners unable to access public courts to resolve disputes, seek redress for grievances, or enforce state and federal laws.

Yet that is precisely where we find ourselves today, as the result of a series of flawed judicial decisions that have strayed far from the 68<sup>th</sup> Congress's original intent in enacting the FAA. The result has been a proliferation of mandatory, pre-dispute arbitration clauses and class action bans. And, given the certainty that most consumers and employees cannot afford to arbitrate small-dollar claims individually, or attract counsel on a contingent fee basis, these provisions effectively eliminate access to justice and undermine rights guaranteed by federal and state law.<sup>3</sup>

Until now, debates over forced arbitration have largely been confined to academics and policymakers; but recent [scandals](#) have revealed the extent to which these provisions enable companies to cover up persistent wrongdoing. And [polling](#) reveals that citizens are now demanding change: 84% of voters -- 87% of Republicans and 83% of Democrats -- support legislation to end forced arbitration.<sup>4</sup> In other words, in this moment of partisan factionalism where we seem to agree on little, Americans across the political spectrum agree that closing the courthouse door is harmful. It therefore falls upon this 116<sup>th</sup> Congress to faithfully represent the interests of this vast majority by amending the FAA to make clear that it does not apply to pre-dispute, class-banning forced arbitration clauses imposed by powerful companies upon unknowing consumers, employees and other weaker counterparties.

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<sup>2</sup> Indeed, even the FAA's primary draftsman, Julius Henry Cohen, warned that arbitration was not the appropriate forum "for deciding points of law of major importance involving constitutional questions or policy in the application of statutes." Andrea Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 109 CAL. L. REV. \_\_\_ (forthcoming 2019) (citing Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926)).

<sup>3</sup> See CONSUMER FINANCIAL PROTECTION BUREAU, [ARBITRATION STUDY](#) (2015) at 10 [hereinafter, CFPB ARBITRATION STUDY] ("Across each product market, 85-100% of the contracts with arbitration clauses – covering close to 100% of market share subject to arbitration in the six product markets studied – include no-class arbitration provisions.")

<sup>4</sup> The percentage of Americans against forced arbitration has risen steadily in the past few years. For example, in 2017, 67% of American – 64% of Republicans and 74% of Democrats – supported the CFPB's rule which would have banned forced arbitration clauses in consumer financial contracts. See Sylvan Lane, [GOP Polling Firm: Bipartisan Support for Consumer Bureau Arbitration Rule](#), THE HILL, Oct. 2017. The more recent nationwide poll by Hart Research found even greater bipartisan support for an even broader federal ban on all forced arbitration clauses in consumer and employment contracts.

I.  
THE OMINOUS RISE OF FORCED ARBITRATION  
IN AMERICA

In 2005, I began studying the effects of forced arbitration clauses on consumers, employees and small businesses. That year, I published an article about class-banning arbitration provisions and warning that these clauses could become ubiquitous, blocking citizens' access to judges and juries.<sup>5</sup> Two important rulings by the United States Supreme Court of the United States brought to life all my dire predictions. In its 2011 decision in *AT&T Mobility v. Concepcion*, the 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>6</sup> This reading of the FAA has since preempted many subsequent attempts by states to regulate arbitration clauses in consumer and employment contracts.<sup>7</sup>

The Court expanded the reach of the FAA in its 2013 decision in *American Express v. Italian Colors*.<sup>8</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>9</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 legal claims collectively.<sup>10</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>11</sup>

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<sup>5</sup> Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005).

<sup>6</sup> 563 U.S. 333 (2011).

<sup>7</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>8</sup> 559 U.S. 1103 (2013).

<sup>9</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>10</sup> 559 U.S. 1103 (2013).

<sup>11</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 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

These decisions, widely viewed as illogical and incorrect interpretations of the FAA, set the Court upon a crooked legal path, leading it to uphold class-banning arbitration clauses in numerous circumstances that stray far from the original goals of the FAA.<sup>12</sup> In case after case, slim majorities have held that it does not matter that individual citizens are unable to vindicate their statutory rights in a one-on-one arbitration – *i.e.*, that countless legal claims 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 view is simply this: “Too darn bad.”<sup>14</sup>

These Supreme Court decisions have given a green light to corporations looking to suppress legal claims and opt out of liability.<sup>15</sup> Corporate actors, seeing that green light, have hit the gas, and the use of class-banning forced arbitration clauses has skyrocketed in recent years.<sup>16</sup> These clauses have quickly spread from telecom and credit card contracts, to contracts with insurance companies, airlines, landlords, payday lenders, banks, gyms, rental car companies, parking facilities, schools, kids’ camps, shippers – even HMOs and nursing homes.<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.

#### a. *Consumers*

Class-banning forced arbitration clauses have permeated every corner of the consumer universe. For example, the Consumer Financial Protection Bureau (“CFPB”) found that seven of

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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>12</sup> 9 U.S.C. § 2. Since 2010, the Supreme Court has decided fourteen 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 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. Oliviera*, 138 S.Ct. 1164 (Jan. 16, 2019); *Lamps Plus v. Varela*, No. 17-988, slip op. (U.S. Sup. Ct. October 2018).

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

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

<sup>15</sup> *See, e.g.*, Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Nov. 1, 2015 (“Corporations said that class actions were not needed because arbitration enabled individuals to resolve their grievances easily. But court and arbitration records show the opposite has happened: once blocked from going to court as a group, most people dropped their claims entirely.”).

<sup>16</sup> *Id.* (“By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies [have] devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.”).

<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. After all, the incremental burden of including magic words in dispute resolution boilerplate -- or even on point-of-sale purchase receipts or box-stuffer notices -- is surely minimal in relation to the benefit of removing oneself from potential exposure to aggregate litigation.”).

the eight largest mobile wireless providers, covering 99.9% of subscribers, required arbitration in their customer agreements.<sup>18</sup> This means an estimated 290 million cell phone subscribers are bound to service agreements that contain class-banning forced arbitration clauses. Likewise, credit card issuers representing more than 90% of all credit card debt impose arbitration clauses in their contracts with consumers.<sup>19</sup> In the checking account market, banks representing 44% of insured deposits have arbitration clauses in their customer contracts, while 98.5% of payday lenders impose arbitration on borrowers.<sup>20</sup> As a result, tens of millions of consumers are, today, subject to these rights-stripping clauses.

Given the ubiquity of these provisions, one might expect some significant number consumers to arbitrate their disputes. But the opposite is true: only a tiny percentage of consumers file arbitrations annually.<sup>21</sup> For example, Yale Law professor Judith Resnik found that the American Arbitration Association (“AAA”), which is “designated by AT&T to administer its arbitrations,” reported that only “134 individual claims (about 27 a year) were filed against AT&T between 2009 and 2014.”<sup>22</sup> During the same time period, Professor Resnik calculates AT&T had over 120 million wireless customers, and that the company was subject during these years to numerous investigations and public enforcement actions for violations of consumer laws.<sup>23</sup>

More recent [data](#) provided by the AAA reveals that, in the first quarter of 2019, it resolved only 895 consumer arbitrations for the hundreds of companies for which it is a designated arbitral provider. Again, this is a miniscule number of claims when compared to the millions of American consumers who sign consumer contracts every year that require them to resolve disputes through individual arbitration. It is also tiny compared to the millions of consumers who would have benefited from class actions, when these procedures were available.<sup>24</sup>

One reason consumers don’t arbitrate their claims is that it would be too costly to do so: under these class-banning arbitration clauses, a consumer must bear 100% of all the costs charged

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<sup>18</sup> See CFPB ARBITRATION STUDY, *supra* note 3. 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> CFPB ARBITRATION STUDY, *supra* note 3, at 22–23. Specifically, the CFPB Arbitration Study noted that, at the time of its study, four major credit card issuers were subject to a federal court injunction under which they were temporarily barred from imposing their mandatory arbitration clauses. *Ross v. Bank of America, N.A.*, 2006 WL 2685082 (S.D.N.Y. 2010). If those four credit card issuers had continued their policy of requiring arbitration during the CFPB’s study period, the percentage of outstanding loans subject to mandatory arbitration would have risen to over 93%. *Id.* And indeed, a casual web check of those four issuers’ terms and conditions today shows they have reinstated their arbitration requirements.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (finding that from 2010 to 2012, only 411 consumers filed individual arbitrations to resolve disputes – while nearly 10 million consumers were represented in comparable class actions during the same period).

<sup>22</sup> 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, 2811 (2015).

<sup>23</sup> *Id.* at 2812.

<sup>24</sup> CFPB ARBITRATION STUDY, *supra* note 3 at pp. 29-31 (concluding that, in the time period it examined, millions of consumers were class members while just hundreds brought claims in arbitration; and that consumers were awarded less than \$200,000 in arbitration compared to \$1.1 billion in class actions).



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 do so.<sup>25</sup> Indeed, in a recent case, a lawyer for the company Fitbit admitted to a federal judge that the company was betting that [no rational litigant](#) would pay arbitration fees, which start at \$750, to litigate a relatively small-dollar claim involving a defective device.

Another reason consumers don't arbitrate their claims is they have no idea that they have signed away their right to go to court before a jury of their peers. In a Congressionally-mandated study conducted by the Consumer Financial Protection Bureau in 2015, half of all respondents surveyed did not know whether they had the right to sue their credit-card issuer in court and more than a third of those who were bound by forced-arbitration clauses incorrectly believed that they could still go to court to resolve disputes.<sup>26</sup> This utter lack of awareness is no surprise, given that class-banning forced arbitration clauses are often hidden in the boilerplate language that consumers either skim or ignore when making purchases. Indeed, [companies now](#) regularly and intentionally impose these class-banning arbitration clauses in click-wrap, envelope-stuffers and other delivery methods intended to obscure or minimize the immensity of the rights that are being forfeited.

Further, these rights-stripping clauses are a *precondition* to obtaining the product or service in question – i.e., they are imposed long before any dispute or problem arises. And since most people simply don't contemplate dispute-resolution procedures at the start of any relationship – but especially not when transacting for a product or service – we simply lack the information necessary to place sufficient value on the rights we're giving up until it's far too late.

All this leaves American consumers without remedy for widespread wrong-doing and allows unscrupulous companies to engage in widespread misconduct with little fear of exposure or penalty. For example, forced arbitration allowed companies like Wells Fargo<sup>27</sup> and Equifax<sup>28</sup> to block consumer lawsuits that would have exposed their misconduct far sooner. In the case of Wells Fargo, injured customers began suing the company for opening fake accounts back in 2013 – two years before press reports surfaced that employees had opened 3 million such accounts – but these claims were quickly forced into the black box of arbitration.<sup>29</sup>

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<sup>25</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?”).

<sup>26</sup> CFPB ARBITRATION STUDY, *supra* note 3 at pp. 19-24 (reporting that half of all respondents surveyed did not know whether they had the right to sue their credit-card issuer in court, and more than a third of those who were bound by forced-arbitration clauses still believed, incorrectly, that they could take the company to court).

<sup>27</sup> See, e.g., Michael Corkery & Stacy Cowly, [Wells Fargo Killing Sham Account Suits by Using Arbitration](#), NY TIMES, Dec. 6, 2016.

<sup>28</sup> See, e.g., Diane Hembree, [Consumer Backlash Spurs Equifax to Drop ‘Ripoff Clause’ in Offer to Security Hack Victims](#), FORBES, Sept. 9, 2017.

<sup>29</sup> See, e.g., Michael Hiltzik, [No Surprise: Wells Fargo Is Leveraging Its Arbitration Clause to Win an Advantageous Scandal Settlement](#), LOS ANGELES TIMES, March 31, 2017; see also Col. Lee F. Lange, [I Served to Protect Our Rights; Don't Let Equifax Take Them Away](#), MEDIUM (reporting that “only four arbitrations have been filed against Wells Fargo in Arizona despite up to 178,972 or more fake accounts in the state”).

b. *Employees*

In recent years, companies have also imposed class-banning arbitration clauses on their employees, silencing aggrieved workers and eliminating corporate accountability for systemic workplace violations.<sup>30</sup> Employer-drafted arbitration clauses require workers to resolve all disputes within the employment relationship in private arbitration, including payment of wages and benefits, provision of breaks and rest periods, rights in termination, and prohibitions against discrimination or harassment. Indeed, many companies go so far as to explicitly highlight 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.

These provisions leave workers nowhere to turn when their rights are violated – a problem of growing magnitude as more employers impose class-banning arbitration clauses. A 2018 study by Cornell Professor Alexander Colvin estimated that over half the country’s nonunionized workforce is now subject to these provisions – more than double the number in the early 2000s.<sup>31</sup> Some of the country’s best-known companies, including Amazon, Walmart, Starbucks, Macy’s and McDonald’s, now require all or most of their workers to sign class-banning forced arbitration clauses – some before they can even apply for a job.<sup>32</sup> Further, Professor Colvin’s study found that forced arbitration is more common in low-wage workplaces, and in industries (such as education and healthcare) that are disproportionately comprised of women and African-American workers.<sup>33</sup>

Yet, despite the large chunk of the U.S. workforce bound to individually arbitrate their disputes, few workers do.<sup>34</sup> One study has estimated that only 1 in 10,400 workers subject to forced arbitration has filed a claim in arbitration – putting a lie to the claim that arbitration is preferable.<sup>35</sup> The remaining workers with potentially valid claims -- somewhere between 315,000 to 722,000 each

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<sup>30</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>31</sup> See Alexander Colvin, *The Growing Use of Mandatory Arbitration*, ECONOMIC POLICY INSTITUTE (April 6, 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>32</sup> For example, when Gloria Marmolejo sought a janitorial position at an LA Fitness club, she filled out a job application that contained an arbitration clause. She got the job, but then, five years later (as she approached 50) was fired. When Marmolejo tried to challenge her termination, the court upheld the arbitration clause in the application -- despite the fact that Marmolejo credibly claimed she had not understood when she was applying for the job that she was also signing away her rights to be treated fairly while in the position. See [Marmolejo v. Fitness Intl. LLC](#), Civ. No. E064190 (Cal. Ct. App., March 7, 2018). There are countless similar examples of workers subjected to arbitration clauses in the process of applying for a job.

<sup>33</sup> Colvin, *supra* note 31.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

year<sup>36</sup> -- 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>37</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>38</sup>

The scope and effects of forced arbitration are likely to worsen given the Supreme Court's 2018 decision in *Epic Systems v. Lewis*<sup>39</sup> and its recent decision in *Lamps Plus v. Varela*.<sup>40</sup> In *Epic Systems*, the Court upheld class-banning arbitration clauses notwithstanding the federally-guaranteed right to "collective action" protected by the National Labor Relations Act.<sup>41</sup> In *Lamps Plus*, the Court ruled 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>42</sup> Observers expect that, given the breadth of these recent decisions, companies that have not yet imposed arbitration on their workers will quickly move to do so in order to take advantage of the immunity from liability promised by the Court's decisions.<sup>43</sup>

## II. THE TROUBLING CONSEQUENCES OF CLASS-BANNING FORCED ARBITRATION CLAUSES

The costs of enforceable class-banning forced arbitration clauses are borne by the millions of consumers, employees and small businesses that are left without meaningful access to justice, as corporations escape accountability for all kinds of illegality and abuse. For example:

- Payday lenders are notorious for illegal, predatory practices: some have made unauthorized debits from consumers' checking accounts or illegally renewed debts without borrower consent<sup>44</sup>; others have used aggressive methods to collect debts -- such as posing as federal authorities, threatening borrowers with criminal prosecution, trying to garnish wages improperly, or engaging in campaigns to harass borrowers. Rapacious profiteers trap low-wage workers and military personnel into "a thicket of debt from which many never emerge."<sup>45</sup> Ordinarily, citizens could rely on a combination agency enforcement actions and private litigation brought by injured borrowers to detect and

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<sup>36</sup> *Id.*

<sup>37</sup> Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679 (2018).

<sup>38</sup> *Id.*

<sup>39</sup> 138 S. Ct. 1612 (2018).

<sup>40</sup> No. 17-988, slip op. (U.S. Sup. Ct. October 2018).

<sup>41</sup> 138 S. Ct. 1612 (2018).

<sup>42</sup> No. 17-988, slip op. (U.S. Sup. Ct. October 2018).

<sup>43</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>44</sup> *See, e.g.*, *Gunson v. BMO Harris Bank, N.A.*, 43 F. Supp. 3d 1396 (S.D. Fla. 2014) (borrower claiming that bank had used an electronic debiting network to help lenders collect payday loan payments in violation of state and federal laws; motion to compel arbitration granted).

<sup>45</sup> Brian Grow & Keith Epstein, [\*The Poverty Business\*](#), BLOOMBERG (May 20, 2007).



reform illegal payday lending practices.<sup>46</sup> Indeed, limited public resources and a preference for decentralized enforcement have resulted in significant reliance placed upon private litigation as the primary enforcement vehicle. But because nearly all payday lenders include forced arbitration clauses in their loan agreements to avoid liability exposure, the ability of private citizens to enforce their rights is hamstrung as never before.<sup>47</sup> The resulting enforcement gap leaves hundreds of thousands of unsophisticated borrowers exposed to these unscrupulous and largely unregulated lenders.<sup>48</sup>

- Forced arbitration perpetuates the exploitation of women in the workplace by shunting victims into a private system where each is unaware of the other and where the arbitration provider (who is chosen and paid by the employer) lacks authority to remedy systemic and recurring workplace abuse. Media reports have shed light on the ways in which forced arbitration enabled high-profile companies, including [Miramax](#) and [Fox News](#), to cover-up widespread workplace harassment.<sup>49</sup> Other less visible stories reveal the appalling ubiquity of the problem. For example, throughout the late 1990's and 2000's, hundreds of employees of [Sterling Jewelers](#) (parent company to Kay Jewelers and Jared Jewelers) were “routinely groped, demeaned and urged to sexually cater to their bosses to stay employed” – but their claims were forced into private arbitration to protect company executives, who were never held accountable, while those who spoke up were fired.<sup>50</sup> These examples reveal that sexual harassment in the workplace affects both the victim and the broader economy, because companies that are allowed to shroud illegal activity enjoy an unfair advantage in the marketplace that would not be afforded them had their practices been exposed to the public. Accordingly, last year 56 state attorneys general from both parties [wrote](#) this body, urging a federal ban on forced arbitration of sexual harassment claims.<sup>51</sup>

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<sup>46</sup> See, e.g., *Kristensen v. Credit Payment Servs.*, 12 F. Supp. 3d 1292, 1308 (D. Nev. 2014) (certifying class action brought by consumers against payday lenders alleging violations of the Telephone Consumer Protection Act); *Mitchem v. GFG Loan Co.*, No. 99-C-1866, 2000 WL 294119, at \*3, \*6 (N.D. Ill. Mar. 17, 2000) (partial denial of motion to dismiss consolidated claims brought by borrowers against payday lenders under the Truth in Lending Act); *Purdie v. ACE Cash Express, Inc.*, No. Civ.A. 301CV1754L, 2003 WL 22976611, at \*1 (N.D. Tex. Dec. 11, 2003).

<sup>47</sup> See CFPB ARBITRATION STUDY, *supra* note 3 (reporting that 98.5% of payday lenders impose arbitration on borrowers).

<sup>48</sup> See generally 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 on borrower litigation against unscrupulous payday lenders).

<sup>49</sup> Emily Martin, [Forced Arbitration Protects Sexual Predators and Corporate Wrongdoing](#), CONSUMER LAW & POLICY BLOG, Oct. 23, 2017.

<sup>50</sup> See, e.g., Drew Harwell, [Hundreds Allege Sex Harassment, Discrimination at Kay and Jared Jewelry Co.](#), WASH. POST, Feb. 27, 2017; Drew Harwell, [Sterling Discrimination Case Highlights Differences Between Arbitration, Litigation](#), WASH. POST, March 1, 2017.

<sup>51</sup> As forced arbitration has expanded, state attorneys general have repeatedly warned that these provisions “erode the states’ ability to protect their citizens and economies.” See, e.g., *American Express v. Italian Colors*, [Brief of the State of Ohio and 21 Other States as Amici Curiae in Support of Respondents](#).

- Consumers today are more vulnerable than ever to identity theft and data breaches. The notorious fraud committed by Wells Fargo employees described above affected nearly 3.5 million customers, many of whom are still trying to get their money back and repair their credit. Similarly, the massive Equifax data breach exposed personal information of over 145 million people.<sup>52</sup> Other major data breaches have exposed the personal and financial information of millions of Americans.<sup>53</sup> And forced arbitration has allowed companies that fail to protect their customer's data to block consumer lawsuits that would have exposed their misconduct far sooner.

But the damage caused by class-banning forced arbitration clauses extends far beyond those who are barred access to public courts: *all* citizens are harmed when the courthouse doors are closed and legal claims are suppressed. And that is precisely what these clauses accomplish by demanding that each claim be brought on one-on-one basis. As the CFPB Arbitration Study exposed, once blocked from going to court as a group, most people drop their claims entirely. This regime allows wrongful conduct to continue undetected and unremedied long after such illegality would otherwise come to light. Without public accountability through the court system, companies have less incentive to follow the law and treat workers and consumers fairly.

Class-banning forced arbitration clauses also undermine the principles central to the rule of law, such as *stare decisis* and the development of legal precedents.<sup>54</sup> These provisions force disputes into hermetically-sealed, secret proceedings, denying citizens the transparency, openness and accountability necessary for the operation of a fair and democratic civil justice system.<sup>55</sup> By allowing companies to opt out of the court system, we have “frozen the law... denying the courts the ability to develop and adapt the law as society and business changes.”<sup>56</sup>

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<sup>52</sup> See, e.g., 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>53</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).

<sup>54</sup> See, e.g., Myriam Gilles, [The Day Doctrine Died: Private Arbitration and the End of Law](#), 2016 U. ILL. L. REV. 371 (2016); Lilliam T. 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>55</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”).

<sup>56</sup> S. 1782, Arbitration Fairness Act of 2007: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 110th Cong. 10 (2007) (statement of Richard Alderman).

### III. THE TRUTH BEHIND CLASS-BANNING FORCED ARBITRATION CLAUSES

Class-banning forced arbitration clauses are not designed to achieve fair, expeditious or cost-effective resolutions. Rather, the entire point of these provisions is to make it nearly impossible for consumers and employees seeking redress for broadly distributed small-value harms to pursue one-on-one arbitrations. Let's face it: if private companies really wanted to create a fair arbitration regime, they could easily do so by (1) offering citizens arbitration as an alternative to litigation *after* a dispute has arisen; and (2) permitting class or collective arbitration so that an individual victim wouldn't alone shoulder the entire cost and exposure of arbitration. No company has done so – and indeed, faced with bad publicity over their forced arbitration clauses, companies like [Google](#), Microsoft and others have instead chosen to eliminate arbitration altogether (or for some [subset](#) of claims) rather than expose themselves to more evenhanded processes.

Nonetheless, large corporations and lobbying groups like the Chamber of Commerce have spent a decade advocating for forced arbitration on grounds that it is “better, cheaper, faster” for ordinary Americans.<sup>57</sup> Their claims are based on a series of hackneyed misrepresentations and fact distortions:

#### a. *The “Litigation Explosion” Myth*

Arbitration advocates try to breed panic by claiming that, should Congress outlaw forced arbitration, the result will be a massive “litigation explosion” of frivolous civil lawsuits that will harm corporate defendants and lead to higher prices for goods and services. There has never been, in our history, any credible data to support the claim that litigation rates have risen due to specious claiming, rather than population growth.<sup>58</sup> Put differently – we weren't in the midst of a litigation explosion immediately prior to the rise of forced arbitration (circa 2012) and we won't be thrown into one if forced arbitration is prohibited tomorrow. Moreover, companies that have eliminated forced arbitration have not, by their own account, experienced significant upticks in litigation that would threaten their overall financial condition.<sup>59</sup>

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<sup>57</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>58</sup> For example, the National Center for State Courts reports that the number of civil cases filed in state courts decreased by 16% between 2007 and 2016. EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2012 STATE COURT CASELOADS, NATIONAL CENTER FOR STATE COURTS, 2014. Likewise, federal civil filings have decreased by 7.1% between 2009 and 2018. FEDERAL JUDICIAL CASELOAD STATISTICS 2014, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS.

<sup>59</sup> For example, both Capital One and Bank of America eliminated forced arbitration in their consumer contracts. Their most recent [SEC Form 10-K](#) filings state that management believes that any “loss contingencies arising from pending [litigation] will not have a material adverse effect on the consolidated financial position or liquidity of the Corporation.” Major tech companies have similarly concluded that ending forced arbitration would not affect the

But more importantly, these fear tactics obfuscate a basic reality: eliminating *all* consumer, employment or other kinds of claims from the public court system is not a sensible way of screening meritless cases. Forced arbitration does not screen for merit – instead, it shunts *all* cases into an expensive, private system meant to deter claimants from seeking redress. Forced arbitration does not keep cases out of the court system that don’t belong there – instead, it guarantees that hundreds of thousands of important and worthy lawsuits will never be heard.

In any event, federal judges possess numerous procedural tools to rid dockets of frivolous cases – including rules that require plaintiffs to make it through a gauntlet of heightened pleading standards,<sup>60</sup> summary dismissals,<sup>61</sup> justiciability doctrines,<sup>62</sup> rigorous class certification requirements,<sup>63</sup> limited discovery,<sup>64</sup> and the narrowing of personal jurisdiction over multinational corporations.<sup>65</sup> Closing the courthouse doors before citizens have an opportunity to run this procedural gauntlet is not fair or efficient, but rather, tips the scales of justice in favor of the large and powerful.

b. *Banning Forced Arbitration Doesn’t Prohibit All Arbitration*

Make no mistake: no one argues that we should ban arbitration. When used knowingly by businesses as originally intended by the 1925 Congress that enacted the FAA, arbitration can be an effective alternative to our court system. It allows sophisticated entities to voluntarily agree to resolve complex disputes before an industry-expert neutral, allowing these entities to protect their trade secrets and maintain their important business relationships.<sup>66</sup> As Professor Christopher Leslie

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company’s bottom line. Microsoft (which ended forced arbitration for sexual harassment claims in 2017) and Google (which recently decided to end forced arbitration in all disputes) have each advised the SEC and their shareholders that any increase in litigation would not result in a material change to the overall liquidity of the company.

<sup>60</sup> See, e.g., *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (announcing a new “plausibility” standard for determining the adequacy of pleadings at the motion to dismiss stage). See also Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193 (2014) (heightened pleading requirements in *Twombly* and *Iqbal* “had palpably negative effects on plaintiffs”).

<sup>61</sup> See Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 883 (2007) (“Over the 25-year period [from 1975 to 2000], the percentage of cases with one or more summary judgment motions granted in whole or in part doubled from 6 percent to 12 percent.”).

<sup>62</sup> See, e.g., *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016) (determining whether statutory injury is sufficient to meet Article III “particularized” and “concrete” harm requirement for standing to sue).

<sup>63</sup> See, e.g., *Bristol-Myers Squibb Co. v. Superior Court*, 137 S.Ct. 1773 (2017) (finding due process does not permit exercise of specific personal jurisdiction in California over nonresident consumers’ claims); *J. McIntyre v. Nicastro*, 564 U.S. 873 (2011) (rejecting personal jurisdiction over a foreign company doing business in the United States and in the state where plaintiff was injured); *Goodyear Dunlop Tires Operations S.A. v. Brown*, 564 U.S. 915 (2011) (finding foreign corporations subject to general jurisdiction only where they are “at home”); *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014) (same).

<sup>64</sup> See, e.g., F.R.C.P. 26(b)(1) (amended 2015 to require that discovery be “proportional”).

<sup>65</sup> See, e.g., *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338 (2011) (elevating predominance requirement under Rule 23(a)); *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) (finding that economic models of antitrust injury must be common to the class).

<sup>66</sup> See Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 970-71 (1999) (“[t]he merchant guilds established arbitration tribunals because they felt that the courts were not sufficiently knowledgeable about commercial customs”).

explains, “in relationships between commercial parties, buyers and sellers are similarly likely to be the plaintiff or defendant.”<sup>67</sup> Accordingly, these sophisticated parties can negotiate on a level field for arbitration procedures that they believe will fairly and efficiently resolve their disputes.

But when pre-dispute arbitration clauses and class action bans are forced upon consumers and employees in take-it-or-leave-it, standard-form agreements, “the probability of litigation positions is highly asymmetrical: the seller is far more likely to be the defendant in any dispute, and the consumer the plaintiff.”<sup>68</sup> There is no negotiation, no choice, and the resulting arbitration procedures are not, in truth, intended to provide a forum to *resolve* claims. The one and only objective of forced, pre-dispute, class-banning arbitration clauses is to suppress and bury claims. The whole point is that consumers and employees seeking redress for broadly distributed small-value harms cannot and will not pursue one-on-one arbitrations.<sup>69</sup> Ever.

### c. *Unmasking the True Intent Behind Forced Arbitration*

The actions of companies faced with large numbers of individual arbitrations expose the true intent behind class-banning arbitration clauses – namely, ensuring that individuals drop their claims altogether. For example, in 2015, a group of Chipotle employees alleged their employer had violating the wage-and-hour provisions of the Fair Labor Standards Act (“FLSA”).<sup>70</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 – and it won.

The plaintiffs’ lawyers then did something unexpected: instead of dropping these claims, 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>71</sup> While “thousands of individual arbitrations” is precisely what Chipotle’s arbitration clause invites, the company balked: it returned to court and pleaded with the federal judge to suspend the arbitral

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<sup>67</sup> Christopher Leslie, *Conspiracy to Arbitrate*, 96 N.C. L. REV. 381, 393 (2018).

<sup>68</sup> *Id.*

<sup>69</sup> The CFPB’s Arbitration Study revealed that very few consumers arbitrate disputes. For example, of the nearly 80 million credit cardholders, checking account holders and payday borrowers who were subject to arbitration clauses as of the end of 2012, only 1241 consumers had filed arbitrations to resolve disputes with their credit card companies, banks, and lenders. CFPB ARBITRATION STUDY, *supra* note 3 at p. 63-64. Professor Colvin’s study of employment arbitration estimates that only 1 in 10,400 workers subject to forced arbitration actually files claim in arbitration. Colvin, *supra* note 29.

<sup>70</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. *See infra*. Accordingly, the judge dismissed the claims 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>71</sup> Michael Hiltzik, [Chipotle May Have Outsmarted Itself by Blocking Thousands of Employee Lawsuits Over Wage Theft](#), LOS ANGELES TIMES, Jan. 4, 2019.



filings and disqualify plaintiffs' counsel.<sup>72</sup> The judge [denied](#) both motions, chastising Chipotle for its “attempts to delay and obfuscate” the workers' claims. In the wake of those rulings, Chipotle has reportedly prevented “the arbitrations from going ahead by failing to pay its \$1,100 share of the filing fee for each case.”<sup>73</sup>

We see a similar crisis of confidence in arbitration at Uber, 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>74</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>75</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 arbitration clause prevents *any* consolidation of claims.<sup>76</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' claims en masse. The resistance by Chipotle, Uber and other companies to arbitrating these claims — after steering workers into arbitration — suggests that their policies were never really about fairness and efficiency, but about suppressing claims at all costs.

### III.

#### LEGISLATION IS THE ONLY SOLUTION TO THE PROBLEM OF CLASS-BANNING FORCED ARBITRATION

It is clear that legislation prohibiting class-banning forced arbitration of consumer, employment and civil rights claims is necessary to restore access to justice, corporate accountability, and the rule of law by giving American citizens the choice of how to pursue their rights against a corporation. Indeed, the Supreme Court itself 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>77</sup>

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<sup>72</sup> Dave Jamieson, [Chipotle's Mandatory Arbitration Agreements Are Backfiring Spectacularly](#), HUFFINGTON POST, Dec. 20, 2018.

<sup>73</sup> *Id.*

<sup>74</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>75</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>76</sup> *Id.*

<sup>77</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.”).



As the access-to-justice crisis grows more untenable, a chorus of judges of all party affiliations have expressed severe misgivings about the Court’s arbitration precedents -- even as they are compelled to follow them. For example, in *CellInfo, LLC v. American Tower Corp.*, federal district Judge Young observed “that one-sided species of arbitration [are] unconscionably forced on vulnerable consumers and workers and almost universally reviled, enforceable only due to the mandate of a slim majority of the Supreme Court.”<sup>78</sup> The West Virginia Supreme Court accused the Justices of manufacturing FAA preemption out of whole cloth, explaining that “[w]ith tendentious reasoning, the United States Supreme Court has stretched the application of the FAA from being a procedural statutory scheme effective only in federal courts, to being a substantive law that preempts state law in both federal and state courts.”<sup>79</sup> And in a recent decision, a district court judge reluctantly granted a motion to compel arbitration in a racial discrimination claim, observing that responsibility for changing the law lies squarely with Congress:

“No matter one’s opinion of the widespread and controversial practice of requiring consumers to relinquish their fundamental right to a jury trial -- and to forgo class actions -- as a condition of simply participating in today’s digital economy, the applicable law is clear... While th[e] result might seem inequitable to some, this Court is not the proper forum for policy objections to mandatory arbitration clauses in online adhesion contracts. Such objections should be taken up with the appropriate regulators or with Congress.”<sup>80</sup>

These judges are duty-bound to follow Supreme Court precedent, even where they believe it wrong and misguided. Congress, on the other hand, is free to reverse the Court’s rulings in this area by prohibiting pre-dispute class-banning arbitration clauses in standard-form contracts with consumer, employment and small businesses. And, indeed, Congress has already enacted legislation outlawing these clauses in payday loan and consumer credit contracts with military families, as well as amendments limiting the use of arbitration clauses in residential mortgage loans and automobile dealer franchise agreements.<sup>81</sup> It is laudable that Congress has sought to safeguard the ability of military families and auto dealer franchisees to vindicate their rights – but it is well past time to extend that ability to all consumers, employees, and small businesses.

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<sup>78</sup> 352 F. Supp. 3d 127, 131 (D. Mass. 2018).

<sup>79</sup> *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250 (W. Va. 2011). The U.S. Supreme Court reversed in a terse, per curiam decision. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam).

<sup>80</sup> *Selden v. Airbnb*, 2016 WL 6476934 at \*2 (D.C. 2016).

<sup>81</sup> See 10 USC § 987(e)(3), (f)(4) (voiding arbitration clauses in payday loan or any consumer credit contracts—with the exception of residential mortgages and car loans—with members of the military or their families); 15 USC § 1639c(e)(1) (barring arbitration clauses in residential mortgage loans); 15 USC § 1226(a)(2) (prohibiting automobile manufacturers from imposing predispute arbitration clauses in their franchise agreements with dealers).