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"Justice Denied: Forced Arbitration and the Erosion of Our Legal System"

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Chairman Cicilline, Ranking Member Sensenbrenner, distinguished members of the Subcommittee: Thank you for inviting me to testify today. My name is Deepak Gupta. I am the founder of Gupta Wessler PLLC, a law firm focused on Supreme Court and appellate advocacy. Over the past decade, I have represented parties in some of the U.S. Supreme Court's key cases interpreting the Federal Arbitration Act—including *AT&T Mobility v. Concepcion* and *American Express v. Italian Colors*. I teach arbitration as a Lecturer at Harvard Law School, have written about arbitration, *see, e.g., Arbitration as Wealth Transfer*, 5 Yale L. & Pol'y Rev. 499 (2017), and previously worked on arbitration issues as Director of the Consumer Justice Project at Public Citizen and as Senior Counsel at the Consumer Financial Protection Bureau.

My testimony today makes just a few basic points:

***First*, forced arbitration is unavoidable and deeply unpopular**. We're all subject to forced arbitration and we have no real choice in the matter (which is why we call it "forced"). Forced arbitration clauses are in 86% of private student loans, 88% of mobile phone contracts, and 99% of storefront payday loans. Credit cards, bank accounts, TV and internet service, gym memberships—they all require arbitration. Taking a job also increasingly requires you to give up your right to hold your employer publicly accountable for sexual harassment or assault, discrimination, or wage theft. It's difficult enough for a family to check a loved one into a nursing home. Now you also have to check your family's legal rights at the door—a practice that has been shown in numerous instances to shield shocking abuse and neglect from public scrutiny.

When Americans are polled about forced arbitration, they hate it. And, despite our hyper-partisan times, this sentiment is widely shared by voters across the political spectrum. Overwhelming majorities of Republicans, Democrats, and independents—80% or more of each—support federal legislation to end forced arbitration. People might not understand all the technical legal details, but they know when the system has been rigged against them.

***Second*, forced arbitration is a threat to democracy and our shared constitutional values.** As the U.S. Supreme Court has itself acknowledged, the presence of a forced arbitration clause often means that Americans will have no effective method of asserting their rights or getting justice under federal laws that could otherwise have been enforced in a court—consumer protection or antitrust laws, for example, or prohibitions on sex or race discrimination. If Congress passes laws that can't be enforced in the real world, what good are those laws?

Forced arbitration in effect replaces the laws that Congress enacts with private legislation, written by corporations into the fine print of contracts that nobody reads and that nobody can negotiate. That's not what's supposed to happen in a democracy.

Forced arbitration also robs us of our constitutional rights to a day in court and a civil trial by jury. This is no mere technicality. The very reason the U.S. Constitution has a Bill of Rights at all is because the original document lacked protection for the cherished Anglo-American right to a civil jury trial. Take a moment to appreciate how far this takes us away from our founding ideals. John Adams once said that "representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle and fed and clothed like swine and hounds."

Forced arbitration is also both *secret* and *slanted*: it shields lawbreaking, inhibits development of the law, and distorts outcomes in favor of those who write the contracts, who get to pick the arbitration forum they prefer. Forced arbitration thereby enables an incredibly broad range of harmful and illegal practices—from sexual harassment and assault to illegal discrimination, from wage theft to consumer-protection and antitrust violations—to go both unnoticed and unpunished.

***Third,* the biggest problem with forced arbitration is not simply that it's a biased or unfair process—it's that it kills most people's claims entirely.** If you remember only one thing from this hearing, I hope it is this: Forced arbitration does not do what its proponents claim it does. It doesn't channel claims into an alternative system that's better, faster, or cheaper at resolving disputes. Instead, under forced arbitration, claims of American consumers and workers *simply disappear,* cutting off compensation and deterrence as well as public accountability and the development of the law itself.

One way to see this empirically is to ask what consumers actually get out of arbitration. It should be no surprise that few consumers with low-value claims successfully advocate for themselves when forced to seek individual relief. But you might be surprised at how few. Of the hundreds of millions of consumers that interact with banks, credit cards, student loans, payday loans, debt collectors, and other companies, how many do you think have won affirmative relief on claims of $1,000 or less in arbitration? A comprehensive study by the Consumer Financial Protection Bureau found that in 2010 and 2011, for the nation's leading arbitration forum (the American Arbitration Association), the number was just *four*.

Not four million, not 400,000, not even 400. Just four.

These numbers expose the efficiency arguments for forced arbitration of consumer claims as nothing more than a bad joke. By contrast, between 2008 and 2012, the CFPB, at least *thirty-four million* consumers of the same universe of companies received compensation through class actions. 422 consumer financial class-action settlements garnered more than $2 billion in cash relief for consumers and more than $600 million in in-kind relief. And those numbers don't capture the additional benefits of industry-changing injunctions and deterrence of future bad practices. One case study comparing outcomes for consumers who had been swindled by banks through overdraft fees found that those without arbitration clauses were able collectively to recover hundreds of millions of dollars. Because the defendant was a bank, that money was deposited straight into the consumers' bank accounts. Meanwhile, while those facing enforceable arbitration clauses won back nothing.

Based on this kind of empirical comparison, we can recognize forced arbitration for what it is: a mechanism that quietly transfers giant amounts of wealth from poor to rich. You can see the same phenomenon play out when you look at how forced arbitration affects a range of wage-theft, consumer-protection, and antitrust claims—to name just a few examples.

Finally, forced arbitration is only possible because unelected federal judges have twisted the original intent of a law passed by Congress in 1925—which means that Congress has the power to fix the problem now. In the 1920s, when the Federal Arbitration Act was passed, some legislators expressed concern that arbitration might let "the powerful people … come in and take away the rights of the weaker ones." But the architects of the FAA assured them this wasn't the case: "It is not intended this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this." The Federal Arbitration Act expressly excludes all employment contracts from its reach, providing that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or *any other class of workers* engaged in foreign or interstate commerce."

For much of the 20th century, arbitration under the FAA worked as Congress had intended: to resolve the garden-variety contractual disputes that arise between businesses. Federal statutory claims were categorically beyond the FAA's reach, as were all claims brought by workers and all claims in state court. The insertion of arbitration clauses into mass contracts with consumers or workers was unheard of. It wasn't until the 1980s and '90s that the Supreme Court even allowed federal statutory claims into arbitration. And, when it did so, it was always careful to insist on a critical "effective vindication" principle: Arbitration was permissible only so long as it didn't interfere with the parties' ability to effectively vindicate their substantive rights. Remarkably, that limiting principle makes no appearance in the Supreme Court's most recent opinions. This essential limit—which was supposed to preserve the legitimacy of arbitrating statutory claims in the first place—now appears to have vanished entirely, without a trace.

I.

Forced arbitration is unavoidable. Forced arbitration clauses are everywhere, and they ensnare us in all facets of our lives, robbing us of our legal rights as consumers, as workers, as patients, as investors, and as small business owners. Amazon, AT&T, Comcast, Wells Fargo, Ticketmaster, Dropbox, Goldman Sachs, P.F. Chang's, and Uber are just some of the many companies that have modified their contracts with consumers or workers to include these terms.[1] Whether you're taking out a student loan or checking a loved one into a nursing home, forced arbitration is a fact of life.

The most comprehensive (and congressionally mandated) study of the prevalence and effects of arbitration found that over 83% of prepaid cards, 86% of private student loans, 88% of mobile wireless contracts, and 99% of storefront payday loans are now subject to forced arbitration.[2] Over 85% of contracts with arbitration clauses include class action bans.[3] Market concentration, meanwhile, magnifies the effects. For example, although only 16% of credit card issuers include arbitration provisions in their contracts, over 50% of credit card debt is outstanding are subject to them.[4] Were it not for an antitrust settlement requiring

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[1] *See generally* Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309 (2015); Lina Khan, *Thrown Out of Court*, WASH. MONTHLY, June/July/Aug. 2014, http://www.washingtonmonthly.com/magazine/junejulyaugust_2014/features/thrown_out_of_court050661.php.

[2] Consumer Financial Protection Bureau, *Arbitration Study*, § 2, at 8 (2015) ("CFPB Study").

[3] CFPB Study, § 2, at 8.

[4] *Id.*

certain credit card issuers to drop their arbitration provisions, the share of debt subject to arbitration would have been 94%.[5]

Existing inequality both reflects and facilitates the growing prevalence of forced arbitration clauses. Economic concentration has handed a relatively small number of firms outsized influence over the contractual terms that govern most transactions. For example, Comcast and TimeWarner together control at least 57% of the national broadband market, and around 63% of Americans live in areas where they can choose only between these two providers.[6] Some cities—including Boston and the Twin Cities—are served by only one company, leaving residents with no choice at all.[7] One or two companies, as a result, now set the contractual terms for a significant share of U.S. broadband consumers. The same is increasingly true of local hospitals, commercial banks, and airlines, to name a few. Under such diminished competition, consumers have no bargaining power and largely sign contracts on a take-it-or-leave-it basis.

Taking a job in America also increasingly requires waiving your legal rights. Last year, the Economic Policy Institute estimated that more than half of nonunion private-sector employees in the United States are already subject to mandatory

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[5] *Id* at § 2, at 9-11.

[6] Shalini Ramachandran, *New FCC Broadband Benchmark Lifts Comcast's Share to Nearly 60%*, WALL ST. J. (Jan. 29, 2015, 5:17 PM), http://blogs.wsj.com/corporate-intelligence/2015/01/29/comcast-bulks-up-on-broadband. Others estimate their joint share could be as high as 75%. *See* William Conlow, *Quantifying Comcast's Monopoly Power*, TECHDIRT (Aug. 1, 2014), https://www.techdirt.com/articles/20140726/10180428015/quantifying-comcasts-monopoly-power.shtml.

[7] Kate Cox, *Here's What the Lack of Broadband Competition Looks Like on a Map*, CONSUMERIST (Mar. 7, 2014), http://consumerist.com/2014/03/07/heres-what-lack-of-broadband-competition-looks-like-in-map-form.

arbitration.[8] That's roughly 60 million American workers—and that number has been climbing each year. Forced arbitration is more common in low-wage workplaces and among larger employers; it is also more common in industries that are disproportionately composed of women and in industries that are disproportionately composed of African-American workers.[9]

II.

Forced arbitration is deeply unpopular—and that sentiment is overwhelmingly bipartisan. Forced arbitration is still poorly understood by the public, which is why hearings like this are so important. But when Americans are asked about what's happening in the fine print, their opinion comes through loud and clear.

One national survey from earlier this year showed that a ***whopping 84% of American voters*** support federal legislation to end forced arbitration for consumers and employees.[10] And that support was overwhelmingly bipartisan, representing the view of 80% or more of Republicans, Democrats, and independents surveyed. 83% of Democrats and 84% of Republicans polled strongly believe that consumers should have a choice between court and arbitration. Moreover, six in ten Americans understand that arbitration requirements mainly

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[8] Alexander J.S. Colvin, *The growing use of mandatory arbitration: Access to the courts is now barred for more than 60 million American workers*, 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/

[9] *Id.*

[10] *National Survey on Required Arbitration*, Hart Research Assocs, Feb. 28, 2019, https://www.justice.org/sites/default/files/2.28.19%20Hart%20poll%20memo.pdf.

benefit corporations over consumers or employees, and seven in ten oppose the ability of a company to select the arbitrator. A GOP polling firm found that substantial majorities of Republicans, independents and Democrats alike supported action to limit forced arbitration of consumer contracts.[11] The evidence also suggests that forced arbitration is growing increasingly unpopular—perhaps as a result of increased public attention in the wake of the #MeToo movement and various financial scandals.[12]

III.

The main purpose and effect of forced arbitration is to kill people's legal claims—plain and simple. If you have only one takeaway from this hearing, I hope it is this: The biggest problem with forced arbitration is that it kills people's claims. Contrary to what forced arbitration's proponents would have you believe, it doesn't channel claims into an alternative system that's better, faster, or cheaper at resolving individual disputes. Instead, under forced arbitration, the small-dollar claims of American consumers and workers *simply disappear.*

To see this in action, consider how forced arbitration plays out in three different areas: wage-and-hour law, consumer law, and antitrust. In each area, the

[11] Sylvan Lane, *GOP polling firm: Bipartisan support for consumer bureau arbitration rule*, The Hill, Oct. 5, 2017, http://thehill.com/policy/finance/354143-gop-polling-firm-finds-bipartisan-support-for-consumer-bureau-arbitration-rule.

[12] A poll of likely voters before the 2016 election found that 75% supported the right of bank customers to take complaints to court, rather than being forced into private arbitration. Americans for Financial Reform & Center for Responsible Lending, 1,000 Likely 2016 National Voters, Lake Research Partners (2015), http://ourfinancialsecurity.org/wp-content/uploads/2015/07/Toplines.AFRCRL.public.070715.pdf.

evidence shows that arbitration functions to transfer wealth upwards from individuals to those who draft the arbitration clauses.[13]

Wage theft. The growing prevalence of forced arbitration clauses in employee contracts decimates workers' ability to hold their employers accountable for labor violations. At a time when, according to federal and state officials, "more companies are violating wage laws than ever before,"[14] workers have found themselves increasingly unable to recover stolen wages from their employers.[15]

Wage theft occurs in several forms, and employers sometimes engage in multiple types of violation simultaneously. Some employers pay workers less than the legally required minimum wage, fail to pay workers legally required rates for overtime work, or wrongfully deduct pay. In other cases, employers commit "off-the-clock" violations, requiring workers to come in early or stay late while failing to compensate them for that additional time. Laws against wage theft are massively under-enforced,[16] which means that joining a collective lawsuit is frequently a worker's only means to recover money they earned but were never paid. Forced arbitration clauses and class action bans block this vital path for redress, enabling

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[13] The following discussion is adapted from Deepak Gupta & Lina Kahn, *Arbitration as Wealth Transfer*, 35 Yale L. & Pol'y Rev. 499 (2017), https://ylpr.yale.edu/arbitration-wealth-transfer.

[14] Steven Greenhouse, *More Workers are Claiming 'Wage Theft,'* N.Y. TIMES, Aug. 31, 2014, http://www.nytimes.com/2014/09/01/business/more-workers-are-claiming-wage-theft.html.

[15] Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft is Costing Workers Hundreds of Millions of Dollars a Year*, ECON. POL'Y INST. (Sept. 11, 2014), http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds.

[16] *Winning Wage Justice: An Advocate's Guide to State and City Policies to Fight Wage Theft*, NAT'L EMP'T LAW PROJECT 17-18 (Jan. 2011), http://www.nelp.org/content/uploads/2015/03/WinningWageJustice2011.pdf.

employers to steal workers' wages with impunity.[17] Because wage theft is already regressive, practices that enable it, like forced arbitration clauses, transfer wealth away from workers and towards big companies.

Experts estimate the sum of wages stolen nationally to be as high as $50 billion a year, "a transfer from low-income employees to business owners that worsens income inequality."[18] In Los Angeles, for example, low-wage workers lose $26.2 million in wage theft violations every week, or $1.4 billion annually.[19] In New York, meanwhile, wage theft is estimated to cheat 2.1 million workers across the state out of a cumulative $3.2 billion in wages and benefits.[20] Nor is the phenomenon isolated to a handful of firms or industries. A 2009 study that surveyed more than 4,000 workers in low-wage industries found that 76% had been underpaid or not paid at all for their overtime hours.[21] The report found that wage theft is prevalent across sectors—including retail, restaurants and grocery stores,

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[17] It is worth noting that some low-wage employers do not provide workers with contracts at all. These workers—usually the most vulnerable to wage theft—are therefore not directly affected by forced arbitration clauses and class action bans. The trend may still affect these workers in a broader sense, given that these contractual terms promote and normalize a general culture of impunity.

[18] Meixell & Eisenbrey, *supra*.

[19] Ruth Milkman et al., *Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment and Labor Law for Low-Wage Workers*, INSTIT. FOR RESEARCH ON LABOR AND EMP'T (2010), http://www.labor.ucla.edu/downloads/wage-theft-and-workplace-violations-in-los-angeles-2.

[20] Aditi Sen, *By a Thousand Cuts: The Complex Face of Wage Theft in New York*, CTR. FOR POPULAR DEMOCRACY (2015), http://populardemocracy.org/sites/default/files/WageTheft%2011162015%20Web.pdf.

[21] Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in American Cities*, UNPROTECTED WORKERS, http://www.unprotectedworkers.org/index.php/broken_laws/index (last visited Jan. 11, 2016).

domestic work, manufacturing, construction, janitorial, security, dry cleaning, laundry, car washes, and nail salons.[22]

Through class action lawsuits, workers have recovered millions of dollars in unpaid wages from their employers. In 2009, for example, Walmart agreed to pay $40 million in unpaid wages as part of a settlement with thousands of former and current employees.[23] To resolve a class action dispute, Staples paid $42 million in back pay to its assistant store managers,[24] and Schneider Logistics paid $21 million to its workers.[25] In other recent examples, New Jersey truck drivers filed suit and recovered $2 million in back wages,[26] New York car wash workers $3.5 million,[27] and cheerleaders for the Oakland raiders $1.25 million.[28]

Once a company introduces a forced arbitration clause with a class action ban, these suits vanish. A worker's only chance at recourse then is individual arbitration, which studies suggest is stacked against workers. For example, a 2011 study found that employees win in arbitration far less often than in employment

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[22] *Id.*

[23] Dave Copeland, *Wal-Mart Will Pay $40m to Workers*, BOSTON.COM (Dec. 3, 2009), http://www.boston.com/news/local/massachusetts/articles/2009/12/03/wal_mart_will_pay_40m_to_workers.

[24] Donna Goodison, *Staples to Pay $42M to Settle Wage Claims* (Jan. 30, 2010), http://news.bostonherald.com/business/general/view/20100130staples_to_pay_42m_to_settle_wage_claims.

[25] *Carrillo v. Schneider Logistics*, 823 F. Supp. 2d 1040 (C.D. Cal. 2011).

[26] Erik Ortiz, *Raymour & Flanigan Drivers get $2M for OT* (July 8, 2009), http://www.pressofatlanticcity.com/business/article_394857c2-233c-517c-9dd2-fcf148daac8c.html.

[27] Libby Nelson, *Car Wash Chain to Pay $3.4 Million in Back Wages*, N.Y. TIMES (June 30, 2009, 4:38 PM), http://cityroom.blogs.nytimes.com/2009/06/30/car-wash-chain-will-pay-34-million-in-back-wages/.

[28] Robin Abcarian, *Cheerleaders' Wage-Theft Lawsuit to Cost Oakland Raiders $1.25 Million*, L.A. TIMES (Sept. 4, 2014), http://www.latimes.com/local/abcarian/la-me-ra-raiders-settle-cheerleader-lawsuit-20140904-column.html.

litigation trials, and that when employees do win, their average awards were "substantially lower" in arbitration than in court.[29] This in itself suggests that forced arbitration in the employee context transfers wealth upwards.

Yet comparing outcomes in litigation and arbitration actually underestimates the regressive effect, since it fails to capture individuals dissuaded from initiating action altogether. This sort of "claim suppression" is a primary effect of forced arbitration and class action bans.[30] Although some commentators argue that arbitration offers employees a more accessible venue for redress than litigation,[31] "empirical evidence now shows that mandatory employment arbitration is bringing about the opposite result—*eroding* rather than boosting employees' access to justice by suppressing employees' ability to file claims."[32] This evidence reveals that employees covered by forced arbitration provisions "almost never file arbitration claims."[33]

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[29] Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011).

[30] As David S. Schwartz writes, "[t]he compelling logic of what is commonly called 'mandatory arbitration' is that it is intended to suppress claims," and "[n]othing is more claim-suppressing than a ban on class actions, particularly in cases where the economics of disputing make pursuit of individual cases irrational." David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND L.J. 239, 240, 242 (2012). *See also* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015) ("The result has been the mass production of arbitration clauses without a mass of arbitrations. Although hundreds of millions of consumers and employees are obliged to use arbitration as their remedy, almost none do so—rendering arbitration not a vindication but an unconstitutional evisceration of statutory and common law rights").

[31] *See, e.g.*, Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001).

[32] Sternlight, *supra*, at 1312.

[33] *Id.*

As a result, the class action recoveries workers obtained even a few years ago are increasingly out of reach. Fewer workers file suit at all, and the claims of those who do are usually dismissed.[34] Employers annually steal, and will continue to steal, billions of dollars from workers—yet arbitration clauses will keep workers from claiming any of it back.

Consumer claims. Research shows that forced arbitration is widespread across consumer markets, in industries ranging from nursing homes and online retail to auto dealers and cell phone providers. For insight into the effects of arbitration in consumer markets, look to the CFPB's March 2015 study. Their report is based on filings with the American Arbitration Association (AAA), which administers the vast majority of consumer financial arbitration cases. Although the report examines just one segment of the economy, it is by far the most comprehensive empirical study to date on outcomes in consumer arbitration.

The CFPB found that a large share of financial products and services are now subject to forced arbitration, including 44% of checking accounts, 83% of prepaid cards, 86% of private student loans, 88% of mobile wireless contracts, and 99% of storefront payday loans.[35] Over 85% of contracts with arbitration clauses include class action bans. Market concentration, meanwhile, magnifies the effects. For example, although only 16% of credit card issuers include arbitration provisions in their contracts, over 50% of credit card loans outstanding are subject

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[34] *Id.*

[35] CFPB Study, § 2, at 8.

to them.[36] Were it not for an antitrust settlement requiring certain credit card issuers to drop their arbitration provisions, the share of loans subject to arbitration would be 94%.[37]

This rise of forced arbitration eliminates what had been a key means of consumer redress. Between 2008 and 2012, 422 consumer financial class action settlements garnered more than $2 billion in cash relief for consumers and more than $600 million in in-kind relief.[38] These figures underestimate the consumer benefit generated by these class action suits, given that several settlements also required companies to change their business practices. As the CFPB notes, cases "seldom provided complete or even any quantification of the value of this kind of behavioral relief."[39] Nor does monetary relief capture the deterrence value of class action suits, the threat of which can serve as a powerful check on corporate wrongdoing.

So how do consumers fare under the new regime? Although it can be difficult to compare litigation and arbitration outcomes, the CFPB's report includes a case study that resembles a controlled-experiment comparison. The study examines outcomes in a multidistrict class action, filed against twenty-three banks for illegally charging consumers millions of dollars in excessive overdraft

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[36] *Id.* at § 2, at 10.
[37] *Id* at § 2, at 9-11.
[38] *Id.* at § 1, at 16.
[39] *Id.*

fees.[40] In total, debit cardholders reached eighteen settlements through the litigation, resulting in $1 billion in cash relief for over twenty-eight million consumers. Not all account holders were able to join the class, however, because nine of the twelve banks with arbitration clauses moved to enforce them. Five of the banks succeeded, getting their cases moved to arbitration, while four eventually chose to settle, giving individuals the chance to opt-out and arbitrate instead. As of February 2015, CFPB could not verify that even a single one of the consumers who had pursued claims in arbitration—either by choice or because banks had forced them to arbitrate—received any relief at all.[41] In a class action against one of the banks that had forced arbitration, the arbitrator dismissed the consumers' contract and tort claims, and they were awaiting an answer on their federal statutory claims.[42] Of the 242 opt-outs, no more than three consumers brought overdraft claims before an arbitrator, and zero were successful.[43] Meanwhile, the twenty-eight million consumers who had secured settlements through litigation saw money transferred directly to their bank accounts.[44]

Because information on both the opt-outs and those forced to arbitrate is incomplete, we cannot say with total certainty that those who pursued arbitration

[40] *Id.* at § 8, at 39-46 (discussing *In Re Checking Account Overdraft Litig.,* MDL 2036. 685 F.3d 1269 (11th Cir. 2012)).

[41] Specifically, 173 consumers opted out of the settlement with Chase, thirty-four opted out of the settlement with M&I, and thirty-five opted out of the settlement with Compass Bank. *Id.* at App. A, at 108-09.

[42] *Id*. at § 5, at 86-87.

[43] "No more than three" because CFPB does not know precisely whether the three opt-outs that did go on to file claims through arbitration had been involved in the overdraft litigation specifically, or some other class action suit. *Id*. at App. A, at 104.

[44] *Id.* at § 8, at 40 & 45-46.

received no money at all. The thirty-two consumers who won money awards from AAA arbitrators in 2010 and 2011 *could* have included victims of unfair overdraft fee practices. But even the most generous reading of these outcomes strongly suggests that arbitration is worse at achieving justice for wronged consumers than is class action litigation. That a maximum of *three* of the 242 opt-outs attempted to arbitrate, too, suggests that forced arbitration suppresses claims.[45]

Moreover, arbitration seems to favor businesses over consumers not just relative to litigation, but in an absolute sense. The CFPB found that, within arbitration, companies are far more successful than consumers. According to the Bureau's report, businesses won relief in 93% of the business-initiated cases in which arbitrators reached a decision on the merits. In the disputes that businesses won, they received ninety-eight cents for every dollar they had claimed; taking into account the disputes where they lost, they recovered ninety-one cents for every dollar claimed. In disputes initiated by consumers, by contrast, arbitrators provided relief to consumers in 27% of cases and awarded them an average of forty-seven cents for every dollar claimed. Among consumer-initiated disputes as a whole, consumers won an average of thirteen cents for every dollar they had

[45] Anecdotes suggest that defense lawyers recognize the suppressive effect of arbitration clauses. As a recent news story reported, "[Lawyers believe] they may have found, in the words of one law firm, the 'silver bullet' for killing off legal challenges. In an industry podcast, two lawyers discussed the benefits of using arbitration to quash consumers' lawsuits. The tactic, they said, is emerging at an opportune time, given that debt collectors are being sued for violating federal law. The beauty of the clauses, the lawyers said, is that often the lawsuit 'simply goes away.'" Jessica Silver-Greenberg & Michael Corkery, *Sued Over Old Debt, and Blocked From Suing Back*, N.Y. TIMES, Dec. 22, 2015, http://www.nytimes.com/2015/12/23/business/dealbook/sued-over-old-debt-and-blocked-from-suing-back.html.

claimed.[46] While a host of factors may account for the disparity in outcomes, it is clear that businesses are more often satisfied with arbitrator decisions than are consumers.

The distributive implications of forced arbitration in consumer finance seem clear. As more cases are diverted into arbitration, consumers will likely win at lower rates and receive lower sums than they would through class action litigation. The cost of wronging consumers—whether by design or through negligence—will drop, given that consumers pursue claims through arbitration at far lower rates than they do through litigation, and those arbitration claims that are filed are less often successful. Moreover, because arbitration proceedings are private, businesses shed the risk of reputational damage. So long as wrongful acts are sufficiently lucrative, firms can build in the occasional arbitration payment as a cost of doing business. As financial institutions can acquire greater sums from consumers with greater impunity, wealth is transferred upwards.

Forced consumer arbitration has especially pernicious distributive effects given that the primary users of payday loans and prepaid cards—which include arbitration clauses at particularly high rates—are low-income consumers. This suggests that those most vulnerable to exploitation by financial institutions are the most likely to be deprived of effective means of redress.

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[46] These figures exclude cases in which consumers were disputing debts they were alleged to owe. Including outcomes in those disputes, consumers won some form of relief in 20% of cases and recovered an average of twelve cents for every dollar they claimed. CFPB Study, *supra*, at § 5, at 41-45.

Antitrust. One area of law especially vulnerable to the preclusive effects of arbitration is antitrust. A primary example of this dynamic was at play in *Italian Colors*, the Supreme Court case in which a small business owner alleged that American Express was illegally abusing its market power. Troublingly, firms that possess monopoly power can enact a sort of "double punch" by imposing arbitration terms that insulate their abuse of that same power. As Justice Kagan warned in her dissent in that case, "The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse."[47] In this way, "a company could use its monopoly power to protect its monopoly power, by coercing agreement to contractual terms eliminating its antitrust liability."[48]

In *Italian Colors*, American Express achieved just that, by coupling a forced arbitration clause with a class action ban. Because proving antitrust damages today requires costly economic analysis, private plaintiffs generally cannot bring suits unless they can split expenses, be it through joining as a class or sharing costs some other way. Since American Express had effectively prohibited all cost-sharing arrangements, upholding the arbitration clause would deprive the plaintiff of any economically viable way to pursue a claim. By ruling for American Express, the Supreme Court handed firms a tool to deflect private antitrust suits—a gift for monopolistic companies, who can use their market power to impose contractual terms that shield abuses of that same market power from liability.

[47] *Italian Colors*, 133 S. Ct. at 2313 (Kagan, J., dissenting).
[48] *Id.* at 2314.

Two consequences stand out: first, antitrust enforcement suffers as a whole, and second, this erosion of antitrust enforcement transfers wealth from low-income to high-income individuals.

Although the Court's holding enables firms to deflect only *private* suits, there's sound reason to think that a fall-off in private claims will injure enforcement as a whole. For one, private litigation has been a traditional mainstay of antitrust enforcement. Indeed, Congress designed the antitrust statutes in order to promote private suits, not only creating a private right of action but also awarding private parties treble damages and injunctive relief. As the Court has noted, Congress created these private rights "not merely to provide private relief" but "to serve as well the high purpose of enforcing the antitrust laws."[49] Moreover, "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."[50] Furthermore, private and public enforcement often work in conjunction, as public officials draw on information revealed through private suits to build their own cases.[51] Anemic private enforcement undermines the antitrust statutes as a whole.[52]

Weaker antitrust, in turn, exacerbates economic inequality by enabling wealth transfers from consumers, workers, and small businesses to the executives and shareholders of large corporations. While the connection between extreme

[49] *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 130–31 (1969).
[50] *Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co*., 381 U.S. 311, 318 (1965).
[51] Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1 (2013).
[52] Einer Elhauge, *How Italian Colors Guts Private Antitrust Enforcement by Replacing it with Ineffective Forms of Arbitration*, 38 FORDHAM INT'L L.J. 771 (2015).

market concentration and wealth distribution has been overlooked for decades, the current inequality crisis is drawing new attention to the ways in which undue market power transfers wealth upwards.[53]

Abuse of market power contributes to inequality in a number of ways. Most obviously, monopolistic and oligopolistic firms often hike consumer prices. For example, a host of studies documents how consolidation across the healthcare industry has enabled hospitals, health insurers, and pharmaceutical companies to charge consumers more for the same goods and services.[54] Businesses also use their dominance to suppress workers' wages. In 2006, for instance, around 20,000 registered nurses filed a class action suit alleging that hospitals in and around Detroit had colluded to keep their wages low. Three hospitals settled for more than a combined $48 million; litigation against a fourth is still pending. Similarly, in 2010, a group of high-tech companies—including Adobe, Apple, Google, Intel, Intui, and Pixar—were found to have squashed competition by agreeing not to poach or solicit each other's employees. Four of the firms ultimately settled a

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[53] *See, e.g.*, Khan & Vaheesan, *supra*; Robert Reich, *The Political Roots of Widening Inequality*, AM. PROSPECT (Spring 2015), http://prospect.org/article/political-roots-widening-inequality; ROBERT REICH, SAVING CAPITALISM: FOR THE MANY, NOT THE FEW (2015); Dave Dayen, *Bring Back Antitrust*, AM. PROSPECT (Fall 2015), http://prospect.org/article/bring-back-antitrust-0; Jason Furman & Peter Orszag, *A Firm-Level Perspective on the Role of Rents in the Rise in Inequality*, NAT'L BUREAU OF ECON. RESEARCH, Oct. 16, 2015; Paul Krugman, *Challenging the Oligarchy*, N.Y. REVIEW OF BOOKS, Dec. 17, 2015, http://www.nybooks.com/articles/2015/12/17/robert-reich-challenging-oligarchy/ (reviewing Robert Reich's *Saving Capitalism: For the Many, Not the Few*).

[54] Zack Cooper et al., *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured*, HEALTH CARE PRICING PROJECT, Dec. 2015; Leemore Dafny et al., *More Insurers Lower Premiums: Evidence from Initial Pricing in the Health Insurance Marketplaces*, NAT'L BUREAU OF ECON. RESEARCH Working Paper No. 20140, May 2014.

private suit for $415 million, providing relief to 64,000 software engineers. Lastly, firms with monopoly power can extract wealth from smaller businesses. *Italian Colors* originated in a suit brought by Alan Carlson, the owner of a family restaurant in Oakland, California, who alleged that American Express had been using its monopoly power in premium and corporate credit cards to force merchants to accept ordinary cards at much higher rates than what rivals charged. An economist analyzing the excess fees charged to the *Italian Colors* plaintiffs estimated that the company's tactics cost Carlson's restaurant nearly $500 a year—a transfer of income from his small business to American Express.[55]

Since forced arbitration clauses and class action bans tend to preclude private antitrust suits, the rise of arbitration will enable firms with monopolistic power to abuse that power with greater impunity. Insofar as anticompetitive behavior transfers income from consumers, workers, and small businesses to the owners and managers of larger firms, the expansion of arbitration will lead to regressive wealth distribution.

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[55] Joint App. at 96, *Italian Colors*, 133 S. Ct. 2304 (2013) (No. 12-133), *available at* http://guptawessler.com/wp-content/uploads/2012/05/12-133ja.pdf. While Carlson's complaint focused on the swipe fee costs incurred by merchants—and hence the transfer of wealth from small businesses to credit card companies—the swipe fee system more generally institutes a systemic wealth transfer from low-income to high-income consumers. This is because credit card use is strongly correlated with consumer income, and merchants pass on swipe fees in the form of higher retail prices to all customers. Cash buyers therefore end up subsidizing the cost of credit cards, while lacking access to the rewards and financial perks that credit card users enjoy. The Boston Federal Reserve estimates that the swipe fee system generates a yearly transfer of $1,282 from the average cash payer to the average card payer. Scott Schuh et al., *Who Gains and Who Loses from Credit Card Payments?: Theory and Calibrations*, FED. RESERVE BANK OF BOSTON PUB. POL'Y PAPER NO. 10-03, Aug. 31, 2010, https://www.bostonfed.org/economic/ppdp/2010/ppdp1003.pdf.

IV.

Forced arbitration is only possible because unelected judges have twisted the original intent of a law passed by Congress in 1925. Until the 1920s federal courts generally refused to enforce arbitration agreements. But in the early decades of the century, as the number of corporate transactions—and, by extension, disputes—grew, businesses wanted to give legal effect to arbitration agreements reached by businesses that wanted to keep their mutual disputes out of court.[56] Arguing that arbitration would relieve congested courts, business interests lobbied Congress to let them set up private solutions that would be faster and cheaper than public courts.

When officials expressed concern that arbitration would let "the powerful people . . . come in and take away the rights of the weaker ones," supporters of arbitration legislation assured them that the device would be used only between consenting merchants of roughly equal bargaining power—not against workers or consumers.[57] The Federal Arbitration Act (FAA) passed Congress in 1925, expressly excluding workers from its reach.

For much of the twentieth century, arbitration largely worked as Congress had intended: to resolve the sorts of fact-based contractual disputes that arise between businesses in the course of routine transactions—concerning whether a

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[56] Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006); IMRE SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA (Carolina Academic Press ed., 2013).

[57] Moses, *supra*, at 106-107.

party had complied with the terms of payment, for example, or delivered goods at the right place and right time.[58] Federal statutory claims were categorically outside the FAA's reach, as were all claims brought by workers and all claims brought in state court. The insertion of arbitration clauses into mass contracts with consumers or workers was unheard of.

Starting in the 1980s, however, the U.S. Supreme Court issued a series of decisions that would begin to steer us down an entirely new path. One key moment came in 1983, when the Court declared that the FAA reflected a "federal policy favoring arbitration."[59] The idea that Congress had intended arbitration as *preferable* to courts, rather than just as an alternative, was not founded in legislative history.[60] Still, the Court's language suggested as much, and future judges would lean on it as they razed the walls that had kept arbitration in its place.

Two successive decisions cemented what might have been a quirky deviation into a major turning point. In 1984, the Supreme Court heard a case brought in California by 7-Eleven franchisees against their parent company, Southland, which had included in their contracts a binding arbitration clause.[61] California outlawed these clauses, recognizing that franchisees usually lacked power to negotiate these terms. Yet Southland argued that its contract overrode state law. Drawing on the Court's interpretation from the previous year—that Congress had intended a

[58] *Id.* at 111.
[59] *Moses H. Cone Mem'l Hosp. v. Mercury Constr.*, 460 U.S. 1 (1983).
[60] Moses, *supra*.
[61] *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

"federal policy favoring arbitration"—a 7–2 majority on the Supreme Court ruled for Southland, eroding the power of states to limit how companies use arbitration.

In a striking dissent, Justice Sandra Day O'Connor criticized the majority for ignoring legislative history. "Today's decision is unfaithful to congressional intent, unnecessary, and ... inexplicable," she wrote. "Although arbitration is a worthy alternative to litigation, today's exercise in judicial revisionism goes too far."[62]

It would soon go farther. In 1985, the Supreme Court heard *Mitsubishi v. Soler Chrysler-Plymouth*, a case in which a car dealer had sued the Japanese firm for violating antitrust laws, and Mitsubishi had pushed to arbitrate.[63] The car dealer noted that the FAA allowed companies to use arbitration only to settle disputes about contracts they had written, not to interpret laws Congress had passed, like the Sherman Antitrust Act. A five-justice majority—continuing its recent pattern of pro-arbitration decisions—sided with Mitsubishi. Arbitrators could now rule on actual statutory law—civil rights, labor protections, as well as antitrust—despite having no accountability or obligation to the public.

In a powerful dissent, Justice John Paul Stevens warned that there were great dangers in allowing "despotic decision-making," as he called it, to extend to law like antitrust. "[Arbitration] is simply unacceptable when every error may have

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[62] *Id.* at 36 (O'Connor, J., dissenting).
[63] *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

devastating consequences for important businesses in our national economy, and may undermine their ability to compete in world markets," he wrote.[64]

In the span of these three decisions, the Supreme Court had drastically enlarged the scope of arbitration. And against the backdrop of a movement claiming excessive lawsuits were strangling small businesses, courts would continue to expand the realms in which companies could compel arbitration. In the 1995 case *Allied-Bruce*, the Supreme Court permitted the use of arbitration clauses by companies in routine consumer contracts.[65] This prompted Justice O'Connor to remark that, "over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."[66] In 2001, the Court ruled against a group of Circuit City workers, holding that employers could use arbitration clauses in contracts with employees despite statutory language to the contrary.[67] In 2004, a court ruled that arbitration clauses were enforceable against illiterate consumers;[68] a separate court ruled that they

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[64] *Id.* at 657.

[65] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

[66] *Id.* at 283 (O'Connor, J., concurring).

[67] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). This decision is impossible to square with both the statutory text and legislative history. As one of the FAA's architects explained in 1923:

> It is not intended this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.

A Bill to Make Valid and Enforceable Written Provisions or Agreements for Arbitration, Hearing Before the Senate Judiciary Committee, 67th Cong. 9 (1923).

[68] Wash. Mut. Fin. Grp. v. Bailey, 364 F.3d 260, 264-66 (5th Cir. 2004).

were enforceable even when a blind consumer had no knowledge of the agreement.[69]

Yet the real watershed came in 2011, in *AT&T Mobility v. Concepcion.* Vincent and Liza Concepcion had sued AT&T in federal court in California, alleging that the company had engaged in false advertising by claiming that their wireless plan included free cell phones—a practice that had shortchanged millions of consumers out of about $30 each. When they tried to litigate as a class, AT&T pointed to the fine print in their contract, which included a class action ban.

The Concepcions pointed out that class action bans violated California law. Many state and federal courts had forbidden class action bans, on the grounds that individuals often had no practical way to make a claim unless they joined with other plaintiffs to share the cost of litigating. Allowing companies to eliminate this right in "take-it-or-leave-it" contracts would effectively let corporations violate laws with little risk of accountability.

The district court and the U.S. Court of Appeals for the Ninth Circuit both ruled for the Concepcions, holding that AT&T's terms were unconscionable and that nothing in the FAA preempted this arbitration-neutral rule of state law.[70] When the case reached the Supreme Court, eight state attorneys general, as well as a group of civil rights organizations, consumer advocates, employee rights groups, and prominent law professors, weighed in, arguing that permitting class

[69] Am. Gen. Fin. Servs., Inc. v. Griffin, 327 F. Supp. 2d 678, 683 (N.D. Miss. 2004).

[70] Laster v. T-Mobile USA, Inc., No. 05CV1167DMS AJB, 2008 WL 5216255, at *2 (S.D. Cal. Aug. 11, 2008) *aff'd sub nom*; Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009) *rev'd sub nom.* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

action bans would enable companies to evade entire realms of law. But the Supreme Court, in a five to four split, ruled that AT&T's contract was enforceable, opening the door for companies to ban class actions routinely in their fine print.

At this point, one limit on class action bans remained: if a ban eliminated the *only way* someone could bring a case, it would be unenforceable. But in 2013, the Supreme Court razed even this protection in a case pitting a group of small merchants—including Italian Colors, the family restaurant—against American Express.[71] This time around, the same five-judge majority ruled that arbitration clauses containing class action bans were enforceable—even when it meant citizens had no way to "effectively vindicate" their rights and were left with no recourse. Even for antitrust laws designed to police the very market power that enables big companies to insert these clauses in the first place.

In *AT&T Mobility v. Concepcion* and *American Express v. Italian Colors*, the Supreme Court gave companies a green light to use arbitration clauses to cut off collective claims by both consumers and small businesses, under both state and federal law. The latest Supreme Court decision in this vein, *Epic Systems v. Lewis,* sweepingly extends this dangerous trend by blocking workers from banding together to redress the full range of workplace legal violations as well.

Just last month, Justice Ginsburg took the unusual step of repeating her call for Congress to take action to bring the Federal Arbitration Act back in line with its original intent. "Congressional correction of the Court's elevation of the FAA

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[71] *Italian Colors*, 133 S. Ct. at 2304.

over the rights of employees and consumers to act in concert," she warned, is "urgently in order."[72]

There was a time when reasonable people might have believed that forced arbitration for consumers and workers was worth allowing as an experiment in cheaper, faster dispute resolution. But, as Americans wake up to the spreading reality of forced arbitration, and as the #MeToo movement and financial scandals expose its pernicious effects, that time has long since passed. Now the only question is when and how we're going to fix it. I urge you to support and enact legislation to end forced arbitration.

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

[72] *Lamps Plus v. Varela*, slip op. at 5 (S. Ct. 2019) (Ginsburg, J., dissenting).