

# TESTIMONY BEFORE THE HOUSE SUBCOMMITTEE: Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights

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Chairman Cicilline, Ranking Member Buck, and other distinguished members of the Committee, thank you for providing me with the opportunity to testify about my experience with forced arbitration.

Four and a half years ago, on July 6, 2016, I jumped off the cliff and sued my boss former Fox News Chairman and CEO Roger Ailes for sexual harassment. It was the biggest decision of my life. Once public, the story ran like wild fire on twitter feeds and breaking news alerts all around the world. Back then, I could have never imagined my story would help ignite the #metoo movement 15 months alter and that I would become one of the prominent faces fighting against forced arbitration in the workplace, or that since my case, a tidal wave of women would have joined me in courageously speaking out against workplace harassment. But here's what I've found out: Courage is contagious...and the cultural revolution we're still experiencing ... is long overdue.

**The first step for me was telling the truth. The next step ... was to passionately work to change the system ... for all women (and men) across our country.** So I've spent much of the last four years walking the halls of Congress, encouraging legislators to take real, meaningful action to help workplace harassment victims — to take the issue out of the shadows of secrecy. So in December 2017, I proudly joined legislators from both parties—Congresswomen Bustos and Stefanik – and Senators Gillibrand and Graham—to introduce the “Ending Forced Arbitration of Sexual Harassment Act”. In February, 2019 my bill was reintroduced in the House -- a bill to restore workplace harassment victims' Constitutional 7<sup>th</sup> Amendment right to a jury trial instead of the secrecy of forced arbitration.

And here we are again with a new Congress. And here I am again talking about my bill and forced arbitration, because quite honestly I believe this legislation will change the landscape of the American workplace, retaining women and people of color while at the same time making it safer for everyone. So why is this bill so important to me?

Because it's not about me. This is about the thousands of women who reached out to me after my story became public – making me realize that almost every woman in our country has a story. That's shameful. So many of these women have shared their emotional stories of pain and humiliation with me -- but mostly about how they've been silenced – because that's what forced arbitration does. Turns out – silencing is the harasser's best friend — and perpetuates the systemic problem of protecting predators and pushing women out of the workforce.

Sadly, my story is not unique. Sexual harassment of women in the workforce isn't a new problem, and unfortunately neither is the use of forced arbitration to cover up the dirty laundry. For years, Dov Charney, the founder and former CEO of American Apparel sexually harassed

and assaulted employees of the company. These were young women, teenagers – some as young as 17 years old.<sup>1</sup> But it wasn't until 2014 that Mr. Charney was held accountable for his actions and he was fired by the company's board. The sexual misconduct was able to be hidden for years because the company required all employees to sign employment agreements that included a forced arbitration clause.<sup>2</sup> The purpose of which was clear: to keep any disputes secret and away from public scrutiny. Had the company not used forced arbitration, they would have faced public accountability and been forced to act years sooner and many of his victims would have been spared.

Another horrifying example is the more than 180 women who have reported being sexually assaulted by massage therapists at Massage Envy spas.<sup>3</sup> These women put their trust into a company and its employees, only to suffer the trauma of being sexually assaulted and then made to suffer more as the company did little to help them – instead tried to silence them. When these women tried to seek public accountability in court, the company tried to force them into arbitration, because hidden in the fine print of the terms and conditions of the company's app and iPads (used to check in for services) was a forced arbitration clause.<sup>4</sup>

Take the case of Lilly Silbert from California. Lilly says she was sexually assaulted by her Massage Envy therapist, but because she used the company's app to try and cancel her membership *after* she was sexually assaulted, the company tried to force her, and many women like her, into arbitration.

Then there's the story of thousands of women who were employed by Sterling Jewelers who suffered widespread sexual harassment and pay discrimination for years.<sup>5</sup> A New York Times article describes the conduct the women were subjected to – groping, sexual coercion, sexual degradation and even rape. For years, the conduct was covered up, because the women being forced into arbitration. As the article describes “[t]he benefit to the company was that it was resolved in secret. The secrecy was the point.”<sup>6</sup> In 2008, many of the women decided to come forward and seek legal action against the company, filing a class action lawsuit comprised of

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<sup>1</sup> Katie Baker, *Dov Charney 'Sex Slave' Lawsuit Will Settle Out of Court*, Jezebel, March 22, 2012: <https://jezebel.com/5895487/dov-charney-sex-slave-lawsuit-will-settle-out-of-court>

<sup>2</sup> Steven Davidoff Solomon, *Arbitration Clauses Let American Apparel Hide Misconduct*, July 15, 2014: <https://dealbook.nytimes.com/2014/07/15/arbitration-clauses-let-american-apparel-hide-misconduct/>

<sup>3</sup> Katie Baker, *More Than 180 Women Have Reported Sexual Assaults at Massage Envy*, BuzzFeed News, November 26, 2017: <https://www.buzzfeednews.com/article/katiejmbaker/more-than-180-women-have-reported-sexual-assaults-at>

<sup>4</sup> Brooks Jarosz, *Fears loom that sexual assault cases involving Massage Envy will remain private*, FOX KTVU, December 21, 2018, <http://www.ktvu.com/news/fears-loom-sexual-assault-cases-involving-massage-envy-will-remain-private>.

<sup>5</sup> Taffy Brodesser-Akner, *The Company That Sells Love to America Had a Dark Secret*, New York Times Magazine, April 23, 2019: <https://www.nytimes.com/2019/04/23/magazine/kay-jewelry-sexual-harassment.html>

<sup>6</sup> i.d.

69,000 women.<sup>7</sup> However, because Sterling Jewelers required their employees to sign arbitration agreements the company wanted to dismiss the lawsuit and force all of the women into private, secretive arbitration, creating a wall of silence even between the women.<sup>8</sup> This prevents women from gathering important evidence about a pattern of behavior, and from supporting one another in stressful litigation against a large corporation.

How about the story from just this past January regarding Robinhood and Game Stop and the novel phenomenon in the investing world where retail investors organized on Reddit and used the trading platform Robinhood to buy targeted stocks. Class action lawsuits were filed but the case may never see the light of day because Robinhood has a forced arbitration clause in its user agreement. This clause buried in the fine print has the potential to ensure that thousands of individuals will never be able to enforce their rights and get public accountability. It's impossible to know exactly how many women have been sexually assaulted or harassed in the American workforce, pushed out, never to work again. The latest statistics say 60 millions American workers are subject to forced arbitration — with women workers and African American workers the most likely to be subjected to it. (A.S. Colvin Economic Policy Institute study) And that by 2024, predictions are that more than 80 percent of private-sector nonunion workers will be subject to forced arbitration. (CPD/EPI forced arbitration growth 2019, Kate Hamaji Center For Popular Democracy & Economic Policy Institute).

I aim to change that.

My going public opened the floodgates to shed a light on this pervasive epidemic – the Weinstein allegations, the Bill Cosby allegations, the Bill O'Reilly allegations, the Les Moonves allegations, the Matt Lauer allegations, the Charlie Rose allegations, the Mark Halperin allegations ... and so many more.

I want you to just for a moment feel what it's like to find the courage to come forward. A woman finally decides to go to HR to complain — and if she has an arbitration clause – the reaction will be — phew! Good! “No one will ever know about this!” Her case is promptly thrown into the “secret chamber” of arbitration. Then the way we handle these things goes into effect. The woman will likely be blacklisted, demoted and fired from her job. In arbitration she'll find out there are limits on discovery and no appeals. There is no legal precedent being set because none of it is actually taking place in a court. She may receive a paltry reward but in arbitration cases, employees only win less than 3 percent of the time. Meantime, large corporations with lots of complaints can keep an arbitrator paid for years. It's that repeat business thing. Wink wink. Our woman will never work again, and notably, no one at her place of employment will know what happened to her, and worst of all, her perpetrator will likely stay on the job – free to harass again and again. And so the cycle continues.

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<sup>7</sup> Drew Harwell, *Hundreds allege sex harassment, discrimination at Kay and Jared jewelry company*, Washington Post, February 27,

2017: [http://wapo.st/2mEkm1F?tid=ss\\_mail&utm\\_term=.03d00fdedcd3](http://wapo.st/2mEkm1F?tid=ss_mail&utm_term=.03d00fdedcd3)

<sup>8</sup> Nick Brown, *Sterling Motion to Disallow Class Action Rejected*, Law360, January 5,

2010: <https://www.law360.com/articles/141374/sterling-motion-to-disallow-class-action-rejected>

We've lost a million women in the workforce in the last year just due to Covid. And everyone knows retaining women and people of color increases the bottom line. So, are we willing to continue losing even more — because we're not brave enough as a nation to finally come together and say enough is enough?

This silencing is unjust and un-American.

Thank you to companies getting on the right side of history and taking action after learning about my bill: Microsoft, Uber, Lyft, Google, Ebay, Airbnb, Facebook, and Vox Media along them. Thank you as well to the brave members of Congress — from both sides — for drawing a line in the sand. Thank you for doing what's right for women.

Now its time for all members of Congress to show the same kind of courage.

Because sexual harassment is not a partisan issue. Before somebody decided to harass you they don't ask you what party you're in.

And that's why we should all care. It's my great hope that we will get this done in a bi-partisan way – for women, for men, for our children and our country.

Thank you.

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