CARDOZO LAW
BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

Myriam Gilles
Paul R. Verkuil Research Chair in Public Law
Professor of Law

email: gilles@yu.edu
scholarship: SSRN

TESTIMONY BEFORE THE
U.S. SENATE COMMITTEE ON THE JUDICIARY

Small Print, Big Impact: Examining the Effects of Forced Arbitration

Prof. Myriam Gilles
Submitted April 8, 2024

Chairman Durbin, Ranking Member Graham, and distinguished members of the Committee:

Thank you for inviting me to participate in this important hearing. My name is Myriam Gilles, and I am a law professor at the Benjamin N. Cardozo School of Law. Since 2005, I have written extensively about the harmful effects of pre-dispute mandatory arbitration clauses – forced arbitration clauses – on consumers, workers and small businesses. These traps hidden in standard-form contracts forfeit a person's Constitutional right to a judge and jury, forcing them into a "privatized, invisible, and often inferior forum in which they are less likely to prevail."[1] I have testified about the negative effects of forced arbitration before this Committee in 2013, 2017 and 2019, before the Senate Banking Committee in 2022, and the before the House Judiciary Committee in February and November 2021. Over this stretch of time, forced arbitration clauses have only grown more pervasive, as millions of Americans have been forced to sign away their right to choose for themselves whether to pursue claims for legal relief.

In my testimony, I hope to shed light on the ways that forced arbitration harms consumers and workers. Part I provides an overview of numerous studies revealing the prevalence of forced arbitration clauses, as well as their deleterious effects on consumers and workers. Part II steps back to examine the broader effects of forced arbitration on the rule of law, the development of legal precedents and Congressional intent in enacting legislation seeking to protect consumers, workers and military servicemembers. Part III describes the Ending Forced Arbitration in Sexual

[1] Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE, Dec. 2015.

Assault and Sexual Harassment Act ("EFASASHA"), passed by Congress in 2022. While this amendment to the Federal Arbitration Act ("FAA") was undoubtedly a step in the right direction, its enactment reveals the need for a more comprehensive statutory exemption barring forced arbitration in all contracts of adhesion. The FAIR Act – legislation that would prohibit forced arbitration for all employment, consumer, antitrust, and civil rights disputes – would ensure that every American can access the civil justice system. Finally, in Part IV, I describe the recent phenomenon of "mass arbitration," in which plaintiffs simultaneously file thousands of individual arbitrations, forcing corporate defendants to make good on their contractual promises to pay the cost of arbitrating large numbers of nominally individual claims. Forced to live up to their own contractual terms, companies have balked and run to court seeking relief. Accordingly, mass arbitration reveals that companies imposing forced arbitration clauses on their employees and consumers never intended these provisions to be actually used; instead, forced arbitration was intended to suppress cases where corporate wrongdoing harms large numbers of people who each suffer relatively modest injuries.

PART I
FORCED ARBITRATION HARMS AMERICAN CONSUMERS & WORKERS

As the result of the Supreme Court's recent and extraordinarily broad interpretation of law passed in 1925 – the Federal Arbitration Act ("FAA") – companies now freely employ forced arbitration clauses in nearly every aspect of American life. Where arbitration was once limited what the 1925 Congress sought to foster, namely commercial contracts negotiated by equally sophisticated parties, today, these provisions are regularly included in "take-it-or-leave-it" contracts of adhesion – including contracts governing credit cards, bank accounts, cell phones, payday loans, insurance, loans, leases and myriad other consumer transactions.[2] Forced arbitration is imposed by most nursing homes, gyms, student loan providers, internet service providers and music streaming services – as well as in job applications, employment contracts and benefits packages.[3] Forced arbitration clauses are literally everywhere, and when these provisions are given legal effect, they are used to silence individuals and deprive them of their choice of whether and how to pursue a remedy.

[2] 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.).

[3] *Id.*

i. *The Effect of Forced Arbitration on Consumers*

The data reveals how prevalent forced arbitration has become in the marketplace. Back in 2015, the Consumer Financial Protection Bureau ("CFPB") reported to Congress that nearly all mobile wireless providers imposed arbitration on their subscribers – meaning that nearly 290 million cell phone users were barred from going to court.[4] The same was true for the vast majority of credit card users, checking account holders, payday borrowers, student loan recipients, and users of countless other consumer financial products.[5]

Today, the situation is significantly worse. One study found that 81 of the 100 largest U.S. companies use forced arbitration in connection with consumer transactions.[6] And in 2020, the publication *Consumer Reports* estimated that over 60% of U.S. retail e-commerce sales are subject to forced arbitration.[7]

Meanwhile, most consumers have no idea they have signed away their right to hold companies accountable for wrongdoing. The 2015 CFPB Study found that only 13% of consumers who were directed to read a forced arbitration clause understood it prohibited them from participating in a class action lawsuit.[8] More recently, a 2020 survey of over 1,000 American consumers further confirmed that a staggering 99% of individuals surveyed had no understanding or awareness of forced arbitration clauses when shown a checking account contract.[9] This utter lack of awareness is no surprise, given that these rights-stripping clauses are often hidden in the boilerplate language that consumers either skim or ignore when making purchases.[10] Indeed, companies intentionally impose these clauses in click-wrap, envelope-stuffers and other delivery methods intended to obscure or minimize the immensity of the rights that are being forfeited.[11] Further, forced arbitration clauses are imposed as 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 point of sale, we simply lack the

---

[4] CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), at 7 (2015) [hereinafter CFPB STUDY], https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[5] *Id.* at § 2, pp. 7-24.

[6] Imre Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233 (2019).

[7] Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPORTS, Jan. 30, 2020.

[8] CFPB STUDY, § 3, 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).

[9] Roseanna Sommers, *What Do Consumers Understand About Pre-dispute Arbitration Agreements? An Empirical Investigation*, PLOS ONE (2024).

[10] *See, e.g.,* Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPORTS, Jan. 30, 2020 (describing an arbitration clause located "about two-thirds of the way through 4,600 words of legalese" in the defendant Wayfair's online terms of use).

[11] Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, NEW YORK TIMES, Oct. 31, 2015.

information necessary to place sufficient value on the rights we're giving up until it's too late.[12] But even if consumers did read and comprehend the fine print, none of us really has a choice of whether to accept or reject an arbitration clause.[13] If 99% of mobile service providers impose arbitration, then there are no real market alternatives available to consumers wishing to avoid these provisions.

Once consumers realize they have unknowingly forfeited their right to a judge and jury, they are left with only two unattractive options: passively accept whatever harm they have suffered or enter the private forced arbitration forum chosen by the company, governed by a set of rules written by the company for its benefit. Faced with this unjust regime, it is little wonder most choose the former, refusing to take part in a process they did not choose and cannot win.[14]

Again, the data backs this up, revealing that only a tiny percentage of consumers file arbitrations annually.[15] In 2017, the nonprofit group Level Playing Field examined the use of forced arbitration in the Wells Fargo identity-theft debacle.[16] Compiling data from the AAA and JAMs, the country's largest forced arbitration providers, the report found that just 250 consumers arbitrated claims with Wells Fargo between 2009 and the first half of 2017.[17] Given that the bank boasts over 70 million customers, the report observed that 250 was "a shockingly low number of

---

[12] Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 413 (2005) (arguing imposing arbitration long before a dispute arises is unfair because most consumers don't place sufficient value on the rights they are relinquishing until after a dispute has arisen).

[13] Colvin & Stone, *supra* note 1 ("[T]he corporation that chooses to make arbitration mandatory for its workers or consumers will write the rules of the procedure, and the worker or consumer will have no choice but to assent if they want to enter into an employment or consumer transaction").

[14] Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, NEW YORK TIMES, Oct. 31, 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."). *See also* Colvin & Stone, *supra* note 1 ("The ability of corporations to set the rules of mandatory arbitration allows them, and not the workers or consumers, to choose whether to adopt the procedures of a reputable organization with due process protections or rules that violate basic principles of fairness.").

[15] *See, e.g.,* CFPB STUDY (finding that from 2010 to 2011, only a handful of consumers who filed individual arbitrations were awarded affirmative relief – while nearly 10 million consumers were represented in comparable class actions during the same period).

[16] In 2016, media outlets reported that Wells Fargo employees had been opening fake accounts as far back as 2013. When injured customers tried holding the bank accountable for the identity theft, their claims were quickly forced into the black box of arbitration. *See, e.g.,* Michael Corkery & Stacy Cowly, *Wells Fargo Killing Sham Account Suits by Using Arbitration,* N.Y. TIMES, Dec. 6, 2016. The profound secrecy afforded by arbitration allowed Wells Fargo to avoid both liability and bad press, and allowed wrongful conduct to continue undetected and unremedied long after such illegality would otherwise come to light. *See* Hearing of the Senate Banking Committee, Wells Fargo: One Year Later, available at https://www.banking.senate.gov/hearings/wells-fargo-one-year-later (Oct. 2017).

[17] Wells Fargo and Forced Consumer Arbitration, Level Playing Field (2017).

arbitration claims" – all the more surprising given the "continued revelations of widespread unfair business practices" by Wells Fargo.[18]

Scholars and journalists have also sought to document the paucity of consumer arbitrations. For instance, in 2018, Professor Imre Szalai determined there were an estimated 826,537,000 consumer arbitration provisions in force.[19] Yet, the AAA and JAMS recorded an average of only 6,000 consumer arbitrations per year.[20] Similarly, Professor Judith Resnik reported that only 134 individual arbitrations were filed against AT&T between 2009 and 2014 – despite the company having over 120 million wireless customers and being the subject of numerous investigations and public enforcement actions alleging widespread violations of consumer laws.[21] And in 2019, journalist Alison Frankel examined data provided by the AAA, which revealed that in the first quarter, it had resolved only 895 consumer arbitrations – despite being the designated arbitral provider for the thousands of consumer companies.[22]

Worse yet, those who individually brave these arbitral waters are unlikely to prevail due to the well-documented repeat-player bias that corporate clients enjoy in arbitration.[23] One study found that of the 30,000 AAA/JAMS consumer arbitrations conducted between 2014 and 2018, consumers prevailed in only 6.3%.[24] The CFPB Study revealed a similar tilt: the agency found that companies won relief in 93% of the business-initiated cases in which arbitrators reached a decision on the merits, and were awarded 98¢ for every dollar claimed; by contrast, arbitrators sided with consumers in just 27% of cases and awarded them an average of 13¢ for every dollar

---

[18] *Id.*

[19] Szalai, *supra* note 6.

[20] *Id.*

[21] *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, 2812 (2015). Professor Resnik notes: "[t]he 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."

[22] Alison Frankel, *Consumer Arbitration is on the Rise -- But the Numbers are Still Puny*, REUTERS, May 9, 2019.

[23] *See, e.g.,* Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2356-57 (2012) (discussing how "selection bias" of the stronger party in a mandatory arbitration setting may prejudice the weaker party by selecting favorable arbitrators or arbitration groups); Katherine V.W. Stone and Alexander J.S. Colvin, The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights, (Economic Policy Institute 2015) (finding that, when an employer and employee both appeared before an arbitrator for the first time, the employee had a 17.9% of winning but if the employer had appeared before the arbitrator four times, the employee in the fifth case only had a 15.3% chance of winning, and if the employer had appeared before the same arbitrator 25 times, the 26th employee only had a 4.5% chance of winning).

[24] American Association for Justice, *The Truth About Forced Arbitration* (2019).

claimed.[25] These findings substantiate decades of research on the "repeat-player" bias in forced arbitration – which posits that arbitrators may decide cases in favor of the party most likely to be in a position to appoint them to serve in a future case.[26] This structural imbalance allows companies to "stack the deck" with arbitrators who will be favorable to their interests, while the secrecy surrounding these proceedings makes it impossible for individual consumers to discern or challenge potential arbitrator bias.[27]

ii. *The Effect of Forced Arbitration on Workers*

Similarly disturbing trends are evident in America's workplaces, as employers increasingly bury forced arbitration clauses in the paperwork that employees must acquiesce to if they want a job. These provisions silence aggrieved workers and eliminate corporate accountability for systemic workplace violations.[28] In 2018, the study by the Economic Policy Institute estimated that 56.2% of private-sector, non-union workers – nearly 60.1 million workers in all – were bound to forced

[25] CFPB STUDY at § 5, pp. 11-12. The agency found that, by contrast, 422 consumer class actions settled between 2008 and 2012 returned over $440 million (after deducting attorneys' fees and court costs) to an average of 6.8 million consumers each year. *Id.* at § 1, pp. 16.

[26] These studies have generally focused on repeat-player bias employment arbitration, but there is no reason to believe that consumers would suffer in similar fashion. *See, e.g.,* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPL. RTS. & EMPLOY. POL'Y J. 189, 198-99 (1997) (reporting on a study of 270 AAA employment arbitration awards from 1993-1994, finding that employees won only 16% of cases against repeat-player employers); Stone & Colvin, *supra* note 1 (reporting on a study finding that when an employer and employee both appeared before an arbitrator for the first time, the employee had a 17.9% of winning -- but if the employer had previously appeared before the arbitrator four times, the employee in the fifth case only had a 15.3% chance of winning, and if the employer had previously appeared before the same arbitrator 25 times, the 26th employee had only a 4.5% chance of winning).

[27] Testimony of Professor Elizabeth Bartholet Before the U.S. Senate Committee on the Judiciary, *Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations* (July 23, 2008) ("The big corporate players were [] free to select arbitration providers who would provide them a sympathetic forum, and to design an arbitration process that would serve their interests, since the employees and consumers would again not be in any position to bargain or even to think about these things at the point they were applying for jobs or credit cards.")

[28] *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).

arbitration clauses.[29] Labor economists now project that by year's end, more than 80% of private-sector non-union workers will be subject to forced arbitration.[30]

Yet, despite the large chunk of the U.S. workforce bound to individually arbitrate their disputes, study after study shows that few workers initiate arbitrations.[31] An EPI study estimated that only 1 in 10,400 workers subject to these provisions has filed a claim in arbitration.[32] The remaining workers with potentially valid cases – somewhere between 315,000 to 722,000 each year – are left to suffer in silence, unwilling to shoulder the expense of individual arbitration and unable to be heard by a judge and jury.[33] 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.[34] And when individual employees do bring arbitrations, they are far less likely to succeed against their employers: of the 11,114 AAA/JAMS employment arbitrations conducted between 2014-18, only 2.5% of cases resulted in an employee monetary award (that was not outweighed by an even larger employer award).[35] Here again, the repeat player advantage is strong. Not only do employers choose the arbitral provider and write the rules, they also "gain familiarity with the system and how to operate effectively in it, [and] may also be able to lobby for changes to the system that benefit them."[36] As Professors Colvin and Stone observe, "[e]ven absent any sort of arbitral bias, more sophisticated repeat-player employers may gain an advantage by getting to know particular arbitrators well and developing an understanding of their decision-making patterns and what types of arguments appeal to them."[37] Taken together, these elements bode poorly for workers should they wish to enter the arbitral regime, and may go a great distance in explaining why so few do so.

iii. *Forced Arbitration Exacerbates Economic Inequality*

The data reveals another troubling development: forced arbitration provisions are disproportionately imposed on low-wage workers and low-income consumers, exacerbating the yawning economic chasm in this country. One study estimates that low-wage workers (those paid $13 or less per hour) suffered approximately $12.6 billion in wage-related losses in 2019 due to

---

[29] Alexander Colvin, Economic Policy Institute, The Growing Use of Mandatory Arbitration (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).

[30] *Id.* (projecting that by the end of 2024, more than 80% of private-sector non-union workers will be subject to forced arbitration).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679 (2018).

[35] AAJ, *The Truth About Forced Arbitration*, *supra* note 24.

[36] Colvin & Stone, *supra* note 1.

[37] *Id.*

minimum wage and overtime violations, employee misclassification and payroll fraud — but because the vast majority of these estimated 6.13 million workers are subject to forced arbitration, they can't access the courts to resolve these disputes or to deter future violations.[38] Other research has shown that minorities and women are more likely to work in fields that subject them to forced arbitration.[39] For instance, the construction industry -- with its predominantly male workforce – has the lowest rate of forced arbitration, whereas education and health, industries with a more predominantly minority and female workforce, have the highest rate.[40] The disparate deployment of forced arbitration provisions contributes to economic inequality by denying low-wage workers access to justice enjoyed by other employees.[41]

Low-income consumers are also more vulnerable to the effects of forced arbitration. For one, low-income individuals face structural barriers to accessing traditional credit markets, which renders them more reliant on high-cost and abusive alternatives – such as payday loans, money orders, pawnshops, rent-to-own stores and high-interest-rate credit cards.[42] These products are rife with forced arbitration provisions, preventing consumers from challenging illegal and exploitative practices.[43] Furthermore, studies show that low-income groups suffer the disproportionate burden of fraud, predatory lending, reverse redlining, abusive mortgages, exorbitant student loans, subprime car loans, and other unfair and deceptive practices.[44] These sorts of consumer harms are precisely the type best addressed through class and collective litigation – procedural devices which allow claimants to aggregate damages where individual suits

---

[38] Hugh Baran, Forced Arbitration Enabled Employers to Steal $12.6 Billion From Workers In Low-Paid Jobs in 2019 (Nat'l Employment Law Project 2020).

[39] Colvin, *supra* note 29 (estimating that 57.6% of working women, 59.1% of African Americans, and 54.3% of Hispanic workers are subject to forced arbitration).

[40] *Id.*.

[41] *See* Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket, Symposium: The War on the Civil Justice System,* 65 EMORY L. REV. 1531 (2016); *see also* Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 90 (2014) (asserting that "mandatory arbitration exacerbates" existing inequalities in the workplace); Jean Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 HARV. CIV. RTS-CIV. LIB. L. REV. 155 (2019) (observing that people of color "stand to lose the most when arbitration is substituted for litigation").

[42] Nathalie Martin & Ozymandias Adams, *Grand Theft Auto Loans: Repossession and Demographic Realities in Title Lending*, 77 MO. L. REV. 41 (2012) (arguing for more regulations to protect lower class credit products); Brian Grow & Keith Epstein, *The Poverty Business*, BLOOMBERG, May 20, 2007 (explaining that the payday-lending industry is concentrated in the poorest counties of the poorest states – luring "unsophisticated shoppers by the hundreds of thousands into a thicket of debt from which many never emerge"); CFPB STUDY at § 2, p. 7 (describing sampling data from California and Texas revealing that 83.7% of payday lenders covering 98.5% of the industry imposed arbitration clauses in their borrower agreements).

[43] Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, Symposium: The War on the Civil Justice System, 65 EMORY L. REV. 1531 (2016).

[44] Susan E. Hauser, *Predatory Lending, Passive Judicial Activism, and the Duty to Decide*, 86 N.C. L. REV. 1501, 1509 n. 43 (2008) (listing studies showing that lower-income groups are specifically targeted by a host of shady businesses for various other types of economic exploitation).

would be inefficient or disproportionately expensive.[45] But the rise of class-banning forced arbitration clauses has left low-income consumers without remedy for widespread wrongdoing.[46] The distributive implications of forced arbitration provisions are clear: companies that exploit the economic vulnerability of low-income groups pay no real price for bilking consumers, given that few will pursue claims in arbitration and those who do will be less successful.[47]

PART II
THE BROADER EFFECTS OF FORCED ARBITRATION

Contemporary forced arbitration clauses typically contain language which strips a person of their right to join together with others who've been harmed in a similar way to try and seek accountability through a class mechanism. The harm caused by class-banning forced arbitration clauses extends well beyond individual consumers and workers: we are *all* harmed when companies escape accountability and individuals are forced to forfeit their rights. In this Part, I offer a brief overview of just some of the harmful effects of these provisions on our system of laws.

i. *Concealing Misconduct Only Leads to More Misconduct*

Forced arbitration keeps consumer rip-offs and worker exploitation secret and largely out of public view. Confidentiality, of course, is core to the institution of forced arbitration and guaranteed by both the providers and the standard terms of contemporary forced arbitration agreements.[48] Accordingly, forced arbitration proceedings and decisions are confidential – i.e., arbitrators hear cases behind closed doors and render decisions without being bound to follow

---

[45] Helen Hershkoff, *Poverty Law and Civil Procedure: Rethinking the First-Year Course*, 34 FORDHAM URB. L.J. 1325, 1347 (2007); *see also* Gilles, *supra* note 43 (asserting that class and collective litigation often result in broad-based injunctive relief to reform problematic practices, which is particular benefit to low-income groups).

[46] *See, e.g.,* Eric W. Macaux, *Limiting Representation in the Age of Private Law: Exploring the Ethics of Limited-Forum Retainer Agreements*, 19 GEO. J. LEGAL ETHICS 795, 806-07 (2006) ("the plaintiffs most likely to be disadvantaged" by forced arbitration clauses "are those least able to protect their interests: low-income individuals").

[47] Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL'Y REV. 499, 515 (2017) ("The distributive implications of forced consumer arbitration are especially pronounced given that the primary users of payday loans and prepaid cards -- which include arbitration clauses at particularly high rates -- are low-income consumers, [which] suggests that those most vulnerable to exploitation by financial institutions are those most likely to lack effective redress."); *see also* Abi Velasco and Remington A. Gregg, *Forced Arbitration Stacks the Deck Against Everyday People, Especially Against Workers and Consumers of Color*, Public Citizen, Feb. 23, 2022.

[48] *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").

legal precedents and often without publishing a written decision that explains their reasoning.[49] This culture of secrecy prevents consumers and employees from learning whether others have experienced a similar problem before and how that problem was resolved. It also leads to arbitrary and inconsistent results in the arbitral forum because arbitrators, unlike judges, are not required to follow precedents created by earlier-decided cases with similar facts. This directly undermines the principles that are central to the rule of law, such as stare decisis and the development of legal precedents.[50] By forcing disputes into hermetically-sealed, secret proceedings, companies deny all citizens the transparency, openness and accountability necessary for the operation of a fair and democratic civil justice system.[51] And, of critical importance to this lawmaking body, forced arbitration undermines law enforcement and deterrence because, once blocked from going to court as a group, most people drop their cases entirely. If Congress passes laws that can't be enforced in the real world, what good are those laws?

The Wells Fargo scandal illustrates this point: some Wells Fargo customers learned that their identities had been stolen by bank employees and fake accounts had been opened using their private information as early as 2013, but the company used its forced arbitration clause to keep the fraud quiet for as long as it could.[52] Regrettably, the main lesson that Wells Fargo took from the identity-theft scandal was that forced arbitration is an effective way of concealing illegal conduct: in a completely different scandal involving its manipulation of debit card purchases to maximize overdraft fees,[53] the bank again tried to force customers into arbitration to avoid bad publicity and legal liability.[54] By compelling cases into secret proceedings, companies like Wells

---

[49] *See, e.g.*, William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 238–39 (1979) ("[Arbitrators] may have little incentive to produce precedents…why should they make any effort to explain the result in a way that would provide guidance for future parties?"); Edward Brunet & Jennifer J. Johnson, *Substantive Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 459, 473 (2008) ("Written arbitration awards currently are the exception in arbitration, which normally operates behind a veil of privacy.").

[50] *See id.*; *see also* Lillian 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.").

[51] *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").

[52] Robert Weissman & Lisa Donner, *Why Wells Fargo Got Away With It For So Long*, THE HILL, Sept. 20, 2016 (observing that if "early cases been allowed to proceed, others almost certainly would have followed, and Wells Fargo may have ended these pervasive abuses years ago").

[53] *See* Gutierrez v. Wells Fargo, 2010 WL 1233885 (N.D. Cal. 2010) (ordering Wells Fargo to return approximately $203 million to California customers who had incurred overdraft fees on debit card transactions as a result of its illegal practices).

[54] Kate Berry, *Wells is Last Bank Standing in Overdraft Litigation*, AMERICAN BANKER, June 26, 2017 (reporting that Wells Fargo had repeatedly tried to use forced arbitration to block relief in the other 49 states and avoid

Fargo deny their customers the right to a fair and just system – but they also deny every citizen the right to learn about potential fraud, illegal fees, and other unfair business practices. Lacking this critical information, consumers cannot make educated choices about the myriad options available in the marketplace.

ii. *Stymying Public Participation and Common Law Development*

Our legal system relies for its legitimacy on publicity and transparency. Through the fair operation of law, "[t]he public participates in a transparent conversation about legal rights. To that end, citizens have some ownership, at least in spirit, of what happens within that system [because] the whole reason for a public dispute resolution system is that it operates for the benefit of the public."[55] But when disputes are shunted into the hermetically-sealed vault of private arbitration, the public has no opportunity to "participate in a transparent conversation about legal rights" – quite the contrary, the public is barred from entry and arbitral outcomes are shrouded in secrecy.[56]

Over the longer term, forcing consumers and workers into the black box of arbitration precludes the very development of common law doctrine.[57] In consumer, employment, antitrust and other areas where forced arbitration clauses have become routine, the imposition of forced arbitration clauses will cease common law development. By enforcing these provisions, we have, in essence "frozen the law… denying the courts the ability to develop and adapt the law as society and business changes."[58]

iii. *Undermining Congressional Intent, Including Consumer Protection, Civil Rights and Statutes Intended to Protect Servicemembers*

With no accountability and no transparency, forced arbitration clauses have been weaponized by businesses and employers to serve as a form of legal immunity, undermining the very laws and protections enacted by Congress. Shielded by forced arbitration, companies brazenly violate consumer protection laws, civil rights statutes, and Congressional efforts to protect active duty servicemembers.

---

repaying up to $1 billion); Associated Press, *Wells Fargo Wants Court to Toss Overdraft Lawsuits and Let it Use Arbitration*, LOS ANGELES TIMES, Aug. 24, 2017.

[55] Erik S. Knutsen, *Keeping Settlements Secret*, 47 FLA. ST. U. L. REV. 945, 959-60 (2010).

[56] Hon. Jennifer Walker Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH L. REV. 303, 324 (2012) ("Arbitrations with no public record do not develop the law in any way.").

[57] *See* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986) ("by diverting particular types of cases away from adjudication, we may stifle the development of law in certain disfavored areas of law").

[58] 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).

For example, in its periodic amendments to the Servicemembers Civil Relief Act ("SCRA") over the past century, Congress has evinced a clear intent to protect the rights of active servicemembers.[59] In 2003, Congress significantly modernized SCRA, expanding protections for service members and their families in areas such as rental agreements, mortgage foreclosure proceedings and more. And then in 2020, Congress passed Section 547 of the National Defense Authorization Act, amending the SCRA to provide that "[a]ny person aggrieved by a violation of [the SCRA] may in a civil action ... be a representative party on behalf of members of a class or be a member of a class, in accordance with the Federal Rules of Civil Procedure, notwithstanding any previous agreement to the contrary."[60] Despite the unambiguous statutory text, robust legislative history and revered status of active-duty servicemembers, companies continue to financially prey on our military and then try to hide behind illegal arbitration clauses. Case in point: when servicemembers Jeremy Bell, Pablo Espin, Nicholas Padao and Keith Taylor sought to challenge a Citibank-imposed "veteran penalty,"[61] the bank – blatantly contravening the 2020 amendments to SCRA – moved to compel arbitration.[62] The district court denied the bank's motion, but it has vowed to appeal the decision – forcing these servicemembers to continue expending time and money fighting an illegal forced arbitration clause.

Forced arbitration undermines congressional intent across all sectors and protected classes, from the most vulnerable to the most impervious. Take former Miami Dolphins NFL Coach Brian Flores. In January 2022, Coach Flores was fired despite back-to-back winning seasons. Flores believed his dismissal was the result of racial discrimination, and along with ex-Arizona Cardinals head coach Steve Wilks and Tennessee Titans defensive coordinator Ray Horton, filed suit against the league.[63] But due to the forced arbitration clauses in their employment contracts, these and other claims of discrimination cases against the NFL have been forced into secret proceedings designating NFL Commissioner Roger Gooddell as the presiding arbitrator.[64] It

---

[59] *See, e.g.,* Gordon v. Pete's Auto Serv. Of Denbigh, Inc., 637 F.3d 454, 457 (4th Cir. 2011) ("The Servicemembers Civil Relief Act is part of a long record of congressional concern for the domestic affairs of those in military service."); Brewster v. Sun Tr. Mortg., Inc. , 742 F.3d 876,879 (9th Cir. 2014) (observing that the "Supreme Court has unambiguously required courts to give a broad construction to the statutory language of the SCRA to effectuate the Congressional purpose of granting active-duty members of the armed forces repose from some of the trials and tribulations of civilian life ....").

[60] 50 U.S.C. § 4042(a). Congress further stated that this amendment "shall not be construed to imply that a person aggrieved by a violation of such Act did not have a right to bring a civil action as a representative party on behalf of members of a class or be a member of a class in a civil action before the date of the enactment of this Act." 116 P.L. 92, div. A, TITLE V § 547(b), 133 STAT. 1198 (2019).

[61] Espin et al. v. Citibank, 2023 WL 6447231 at *1 (E.D.N.C. Sept. 29, 2023) (this penalty "refers to interest and fee increases imposed on servicemembers returning to civilian life").

[62] Espin et al. v. Citibank, No. 5:22-CV-383-BO-RN, Order Denying Motion to Compel Arbitration, Sept. 29, 2023.

[63] Flores v. NFL, 2023 WL 4744191 (S.D.N.Y. July 25, 2023).

[64] Notably, cases against the New York Giants, the Denver Broncos, and the Houston Texans for violations of the Rooney Rule (which requires teams to interview minority candidates) have been allowed to proceed in court because plaintiffs in those cases were not bound by forced arbitration clauses. *See* Daniel Kaplan, *Judge*

doesn't seem a stretch to believe Goodell is likely to be biased in favor of the team owners, rendering him the single most unsuitable person to act as a sole arbitrator in cases brought against the league. Without meaningful legal accountability, the discriminatory hiring practices Congress intended to stop through the Civil Rights Act have gone unchecked.[65]

PART III
THE ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2022

In 2022, Congress enacted the bipartisan Ending Forced Arbitration in Sexual Assault and Sexual Harassment Act (the "EFASASHA"), which amended the FAA by restoring the rights of sexual harassment and assault survivors to file a case in court, despite the presence of a forced arbitration clause. This was the first major legislative change to the FAA in nearly a century, revealing that the statute can withstand revision without damage to its core mission.

The EFASASHA provides in relevant part that "no pre-dispute arbitration agreement ... shall be valid or enforceable with respect to a case which is filed under Federal [or] State law and relates to the sexual harassment dispute."[66] In effect, this amendment renders arbitration agreements voidable at the election of a plaintiff alleging sexual harassment or assault.[67]

As of this writing, only a handful of federal district courts have had occasion to interpret the EFASASHA. Much of this early decisional law centers on the question of whether the statute permits a plaintiff with multiple claims for harassment to bring *all* her claims in court, or instead, demands that only claims for sexual harassment may escape arbitration. So far, the lower federal courts are divided on this issue. For instance, in *Johnson v. Everyrealm,* a case brought by a black male employee alleging both sexual and racial harassment in the workplace, the court denied defendant's motion to cleave the case in two and dispatch the race claim to arbitration.[68]

---

rules Brian Flores can pursue some discrimination claims in court, others sent to arbitration, THE ATHLETIC, March 1, 2023, *available at* https://theathletic.com/4265892/2023/03/01/brian-flores-discrimination-case-nfl/.

[65] Fred Bowen, *The NFL has only 3 Black head coaches. That needs to change.*, WASH. POST, Sept. 29, 2022, available at https://www.washingtonpost.com/kidspost/2022/09/29/nfl-has-only-3-black-head-coaches-that-needs-change/; Tom Schad, *Often interviewed, never hired: How hot-shot NFL head coaching candidates go cold*, USA TODAY, Jan. 12, 2023, available at https://www.usatoday.com/story/sports/nfl/2023/01/12/do-nfl-teams-head-coach-vacancies-shortchange-coaches-color/10994631002/.

[66] PUB. L. NO. 117-90, 136 STAT. 26 (2022) (codified at 9 U.S.C. §402(a)). Note: the EFAA defines a "sexual harassment dispute" as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State Law." *Id*

[67] H.R. 4445; 168 CONG. REC. 27 (February 10, 2022) (statement of Senator Dick Durbin (D-IL)) (The EFASASHA "ensure[s] that every survivor has the choice to go to court" and "give[s] survivors a choice of whether or not to bring a claim in court after the sexual [] harassment claim has arisen, notwithstanding the presence of a forced arbitration clause.").

[68] 2023 WL 2216173, at *7 (S.D.N.Y. Feb. 24, 2022). Alternatively, the defendants argued that – should the court find that plaintiff's allegations of discrimination based on sex were subject to the EFAA – "those claims should be stayed pending the outcome of the arbitration" of the remainder of plaintiff's claims. *See* Motion to

Reasoning that a "case," as that term is used in the EFASASHA, encompasses an *entire* legal proceeding, the court held that once a claim of sexual harassment is plausibly pled, all of plaintiff's claims remain in court.[69] In support of this conclusion, the court observed that Congress, in enacting the new law, "amended the FAA directly," which:

> reinforces Congress's intent to override – in the sexual harassment context – the FAA's background principle that, in cases involving both arbitrable and non-arbitrable claims, 'the former must be sent to arbitration even if this will lead to piecemeal litigation.'[70]

This outcome comports with the drafters' deliberate intent *not* to divide cases by sending some claims from the same case into arbitration. Several senators addressed this precise issue during debates of the EFASASHA, stating that keeping cases whole "is exactly what we intended the bill to do."[71] For instance, Senator Gillibrand explained:

> When a sexual assault or sexual harassment survivor files a court case in order to seek accountability, her single case may include multiple claims [but] it is essential that all the claims related to the sexual assault or harassment can be *adjudicated at one time* to ensure that a victim need not relive that experience in multiple jurisdictions.[72]

By contrast, a handful of courts have been unperturbed by the specter of claim-splitting created by selective application of the statute.[73] Relying on Supreme Court decisions dating back to the 1980's announcing that litigants may have to tolerate greater inefficiency, wasted resources

---

Compel Arbitration at 14-15 ("Arbitrable claims accordingly predominate the dispute. In light of the foregoing, the Court should, respectfully, stay any potential non-arbitrable claims while arbitration is pending.").

[69] 2023 WL 2216173, at *7 (the court observed that the plain text of the EFAA clearly "keys the scope of the invalidation of the arbitration clause to the entire 'case' relating to the sexual harassment dispute [and] does not limit the invalidation to the claim or claims in which that dispute plays a part"); *see also id.* at *17 ("Congress, in enacting the EFAA, thus can be presumed to have been sensitive to the distinct meanings of the terms "case" and "claim."). A handful of courts have adopted *Everyrealm*'s approach. *See, e.g.,* Turner v. Tesla, 2023 WL 6150805 (N.D. Cal. Aug. 11, 2023) ("while the two other claims are not strictly sexual harassment claims, their resolution is intertwined with the resolution of the sexual harassment claims. Accordingly, the EFAA renders the parties' arbitration agreement unenforceable in Turner's entire case…").

[70] *Id.*, citing KPMG LLP v. Cocchi, 565 U.S. 18, 19 (2011) (holding that "if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation" because "[a] court may not issue a blanket refusal to compel arbitration merely on the grounds that some of the claims could be resolved by the court without arbitration").

[71] 168 CONG. REC. S627 (daily ed. Feb. 10, 2022) (statement of Sen. Kirsten Gillibrand).

[72] *Id.*

[73] Silverman v. DiscGenics, Inc., 2023 WL 2480054 at *3 (D. Utah Marh 13, 2023) (enforcing the parties' arbitration agreement "even if doing so requires some claims to be resolved in arbitration while other closely related claims are litigated in court"); Mera v. SA Hospitality Group LLC, 2023 WL 3791712 (S.D.N.Y. June 3, 2023) (finding that plaintiff had to resolve his wage and overtime claims in arbitration, while his sexual orientation claims would remain in court pursuant to the EFAA).

and higher costs for the sake of arbitration, these courts have fragmented cases into separate judicial and arbitral parts – in seeming contradiction to congressional intent.[74]

While questions surrounding the proper interpretation of the EFASASHA may continue to wend their way through the courts, these early decisions make clear that the drafters' well-intentioned effort to single out claims of sexual harassment and sexual assault is both insufficient and unjustified. In many cases, such as *Johnson,* the precise nature of the harassment is simply not known to the victim, whose diverse identities may preclude a single, distinct basis for alleging discriminatory action. Furthermore, there is no clear justification for differentiating between claims of sexual harassment and other forms of harassment – whether based on age, race, disability, religious or political affiliation, or any other protected category. *All* victims should have the right to access courts to seek justice for these injuries, not just those alleging harm based on sex. Indeed, there are currently a number of bills circulating in Congress that would apply the EFASASHA's basic structure to other disadvantaged groups[75] -- an effort reminiscent of prior "piecemeal" legislation enacted to eliminate forced arbitration in certain instances or as against certain narrowly drawn claimants.[76] While the impetus behind these bills is understandable, I urge this body to enact the Forced Arbitration Injustice Repeal Act ("FAIR" Act), which would invalidate any pre-dispute arbitration clause imposed in an employment, consumer, antitrust or civil rights dispute.[77]

---

[74] Silverman, 2023 WL 2480054 at *3, citing Dean Witter, 470 U.S. at 217 (holding that the FAA requires district courts to compel arbitration "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums"); Moses H. Cone, 460 U.S. at 20 ("[R]elevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement.").

[75] On May 2, 2023, Senators Cory Booker (D-NJ) and Representative Colin Allred (D-TX) introduced a bicameral bill that would end the practice of forcing individuals who have experienced racial discrimination into arbitration. Ending Forced Arbitration of Race Discrimination Act of 2023, S. 1408, HR 3038 (118th Cong. 2023-4). A month later, Senators Kristen Gillibrand (D-NY), Lindsay Graham (R-SC) and Richard Durbin (D-IL), along with Representative Nancy Mace (R-SC), introduced another bill, the "Protecting Older Americans Act of 2023," prohibiting arbitration of age discrimination claims. *See* S.1979, Protecting Older Americans Act of 2023, 118th Cong. (2023-4).

[76] *See, e.g.,* The Franken Amendment, § 8116 of 2010 Defense Appropriations Act (prohibiting federal contractors who receive funds under the Act for contracts in excess of one million dollars from requiring their employees or independent contractors to arbitrate "claims involving Title VII of the civil rights act or any tort arising out of alleged sexual assault or harassment"); Military Lending Act, 32 C.F.R. § 232.8 (prohibiting mandatory arbitration in certain forms of credit extended to military service members and dependents); Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 1639c(e) (prohibiting mandatory arbitration in mortgage loan and manufactured home loan agreements); Fair Contracts for Growers Act of 2007, S. 221, 110th Congress (2007); Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, S. 1140, 107th Cong. (2011).

[77] Forced Arbitration Injustice Repeal (FAIR) Act, H.R. 1423, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/1423/text.

PART IV
MASS ARBITRATION

Class action-banning forced arbitration clauses were not designed to achieve fair, expeditious or cost-effective resolutions – indeed, they were not designed to be used at all. Instead, companies and employers have imposed forced arbitration in order to deter victims from filing cases altogether. The proof of this is evident in the recent phenomenon of "mass arbitration," in which victims simultaneously file thousands of individual arbitrations, forcing corporate defendants to confront claims of wrongdoing and make good on their contractual promises to pay the costs of arbitrating large numbers of individual claims.[78] The offer of financial subsidies helped buttress corporate advocates' claims that arbitration is just as fair as the public legal system and less expensive to claimants.[79] But in reality, companies were simply betting that, even factoring in the subsidies, "consumers and employees would not think it worth the time and money to pursue their meritorious but likely monetarily-small claims."[80]

But now that some consumers and employees are filing thousands of nearly identical individual arbitration demands and companies are confronting their contractual obligation to incur millions of dollars in arbitral fees, a number of corporate defendants have balked at the prospect of individually arbitrating claims.[81]

Take, for example, the case of Twitter: after Elon Musk purchased the company and laid off a substantial portion of its workforce, a putative class of ex-employees filed suit alleging wrongful termination in violation of federal and state laws.[82] The court compelled individual arbitration of these claims pursuant to the Twitter employment agreement, which designates JAMS as the arbitral provider. In turn, JAMS Rules governing employment arbitrations provide that employees are required to pay but a nominal filing fee (roughly the same amount that would be required for

---

[78] *See* Myriam Gilles, *Arbitration's Unraveling*, 172 U. PENN. L. REV. __ (forthcoming 2024).

[79] *See* Myriam Gilles, *Killing Them With Kindness: Examining Consumer-Friendly Arbitration Clauses After* AT&T Mobility v. Concepcion, 88 NOTRE DAME L. REV. 825 (2012) (explaining in the immediate wake of *Concepcion* that companies seeking to protect their arbitration provisions from judicial scrutiny adopted "consumer-friendly" provisions limiting the financial responsibility of the individual claimant and promising to pay the bulk of costs).

[80] Lynda J. Grant, *Turnabout Is Fair Play: The Power of Mass Arbitrations,* VERDICT, vol. 29, No. 3 (July 2023) at 4.

[81] *See* J. Maria Glover, *Mass Arbitrations,* 74 STAN. L. REV. 1283, 1314 n.8 (2022) ("claims that were rendered unmarketable by class-action waivers suddenly became capable of generating settlement pressure greater than that produced by class certification"). *See also* Sam Mellins, *How Corporate America's Favorite Legal Trick Is Backfiring*, THE LEVER, May 27, 2022 (reporting that one prominent mass arbitration firm, Keller Postman, "claims that it has secured more than $200 million for its mass arbitration clients," mainly through mass settlements).

[82] Cornet et al. v. Twitter, 2022 WL 18396334 (N.D. Cal., Dec. 14, 2022). Two other class actions were subsequently filed against Twitter by other groups of workers. *See* Borodaenko v. Twitter, Inc., 2023 WL 3294581 (N.D. Cal. May 5, 2023); Rodriguez v. Twitter, Inc., 2023 WL 3168321 (N.D. Cal. May 1, 2023).

filing a lawsuit in state court).[83] All other arbitration fees must be borne by the employer, including a $2000 filing fee that "must be paid in full" at the commencement of proceedings, as well as all arbitrators' hourly fees and JAMS administrative fees.[84]

Following the court's grant of Twitter's motion to compel arbitration, nearly 2,000 ex-employees inundated JAMS seeking to initiate individual arbitrations. But Twitter refused to pay JAMS' $4 million non-refundable filing fee – much less the arbitral fees that would come later – and, after multiple attempts to secure payment, JAMS finally closed the delinquent file.[85] The ex-employees have now returned to court – this time to compel Twitter to abide by its own arbitration provision.

Likewise, in a bid to avoid paying $91 million in filing fees for 31,500 individual consumer disputes, Uber sued the AAA in New York state court, claiming the "exorbitant" fees violated the provider's commitment to "a fair, cost-effective process."[86] The court was unimpressed, reminding Uber that it alone had "made the business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers, and [that the] AAA's fees are directly attributable to that decision."[87] Other courts have similarly rejected companies' attempts to avoid the implications of their own arbitration provisions.[88]

In the case of DoorDash, thousands of couriers filed individual arbitrations with the AAA, which informed the company that it owed about $12 million in nonrefundable fees to launch these worker arbitrations.[89] Like Uber, DoorDash ran to court for help, but Northern District of California Judge William Alsup was unsympathetic: "Faced with having to actually honor its side of the bargain, DoorDash now blanches at the cost of the filing fees it agreed to pay in the

---

[83] JAMS Policy on Employment Arbitration, Minimum Standards of Fairness at p. 4, Stnd. 6 ("The only fee that an employee may be required to pay is the initial JAMS Case Management Fee. All other costs must be borne by the company, including any additional JAMS Case Management Fees and all professional fees for the arbitrator's services…"). Further, JAMS Rules require that all employment-related arbitrations before JAMS "must comport with the JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness." *Id.*

[84] *Id.; see also* Cornet, *supra* note __, 2023 WL 187498, at *3.

[85] Fabien Ho Ching Ma v. Twitter, 23-cv-03301 (N.D. Ca., July 3, 2023), Petition to Compel Arbitration at ¶ 35 ("On June 30, 2023, following Twitter's notice of its refusal to pay these fees, JAMS notified the parties that: "JAMS will close its file as JAMS will not proceed with cases that we have determined fall under our Employment Minimum Standards if Respondent will not abide by those standards."). *See also* Cyrus Farivar, *Ex-Employees Suing Twitter Say It's Not Cooperating On Arbitration, Asks To Keep Case In Court*, FORBES, Feb. 10, 2023.

[86] Uber Tech., Inc. v American Arbitration Assn., Inc., 2022 N.Y. Slip Op. 02503 (1st Dept., April 14, 2022).

[87] Uber v. AAA, 2022 N.Y. Slip Op. 02503 (unanimously affirming the trial court order rejecting Ubers motion for preliminary injunction, in which Uber sought to enjoin the AAA from issuing any additional invoices).

[88] *See, e.g.*, Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1068 (N.D. Cal. 2020) ("The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them.").

[89] *See, e.g.,* Abernathy v. DoorDash, Inc., No. C 19-07545 WHA, 2020 WL 619785 (N.D. Cal. Feb. 10, 2020).

arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration."[90]

The resistance of these companies to individually arbitrating these cases — after unilaterally forcing these provisions on their workers and consumers — makes clear that the corporate preference for forced arbitration was never about fairness and efficiency, but about suppressing worker and consumer cases and avoiding accountability at all costs. This stunning hypocrisy underscores the need for legislative action, as corporate actors and their savvy defense counsel are already finding ways to avoid legal exposure by rewriting contractual provisions to repel mass arbitrations in various ways.[91]

CONCLUSION

Forced arbitration does not accomplish what its proponents claim: it doesn't channel cases into an alternative system that's cheaper or faster. Instead, when subject to forced arbitration, consumer and worker claims simply vanish. And along with those disappearing cases, we sacrifice the rights of all Americans to make decisions for themselves about the path to accountability, as well as deterrence, adherence to legal principles, and the development of the law itself.

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

[90] *Id.* ("This hypocrisy will not be blessed.")
[91] Myriam Gilles, *Arbitration's Unraveling*, 172 PENN. L. REV. __ (forthcoming 2024).