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Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements

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Chairperson DeSaulnier, Ranking Member Allen, and Members of the Subcommittee,

I am a partner in the Civil Rights and Employment Practice Group of the law firm Cohen Milstein Sellers & Toll, P.L.L.C., in Washington, D.C. We represent workers who are regularly subject to forced arbitration clauses governing claims arising under Title VII and other anti-discrimination statutes as well as claims under wage and hour laws. Because these cases are currently pending before arbitrators, I will not be discussing the specifics of these cases or the claims asserted therein. However, I draw upon our experience to share lessons learned about the limitations inherent in arbitration which call into serious doubt that it should be routinely regarded as a forum fully comparable to adjudication by the judiciary.[1]

At the outset, I briefly define two of the terms that I use frequently. First, forced arbitration, sometimes referred to as "mandatory arbitration," is the process by which employers impose on workers a requirement that any legal claims that ultimately arise will be disposed of in a forum selected by the corporation and adjudicated by a private individual. Mandatory arbitration is usually confidential and there is limited appellate review; it typically covers a wide range of claims, from discrimination or sexual harassment to wage and hour claims. Second, joint action bans, which include bans on class or collective actions,[2] are often included within forced arbitration provisions, and require that individuals relinquish the ability to bring their claims in a single dispute. These bans are imposed without regard for whether it is in fact more efficient, or avoids the risk of inconsistent outcomes, to pursue multi-party claims in a single action rather than one-by-one.

In the last two decades, the expansion of forced arbitration together with joint action bans in the workplace, such that arbitration has become the exclusive forum for workers to bring claims against their employers, has disrupted workers' abilities to vindicate their substantive rights, in particular their federal statutory rights, creating systemic and persistent disadvantages for workers who seek to be free from discrimination at work and to be paid fairly for their work.

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[1] I am grateful for the assistance of Cohen Milstein Fellow Brendan Schneiderman in preparing this testimony.

[2] Corporate defendants refer to these joint arbitration bans as "*class* arbitration *waivers*," a term which I and other advocates view as at odds with the reality of how these provisions operate. For one, a waiver is a consensual, knowing, and well-informed relinquishment of a right. In my experience, this almost never accurately describes the circumstances under which an employee enters into mandatory arbitration. Usually, employees are pressured into signing such agreements without knowing what a ban on class arbitration is or why it is significant. I also use the term "joint action" because focusing only on class or collective action bans may understate the problem. Mandatory arbitration provisions often reach further than merely banning class actions, to banning *any* kind of consolidation or joinder of multiple people's claims into a single arbitration.

In our practice representing workers in discrimination and wage and hour claims, my colleagues at Cohen Milstein and I regularly see the effects of forced arbitration and associated bans on joint actions. These practices, despite the Supreme Court's jurisprudence holding the contrary, interfere with workers' abilities to combat workplace discrimination and ensure they are being paid fairly. Workers have rights granted to them by Congress that they cannot effectively vindicate. I will not be discussing the particulars of cases my colleagues and I are litigating in arbitration, as those matters are ongoing. Having said that, our experience allows me to draw lessons about forced arbitration and joint action bans and to reflect on how arguments enshrining arbitration and joint action bans come up short in practice.

THE EXPANSION OF THE FEDERAL ARBITRATION ACT

As practitioners, understanding the way in which the Supreme Court has drawn upon a statute, the Federal Arbitration Act ("FAA"), to diminish the value and meaning of rights afforded to workers through more recent Congressional action has been important as we advocate for our clients. To that end, I provide a primer. The FAA, enacted in 1926, was originally intended to provide a "framework for courts to support a limited, modest system of private dispute resolution for commercial disputes"[3] and permits parties to agree to handle a dispute between them in arbitration, treating agreements to arbitrate as "valid, irrevocable, and enforceable" to the same degree as any other contract.[4] Arbitration was only ever intended to serve as an alternative forum to federal courts in a limited set of cases: commercial disputes, between merchants, on matters arising out of contractual or maritime claims.[5] And in these circumstances – between parties of equal bargaining power to resolve commercial disputes – arbitration makes sense.

However, in recent decades, the Supreme Court has expanded the FAA's reach far beyond its original purpose, into state courts and cases where statutory rights are at issue, resulting in arbitration's metastasis – to use Professor Colvin's term.[6] Today, more than half of all private-sector non-union employees are subject to forced arbitration provisions.[7] And these provisions reach every corner of the American workforce: traditional employees and gig workers, commonly classified as "independent contractors," alike.[8]

The expansion of the FAA began in 1985, with the 5-3 Supreme Court opinion in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[9] in which the Supreme Court first upheld an effort to compel arbitration of claims derived from statutes. Despite that expansion of the FAA's scope, the *Mitsubishi* Court acknowledged an important boundary: the FAA could not be construed to prevent the "effective vindication of [*other*] statutory rights." This principle, which has become known as the "effective vindication doctrine," has been the subject of numerous cases.

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[3] Imre S. Szalai, Exploring the Federal Arbitration Act through the Lens of History Symposium, 2016 J. DISPUTE RESOL. 115, 117 (2016).
[4] 9 U.S.C. § 2.
[5] *Id.* at 122.
[6] *See* Alexander J.S. Colvin, The Metastasization of Mandatory Arbitration, 94 CHI.-KENT L. REV. 3 (2019).
[7] Hugh Baran & Elisabeth Campbell, *Forced Arbitration Helped Employers Who Committed Wage Theft Pocket $9.2 Billion in 2019 From Workers in Low-Paid Jobs*, NAT'L EMP'T L. PROJECT (June, 2021), https://s27147.pcdn.co/wp-content/uploads/Data-Brief-Forced-Arbitration-Wage-Theft-Losses-June-2021.pdf.
[8] *See generally* Charlotte Garden, Disrupting Work Law: Arbitration in the Gig Economy, 2017 U. CHI. LEGAL F. 205 (2018); *see also infra* at 9 discussion of situation in which workers must challenge their collective misclassification as independent contractors, resulting in more than 1,500 individual claims being brought to date.
[9] *See Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 (1985).

Unfortunately, since *Mitsubishi*, employers have used the FAA to erect countless hurdles against workers seeking justice, and Supreme Court opinions like *Italian Colors* and *Epic Systems* have rejected complaints that those hurdles interfere with the effective vindication of statutory rights. It is unclear whether anything remains of the effective vindication doctrine.

In its 2013 *Italian Colors* opinion, the Supreme Court held that a provision that bans joint arbitration does not interfere with plaintiffs' ability to effectively vindicate their statutory rights, even when that ban renders a plaintiff's cost of individually arbitrating the case more expensive than the potential individual recovery, preventing such claims from being brought at all.[10] The result is an upending of the economics of many employment claims: because joint action bans force the millions of dollars in expert expenses that are normally borne by class counsel and spread over a large pool of claimants to instead be borne individually, claims that were once economically viable evaporate.

In *Epic Systems Corp. v. Lewis*, decided in 2018, the Supreme Court further eroded the effective vindication doctrine by deprioritizing federal statutory rights set forth in the National Labor Relations Act ("NLRA") and Fair Labor Standards Act ("FLSA").[11] In *Epic Systems*, the Supreme Court was asked squarely whether provisions banning joint arbitration conflict with the NLRA,[12] which guaranteed workers a right to "engage in … concerted activities for the purpose of collective bargaining or other mutual aid or protection."[13] Though the National Labor Relations Board ("NLRB"), the agency charged with interpreting and administering the NLRA, concluded that it did,[14] the Supreme Court disagreed, holding instead that a group arbitration ban in an employment agreement was enforceable, despite the NLRA.[15]

The *Epic Systems* opinion is at odds with the reality on the ground in several ways,[16] but I would like to highlight one in particular: Justice Gorsuch's opinion replaced the NLRB's well-reasoned harmonious reading of the NLRA, FAA and Supreme Court precedent with a reading based on two distinct fictions. First, Justice Gorsuch relies on a fiction that forced arbitration agreements in the employment setting are the product of bargaining and consent between two well-informed parties; in reality, individuals are often compelled into forced arbitration proceedings, imposed and designed by corporations, often without understanding what it is to which they are agreeing. Second, implicit in Justice Gorsuch's opinion is a false belief that joint arbitration bans are consistent with the effective vindication doctrine required by *Mitsubishi*; here, too, Justice Gorsuch badly misunderstands the myriad ways in which forced arbitration directly impedes the vindication of statutory rights for individuals. I elaborate on each of these fictions below.

The FAA's judicially-imposed overreach has touched nearly every corner of workplace protections. In 1991, the Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corporation* that an employee's claim under discrimination statutes is subject to the FAA unless Congress explicitly says

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[10] *See Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).
[11] *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612 (2018).
[12] 138 S.Ct. at 1632–33 (construing 29 U.S.C. § 151–169). The NLRA was also passed nearly a decade after the FAA.
[13] 138 S.Ct. at 1616 (construing 29 U.S.C. § 157).
[14] *See, e.g.*, *In re D.R. Horton, Inc.*, 357 NLRB 184 (2012).
[15] 138 S.Ct. at 1632 (construing 9 U.S.C. § 2).
[16] For a deeper discussion of the Supreme Court's opinion versus the NLRB's earlier opinion, see Kalpana Kotagal, *Knocking the Federal Arbitration Act Off Its Pedestal: How the NLRA Can Re-Establish Balance*, in ARBITRATION AND MEDIATION OF EMPLOYMENT AND CONSUMER DISPUTES, PROCEEDINGS OF THE NEW YORK UNIVERSITY 69TH ANNUAL CONFERENCE ON LABOR (2018).

otherwise.[17] *Gilmer* itself was about the Age Discrimination in Employment Act ("ADEA"), but its holding has been applied to other statutory schemes, including Title VII, the central legislation used to protect Americans from race-, religious-, or sex-based discrimination, among others, in employment.[18]

The creeping reach of the FAA also interferes with state-level legislative efforts to protect workers. For example, courts have held that the federal FAA preempts state efforts to forbid the use of mandatory arbitration in the context of sexual harassment,[19] effectively preventing states from doing anything to pare down the reach of the federal statute.[20] While we as practitioners must bend over backwards to show Congress intended a given statute to supersede the FAA, the Supreme Court has been much more generous to employers in interpreting the language they draft. In its 2019 *Lamps Plus* opinion, the Supreme Court reversed a lower court's finding that an ambiguous employment agreement should be construed against the employer. Relying in large part on the 2010 opinion *Stolt-Nielsen*, in which the Court concluded that there must be a "contractual basis for concluding that the [parties] agreed" to permit joint arbitration, the *Lamps Plus* Court extended the *Stolt-Nielsen* holding to agreements where the language is ambiguous, not just silent, on the matter of joint arbitration.[21]

Reading this line of cases together, the unwarranted expansion of forced arbitration becomes undeniable. The FAA – originally intended solely for contractual commercial disputes between merchants – now governs nearly every conceivable cause of action. It renders forced arbitration provisions enforceable, even when they contravene the goals of Congress or state legislatures with respect to protecting consumers, employees, and marginalized communities, and it sanctions employers' bans on employees' joining together to arbitrate their claims, even when employment contracts are silent or ambiguous on whether the agreement permits class treatment.

Recent efforts by Congress are reassuring, demonstrating a recognition of the pervasive and harmful nature of forced arbitration clauses and joint action bans: the Protecting the Right to Organize ("PRO") Act would overturn both *Epic Systems* and *Lamps Plus* by making it an unfair labor practice to impose joint action bans on employees.[22] The Forced Arbitration Injustice Repeal ("FAIR") Act goes even further, to explicitly pare down the scope of the FAA back to commercial disputes (and ban it from employer, consumer, antitrust, or civil rights disputes).[23] Finally, the Restoring Justice for Workers Act is

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[17] *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

[18] *See, e.g.*, *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 499 (6th Cir. 2004) (holding that "Title VII claims may be subjected to binding arbitration"); *Murray v. United Food & Com. Workers Int'l Union*, 289 F.3d 297, 301 (4th Cir. 2002) (calling the question of whether the FAA applies to Title VII "settled").

[19] *See* Samuel D. Lack, *Forced into Employment Arbitration? Sexual Harassment Victims are Saying #MeToo and Beginning to Fight Back—But They Need Congressional Help*, HARV. NEGOT. L. REV. (Aug., 2020), https://www.hnlr.org/2020/08/forced-into-employment-arbitration-sexual-harassment-victims-are-saying-metoo-and-beginning-to-fight-back-but-they-need-congressional-help/ (noting that New York, Illinois, Missouri, and Maryland have passed such statutes).

[20] For one example, a former employee of Morgan Stanley was unable to bring his claims of "inappropriate comments regarding his sexual orientation, inappropriate touching, sexual advances, and offensive comments about his religion," in court because the FAA was held to preempt New York's state law barring forced arbitration for such matters. *See Latif v. Morgan Stanley & Co.*, No. 18cv11528 (DLC), 2019 WL 2610985, at *1 (S.D.N.Y. June 26, 2019).

[21] *See Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407 (2019). In yet another favor to proponents of arbitration, the *Lamps Plus* Court also held that construing language against the draft is an inappropriate exercise when interpreting arbitration agreements, regardless of state contract law. *Id.* at 1416–18.

[22] *See* Protecting the Right to Organize Act, H.R. 842, 117th Cong. (2021).

[23] *See* Forced Arbitration Injustice Repeal Act, H.R. 963, 117th Cong. (2021).

significant because it bans *pre*-dispute arbitration for workers' claims and limits *post*-dispute arbitration for workers' claims to only those instances where the arbitration was actually consented to by a well-informed employee.[24]

What follows is an explanation, from the perspective of an attorney who navigates this landscape on behalf of workers, of how forced arbitration *systemically* undermines workers' abilities to vindicate their statutory rights and erodes the pillars of our legal system. The secretive, non-precedential nature of forced arbitration stands diametrically opposed to the American common law regime, in which adjudications are meant to be public, reviewable, and in concert with previous opinions. I hope to convey to this Subcommittee my grave concerns about the lasting damage that forced arbitration is doing, and why tinkering at the FAA's edges is a wholly inadequate statutory response to that damage.

MYTH 1: FORCED ARBITRATION IN THE EMPLOYMENT SETTING IS A MATTER OF CONSENT

Among the most pervasive myths about forced arbitration provisions in the employment setting is that they are truly a matter of consent, the product of a fair bargaining process. Unfortunately, given the "who" – namely corporations and individual workers with vastly unequal bargaining power – and "when" – well before grounds for any claims have actually arisen, before there is an actual dispute – behind forced arbitration, the concept that arbitration is actually a matter of consent is a fiction. In my experience, workers confronting the terrible circumstance of workplace discrimination or violations of the wage and hour laws are horrified to realize that their options are further limited by a term imposed on them before the dispute arose, shunting them into a forum with limitations not found in court – joint action bans, confidentiality, limited options for review, limited discovery, and a decision-maker whose impartiality may be in doubt.

Unfortunately, the twin fictions of mutual consent and equal bargaining power on which forced arbitration and joint action bans rest have been perpetuated in the Supreme Court's recent jurisprudence. For example, the majority opinion in *Epic Systems* is anchored in the underlying assumption that the forced arbitration provision, which included a joint action ban, was mutually agreed upon. Justice Gorsuch sets the scene by asking whether employees should "always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?"[25] He observes that "the parties before us contracted for arbitration," that "*[t]hey* proceeded to specify the rules that would govern their arbitrations," and that it was "*their* intention to use individualized rather than class or collective action procedures."[26]

It is not my position that there is no place for arbitration in our legal system. In fact, in some instances – like when it occurs between two sophisticated commercial entities, or in the context of good faith bargaining between unions and employers – arbitration may even be desirable. But *Epic Systems'* depiction of forced arbitration inaccurately conflates entering into forced arbitration agreements with those other contexts. Employer-union bargaining results in the creation of collective bargaining agreements ("CBAs") that contain their own arbitration procedures. But unlike in the forced arbitration context, CBAs are the product of a bilateral system of negotiation between the employer and the

[24] *See* Restoring Justice for Workers Act, H.R. 4841, 117th Cong. (2021).
[25] 138 S.Ct. at 1619.
[26] *Id.* at 1621 (emphasis added).

employees' representative, the union. In these negotiations, the union wields the considerable power of the bargaining unit and enjoys the technical expertise and institutional knowledge that comes with having negotiated CBAs in the past. Mandatory employment arbitration, by contrast, is the product of unilateral dictation by the employer, is usually non-negotiable, and leaves individual employees to try and decipher the legalese often contained in such agreements. [27]

Moreover, in my experience, forced arbitration falls on the shoulders of those who are already marginalized in the American economy, imposed disproportionately on low-wage workers.[28] My firm's clients contending with forced arbitration are hourly workers, overwhelmingly women, Black workers, and workers of color. This comports with the statistics that tell us that women are more likely than men to be subject to forced arbitration.[29] And Black workers are more likely than white workers to be bound by forced arbitration provisions.[30]

As to the timing of the imposition of forced arbitration, perhaps these concerns would be allayed somewhat if corporations asked individuals to sign these agreements after a dispute between the worker and the employer had already arisen. Then, at least the employees would have a clearer understanding of what dispute they were taking into arbitration. Instead, these agreements are entered into at the very start of employment and include sweeping, often vague, language that has been read to cover claims as wide-ranging as wage theft, sexual harassment, and negligence liability. They are entered into before individuals understand what the arbitral forum is like, and how it comes with secrecy, limits on discovery, and an inability to challenge patterns or practices. Workers should not have to think like lawyers, but imposing pre-dispute forced arbitration forces them to do so. Thankfully, this is exactly the sort of situation that the Restoring Justice for Workers Act seeks to remedy.

MYTH 2: ARBITRATION PRODUCES EFFICIENT DISPOSITION OF CLAIMS

Another dangerous myth about forced arbitration is that it provides for more efficient disposition of claims than litigation would. Despite being one of the most frequently cited justifications for arbitration, this notion is patently false. As a threshold matter, litigation in court is overseen from the very outset by a judge who can, and often does, press the parties to proceed efficiently. According to the Federal Rules of Civil Procedure, for example, cases are supposed to end within 8 months of being

[27] Some employers attempt to gloss over this power disparity by technically offering an "opt out" provision, by which individuals that oppose forced arbitration clauses may invalidate them. This solution is wholly inadequate for several reasons, as summarized in a study by the Consumer Financial Protection Bureau: first, individuals are usually unaware that these opt out provisions even exist, and even when they are aware of them, often fail to comprehend the legal language and what it may require if a dispute were to arise. Finally, the corporations often make opting out cumbersome, by imposing tight time restrictions, and requiring that specific words be uttered to make the opt out effective. *See Arbitration Study*, CONSUMER FIN. PROT. BUREAU (Mar., 2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf; Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPORTS (Jan. 30, 2020), https://www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern/.

[28] Baran & Campbell, *supra* note 7.

[29] *Id.*

[30] *Id.*

filed, plus time for discovery and trial.[31] Even in complex cases requiring extensive fact and expert discovery, in my experience, the court plays an active role in advancing litigation.

I am currently involved in a case alleging systematic sex-based discrimination brought by women working in sales at the company. That case has been conducted through arbitration but has hardly led to a speedy disposition of the claims at issue. Our arbitration was first filed in 2008 and the case remains ongoing because of numerous appeals of the arbitrator's decisions, an option afforded under many arbitration rules that permits appeals of right at stages of the case where there would be no such option in court. In the case in question, there have been four separate appeals through the district court to the court of appeals, including twice asking the Supreme Court to weigh in, and the case has not yet reached trial. These appeals included challenging the arbitrator's interpretation of the arbitration agreement as permitting the class arbitration, known as clause construction. The Second Circuit Court of Appeals confirmed that the arbitrator was within her powers to reach that decision, and the Supreme Court declined to hear the matter, but years slipped away.[32] Of course the clause construction stage does not occur in litigation taking place in the judicial forum. There have also been several appeals of the arbitrator's class certification determination. Most recently, the Second Circuit held that the arbitrator was within her authority to certify the class as she did to include absent class members who had not affirmatively opted into this particular arbitral proceeding, a decision which the Supreme Court also declined to hear. Together these appeals, several of which would not have been possible in court, have consumed years.

An important observation about my experience in that case, aside from the obvious point that it badly undermines the narrative that arbitration is necessarily speedier than litigation, is that this approach to arbitration is one that only corporate defendants can afford. The clients I represent, often low-wage or hourly workers who simply wish to be made whole as quickly as possible and to ensure that other workers do not have to endure what they have endured, do not have years to spend appealing every negative outcome to the district courts and inevitably the Courts of Appeals. This control of the timeline is just one of the many ways in which forced arbitration skews the balance of power dramatically in favor of employers.

The dispute resolution timeline in arbitration, as compared with litigation in court, is also problematic with respect to the process of selecting the adjudicator. In litigation, as soon as the clerk's office processes a complaint, the case is assigned to a judge who will then oversee every legal development in the case. If the judge can no longer see to that case for whatever reason, the case is immediately transferred to another judge in the same court. In contrast, when arbitration commences, the parties themselves must seek out an arbitrator to process their dispute. Thus, there is a period at the beginning of a dispute where no adjudicator is refereeing. Moreover, if the eventual arbitrator must step away from the case, the parties must seek out a new one. Sometimes this happens in the middle of the case, opening another front between the parties and badly delaying proceedings. This too is something I experienced first-hand, where the arbitrator resigned after years of overseeing the case.

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[31] *See* Paul Stephan, *Arbitration's Supposed Benefits Don't Measure Up*, LAW360 (Sept. 30, 2021); Paul Stephan, *Nothing to Say for the FAA: Why Arbitration Does Not Offer Unparalleled and Mutual Benefits*, 51 UNIV. OF MEMPHIS L. REV. 71 (2020).

[32] Note, then, that the years spent on this dispute were focused on an interpretation of the arbitration agreement to determine whether the agreement permitted my clients to seek certification of a class at all, this clause construction determination does not arise in court proceedings.

The process of selecting a new arbitrator took another year, a year during which there was no one with jurisdiction over the matter, no one to whom my clients could turn in the event of retaliation or other workplace issues.

MYTH 3: JOINT ACTION BANS AND FORCED ARBITRATION DO NOT IMPEDE "EFFECTIVE VINDICATION" OF SUBSTANTIVE RIGHTS

Perhaps the most alarming aspect of forced arbitration is the provision often embedded in forced arbitration provisions, to which I have already alluded: joint action bans. As described above, these joint action bans prevent workers from being able to proceed together in a case against their employer, even where their claims challenge the same workplace policy or practice of their shared employer, for example, a process for setting pay or giving raises that leads to discrimination in compensation or classifying workers as independent contractors when they are actually employees. These joint action bans have a tremendous impact on the viability and ultimate outcome of employment disputes. In fact, several academics have suggested – and I believe – that being able to prevent workers from coming together to bring their claims is really what motivates employers to utilize mandatory arbitration in the first place.[33] The *Mitsubishi* opinion discussed above gave birth to what was supposed to be an important limitation on the way in which the FAA privileges arbitration: "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the [FAA] will continue to serve both its remedial and deterrent function."[34] This, the "effective vindication" doctrine, stood for the proposition that arbitration could not be used as an impediment to parties' vindicating rights afforded to them by statutes, statutes like Title VII or the FLSA or even the Sherman Act. Though the Supreme Court has repeatedly insisted plaintiffs can effectively vindicate their rights, that arbitration has imposed impediments to that, even a cursory review of the state of forced arbitration and joint arbitration waivers makes clear this is wrong.

The behavior of corporations proves as much. Consider, for example, how readily corporations announce their decisions to abandon forced arbitration for individual sexual harassment matters, publicizing such decisions in an effort to promote themselves as "model workplaces." In so doing, these companies acknowledge that forced arbitration cuts against our sense of fairness, effectively conceding that forced arbitration is a barrier to justice. If removing forced arbitration is "the right thing to do," as

[33] *See, e.g.*, David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND L.J. 239, 240, 242 (2012) ("The 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."); Myriam Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 391–412 (2005); Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REFORM 871, 888 (2008) (finding the "most plausible" explanation for the disparity in forced arbitration use rates in employment and non-employment contracts is avoidance of joint action); Nicole F. Munro & Peter L. Cockrell, *Drafting Arbitration Agreements: A Practitioner's Guide for Consumer Credit Contracts*, 8 J. Bus. & Tech. L. 363, 381 (2013) ("The class action waiver is the focal point of any arbitration clause. Without a class action waiver, one need not engage in arbitration.")

[34] 473 U.S. at 637.

Uber puts it, in the context of individual sexual harassment claims, why are potential class or collective action claims challenging potential wage theft or systemic discrimination any different?[35]

Joint action bans cause unnecessary delays, inefficiency, and exhaustion of resources. One of the key justifications for the creation of the class action was the efficiency gains that could be had by litigating like cases together rather than separately. Federal Rule of Civil Procedure 23 has a list of criteria to which a court must give "rigorous" consideration before a class can be certified. Among the elements of Rule 23 is ensuring that named plaintiffs and members of the class have claims that are common – that the policies they challenge are consistent across members of the class and that the key issues in determining the legality of those policies can be determined in one fell swoop for members of the class, that the plaintiffs are sufficiently numerous, and that the legal and factual similarities that characterize the claims of class members predominate over the differences. These criteria help ensure that the class action will provide serious efficiency gains over individual litigation. Joint action bans in arbitration destroy these gains by forcing claimants – no matter how similar their claims are – to resolve their disputes individually. This often requires that depositions, document sharing, and other slow, costly, and labor-intensive aspects of discovery are duplicated unnecessarily.

Consider another case, where we represent workers who claim they were misclassified in their employment status with a very large company. Because those workers' arbitration agreements ban collective arbitration, they are obliged to pursue their claims individually. At this point, over 1,500 claims have been filed, and we anticipate more to come. This is despite the fact the inquiry around worker classification is nearly identical for each of the claimants.

From where I sit, the inefficiencies of joint action bans can hurt corporate defendants, too. While joint action bans were originally intended to deter individuals from ever bringing cases, a phenomenon has emerged recently wherein individuals may file their claims anyway. This maneuver, referred to as "serial" or "mass" arbitration, is as much a form of political organizing as it is a legal strategy, and it has become a source of frustration for corporate defendants. Consider the recent mass arbitration action against Intuit, in which the TurboTax software creator faced a deluge of 40,000 arbitration claims all filed at once.[36] The onslaught of claims, and subsequent fees, associated with the mass arbitration action led Intuit to attempt to "beat a hasty retreat," one that the courts refused to allow.[37] Corporate defendants suffer the consequences of joint action bans outside the consumer context, too. In 2019, 5,000 workers filed individual arbitration claims against DoorDash because the employer barred joint arbitration. Rather than pay the millions of arbitration fees for which it was suddenly responsible, DoorDash sought reprieve from the arbitrations in federal court, which was

[35] *See, e.g.*, *A Letter From Bobby Kotick Regarding Progress and Commitments Made at Activision Blizzard*, BUS. WIRE (Oct. 28, 2021, 5:15 AM), https://www.businesswire.com/news/home/20211028005446/en/A-Letter-From-CEO-Bobby-Kotick-Regarding-Progress-and-Commitments-Made-at-Activision-Blizzard; Laharee Chatterjee, *Uber, Lyft scrap mandatory arbitration for sexual assault claims*, REUTERS (May 15, 2018), https://www.reuters.com/article/us-uber-sexual-harassment/uber-lyft-scrap-mandatory-arbitration-for-sexual-assault-claims-idUSKCN1IG1I2.

[36] *See* Scott Medintz, *How Consumers Are Using Mass Arbitration to Fight Amazon, Intuit, and Other Corporate Giants*, CONSUMER REPS. (Aug. 13, 2021), https://www.consumerreports.org/contracts-arbitration/consumers-using-mass-arbitration-to-fight-corporate-giants-a8232980827/.

[37] *Id.*

swiftly rejected as "hypocrisy" that would "not be blessed."[38] Having said that, this rise of mass arbitrations is the exception rather than the rule in my experience and requires well-resourced counsel who can credibly threaten to litigate thousands of individual claims against a defendant. More often than not, joint arbitration bans work exactly as they are intended, suppressing claims, preventing workers from vindicating their statutory rights.[39]

Forced arbitration can lead to inconsistent outcomes. In cases where the conditions for class or collective treatment are satisfied, there are, by definition, issues that are common across members of the class or collective action, common features that that should be adjudicated together. When these workers are forced to adjudicate their claims individually, there is a serious risk of inconsistent findings – one arbitrator might uphold the company's practice while another finds it violates the law – from case to case where different arbitrators hear these individuals claims. The inconsistency of outcomes that results from forced arbitration and joint action bans may take multiple forms. First, the decision to proceed to arbitration is left to the discretion of the employer, whether through their decision to include a forced arbitration provision in the first place, or by adopting a provision that leaves it to the sole discretion of the employer whether to initiate arbitration on a case-by-case basis. Thus, as Professor Colvin points out, "[t]he result is variation across the economy from employer to employer in whether employees have access to the courts or are required to bring their claims in arbitration."[40]

Second, there is no uniform set of procedures that apply when parties proceed to arbitration. While many employers utilize the American Arbitration Association's default procedures, employers may also rewrite these rules as they please, or construct their own rules entirely. Thus, in addition to the use of arbitration in the first place, the rules that govern that arbitration also vary widely. Such variability, squarely in the hands of the employer, is at odds with one of the defining principles of the American legal system, that individuals should enjoy *equal* protection under the law.

Third, the quality of arbitrators themselves can vary greatly from matter to matter. While ideally arbitrators are neutral third parties, many are advocates, "most frequently employer side counsel, who arbitrate cases on a part-time basis—representing management one day, deciding employment rights cases the next."[41]

A fourth and final source of inconsistency comes from the simple fact that cases that would otherwise be decided in one consolidated action are instead spread over many (sometimes hundreds or thousands) of separate arbitrations. These separate arbitrations can arrive at vastly different conclusions with respect to liability, damages, witness credibility, and more. Such an outcome can produce confusing results for claimants and respondents alike about what conduct is legally permissible

[38] *See* Stephan, *supra* note 31.

[39] *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. 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").

[40] Colvin, *supra* note 6, 22.

[41] *Id.* at 23 (citing Mark D. Gough & Alexander J.S. Colvin, Decision-Maker and Context Effects in Employment Arbitration (July 26, 2018) (unpublished manuscript) (on file with the International Labor and Employment Relations Association 18th World Congress, Seoul, South Korea)).

and what transgressions constitute legally cognizable misconduct. This result also undermines the notion that our legal system is one that is applied uniformly to everyone.

Forced arbitration skews in favor of corporate defendants. In the law, there is a well understood phenomenon known as the "repeat player effect,"[42] where "repeat players," those involved in many similar litigations over time, enjoy systematic advantages as compared to "one-shotters," who have only occasional recourse to the courts.[43] In the forced arbitration context, the repeat players are the corporate defendants who draft the arbitration provisions, choose or even write the arbitration procedures, and repeatedly find themselves in arbitration hearings.[44] The disadvantaged one-shotters are the employees who enjoy fewer resources and dramatically less familiarity with the arbitration system. This is another notable difference between the forced employment arbitration system as compared to labor arbitration, where both the employer and the union can be classified as repeat players that therefore stand on somewhat equal footing. The concern about the repeat player bias in arbitration is borne out in the data, as Professor Colvin's research has highlighted.[45]

Characteristics inherent to forced individual arbitration directly impede "effective vindication" of claimants' rights. Forced individual arbitration can *directly* reduce claimants' ability to enforce their statutory rights. For one, consider the imbalance in information where an employee must challenge the workplace practices of a large corporate defendant individually, rather than with others who have claims arising from the same workplace policy. When determining the scope of permissible discovery, judges and arbitrators alike will take account of the "proportionality" of the request. Imagine, for instance, that an individual employee who worked for a company for one year, and a group of thousands of employees who spent centuries, collectively, at that same company, both allege sex-based discrimination in the company's promotion process. While both sets of claimants might seek all of the available internal records including workforce data for analysis, an adjudicator is more likely to grant the class the information that it seeks than it is the individual claimant. Thus, by forcing what could be a class arbitration to instead be resolved at the individual level, employers directly impede claimants' access to critical information, information to which they (the employers) have ready access. Furthermore, in class or collective cases – where common issues including challenges to company-wide policies are being litigated together – counsel for employees can spread the considerable costs of gathering information and data over multiple people. Where individual arbitrations and associated rules prevent that, costs deter workers from bringing claims, belying the foundational assumption that a worker can enforce her substantive rights in arbitration. Forcing claimants to seek redress individually can create other impediments too. Consider, for example, that federal courts have held that individual plaintiffs are not entitled to broad-based injunctive relief – even if class plaintiffs are – in Title VII cases. The Eleventh Circuit recently held that individual employees may not prosecute "pattern or practice"

[42] The notion of repeat players was initially made famous in Marc Galanter's essay, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 1 (1974).
[43] *Id.* at 3.
[44] For deeper discussion of this idea, see the "Repeat player advantages in arbitration" discussion in Katherine V.W. Stone & Alexander J.S. Colvin, *The arbitration epidemic: Mandatory arbitration deprives workers and consumers of their rights*, ECON. POL'Y INSTITUTE (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/#_ref57.
[45] *See* Alexander J.S. Colvin and Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 INDUS. LAB. REL. REV. 1019 (2015).

claims for declaratory and injunctive relief unless they are certified as class representatives.[46] Thus, the Supreme Court's blessing of joint action bans and courts' interpretations of Title VII combine to produce the very real possibility that joint action bans impede the vindication of the statutory right to pursue a pattern or practice investigation.

In addition, the FAA makes clear that arbitrators have much more limited power to compel witnesses to appear or to require the production of materials.[47] For example, an arbitrator is limited in her ability to compel the appearance of a third-party witness outside her jurisdiction.[48] Some courts reading Federal Rule of Civil Procedure 45 together with Section 7 of the FAA have held that district courts in the jurisdiction where the arbitrator is sitting do not have personal jurisdiction over a non-party entity served with a subpoena to appear in the arbitration.[49] Discovery isn't the only domain in which our claimants' hands are tied. In the sex discrimination case I mentioned above, unlike if we were in court, where the matter would become public the moment it is filed, under the governing arbitration rules, the female workers were forced to proceed confidentially until their case was certified as a class arbitration.

This highlights how forced arbitration is fundamentally at odds with the foundations of our legal system. Our legal system is based on the common law – a process by which judges author publicly available opinions, consistent with the opinions that came before, that are subject to popular and legislative scrutiny. In the world of forced arbitration, on the other hand, pending claims and opinions are often confidential, and there exists no notion of jurisprudence by which today's opinions must flow from and be consistent with yesterday's. Arbitral awards are not precedential, which means they are not iterative, building on one another over time to refine and clarify ambiguities in the law. In fact, most arbitral awards are never even made public. What claims workers are able bring are secreted behind the curtains of forced arbitration and joint action bans, leaving a hole in the common law where there should be decisions regarding workplace practices and their legality. What will be the state of employment law in twenty years when arbitration has been favored for decades? Furthermore, this hole in the common law left by forced arbitration is particularly alarming when one considers that many of these cases address matters of public consequence. This includes claims of sexual harassment and misconduct against employees, but other types of claims as well. American workers have the right to know which employers consistently engage in the practice of depriving their workers of earned wages. Over the course of the last century, Congress has issued laws to protect workers and consumers against those abuses, but the advent of forced arbitration and class waiver have done serious damage in clawing back those protections.

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[46] *See, e.g.*, *Davis v. Coca-Cola Bottling Co.*, 516 F.3d 955 (11th Cir. 2008).

[47] *See, e.g., CVS Health Corp. v. Vividus LLC*, 878 F.3d 703 (9th Cir. 2017) (upholding the district court's ruling that the FAA does not grant an arbitrator the power to compel third-party document production); 9 U.S.C. § 7 (conferring on arbitrators the power to "summon in writing any person to attend before them . . . as a witness and in a proper case to bring with him . . . any book, record, document, or paper which may be deemed material as evidence in the case.").

[48] *See* Fed. R. Civ. P. 45(c); 9 U.S.C. § 7 (combining to allow arbitral subpoenas to compel third-party witness appearances at trial only if the witness lives within 100 miles of the hearing or has substantial relations with the state if particular conditions are satisfied).

[49] *Dynegy Midstream Servs. v. Trammochem*, 451 F.3d 89, 94 (2d Cir. 2006); *Vividus*, 878 F.3d at 708.

In my experience, aside from undermining the general principle of transparency in the legal system and the dangers of having matters of public significance shielded from scrutiny, confidentiality also limited our client's ability to contact and collaborate with other women whose interests may have been affected. Indeed, women whose claims were being adjudicated were not permitted to see evidence being submitted in support of their claims under the arbitral rules. Only after the class was certified did the arbitrator permit limited materials in the case to be made public.

Even this does not describe the totality of the procedural barriers forced arbitration erects against workers. Claimants are also deprived of the constitutional right to a jury trial when they are forced to proceed through arbitration.[50] The right to a jury trial, viewed by some legal scholars to be so important as to be considered a fourth branch of our system of government,[51] is enshrined both in the Seventh Amendment of the Constitution, and explicitly in anti-discrimination statutes like the ADA and Title VII. Nonetheless, courts have repeatedly enforced bans on jury trials embedded in forced arbitration provisions, despite the fact that this procedural change may reduce claimants' success rates and the size of the damages they usually recover.

All of this presumes that the individual claims are even brought in the first place. As the Supreme Court itself acknowledged, forcing a worker to bring a claim as an individual, rather than as part of a group, destroys the economics of bringing the claim, such that it is often financially irrational to do so. The ability to aggregate a handful of relatively small claims into one suit, where resources and legal expenses are pooled, works to overcome this collective action problem, but cutting off employees' access to group-level mechanisms reimposes the collective action problem as a prohibitive barrier. Empirical studies support this concern: research by Cynthia Estlund found that employees bring claims in arbitration at only 1-3% the rate that they bring them in court.[52]

For those employees that elect to bring their cases to arbitration anyway, they suffer from a reduced likelihood of success and, on average, a lower award when they prevail.[53] Professor Colvin's study found an employee win rate in arbitration of 21%, as compared with previous studies' findings of a 33-36% win rate for employees in federal court and 50-60% in state court.[54] And this matters: as my colleagues Joe Sellers and Stacy Cammarano have written, "[s]ubstantive rights are only as good as the procedures available to enforce them."[55]

CONCLUSION

[50] *See* Jacob W. Gent, *Forced Arbitration and the Vanishing Right to Jury Trial*, ADLER GIERSCH (Feb. 25, 2016), https://www.adlergiersch.com/provider-blog/disappearing-right-trial-jury-big-business-misappropriates-rights-forced-arbitration-clauses/.

[51] *See, e.g.*, SUJA A. THOMAS, THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES (2016).

[52] *See* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 690 (2018).

[53] *See* Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 5 (2011).

[54] *Id.* at 6–7.

[55] Stacy N. Cammarano & Joseph M. Sellers, *The PRO Act Offers Some Hope for Protecting Workers' Rights*, BLOOMBERG L. (June 22, 2021, 4:00 AM), https://news.bloomberglaw.com/daily-labor-report/the-pro-act-offers-some-hope-for-protecting-workers-rights.

In *Mitsubishi*, the Supreme Court described the forced arbitration provision as nothing more than an agreement to change forum, stating that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[56] What practitioners have learned in the nearly forty years since that case was decided is that moving a claim from the courthouse to a conference room is far more than just a change in scenery. The transition from the judicial forum to arbitration fundamentally changes the playing field to one that is unilaterally designed, imposed, and slanted.

What results is an underworld of dictated secret law that lacks the guardrails of justice – democratic accountability, disinterested adjudication, and equal protection – that the Framers of our constitution envisioned as inseparable from our legal system. What results is the atrophy of the common law. And without Congress's prompt intervention, this erosion of our system of justice will proceed apace.

[56] 473 U.S. at 628.