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TESTIMONY BEFORE THE U.S. SENATE
COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS

Examining Mandatory Arbitration in Financial Service Products

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Chairman Brown, Ranking Member Toomey, 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 on consumers and workers. These are provisions hidden in the fine print of standard-form contracts that forfeit a consumer's 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've testified on these issues before the Senate Judiciary Committee in 2019, 2017 and 2013, and the before the House Judiciary Committee in February and November 2021. Over this stretch of time, mandatory arbitration provisions have grown more pervasive, as millions of consumers have been forced to sign away their right to choose for themselves whether to pursue claims for relief. Today, forced arbitration clauses are included in the vast majority of financial services contracts -- including contracts governing credit cards, bank accounts, cell phones, payday loans, insurance, student loans, leases and myriad other

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

consumer transactions.[2] Indeed, a recent study found that 81 of the 100 largest U.S. companies now use forced arbitration in their dealings with consumers.[3]

Yet, despite the pervasiveness of forced arbitration, most consumers have no idea they have signed away their right to hold companies accountable for wrongdoing.[4] This is by design, as companies keep consumers in the dark by burying forced arbitration clauses in the fine print of standard-form contracts or lengthy terms of service agreements.[5] Once consumers realize they have unknowingly forfeited their right to a judge and jury, they are left with only two choices, neither appealing: lump it or enter the private 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 consumers choose the former, refusing to take part in a process they did not choose and cannot win.[6]

In my testimony, I hope to shed light on the ways that forced arbitration provisions are an unfair and unjustified intrusion into the rights of consumers to decide for themselves where and how to resolve disputes. In Part I, I will describe the findings of the 2015 study conducted by the Consumer Financial Protection Bureau ("CFPB"), as well as other studies that have examined the detrimental effects of forced arbitration on consumers. In Part II, I will explain how forced arbitration clauses eliminate public accountability – a powerful motivation for industry to change unfair practices or eliminate illegal acts – by suppressing and concealing consumer complaints. Finally, in Part III I will describe how mandatory arbitration imposes a disproportionate burden on economically-fragile communities, which are often made up of minorities and people of color, and whose members are more likely to confront these unjust provisions.

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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 Imre Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies,* 52 U.C. DAVIS L. REV. ONLINE 233 (2019) (also reporting that almost two-thirds of American households are covered by broad consumer arbitration agreements and that more then 60% of U.S. e-commerce sales are governed by these agreements).

4 Jeff Sovern et al., *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements,* 75 MD. L. REV.1 (2015) (reporting that in a survey of 668 consumers, less than 9% understood the implications of a forced arbitration provision).

5 *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).

6 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.").

PART I
THE DATA

In this part, I review the existing data on the use and effect of forced arbitration on consumers. These data establishes that the current regime forces consumers to forfeit their right to a fair and neutral process, leading many consumers to simply abandon their claims.

A. *The CFPB Arbitration Study*

The Dodd-Frank Act of 2010 directed the CFPB to study "the use of pre-dispute arbitration clauses in consumer financial markets."[7] Accordingly, the Bureau sought to examine the frequency, terms, and effects of these provisions from a variety of perspectives. For instance, the CFPB reviewed nearly 850 representative consumer finance agreements across multiple industries.[8] It also examined more than 1,800 consumer finance disputes that were resolved in arbitration, as well 3,400 federal consumer lawsuits. The Bureau surveyed banks, credit card companies, payday lenders, private student loan providers, and consumers of these various financial products. Upon completion of this multi-year study, the Bureau reported its findings to Congress.[9] To put it mildly, these findings were startling:

- "Seven of the eight largest . . . mobile wireless providers . . . covering 99.9% of subscribers," required arbitration in their customer agreements – so that nearly 290 million cell phone users were subject to forced arbitration;[10]
- Credit-card issuers representing more than 90% of all U.S. credit-card debt impose arbitration clauses in their contracts with consumers;[11]

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[7] Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 STAT. 1376, Tit. X, §1028(a) (2010).

[8] 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 ARBITRATION STUDY], https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[9] *Id.* at 5, n.6.

[10] *Id.* at § 2, p. 7. *See also* Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Non-consumer Contracts,* 41 U. MICH. J.L. REF. 871, 882–84 (2008) (reviewing internet, phone, and data service contracts finding that 75% contained mandatory arbitration clauses and 80% contained class action bans).

[11] *Id.* app. A at 22-23. Specifically, the CFPB noted that, at the time of its study, four major credit-card issuers agreed to settlements from an antitrust class action under which they were temporarily barred from imposing their mandatory arbitration clauses. *See id.* (citing various settlement agreements arising out of *Ross v. Bank of Am., N.A.* (USA), 524 F.3d 217 (2d Cir. 2008)). If those four credit-card issuers had continued their policy of requiring arbitration during the CFPB's study period, the percentage of outstanding loans subject to mandatory arbitration would have risen to over 93%. *Id.* And indeed, a casual internet search of those four issuers' terms and conditions today shows they have reinstated their arbitration requirements.

- In the checking-account market, banks representing 44% of insured deposits had arbitration clauses in their customer contracts;[12]
- Forced arbitration clauses appeared in over 86% of private student loan contracts;[13]
- Sampling data from California and Texas revealed that 83.7% of payday lenders covering 98.5% of storefronts imposed arbitration clauses in their borrower agreements;[14]
- Once in arbitration, financial services companies were represented by counsel nearly 100% of the time, while consumers were represented by counsel in "roughly 60% of the cases";[15]
- In the 1,060 arbitrations cases initiated by consumers in 2010 and 2011, only 341 resulted in decisions by arbitrators – with consumers obtaining relief on their affirmative claims in only 32 arbitrations and debt forbearance in only 46;[16]
- 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 claimed;[17]
- Of the 341 arbitrations filed by consumers in 2010 and 2011, "consumers obtained relief regarding their affirmative claims in 32 disputes"[18];
- By contrast, between 2008 and 2012, 422 consumer class action settlements returned over $440 million (after deducting attorneys' fees and court costs) to an average of 6.8 million consumers each average year;[19] and
- In a survey of consumers, most were unaware that they had entered into mandatory arbitration agreements. For example, three-quarters of those surveyed did not know that their credit-card agreement contained an arbitration clause and more than a third of those who were bound by forced-arbitration clauses incorrectly believed that they could still go to court to resolve disputes.[20]

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[12] *Id.* app. A at 25-26.

[13] *Id.* at § 2, p. 24.

[14] *Id.* at § 2, p. 7.

[15] *Id.*, at § 5, p. 10.

[16] *Id.* at § 1, p. 12.

[17] *Id.* at § 5, pp. 11-12.

[18] *Id.* at § 5, pp. 41-42 (finding that "[t]he total amount of affirmative relief awarded was $172,433 and total debt forbearance was $189,107").

[19] *Id.* at § 1, pp. 16.

[20] *Id.* at § 3, pp. 20-22.

The CFPB Study revealed both the alarming degree to which forced arbitration clauses had permeated the consumer financial sector, as well as the significant divergence in consumer outcomes as between arbitration and litigation. More startling was what the CFPB did *not* find in its extensive study – namely, that the imposition of arbitration resulted in lower prices for consumers.[21] Proponents of arbitration had, for many years, asserted that arbitration was a "cheaper, faster, better" alternative to court that would save companies millions in legal fees and associated costs.[22] The Bureau searched for evidence that companies had indeed passed along these savings to consumers in the form of reduced prices, or on the flip side, that abandonment of arbitration had resulted in higher consumer prices.[23] For instance, the agency examined the total cost of credit paid by consumers after Bank of America, JPMorgan Chase, Capital One, and HSBC were forced to eliminate their arbitration clauses as a result of court-approved settlements – but found no evidence that these companies had increased prices or reduced access to consumer credit as a result of dropping their forced arbitration provisions.[24] Similarly, the CFPB analyzed mortgage rates after Congress passed a law prohibiting the use of forced arbitratioin in mortgage contracts – but again, found no increase in rates.[25]

The 2015 Arbitration Study is the more comprehensive empirical examination of arbitration that has ever been done. Its critics – the Chamber of Commerce etc. – have sought to discredit the study's methodologies, when in reality, they simply wish to avoid the Study's conclusions: that forced arbitration eliminates consumer choice, suppresses consumer claiming, and broadly immunizes illegal practices.

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[21] *Id.* at § 10, pp. 2-5 ("The assertion that pre-dispute arbitration clauses generate cost savings . . . is difficult to test and has not been established or disproved.").

[22] *See, e.g.* Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 91-93 (asserting that forced arbitration allows companies to pass on savings to their customers and employees); Archis Parasharami, Testimony before Senate Committee on the Judiciary, Dec. 17, 2013 ("Arbitration before a fair, neutral decision-maker leads to outcomes for consumers and individuals that are comparable or superior to the alternative -- litigation in court -- and that are achieved faster and at lower expense.").

[23] ARBITRATION STUDY, *supra* note 8, at Section 10, pp. 2-5 ("[E]ven a correlation between the use of pre-dispute arbitration clauses and price levels should not be construed as a causal relationship between the two, absent additional information.").

[24] *Id.* at § 1, p. 18. Notably, the Office of the Comptroller of the Currency ("OCC") published a report in 2017 purporting to find banning forced arbitration would raise interest rates on credit cards by as much as 25%. Probable Cost to Consumers Resulting from the Consumer Finance Protection Bureau's Final Rule on Arbitration Agreements, OCC (2017). However, the CFPB considered the exact same data that the OCC used, and accurately assessed that there was no "statistically significant evidence of an increase in prices among those companies that dropped their arbitration clauses." ARBITRATION STUDY, *supra* note 8, at 5.

[25] *Id.*

B. *Post-2015 Studies*

Smaller and more recent case studies have corroborated the CFPB's findings. For example, a 2017 report by the nonprofit group, Level Playing Field, examined the use of forced arbitration in the Wells Fargo identity-theft debacle.[26] Compiling data from the AAA and JAMs, the country's largest arbitration providers, the report found that just 250 consumers arbitrated claims with Wells Fargo between 2009 and the first half of 2017.[27] Given that the bank boasts over 70 million customers, this is "a shockingly low number of arbitration claims" – but it is particularly surprising given the "continued revelations of widespread unfair business practices."[28]

Scholars and journalists have also sought to document the paucity of consumer arbitrations. For instance, in 2018, Imre Szalai determined there were an estimated 826,537,000 consumer arbitration provisions in force.[29] Yet, the two largest arbitration providers (AAA and JAMS) recorded an average of only 6,000 consumer arbitrations per year.[30] Similarly, Judith Resnik reported that only 134 individual claims 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 for violations of consumer laws.[31] In 2019, 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.[32]

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26 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).

27 Wells Fargo and Forced Consumer Arbitration, Level Playing Field (2017).

28 *Id.*

29 Szalai, *supra* note 3.

30 *Id.*

31 *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."

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

Others have studied outcomes in the small number of consumer-initiated arbitrations to determine whether the arbitral forum helps or harms consumers. For instance, the American Association of Justice reviewed 30,000 consumer arbitrations conducted by AAA and JAMS between 2014-18, and found that only 6.3% resulted in consumers winning a monetary award.[33] This finding substantiates decades of research on the "repeat-player" bias in 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.[34] 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.[35]

In 2020, Consumer Reports studied the incidence of forced arbitration in retail e-commerce sales, a fast-growing sector.[36] Consumer Reports found that over 60% of U.S. retail e-commerce sales are subject to forced arbitration.[37] As this Committee well knows, online transactional activity increases consumers' risk of fraudulent use of their payment card data, identity theft and related injuries.[38] Forced arbitration clauses prevent consumers from learning about data breaches so that they may better protect themselves. When a company negligently exposes the personal information of millions of Americans, its arbitration clause enables it to escape accountability and avoid bad publicity.[39]

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

[34] 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).

[35] 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.")

[36] U.S. Census Bureau, Quarterly Retail E-Commerce Sales, Feb. 18, 2022 (reporting that retail e-commerce sales for the fourth quarter of 2021was $218.5 billion, an increase of 1.7% from the third quarter of 2021).

[37] *Id.*

[38] *See* Senate Banking Committee Hearing, *Examining The Procedures For Overseeing Data Security And Breaches Of Data Security By The United States Secret Service And The Federal Trade Commission,* Feb. 3, 2014.

[39] *See, e.g.,* Diane Hembree, *Consumer Backlash Spurs Equifax to Drop 'Ripoff Clause' in Offer to Security Hack Victims*, FORBES, Sept. 9, 2017 (reporting that Equifax tried to limit its exposure by offering data breach victims "free" credit monitoring in exchange for agreeing to an arbitration clause containing a class action ban); *see also*

Finally, in 2015, the New York Times published a three-part investigation of forced arbitration.[40] The authors found, among other things, that companies intentionally hide arbitration clauses in click-wrap, envelope-stuffers and other delivery methods intended to obscure or minimize the immensity of the rights that are being forfeited.[41] But the authors acknowledged that, even if consumers did read the fine print, none of us really has a choice of whether to accept or reject an arbitration clause. If 99% of mobile service providers impose arbitration, then there are no real alternatives available to consumers wishing to avoid these provisions. If more than 240 million cell phone subscribers are bound by service agreements containing forced arbitration clauses – did any one of them really "choose" to relinquish their rights? Where a pre-dispute mandatory arbitration clause is imposed as a precondition to obtaining product or service, consumer choice is illusory.[42]

PART II
THE BROADER EFFECTS OF FORCED ARBITRATION

The harm caused by class-banning forced arbitration clauses extends well beyond individual consumers: 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 some of the harmful effects of these provisions on our system of laws.

A. *Concealing Misconduct Only Leads to More Misconduct*

Forced arbitration keeps consumer rip-offs secret and largely out of public view. Privacy, of course, is core to the institution of arbitration and guaranteed by both the providers and the standard terms of contemporary arbitration agreements.[43] Accordingly, arbitrators hear disputes behind closed doors and issue awards without written decisions explaining their reasoning.[44]

Orman v. Citigroup, 2012 WL 4039850 (S.D.N.Y. 2012) (compelling arbitration of claims alleging that Citigroup failed to "adequately secure their computer systems against intrusion," resulting in data breach and identity theft).

40 *See* Silver-Greenberg & Gebeloff, *supra* note 6; *see also* Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, A Privatization of the Justice System*, NEW YORK TIMES, Nov. 1, 2015; Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, NEW YORK TIMES, Nov. 2, 2015.

41 Silver-Greenberg & Gebeloff, *supra* note 6 at A1.

42 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 waiving until a dispute has arisen).

43 *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").

44 *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

Moreover, arbitrators have "plenary authority to decide how the case is conducted, with very limited grounds for review."[45] This culture of secrecy prevents consumers from learning about problems in the marketplace, rendering them unable to exercise their good judgment to avoid financial harm.

The cascading illegal conduct by Wells Fargo 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.[46] 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,[47] the bank again tried to force customers into arbitration to avoid bad publicity and legal liability.[48] By compelling disputes into secret proceedings, companies like Wells 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.

B. *Eliminating Consumer Choice*

Forced arbitration represents a massive incursion on consumer choice, on numerous levels. For one, companies write the rules and choose the arbitration provider.[49] The provider, in turn,

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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.").

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

[46] Robert Weissman And 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").

[47] *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).

[48] 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 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.

[49] The most commonly-designated arbitral providers are the American Arbitration Association ("AAA") and JAMS. However, companies may designate any provider and write their own rules to govern the arbitration. *See* 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.").

chooses the pool of arbitrators it will make available in any given case. Consumers have no right to choose a different arbitration provider, nor do they have any say over the rules that govern the arbitration.[50] And while consumers may have some limited choice within the pool of arbitrators presented to them, this is illusory because consumers lack the information needed to make an informed decision about which arbitrator to choose (or strike). After all, there are no public records to search or prior decisions to read because, again, arbitrators do not write publicly-available decisions.[51] Accordingly, repeat-player companies hold all the cards, and consumers are left in the dark.

The advantages accruing to repeat players raise serious concerns about the neutrality and fairness of the arbitration system. Not only do companies 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."[52] As discussed above, arbitrators who wish to be chosen in future arbitrations may feel pressure to side with the company over the consumer. 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."[53] Taken together, these elements bode poorly for consumers should they wish to enter the arbitral regime, and may go a great distance in explaining why so few do so.

C. *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."[54] But when disputes are shunted into the hermetically-sealed vault of private arbitration,

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[50] Colvin & Stone, *supra* note 1 ("the 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").

[51] *See* Landes & Posner, *supra* note 43.

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

[53] *Id.*

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

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.[55]

Over the longer term, forcing consumers into the black box of arbitration precludes the very development of common law doctrine.[56] In 2016, I sought to measure the effects of forced arbitration on consumer law.[57] To do so, I took a typical state consumer protection statute – I chose the Illinois Consumer Fraud Act ("ICFA") -- and examined cases arising under that statute decided by the Seventh Circuit from 2005 to 2014.[58] My experiment posed one question: if companies had deployed arbitration clauses in these underlying disputes, how would those provisions have affected the development of consumer law in Illinois during the relevant period? In my sample of 35 ICFA cases, I found 27 involved contracts in which an arbitration clause could be transmitted.[59] I concluded that, if arbitration clauses had been in effect, all of these cases would have "disappear[ed] from the judicial docket"[60] -- which would have had an immense impact on the development of consumer protection law in Illinois. The cases captured in my ICFA sample provide a small illustration of the range of the doctrinal developments that would be foreclosed if arbitration clauses are applied in a wide and ever-expanding category of cases. 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 provision, we have, in essence "frozen the law… denying the courts the ability to develop and adapt the law as society and business changes."[61]

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55 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.")

56 *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").

57 *See also* Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 416 (2016).

58 *Id.*, citing 815 ILL. COMP. STAT. 505/1 (2007).

59 *Id.* Eighteen of these were consumer class actions brought against mortgage banks, savings & loans, associations, debt collectors, insurance companies, tax preparers, rental companies, credit reporting services, long-distance service providers, and telecom companies.

60 *Id.* at 418-9. The cases captured in my ICFA sample provide just a tiny illustration of the range of doctrinal developments that would be foreclosed. These cases include a controversial pronouncement by the Seventh Circuit that that "federal banking laws [do not] preempt state laws of general applicability like the Illinois Consumer Fraud Act," *see* Courtney v. Halleran, 485 F.3d 942, 951 (7th Cir. 2007), and a test for resolving "a conflict between a state rule of procedure and a federal rule of procedure" where facts pled under the ICFA do not meet the pleading standards under the federal rules. Windy City Metal Fabrications & Supply, Inc. v. CIT Tech. Fin. Servs., Inc., 536 F.3d 663, 671 (7th Cir. 2008).

61 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).

PART III
FORCED ARBITRATION AND ECONOMIC INEQUALITY

In recent years, much attention has been paid to the startling disparities in income and wealth in contemporary U.S. society. But one issue that gets little mention is the relationship between forced arbitration and increased economic inequality. Put simply: low-income consumers are both more likely to experience injuries in the marketplace and less likely to pursue individual arbitration to remedy those injuries. As a result, forced arbitration contributes to economic inequality.[62]

First, low-income groups are more susceptible to abusive practices in the marketplace for goods and services. Multiple studies have shown that low-income consumers suffer the disproportionate burden of fraud, predatory lending, reverse redlining, abusive mortgages, exorbitant student loans, subprime car loans, and other unfair and deceptive practices.[63] And, because low-income individuals face structural barriers to accessing traditional credit markets, they are often reliant on high-cost and abusive alternatives – such as payday loans, money orders, pawnshops, rent-to-own stores and high-interest-rate credit cards.[64] Second, 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 would be inefficient or disproportionately expensive.[65] Moreover, class and collective litigation often result in broad-based injunctive relief to reform problematic practices -- for low-income groups in particular, aggregating claims has historically provided significant access to justice and heightened deterrence against future harm. But the rise of class-banning forced arbitration clauses has left low-income groups without remedy for widespread wrongdoing.[66] Individuals within these groups may not bring or join class or collective cases, nor may they access courts independently. The distributive implications of forced

62 *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).

63 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).

64 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").

65 Helen Hershkoff, *Poverty Law and Civil Procedure: Rethinking the First-Year Course*, 34 FORDHAM URB. L.J. 1325, 1347 (2007).

66 *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").

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.[67]

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, under forced arbitration, consumer claims simply vanish. And along with those disappearing cases, we sacrifice deterrence, public accountability and the development of the law itself.

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

[67] 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.").