



Written Testimony of

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before the

Committee on Banking, Housing, and Urban Affairs

United States Senate

on

“Examining Mandatory Arbitration in Financial Service Products”

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Good morning Chair Brown, Ranking Member Toomey, and Members of the Committee:

Thank you for inviting me to testify. My name is Remington A. Gregg, and I am counsel for civil justice and consumer rights at Public Citizen. Public Citizen is a national non-profit organization with more than 500,000 members and supporters across the country. We represent the public interest through legislative and administrative advocacy, litigation, research, and public education on a broad range of issues including ensuring access to justice for all people. Pertinent to this hearing, Public Citizen has held a long interest in holding corporate wrongdoers accountable through the civil justice system, both to provide individuals the justice they deserve and to help rein in corporate misconduct. We have worked on this issue for decades in Congress, before federal agencies, and in the courts. We have submitted numerous briefs as amicus curiae on arbitration issues before the United States Supreme Court (Court) and issued reports on the impacts of forced arbitration.

1. Forced arbitration is an inherently unfair practice.

Forced arbitration clauses and bans on class actions (forced arbitration clauses) use fine-print “take-it-or-leave it” agreements that abolish a consumers’ fundamental rights and remedies. Forced arbitration clauses have become ubiquitous in such varied settings as agreements governing bank accounts, student loans, cell phones, employment, and even in nursing home admissions.¹ These clauses deprive people of their day in court when they are harmed by violations of the law, no matter how widespread or egregious the misconduct may be. Justice Hugo Black summed up the unfairness of arbitration well:

“For the individual, whether his case is settled by a professional arbitrator or tried by a jury can make a crucial difference. Arbitration differs from judicial proceedings in many ways: arbitration carries no right to a jury trial as guaranteed by the Seventh Amendment; arbitrators need not be instructed in the law; they are not bound by rules of evidence; they need not give reasons for their awards; witnesses need not be sworn; the record of proceedings need not be complete; and judicial review, it has been held, is extremely limited.”²

Corporate entities write the contracts that contain forced arbitration clauses, so it is unsurprising that its terms are corporate friendly. Arbitration provisions generally:

- Prohibit individuals from banding together in a class or collective action, which may be the only realistic avenue for bringing small claims (discussed in greater detail below);

¹ Paula Vason, *The fight for transparency among nursing homes*, WHAS 11 NEWS (June 3, 2021), <https://www.whas11.com/article/news/investigations/focus/nursing-home-arbitration-agreements/417-9b598fa5-d4a8-4f4b-b79c-3da4a76d5c76>.

² *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 664 (1965) (Black, J., dissenting).

- Limit discovery and other attempts to obtain evidence;
 - A Public Citizen report details that “54 percent of arbitration clauses discussed discovery or evidentiary standards, in most instances to ‘alert consumers that discovery may be limited and evidentiary standards may be relaxed by comparison to litigation’;”³
- Include arbitration fees that are “are dramatically higher than court costs”⁴ and may include a “loser pays” provision which creates a significant disincentive for an individual to bring a claim for fear that they will be on the hook for all fees if they do not prevail.

A 2015 study by Professor Jeff Sovern, among others, showed that most consumers did not know when they were subject to a forced arbitration clause and that even when they did, consumers *still assumed* that were protected by the safeguards of the judicial system.⁵ The “survey results suggest a profound lack of understanding about the existence and effect of arbitration agreements among consumers.”⁶ Out of 668 respondents who were asked to read a consumer contract, 59 people, or less than 9 percent, realized that the contract included an arbitration clause. A smaller number of individuals—46 people, or less than 7 percent—realized that the contract included a class-action ban. More disturbing still, the “results suggest that many citizens assume that they have a right to judicial process that they cannot lose as a result of their acquiescence in a form consumer contract.” Importantly, this study confirms that even when people know they are bound by an arbitration agreement they truly do not understand the legal consequences of signing away their fundamental rights to a neutral judge and open court. This should concern all of us.

The pervasive lack of awareness that this study found in the context of consumer contracts is not just confined to consumer contracts. At a powerful hearing last November in the House Judiciary Committee,⁷ survivors of sexual assault and harassment, in testimony given under the protection of congressional subpoenas, detailed not only how they did not realize they were subject to a forced arbitration clause in their employment contract until they sought to hold their perpetrator accountable, but that even sophisticated (and highly educated) individuals among them did not fully understand the implications of the clause.

³ Taylor Lincoln & David Arkush, *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration* 38 (2008), available at <https://www.citizen.org/sites/default/files/arbitrationdebatefinal.pdf>.

⁴ *Id.* at 39.

⁵ Jeff Sovern, “Whimsy Little Contracts” with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 MD. L. REV. 1 (2015).

⁶ *Id.* at 2.

⁷ How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the Shadows: Hearing Before the House Committee on the Judiciary, YOUTUBE (Nov. 16, 2021), https://www.youtube.com/watch?v=JC5y1GbfUVk&list=PLStrNx2NtyMOUt5Y0Mflbw0-Xcc6nH_9o&index=22.

2. The Congress that passed the Federal Arbitration Act never intended arbitration clauses to extend to consumer and employment agreements.

One of the most consequential decisions impacting arbitration governing consumers is *AT&T Mobility v. Concepcion*.⁸ There, the Court held that corporations could use arbitration provisions in consumer and employment contracts to ban class actions, and that state contract law is preempted to the extent that it deems class-action bans unconscionable. This holding cannot be overstated because it has given companies even greater license to slip these take-it-or-leave-it clauses into all types of contracts with impunity.

The text and legislative history of the Federal Arbitration Act (FAA), however, clearly shows that the Court's holding in *Concepcion* (and its other modern day arbitration jurisprudence) does not reflect congressional intent. The law was meant to be limited in scope to arbitration agreements between parties of roughly equal bargaining power⁹ and to be procedural in nature.¹⁰ Justice Sandra Day O'Connor, joined by Chief Justice William Rehnquist, dissenting in a major forced arbitration case, *Southland Corp. v. Keating*, persuasively explained the 1925 Congress's intent regarding the Federal Arbitration Act:

One rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts.

In 1925 Congress emphatically believed arbitration to be a matter of 'procedure.' At hearings on the Act congressional subcommittees were told: 'The theory on which you do this is that you have the right to tell the Federal courts how to proceed.' The House Report on the FAA stated: 'Whether an agreement for arbitration shall be enforced or not is a question of procedure....' On the floor of the House Congressman Graham assured his fellow members that the FAA 'does not involve any new principle of law except to provide a simple method ... in order to give enforcement.... It creates no new

⁸ 563 U.S. 333.

⁹ See *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407, 1420 (2019)(J. Ginsburg, dissenting), stating that "Congress enacted the Federal Arbitration Act (FAA) in 1925 "to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate commercial disputes;" and see *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403, n.9 (1967), noting that the Act was not designed to govern contracts "in which one of the parties characteristically has little bargaining power;" and see *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 42 (1991) (Stevens, J., dissenting) ("I doubt that any legislator who voted for [the FAA] expected it to apply ... to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship."); and see Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N. Y. U. L. Rev. 286, 323 (2013) (The FAA was "enacted in 1925 with the seemingly limited purpose of overcoming the then-existing 'judicial hostility' to the arbitration of contract disputes between businesses.").

¹⁰ See generally *Southland v. Keating*, 465 U.S. 1 (1984) (O'Connor, J., dissenting).

legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.’¹¹

A decade later, Justice O’Connor noted how the “ Court [] strayed far afield in giving the Act so broad a compass.” She noted that “over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.”¹²

The rejection of the more limited view of the FAA originally taken by Chief Justice Rehnquist, Justice O’Connor, and Justice Antonin Scalia, and still adhered to by Justice Clarence Thomas,¹³ has given corporations near free rein to use these clauses in every aspect of our lives. Not only do these clauses apply in federal and state courts, but a company can force an individual with a federal statutory claim into arbitration—clearly not intended by the 1925 Congress. The implications have been immense. Because arbitrators are not required to publicize their decisions, consumers, workers, and small business owners are now subject to decisions on issues as vast as workplace discrimination, unfair and deceptive business practices, securities fraud, RICO, and antitrust violations without a requirement that the arbitrator publish a decision, much less explain his or her reasoning. And if the consumer, worker, or small business loses in arbitration—and it is overwhelmingly likely that they will—the odds are quite high that they will be barred from appealing because an arbitrator’s decision is given “limited judicial review.”¹⁴ Rather, “[u]nder the [Federal Arbitration Act], courts may vacate an arbitrator’s decision ‘only in very unusual circumstances.’”¹⁵ These circumstances include where:

- (1) The award was procured by corruption, fraud, or undue means;
- (2) There was evident partiality or corruption in the arbitrators, or either of them;
- (3) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.¹⁶

¹¹ *Id.* at 25 (citations omitted).

¹² *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring).

¹³ *DIRECTV, Inc. v. Imburgia*, (Thomas, J., dissenting) (stating that “I remain of the view that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., does not apply to proceedings in state courts.”).

¹⁴ *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013).

¹⁵ *Id.* (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)).

¹⁶ 9 U.S.C. § 10 (2012).

It makes sense to severely limit appeals if arbitration, as the 1925 Congress intended, was designed to dispense with procedural formalities in disputes between business entities of equal bargaining power. It does not make sense to limit a person’s appeal rights if arbitration was designed to sweep in claims of all kinds, including statutory claims and tort claims where discovery and other fundamental safeguards are often necessary. The assertion that arbitration was designed for business-to-business claims is buttressed not only by Justice O’Connor and Chief Justice Rehnquist, but by other former members of the Court. In a concurring opinion in *Commonwealth Coatings Corp. v. Continental Case Co.*, a case on whether the arbitration award should be vacated due to the arbitrator’s impartiality,¹⁷ Justice Byron White noted that “[t]he Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, *not apart from but of the marketplace*, that they are effective in their adjudicatory function.”¹⁸

In essence, Justice White was saying that arbitrators are good at their jobs because they are actively engaged in business activities. At a time when arbitration was mainly between business entities of equal bargaining power, understanding the issues that companies brought to arbitration was helpful. However, in the traditional legal system we do not want our judges to be actively engaged in businesses because we seek impartiality in our judges in issues between businesses and consumers or businesses and workers. But this aspect of arbitration has been of little consequence to the Court in the intervening years, supporting Justice O’Connor’s belief that the Court by the 1980s had completely abandoned “all pretense”¹⁹ of gleaning congressional intent regarding the Federal Arbitration Act.

3. Forced arbitration clauses dominate consumer contracts.

Forced arbitration clauses are now included in all manner of consumer contracts. According to Consumer Reports, eighty-one of the 100 largest U.S. companies use arbitration in their dealings with consumers.²⁰ And more than two-thirds of its most popular reviewed products included a forced arbitration clause as a term of purchase. Public Citizen highlights the ubiquity of forced arbitration in all sectors of the economy in its forced arbitration “Wall of Shame”²¹—a list that seemingly only increases.²² From cable companies such as DirectTV and Comcast to banks

¹⁷ See generally *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968).

¹⁸ *Id.* at 150.

¹⁹ Southland, *supra* note 12.

²⁰ Scott Medintz, *How Consumers Are Using Mass Arbitration to Fight Amazon, Intuit, and Other Corporate Giants*, CONSUMER REPORTS (Aug. 13, 2021), <https://www.consumerreports.org/contracts-arbitration/consumers-using-mass-arbitration-to-fight-corporate-giants-a8232980827/>.

²¹ Public Citizen, *Forced Arbitration Wall of Shame: Exposing Corporations That Are Rigging the Justice System Against Consumers and Workers*, <https://www.citizen.org/article/forced-arbitration-wall-of-shame/>.

²² For example, in writing this testimony and reviewing consumer contracts, the author realized that Comerica Bank, with 432 locations and assets totaling \$94.6 billion in states including Arizona, California, Florida and Michigan

including Chase and Citibank to consumer travel companies Airbnb and Amtrak, consumers cannot escape these clauses. In 2019, Amtrak amended the terms and conditions for purchasing tickets or traveling on Amtrak to add an arbitration clause under which disputes with Amtrak would be submitted to binding arbitration before a private arbitrator. The only way that riders can escape agreeing to its terms is forgoing using Amtrak. But when the only national passenger rail service in the country includes an arbitration clause in its terms that covers all types of disputes, from Americans with Disability Act claims to wrongful death—the consumer has no choice but to agree. When many of the big banks employ a forced arbitration clause, one shouldn't feel like their only option is to accept the terms (including the arbitration clause) or hide their money under a mattress. In sum, consumers no longer have a meaningful choice. They must accept the forced arbitration clause or forgo products and services.

Another consequence of forced arbitration clauses is the suppression of claims altogether. Stopping consumers from banding together has significant implications for companies. Many consumers have low dollar claims and therefore it is incredibly impractical to bring an individual claim in arbitration. It simply is not worth the time and effort, even for those who are subjected to misconduct. As Justice Breyer noted in his *Concepcion* dissent, “[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.” Or, in the words of Professor Adam Levitin, “Class actions are the only practical recourse for addressing widespread, small-dollar harms, the category under which most consumer claims fall.”²³

When the CFPB released its comprehensive study on the use of forced arbitration in consumer financial products and services, it found that “[t]ens of millions of consumers are covered by arbitration clauses, but few know about them or understand their impact.”²⁴ This fact, along with the inability of consumers to vindicate their rights in small dollar cases, is precisely why the CFPB issued its 2017 rule that would have outlawed class action bans in forced arbitration agreements.²⁵ Sadly, the United States Congress, on a partisan basis, using the Congressional Review Act (CRA), overturned the agency’s exhaustive and carefully reasoned rule even though it was extremely

was not listed in Public Citizen’s Wall of Shame. See Comerica Bank, *Fast Facts*, <https://comerica.mediaroom.com/fast-facts>; and see Comerica Bank, *Deposit Account Contract*, <https://www.comerica.com/content/dam/comerica/en/documents/resources/about/cra2021/CB-Business-and-Personal-Deposit-Account-Contract-2020.pdf>. In addition, Citizens Bank, also not on the Wall of Shame, with branches in 14 states and the District of Columbia and \$188 billion in assets, also forces its customers into arbitration. See Citizens Financial Group, *Our Company*, <https://investor.citizensbank.com/about-us/our-company.aspx>; and see Citizens Financial Group, *Online Terms and Conditions*, <https://www.citizensbank.com/account-safeguards/online-terms-and-conditions.aspx>.

²³ American Banker, *Mandatory Arbitration Offers Bargain-Basement Justice*, (May 13, 2014), <https://www.americanbanker.com/opinion/mandatory-arbitration-offers-bargain-basement-justice>.

²⁴ Consumer Financial Protection Bureau, *CFPB Study Finds That Arbitration Agreements Limit Relief for Consumers*, (Mar. 10, 2015), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/>.

²⁵ 12 CFR 1040, available at https://files.consumerfinance.gov/f/documents/201707_cfpb_Arbitration-Agreements-Rule.pdf.

popular with the public and supported by organizations representing millions of people including entities representing small businesses,²⁶ veterans,²⁷ and consumers, civil rights, and labor.²⁸ Congress should listen to the public.²⁹

4. Consumers benefit much more when given a choice between court and arbitration.

The ability to choose where to bring a claim benefits consumers.

Consumers, not the wrongdoers responsible for cheating or defrauding, should be able to choose how to hold bad actors accountable.

- According to the CFPB’s 728-page study on forced arbitration, “[b]etween 2008 and 2012, 422 consumer financial class action settlements garnered more than \$2.0 billion in cash relief for consumers and \$644 million in in-kind relief³⁰—money that goes back into the hands of consumers. The study noted these numbers served as the “floor” for relief because many settlements “had relief, such as provisions in which companies agreed to change company behavior towards consumers, that was not quantified as of final approval.”³¹
- The Economic Policy Institute (EPI)’s analysis of the CFPB study found that between 2002 and 2012, 32 million consumers a year, on average, were eligible for relief through class-action settlements in federal court, totaling \$220 million in payments a year. EPI noted that consumers recovered “at least \$440,000,000 in class actions, *after deducting all attorneys’ fees and court costs*—compared with a total of \$86,216 in arbitration.”³² Notably, when a customer faced a bank in arbitration, EPI found that “the average consumer [was] ordered to pay \$7,725 to the bank or lender.”³³ EPI also found that “[c]onsumers obtain relief regarding their claims in only 9 percent of disputes. On the

²⁶ Letter from Main Street Alliance to U.S. Consumer Financial Protection Bureau (Aug. 22, 2016), <https://fairarbitrationnow.org/wp-content/uploads/2016/05/Main-Street-Alliance.pdf>.

²⁷ Letter from The Military Coalition to Congressional Leaders (July 25, 2017), <https://www.nclc.org/images/pdf/arbitration/military-coalition-letter-arb-rule.pdf>.

²⁸ Letter from 310 Organizations to U.S. Consumer Financial Protection Bureau (July 12, 2017), <https://www.nclc.org/images/pdf/arbitration/071217-coalition-letter-final-cfpb-arb-rule.pdf>.

²⁹ Americans For Financial Reform, *New AFR/CRL poll: By a 3 to 1 Margin, Voters of All Parties Support Restoring Right to Consumer Class Actions* (July 6, 2016), <http://ourfinancialsecurity.org/2016/07/new-afrcrl-poll-3-1-margin-voters-parties-support-restoring-right-consumer-class-actions/>.

³⁰ Consumer Financial Protection Bureau, *Arbitration Study* (Mar. 2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

³¹ *Id.* at 4.

³² Heidi Shierholz, *Correcting the Record*, Economic Policy Institute (Aug. 1, 2017), <https://www.epi.org/files/pdf/132669.pdf> (emphasis added).

³³ *Id.* (emphasis added).

other hand, when companies make claims or counterclaims, arbitrators grant them relief 93 percent of the time—meaning they order the consumer to pay.”³⁴

- The outrageous loss rate that consumers face can be traced, in part, to the so-called “repeat player” problem—in which companies who frequently use the same arbitrators receive more favorable outcomes.³⁵
- An additional problem that provides yet another reason why forcing consumers into arbitration should be prohibited is the overwhelming lack of gender, racial, and socio-economic diversity of arbitrators.³⁶

Forced arbitration clauses do not lead to lower prices or more access to credit.

Arbitration defenders assert that the use of forced arbitration clauses keep costs down for consumers. If that were so, then banks that have adopted arbitration clauses should have lowered their annual fees, increased interest rates, and the like in order to reflect lower costs. These same arbitration defenders also assert that banning arbitration clauses would hit low-income people seeking access to credit the hardest. This argument attempts to deflect the impact that forced arbitration clauses have on lower income people, especially consumers of color. Take, for example, the payday lending industry. According to the Center for Progressive Reform, “[f]orced arbitration is found in 44 percent of checking account contracts, 53 percent of credit card contracts, 83 percent of prepaid credit card contracts, 98 percent of tuition agreements at for-profit colleges, and 99 percent of payday loan agreements. Like other consumers, they have little chance of winning in arbitration if a payday lender broke the law, and few even bother to try.”³⁷

According to the Pew Charitable Trusts, Black people are 105 times *more likely* than other racial groups to use payday lenders.³⁸ This is largely due to exclusionary measures including discrimination in banking and “bank deserts”³⁹ that leave communities of color with few banking choices. And according to Professor Jean Sternlight, people of color “stand to lose the

³⁴ *Id.*

³⁵ See generally National Consumer Law Center, *Consumer Arbitration Agreements* (8th ed. 2020), <https://library.nclc.org/arb/01040401>.

³⁶ Megan Leonhardt, *The Huge Diversity Issue Hiding in Companies’ Forced Arbitration Agreements*, CNBC (Jun. 7, 2021), <https://www.cnbc.com/2021/06/07/arbitrators-are-male-and-overwhelming-white-heres-why-it-matters.html>; and see Sarah Rudolph Cole, *Arbitrator Diversity: Can it be Achieved*, 98 Wash. U. L. Rev., 965 (2021).

³⁷ Center for Progressive Reform, *Private Courts, Biased Outcomes: The Adverse Impact of Forced Arbitration on People of Color, Women, Low-Income Americans, and Nursing Home Residents* (Feb. 2022), <https://cpr-assets.s3.amazonaws.com/documents/private-courts-biased-outcomes-forced-arbitration-rpt-0222.pdf>.

³⁸ PEW Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why* (July 2012), https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf.

³⁹ Ethan Wolff-Mann and Brian Cheung, *Black communities vulnerable to debt traps as key protections against payday loans removed*, YAHOO NEWS (July 8, 2020), <https://www.yahoo.com/video/black-communities-vulnerable-to-debt-traps-as-key-protections-against-payday-loans-removed-205751251.html>.

most when arbitration is substituted for litigation.”⁴⁰ Thus, the continued use of forced arbitration clauses not only hits lower income Black and Brown communities hardest, but allows corporate wrongdoers that prey on these communities to get away scot-free if they act illegally. Nor do forced arbitration clauses advance economic justice. They saddle those with the fewest resources with the responsibility of going at it alone to hold megacompanies accountable in arbitration. And that, we have seen, does not actually happen.

Forced arbitration clauses impact servicemembers’ ability to access the justice system.

Last year, the Government Accountability Office (GAO) found that forced arbitration clauses hinder protections for servicemembers and their families that Congress extended to them under two federal laws. The Uniformed Services Employment and Reemployment Rights Act (USERRA) “entitles servicemembers to return to their civilian employment upon completion of their military service with the seniority, status, and rate of pay that they would have obtained had they remained continuously employed by their civilian employer” and prohibits discrimination based on past, current, or future military service.⁴¹ And the Servicemembers Civil Relief Act (SCRA) protects servicemembers against default judgments, foreclosures, and repossessions while on active duty. The protections “cover[] issues such as rental agreements, security deposits, prepaid rent, evictions, installment contracts, credit card interest rates, mortgage interest rates, mortgage foreclosures, civil judicial proceedings, automobile leases, life insurance, health insurance and income tax payments.”⁴² Forcing servicemembers into arbitration, GAO found, “prevent[s] them from availing themselves of potentially important processes that are typically available in a judicial forum, such as robust discovery or the ability to appeal interpretations of the law.”⁴³

Kevin Ziober, a Navy reservist who was fired from his job the day before being deployed to Afghanistan, fought to get his job back when he returned from deployment by filing a lawsuit when his tour of duty ended. The employer filed a motion to compel arbitration and Mr. Ziober was forced into arbitration. At a House Judiciary Committee hearing in 2019, he stated, “Along

⁴⁰ Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, SCHOLARLY WORKS (2019), <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=2202&context=facpub>.

⁴¹ U.S. DEPARTMENT OF JUSTICE, *Uniformed Services Employment And Reemployment Rights Act of 1994 (USERRA)*, <https://www.justice.gov/servicemembers/uniformed-services-employment-and-reemployment-rights-act-1994-userra>.

⁴² U.S. DEPARTMENT OF JUSTICE, *The Servicemembers Civil Relief Act (SCRA)*, <https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-skra/>.

⁴³ *Servicemember Rights*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE 13 (Feb. 2021), <https://www.gao.gov/assets/gao-21-221.pdf>.

with other servicemembers, I have fought to advance American ideals and values abroad, so it was particularly disheartening to lose these fundamental rights at home.”⁴⁴

Moreover, according to one academic that GAO interviewed, the inclusion of class-action waivers in consumer contracts can nullify protections given under SCRA: “These waivers create a particular challenge for individual servicemembers who think their rights under SCRA have been violated, because individuals in general rarely pursue the types of cases that are brought in class-action lawsuits against companies. According to an official from the State Attorney General’s Office of a state with one of the highest concentrations of active duty servicemembers and reservists, in his experience, almost all mandatory arbitration clauses contain class-action waivers.”⁴⁵

We should not subject servicemembers who are fighting for our country with the indignity of forcing their claims into a secretive proceeding where the principles that they fight for aren’t even afforded to them.

5. The ability to band together in class actions is an important complement to public enforcement of consumer finance laws.

Forced arbitration clauses allow companies to keep ill-gotten gains and hinder private enforcement of the country’s consumer protection laws. This principle is expressed most clearly in the securities context. The indispensable role that private enforcement plays in policing wrongdoers in the securities context continues to be a bipartisan-held principle. Former SEC Chairmen William Donaldson and Arthur Levitt, Jr., and former Commissioner Harvey Goldschmid, who were nominated to serve by presidents of both political parties, clearly stated in an *amicus curiae* brief the importance of private enforcement:

Investors must rely primarily on private actions to recover when defrauded. The SEC’s disgorgement and civil money penalty powers, although enhanced by the Sarbanes-Oxley Act, are limited, and will generally cover only a fraction of the damage done to investors by serious securities fraud. Moreover, the SEC with limited resources cannot possibly undertake to bring actions in every one or even most of the financial fraud cases that have proliferated over the past few years.

⁴⁴ Submitted Testimony of Kevin Ziober, Justice Denied: Forced Arbitration and the Erosion of our Legal System, Hearing Before the United States Subcommittee on Antitrust, Commercial and Administrative (May 26, 2019), <https://docs.house.gov/meetings/JU/JU05/20190516/109484/HHRG-116-JU05-Wstate-ZioberK-20190516.pdf>.

⁴⁵ *Id.*, supra note 43, at 18.

...Private cases, so long as they are well grounded, are an important enforcement mechanism supplementing the SEC in the policing of our markets.⁴⁶

And then-commissioner Luis A. Aguilar said: “[i]t is unrealistic to expect that the Commission will have the resources to police all securities frauds on its own, and as a result, it is essential that investors be given private rights to complement and complete the Commission’s efforts.”⁴⁷

While agencies police the marketplace, they cannot do it alone. Allowing consumers to band together to hold wrongdoers accountable is an important complement to public enforcement of our laws.

6. Congress must take action to protect consumers by restoring their rights to access the justice system.

Wells Fargo continues to force its customers to submit to arbitration⁴⁸ even as it continues to clean up messes of its own making, such as opening millions of fake accounts.⁴⁹ Yet, if sunlight is the best disinfectant,⁵⁰ the best way to ensure that the megabank is atoning for past misdeeds is to ensure that customers going forward can hold it accountable in the courts, rather than be forced into secretive arbitration proceedings.⁵¹

Wells Fargo isn’t the only company that has used forced arbitration clauses to try to escape accountability to consumers. In the wake of credit agency Equifax’s disclosure that the company had been hacked, potentially exposing the data of 143 million consumers, Equifax offered free credit monitoring to customers for one year. The problem: the terms of the TrustID product that Equifax offered to consumers included a forced arbitration clause. Following public outcry, Equifax dropped the arbitration requirement for consumers who signed up for TrustID through

⁴⁶ Brief for Former SEC Commissioners et al. as Amici Curiae Supporting Respondents at 7-8, *Stoneridge Inv. Partners, LCC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2007) (No. 06-43).

⁴⁷ *Statement by Commissioner: Defrauded Investors Deserve Their Day in Court*, U.S. SECURITIES AND EXCHANGE COMMISSION (Apr. 11, 2012), <https://www.sec.gov/news/public-statement/2012-spch041112laahtm>.

⁴⁸ Wells Fargo, *Account Agreements*, <https://www.wellsfargo.com/credit-cards/agreements/#Section31>.

⁴⁹ Matt Egan, *Wells Fargo can’t seem to escape its troubled past*, CNN (Jan. 15, 2021), <https://www.cnn.com/2021/01/15/investing/wells-fargo-bank-earnings-scandal/index.html#:~:text=More%20than%20four%20years%20after,to%20a%20staggering%20%242.2%20billion>.

⁵⁰ L. Brandeis, *Other People’s Money* (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”). <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v>

⁵¹ Michael Corkery and Stacy Cowley, *Wells Fargo killing sham account suits by using arbitration*, NEW YORK TIMES (Dec. 6, 2016) <https://www.nytimes.com/2016/12/06/business/dealbook/wells-fargo-killing-sham-account-suits-by-using-arbitration.html>.

the webpage offering free monitoring.⁵² Yet Equifax continued to make arbitration part of its terms and services. Although its agreement allows consumers to opt out, opt-out provisions are inadequate to resolve the problem with predispute arbitration clauses. First, they are buried in a contract. If the public already does not understand arbitration or its implications,⁵³ they are unlikely to understand the option of opting out of the arbitration clause. Second, many companies put up roadblocks for consumers to opt out, such as requiring mailing in the opt-out request or requiring an individual to provide a picture of their driver's license with their the opt-out request.⁵⁴

Although these examples show how forcing individuals into arbitration harms consumers, there are many more stories out there. The problem, however, is that these stories often only emerge *after* those who were wronged break their silence, such as former Fox News host Gretchen Carlson.⁵⁵ Only then do others feel empowered to tell their stories.⁵⁶ The misdeeds are happening, but the public doesn't hear about them when complaints are handled behind closed doors, in arbitration, rather than in the public court system. Although other factors contribute, forced arbitration clauses are an important reason why misdeeds do not come to light.

7. Conclusion

We are at a moment of reckoning in our society. Consumers, among others, are standing up to corporate behemoths that have historically used their enormous financial and political power to silence dissent and keep systemic wrongdoing in the shadows. Public Citizen strongly supports measures that increase access to justice for all people and the ability to hold the powerful accountable. One way to do that is to empower consumers by banning the use of forced arbitration clauses in all contexts, including in consumer financial products and services.

⁵² See generally Press Release: *Brown Calls On Equifax to Remove Forced Arbitration From Credit Monitoring, Following Data Breach*, BANKING, HOUSING, AND URBAN AFFAIRS MINORITY NEWSROOM (Sep. 11, 2017), <https://www.banking.senate.gov/newsroom/minority/brown-calls-on-equifax-to-remove-forced-arbitration-from-credit-monitoring-following-data-breach>; see also Mahita Gajanan, *Equifax says you won't surrender your right to sue by asking for help after massive hack*, TIME (Sep. 11, 2017), <https://time.com/4936081/equifax-data-breach-hack/>; and Chris Morran, *Equifax drops controversial condition from free credit monitoring service*, CONSUMER REPORTS (Sep. 11, 2017), <https://www.consumerreports.org/consumerist/equifax-drops-controversial-condition-from-free-credit-monitoring-service/>.

⁵³ See Govern, *supra* note 5.

⁵⁴ See, e.g., Grindr, *Terms and Conditions of Service*, <https://www.grindr.com/terms-of-service/?lang=en-US> (requiring an "unaltered digital image of Your valid driver's license").

⁵⁵ Soo Youn, *Google drops forced arbitration in sexual harassment and assault cases: why it matters*, ABC NEWS (Nov. 10, 2018), <https://abcnews.go.com/Business/google-drops-forced-arbitration-sexual-harassment-assault-cases/story?id=59084593>.

⁵⁶ Sarah Staszak, *Google workers want to outlaw mandatory arbitration: here's why that matters*, WASHINGTON POST (May 3, 2019), <https://www.washingtonpost.com/politics/2019/05/03/google-workers-want-outlaw-mandatory-arbitration-heres-why-this-matters/>.

Public Citizen supports the Arbitration Fairness for Consumers Act because it would restore consumers' rights to use the courts to hold wrongdoers accountable for systemic wrongdoing regarding financial services and products. And in doing so, it would increase accountability and transparency throughout the consumer financial industry. More broadly, Public Citizen, along with 91 consumer, worker rights, and civil rights organizations supports the Fair Arbitration Injustice Repeal (FAIR) Act, which would prohibit the use of forced arbitration in consumer, civil rights, employment, and antitrust disputes. According to a national survey, 84 percent of the public supports federal legislation that ends the practice of forcing consumers, workers, and small businesses into arbitration. Republicans support the legislation more than Democrats (87% to 83%).⁵⁷

In February, Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act. The bipartisan law (garnering 113 House Republicans and a voice vote in the U.S. Senate) empowers survivors of sexual assault and sexual harassment by allowing them to file a case in court rather than be forced into arbitration. It is clear from this event that Congress can come together to protect individuals from wrongdoing. It should do so again now. Until Congress does so, however, forced arbitration will continue to hamstring consumers. Noted federal Judge Jed S. Rakoff said:

...while appellate courts still pay lip service to the 'precious right' of trial by jury, and sometimes add that it is a right that cannot readily be waived, in actuality federal district courts are now obliged to enforce what everyone recognizes is a totally coerced waiver of both the right to a jury and the right of access to the courts — provided only that the consumer is notified in some passing way that in purchasing the product or service she is thereby 'agreeing' to the accompanying voluminous set of 'terms and conditions.' This being the law, this judge must enforce it — even if it is based on nothing but factual and legal fictions.⁵⁸

Congress can help to erase this legal fiction. This hearing before this Committee plays an important role in shining a light on this issue, and I hope that you will take quick action to continue to restore choice to the American public.

Thank you for the opportunity to provide testimony and I look forward to your questions.

⁵⁷ Guy Molyneux & Geoff Garin, *Nat'l Survey on Required Arbitration*, HART RESEARCH ASSOC. (Feb. 28, 2019), <http://www.takejusticeback.com/sites/default/files/Survey%20on%20Forced%20Arbitration%20February%202019.pdf>.

⁵⁸ *Meyer v. Kalanick*, 200 F.Supp.3d 408 (S.D.N.Y. 2016).