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FROM THE FRONTLINES OF THE MODERN MOVEMENT TO END FORCED ARBITRATION AND RESTORE JURY RIGHTS

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FROM THE FRONTLINES OF THE MODERN MOVEMENT TO END FORCED ARBITRATION AND RESTORE JURY RIGHTS

An Essay in Three Parts

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INTRODUCTION

Throughout history, groups of people united by a shared purpose have achieved transformational changes in the law. Movements for women's suffrage in the early 1900s, black civil rights in the mid-century, and marriage equality in the early 2000s, as examples, began as ideas for change expressed through grassroots protests, marches, rallies and petition drives.[1] Over time, these efforts gathered force and gained support, eventually laying the groundwork for precedent-changing lawsuits and historic legislation. Meanwhile, other reform efforts have had noticeably less success penetrating the public consciousness and maintaining momentum. For example, Occupy Wall Street,[2] Black Lives Matter,[3] and the Women's March[4] each arose from shocking incidents that incited tremendous public fervor and generated countless headlines; and while these movements have

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1. *See generally* Nan Hunter, *Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign*, 64 U.C.L.A. L. REV. 1662, 1665 (2017) (describing social movements that "produce change in the law").

2. Occupy Wall Street began in 2011 to protest the misdeeds of the financial industry that led to a massive economic meltdown. For two months, protestors occupied a small park in lower Manhattan until they were evicted by police. *See* Sarah Kunstler, *The Right to Occupy: Occupy Wall Street and the First Amendment*, 39 FORDHAM U. L.J. 989, 990 (2012) (describing protest).

3. In 2014, Black Lives Matter started as a protest in Missouri that spread across the nation to condemn police shootings of unarmed black people. *See* Jonathan Capehart, *From Trayvon Martin to 'Black Lives Matter'*, WASH. POST (Feb. 27, 2015), http://www.washingtonpost.com/blogs/post-partisan/wp/2015/02/27/from-trayvon-martin-to-black-lives-matter/.

4. The largest single-day demonstration in U.S. history, the Women's March on January 21, 2017, saw 700,000 people pack into the National Mall to protest for female empowerment in the wake of Trump's election. Thousands more marched in demonstrations across the country and the world. Matt Broomfield, *Women's March against Donald Trump is the largest day of protests in US history, say political scientists*, INDEPENDENT (Jan. 23, 2017), http://www.independent.co.uk/news/world/americas/womens-march-anti-donald-trump-womens-rights-largest-protest-demonstration-us-history-political-a7541081.html.

left their mark on our culture, none have (yet) resulted in lasting legal change.[5] The current protest—fueled not just by the killing of George Floyd by Minneapolis police officers, but by a pandemic that has visited hardship and death with particular virulence on black and brown people—has problematized issues of systemic bias in ways that may or may not lead to real reform.

How is any movement for legal change created and sustained? Why does one movement succeed where another fails? How do supporters transform public discourse and advocacy into meaningful legal change?

Each of the authors of this essay have tried, in different ways, to engage and sustain a change-making movement to end forced arbitration and restore jury rights. These are provisions that companies write into standard-form contracts with their consumers and employees that require all legal disputes between the parties be resolved in one-on-one, private arbitrations.[6] These provisions require citizens to forsake procedural rights to a fair and open hearing before a jury of their peers.[7] And, given the certainty that consumers and employees will almost never be able to arbitrate small-dollar claims individually, forced arbitration provisions promise corporate parties virtual immunity from liability.[8] Today, millions of citizens are subject to these provisions, and as a result, they are routinely denied access to public courts and juries of their peers.[9]

Over the past decade, battles over the legality of forced arbitration have been waged all across the nation in courtrooms, legislative chambers, and boardrooms, pitting two sets of combatants against one another.[10] On one side are left-leaning public interest groups, plaintiffs' lawyers, and

5. *See* Anna North, *7 Positive Changes That Have Come From the #MeToo Movement*, VOX (Oct. 4, 2019), https://www.vox.com/identities/2019/10/4/20852639/me-too-movement-sexual-harassment-law-2019 [https://perma.cc/7S6Q-A86S].

6. *See, e.g.*, Myriam Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005) (describing forced arbitration).

7. *Id.*

8. *Id.*

9. *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET AND CONSUMER PROTECTION ACT 1028(A), § 2.3 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/2XBD-G9V7] (reporting that 99.9% of cell phone subscribers, 90% of credit card contracts, 98.5% of storefront payday loans, 86% of private student loans, and 84% of prepaid cards are all subject to forced arbitration); *see also* Alexander Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (2018), epi.org/files/pdf/144131.pdf [https://perma.cc/P9L2-ZY3N] (estimating that over half the country's nonunionized workforce is now subject to these provisions – over 80 million workers).

10. *See, e.g.*, Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. (2016) (describing partisan battles between the U.S. Chamber of Commerce and nonprofit groups over forced arbitration).

advocates for consumer and worker rights.[11] These legal liberals have long relied on access to courts and juries to vindicate important statutory and common law rights, as well as to seek effective redress for widespread wrongdoing.[12] These advocates argue that forced arbitration shuts the courthouse door and denies citizens their constitutionally guaranteed rights of due process and transparency.[13]

Political support for arbitration comes from corporations, big-firm defense lawyers, and conservative policymakers who argue that consumers and employees benefit from a dispute resolution system that is cheaper, faster, and easier than traditional litigation.[14] For these groups, whose hostility to the plaintiffs' bar and class action litigation is well-documented,[15] enforceable arbitration clauses offer the power to unilaterally define "certain types of claims as not warranting a hearing by a judge and jury."[16] In this alternative procedural process, companies have written the rules to benefit their parochial business interests—i.e., barring class actions, shortening statutes of limitation, restricting discovery, requiring complete confidentiality, and prohibiting certain remedies.[17] Much of this has been enabled by a conservative Supreme Court, which has allowed sophisticated legal actors to rewrite the procedural rules that govern the proceedings to their own advantage.[18]

The battles over forced arbitration are deeply consequential and hard-fought. This essay describes some of these battles from our perspective—as

11. *See infra* notes 38-41 and accompanying text (describing efforts by Public Justice and other nonprofit groups to eliminate forced arbitration).

12. *Id.*

13. *Id.*

14. *See, e.g.*, *The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?*: *Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013) (statement of Archis Parasharami). https://www.judiciary.senate.gov/imo/media/doc/12-17-13ParasharamiTestimony.pdf.

15. *See, e.g.*, SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010); ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION (2008); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (Ira Katznelson et al. eds., 2008).

16. SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND JUDICIAL RETRENCHMENT 41 (2015).

17. *See* Gilles, *Day Doctrine Died*, *supra* note 10.

18. In the past decade, the Supreme Court has decided over a dozen cases upholding forced arbitration clauses. *See, e.g.*, Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015); BG Grp. PLC v. Republic of Argentina, 572 U.S. 25 (2014); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); Oxford Health Plans LLC v. Sutter, 569 U.S. 564 (2013); Nitro-Lift Techs., LLC v. Howard, 568 U.S. 17 (2012); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012); CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); KPMG LLP v. Cocchi, 565 U.S. 18 (2011); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287 (2010); Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

advocates who have litigated, testified and protested in an effort to end forced arbitration.

I. CHALLENGES TO FORCED ARBITRATION: BACKGROUND AND CONTEXT

Thirty years ago, an idea was hatched by a group of corporate defense lawyers and arbitration marketers. These lawyers were tired of defending their corporate clients from "frivolous" class actions brought by entrepreneurial plaintiffs' lawyers, earning staggeringly high fees; and the arbitration marketers wanted to expand the sale of private dispute-resolution services.[19] Working together, this brain trust devised a startlingly simple idea: rewrite all standard-form consumer and employment contracts to require that any disputes be resolved in one-on-one, private arbitral proceedings.[20] In other words, these agreements would contractually prohibit class actions and other aggregate litigation, starving entrepreneurial lawyers of fees[21] and shunting all these disputes into arbitral proceedings before private judges whose livelihoods depend on the repeat business of large corporate actors.[22] In response to any argument that class-banning arbitration clauses might deter small-dollar litigants from individually arbitrating their disputes, these corporate lawyers suggested that companies offer "bounties" to pay the attorneys' fees of successful litigants.[23]

Corporate defenders had some basis for believing their gambit would succeed: In the 1980s and 90s, Supreme Court Justices began to interpret the Federal Arbitration Act ("FAA") in new and unexpected ways.[24] Enacted in 1925 to promote arbitration among equally sophisticated parties in commercial and maritime contracts, the FAA provides that an arbitration agreement "written provision in any maritime transaction or a contract evidencing a transaction involving commerce" was enforceable, subject only to "such grounds as exist at law or in equity for the revocation of any

19. *See* Gilles, *Opting Out*, *supra* note 6.

20. *See* Complaint, Ross v. Bank of Am., N.A. (USA), 05 C. 7116 (S.D.N.Y. 2005) (alleging that defendant banks and corporate defense lawyers held a series of secret meetings to discuss and plan the implementation of class-banning forced arbitration clauses).

21. *See, e.g.*, Alan Kaplinsky & Mark J. Levin, *Excuse Me, But Who's the Predator? Banks Can Use Arbitration Clauses as a Defense*, 7 BUS. L. TODAY, May-June 1998, at 25, 26 (arguing that eliminating class actions would reduce the incentive of entrepreneurial lawyers to sue big companies and banks).

22. *See, e.g.*, Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997) (finding that employees prevailed merely 16% of the time against "repeat players" firms in arbitration).

23. *See* Parasharami, *supra* note 14.

24. *See* Gilles, *Day Doctrine Died*, *supra* note 10.

contract."[25] In the early half of the 20th century, arbitration remained a niche practice, deployed primarily by business interests seeking to channel disputes out of the traditional litigation system and into less expensive and more private forms of alternative dispute resolution.[26] In these early years, the Supreme Court repeatedly affirmed its view that the FAA encouraged the arbitration of claims between equally sophisticated parties and rejected efforts to impose arbitration upon guileless consumers or employees via standard form contract.[27] In 1953, for example, the Court unanimously ruled that claims brought by an investor under the federal securities laws could not be forced into arbitration.[28]

But by the mid-1980s, the Supreme Court began to reinterpret the FAA in service of the ideologically conservative goal of allowing corporations to compel arbitration and eliminate access to courts and juries.[29] In case after case, the Court gave this statute an increasingly prominent role in shaping dispute resolution, applying it to a wide range of disputes far beyond what its drafters intended.[30] These decisions empowered large corporate actors to force arbitration on consumers, employees and other weaker contractual counterparties lacking the ability to bargain for or even comprehend the rights that they were giving up. Over time, arbitration clauses have been used to eliminate class actions, shorten statutes of limitation,

25. 9 U.S.C. § 2 (2018).

26. *See* Steven A. Meyerowitz, *The Arbitration Alternative*, A.B.A. J., Feb. 1985, at 78, 79 (reporting on the increase of commercial, labor and construction cases arbitrated before the AAA from 1975 to 1985).

27. *See, e.g.*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 414 (1967) (Black, J., dissenting) ("On several occasions [1925 legislators] expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power. Senator Walsh cited insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it-or-leave-it basis to captive customers or employees." (internal citations omitted)).

28. Wilko v. Swann, 346 U.S. 427, 435 (1953).

29. *See* Gilles, *Day Doctrine Died*, *supra* note 10.

30. *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 15 (1984) (holding that the FAA applies in state courts and preempts state legislation intended to protect franchisees from unfair arbitration agreements); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626–27 (1985) (announcing "the federal policy favoring arbitration"); Perry v. Thomas, 482 U.S. 483, 490–91 (1987) (finding that the FAA preempted a California law guaranteeing access to courts in wage collection actions); Gilmer v. lnterstate Johnson Lane Corp., 500 U.S. 20, 35 (1991) (finding that the FAA applies to the Age Discrimination in Employment Act); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 688–89 (1996) (finding that the FAA preempted a state law requirement that a contract containing an arbitration clause include a notification on the first page of the contract); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995) (rejecting arguments by twenty state Attorneys Generals in finding that the FAA applies to state, as well as federal court); AT&T Mobility LLC v. Concepcion, 563 U.S. 321, 353 (2011) (finding that the FAA preempts state public policy from prohibiting waivers of class actions).

restrict discovery, and force litigants to waive a variety of rights and remedies.[31]

Legal academics and liberal judges roundly criticized the Supreme Court's decisions. Some warned that the Justices were divesting public dispute resolution of critical transparency and due process values.[32] These critics worried that denying litigants the right to their day in court and their right to a jury of their peers would foster distrust in the rule of law, undermining its very legitimacy.[33] Others challenged the Court's interpretation of the FAA as historically inaccurate and redolent of an ideological distrust of litigation.[34] And yet, others cautioned that enforcing arbitration provisions would allow important rights guaranteed by federal and state law to simply go unredressed and future rights violations undeterred.[35] By the mid-1990s, some of the Justices themselves began to sound the alarm.[36]

Legal challenges to the enforceability of forced arbitration clauses commenced immediately. Dusting off state law unconscionability doctrines, lawyers like Paul Bland at Public Justice sought to invalidate forced arbitration provisions based on the FAA "saving" clause, which provides that a party may oppose arbitration on such "grounds as exist at law or in equity for the revocation of any contract."[37] These early legal clashes set the tone for a decades-long battle over the meaning and function of forced arbitration clauses.

31. *See generally* SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND JUDICIAL RETRENCHMENT 41-46 (2015).

32. *See, e.g.*, Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 J. L. & CONTEMP. PROBS. 279, 279 (2004); Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1958 (1996).

33. *Id.*

34. *See, e.g.*, David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67-SPG LAW & CONTEMP. PROBS., 5, 5 ("Despite its constant, talismanic repetition, the 'national policy favoring arbitration' is illusory and highly dubious federalism.").

35. *See, e.g.*, Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 277 (1995); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL L. REV. 1, 12–13 (1997).

36. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 132 (2001) (Stevens, J., dissenting) ("There is little doubt that the Court's interpretation of the [FAA] has given it a scope far beyond the expectations of the Congress that enacted it."); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) ("[T]he Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation.").

37. 9 U.S.C. §2 (2018). The Supreme Court has held that unconscionability challenges fall within the meaning of FAA § 2. *See* Doctor's Assocs. Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (holding that "generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2" of the FAA).

II. PAUL BLAND: CHALLENGING FORCED ARBITRATION IN COURT[38]

Public Justice (formerly known as Trial Lawyers for Public Justice) first represented an individual challenging the enforcement of an arbitration clause in 1998. In the years that followed, we would go on to win dozens of cases striking down unfair arbitration provisions in federal and state courts around the country.[39] When we were not litigating these cases, lawyers at

38. Paul Bland began working at Trial Lawyers for Public Justice in 1997 as a staff attorney (in 2007, the organization changed its name to Public Justice), later becoming the Director of its Mandatory Arbitration Abuse Prevention Project, and in 2014 became Executive Director of Public Justice. During that time, he argued and litigated scores of challenges to arbitration clauses. The first appeal he handled was McDougle v. Silvernell, 738 So.2d 806 (Ala. 1999) (finding that an arbitration clause sent to homebuyers weeks after closing was enforceable). The last case he argued was A-1 Premium Acceptance, Inc. v. Hunter, 557 S.W.3d 923 (Mo. 2018) (finding that a loan contract's arbitration clause precluded appointment of a substitute arbitrator for the organization named in the arbitration clause, and the original arbitration company named in the clause was forced to stop handling consumer arbitration to settle corruption allegations from state of Minnesota). In the meantime, he won numerous appeals challenging arbitration clauses. *See, e.g.*, Murphy v. DirecTV, Inc., 724 F.3d 1218 (9th Cir. 2013) (finding that a non-party to arbitration clause was not entitled to enforce it against consumer); Lewallen v. Green Tree Servicing, LLC, 487 F.3d 1085 (8th Cir. 2007) (lending waived right to compel arbitration); Cordova v. World Fin. Corp., 208 P.3d 901 (N.M. 2009) (one-sided arbitration clause unconscionable); Toppings v. Meritech Mortgage, 569 S.E.2d 149 (W. Va. 2002) (concluding that where a lender's arbitration clause designates an arbitration forum that is paid through a case volume fee system, and the arbitration forum's income is dependent on continued referrals from the creditor, this so impinges on neutrality and fundamental fairness that the clause is unconscionable and unenforceable). He also argued and lost some major cases. *See, e.g.*, Buckeye Check Cashing v. Cardegna, 546 U.S. 440 (2006) (holding that an arbitration clause was enforceable even though it was contained in a contract whose principal purpose was criminal under state law). He also argued and won a number of cases later overturned by the U.S. Supreme Court's decision in AT&T Mobility v. Concepcion. *See, e.g.*, Discover Bank v. Superior Court of Los Angeles County (Boehr), 113 P.3 1100 (Ca. 2005); Homa v. Am. Express Co., 558 F.3d 225 (3rd Cir. 2009). Bland has testified about forced arbitration in both houses of Congress a number of times. *See S. 1782, The Arbitration Fairness Act of 2007, Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 50-87 (2007) (testimony of Paul Bland, Staff Attorney, Public Justice); *Examining the CFPB's Proposed Rulemaking on Arbitration: Is It in the Public Interest and for the Protection of Consumers?*: *Hearing Before the H. Subcomm. on Fin. Inst. & Cons. Credit of the H. Comm. on Fin. Servs.*, 114th Cong. (2016) [hereinafter *CFPB's Proposed Rulemaking Hearing*]. He has also testified about forced arbitration before various state legislatures. *E.g.*, *Assembly Bill No. 381, Hearing Before the Assembly Comm. on Commerce & Labor.*, 75th Sess. 24 (Nev. 2009); *S.B. 645, Hearing Before the S. Comm. on General Laws & Tech.*, 2020 Sess. (Va. 2020). He has fielded innumerable case intakes from consumers, workers, nursing home patients, small businesses and others seeking to challenge arbitration clauses; he has written numerous blog posts published on Public Justice's website; among many other types of advocacy related to forced arbitration over the last two decades.

39. *See* cases cited *supra* note 38. *See also, e.g.*, New Prime v. Oliveira, 139 S. Ct. 532, 543–44 (2019) (noting that Federal Arbitration Act's exclusion for "contracts of employment" for certain transportation workers applies to both employer-employee contracts and contracts involving independent contractors); Nat'l Fed. of the Blind v. Container Store, Inc., 904 F.3d 70, 84 (1st Cir. 2018) (no arbitration agreement existed because flat touch screen interface was inaccessible to blind customers so they did not know a contract was being offered to them, and even for one consumer who did have notice, the contract was illusory because the retailer could modify the terms at any time without notice to consumers); Smith v. GC Servs. Ltd. P'ship, 907 F.3d 495 (7th Cir. 2018) (debt collector waived any right to enforce arbitration clause); Parnell v. Western Sky Fin. LLC, 664 F. App'x 841 (11th Cir. 2016) (predatory lender's arbitration clause requiring arbitration before an arbitrator who did notexist was unenforceable); Messina v. North Central Distributing, 821 F.3d 1047 (8th Cir. 2016) (employer waived

Public Justice filed amicus briefs ensuring that courts understood the magnitude of these issues.[40] And to educate lawyers about the scourge of forced arbitration, Public Justice attorneys made presentations at more than 100 Continuing Legal Education programs and published numerous articles and blog posts.[41] Our attorneys have been quoted in national and local media stories about the legal issues relating to forced arbitration.[42] As a result of our litigation and amicus and educational work around these issues, Public Justice has become a prominent voice in the fight against forced arbitration. Accordingly, many consumers, workers and others who are victimized by these provisions have asked us for advice or to represent them. The experience of fielding and handling these thousands of intakes over the years informs many of the observations included in this article.

right to arbitrate by litigating); Dang v. Samsung Electronics Co. Ltd., 673 F. App'x 779 (9th Cir. 2017) (consumer did not agree to arbitration clause buried in informational brochure with cell phone); Sgouros v. TransUnion Corp., 817 F.3d 1029 (7th Cir. 2016) (website presentation did not give reasonable notice to consumer of arbitration clause, no agreement formed); FIA Card Servs. v. Weaver, 62 So.3d 709 (La. 2011) (debt collector failed to meet burden of proving that consumer had agreed to arbitrate claims); Midland Funding LLC v. Bordeaux, 147 A.3d 885 (N.J. Super. Ct. App. Div. 2016) (debt buyer could not enforce arbitration agreement where there was insufficient evidence that the cardholder agreed to arbitration); Gibson v. Nye Frontier Ford, Inc., 205 P.3d 1091, 1098 (Alaska 2009) (selective appeal provision unconscionable; case would only be sent to arbitration if employer would pay all substantial costs of arbitration); Holt v. HH Motors, 1542 So.3d 745 (Fla. Dist. Ct. App. 2014) (arbitration clause contained in retail purchase agreement did not apply to class action); Raymond James Fin. Servs., Inc. v. Saldukas, 896 So.2d 707 (Fl. 2005) (broker waived right to compel arbitration, even though investor proved no prejudice); Cain v. Midland Funding, LLC., 156 A.3d 807 (Md. 2017) (arbitration clause waived when debt buyer filed collection action in court before later invoking arbitration in subsequent lawsuit); Wells v. Chevy Chase Bank, FSB, 768 A.2d 620 (Md. 2001) (reading of text of arbitration clause to be voluntary, not mandatory upon consumer)

40. *See, e.g.*, Brief for Public Justice, P.C., et al. as Amici Curiae, American Express Co. v. Italian Colors, 570 U.S. 228 (2013), 2013 WL 417720; Brief for Public Justice & Public Good as Amici Curiae in Support of Respondent, Stolt-Nielsen v. Animal Feeds Int'l Corp., 559 U.S. 662 (2010), 2009 WL 3495341; Brief for Public Justice as Amici Curiae, Breazeale v. Victim Servs., 878 F.3d 759 (9th Cir. 2017), 2017 WL 1548959. PDFs of numerous Public Justice briefs can be found at its website, www.publicjustice.net (What We Do/Access to Justice/Forced Arbitration).

41. Numerous blogs by Public Justice Lawyers addressing issues relating to forced arbitration can be found at its website. *See Blog*, PUBLIC JUSTICE (last visited May 4, 2020), www.publicjustice.net/News?blog. Upcoming presentations at CLE programs can be found on the cite. *See Public Justice's Speaker Series*, PUBLIC JUSTICE (last visited May 4, 2020), www.publicjustice.net/speaker-series/. For examples of articles written by Public Justice attorneys addressing forced arbitration, see, for example, Sarah Belton & F. Paul Bland, *How the Arbitration-At-All-Costs Regime Ignores and Distorts Settled Law*, 35 BERKELEY J. EMP. & LAB. L. 135 (2014); F. Paul Bland & Claire J. Prestel, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 CARDOZO J. CONFLICT RESOL. 369 (2009).

42. *See* Drew Harwell, *Sterling discrimination case highlights differences between arbitration, litigation*, WASH. POST (March 1, 2017), https://www.washingtonpost.com/business/economy/sterling-discrimination-case-highlights-differences-between-arbitration-litigation/2017/03/01/cdcc08c6-fe9b-11e6-8f41-ea6ed597e4ca_story.html (quoting Paul Bland); Emily Peck, *The Infuriating Reason Wells Fargo Got Away With Its Massive Scam For So Long*, HUFFINGTON POST (Sept. 22, 2016, 4:55 PM), https://www.huffpost.com/entry/wells-fargo-fraud-republicans_n_57e4192be4b0e80b1ba0d583; James Koren, *Even In Fraud Cases, Wells Fargo Customers Are Locked Into Arbitration*, L.A. TIMES (Dec. 5, 2015), https://www.latimes.com/business/la-fi-wells-fargo-arbitration-20151205-story.html (same).

Arbitration clauses first began appearing in consumer and employment agreements in the mid-1990s, and then, their use very rapidly expanded in the late 1990s and on.[43] For a variety of reasons, workers and consumers began challenging the enforceability of arbitration clauses in court in the 1990s, and that litigation expanded rapidly over the years until at least 2011, when it began to slow.[44]

Early on, many of the challenges to the enforceability of arbitration clauses involved provisions of contracts that were not inherent to the idea of arbitration but rather mere unfair "bells and whistles" that some corporations injected into their arbitration clauses. While the case law was, for a time, divided on these points, courts eventually struck down arbitration clauses that (among other things) required individuals to travel long distances to arbitrate their claims,[45] imposed prohibitively expensive fees and costs upon individuals seeking to arbitrate cases,[46] gave the corporation exclusive control over the selection of the arbitrator,[47] had other indicia of arbitration bias,[48] or stripped plaintiffs of substantive statutory rights that they would normally have enjoyed and a number of other similar provisions.[49]

43. Arbitration agreements had been common in the collective bargaining setting for decades but did not take hold in many non-unionized settings until the 1990s. *See, e.g.*, Gilles, *Day Doctrine Died*, *supra* note 10, at 375 ("Until the mid-1980s, arbitration had primarily served as a forum for international contract disputes and other sedate niches of the dispute resolution world.").

44. In our observation and experience, successful challenges to arbitration clauses have declined sharply in the wake of two U.S. Supreme Court cases. *See* AT&T v. Concepcion, 563 U.S. 333, 352 (2011) (finding that state law policy protecting the right to collective litigation was preempted by the FAA); Rent-A-Center v. Jackson, 561 U.S. 63, 80 (2010) (finding that many challenges to arbitration clauses should be decided by an arbitrator instead of a court).

45. *See, e.g.*, Nagrampa v. Mailcoups, Inc., 469 F. 3d 1257, 1292 (9th Cir. 2006) (en banc) (holding that it was unconscionable to require California resident to arbitrate in Boston); Newton v. American Debt Services, No. 12-155549, 549 F. App'x 692, 694 (9th Cir. 2013) (striking down an arbitration clause that required California consumers to arbitrate their claims in Tulsa, Oklahoma).

46. *See* Ting v. AT&T Corp., 319 F. 3d 1126, 1151 (9th Cir. 2003).

47. *Newton*, 549 F. App'x at 694 (striking down a clause that gave the defendant unilateral control over the choice of the arbitrator); Ditto v. RE/MAX Preferred Props., Inc., 861 P.2d 1000, 1004 (Okla. Civ. App. 1993) (refusing to enforce an agreement where the employer had sole authority to appoint arbitrators).

48. *See* Toppings v. Meritech Mortgage Servs., Inc., 212 W. Va. 73, 73 (2002) (concluding that where a lender's arbitration clause designates an arbitration forum that is paid through a case volume fee system, and the arbitration forum's income is dependent on continued referrals from the creditor, this so impinges upon neutrality and fundamental fairness that the clause is unconscionable and unenforceable)

49. *See generally* F. PAUL BLAND, CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER ISSUES (2003) (collecting and discussing a large number of cases where courts held that terms within arbitration clauses, or entire arbitration clauses, unenforceable either because they were unconscionable under state contract law or because they violated some other rule of state or federal law.)

The litigation over abuses of arbitration clauses informed the public discussion of the broader merits of arbitration, as stories about unfair bells and whistles appeared in a number of press stories and were recounted and discussed in Congressional hearings and other forums.[50] Cases where courts struck down these clauses as abusive and unfair were useful in highlighting the problem of forced arbitration. But so too were the cases where courts did not take action to strike down an unconscionable arbitration clause. Those circumstances where courts compelled arbitration in circumstances where most people would agree that given system was unfair also fueled our advocacy. In the court of public opinion, Public Justice lawyers were able to point to this kind of unfair decision as an indictment of the legal regime that enforced arbitration clauses against workers and consumers.[51] Accordingly, the court battles over the enforceability of arbitration clauses in a particular lawsuit took on a broader significance in legislative and public debates.

As challenges to abuses of arbitration became more widespread (and often more successful) between the 1990s and 2010, many corporations moved towards systems that were fairer for individual litigants.[52] There was a strong element of self-interest in this strategy: A major reason that many corporations have adopted arbitration clauses is to ban their workers and customers from bringing class actions against them.[53] But where courts struck down entire arbitration clauses because of unfair bells and whistles, corporations lost the "benefit" of wiping away class actions.[54] Corporate cost-benefit analyses clearly indicated that making their arbitration provisions "fairer" overall would render them enforceable and preserve the all-important class action ban.

Litigation over the terms in arbitration clauses that barred workers and consumers from bringing class actions also greatly informed the advocacy around the broader debate about forced arbitration. Prior to the Supreme

50. *See, e.g.*, *Testimony of F. Paul Bland, Jr. to the Senate Judiciary Committee on the Arbitration Fairness Act of 2007*, 110th Cong. (2007) (providing examples of unfair provisions that companies tack onto their arbitration clauses, such as "loser pays" rules and waivers of substantive rights and remedies).

51. *See id.*

52. AT&T Mobility "and other companies responded to the decisions invalidating first-generation arbitration provisions by revising their arbitration agreements to address the concerns expressed in those decisions." Brief of AT&T Mobility LLC as Amicus Curiae in Support of Neither Party at 11, T-Mobile USA, Inc v. Laster, (2008) (No. 07-976).

53. Alan Kaplinsky, *Excuse me, but who's the predator: Banks can use arbitration clauses as a defense*, BUS. LAW. 24, 26 (June 1998) ("Arbitration is a powerful deterrent to class action lawsuits.").

54. *See* Newton v. American Debt Services, Inc., 549 F. App'x 692 (9th Cir. 2013) (striking arbitration clause because it required consumer to travel long distance, imposed a loser pays rule, among other things).

Court's decisions in *Stolt-Nielsen v. Animal Feeds International Corporation*[55] and *AT&T Mobility v. Concepcion*,[56] many advocates successfully argued that contractual terms banning class action were not inherent to arbitration, leading numerous courts to strike down class action bans embedded in arbitration clauses.[57] In a number of cases, courts traced through evidence that established that class action bans were effectively exculpatory clauses.[58] The Supreme Court's decisions in *Concepcion* and *American Express Company v. Italian Colors Restaurants*[59] effectively ended this body of litigation, but the debate around class action bans accelerated.

One significant proceeding that helped focus the national policy debate on the issue of class action bans in arbitration clauses was the 2015 Consumer Financial Protection Bureau's ("CFPB") study and subsequent rulemaking that dealt with arbitration.[60] The CFPB study concluded that class action bans harmed consumers by making it harder for them to obtain relief when they had been cheated or abused by illegal behavior.[61] Significantly, the CFPB study pointed to cases where some defendants were held responsible to consumers in the court system and made to pay large sums of damages, while in other cases, similar defendants shielded by arbitration clauses were not held to account for wrongdoing.[62] The pre and post-*Concepcion* litigation over class action bans greatly informed the agency's conclusions.[63]

The discussion triggered by and surrounding the CFPB Study and the CFPB's regulations had a substantial impact on how arbitration was viewed. There was an enormous amount of press coverage of the CFPB's rulemaking,[64] as well as the subsequent legislative debate under the Con-

55. 559 U.S. 662, 663 (2010).

56. 563 U.S. 333 (2011).

57. *See, e.g.*, *In re* Cotton Yarn Antitrust Litig., 505 F.3d 274, 285 (4th Cir. 2007) ("[I]f a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement . . . ."); Kristian v. Comcast Corp., 446 F.3d 25, 37, 51 (1st Cir. 2006).

58. *See, e.g.*, Cooper v. QC Financial Services, Inc, 503 F. Supp. 2d 1266, 1290 (D. Ariz. 2007); Caban v. J.P. Morgan Chase & Co, 606 F. Supp. 2d 1361, 1372 (S.D. Fla. 2009); Dale v. Comcast Corp, 498 F.3d 1216, 1224 (11th Cir. 2007).

59. 570 U.S. 228, 238–39 (2013).

60. *See supra* note 5.

61. The conclusions and evidence in the CFPB's study showing the harm of forced arbitration clauses to consumers is discussed in detail in Paul Bland's house testimony. *See CFPB's Proposed Rulemaking Hearing*, *supra* note 38.

62. *Id.* at 45.

63. *See id.*

64. Lauren Saunders, *Will Congress Help Companies Use Forced Arbitration to Undercut Consumers?*, CHI. TRIB., (July 27, 2017, 4:42 PM), https://www.chicagotribune.com/opinion/commentary/ct-wells-fargo-consumers-congress-perspec-

gressional Review Act that overturned the agency's regulation, with numerous members of both houses speaking out against arbitration clauses that banned class actions. There was also extensive social media traffic discussing the CFPB study, as well as substantial Congressional debate focused upon the CFPB study.[65] Never before had so much attention been focused upon forced arbitration in America. It seems likely that the substantial discussion of the CFPB regulation on forced arbitration played a significant role in laying the groundwork for the House of Representatives when it passed the FAIR Act in September of 2019.

The public debate and the legislative battle over forced arbitration is likely to continue to grow in the years to come. And the experience of litigation over challenges to arbitration clauses is likely to continue to inform these discussions.

III. MYRIAM GILLES: THERE OUGHT TO BE A LAW AGAINST THAT. . .

As Paul Bland and other progressive lawyers were busy challenging forced arbitration clauses in state and federal courts all around the country, members of Congress were just beginning to grasp the enormity of the problem. By the late 1990s and early 2000s, news outlets were reporting on the rise of forced arbitration clauses in credit card and bank account agreements[66] and other ordinary consumer transactions.[67] Small businesses were

0728-jm-20170727-story.html [https://perma.cc/J6JN-6M4Z]; David P. Cluchey, *Congress Could Undo Rule That Makes It Easier for Financial Fraud Victims to Sue Banks*, BANGOR DAILY NEWS, (July 27, 2017, 9:01 AM), https://bangordailynews.com/2017/07/27/opinion/contributors/congress-could-undo-rule-that-makes-it-easier-for-financial-fraud-victims-to-sue-banks/ [https://perma.cc/X8NQ-BFPA]; M. Sixel, *Financial Firms Win Arbitration Claims More Often than Consumers*, HOUSTON CHRONICLE (October 5, 2017), https://www.chron.com/business/bizfeed/article/Consumers-rarely-win-in-arbitration-disputes-12252519.php [https://perma.cc/W866-AXK3].

65. *See* Editorial Board, *Bad for Consumers: Congress Hands a Gift to the Financial Industry*, PITTSBURGH POST-GAZETTE (Nov. 1, 2017, 11:00 PM), https://www.post-gazette.com/opinion/editorials/2017/11/02/Bad-for-consumers-Congress-hands-a-gift-to-the-financial-industry/stories/201711020019. *See also CFPB's Proposed Rulemaking Hearing*, *supra* note 38.

66. *See* Michael Ferry, *Consumers: Forced Arbitration Is Bad*, ST. LOUIS POST-DISPATCH, Sept. 8, 1992, at 7D ("The banks . . . are rewriting their consumer contracts, such as credit-card agreements and account agreements, to state that either the bank or a customer will refer a dispute to binding arbitration . . . [because they] are afraid of big jury verdicts and big class actions against them. They think arbitrators will be less likely than juries to give customers big damage awards.").

67. *See, e.g.*, Caroline E. Mayer, *The Price is Rights: People Are Signing Away Consumer Protections And Many Don't Even Know It*, NEWSDAY, May 30, 1999, at F8 (reporting that a growing number of companies are "rewriting the fine print of their contracts and sales agreements to require that consumers agree, in advance, to give up their right to sue and submit disagreements to arbitrators [and that] [s]uch clauses also bar consumers from participating in class action suits"); Linda J. Demaine & Deborah R. Hensler, "*Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 L. & CONTEMP. PROBS. 55, 62 n.30 (2004) (reporting that just over 55% "of businesses that offer an ongoing product or service" included an arbitration clause in the written contract).

complaining that they were compelled to individually arbitrate claims against larger and more powerful corporations involving violations of franchise, antitrust and contract law.[68] Even employees were increasingly subject to forced arbitration clauses as a condition of employment.[69]

Defenders of private dispute resolution, meanwhile, asserted that the less formal procedures available in arbitration were cheaper and faster, enabling litigants to achieve better outcomes than they could in court and saving companies money that would be passed on in the form of cheaper products and services.[70] But detractors argued the opposite was true: Large corporations hand-picked arbitral providers who promised them "a sympathetic forum," and together, they designed "an arbitration process that would serve their [combined corporate] interests."[71] Arbitrator bias, critics argued, favored repeat-player corporations over the legitimate interests of consumers and employees, whose constitutional right to a jury was systematically denied.[72]

In 2007, a scandal over arbitrator bias made national news when the Minnesota State Attorney General announced a massive investigation into the National Arbitration Forum ("NAF"), then the nation's largest for-profit arbitration provider.[73] The investigation ultimately revealed that,

68. *See, e.g.*, Bob Trichinelli, *Bill is Aimed at Contract Abuses*, BALTIMORE SUN (Oct. 26, 2007) [https://perma.cc/9557-LYDF] (reporting on franchise fraud hidden by forced arbitration clauses).

69. Stephanie Mencimcer, *Have You Signed Away Your Right to Sue?*, MOTHER JONES (Mar.-Apr. 2008) (reporting on employees who had been dismissed for refusing to sign arbitration clauses); Michael H. LeRoy & Peter Feuille, *Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future*, 18 OHIO ST. J. ON DISP. RESOL. 249, 305 (2003) ("Mandatory arbitration quickly spread in the 1990s . . . to a wide variety of workplaces, including those with Spanish-speaking, low-wage, poorly educated, and minor workers.").

70. David Sherwyn, et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 105 (1999) ("[A]rbitration provide[s] the parties with an inexpensive, confidential, and fast resolution . . . ."); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89 (2001) ("[A]rbitration provides opportunities for a business to save on its dispute-resolution costs . . . .").

71. *Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008) [hereinafter *Courting Big Business Hearing*] (testimony of Elizabeth Bartholet).

72. *See* Stephanie Mencimer, *Franchise Fraud: Wake Up and Smell the Fine Print*, MOTHER JONES (Mar.-Apr. 2009) https://www.motherjones.com/politics/2009/02/franchise-fraud-wake-and-smell-fine-print/ [https://perma.cc/DV55-GBJX] (reporting on arbitrator bias and conflicts of interest); Eric Berkowitz, *"Is Justice Served?*," L.A. TIMES, Oct. 22, 2006, at 20 (describing arbitration as a "pay-for-justice phenomenon" where arbitrators are more likely to rule in favor of clients upon whom they depend for future business). *See also* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 60–61 (1997) ("[I]ndividual arbitrators have an economic stake in being selected again, and their judgment may well be shaded by a desire to build a 'track record' of decisions that corporate repeat-users will view approvingly.").

73. The investigation was spurred by a Public Citizen report finding that NAF arbitrators had ruled against consumers in 94% of cases. PUBLIC CITIZEN, THE ARBITRATION TRAP: HOW CREDIT

while portraying itself as impartial, NAF had deep and extensive financial ties to credit card collection agencies; as a result, the forum ruled in favor of those agencies and against consumers in nearly 100,000 disputes.[74] Evidence also emerged that the NAF ensured its arbitrators towed the company line by removing those who ruled in favor of consumers.[75] One arbitrator, Harvard Law professor Elizabeth Bartholet, told legislators that she was "blacklisted" from the NAF for *once* ruling in favor of a consumer over a credit card company.[76] After that lone decision, the credit card companies decided she was too "pro-consumer" and cut her from the NAF's roster of "acceptable" arbitrators.[77]

The NAF scandal, along with the Supreme Court's continued embrace of forced arbitration, prompted the new Democratic majority in Congress to take action.[78] In July 2007, Senator Russ Feingold of Wisconsin and Representative Hank Johnson of Georgia proposed the "Arbitration Fairness Act of 2007" ("2007 AFA").[79] The bill sought to amend Section 2 of the FAA to require that agreements to arbitrate employment, consumer or civil rights disputes be valid and enforceable only if they were made voluntarily

CARD COMPANIES ENSNARE CONSUMERS 2 (Sept. 2007), https://www.citizen.org/wp-content/uploads/arbitrationtrap.pdf [https://perma.cc/U3NQ-N5M7].

74. *See "Arbitration" or "Arbitrary": The Misuse of Mandatory Arbitration to Collect Consumer Debts Hearing Before the Subcommittee on Domestic Policy of the H. Committee on Oversight and Government Reform*, 111th Cong. 33 (2009) (statement of Lori Swanson, Att'y Gen. of Minn.) https://pubcit.typepad.com/files/nafconsentdecree.pdf [https://perma.cc/NM5N-Z449]. Swanson ultimately filed a lawsuit against NAF, which resulted in a consent decree that barred the company from operating in the state. A year later, the city of San Francisco filed a similar lawsuit after it found that NAF had ruled against consumers in 98.9% of cases. People v. Nat'l Arbitration Forum, Inc., 2008 Cal. Super. LEXIS 8969 (No. 473-569 (March 24, 2008)).

75. *See Courting Big Business Hearing*, *supra* note 71 (testimony of Bartholet) (describing efforts by NAF to remove her from their list of arbitrators because, in one case, she ruled in favor of the consumer over the credit card company).

76. *See id.* (concluding from her experience "that the NAF process was systematically biased in favor of credit card companies and against debtors" because "arbitration providers are under financial pressure to satisfy the corporate repeat player by systematically ruling in its favor.").

77. *Id.* at 4 (observing that "it seemed clear that I was being removed simply because I had once ruled on the merits against a credit card company, after having ruled in favor of the company numerous times.").

78. Prior to 2007, there had been dozens of bills introduced in Congress to limit or prohibit arbitration in various contexts, but 2007 marked the start of a new awareness among members of Congress about the stakes involved in this debate. *See* Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309, 1355 (2011) (listing federal legislative efforts to regulate arbitration from 1995-2010).

79. *See* H.R. 3010, 110th Cong. (2007). Two companion bills were also introduced in the 2007 term. First, the Fair Arbitration Act required arbitration clauses to contain certain procedural safeguards to be enforceable. S. 1135, 110th Cong. (2007); S. 1186, 112th Cong. (2011). The bill was first introduced in the Senate in 2007, then was reintroduced in 2011 but died in committee both times. Second, the Consumer Fairness Act of 2007, which was limited to eliminating forced arbitration in standard-form consumer contracts, was introduced in the House but failed to get a hearing. *See* H.R. 1443, 110th Cong. §1003 (2007).

and after the dispute had arisen.[80] Initially, the 2007 AFA garnered significant bi-partisan support: The bill was co-sponsored by 110 members of Congress, including five Republicans.[81] For a brief moment, it seemed likely that federal legislation would intervene to solve the growing problem of forced arbitration.

But the moment quickly passed; indeed, as soon as the House hearings on the bill commenced in October 2007, the ideological fault lines were made plain, and politicians lined up on their respective sides. The opening salvo was strong opposition to the 2007 AFA from the U.S. Chamber of Commerce, which asserted that passage "would severely damage an alternative dispute resolution system that consumers and businesses have relied on for decades, disrupt current commercial arbitration practices, and increase litigation."[82] The Chamber also offered a litany of testimony from business owners, academics and others arguing that the bill would "have significant negative economic effects."[83] For conservatives in Congress, the Chamber's message was clear: Arbitration clauses effectively eliminate many forms of litigation, disempowering wealthy trial lawyers and liberal jurists, while protecting the corporate bottom line. The 2007 AFA failed to make it past committee in either the Houses or Senate, and the bill would mark the last time that a proposed amendment to the FAA would garner any bipartisan support.[84]

In 2008, Democrats won the presidency and bolstered their majorities in both chambers of Congress; with political wind at their backs and spurred by reports that forced arbitration clauses were growing more common in light of broad judicial approval,[85] progressive legislators resurrected

80. S. 1782, 110th Cong. The bill was accompanied by legislative findings that "millions of consumers and employees [had been forced] to give up their right to have disputes resolved by a judge or a jury," and that few "realize or understand the importance of the deliberately fine print that strips them of their rights." *Id.* at §2(2).

81. *See* H.R. 3010.

82. Byron Allen Rice, *The Battle of Enforceability Class Action Waivers in Mandatory Arbitration*, 27 NO. 4 BANKING & FIN. SERVS. POL'Y REP. 1, 7 (2008) (internal citations omitted).

83. *Id.* (citing *Hearing on H.R. 3010 Before the Subcomm. On Commercial and Admin. Law of the H. Comm. On the Judiciary*, 110th Cong. 3 (2007) (statement of Peter B. Rutledge)).

84. While the bill was sent to both the House Judiciary Committee and the Senate Subcommittee on the Constitution, neither committee issued a report, and the bill never came to the floor for a vote. *See* S. 1782.

85. *See, e.g.*, *Forced Arbitration: Unfair and Everywhere*, PUBLIC CITIZEN 1 (Sept. 14, 2009), https://www.citizen.org/wp-content/uploads/unfairandeverywhere.pdf [https://perma.cc/AB5P-B4JP]) (reporting that over 75% of companies, including credit cards, banks, and cell phone providers, imposed arbitration on their consumers or employees); 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, 886 (2008) (finding mandatory arbitration clauses in 93% of the employment contracts and 77% of the consumer contracts). *See also* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2009) (upholding arbitration of Age Discrimination in Employment Act claims in union contracts).

the AFA.[86] The 2009 Arbitration Fairness Act ("2009 AFA") was nearly identical in language to its predecessor, and it suffered the same demise. By this point, congressional Republicans had fully internalized the Chamber's talking points that arbitration was cheaper, faster, and better for consumers, reduced "frivolous" litigation, and sidelined unscrupulous lawyers.[87] Accordingly, the hearings on the 2009 AFA featured partisan grandstanding rather than policymaking.[88] With the battle lines drawn, the bill garnered the support of 117 Democrats in the House – but only 1 Republican – and never made it past committee in either chamber.[89]

By 2010, however, the landscape had shifted considerably. The Lehman Brothers crash in late 2008 sent stocks plummeting, sparking the worst economic recession in nearly a century.[90] Many attributed the crisis to a lack of government oversight and regulation of financial institutions, which led to the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[91] Among the Act's complex legislative reforms was the creation of the Consumer Financial Protection Bureau ("CFPB"), which was instructed to study and report to Congress on the impact of pre-dispute arbitration clauses in consumer financial contracts.[92] Democrats clearly anticipated that the CFPB would ultimately promulgate regulations banning forced arbitration, but first, the statutorily-mandated study would take five long years to complete.

Meanwhile, the Supreme Court continued to expansively interpret the FAA, emboldening corporations to impose ever-more onerous terms in

86. The Arbitration Fairness Act of 2009, S. 931, H.R. 1020, 111th Cong. (2009). Democrats also introduced a companion bill, The Fairness in Nursing Home Arbitration Act, S. 512, H.R. 1237, that sought to eliminate pre-dispute arbitration clauses in nursing home admissions contracts.

87. *Voters Strongly Back Arbitration, New Poll Shows*, U.S. CHAMBER OF COMMERCE (Apr. 1, 2008), https://www.uschamber.com/press-release/voters-strongly-back-arbitration-new-poll-shows.

88. *See, e.g.*, *Mandatory Binding Arbitration: Is It Fair and Arbitrary?*: *Hearing Before the H. Subcomm. on Commercial and Admin. Law*, 111th Cong. (2009); *Workplace Fairness: Has the Supreme Court been Misinterpreting Laws Designed to Protect American Workers from Discrimination?*: *Hearing before the Comm. on the S. Judiciary*, 111th Cong. (2009).

89. Representative Steven LaTourette of Ohio was the sole Republican in favor of the 2009 AFA. Arbitration Fairness Act of 2009, H.R. 1020, congress.gov [https://perma.cc/BG2J-4HHZ].

90. Ben Chu, *Financial Crisis 2008: How Lehman Brothers Helped Cause "the Worst Financial Crisis in History,"* INDEPENDENT (Sept. 12, 2018) https://www.independent.co.uk/news/business/analysis-and-features/financial-crisis-2008-why-lehman-brothers-what-happened-10-years-anniversary-a8531581.html.

91. Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5481-5603 (2018).

92. Dodd-Frank Act, Pub. L. No. 111-203 § 1028(b) (2010); 12 USC § 5518(b). The Act also provided that the CFPB might promulgate rules to regulate the use of forced arbitration in contracts within its purview. *Id.* (providing that the Bureau could "prohibit or impose conditions or limitations on the use of . . . arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.").

their standard-form arbitration clauses.[93] The coup de grace was the Court's 2011 decision in *AT&T v. Concepcion*.[94] Consumers filed a class action against AT&T, alleging fraud in the marketing and sale of cell phones; in response, the company moved to compel arbitration based on a clause in the service contract that accompanies every new mobile phone purchase.[95] Both the California district and the Ninth Circuit found that AT&T's arbitration clause, which required consumers to waive their class action rights, was unconscionable under California law.[96] In a 5-4 decision authored by Justice Scalia, the Supreme Court reversed, finding that the FAA preempted "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[97]

The *Concepcion* decision was immediately and intensely controversial. Critics complained that the conservative Justices had eliminated the only tools available to consumers and employees to fight abusive business practices.[98] As the Court's holding began to "spread from the consumer milieu to high-stakes claims under employment law" and other areas, calls for Congressional action grew more insistent.[99] Less than two weeks after *Concepcion* was decided, Senators Al Franken and Richard Blumenthal, along with Congressman Hank Johnson, reintroduced the Arbitration Fairness Act ("2011 AFA"), which sought to reverse the Court's decision by prohibiting waivers of class actions in all consumer, employment, and civil-rights-related contracts.[100] Yet, despite the public outcry over *Concepcion* and the growing concern that valid claims were "slip[ping] through the

93. *See* Rent-A-Center West, Inc. v. Jackson, 561 U.S. 63, 72 (2010) (concluding that challenges to the enforceability of a contract containing an arbitration clause rest with the arbitrator).

94. 563 U.S. 333 (2011).

95. *Id.* (describing procedural posture).

96. *Id.*

97. *Id.* at 351.

98. *See* Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 491 (2011) ("Following *Concepcion*, remedies for consumers with low value claims will no longer be available through the judicial system. Thus, consumers and their advocates must turn to Congress for assistance with this major concern.").

99. Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CAL. L. REV. 1, 17 (2019) (internal citations omitted). *See* Editorial, *Gutting Class Action*, N.Y. TIMES, May 13, 2011, at A26, https://www.nytimes.com/2011/05/13/opinion/13fri1.html [https://perma.cc/62PF-KHHV] (calling on Congress to legislatively overrule *Concepcion*); Amalia Kessler, *Stuck in Arbitration*, N.Y. TIMES, March 6, 2012, at A27 https://www.nytimes.com/2012/03/07/opinion/stuck-in-arbitration.html [perma.cc/8WBT-RYA7] (observing that "Congress has repeatedly failed to step in and fix this system.").

100. *See* Arbitration Fairness Act of 2011, S. 987, 112th Cong., § 1 (2011).

legal system," the hyper-partisan atmosphere in Washington was no more receptive to this corrective legislation than its precursors.[101]

Two years later, in *American Express Company v. Italian Colors Restaurants,* the Supreme Court again enforced a class-banning arbitration clause imposed in a standard-form credit card acceptance agreement; this time, its ruling prevented small businesses from banding together to vindicate their rights under federal antitrust laws.[102] And once again, Democrats in Congress reintroduced the Arbitration Fairness Act of 2013 ("2013 AFA").[103]

When the Senate Judiciary Committee scheduled hearings on the 2013 AFA for December 17, 2013, I was invited to provide testimony on the impact of class-banning forced arbitration clauses on the claims of consumers, employees and small businesses.[104] I can still recall the excitement in the Chamber that morning; it was my first time testifying before Congress and after a decade of writing about forced arbitration, I felt so strongly that a federal statutory solution was the only hope. Perhaps I was one of the few who entered the room believing that the bill could finally become law—a feeling that dissipated over the course of the hearing itself. The politics were so evident—Democrats on the side of litigation before public courts and juries, Republicans on the side of corporations and "freedom of contract." But even as we left the Senate building that winter day, advocates were buoyed by a feeling of growing momentum and engagement on the issue. People were beginning to pay attention, and change was coming.

But the 2013 AFA, like each version before it, died in committee after securing only twenty-four co-sponsors in the Senate and seventy-one in the House—all Democrats, no Republicans.[105] Indeed, subsequent versions of the AFA were reintroduced in 2015 and 2017; each offered up in response to the latest Supreme Court decision upholding forced arbitration or public scandal involving arbitration and each failing to marshal enough support to make it to a vote on the House or Senate floor.[106] In 2017, for example,

101. *Concepcion*, 563 U.S. at 351. *See* Editorial, *supra* note 99, at A26 (noting that the chances of federal legislation overriding *Concepcion* "aren't great in the current political environment.").

102. 570 U.S. 228, 238 (2013).

103. S. 878, 113th Cong. (2013); H.R. 1844, 113th Cong. (2013). In direct response to the *Italian Colors decision*, the 2013 AFA prohibited forced arbitration in consumer, employment, civil rights cases and antitrust disputes.

104. *The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers and Small Businesses?*, SENATE JUDICIARY COMMITTEE 15 (Dec. 17, 2013), https://www.govinfo.gov/content/pkg/CHRG-113shrg89563/pdf/CHRG-113shrg89563.pdf [https://perma.cc/A2KH-QPSD].

105. S. 878.

106. *See generally* H.R. 1844; Arbitration Fairness Act of 2015, H.R. 2087, 114th Cong. (2015) (enacted); Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017) (enacted).

reports surfaced that Wells Fargo employees had been opening fraudulent accounts using their customer's private information.[107] But when customers tried to sue, their claims were shunted into private arbitration, allowing the company to keep the fraud out of the public eye for years.[108] Ultimately, around 2 million fake accounts were opened, and even when the scandal became public, Well Fargo continued to hide behind its arbitration clause.[109] Convinced as ever that the threat of private litigation would have deterred this widespread misconduct, Congress again tried and failed to pass the AFA.[110]

But even as Congress failed to rally support for legislation, public awareness and outrage over forced arbitration grew.[111] Weary of legislative battles that went nowhere, advocates began to lobby the executive branch—a strategy that proved hugely successful in the short-term. In 2014, President Obama signed an Executive Order barring federal agencies from entering into agreements with companies that force their workers to arbitrate claims for sexual assault, harassment, or discrimination.[112] That same year, Attorneys Generals from sixteen states and the District of Columbia urged the federal government to deny Medicaid and Medicare money to nursing homes that use these clauses; a year later, the Department of

107. Emily Flitter, *The Price of Wells Fargo's Fake Account Scandal Grows by $3 Billion*, N.Y. TIMES (Feb. 21, 2020), https://www.nytimes.com/2020/02/21/business/wells-fargo-settlement.html (describing scandal involving sham accounts).

108. *See, e.g.*, Michael Corkery & Stacy Cowly, *Wells Fargo Killing Sham Account Suits by Using Arbitration*, N.Y. TIMES (Dec. 6, 2016), nytime.com/2016/12/06/business/dealbook/wells-fargo-killing-sham-account-suits-by-using-arbitration.html [https://perma.cc/T25Z-CAYV] (reporting that the bank "has sought to kill lawsuits that its customers have filed over the creation of as many as two million sham accounts by moving the cases into private arbitration.").

109. Michael Hiltzik, *No Surprise: Wells Fargo Is Leveraging Its Arbitration Clause to Win an Advantageous Scandal Settlement*, L.A. TIMES (Mar. 31, 2017, 4:45 PM), latimes.com/business/hiltzik/la-fi-hiltzik-wells-settlement-20170331-story.html [https://perma.cc/GQ2S-42AB].

110. S. 537, H.R. 1374, 115th Cong. (2017). The bill received support of only 26 Senators and 82 Representatives – all Democrats.

111. *See, e.g.*, Editorial Board, *A Tool Consumers Need*, N.Y. TIMES (Dec. 29, 2013), https://www.nytimes.com/2013/12/30/opinion/a-tool-consumers-need.html [https://perma.cc/R2R6-8UM4] (chronicling the rise of force arbitration); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-ofjustice [http://perma.cc/QA9T-Z26P]; Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justicesystem [http://perma.cc/6EN5-CUZM]; Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), https://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html?searchResultPosition=1 [https://perma.cc/V7PG-L7KF].

112. *See* Fair Pay and Safe Workplaces Executive Order, Exec. Order No. 13,673, § 6(a) (July 31, 2014).

Health and Human Services issued a rule barring federally-funded nursing homes from forcing residents to sign arbitration clauses.[113] In quick succession, numerous federal agencies promulgated area-specific rules banning arbitration clauses and class action bans.[114]

Finally, in 2015, the CFPB issued a 728-page report chronicling the deleterious effects of forced arbitration on consumers and promulgated regulations prohibiting these provisions in consumer financial contracts.[115] But once President Trump was elected in 2016 and Republicans regained control in both chambers of Congress, the strategy of banning forced arbitration via regulation began to unravel. In March 2017, President Trump repealed President Obama's Fair Pay and Safe Workplaces Executive Order.[116] A few months later, the Department of Health and Human Services reconsidered its opposition to arbitration clauses in nursing home admission contracts, calling them "advantageous to both providers and beneficiaries because they allow for the expeditious resolution of claims without the costs and expense of litigation."[117] Other agencies quickly followed suit, abandoning the "anti-arbitration rules they had inherited."[118] Finally, on October, 24, 2017, the Senate voted 51 to 50 – with Vice President Pence casting the tie-breaking vote – to repeal the CFPB's rule prohibiting class-banning clauses before the rule could take effect.[119]

That late-night vote was a heart-breaking moment for advocates and Democrats in Congress. Efforts to enact curative legislation would eventually resume, particularly in the wake of the #MeToo movement and growing evidence that arbitration clauses had shielded sexual predators from

113. *See* Jessica Silver-Greenberg & Michael Corkery, *U.S. Just Made It a Lot Less Difficult to Sue Nursing Homes*, N.Y. TIMES, Sept. 28, 2016, at A1 https://www.nytimes.com/2016/09/29/business/dealbook/arbitration-nursing-homes-elder-abuse-harassment-claims.html [https://perma.cc/K2WZ-X8T8].

114. *See, e.g.*, Department of Labor (DOL), Employee Benefits Security Administration (EBSA), "Definition of the Term ''Fiduciary;'' Conflict of Interest Rule" 81 Fed. Reg. 20946, (Apr. 8, 2016) ("[P]rohibit[ing] pre-dispute binding arbitration agreements with respect to individual contract claims."); Department of Education, 34 C.F.R. § 685.300(e)-(f) (2018) (precluding forced arbitration for certain allegations against schools that receive Title IV assistance under the Higher Education Act).

115. CONSUMER FIN. PROT. BUREAU, *supra* note 9; *see also* Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017); Jessica Silver-Greenberg & Michael Corkery, *U.S. Agency Moves to Allow Class-Action Lawsuits Against Financial Firms*, N.Y. TIMES (July 10, 2017), nytimes.com/2017/07/10/business/dealbook/class-action-lawsuits-finance-banks.html [https://perma.cc/XW4R-YE7R].

116. *See* Exec. Order No. 13,782, § 1, 82 Fed. Reg. 15,607 (Mar. 30, 2017).

117. Chandrasekher & Horton, *supra* note 99, at 18 (internal citations omitted).

118. *Id.*

119. Jessica Silver Greenberg, *Consumer Bureau Loses Fight to Allow More Class-Action Suits*, N.Y. TIMES (Oct. 24, 2017), https://www.nytimes.com/2017/10/24/business/senate-vote-wall-street-regulation.html?searchResultPosition=4 [https://perma.cc/J3V7-TST2].

responsibility,[120] and are ongoing to this day. As of this writing, the Forced Arbitration Injustice Repeal Act ("FAIR" Act), which would prohibit pre-dispute agreements to arbitrate employment, consumer, antitrust and civil rights claims, has passed the House of Representatives but again, appears unlikely to gain traction in the Senate.[121]

* * *

In a recent decision upholding forced arbitration clauses in employment contracts, Justice Gorsuch surveyed the limited legislative exceptions to the FAA and observed "Congress has shown that it knows exactly how . . . to override the [FAA]."[122] To some extent, Justice Gorsuch is right: Over the past fifteen years, Congress has responded to the problems of class-banning forced arbitration clauses by enacting a handful of very narrow, highly specific carve-outs for particular groups of people or contexts.[123] In doing so, its members have shown an awareness of how unfair these provisions can be, but the body still has not managed to secure the necessary votes for a broad legislative fix. If anything, the issue of class-banning forced arbitration has grown only more ideologically polarized with each new Congressional session.[124] The well-resourced Chamber of Commerce has used its influence (and campaign contributions) to repel repeated efforts to amend the FAA, even as polls show that the vast majority of Americans believe that consumers and employees should have the right to go to court and be heard by a jury of their peers.[125]

By now, there really ought to be a law.

120. Gretchen Carlson, *How to Encourage More Women to Report Sexual Harassment*, N.Y. TIMES (Oct. 10, 2017), https://www.nytimes.com/2017/10/10/opinion/women-reporting-sexual-harassment.html [https://perma.cc/3USJ-XXAW] (writing that when a woman's "employment contract includes an arbitration clause, she's likely to have signed away her right to a jury trial.").

121. *See* FAIR Act, H.R. 1073, S. 2591, 115th Cong. (2019).

122. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1617 (2018).

123. Motor Vehicle Franchise Contract Arbitration Fairness Act, codified at 15 U.S.C. § 1226(a)(2) (2018) (prohibiting pre-dispute arbitration clauses in contracts between car manufacturers and dealers); Military Lending Act, codified at 10 U.S.C. § 987(e)(3) (2018) (prohibiting forced arbitration clauses in consumer credit agreements with active military personnel); Food, Conservation and Energy Act of 2008, codified at 7 U.S.C. § 197(c) (2018) (prohibiting forced arbitration in livestock and poultry contracts); Consolidated Appropriations Act of 2017, Pub. L. No. 115-31, 131 Stat. 135 (2017) (prohibiting federal contractors from forcing employees to arbitrate Title VII claims); 5 U.S.C. § 1639c(e)(1) (2018) (prohibiting forced arbitration in residential mortgage contracts).

124. See, for example, Fairness in Class Action Litigation Act, H.R. 985, 115th Cong. (2017), as a Republican-led effort to eliminate most forms of class action litigation.

125. GUY MOLYNEUX & GEOFF GARIN, HART RESEARCH ASSOCS., *National Survey on Required Arbitration*, (Feb. 28, 2019), https://www.justice.org/sites/default/files/2.28.19%20Hart%20poll%20memo.pdf [https://perma.cc/GV5N-CZMW] (demonstrating that 83% of Democrats and 84% of Republicans polled strongly believe that consumers should have a choice between court and arbitration).

IV. TANUJA GUPTA: HOW THE NON-LAWYERS CAN FIGHT BACK

In the season finale of *The Morning Show*, Billy Crudup's character seemed to reach through the TV and answer the question that had been rolling around my head: After nearly 9 years, with new stories of sexual harassment and gender discrimination breaking too frequently to track, did I really want to stay at Google? Billy grabbed my shoulders and looked me squarely in the eye, "[y]ou cannot keep yourself pure just by moving on every time someone disappoints you. You think people in one town over are gonna be any better? No. Human nature, it's surprisingly universal, and it's universally disappointing, so you might as well stay and fight the fight."[126] I suspect that impulse to "fight the fight" was what led 20,000 Google employees to walk off the job on November 1, 2018 in protest of Google's sexual harassment policies. And that same drive is why the majority of my colleagues continue to tussle with our company's leadership to this day.

I was sitting in a meeting when I first learn of the *New York Times* article that would spark the Google Walkout.[127] In many meetings, Googlers multitask by answering emails or chats as they listen to the conversation in the session. No less guilty of this terrible practice, I received a chat ping from my colleague John who is sitting across from me. I looked at him in surprise and then clicked the link he sent. I scanned the article to find that the "father of Android" Andy Rubin received a $90 million payout when he left Google, despite credible allegations of sexual misconduct. And then I went back to answering my other emails.

In our office ten minutes later, John mused, "I thought you would be more upset by this news?" I closed the door to our office and proceeded to tell him about my own experiences with sexual harassment and gender discrimination at Google. I reminded him that we live in an era when a man can face twenty-five credible accusations of sexual assault and still be elected president,[128] when another man just weeks ago had been confirmed

126. Jackie Strause, *'Morning Show': Billy Crudup Reveals Inspiration Behind 'Shape-Shifter' Network Exec*, HOLLYWOOD REPORTER (Dec. 13, 2019, 6:41 AM), https://www.hollywoodreporter.com/live-feed/apples-morning-show-billy-crudup-interview-cory-finale-season-2-1262376 [https://perma.cc/V8C7-AVNF].

127. Daisuke Wakabayashi & Katie Benner, *How Google Protected Andy Rubin, the 'Father of Android'*, N.Y. TIMES (Oct. 25, 2018), https://www.nytimes.com/2018/10/25/technology/google-sexual-harassment-andy-rubin.html [https://perma.cc/MBN5-97SV].

128. Eliza Relman, *The 25 women who have accused Trump of sexual misconduct*, BUS. INSIDER (Oct. 9, 2019, 2:07 PM), https://www.businessinsider.com/women-accused-trump-sexual-misconduct-list-2017-12 [https://perma.cc/TLL5-HZ68].

to the Supreme Court despite a questionable temperament about potential sexual misconduct.

Nothing much happened until Monday, October 29th around 8:00 PM. As I checked my work email, I saw a thread called "Women's Walk" posted to an internal forum for New Yorker Googlers with two emails from earlier in the evening. One email contained a link to a Buzzfeed article about the walkout asking, "is this happening in NYC"?[129] Someone responded with a link to another post on a different internal forum with a document proposing HR policy changes to Google leadership, including the idea of a walkout from fellow Googler, Claire Stapleton.[130]

Finally, I started to feel what John had likely been expecting from me.

I pinged Claire on gChat and told her that I would organize the NYC walkout event, setting up a time to meet the following day. By 11 AM the next day, I was working with coordinators across 50 offices to organize logistics for walkouts across all the Google offices.

Suddenly all the tools and practices I use to run an engineering program in my career became incredibly useful for organizing a global protest around company misconduct. I created an internal site that racked up 34,000 views over the next four days, where local organizers could download rally scripts, logos and press kits. Googlers could share their stories and experiences with harassment via a Google Form (which I scrubbed for any personally identifiable information before posting).

Most importantly, on this website, colleagues could learn more about the "demands" of the walkout.[131] By this time, the walkout was much more than just anger at one particular executive; it was the culmination of years of gender, racial and economic inequity at this company coming to a head. The goals of the walkout were to drive change in a number of areas that all contribute to the structural imbalance of power. A demand to end our company policy of mandatory arbitration was at the top of the list.

In spite of the ubiquity of mandatory or "forced" arbitration provisions, most Americans have never heard of them. No high school government or civics curriculum covers this arcane procedure because forcing

129. Caroline O'Donovan & Ryan Mac, *Google Engineers are Organizing a Walkout to Protest the Company's Protection of an Alleged Sexual Harasser*, BUZZFEED NEWS (Oct. 30, 2018), https://www.buzzfeednews.com/article/carolineodonovan/googles-female-engineers-walkout-sexual-harassment [https://perma.cc/TT8Z-J6QY].

130. *See* Claire Stapleton, *Google Loved Me, Until I Pointed Out Everything That Sucked About It*, ELLE (Dec. 19, 2019), https://www.elle.com/culture/tech/a30259355/google-walkout-organizer-claire-stapleton/ [https://perma.cc/L7UJ-6MMA].

131. Claire Stapleton et. al., *We're the Organizers of the Google Walkout. Here are Our Demands*, THE CUT (Nov. 1, 2018), https://www.thecut.com/2018/11/google-walkout-organizers-explain-demands.html [https://perma.cc/PBX7-8TS6].

arbitration on employees is not law. It is the *circumvention* of law. And in the private sector, large corporations take advantage of these provisions to squelch workers' claims of harassment, discrimination, wage theft, retaliation and more. As the resident layperson in this article's byline, here is how it works from an employee's view: You get harassed by your manager and report him to Human Resources. HR starts to investigate your claim and in asking your coworkers and others questions, inevitably tips off your manager to the complaint. Suddenly, you find yourself left out of meetings or dropped off emails, impacting your ability to do your job well. Any higher-up who you try to tell backs away quickly from the conversation, encouraging you to work with your HR rep, the very person who tipped off your manager in the first place. In your performance review, your manager lowers your ratings because your work has suffered, and you are "encouraged" to find a new team; except no team will take you with poor ratings and eventually, you are let go. You meet with an employment lawyer because you realize what happened to you was not just about a single bad manager who preys on women, but how those in power (HR, VPs, colleagues) all contributed to your firing and made it hard for you to find work again, leaving you without an income.

But then your lawyer asks if you signed away your right to sue the company. You blink curiously. *No, I would never sign such a thing.* Except most of us have. In fact, 60 million US workers in the private sector have signed away this right and agreed to resolve issues like these through forced arbitration.[132] When you ask your lawyer what the chances are of winning in this process, your lawyer gives you the odds, and then politely declines to take the case because even if you do win, the dollar amount of the award would barely cover the legal fees. So, you drop it all together because you do not have time or money to hold your employer accountable while searching for a new employer. And the pattern of harassment continues for the next victim.

What happened on the day of the walkout and the following weeks is well documented in the press. 20,000 Googlers walked out across fifty cities, starting from the Asia-Pacific region and finally ending at the mothership campus in Mountain View, California.[133] The following week, Google indirectly responds to the demands by offering to make arbitration

132. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Apr. 2, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ [https://perma.cc/J5T8-PFEM].

133. *Google walkout - Mountain View - Nov. 1, 2018*, VIMEO (Nov. 2, 2018), https://vimeo.com/298574248 [https://perma.cc/HZ6H-RHWP].

optional but only in individual cases of sexual assault and harassment.[134] This sounds like progress, but our organizing group sees right through it.

First, Google offered no insight into their calculus of how claims like sexual harassment can go to court but not others like racial discrimination. Second, claims could be inextricably linked to one another, like in the case of my colleague Loretta Lee, who sued Google for wrongful termination, which she believes occurred because she reported sexual harassment.[135] With Google's new policy, a case for harassment would go one way, and a case for retaliation would go another way. Lee's lawyer Richard Hoyer assessed the policy change best: "That doesn't make any sense for any case I've ever taken in 27 years . . . [n]obody wants to make two lawsuits out of one."[136] And third, since only individual cases could go to court, employees could not band together to form a class action lawsuit. It is the most anti-MeToo change Google could make.

So, at this point, the walkout seemed to have prompted nothing more than public relations from the company, rather than actual change. Google took a victory lap in the press, and the next day, Facebook, Airbnb and eBay all make the same hollow gesture.[137] To some, the walkout appears successful, but arbitration is still forced for cases of discrimination, wage theft and retaliation. And internally, the organizing group dynamic began to shift.

When relative strangers come together in two weeks to spark a protest, they skip the necessary effort it takes to build a network of trusted partners that agree on how to handle setbacks, the roles of different organizers or the levels of risk that each person is willing to take. A group can fall apart just as quickly as it comes together if it lacks a shared understanding of long-term viability, identity and constituency. While email threads and video conference calls helped us do something that may have taken years in

134. Sundar Pichai, *A Note to Our Employees*, GOOGLE (Nov. 8, 2018) https://www.blog.google/inside-google/company-announcements/note-our-employees/ [https://perma.cc/59QL-TP6M].

135. Davey Alba, *A Google Lawyer Said Its Sexual Misconduct Policy Change "Does Not Apply Retroactively To Claims"*, BUZZFEED, https://www.buzzfeednews.com/article/daveyalba/google-lawyer-says-sexual-misconduct-policy-change-does-not [https://perma.cc/TV4R-VYLP].

136. Nitasha Tiku, *Tech's New Harassment Policies Are Too Late for Some Women*, WIRED (Nov. 11, 2018, 8:39 PM), https://www.wired.com/story/techs-new-harassment-policies-late-some-women/ [https://perma.cc/7NVF-4M3F].

137 *See, e.g.*, Didi Martinez, *Facebook, Airbnb and eBay join Google in ending forced arbitration for sexual harassment claims*, NBC NEWS (Nov. 12, 2018, 5:18 PM), https://www.nbcnews.com/tech/tech-news/facebook-airbnb-ebay-join-google-ending-forced-arbitration-sexual-harassment-n935451.

the past, they also could not replace some of scaffolding that comes only with time.

To this day, I have never met three of the other global walkout organizers face to face, much less the local leads in other offices. The four white women organizers left the company within a year of the walkout, while the three people of color remain.[138] And we have all had different approaches to how or who should court the press. And if you think race is not a factor, think again. Now, when people at other companies ask how they too can organize a walkout, I first ask, "what's your goal and how far are you willing to go?" I point them to the resources that I wish I had read first and encourage them to talk to the people that I wish I had listened to more intently during the leadup to November 1st.

By December 2018, with the holidays fast approaching, the group was unclear on next steps or which demands to chase. A handful of us splintered off to focus on ending forced arbitration. We refused to squander the momentum and publicity of the Google Walkout without making a real dent on the issue of mandatory arbitration; not to mention, our CEO was about to testify before the House Judiciary Committee and we believe this was a chance to hold Google publicly accountable for its worker policies.[139] Our rationale for picking arbitration as the top issue was that we could not have an honest conversation about gender or racial inequity if we could not even understand the number of claims being swept under the rug due to forced arbitration. Plus, arbitration was the only specific policy that had a piece of looming federal legislation that could change working conditions for all workers.[140]

We started small, with organizers from New York, Boston, Seattle and San Francisco. We confirmed our mission: to end forced arbitration for all our colleagues.[141] We set up our communications structure on Medium, Twitter and a dedicated website. We scheduled weekly video conference calls on Tuesdays at 10 PM EST, with all communication conducted off the corporate infrastructure and outside of normal work hours. We established point-people for each area, designated which members are willing to be

138 *See* Nitasha Tiku, *Most of the Google Walkout Organizers Have Left the Company*, WIRED (July 16, 2019, 4:22 PM), https://www.wired.com/story/most-google-walkout-organizers-left-company/.

139. Rep. Pramila Jayapal (@RepJayapal), TWITTER (Dec. 11, 2018, 1:27PM), https://twitter.com/repjayapal/status/1072573550186381312?lang=en [https://perma/cc/7CV7-TVFK].

140. *See infra* Part IV.C.

141. End Forced Arbitration, *2019 Must be the Year to End Forced Arbitration*, MEDIUM (Dec. 10, 2018), https://medium.com/@endforcedarbitration/2019-must-be-the-year-to-end-forced-arbitration-f4f6833abef7 [https://perma.cc/RMG4-TsSD].

public and talk to press, and which prefer to remain anonymous. We punted on important questions like how we would pay for things or how we would handle any issues around using Google in our name (i.e., "Googlers for Ending Forced Arbitration") without authorization, opting to figure the rest out as we go. For now, we focused on a three-pronged strategy to get what we want.

A. Education

Aside from getting more Americans to care about the arbitration legalese in their contracts, we also had to re-rally our own Google colleagues about the issue. We first had to dispel the myth that Google ended arbitration with their initial walkout response and then show why forcing arbitration is unfair to workers. We launched educational campaigns on social media to explain the practice.[142] We published essays to refute common talking points.[143] We brought in experts for a panel session where legal scholars like Myriam Gilles, Kathy Stone and Alexander Colvin explained the perils of forced arbitration to 800 of our colleagues. Holidays and weekends soon became time to shoot and edit video that tell the stories of numerous victims. We posted all this content on www.endforcedarbitration for people to share what they learn with others.

B. Coalitions

However, we were not the only ones educating. We also enlisted the help of professors, lawyers, activists and survivors outside of Google for guidance on how to be good allies in this fight. One contact connected us to another and another, and soon we had a rolodex of people who had been fighting forced arbitration far longer than we have. Lawyers from top firms around the country and activists from labor protection advocacy groups reviewed our content for accuracy, helped us to interpret recent court case rulings and navigate the impacts of growing state legislation efforts. But the most educational and humbling meetings were with the survivors of forced arbitration.

142 *See* David Ingram, *Google employees launch campaign to end all forced arbitration*, NBC NEWS (Jan. 15, 2019, 2:23 PM), https://www.nbcnews.com/tech/tech-news/google-employees-launch-campaign-bring-discrimination-issues-out-shadows-n959016.

143 *See* End Forced Arbitration, *The Bipartisan Case for Ending Forced Arbitration*, MEDIUM (Mar. 28, 2019), https://medium.com/@endforcedarbitration/the-bipartisan-case-for-ending-forced-arbitration-485f73eeb635.

And I use this term "survivor" intentionally. Heather and Ellen survived, not only the assaults by their managers at Sterling Jewelers, but the humiliation of begging the justice system for two years for the right to bring their claims to light. After failing to convince a court to strike down the arbitration clause in their employment contract, these women spent a decade fighting for justice in arbitration.[144] Tara Zoumer knew WeWork was trouble long before the rest of us when she was fired for refusing to sign her forced arbitration agreement. In fact, she was the first to be subpoenaed by the California state legislature to tell lawmakers about what happened to her at WeWork.[145]

As our education efforts grew with the guidance of these workers, more people started coming forward to join our coalition. After one of our social media campaigns, Peter and Glenda Perez reached out via Twitter direct message. They had both lost their jobs at Cigna and believed that the company was engaged in a pattern of racial discrimination; then, they faced the further humiliation of seeing their "impartial" arbitrator arm in arm with the lawyer from Cigna. We produced a video for the Perez family to share their story and set up a GoFundMe to help with their kids' expenses.[146] Through Google Alerts, I received notifications of new cases, which is how we learned about the systemic harassment that Karen Ward suffered at Ernst & Young[147] and how the luxury-brands company Louis Vuitton Moet Hennessy promoted an executive who thrust his genitals in employee Andowah Newton's face, while forcing that employee to arbitrate her claims of sexual misconduct.[148] As we learned about these employees who had been victimized and silenced by forced arbitration, we realized that we

144. Drew Harwell, *Hundreds allege sex harassment, discrimination at Kay and Jared jewelry company*, WASHINGTON POST (Feb. 27, 2017), https://www.washingtonpost.com/business/economy/hundreds-allege-sex-harassment-discrimination-at-kay-and-jared-jewelry-company/2017/02/27/8dcc9574-f6b7-11e6-bf01-d47f8cf9b643_story.html [https://perma.cc/AQ4P-7HTS].

145. Melody Gutierrez, *Unmuzzled by Legislature's subpoena, Bay Area woman backs workers' rights bill*, SAN FRANCISCO CHRONICLE (Apr. 24, 2018, 3:59 PM), https://www.sfchronicle.com/business/article/Unmuzzled-by-Legislature-s-subpoena-Bay-Area-12861013.php [https://perma.cc/6P3U-S8NT].

146. Tanuja Gupta, *Peter & Glenda Perez – End Forced Arbitration*, GOFUNDME (Feb. 8, 2019), https://www.gofundme.com/f/peter-amp-glenda-perez-end-forced-arbitration [https://perma.cc/DG8M-6BH7].

147. Emily Peck, *She Spoke Up About Sexual Harassment at Ernst & Young and got Caught in a Web of Retaliation*, HUFFPOST (Feb. 11, 2019), https://www.huffpost.com/entry/ernst-and-young-sexual-harassment-karen-ward_n_5c14080ee4b009b8aea73086 [https://perma.cc/42VG-FFLB].

148. Emily Smith, *LVMH Says Legal Exec's Sexual Harassment Claims are 'Meritless and Frivolous'*, PAGE SIX (May 20, 2019), https://pagesix.com/2019/05/20/lvmh-says-legal-execs-sexual-harassment-claims-are-meritless-and-frivolous/ [https://perma.cc/9H8J-CYB8].

had to tell these stories – not just to the public – but to the elected officials who *represent* the public.

C. Legislation

One final coalition was yet to be built. While some members of Congress are quite aware of forced arbitration, others are new and have yet to take a stance on the matter. Two weeks after the walkout, the House Democrats introduced a bill into Congress called the Restoring Justice for Workers Act.[149] We also learned that Senator Richard Blumenthal (D-CT) would soon be re-introducing the Arbitration Fairness Act but with a new much catchier title in early 2019.

By this time, it was clear that Google would not be changing its stance anytime soon, so we began planning a trip to DC. Our goal was to share the stories we had learned and to ask members of Congress to support legislation that ends forced arbitration at the federal level. Google had very strict ethical policies on how employees can interact with members of government or bring politics into the workplace. So we knew that any lobbying time would need to be taken as vacation days, any meetings we requested with members of Congress could not be obtained by using Google's brand, and that we would have to be careful not to become leverage for elected officials in their own political agenda against Google.

We cautiously started reaching out to our own elected officials and asked for meetings to talk about the issue, explaining that we were organizers of the Google Walkout and our goal was to end forced arbitration in all workplaces. We consulted the American Association of Justice to understand which members of Congress would be most open to hearing our stories. Responses ranged from instant acceptance to total silence. We took any meeting we can get, whether with an elected official or a sympathetic legislative assistant. When Senator Blumenthal's office learned that we were coming to D.C., staffers asked us to help introduce the new legislation under its new name (the Forced Arbitration Injustice Repeal Act, or the "FAIR Act) at the February press conference.

We started to suspect that word of our trip had leaked to the Google policy liaisons. Our suspicions were confirmed when, one week before our trip, a staffer in a Congressperson's office forwarded me the note that Google sent her boss:

149. Alexia F. Campbell, *House Democrats Have a Sweeping Plan to Protect Millions of Workers' Legal Rights*, VOX (Nov. 14, 2018), https:/www.vox.com/policy-and-politics/2018/11/14/18087490/mandatory-arbitration-house-democrats [https://perma.cc/QL4B-LM99].

> Hi there. Hope you're well.
>
> As you know, last year we made some changes to how we handle various workplace issues, including making arbitration optional for individual sexual harassment and sexual assault disputes. Since then, we have been focused on understanding the full landscape and the options available in this space. Today, our SVP of Global Affairs, Kent Walker, let employees know that the company will no longer require current and future Google employees to arbitrate employment disputes. This article (https://www.vox.com/2019/2/21/18235161/google-workplace-dispute-end-forced-arbitration) covers some of the details of the change.
>
> I know many of you have been deeply invested in this issue and we wanted to share this update. Please let us know if you have any questions or comments. Thanks.

At 4:32 PM that same day, all Google employees received an email from VP Kent Walker with the update that Google has ended forced arbitration for all current and future employees for all issues.

Overnight, the tone of our trip changed. We transitioned from tech workers railing against our company's policies to the best press agents that Google could get. It felt as if Google wanted us to say, "Look, our company ended forced arbitration, so should you!" We were suddenly lacking a battle to fight, but only because we already won it. Not to mention, the fight to end forced arbitration seemed bigger than a policy change at one company. We wanted this for all companies now, so the Heathers and Ellens and Glendas and Peters and Karens and Taras and Lorettas and Andowahs of the workforce would never be forced into arbitration again. We wanted all the temps, vendors and contractors who make up half of the workforce at Google, but do not enjoy the rights of employees, so[150] we continued with our trip to D.C. and helped introduce the FAIR Act into the 2018-2019 Congressional docket.[151]

This was the first of six trips to Washington D.C. in 2019. We talked to anyone and everyone who would listen, stumbling through our first meetings and getting lost on the Hill. But soon, the process felt like second

150. Daisuke Wakabayashi, *Google's Shadow Work Force: Temps Who Outnumber Full-Time Employees*, N.Y. TIMES (May 28, 2019), https://www.nytimes.com/2019/05/28/technology/google-temp-workers.html [https://perma.cc/6TSB-DGAB].

151. Emily Birnbaum, *Google employees join lawmakers pushing bills to end forced arbitration*, THE HILL (Feb. 28, 2019, 2:14 PM), https://thehill.com/policy/technology/432065-lawmakers-introduce-bills-to-end-forced-arbitration [https://perma.cc/NA7M-JH8Q].

nature. The meetings varied in success. For some of the freshmen members of Congress, whose staff had never even heard of the FAIR Act, it was important to just explain the issues so they could be comfortable with co-sponsoring the bill. For others, they cited delicate ties to businesses that force arbitration and worried about their re-election prospects. No amount of explanation moved the needle in these meetings. We followed the lead set by the American Association for Justice, attending committee hearings and supplying evidence material when they request it. We supported other groups in their efforts to meet with Congress, such as the Harvard law students at the People's Parity Project;[152] and we connected with workers at other companies like Riot Games when they protested forced arbitration in their workplaces.[153] And when we were not physically in D.C., we organized phone banks to flood legislators with calls about the issue.[154]

On September 20, 2019, the FAIR Act passed in the House.[155] Our group celebrated with the hundreds of people who had been working on this victory, vowing to use the Fall for planning how we would meet with each Senator until we could get the bill through the Senate. In the midst of impeachment hearings and other disasters, we still planned to do whatever we could to move the needle in 2020.

But the story of Googlers to End Forced Arbitration did not wrap up with a celebration on the steps of Congress. Instead, two months later, Google fired four employees who were also organizing around labor issues, namely the company's work with Customs & Border Patrol.[156] One of the engineers that was fired sat 10 feet away from me in the New York office. He and I would often trade tips on how to organize. We would sign each other's petitions and field questions from other Google employees who wanted to get involved. The firings shaked our entire group, comprised of parents with kids in school and mortgages to pay. Not to mention, the toll

152. *About Us*, PEOPLE'S PARITY PROJECT, https://www.peoplesparity.org/about/ [https://perma.cc/X535-PR3B].

153. Samantha Masunaga, *Riot Games Keeps Requiring Arbitration in Sexual Harassment Cases, Despite Protest*, L.A. TIMES (May 17, 2019), https://www.latimes.com/business/la-fi-tn-riot-games-arbitration-sexual-harassment-discrimination-20190517-story.html [https://perma.cc/377Y-33HA].

154. End Forced Arbitration, *Googlers for Ending Forced Arbitration share phonebank feedback, fellow organizers . . . and the flaw in Google's refusal to end forced arbitration for Suppliers*, MEDIUM (May 3, 2019), https://medium.com/@endforcedarbitration/googlers-for-ending-forced-arbitration-reveal-may-1st-call-logs-fellow-organizers-and-the-flaw-ac7c530db667.

155. Alexia Fernández Campbell, *The House just passed a bill that would give millions of workers the right to sue their boss*, VOX (Sep 20, 2019, 11:30 AM), https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act [https://perma.cc/RFT7-NDSL].

156. Kate Conger & Daisuke Wakabayashi, *Google Fires 4 Workers Active in Labor Organizing*, N.Y. TIMES, Nov. 25, 2019, at B5, https://www.nytimes.com/2019/11/25/technology/google-fires-workers.html [https://perma.cc/NPF4-G2ZF].

of the year started to weigh on me, and I wondered how much longer I could keep up these two full-time jobs.

So, we started to re-evaluate. We looked at the risks we had taken and wondered if and when Google will decide to go after us. We considered when our faces needed to be front and center versus when we could organize behind the scenes. We thought about the mundane things, like how often we tweeted, and the larger tasks, like how we should continue to visit D.C. And we thought about all the survivors we had met along the way. We decided two things: We needed to lower our public profile, and we were not done yet.

CONCLUSION

Changing law is time-consuming, arduous work. It requires deep stores of patience, commitment and tenacity. Frankly, it requires a dose of good fortune. Each of us has tried to change the law by challenging forced arbitration in a variety of contexts, and this essay is an effort to tell these stories of legal transformation-in-the-making. Needless to say, our side has suffered more losses than victories: As of this writing, forced arbitration clauses remain broadly enforceable and ever-more commonplace. We may have chipped away at its most egregious forms and spotlighted its worst abuses, but we have yet to defeat the *idea* of forced arbitration. We have yet to successfully petition a majority of Congress to enact a federal law banning these provisions or convince a majority of Supreme Court Justices that forced arbitration violates basic notions of due process, denying citizens access to justice and the right to a jury of their peers. The corporatist, hyper-partisan politics of this era have stalled progress on this issue, even as the majority of Americans express strong opposition to forced arbitration.[157]

Nonetheless, each of us has also experienced small and important victories: an organized employee walkout, followed by months of sustained activism, that forced a major tech company to abandon its forced arbitration clause and led other companies to follow suit; powerful legal arguments that compelled courts to strike down unconscionable arbitration clauses; testimony that has sought to hold congressional leaders accountable for the harmful effects of forced arbitration on their constituents. And we are not alone: There are many other groups of lawyers, activists, legal scholars and policymakers at both the state and federal level who challenge

157. *See* GUY MOLYNEUX & GEOFF GARIN, *supra* note 125 (showing that 84% of voters—87% of Republicans and 83% of Democrats—support legislation to end forced arbitration).

these provisions at every turn. Our shared experiences, both the failures and the successes, reflect a fundamental truth about movements to transform legal doctrine—namely (to paraphrase Margaret Mead), it only takes a small group of thoughtful, committed citizens to change the world; indeed, it's the only way meaningful change has ever come about. As the battles over forced arbitration continue to rage—as they surely will—each of us will continue to play our part in bringing about the transformative legal change of ending forced arbitration and restoring jury rights.