Rachel Deutsch
Testimony to the House Committee on the Judiciary
H. 789, An Act Delegating Public Enforcement Powers to Private Attorneys General
April 6, 2018

My name is Rachel Deutsch and I am a senior attorney at the Center for Popular Democracy. CPD is a network of high-impact base-building organizations, like our Vermont affiliate Rights and Democracy, that work to create equity, opportunity and a dynamic democracy. In recent years, our network has been deeply engaged in campaigns to win new workplace protection standards: dramatic increases to the minimum wage, paid sick and family leave, and protections against volatile and unpredictable work schedules. These victories deliver real benefits to low-wage workers and their families. Yet under-enforcement risks rendering these new legal rights – along with many well-established protections – hollow.

Effective enforcement of these laws depends on a combination of public enforcement (through state attorney general offices, state agencies, district attorneys, or others) and private enforcement (through lawsuits brought by harmed individuals). This Legislature has recognized that relying on the office of the Attorney General, or any government office, to enforce all laws single-handedly is unrealistic – that is why so many Vermont statutes include a private right of action. But today, private enforcement of employment laws is increasingly hampered by pre-dispute arbitration provisions in job applications, employee handbooks, and contracts with employees and supposedly independent contractors. These "forced arbitration" clauses undermine substantive workplace rights by foreclosing judicial remedies, while deterring all but a few from seeking justice through arbitration.

1. The Spread of Forced Arbitration and Its Impact on Compliance

A recent empirical analysis by Cornell University Professor Alexander Colvin concluded that the share of workers subject to forced arbitration has more than doubled in recent years. Over 60 million American workers – more than 56 percent of the non-union, private sector workforce – have lost access to court to confront wage theft and workplace discrimination, with

low-wage workers, women and African-American workers disproportionately affected.[1] NYU Professor Cynthia Estlund estimates that 98 percent of employment cases that workers would otherwise bring in court are abandoned due to a clear-eyed assessment of the mechanisms that stack the deck against plaintiffs in arbitration. This silencing effect results in 315,000 to 722,000 "missing" employment cases every year.[2]

The impact of so many missing lawsuits goes beyond the many individual Vermonters who lack recourse when their rights are violated. It represents a systemic and significant reduction in our collective capacity to deter violations and incentivize compliance with important standards like fair wages and overtime, earned sick leave, and the opportunity to thrive regardless of race or gender. The University of Chicago economist Gary Becker posited that when the profitability of violating the law exceeds the amount of the penalty, adjusted for the likelihood of being caught and punished, corporate wrongdoers make a rational choice to disregard the law. *Forced arbitration affects approximately half of the workforce, and has the effect of deterring virtually all of those employees from taking steps to vindicate their rights under the law.* This assault on private enforcement presents Vermont with a stark choice: either double the enforcement capacity of state agencies, or face an economy in which bad employers are emboldened to violate workers' rights and undercut their law-abiding competitors.

Vermont is home to many small and socially responsible businesses that take pride in investing in their workforce. These businesses are already under increasing pressure from corporate concentration, such as Amazon's expansion. They are also threatened by the use of forced arbitration, which is used at a much higher rate by large corporations (68 percent for businesses with 5,000 or more employees; less than half of businesses with 500 or fewer employees; and presumably far fewer truly small businesses).[3] When large businesses rely on forced arbitration to insulate themselves from liability, they can cut corners and shortchange

---

[1] Alexander J.S. Colvin, "The Growing Use of Mandatory Arbitration," Economic Policy Institute, April 6, 2018. State-specific data on the scale of forced arbitration clauses is not available for Vermont. However, in the ten largest states these clauses cover between 40 and 70 percent of the workforce.

[2] Cynthia Estlund, *The Black Hole of Mandatory Arbitration,* North Carolina Law Review, Vol. 96, 2018; NYU School of Law, Public Law Research Paper No. 18-07.

[3] Colvin, *supra* fn. 1.

employees in search of profit, delivering goods and services more cheaply than the good businesses that work hard to comply with the law.

It is particularly urgent to take action because forced arbitration has been expanding rapidly and is likely to spread further in the coming years if, as widely expected, the Supreme Court authorizes these clauses when it rules on *NLRB v. Murphy Oil* this Spring. *Murphy Oil* concerns the legality of clauses that prohibit employees from participating in any collective or representative legal proceeding, either in arbitration or in court.[4] These "class action waivers" are extremely harmful. For many violations, the amount that an individual can recover is too small – they can't afford to go it alone against a big company. Without class or collective actions, there is no way to hold corporations accountable when they clear millions in profits from widespread, low-dollar violations.

Language prohibiting collective enforcement is currently included in 40 percent of forced arbitration employment clauses – but can be found in virtually *all* consumer forced arbitration clauses.[5] Professor Colvin postulates that the legal uncertainty about the enforceability of these clauses in the employment context has limited their spread for workers – but that *Murphy Oil* could trigger further expansion of the number of employers that use both forced arbitration and class action waivers. Of the companies that currently force arbitration on their employees, 40 percent adopted the practice in the last few years, likely prompted by the Supreme Court's rulings in *AT&T Mobility v. Concepcion* and *American Express v. Italian Colors* that broadly upheld the use of forced arbitration clauses.[6] This adoption pattern suggests we can expect an explosion in forced arbitration clauses and class-action waivers following *Murphy Oil*.

[4] The National Labor Relations Board has taken the position that these clauses are unenforceable in employment contracts because they interfere with section 7 of the National Labor Relations Act, which protects workers' right to engage in concerted activity to improve workplace conditions.
[5] Colvin, supra fn. 1, Consumer Fin. Protection Bureau, Arbitration Study: Report to Congress, March 2015.
[6] Colvin, *supra* fn. 1

2. Expanding Public Enforcement Capacity through the Whistleblower Model

As Professor Myriam Gilles explained in her testimony and supplemental materials, federal preemption severely limits Vermont's authority to regulate forced arbitration provisions and class action waivers. However, the state has broad authority to determine how it will enforce its own laws. Given that the existing enforcement regime was designed with the assumption that private litigation would supplement the capacity of the Attorney General and other enforcement agencies to secure compliance with Vermont's laws, the use of forced arbitration to kneecap private enforcement demands a bold approach to increasing public enforcement capacity.

Fortunately, there is an effective and time-tested model for increasing public enforcement capacity, and it does not require new appropriations. Whistleblowers – those with inside knowledge of corporate fraud or illegality – have long been an important feature of American law enforcement. Whistleblower enforcement is based on an ancient cause of action known as *qui tam* (from the Latin "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," or "he who sues in this matter for the king as well as for himself"). *Qui tam* actions, which authorize private individuals to bring enforcement actions on behalf of the state, have been used for centuries to enforce a variety of legal protections, particularly in far-flung locations where the government might not have had sufficient enforcement personnel. Since 1863, the Federal False Claims Act (FCA) has relied on whistleblowers with inside knowledge of fraud against the government to come forward and litigate on behalf of the state. The FCA was originally enacted to address Civil War defense contractor fraud, and now broadly protects the integrity of federal programs by punishing the submission of fraudulent claims and obtaining restitution of government losses due to fraud. In 2015, Vermont joined 30 other states in adopting a state FCA to deter fraud.[7]

The FCA and its state-law analogs authorize both the government and private actors to file civil claims seeking treble damages and civil penalties for fraud.[8] Private actors who file claims under the Act are referred to as "relators" because they bring the case "on relation of" the

[7] 32 V.S.A. § 632.

[8] See, e.g. 31 U.S.C.A. § 3729(a)(1) for the Federal FCA provision detailing remedies available under the statute.

government. *Qui tam* relators must file their complaints under seal with the court before the complaint is publicly served upon the defendant. The government then has a statutory period to decide, based on the allegations and information in the relator's complaint, whether or not the state will pursue the claim. If the government declines to join the suit, the relator may proceed on behalf of him/herself and the government; if the government chooses to take the case, the relator has a right to remain a named party to the suit. Regardless of who pursues the case, the relator is entitled to some share of the proceeds of the action or settlement of the claim.[9]

In 2014, California enacted the Private Attorneys General Act (PAGA), which replicated many of the FCA's essential *qui tam* features in order to enhance enforcement of the state's labor code. Individual workers can file suit against their employer for most violations of the Labor Code and collect civil penalties on behalf of the State. For those provisions of the Labor Code that did not specify civil penalties, PAGA created default civil penalties, increasing the potential consequence of violations. Because PAGA is a representative action, the penalty amount is determined based on the number of workers in the state affected by the violation. Before filing a suit, employees must exhaust an administrative procedure, beginning with filing a notice that gives the agency an opportunity to investigate claims. After a successful suit or settlement, 25 percent of recovered penalties go to the employee(s), and the rest go to the labor agency. As described in detail in Michael Rubin's written testimony, PAGA has been enormously successful in empowering low-wage workers to vindicate their rights, promoting compliance with California workplace protections, and generating revenue for the state labor agency.

By leveraging private actors' greater access to information, the *qui tam* model improves deterrence of fraud by increasing both the probability and the consequences of enforcement. Monetary rewards for private actors who successfully pursue claims on the government's behalf encourages those with inside information to come forward, increasing the probability that violations will be detected. By authorizing private enforcement to supplement the government's prosecution of claims, the FCA and PAGA raise the probability of suspected

[9] *Id.* § 3730(b)-(d).

illegality becoming subject to enforcement.[10] Stiff civil penalties raise the stakes, further enhancing the deterrent power of the law.

Incentives for whistleblowers have proven critical to uncovering information about illegal practices. Whistleblowers were the driving force behind disclosure of the Enron, Worldcom, and UBS tax fraud scandals.[11] Studies estimate that whistleblowers are responsible for between 43 and 54 percent of fraud detection.[12] In 2017, 92 percent of the total recovery in federal FCA cases came from suits litigated by *qui tam* plaintiffs – resulting in the recovery of $3.4 billion for the U.S. government.[13]

3. How Whistleblower Enforcement Could Function in Vermont

Over the past year, a working group comprised of academic experts, former regulators, worker rights and consumer rights advocates, and litigators has been collaborating to design a model policy that builds on the PAGA and FCA models. We extensively interviewed and consulted with officials within California's Division of Labor Standards Enforcement, which administers PAGA, to ensure that the policy would allow effective supervision of public enforcement actions by state agencies. Note that we recommend adopting this whistleblower model for all areas where forced arbitration has significantly decreased private enforcement and where the need for increased public enforcement is therefore most urgent – including labor, consumer, and nursing home protections. For purposes of this overview, assume application to employment practices. The policy features we recommend are the following:

- Who can bring a claim:
    - Affected employees;
    - Possibly additional whistleblowers whose positions provide unique knowledge of wrongdoing, such as a manager or contractor;

[10] *See* Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 Tenn. L. Rev. 455, 456 (1998) (discussing the elements of the Act that give rise to its "potential for aggressive enforcement").
[11] Lesley Curwen, "The Corporate Conscience," THE GUARDIAN, June 21, 2003; Julia Homer & David M. Katz, "WorldCom Whistleblower Cynthia Cooper," CFO Magazine, Feb. 1, 2008; David Kocieniewski, "Whistle-Blower Awarded $104 Million by I.R.S." NY TIMES, Sept. 11, 2012.
[12] Aaron Jordan, "Whistleblowing Is a Key Regulatory Tool," The Regulatory Review, Feb. 2018.
[13] https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017.

    - A nonprofit advocacy organization designated by an affected employee – for example if the employee fears retaliation (the agency would be privy to the employee's identity).
- Exhaustion requirements:
    - Notice filed with agency before a lawsuit is brought must contain specified information (contact information for employer, employee & representatives, nature of claim);
    - Online filing of notices makes it easier for agency to track;
    - Possibly include a $75 filing fee to defray costs of reviewing notices and dissuade frivolous claims.
- Agency opportunity to investigate and resolve the claim before any action is filed:
    - Two months to decide whether to investigate; if it decides not to, the action can commence;
    - Six months to issue a finding or bring an enforcement action – can be extended by two months;
    - Overall, up to ten months to investigate and decide whether to bring the case itself, settle, or delegate the action to the relator.
- Agency retains control after filing:
    - Agency can intervene as a party to the lawsuit for any reason within 30 days of filing and for good cause thereafter;
    - Agency can dismiss or settle the case over relator's objection with court approval;
    - If the agency does not choose to intervene, it can still:
        - receive electronic copies of pleadings & discovery to monitor the case;
        - review and comment on proposed settlements.
- Calculation and distribution of penalties:
    - Penalties are calculated per employee per pay period, so size of the employer and duration of noncompliance are factored into total penalty;
    - Judge has discretion to reduce penalties based on circumstances;
    - Agency receives 70% of penalties (80% if it intervened in the litigation), earmarked for enforcement;
    - Relator distributes remaining share to affected workers.

In recent months, Congress and the Trump administration has reversed or indefinitely postponed federal regulations that would have limited forced arbitration.[14] States must therefore develop new strategies to effectively investigate and hold accountable companies

[14] Last fall the Senate voted to abolish a rule adopted by the Consumer Financial Protection Bureau (CFPB) that would have allowed consumers to participate in class action lawsuits to challenge systemic fraud in financial transactions. The Centers for Medicaid and Medicare Services (CMS) recently reversed course on a rule that would have prohibited nursing homes from forcing patients into arbitration. And the Department of Education has indefinitely postponed a rule that would have prevented colleges that take federal aid from blocking access to courts.

that disregard their laws. I urge this Committee to consider the time-tested and effective whistleblower model to ensure that important workplace protections are not hollowed out by the assault on private enforcement.