CARDOZO

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY
Myriam Gilles, Vice Dean and Paul R. Verkuil Research Chair • gilles@yu.edu
212-790-0344 (office) / 212-790-0205 (fax)

Myriam Gilles, Professor of Law
Testimony to the House Committee on the Judiciary
on the Model State Consumer Justice Enforcement Act, S. 105
March 29, 2018

"Too Darn Bad"

Chairwoman Grad and members of the Committee, thank you for inviting me to speak to you today via telephone to participate in this important hearing. I hope my testimony will help to inform the discussion of the pernicious effects of mandatory, binding, pre-dispute arbitration clauses on consumers, employees and small businesses.

My name is Myriam Gilles, and I am a law professor who has spent a great deal of time over the past eight years researching, writing and lecturing about the rise of mandatory arbitration clauses in standard-form contracts. These unilaterally-imposed provisions force all disputes out of our public courts and into secret, privatized arbitrations. Furthermore, contemporary arbitration clauses often contain "class action bans," which prevent claimants from joining together to pursue their claims. Given the certainty that consumers and employees will almost never be able to arbitrate small-dollar claims individually, class action bans offer defendants near-absolute immunity from legal liability. Taken together, forced arbitration clauses and class action bans prevent individuals from vindicating their legal rights, undermine the rule of law and the deterrence function of statutory rules, and deny the constitutionally-protected guarantee to a fair hearing before a jury.

Forced arbitration clauses and class action waivers are now commonplace in consumer and employment contracts, drastically curtailing the power of private citizens to hold corporate

wrongdoers accountable. The Consumer Financial Protection Bureau estimated that these clauses appear in 53% of credit card accounts, 98% of payday loans, and 99% of cell phone contracts.[1] The Economic Policy Institute estimated in 2015 that 25% of non-union employees were subject to forced arbitration; last year it adjusted that estimate to 56%.[2] One legal scholar estimates that 98% of employment cases that would otherwise be brought in some forum are abandoned due to a clear-eyed assessment of the mechanisms that stack the deck against plaintiffs in arbitration: shortened limitations periods that bar the claim at the outset; unaffordable arbitrator fees; limitations on discovery that make proving the case impossible; a biased arbitrator pool or a skewed selection process; provisions against attorney fee shifting or damage caps. This silencing effect results in 315,000 to 722,000 "missing" employment cases every year.[3]

To make matters worse, studies show that most people have no idea that they have signed away their right to go to court before a jury of their peers.[4] This is because forced arbitration clauses are often hidden in the fine print of employment contracts or orientation materials that employees receive when beginning a new job, or the boilerplate language that consumers either skim or ignore when making purchases. Companies now regularly impose these bans in standard-form contracts, click-wrap, envelope-stuffers and other delivery methods intended to obscure or minimize the immensity of the rights that are being forfeited. And, in any event, none of us really has a choice as to whether to accept or reject an arbitration clause: these rights-stripping clauses are a precondition of obtaining the job, product or service in question. Indeed, now that forced arbitration clauses and class action bans have proliferated, citizens are left with no meaningful alternatives in the workplace or the marketplace.

In 2005, I began studying the effects of forced arbitration clauses on consumers, employees and small businesses. That year, I wrote an article warning that corporate defendants were beginning to insert in their standard-form consumer contracts liability-avoiding arbitration

---

[1] *See* CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [hereinafter, CFPB ARBITRATION STUDY].

[2] *See* Alexander Colvin, *The Growing Use of Mandatory Arbitration*, ECONOMIC POLICY INSTITUTE (2017), https://www.epi.org/files/pdf/135056.pdf.

[3] 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.

[4] CFPB ARBITRATION STUDY, *supra* note 1 at pp. 19-24 (reporting that half of all respondents surveyed did not know whether they had the right to sue their credit-card issuer in court, and more than a third of those who were bound by forced-arbitration clauses still believed, incorrectly, that they could take the company to court).

provisions – clauses requiring that disputes be asserted only in a one-on-one proceeding.[5] Many clauses prohibited consumers from participating in, financing or supporting the prosecution of any group action in any way. I predicted, back in 2005, that these arbitration clauses would undermine corporate accountability and leave widespread wrongdoing unaddressed.

Two important rulings by the United States Supreme Court of the United States brought to life all my dire predictions. The Supreme Court's 2011 decision in *AT&T Mobility v. Concepcion* (*Concepcion*)[6] and its 2013 decision in *American Express v. Italian Colors* (*Amex*)[7] broadly upheld the use of forced arbitration clauses, rendering them beyond legal challenge regardless of their impact. In the wake of these momentous decisions, a slim majority of the Court has repeatedly held that it does not matter whether claimants are unable to vindicate their rights in a one-on-one arbitration; all that matters under the Federal Arbitration Act ("FAA") is that the arbitration clause is enforced exactly as the company has written it up.[8] The FAA was enacted in 1925 to facilitate efficient resolution of commercial disputes centered on contracts voluntarily entered into by businesses of relatively equal strength. Yet the Court's recent rulings have interpreted the FAA to mean that any remedy-stripping boilerplate term that is signed, clicked, or otherwise agreed to in our 21st century economy must be fully enforced, never mind the policy implications.

As Justice Kagan wrote in her blistering dissent in *Amex*, "the nutshell version" of the majority view is simply this: "Too darn bad."[9] The State of Vermont enacted a statute to protect ordinary workers or consumers from predatory corporate practices, but an arbitration clause prevents Vermonters from vindicating their rights under that statute? "Too darn bad."[9]

These Supreme Court decisions have given a green light to corporations looking to suppress legal claims and avoid liability. Corporate actors, seeing that green light, have hit the gas, and the use of forced arbitration clauses containing class action bans has skyrocketed.[10] Click on

---

[5] Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005).

[6] 563 U.S. 333 (2011) (striking down state law rule under which arbitration clauses were regarded as unconscionable unless they allowed for class proceedings, and dismissing the argument "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system").

[7] 133 S.Ct. 2304 (2013) (enforcing class actions bans in arbitration clauses, even where proving the violation of a federal statute in an individual arbitration would be so costly that no rational claimant would undertake it).

[8] 9 U.S.C §2.

[9] Amex, 133 S.Ct. at 2313.

[10] *See* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Nov. 1, 2015, available https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html ("By inserting individual arbitration clauses into a soaring

the "Terms & Conditions" link in any standard form web transaction and you'll surely find (in the small print) a mandatory arbitration clause. These clauses have spread from telecom and credit card contracts, to contracts with insurance companies, airlines, landlords, payday lenders, banks, gyms, rental car companies, parking facilities, schools, kids' camps, shippers – even HMOs and nursing homes.[11]

Sensing an opportunity and increasingly confident about enforceability, companies are moving beyond class action bans and are adding even more onerous provisions to their arbitration clauses. In addition to prohibiting class and collective actions, arbitration clauses now commonly include provisions that:

- Mandate a venue likely to be geographically convenient only for the corporate defendant;
- Severely limit the consumer or worker's right to appeal;
- Shift much of the financial burden of arbitration onto the worker or consumer;
- Restrict the evidence that the consumer or worker can obtain through discovery;
- Forbid plaintiffs from pursuing arbitration after a certain period of time has expired, even if the statute of limitations provided by law is longer;
- Prohibit the arbitrator from awarding certain kinds of relief, such as punitive damages or injunctive relief to obtain prospective compliance with the law.

These clauses are harming real people. Let's look at what "too darn bad" means for real people in real cases:

- Forced arbitration clauses allow employers to engage in widespread and difficult-to-detect wrongdoing, with little concern about liability. Large employers, particularly in low-wages service industries, like Macy's, Amazon, Olive Garden, Applebee's, Sprint and T-Mobile, have added arbitration clauses to their employment contracts, ensuring that systemic harms, such as wage theft and discrimination, never come to light.[12] "Gig

number of consumer and employment contracts, companies [have] devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.").

[11] Myriam Gilles & Gary Friedman, A*fter Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 631 (2012) ("[A]bsent broad legal invalidation, it is inevitable that the waiver will find its way from the agreements of 'early adopter' credit card, telecom, and e-commerce companies into virtually all contracts that could even remotely form the predicate of a class action someday. After all, the incremental burden of including magic words in dispute resolution boilerplate—or even on point-of-sale purchase receipts or box-stuffer notices—is surely minimal in relation to the benefit of removing oneself from potential exposure to aggregate litigation.").

[12] *See, e.g.*, Kriston Capps, *Sorry: You Still Can't Sue Your Employer*, CITYLAB, July 11, 2017, available

economy" companies like Uber, Handy and Lyft have used forced arbitration clauses in their on-going effort to evade claims by employees who have been classified as independent contractors.[13] These arbitration clauses apply to all disputes regarding the employment relationship, including wages, benefits, breaks and rest periods, termination, discrimination, or harassment.[14] And again, the recent Economic Policy Institute report reveals that over 60 million workers no longer have access to the courts to protect their workplace rights.[15]

- Payday lenders have become notorious for illegal, predatory practices: "some have made unauthorized debits from consumers' checking accounts or used aggressive methods to collect debts, such as posing as federal authorities, threatening borrowers with criminal prosecution, trying to garnish wages improperly, and harassing the borrower."[16] These rapacious profiteers trap low-wage workers and military personnel into "a thicket of debt from which many never emerge."[17] Ordinarily, we would rely on private litigation brought by injured borrowers to detect and reform illegal payday lending practices.[18] But today, nearly all payday lenders include forced arbitration clauses in their loan agreements to

---

at https://www.citylab.com/equity/2017/07/the-fine-print-that-keeps-you-from-suing-your-employer/533145/ (reporting that Wells Fargo, Citibank, Comcast, AT&T, Time-Warner Cable, Olive Garden, T.G.I. Friday's, Applebee's, Macy's, Target, Amazon, Uber, and Lyft all impose arbitration and class action bans in employment contracts).

[13] *See, e.g.*, Yucesoy v. Uber Techs., Inc., 109 F. Supp. 3d 1259 (N.D. Cal. 2015); O'Connor et al v. Uber Techs., Inc., No. C-13-3826-EMC, 2013 WL 6407583 (N.D. Cal. 2013). Uber ultimately settled these class actions for just under $100 million, and most importantly, the right to continue to "categorize its drivers as independent contractors." Mike Issac & Noam Scheiber, Uber Settles Cases with Concessions but Drivers Stay Freelancers, N.Y. TIMES (Apr. 21, 2016), available at https://www.nytimes.com/2016/04/22/technology/uber-settles-cases-with-concessions-but-drivers-stay-freelancers.html?_r=1.

[14] Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1104-1107 (2012) (noting that "[u]npaid minimum wages, misclassification of workers as 'salaried' and therefore ineligible for overtime… illegal deductions, [and] failure to pay final paychecks" are among the "unlawful practices result in millions of dollars of lost money for workers").

[15] Colvin, *supra* note 2.

[16] Prepared Remarks by Richard Cordray, Director of the Consumer Financial Protection Bureau Payday Loan Field Hearing, Birmingham, Ala. (Jan. 19, 2012), available at http://tinyurl.com/7mu3hwb.

[17] Brian Grow & Keith Epstein, *The Poverty Business*, BLOOMBERG (May 20, 2007), http://www.bloomberg.com/bw/stories/2007-05-20/the-poverty-business.

[18] *See, e.g.*, Kristensen v. Credit Payment Servs., 12 F. Supp. 3d 1292, 1308 (D. Nev. 2014) (certifying class action brought by consumers against payday lenders alleging violations of the Telephone Consumer Protection Act); Mitchem v. GFG Loan Co., No. 99-C-1866, 2000 WL 294119, at *3, *6 (N.D. Ill. Mar. 17, 2000) (partial denial of motion to dismiss consolidated claims brought by borrowers against payday lenders under the Truth in Lending Act); Purdie v. ACE Cash Express, Inc., No. Civ.A. 301CV1754L, 2003 WL 22976611, at *1 (N.D. Tex. Dec. 11, 2003).

avoid liability exposure – leaving hundreds of thousands of unsophisticated borrowers exposed to these unscrupulous and largely unregulated lenders.[19]

- Forced arbitration perpetuates the exploitation of women in the workplace by shuttling victims into a private system where each is unaware of the other and where the arbitration provider (who is chosen and paid by the employer) lacks authority to remedy systemic and recurring workplace abuse. Forced arbitration has enabled many companies, including American Apparel and Fox News, to cover-up widespread workplace harassment.[20] Over the past two decades, hundreds of employees of Sterling Jewelers were "routinely groped, demeaned and urged to sexually cater to their bosses to stay employed" – but their claims were shunted into private arbitration to protect company executives, who were never held accountable, while those who spoke up were fired.[21]
- Consumers today are more vulnerable than ever to identity theft and data breaches. The recent and notorious fraud committed by Wells Fargo employees effected nearly 3.5 million customers, most of whom are still trying to get their money back and repair their credit. Similarly, the massive Equifax data breach exposed personal information of over 145 million people. Forced arbitration allowed companies like Wells Fargo and Equifax to block consumer lawsuits that would have exposed their misconduct far sooner. In the case of Wells Fargo, injured customers began suing the company for opening fake accounts back in 2013, but these claims were quickly forced into the black box of arbitration.[22] Equifax, meanwhile, tried to limit its exposure by offering data breach victims "free" credit monitoring in exchange for agreeing to an arbitration clause containing a class action ban.[23]

---

[19] *See generally* Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1542 (2016) (discussing the claim-suppressing effects of forced arbitration clauses and class action bans on borrower litigation against unscrupulous payday lenders).

[20] *See generally* Emily Martin, *Forced Arbitration Protects Sexual Predators and Corporate Wrongdoing*, CONSUMER LAW & POLICY BLOG, Oct. 23, 2017, available at http://pubcit.typepad.com/clpblog/2017/10/forced-arbitration-protects-sexual-predators-and-corporate-wrongdoing.html.

[21] Drew Harwell, *Sterling Discrimination Case Highlights Differences Between Arbitration, Litigation*, WASHINGTON POST, March 1, 2017, available at https://www.washingtonpost.com/business/economy/sterling-discrimination-case-highlights-differences-between-arbitration-litigation/2017/03/01/cdcc08c6-fe9b-11e6-8f41-ea6ed597e4ca_story.html?utm_term=.1f1ccba3921d.

[22] *See, e.g.*, Michael Corkery & Stacy Cowly, *Wells Fargo Killing Sham Account Suits by Using Arbitration*, N.Y. TIMES, Dec. 6, 2016, available at https://www.nytimes.com/2016/12/06/business/dealbook/wells-fargo-killing-sham-account-suits-by- using-arbitration.html?_r=0.

[23] *See, e.g.*, Diane Hembree, *Consumer Backlash Spurs Equifax to Drop 'Ripoff Clause' in Offer to Security Hack Victims*, FORBES, Sept. 9, 2017, available at https://www.forbes.com/sites/dianahembree/2017/09/09/consumer-anger-over-equifaxs-ripoff-clause-in-

When used by businesses with equal bargaining power, as originally intended by the 1925 Congress that enacted the FAA, arbitration can be an effective alternative to our court system. It allows sophisticated companies to knowingly agree to resolve complex disputes before an industry-expert neutral, allowing these entities to protect their trade secrets and maintain their important business relationships. But the arbitration clauses and class action bans forced upon consumers and employees in standard-form agreements are not intended to provide an alternative forum to *resolve* claims. The one and only objective here is to suppress and bury claims. The whole point is that consumers and employees seeking redress for broadly distributed small-value harms cannot and will not pursue one-on-one arbitrations.[24] Ever.

A case involving Time Warner Cable of New York, Inc. illustrates how forced arbitration clauses functionally allow bad corporate actors to evade liability for highly profitable – and illegal – practices. Time Warner added a $3.95 monthly charge for the modem it has long provided subscribers for free. There was no advance notice of the fee and it did not matter that most subscribers were on a set price plan, which the company had promised not to raise for some number of years. But, thanks to an arbitration clause the company had quietly inserted in its 'Terms & Conditions,' subscribers were prevented from bringing a consumer class action against the company.[25] And since no rational Time Warner subscriber would pursue an individual arbitration to recoup the illegal $3.95 monthly fee, the company profited enormously from its unlawful practice. More worrisome, without fear of legal liability going forward, Time Warner and other market actors may continue to take advantage of unsuspecting consumers.

What does all this mean for the state of Vermont? Not only are Vermont residents unable to access justice when injured by bad corporate behavior, but by taking private plaintiff enforcers out of the game, forced arbitration imposes an unrealistic burden on public agencies.[26] State law enforcement agencies cannot realistically oversee every workplace, commercial transaction, or nursing home in the entire state. They direct their limited resources toward high-priority industries

---

offer-to-security-hack-victims-spurs-policy-change/#5cd7462e6e7e.

[24] The CFPB's Arbitration Study revealed that very few consumers arbitrate disputes. According to that agency, of the nearly 80 million credit cardholders, checking account holders and payday borrowers who were subject to arbitration clauses as of the end of 2012, only 1241 consumers filed arbitrations to resolve disputes with their credit card companies, banks, and lenders. CFPB ARBITRATION STUDY, at p. 63-64.

[25] *Damato v. Time Warner Cable, Inc.*, 2013 WL 3968765 (E.D.N.Y. 2013).

[26] *See, e.g.,* Gilles & Friedman, 79 U. CHI. L. REV. at 668 (public enforcers "lack the resources to take the laboring oar on many of the large-scale cases that have traditionally been the province of the class action plaintiffs' bar"); *see also* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 761 (2011) ("[S]tate attorneys general face resource constraints that limit the scope of possible enforcement actions.").

or practices, and rely on private suits to complement their efforts.[27] That is why the Attorneys General of 22 states, including Vermont, warned the Supreme Court that allowing companies to use legalese to avoid collective private enforcement "erode[s] the states' ability to protect their citizens and economies."[28] Here, once again, the Court's response was "too darn bad."

An economy in which state agencies are functionally responsible for all law enforcement will be one in which corporations play fast and loose with the rules. The University of Chicago economist Gary Becker has posited that the efficacy of law enforcement can be captured by a simple economic formula. When the profit to be gained by 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.[29] With forced arbitration clauses driving the chance of enforcement perilously close to zero, even astronomical penalties won't deter wrongdoing: it is simply too unlikely that the company will ever be made to pay up.

This body has already recognized the public policy implications of this debate: in 1985 the Legislature enacted the Vermont Arbitration Act to ensure that "no arbitration agreement shall have the effect of preventing a person from seeking or obtaining the assistance of the courts in enforcing his constitutional or civil rights."[30] Unfortunately, because the Supreme Court has interpreted the FAA so broadly, the state of Vermont cannot comfortably rely on that 30-year old statute, nor can it ban mandatory pre-dispute arbitration clauses or class-action waivers in most contexts.[31] However, this Committee can take meaningful steps to protect the integrity of Vermont's laws.

One such step is to advance S.105, which would establish that certain limitations commonly included in forced arbitration clauses (shortened statutes of limitations, inconvenient venues, cost shifting to plaintiffs, and waivers of certain remedies) are unconscionable and

---

[27] For example, the 2017 Report of the Vermont Office of the Attorney General lists an annual budget of approximately $10 million dollars. *See* http://www.leg.state.vt.us/jfo/appropriations/fy_2017/Department%20Budgets/Attorney%20General%20-%20Budget.pdf. While this a serious sum, it is simply insufficient to detect, investigate and litigate every violation of state law the AG is tasked with enforcing.

[28] Brief of the State of Ohio and 21 Other States as *Amici Curiae* in Support of Respondents, available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-133_resp_amcu_ohio_etal.authcheckdam.pdf.

[29] Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

[30] 12 V.S.A. § 5653.

[31] *See, e.g.*, Jean Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 727 (2012) ("State legislatures have quite limited power to combat the effects of *Concepcion* given prior Supreme Court decisions. In particular, state legislatures can neither prohibit mandatory arbitration nor prohibit use of arbitral class action waivers.").

unenforceable under state law. S.105 would also require reporting of arbitration data to promote transparency so that corporate actors can less easily use forced arbitration to keep violations out of public view.

Another approach, which could complement S.105, is to expand the enforcement capacity of the Attorney General and executive agencies that enforce the rights of employees, consumers and the elderly to meet the increased demand on those agencies in an era of shrinking private enforcement. And the most efficient way to do so is to allow consumers, employees and elderly who have been harmed by unlawful practices to initiate a public enforcement action on behalf of the state. The state can then choose whether to intervene or let the citizen continue to litigate on its behalf. If the citizen-enforcers prevail in the action, they retain a portion of the civil penalties, with the bulk reverting to the government. This model builds on an ancient mechanism for citizen-assisted enforcement, known as "*qui tam*," that encourages whistleblowers to bring allegations of wrongdoing to light.[32] The federal government and 30 states use *qui tam* statutes to deter and punish fraud on the government – Vermont is one such state.[33] State governments have collected millions in cases brought by *qui tam* plaintiffs, known as relators.[34]

This citizen-enforcement model can and should be expanded to enforce other laws, especially in areas where private enforcement is limited. In 2004, California applied the *qui tam* concept in creating the Private Attorneys General Act of 2004 (PAGA), which allows workers to bring claims on behalf of all employees affected by an employment law violation in the name of the state Labor Commissioner. In 2017, the New York legislature introduced the Empowering People in Rights Enforcement (EMPIRE) Worker Protection Act and Consumer Protection Act to establish public enforcement actions for violations of consumer and workplace rights.[35]

---

[32] *See generally* David Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUMBIA L. REV. 1913 (2014).

[33] 32 V.S.A. § 632.

[34] In 2013, Connecticut recovered over $10 million in a case brought by a qui tam plaintiff under the state's False Claims Act against a pharmaceutical company that had been marketing its product for unapproved purposes. Press Release, George Jepson: Office of the Attorney General, *Connecticut Joins $1.2 Billion Settlement with Johnson & Johnson, Janssen Pharmaceuticals* (Nov. 4, 2013). In 2016, Washington State recovered $46.7 million by joining a pharmaceutical overcharging case. Press Release, Washington State Office of the Attorney General, *AG recovers record $46.7 million for the state Medicaid program from pharma co. Wyeth's underpayments* (Apr. 28, 2016).

[35] *See* Assembly Bill A7958, New York State Assembly, May 2017, available at https://www.nysenate.gov/legislation/bills/2017/a7958 (worker); Assembly Bill A8035, New York State Assembly, May 2017, available at https://www.nysenate.gov/legislation/bills/2017/a8035 (consumer) The EMPIRE Worker Act authorizes an aggrieved employee or representative organization to initiate a public enforcement action on behalf of the Labor Commissioner for violations of any provision of the New York Labor law, while the Consumer Act allows aggrieved consumers to initiate similar public actions on behalf

Representative Morris is developing similar legislation for Vermont.

California's PAGA shows how an updated citizen enforcement model can benefit the state and its residents by improving enforcement of its employment laws. In the first nine years of the law's existence, the California government collected $24.5 million in PAGA penalties across 1,255 cases. In 2015 and 2016 alone, California's Department of Labor and Attorney General collected over $116 million owed to workers – about $7 per worker in the state. (As a point of contrast, Vermont's agencies collected $187,992 over these same two year period – about 59 cents per worker in the state.[36]). And, according to attorneys who practice employment law, PAGA has markedly improved employer compliance with statutory and regulatory mandates.[37]

Importantly, the public nature of the *qui tam* action and the penalty structure of the PAGA statute should enable this legislation to avoid FAA preemption under *Concepcion* and its progeny, for a number of reasons. First, the Supreme Court has recognized that the government is not a party to the contract containing the arbitration clause and does not waive its right to enforce the law because an individual enters into a private agreement containing such a clause. In *EEOC v. Waffle House*, for example, the Court held the EEOC could seek victim-specific damages for an ADA violation – even though the victims themselves had all signed class-waiving arbitration agreements with the employer. The majority reasoned that the Commission was not a party to the arbitration agreement, and possessed independent statutory authority to bring suit.[38]

Relatedly, "private individuals cannot contract away the state's right to enforce the law."[39] Accordingly, claims brought by these private citizens in the name of the state or the AG are not subject to arbitration or FAA preemption.[40] Directly on this point, the Ninth Circuit recently held

---

of the Attorney General to enforce specified consumer-protection statutes.

[36] Celine McNicholas, Zane Mokhiber, and Adam Chaikof, *Two billion dollars in stolen wages were recovered for workers in 2015 and 2016—and that's just a drop in the bucket*, ECONOMIC POLICY INSTITUTE, December 13, 2017.

[37] Laura Reathaford & Eric Kingsley, *He Said, She Said: Employment Litigators Debate California's Private Attorneys General Act*, 30 NO. 23 WESTLAW J. EMP. 2, June 7, 2016, at 1.

[38] EEOC v. Waffle House, 534 U.S. 279 (2002) (reasoning that the FAA does not mention enforcement by public agencies but instead ensures the enforceability of private agreements to arbitrate).

[39] Janet Alexander, at 1228 (observing that because "[t]he private plaintiff stands in the state's shoes to litigate the action" for civil penalties, qui tam claims are not subject to FAA preemption).

[40] Engstrom, 114 COLUMBIA L. REV. at 1228 (observing that because "the private plaintiff stands in the state's shoes to litigation the action" for civil penalties, qui tam claims are not subject to FAA preemption). *See also* Myriam Gilles, *The Politics of Access: Examining State/Private Enforcement Solutions to Class Action Bans*, FORDHAM LAW REVIEW (forthcoming 2018) (analyzing qui tam and other proposals which "rely fundamentally on the threshold supposition that the Supreme Court's pro- arbitration jurisprudence does not block the right of a public enforcer to bring collective litigation for damages on behalf of citizen-victims who have waived their right to seek relief in court or in collective proceedings," and concluding that qui tam is immune from the reach of arbitration and class action bans).

in *Sakkab v. Luxottica Retail North America, Inc.*[41] that qui tam actions fall under the "historic police powers" delegated to the states by the Constitution, and therefore cannot be preempted by federal law.[42]

Finally, the *qui tam* model would allow relators to file suit seeking statutory per-incident penalties on behalf of other in-state employees. As such, the penalties are intended to punish and deter wrongdoers who violate the statutory rights – not to compensate victims for their injuries.[43] In other words, the qui tam enforcement model does not seek "damages," but a specific penalty that complements the individual damages action or arbitration.[44] This penalty structure underscores the public nature of the claim, taking it out of the specific contract and into the sphere of broader law enforcement.

The timing could not be better for this Legislature to act. Forced arbitration clauses have proliferated beyond what anyone could have imagined just a few years ago, and the federal government has refused to halt their spread.[45] Under the Obama administration, a number of federal agencies undertook rulemaking to regulate forced arbitration – but all of these measures are at risk of repeal or rollback. The Consumer Financial Protection Bureau issued a rule that would have prevented financial companies from using arbitration clauses to deny groups of consumers the ability to pursue their legal rights in court. Although this rule was based on a comprehensive study that found that forced arbitration clauses were effectively blocking billions of dollars of relief for millions of harmed consumers, and had overwhelming public support, it was repealed by the Senate along party lines, with the Vice President casting the tie-breaking vote.[46] President Trump rolled back an Obama-era executive order that forbid recipients of federal

---

[41] 803 F.3d 425 (9th Cir. 2015).

[42] *Id.* at 439.

[43] *Id.* at 430–31 (observing that "the penalties contemplated under the PAGA . . . punish and deter employer practices that violate the rights of numerous employees" (quoting Brown v. Ralph's Grocery Co., 128 Cal Rptr. 3d 854, 862 (2011)).

[44] Arguably, there is friction between qui tam actions and individual cases where punitive damages in the individual case, when added to the qui tam penalty, implicate over-punishment concerns. See BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) (finding that a $2 million punitive damage award was disproportionate to both the conduct alleged and the compensatory damages awarded).

[45] The Arbitration Fairness Act ("AFA"), which would broadly invalidate pre-dispute arbitration clauses imposed on consumers and employees, has been repeatedly introduced by Congressional Democrats since 2005. But the AFA has never once made it out of committee and is surely no closer to enactment in today's political environment.

[46] *See* Zachary Warmbrodt, *Pence Breaks Tie in Senate Vote to Ax Arbitration Rule*, POLITICO, available at https://www.politico.com/story/2017/10/24/consumer-protection-arbitration-senate-pence-244140. Among Republican Senators, only Lindsey Graham (R-SC) and John Kennedy (R-LA) voted against repeal.

contracts from forcing sexual harassment, sexual assault or discrimination claims into arbitration.[47] The Centers for Medicare and Medicaid Services (CMS) reversed course on a rule that would have prohibited nursing homes from forcing patients into arbitration.[48] The Department of Education has indefinitely postponed a rule that would have prevented colleges that take federal aid from blocking access to courts.[49] And the Supreme Court is now poised to overturn the National Labor Relations Board's rule that class action waivers in employment contracts contravene workers' right to engage in collective workplace activity.[50]

As mandatory arbitration clauses foreclose millions of citizens from vindicating their rights, and as the remedial statutes enacted by this legislature and those of 49 other states are thwarted, the Supreme Court's "too darn bad" just doesn't cut it. I urge this Committee to act swiftly to remedy these wrongs so that the laws that protect Vermonters can be meaningfully enforced.

[47] Mary Emily O'Hara, *Trump Pulls Back Obama-Era Protections For Women Workers*, NBC NEWS, April 3, 2017.
[48] Megan Leonhardt, *The Trump Administration Wants to Kill a Rule Protecting Elderly From Nursing Home Abuses*, TIME, June 6, 2017.
[49] Andrew Kreighbaum, *Few Solutions for Defrauded Borrowers*, INSIDE HIGHER ED, June 26, 2017.
[50] *See, e.g.*, Celine McNicholas, Murphy Oil *May Be the Last Workers' Case the Supreme Court Has the Opportunity to Consider*, Economic Policy Institute (2017), available at https://www.epi.org/blog/murphy-oil-may-be-the-last-workers-rights-case-the-supreme-court-has-the-opportunity-to-consider/.