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Testimony to the United States Senate Special Committee on Aging
Provided for the Hearing: "Protecting Older Americans: Leveling the Playing Field for Older Workers"

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Thank you Chairman Scott, Ranking Member Gillibrand, and Distinguished Members of the Committee for the opportunity to speak today.

My name is David Horton. I hold the Fair Business Practices & Investor Advocacy Endowed Chair at UC Davis School of Law. One of my areas of focus is forced arbitration. For example, I have written papers that analyze outcomes of forced arbitrations based on data published by leading arbitration providers[1] and the prevalence and content of forced arbitration clauses used by Fortune 500 companies.[2] Today, we heard from Nancy about how age discrimination adversely impacts older workers. I will discuss how forced arbitration compounds those harms.

At the outset, I should clarify that I believe that arbitration can be valuable in certain contexts. For example, two businesses in the same industry might prefer to submit a dispute to a specialist in their field rather than a generalist judge. Similarly, an arbitration provision in a collective bargaining agreement between a union and an employer can be a fair and efficient way to settle labor grievances.

However, for two main reasons, I oppose the forced arbitration of cases involving pernicious and pervasive wrongdoing such as age discrimination. First, although arbitration derives its legitimacy from the parties' agreement to bypass the court system,[3] forced arbitration in the employment setting is not consensual. Consider the various ways in which workers "agree" to arbitrate. Sometimes employers place arbitration provisions in their onboarding paperwork. Studies confirm what our intuition tells us: workers are bombarded with information, their eyes glaze over at the legalese, and very few realize that they are surrendering their right to access the courts.[4]

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[1] *See, e.g.*, David Horton, *Do Arbitrators Follow the Law? Evidence From Clause Construction*, 126 COLUM. L. REV. FORUM -- (forthcoming 2026); Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1 (2019); David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 45 (2016); David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57 (2015).

[2] *See* David Horton, *Forced Arbitration in the Fortune 500*, 109 MINN. L. REV. 2165 (2025).

[3] *See, e.g.*, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995) ("arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration").

[4] *See, e.g.*, Zev J. Eigen, *The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-*

But even workers who read and understand arbitration mandates have little meaningful choice. For starters, as one court put it: "the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement."[5] Moreover, declining a position due to forced arbitration makes no sense because the odds are that other jobs will also be subject to the process. Indeed, forced arbitration provisions govern more than half of non-unionized private sector workers—a staggering 60,000,000 individuals[6]—and at least 53% of the employment contracts used by Fortune 500 companies.[7] It would be irrational to say no to an offer because of a condition of employment that is becoming increasingly unavoidable.

Similarly, companies often impose arbitration on people who have already been on their payroll for years or even decades. Here is an example from a recent age discrimination case: Joanne Grace started as a nurse at ValleyCare Health System of Ohio in 1976 and worked at a facility that Steward Health Care System acquired in 2017.[8] Steward claims that, in 2019, Grace completed an online training that culminated with her electronically agreeing to arbitrate (although Grace denies this).[9] A year later, Steward hired a new director of nursing who, according to Grace, made inappropriate comments about the fact that Grace was in her late sixties, suggested that Grace retire, and eventually fired Grace and replaced her with someone in their twenties.[10] In 2023, Grace sued.[11] A federal judge in Ohio enforced the arbitration clause and Grace's age discrimination lawsuit, like countless others, disappeared into the arbitral forum.[12] Yet calling Grace's acceptance of arbitration "consensual" stretches that word past the breaking point. Was she really going to leave her job of fifty years over fine print?

The second reason employees should not be compelled to arbitrate age discrimination claims is that arbitration is less hospitable to them than the judicial system. Admittedly, in 1991, the U.S. Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.* that workers can effectively prosecute alleged violations of the Age Discrimination in Employment Act (ADEA) in the arbitral forum.[13] But arbitration (and what we know about the process) has evolved dramatically since then. For example, age discrimination often stems from company-wide policies which call for class or collective proceedings. When the Court decided *Gilmer*, plaintiffs could pursue aggregate relief in arbitration; in fact, the Justices observed that the arbitration provider in that case expressly "provide[d] for collective proceedings."[14] Nevertheless, between 2010 and 2019, the Court decided a rash of cases that held that the mere existence of an arbitration agreement functions as a waiver of an employee's ability to bring a class or collective action.[15] Today, age discrimination victims can band together in the courts but not in arbitration.

Adhesive Contracts, 41 CONN. L. REV. 381, 401 (2008) (finding that just 8% of sales associates at an electronics dealership understand that they had signed a forced arbitration clause when they were hired).

[5] Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000).

[6] *See* Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration* 1-2, ECON. POL'Y INST. (Sept. 27, 2017).

[7] *See* Horton, *supra* note 2, at 2208.

[8] *See* Grace v. Steward Health Care Sys., LLC, No. 4:23CV2178, 2024 WL 3992257, at *1 (N.D. Ohio Aug. 29, 2024).

[9] *See id.* at *2.

[10] *See id.*

[11] *See* Complaint for Damages, Grace v. Steward Health Care Sys., LLC, No. 4:23CV2178 (N.D. Ohio Nov. 7, 2023).

[12] *See id.* at *3-4.

[13] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991).

[14] *Id.* at 32.

[15] *See, e.g.*, Lamps Plus, Inc. v. Varela, 587 U.S. 176, 189 (2019) (interpreting an arbitration clause that does not mention whether it allows class actions to bar such procedures).

Forced employment arbitration also suffers from a "repeat player" problem. Unlike judges, arbitrators are paid and chosen by the parties. This gives them a monetary incentive to rule in favor of frequently arbitrating employers that may select or veto them in future cases. To be sure, *Gilmer* "'decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.'"[16] More recently, though, scholars have conducted econometric analyses of arbitration results and discovered "strong evidence of a repeat player effect."[17] Some of these studies find that the companies that arbitrate the most—"extreme repeat players"—have a higher win probability than firms that only arbitrate once.[18] Others determine that there is a "repeat pairing" phenomenon in which employers fare better when they arbitrate before the same arbitrator more than once.[19] In 2015, *The New York Times* recounted the story of an arbitrator who "ruled in favor of an employee in an age discrimination suit, awarding him $1.7 million, and was never hired to hear another employment case."[20]

Concerns about arbitrator bias are especially pressing because of another sea change since *Gilmer*: the practice of arbitrators—not judges—evaluating whether an arbitration clause is fair enough to enforce. For decades, courts have used the contract doctrine of unconscionability to invalidate arbitration provisions that tilt the scales of justice by saddling plaintiffs with fees, eliminating certain remedies, selecting a distant forum, and shortening the statute of limitations.[21] However, in 2010, the Court decided *Rent-A-Ctr., W., Inc. v. Jackson*, which gave its blessing to "delegation clauses," which assign questions about whether the arbitration should proceed to arbitrators.[22] More than 80% of forced arbitration clauses in the employment contracts of Fortune 500 companies contain delegation clauses.[23] If an arbitrator finds that the arbitration clause is unfair, they deprive themselves of the ability to preside over the merits of the case. As even some arbitrators have admitted, the "financial conflict of interest when arbitrators are vested with the jurisdiction to determine their own jurisdiction is a serious problem."[24]

Finally, there is growing evidence that arbitration's inherent differences—its lack of class and

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[16] *Id.* at 30 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 634 (1985)).

[17] Alexander J. S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 INDUS. & LAB. REL. REV. 1019, 1026-35 (2015) (reviewing 10,335 cases and 2,802 awards in AAA employer-promulgated arbitrations between 2003 and 2013).

[18] *See* Chandrasekher & Horton, *supra* note 1, at 58 (analyzing roughly 16,000 forced employment arbitrations from the AAA, JAMS, and ADR Services, Inc. and concluding that "arbitration favors repeat-playing defendants").

[19] Colvin & Gough, *supra* note 17, at 1037; Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 17-17 (2011) (evaluating the outcomes of 1,213 AAA forced employment arbitrations between January 1, 2003 and December 31, 2007 and concluding that the chances of an employee win fell by 49% against repeat players and 40% in repeat pairings).

[20] 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-justice-system.html.

[21] *See, e.g.*, David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 388 (2012).

[22] *See* Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 72 (2010).

[23] *See* Horton, *supra* note 2, at 2241.

[24] David Horton, *Clause Construction: A Glimpse into Judicial and Arbitral Decision-Making*, 68 DUKE L.J. 1323, 1374 (2019) Partial Final Clause Construction Award at 6 n.1, Schofield v. Delilah's Den. of Phila., Inc., Case No. 03-15-0003-4601 (Am. Arb. Ass'n Commercial & Class Arbitration Tribunal 2016) (Matthews, Arb.)).

collective actions, risk of biased decision-makers, limited discovery,[25] and privacy and confidentiality[26]—deter plaintiffs from pursuing claims. Based on federal and state court filing levels and the percentage of employees covered by forced arbitration clauses, scholars "expect to see between 320,000 and 727,000 employment claims in arbitration" every year.[27] Yet the American Arbitration Association, the leading arbitration provider, typically handles a paltry 2,000-3,000 cases stemming from forced employment arbitration annually.[28] Of course, given the fact that age discrimination is rampant, many of these "missing" lawsuits involve violations of the ADEA or its state analogues.[29]

For these reasons, the phrase "alternative dispute resolution" is a misnomer when applied to the forced arbitration of allegations of age discrimination. Arbitration is not a true "alternative" because employees have no real choice. It is also not "alternative" because it is the norm. And it is not "dispute resolution" because it is designed not to resolve claims, but to suppress them.

An elegant way to remedy these issues would be to pass the Protecting Older Americans Act.[30] This bill allows "the person alleging conduct constituting an age discrimination dispute" the option of invalidating a forced arbitration clause or "joint action waiver . . . with respect to a case which is filed under Federal, Tribal, or State law and relates to the age discrimination dispute."[31] The Protecting Older Americans Act also gives courts, not arbitrators, the exclusive power to decide whether its protections apply.[32] These interventions would give workers with age discrimination claims what they have been sorely lacking: the freedom to pick a forum in which to seek relief.

Thank you again for the opportunity to testify.

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[25] *See, e.g.*, Martinez v. Master Prot. Corp., 118 Cal. App. 4th 107, 118, 12 Cal. Rptr. 3d 663, 672 (2004) ("discovery limitations are an integral part of the arbitration process").

[26] *See, e.g.*, E. Gary Spitko, *Arbitration Secrecy*, 108 CORNELL L. REV. 1729, 1733 (2023).

[27] Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 696 (2018).

[28] *Id.* at 691.

[29] *See id.* at 690; Chandrasekher & Horton, *supra* note 1, at 32.

[30] *See* S.1979 - Protecting Older Americans Act of 2023, https://www.congress.gov/bill/118th-congress/senate-bill/1979.

[31] *Id.*

[32] *See id.*