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Testimony to the Oregon State Legislature
Senate Committee on Workforce
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S.B. 750

Dear Chair Taylor, Vice-Chair Knopp and Members of the Senate Committee on Workforce,

Thank you for allowing me to submit this written testimony on S.B. 750. I hope my testimony will help inform the discussion of the pernicious effects of class-banning forced arbitration clauses on employees, and how S.B. 750 can fill the resulting void in enforcement of workplace protections.

Mandatory, pre-dispute, binding arbitration clauses force all disputes out of our public courts and into secret, privatized arbitrations. Today, arbitration clauses almost universally feature "class action bans," which prevent claimants from joining together to pursue their claims. Given the certainty that employees will almost never be able to arbitrate small-dollar claims individually, class action bans offer defendants near-absolute immunity from legal liability. In short, class-banning arbitration clauses 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.

1. *The Current Forced Arbitration Crisis*

Forced arbitration clauses and class action silence aggrieved workers and reduce corporate accountability for systemic workplace violations.[1] In 2018, the Economic Policy Institute estimated over half the country's workforce is now subject to mandatory arbitration provisions.[2] The scope and effects of forced arbitration are likely to worsen given the Supreme Court's recent decision in *Epic Systems v.*

[1] *See* Lauren Weber, *More Companies Block Employees From Filing Suits*, WALL ST. J. (Mar. 31, 2015), https://www.wsj.com/articles/more-companies-block-staff-from-suing-1427824287 (reporting that CVS, Kmart, Nordstrom, and Halliburton are "among the largest employers that require or ask employees to waive their rights to sue as a class"); Kriston Capps, *Sorry: You Still Can't Sue Your Employer*, CITYLAB, July 11, 2017, https://www.citylab.com/equity/2017/07/the-fine-print-that-keeps-you-from-suing-youremployer/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).

[2] *See* Alexander Colvin, The Growing Use of Mandatory Arbitration, Economic Policy Inst. (Apr. 6, 2018), https://www.epi.org/144131.

Lewis.[3] There, a 5-4 Court upheld class-banning arbitration clauses notwithstanding the federally-guaranteed right to "collective action" protected by the National Labor Relations Act. Observers expect that, given the breadth of the *Epic Systems* opinion, companies that have not yet imposed arbitration on their workers will quickly move to do so in order to take advantage of the immunity from liability promised by the Court's decision.[4]

2. *How We Got Here: Supreme Court Decisions Upholding Forced Arbitration*

The Supreme Court's 2011 decision in *AT&T Mobility v. Concepcion*[5] and its 2013 decision in *American Express v. Italian Colors*[6] broadly upheld the use of forced arbitration clauses. In the wake of these momentous decisions, the Court has repeatedly held that it does not matter whether individual claimants are unable to vindicate their rights in a one-on-one arbitration; all that matters under the FAA is that the arbitration clause is enforced exactly as the company wrote it up. As Justice Kagan wrote in her blistering dissent in *Italian Colors,* "the nutshell version" of the majority view is simply this: "Too darn bad."[7] Oregon enacted a statute to guarantee a livable minimum wage, and another to ensure workers can earn and use sick leave, but an arbitration clause prevents those from vindicating their rights under that statute? "Too darn bad."

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.[8] As research from the Economic Policy Institute shows, these clauses have already expanded beyond the consumer context to employment contracts – and are increasingly prevalent: over 60 million workers no longer have access to the courts to protect their workplace rights.[9]

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[3] 138 S. Ct. 1612 (2018).

[4] Jess Bravin, *Supreme Court Imposes Limits on Workers in Arbitration Cases*, WALL ST. J. (May 21, 2018), https://www.wsj.com/articles/supreme-court-imposes-new-limits-on-workers-in-arbitration-cases-1526916858 (reporting that lawyers expect that companies will now impose forced arbitration clauses "on millions more" workers, and that the *Epic Systems* decision could affect "worker claims against Amazon, Grubhub, Lyft and Uber," among other large companies).

[5] 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").

[6] 570 U.S. 228 (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).

[7] *Italian Colors*, 570 U.S. at 240.

[8] *See* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice,* N.Y. TIMES (Nov. 1, 2015), 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 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.").

[9] Colvin, *supra* note 5.

3. *A Deepening Problem*

Forced arbitration prevents working people from vindicating their statutory rights and having their disputes resolved in open court before a jury of their peers. For example, 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.[10] These arbitration clauses apply to all disputes regarding the employment relationship, including payment of wages and benefits, provision of breaks and rest periods, rights in termination, prohibitions against discrimination or harassment.[11]

Forced arbitration perpetuates the exploitation of women in the workplace by shuttling victims into a private system where each is unaware of the others 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.[12] 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.[13] And while some companies have recently excepted claims of sexual harassment from their arbitration clauses, these new corporate policies beg the question: if claims of sexual harassment are "important enough" to be heard in public courts of law, why not claims of discrimination, wage theft, wrongful termination or other allegations of systemic workplace harms?[14]

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[10] *See, e.g.,* Capps, *supra* note 4 (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).

[11] 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").

[12] *See generally* Emily Martin, *Forced Arbitration Protects Sexual Predators and Corporate Wrongdoing*, CONSUMER L. & POL'Y BLOG (Oct. 23, 2017), http://pubcit.typepad.com/clpblog/2017/10/forced-arbitration-protects-sexual-predators-and-corporate-wrongdoing.html.

[13] Drew Harwell, *Sterling Discrimination Case Highlights Differences Between Arbitration, Litigation,* WASH. POST (Mar. 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.

[14] *See, e.g.,* Terri Gerstein, *End Forced Arbitration for Sexual Harassment. Then Do More,* N.Y. TIMES (Nov. 14, 2018), https://www.nytimes.com/2018/11/14/opinion/arbitration-google-facebook-employment.html ("[W]hy would it make sense to end forced arbitration in cases of sexual harassment only? Why should any company still block people from filing in court when they're racially harassed or underpaid or paid less because of their national origin? All are

4. *What Can Oregon Do?*

Not only are Oregonians 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.[15] State law enforcement agencies cannot realistically oversee every workplace in the entire state. They must instead direct their limited resources toward high-priority industries or practices, and rely on private suits to complement their efforts. An environment in which a state agency is functionally responsible for *all* law enforcement will be one in which corporations will play fast and loose with the rules – confident that wrongdoing is far less likely to be detected.[16]

S.B. 750 seeks to expand the enforcement capacity of the state's labor agency by authorizing private citizens to initiate public enforcement actions on behalf of the state. This legislation is modeled on an ancient mechanism for citizen-assisted enforcement, known as "*qui tam*," that encourages whistleblowers to bring allegations of wrongdoing to light.[17] The federal government and 30 states use *qui tam* statutes to deter and punish fraud on the government. State governments have collected millions in cases brought by *qui tam* plaintiffs, known as relators.[18]

This citizen-enforcement model can and should be expanded to enforce workplace rights. 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.[19] Washington, New York, Vermont, and

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offenses against human dignity, and in all of these cases, there is the same tremendous power differential that makes it so hard for people to speak up.").

[15] *See, e.g.,* Myriam Gilles & Gary Friedman, After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 668 (2012), (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.").

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

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

[18] 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, Conn. Office of the Att'y Gen., *Connecticut Joins $1.2 Billion Settlement with Johnson & Johnson, Janssen Pharmaceuticals* (Nov. 4, 2013), https://portal.ct.gov/AG/Press-Releases-Archived/2013-Press-Releases/Connecticut-Joins-12-Billion-Settlement-with-Johnson--Johnson-Janssen-Pharmaceuticals. In 2016, Washington State recovered $46.7 million by joining a pharmaceutical overcharging case. Press Release, Wash. State Office of the Att'y Gen., *AG Recovers Record $46.7 Million for the State Medicaid Program from Pharma Co. Wyeth's Underpayments* (Apr. 28, 2016), https://www.atg.wa.gov/news/news-releases/ag-recovers-record-467-million-state-medicaid-program-pharma-co-wyeth-s.

[19] *See* Private Attorneys General Act of 2004, CAL. LAB. CODE § 2698 *et seq.*; CAL. ASSEMBLY JUDICIARY COMM., COMM. ANALYSIS OF S.B. 796, at 3-4 (June 26, 2003).

Massachusetts are currently considering *qui tam* bills similar to S.B. 750.[20]

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, the state of California collected over $116 million owed to workers – about $7 per worker in the state. And, according to attorneys who practice employment law, PAGA has markedly improved employer compliance with statutory and regulatory mandates.[21]

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. 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.[22]

Relatedly, courts have held that "private individuals cannot contract away the state's right to enforce the law."[23] Accordingly, claims brought by these private citizens in the name of the state are not subject to arbitration.[24] The Ninth Circuit recently held in *Sakkab v. Luxottica Retail North America*[25] 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.[26]

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

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[20] H.B. 1965, 2019-20 Leg., Reg. Sess. (Wash. 2019); H.R. 789, 2017-18 Gen. Assemb., Reg. Sess. (Vt. 2018), S.1066 (Mass. 2019)

[21] Laura Reathaford & Eric Kingsley, *He Said, She Said: Employment Litigators Debate California's Private Attorneys General Act*, 23 No. 5 WESTLAW J. CLASS ACTION 11, *1 (2016).

[22] 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).

[23] Janet Cooper Alexander, *To Skin a Cat: Qui Tam Actions as a State Legislative Response to* Concepcion, 46 U. MICH. J. L. REFORM 1203, 1228.

[24] *Id.* (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*, 86 FORDHAM L. REV. 2223 (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).

[25] 803 F.3d 425 (9th Cir. 2015).

[26] *Id.* at 439.

who violate the statutory rights – not to compensate victims for their injuries.[27] In other words, the *qui tam* enforcement model does not seek "damages," but a specific penalty – underscoring the public nature of the claim, taking it out of the specific contract and into the sphere of broader law enforcement.

SB 750 also contains several provisions that allow the state to oversee litigation undertaken on its behalf. Not only does the bill provide the Commissioner of the Bureau of Labor and Industries (BOLI) a period of exclusive jurisdiction to investigate and resolve the alleged violation before a suit can be filed, but the Commissioner can also intervene and elect to take control of the action after litigation has commenced. The bill provides for the Commissioner to monitor the litigation through service of pleadings and transcripts, to opine on proposed settlements before the court approves them, and to approve any settlements reached during BOLI's initial review period. The Commissioner may also move to disqualify any private counsel retained by a relator based on conduct incompatible with representing the state's interest in enforcement. These provisions ensure that *qui tam* relators serve the state's interest in deterring serious and widespread violations. They also reinforce the substantial differences between private class actions and public enforcement actions, further helping the bill avoid FAA preemption.

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.[28] 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 Oregon's residents can be meaningfully enforced.

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[27] *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. Ralphs Grocery Co., 128 Cal. Rptr. 3d 854, 862 (Cal. Dep't Super. Ct. 2011)).

[28] 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.