Article

Investor Justice

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There is a systemic flaw in the investor protection landscape. Unrepresented investors face off against well-resourced repeat-player firms that almost always have lawyers. While consumers face similar challenges in civil courts, in forced securities arbitration, the decisionmaker may not have a law degree, is prohibited from conducting any outside legal research, and has no monetary incentive to read materials the parties submit. These realities amplify already-existing informational and resource asymmetries between Main Street investors and stockbrokers and undermine the market-legitimizing function of securities arbitration. Despite being designed to permit investors to recoup losses without the aid of an attorney, the mandatory securities arbitration system has evolved into a process that investors cannot navigate on their own. This Article explores the unintended consequences of procedural changes designed to improve and professionalize the mandatory securities arbitration forum. In addition to shedding light on structural norms that disproportionately impact average investors, this Article proposes interventions to ameliorate those burdens. In so doing, it contributes to ongoing discourse concerning investor protection, procedural justice in forced arbitration, and access to justice for regular people.

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INTRODUCTION

Soon after losing her job and the death of her parents, a fifty-three-year-old Floridian hired a stockbroker to help her mitigate the financial impact of these losses.[1] She "did not want to get rich," but rather "wanted to ensure that her limited financial assets would last her the rest of her life."[2] Having no prior stock market experience, she unhesitatingly trusted her stockbroker to help her protect her nest egg.[3] But when she sought to access her funds, she learned that $50,000 of her savings were locked into a risky and illiquid investment.[4] Around the same time, on the other side of the country, a sixty-nine-year-old California man sought a stockbroker's advice to help him navigate retirement.[5] His stockbroker sold him a similarly illiquid investment.[6]

At first blush, both investors have much in common: both saved for retirement; both sought out and relied upon expert advice; both purchased a non-traded Real Estate Investment Trust (REIT), allegedly due to the large fee it generated for their stockbroker; and both were allegedly ineligible for the investment sold to them.[7] Despite these shared characteristics, the ending to

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1. Patrick Donachie, *Lost in Arbitration*, WEALTH MGMT. (Nov. 21, 2022), https://www.wealthmanagement.com/industry/lost-arbitration [https://perma.cc/3R3Y-N53S] (describing Kathy Piniewski's difficulties in recovering her investment); Claimant's Reply to Respondent's Answer and Affirmative Defenses and Supplemental Submission at 6, Piniewski v. Royal All. Assocs., Inc., No. 14-03551, 2015 WL 8521355 (Fin. Indus. Regul. Auth. Dec. 3, 2015) [hereinafter Piniewski Reply] (LaLonde, Arb.).

2. Piniewski Reply, *supra* note 1, at 6.

3. *Id*. at 14 (stating that the investor's "entire prior investment history consisted of savings accounts and purchasing CDs and annuities").

4. Donachie, *supra* note 1.

5. Complaint at 8, Patatian, No. 2018057235801, 2022 WL 1566758 (Fin. Indus. Regul. Auth. Jan. 12, 2021) [hereinafter Patatian Complaint] (describing the relationship between Patatian, an investment advisor, and the elderly investor).

6. *Id*. at 7 ("[The investor]'s $95,279 non-traded REIT purchase represented almost all of [the investor]'s liquid net worth of approximately $130,000 and exceeded the ten percent concentration limit.").

7. Respondent Kathy Piniewski's Response in Opposition to Petition for an Order Modifying an Arbitration Award or, in the Alternative, Vacating an Arbitration Award at 3, Royal All. Assoc., Inc. v. Piniewski, No: 6:16-cv-13-Orl-22GJK, 2016 WL 11581005 (M.D. Fla. Sept. 26, 2016) [hereinafter Piniewski Response] ("[The investor]'s agent knew that she did not qualify for the REIT, but he sold it to her anyway because the REIT paid [the stockbroker] a seven percent commission."); *id*. ("[H]e placed $50,000 of her limited assets in an

each investor's story differs considerably: the Florida woman recouped her investment, while the California senior's assets remain locked in the non-traded REIT, and he continues to work as a security guard at the age of seventy-two.[8] An accident of geography may explain the discrepancy. The Florida woman lives in one of only six states where investors like her can access free legal assistance for stockbroker negligence, and with that help, she was able to recover her losses.[9]

California investors have no such option, and if the security guard wanted to recoup his losses, he most likely would have had to represent himself, facing off against a well-resourced stockbroker who had experienced counsel in a forced arbitration forum created and overseen by the securities industry.[10] Most Main Street investors who have smaller claims face a similar fate—they are unlikely to secure an attorney to help them recover for stockbroker malfeasance unless they lost more than

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illiquid real estate investment trust (REIT), an investment for which she did not qualify because she neither owned sufficient assets nor had sufficient income (she was unemployed) to purchase any shares."); Patatian Complaint, *supra* note 5, at 8 (alleging that a stockbroker falsified documents to make the investor appear eligible for non-traded REIT); *see also* Benjamin P. Edwards, *Conflicts & Capital Allocation*, 78 OHIO ST. L.J. 181, 188 (2017) ("Non-traded REITs appear cynically designed to make it possible for financial intermediaries to advance their own interests at the expense of their clients.").

8. *Compare* Donachie, *supra* note 1 (noting Piniewski's success with reclaiming the mismanaged investment), *with* Patatian Complaint, *supra* note 5, at 8 ("[The investor] planned to retire from his job as a security guard shortly after his REIT purchase. He had to continue working because the REIT that Patatian sold to him, which is a substantial part of his retirement assets, remains illiquid.").

9. The University of Miami Law School's Investor Rights Clinic represented her. Piniewski v. Royal All. Assoc., Inc., No. 14-03551, 2015 WL 8521355, at *1 (Fin. Indus. Regul. Auth. Dec. 3, 2015) (LaLonde, Arb.); *see* Nicole G. Iannarone, *Small Claims Securities Arbitration*, 26 U. PA. J. BUS. L. 731, 748–49 (2024) (describing law school securities arbitration clinics); *see, e.g.*, *How to Find an Attorney*, FINRA, https://www.finra.org/arbitration-mediation/how-find-attorney [https://perma.cc/QFE9-2G6P] (listing securities arbitration law school clinics); *see also* Donachie, *supra* note 1 (describing the role of law school clinics in providing legal services to small investors and SEC initiatives to foster investor rights clinics).

10. *See, e.g.*, Iannarone, *supra* note 9, at 734 (explaining the challenges small investors face when going up against well-resourced industry insiders). The identity of the California investor is not public, and it is unclear if he asserted any claim against his stockbroker and, if he did not, why he did not do so. Regulatory filings indicate only that he is still in the investment. *See* Patatian Complaint, *supra* note 5, at 8.

$100,000.[11] As one might expect, legal representation in stockbroker suits makes a difference.[12] Investors with lawyers in small-claims arbitration against stockbrokers recover more frequently than investors who go it alone.[13] In this sense, the California and Florida investors' situations are not unlike millions of Americans with important legal disputes who are unable to obtain legal assistance.[14]

Yet there are important differences between consumers who represent themselves in civil courts and investors who do the same in forced securities arbitration. The former often have access to courthouse resources to help them navigate the system: a patient judge who researches the law applicable to the dispute, a helpful court clerk, a non-lawyer volunteer to guide them to forms, self-help aids, or even appointed counsel to represent them.[15] Courts have thus taken some steps to lessen asymmetries existing between self-represented consumers and represented litigants.[16] In forced securities arbitration, however, such

11. *Regulatory Notice 17-34*, FINRA 3 (Oct. 18, 2017), https://www.finra.org/rules-guidance/notices/17-34 [https://perma.cc/G8H2-9EGR] ("Investors with small claims (claims of $100,000 or less) who want to be represented in the forum have limited access to attorneys because some attorneys may not be willing to offer services given the small dollar value of a dispute."); *see* H.R. REP. NO. 117-393, at 101 (2022) ("[T]oo many small-dollar investors lack access to high-quality legal advice and representation, either because they cannot afford representation, or because their claims are too small to obtain private counsel."); *see also* Donachie, *supra* note 1 ("I was online and tried to get a lawyer, but they didn't think it was worth it.").

12. Constantine N. Katsoris, *Securities Arbitration: A Clinical Experiment*, 25 FORDHAM URB. L.J. 193, 208 (1998) ("Adequate and affordable representation of claimants in securities arbitrations has been difficult to obtain in small cases. Yet, such representation makes a difference in the success of such claimants." (footnote omitted)).

13. Iannarone, *supra* note 9, at 736 (finding empirical evidence that investors with securities claims under $50,000 in mandatory FINRA securities arbitration forums who are represented have a statistically significant higher recovery rate than investors who proceed on a pro se basis).

14. *See infra* Part I (outlining the structural challenges that disproportionately impact low-income and small investors who are often forced to represent themselves in arbitration proceedings).

15. *See* Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509, 525 (2022) (describing the different resources, tools and trainings courts may use to aid *pro se* litigants).

16. *See infra* Part II (tracing the evolution of securities arbitration into forced arbitration model and the different procedural hurdles for pro se litigants as compared to courts).

resources are not available, and some are even prohibited.[17] For example, unlike judges in civil court, arbitrators are expressly prohibited from conducting any research and are admonished to rely only upon the legal and factual materials submitted by the parties.[18] Such prohibitions may be the reason for the advantage that repeat-player broker-dealer firms have in the securities arbitration forum against unrepresented investor claimants.[19] Moreover, investors with small securities arbitration claims will have their cases decided by an arbitrator who has no significant ties to the securities industry.[20] That arbitrator may or may not be a lawyer, and they may or may not have any expertise concerning the investment at the heart of the investor's claim.[21] The *intention* of these rules was to provide investors with a fair and impartial forum for resolving disputes.[22] Yet, as applied to small claims, these procedural rules may have an outsized *impact* on self-represented investors and undermine the goal of small claims securities arbitration—to provide investors with small claims a simplified method of obtaining recovery for stockbroker malfeasance without the aid of an attorney.[23]

This Article uncovers structural norms in the mandatory securities arbitration system that disadvantage investors whose

17. *See infra* Part II.A.4 (describing the procedural peculiarities of securities arbitrations like the ban on arbitrators doing outside research).

18. *Id*. (noting how FINRA prohibits arbitrators from engaging in outside research concerning the applicable law).

19. Mark Egan, Gregor Matvos & Amit Seru, *Arbitration with Uninformed Consumers* 3 (Harv. Bus. Sch. Fin. Working Paper No. 19-046, 2021) (on file with Minnesota Law Review) ("[F]irms have an informational advantage over consumers . . . resulting in industry-friendly arbitration outcomes.").

20. Iannarone, *supra* note 9, at 740 ("[The] arbitrator must . . . be a 'public' arbitrator, meaning that they do not have ties to the securities industry.").

21. *See infra* Part II.C.2 (detailing impact on small investors of the arbitrator's background standards and training).

22. *See infra* Part II (describing intent of securities arbitration reforms, including lowering costs and increasing efficiency while providing investors with more agency in arbitrator selection).

23. *See* Nicole G. Iannarone, *Structural Barriers to Inclusion in Arbitrator Pools*, 96 WASH. L. REV. 1389, 1401–02 (2021) [hereinafter Iannarone, *Structural Barriers*] (describing development of simplified securities arbitration rules); *see also* SEC. INDUS. CONF. ON ARB., REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION TO THE SECURITIES AND EXCHANGE COMMISSION 4 (1977) [hereinafter SICA REPORT] (claiming small claims arbitration provides "a public customer with a relatively simple procedure for resolving disputes without the aid of an attorney or the need to appear at a hearing").

damages most closely approximate the savings of the average American retiree. In so doing, it examines rule changes intended to improve and professionalize securities arbitration that may have instead harmed the most vulnerable investors. These challenges pro se investors face appear to be of a greater magnitude than those experienced by pro se consumer claimants in state courts where judges, systems, and materials may counteract some of the inequities between represented and pro se parties in civil claims. In addition, the structural impediments identified in this Article illustrate that previously observed inequities between inexperienced investor claimants and well-represented, repeat-player parties understate access to justice concerns in forced securities arbitration. Indeed, the findings highlight significant burdens placed upon the shoulders of the investors least able to overcome them.

The Article proceeds in three parts. Part I explores why access to justice for retail investors with small claims matters. Part II describes the mandatory securities arbitration forum and procedural changes that may have diminished its initial goal of providing a forum in which unrepresented parties could represent themselves. This Part also identifies well-intentioned changes to securities arbitration that unduly impact and burden small claims investors without counsel. Finally, Part III offers potential solutions to ameliorate asymmetries between self-represented small claims investors and repeat-player broker-dealers and associated persons in the mandatory securities arbitration forum.

I. WHY DO INVESTORS NEED JUSTICE?

America has a problem with lawyers, and that problem is not that there are too few of them.[24] Rather, there is a plethora of lawyers for those who can afford them, but a dearth of lawyers for middle-class and low-income Americans facing civil problems (let alone criminal legal problems).[25] For those who represent

24. *See, e.g.*, DEBORAH L. RHODE, ACCESS TO JUSTICE 3 (2004) ("It is a shameful irony that the country with the world's most lawyers has one of the least adequate systems for legal assistance.").

25. *See id*. ("According to most estimates, about four-fifths of the civil legal needs of the poor, and two- to three-fifths of the needs of middle-income individuals, remain unmet."); *see,* J. David Greiner, Dalié Jiminéz & Lois R. Lupica, *Self-Help, Reimagined*, 92 IND. L.J. 1119, 1120 (2017) ("By any measure, the

themselves, multiple barriers inside civil legal systems make clear that those systems are not designed for them.[26] Given the bleak outlook for regular Americans with civil legal issues, why focus on representation and access to justice questions in a securities arbitration forum?[27] To even have a dispute with a stockbroker, an individual must have had enough assets to invest in the first place.[28] That fact alone separates investors with small accounts from the nearly half of all Americans who do not have sufficient savings to cover three months' living expenses if they were faced with an unexpected health emergency, layoff, or other financial exigency.[29] It also sets aggrieved retail investors apart

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overwhelming majority of human beings (as opposed to corporate, labor unions, or other incorporeal entities) who face legal problems in the United States do so without a traditional attorney-client relationship and indeed, without any form of professional legal assistance." (footnote omitted)); *see also* Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the 'New' Civil Judges*, 2018 WIS. L. REV. 249, 252 (2018) ("State civil court dockets are now dominated by lay people who manage their civil justice problems without the assistance of a lawyer . . . ." (footnote omitted)).

26. *See* RHODE, *supra* note 24, at 5 ("[T]hose who attempt to navigate the system unassisted confront unnecessary obstacles at every turn . . . . Yet the system has been designed by and for lawyers, and too little effort has been made to ensure that it is fair or even comprehensible to the average claimant."); Carpenter, Steinberg, Shanahan & Mark, *supra* note 25, at 259 ("Our modern civil justice system was not designed-outside of the small claims context—for lay people. It was designed by and for lawyers, with a baseline assumption of party control over litigation."); *see also* Carpenter, Shanahan, Steinberg & Mark, *supra* note 15, at 512 ("In America's civil justice system, millions of low- to middle-income people without counsel or legal training must protect and defend their rights and interests in courts designed by lawyers for lawyers." (footnote omitted)).

27. *See, e.g.*, RHODE, *supra* note 24, at 6 (discussing difficulty determining which legal needs most worthy of assistance and how much to provide).

28. *See 2023 SIFMA Capital Markets Factbook*, SIFMA 76 (July 30, 2023), https://www.sifma.org/wp-content/uploads/2022/07/2023-SIFMA-Capital-Markets-Factbook.pdf [https://perma.cc/8WHH-M9DR] (reporting that 52.6% of American households have direct or indirect stock holdings in 2019). While half of Americans have some equity ownership, the American savings rate for 2022 was reported at only 3.7%. *Id.* at 92.

29. Judy T. Lin, Christopher Bumcrot, Gary Mottola, Olivia Valdes, Robert Ganem, Christine Kieffer, Gerri Walsh & Annamaria Lusardi, *Financial Capability in the United States*, FINRA INV. EDUC. FOUND. 6 (July 2022), https://www.finrafoundation.org/sites/finrafoundation/files/NFCS-Report-Fifth-Edition-July-2022.pdf [https://perma.cc/4GN9-8W65] (reporting that fifty-three percent of Americans surveyed in 2021 have "set aside 'rainy day' funds to cover three months' worth of expenses in case of sickness, job loss, economic downturn or other emergencies").

from millions of Americans with unmet civil legal needs related to life necessities who cannot afford an attorney.[30] I make no claim that such implications mean that providing access to justice in securities arbitration should take precedence in allocating scarce resources among the many with unmet—and arguably more pressing—legal needs. That aggrieved retail investors start—or remain—in better situations than most people with civil legal problems does not mean, however, that access to justice in securities arbitration should be ignored.[31] In fact, the inability of investors to recover smaller claims as a result of lack of access either to counsel or to the securities arbitration forum has serious implications for individual retail investors, the health of capital markets, and forced arbitration.[32] This Part unpacks those implications.

A. INVESTOR IMPACT

Suffering a financial loss because of stockbroker misconduct results in harm to the individual investor in the form of monetary damages.[33] While some retail investors may be able to bear those losses, the investors most likely to have small claims may

30. *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans*, LEGAL SERV. CORP. (June 2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-ExecutiveSummary.pdf [https://perma.cc/EDM7-MJQW] ("[Eighty-six percent] of the civil legal problems reported by low-income Americans in the past year received inadequate or no legal help."). Scholars have also uncovered barriers both apart from and in addition to monetary resources that prevent many Americans from seeking legal assistance for civil legal problems. *See, e.g.*, Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1317 (2016) ("Negative experiences with, and perceptions of, criminal law, coupled with negative past experiences with public institutions, means that for many poor people, seeking help is off the table."). *See generally id*. (arguing that "cultural and cognitive barriers" preventing people from seeking legal advice should be included as part of the definition of access to justice).

31. *See, e.g.*, RHODE, *supra* note 24, at 6 (discussing difficulty prioritizing legal needs for promoting greater access and representation).

32. *See id*. at 11 ("Protecting legal rights often has value beyond what those rights are worth to any single client.").

33. *See, e.g.*, Joan Macleod Heminway, *Hell Hath No Fury Like an Investor Scorned: Retribution, Deterrence, Restoration, and the Criminalization of Securities Fraud Under Rule 10b-5*, 2 J. BUS. & TECH. L. 3, 5 (2007) ("Private civil enforcement generally results in damages being assessed against a defendant found liable for violating Rule 10b-5.").

not be so lucky.[34] The fact that they had money to invest does not mean that an investor is wealthy or that the loss of investments due to stockbroker misconduct does not impact their life.[35] Instead, if the investor with small claims cannot—or does not—recover those economic losses, they may suffer a cascade of additional harms.[36] This Section describes the impact of financial misconduct on those investors, including the economic and non-economic harms they may suffer, highlighting how lack of access to justice in the securities arbitration forum uniquely impacts investors with the smallest claims and the communities in which they live.

Stockbroker misconduct arises in a relationship where one party—the investor—places enormous trust in an expert to advise and guide them.[37] In general, Americans are vulnerable to financial misconduct because they lack financial literacy.[38] This

34. Nicole G. Iannarone, Elissa Germaine, Elizabeth Goldman, Christine Lazaro, Robert Talbot, Alice L. Stewart, Robert A. Uhl, J. Samuel Tenenbaum, Teresa J. Verges, David Michael White, Gary J. Pieples, Howard S. Meyers & Bruce Sanders, Comment Letter on FINRA Special Notice: Engagement Initiative 2 (June 19, 2017) [hereinafter Clinic Letter], https://www.finra.org/sites/default/files/notice_comment_file_ref/SN-32117_GSU_comment.pdf [https://perma.cc/PLF5-W67C] (highlighting the difficulties for small investors in finding representation for small claims that nonetheless have drastic financial consequences).

35. *See, e.g.*, Qudsia Shafiq, Student Att'y, Inv. Advoc. Clinic, Ga. State Univ. Coll. of L., Prepared Remarks at the Investor Advisory Committee Meeting 2 (Oct. 12, 2017) [hereinafter Shafiq Remarks], https://www.sec.gov/spotlight/investor-advisory-committee-2012/qudsia-shafiq-remarks-iac-101217.pdf [https://perma.cc/UX98-VT9X] (describing difficult financial choices facing regular retail investors harmed by stockbroker misconduct).

36. *See, e.g.*, Iannarone, *supra* note 9, at 733 ("Though an American with savings to invest has more wealth than the typical American, losses at the hands of a stockbroker force at least some segment of retail investors into poverty." (footnote omitted)).

37. *See* Shafiq Remarks, *supra* note 35, at 2 ("When we listen, we discover our clients truly and deeply trusted their broker on both a personal and professional level.").

38. Jill E. Fisch, Annamaria Lusardi & Andrea Hasler, *Defined Contribution Plans and the Challenge of Financial Illiteracy*, 105 CORNELL L. REV. 741, at 757–71 (2020) (describing how a substantial amount of Americans lack of financial literacy); *see also* Judy T. Lin, Christopher Bumcrot, Gary Mottola, Olivia Valdes & Gerri Walsh, *Investors in the United States: The Changing Landscape*, FINRA INV. EDUC. FOUND. 2 (2022), https://www.finrafoundation.org/sites/finrafoundation/files/NFCS-Investor-Report-Changing-Landscape.pdf [https://perma.cc/A4CH-QRB3] ("Investor knowledge is low. On the ten-

general lack of financial literacy may lead some investors to seek financial advice to guide them.[39] Investors with lower financial literacy may be more likely to trust the advice of their investment professional and thus be at a higher risk of becoming a victim of adviser misconduct.[40] When trust in such a close

question investing quiz, the average number answered correctly is 4.7."); Lisa Fairfax, *The Securities Law Implications of Financial Literacy*, 104 VA. L. REV. 1065, 1085–112 (2018) (describing how securities law remains premised on the financial literacy of investors and their ability to understand what information is being disclosed).

39. Lin, Bumcrot, Mottola, Valdes & Walsh, *supra* note 38, at 19 (reporting that 73% of investors rely on investment research and tools from their financial advisers and 66% rely on financial adviser recommendations); Press Release, Natixis Inv. Managers, Millennials Want Financial Advice, Not Trophies (May 4, 2022), https://www.im.natixis.com/en-us/about/newsroom/press-releases/2022/millennials-want-financial-advice-not-trophies [https://perma.cc/P9YG-UW25] (finding 75% of Millennials, 67% of Gen X, and 70% of Baby Boomers have a financial adviser); *see also* Press Release, Ceruilli Assocs., Investors' Willingness to Engage in Paid Advice Relationships Is Peaking (Oct. 22, 2020), https://www.cerulli.com/press-releases/investors-willingness-to-engage-in-paid-advice-relationships-is-peaking [https://perma.cc/7QA5-A8SB] (reporting 56% of investors willing to pay for financial advice); Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 VA. L. REV. 1025, 1049 (2009) ("[W]hen faced with complex, difficult, and affect-laden choices (and hence a strong anticipation of regret should those choices be wrong), many investors seek to shift responsibility for the investments to others."); Angela Fontes, Katheryn Meagher, Brian Mulford, Adam Bloomfield, Robert Ganem, Olivia Valdes & Gary Mottola, *Where Are They Now? Following Up with the New Investors of 2020*, FINRA INV. EDUC. FOUND. 1 (Mar. 2023), https://lawapps2.law.miami.edu/clink/download.aspx?ca_id=1811&cad_id=2728 [https://perma.cc/HPN5-24DF] (describing trend of new investors shifting to financial advisers to guide their investments).

40. *See, e.g.*, Craig Honick, Marti DeLiema, Emma Fletcher, Gary R. Mottola, Rubens Pessanha & Melissa Trumpower, *Exposed to Scams: Can Challenging Consumers' Beliefs Protect Them from Fraud*, FINRA INV. EDUC. FOUND. 10 (Sept. 2021), https://www.finrafoundation.org/sites/finrafoundation/files/exposed-to-scams-can-challenging-consumers-beliefs-protect-them-from-fraud.pdf [https://perma.cc/3MAG-Y5LL] (finding that investors with a mental frame of order and compliance with authority are is more likely to lead to financial loss); *id.* (finding that an *intelligence* mental frame of believing that "[n]ot knowing the answers causes shame and reduces an individual's status" is more likely to lead to financial loss); *id.* at 22 ("The *intelligence* mental frame may prompt individuals to skip due diligence, fearing that they will appear less worldly and informed than others."); *id.* (finding that this order frame in investors "may predispose people to view financial offers as well-deserved gifts or to trust individuals who are, in fact, not worthy of anyone's trust"); *see also* Lin, Bumcrot, Mottola, Valdes & Walsh, *supra* note 38, at 19 (reporting 73% of investors rely on investment research and tools from their financial advisers and 66% rely on financial adviser recommendations).

relationship is compromised, greater damage to social groups results.[41]

In addition to the direct economic costs of stockbroker misconduct (for example, the loss of the investment and fees related thereto), research suggests that there may also be indirect financial costs suffered by victims of investment fraud.[42] Those costs include late fees, banking fees, and, potentially, bankruptcy.[43] In addition, policy choices that have resulted in a shift from employer-sponsored pensions to employee responsibility for retirement planning[44] mean that investment losses may have a more

41. *See, e.g.*, Lisa M. Fairfax, *The Thin Line Between Love and Hate: Why Affinity-Based Securities and Investment Fraud Constitutes a Hate Crime*, 36 UC DAVIS L. REV. 1073, 1089 (2003) (arguing exploitation of trusting relationship within social group causes greater societal damage than crime or fraud perpetrated by a stranger).

42. *See* Applied Rsch. & Consulting LLC, *Non-Traditional Costs of Financial Fraud*, FINRA INV. EDUC. FOUND. 1 (Mar. 2015), https://www.finrafoundation.org/sites/finrafoundation/files/non-traditional-costs-financial-fraud.pdf [https://perma.cc/HL9M-KJNT] ("Beyond emotional costs, nearly half of fraud victims reported incurring indirect financial costs associated with fraud."); *id.* (detailing indirect financial costs of financial fraud suffered by victims as late fees (25%), fees for bounced checks (23%), and declaring bankruptcy (9%)). Note, however, that this research details financial fraud which can include some forms of stockbroker misconduct (for example, fraud claims) but may overstate victim impact because it includes other types of fraud, and may understate impact to the extent that non-fraud based financial misconduct (for example, negligence, breach of contract, etc.) was not included in the study. *Id.* at 4.

43. *Id.* at 1.

44. *See* ELIZABETH A. MYERS & JOHN J. TOPOLESKI, CONG. RSCH. SERV., IF12007, VISUAL DEPICTION OF THE SHIFT FROM DEFINED BENEFIT (DB) TO DEFINED CONTRIBUTION (DC) PENSION PLANS IN THE PRIVATE SECTOR (2021) (describing fifty-year trend from defined benefit plans to defined contribution plans); Fisch, Lusardi & Hasler, *supra* note 38, at 746–54 (recounting the "evolution of defined contribution plans"); Anne Tucker, *Retirement Revolution: Unmitigated Risks in the Defined Contribution Society*, 51 HOUS. L. REV. 153, 156 (2013) ("The average American employee saving for retirement does so through investments pooled in an individual account found in self-directed defined contribution plans, like the 401(k)-the subject of this Article."); Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV. 197, 200 (2008) (identifying an increase in investor responsibility for retirement); Janice Kay McClendon, *The Death Knell of Traditional Defined Benefit Plans: Avoiding a Race to the 401(K) Bottom*, 80 TEMP. L. REV. 809, 813–19 (2007) (explaining the "shift away from traditional retirement plan sponsorship"); Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 453 (2004) ("Americans today primarily conceive of and implement retirement savings in the form of

significant impact on investors' lives.[45] The more advanced in age an investor is at the time of an investment loss, the less time and opportunity they will have to make up that loss.[46] These investors also largely lack the safety net of a defined benefit pension plan.[47]

As a result, when investments are lost due to stockbroker misconduct, investors may be forced back into the workforce at an advanced age.[48] For example, the California investor whose story opens this Article continued to work as a security guard at the age of seventy-two.[49] This story is not an outlier: being a victim of securities fraud forced an eighty-three-year-old widow to

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individual accounts."); Jayne Elizabeth Zanglein, *Investment Without Education: The Disparate Impact on Women and Minorities in Self-Directed Defined Contribution Plans*, 5 EMP. RTS. & EMP. POL'Y J. 223, 227 (2001) ("In the 1980s, employers abandoned defined benefit plans in a mass exodus and adopted defined contribution plans."); Maarten C.J. van Rooij, Annamaria Lusardi & Rob J.M. Alessie, *Financial Literacy, Retirement Planning and Household Wealth*, 122 ECON. J. 449, 449 (2012) ("The relationship between financial literacy and household behaviour is important, as individuals are increasingly being asked to take on responsibility for their financial well being and their retirement preparation.").

45. *See, e.g.*, Christine Hurt, *Evil Has a New Name (and a New Narrative): Bernard Madoff*, 2009 MICH. ST. L. REV. 947, 987 (2009) ("[O]ne's savings and retirement accounts have become the new castles that must be protected by the government from criminal fraudsters. As daily survival has become expected and our life expectancy extended, our fears have shifted to survival of our retirement funds."); *Get the Facts on Economic Security for Seniors*, NAT'L COUNCIL ON AGING (Jun. 1, 2024), https://www.ncoa.org/article/get-the-facts-on-economic-security-for-seniors [https://perma.cc/N42K-FVLC] ("Older workers of color are most at risk for unemployment."); Brooke Helppie McFall, *Crash and Wait? The Impact of the Great Recession on the Retirement Plans of Older Americans*, 101 AM. ECON. REV. 40, 40 (2011) ("While stock market declines in past decades have disproportionately affected the relatively wealthy stock-holding class, the increasing prevalence of defined contribution pensions has exposed a much broader set of older adults to stock market risk in the most recent economic downturn.").

46. Ravi Jagannathan & Narayana R. Kocherlakota, *Why Should Older People Invest Less in Stocks Than Younger People?*, FED. RSRV. BANK OF MINNEAPOLIS Q. REV., Summer 1996, at 11, 11–23 (describing general advice of switching to less risky investments with increased age due to lack of time for older people to make up losses, and older people are less likely to have wages to cover loss).

47. *See* sources cited *supra* note 45.

48. *See, e.g.*, Patatian Complaint, *supra* note 5, at 8.

49. *Id*.

mow lawns and clean motel rooms to make ends meet.[50] Yet many who have suffered from stockbroker misconduct may not be able to rejoin the workforce due to the difficulties that older workers—and particularly older workers of color—have in finding and maintaining employment as a result of discrimination and health status.[51] Such a predicament has a real impact.[52] Without the ability to recover, some people already facing financial insecurity may be forced into even more difficult choices.[53] Investor advocates share heart-wrenching stories about the impact of stockbroker misconduct on retail investors, including one investor forced to choose between paying their mortgage or for medication, and another choosing between dog food and toilet paper, due to stockbroker misconduct.[54] The economic harm of stockbroker misconduct on investors with smaller claims is likely to result in real impact on their lives. Indeed, the ability to recover losses may prevent investors from becoming indigent.[55]

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50. Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39, 53 (2001) (quoting criminal court records recounting harm to securities fraud victims). Though the cited article recounts harm to securities fraud victims in criminal cases, the same facts often give rise to civil claims. *See, e.g.*, Heminway, *supra* note 33, at 4–5 (discussing securities fraud provisions as "allowing for administrative, civil (private and public), and criminal enforcement" with identical "core elements of proof").

51. *See* Nicole Delaney & Joanna N. Lahey, *The ADEA at the Intersection of Age and Race*, 40 BERKELEY J. EMP. & LAB. L. 61, 64–71 (2019) (describing employment and related economic outcomes for Black and non-Black older Americans and potential causes, including discrimination, education, and health status); *see also* Alexander A. Boni-Saenz, *The Age of Racism*, 100 WASH. U. L. REV. 1583, 1585 (2023) (explaining the concept of aged racism).

52. *See, e.g.*, Delany & Lahey, *supra* note 51, at 63 ("Because older Americans of color are among the most economically fragile, their ability to find and retain employment will have important implications for government programs such as Social Security, Disability Insurance, and Medicaid. Unchecked discrimination can prevent people who need to and are able to work from working, which then puts stress on these government programs."); Clinic Letter, *supra* note 34, at 2 (describing ability of retired investors with small claims to recover against stockbroker as mechanism to prevent reliance upon government assistance).

53. Shafiq Remarks, *supra* note 35, at 2 (detailing the bevy of difficult decisions and obstacles facing individuals who rely on bad financial advisors).

54. *Id.* ("[O]ur help may be the only thing that makes it possible to pay the mortgage *and* afford their medication in the same month . . . ."); *see also* Donachie, *supra* note 1.

55. Clinic Letter, *supra* note 34, at 6 ("[O]ur [law school clinics'] work often prevents aggrieved investors from becoming destitute.").

Individuals who have suffered financial losses due to financial professional misconduct do not simply suffer economic damages, however: researchers have discovered that economic crimes also result in emotional and physical harm.[56] The Financial Industry Regulatory Authority (FINRA) Foundation, for example, reports that almost two-thirds of financial fraud victims also experienced "at least one non-financial cost of fraud to a serious degree," including severe stress (50%), anxiety (44%), difficulty sleeping (38%), and depression (35%).[57] While these emotional costs alone are significant, they have also been found to lead to adverse health consequences.[58] In one study, researchers found a link between financial strain and failing to take medication as well as lower perceived health.[59] Another study uncovered a link between economic insecurity and subsequent chronic health concerns.[60] Providing access to justice for victims of stockbroker misconduct may allow those victims to regain their

56. *See, e.g.*, Barnard, *supra* note 50, at 44 ("Some degree of emotional harm is present in most economic crime cases."); *id*. at 44 n.25 (describing emotional harms of fraud victimization).

57. Applied Rsch. & Consulting LLC, *supra* note 42 ("$50 BILLION per year is lost to fraud . . . but that's not the whole story. There is an emotional side of fraud that is not often talked about.").

58. *See, e.g.*, Chandra Y. Osborn, Sunil Kripalani, Kathryn M. Goggins & Kenneth A. Wallston, *Financial Strain is Associated with Medication Nonadherence and Worse Self-Rated Health Among Cardiovascular Patients*, 28 J. HEALTH CARE FOR POOR & UNDERSERVED 499, 499 (2018) (reporting results of patient study finding association between financial strain and less adherence to medication and worse self-health); Richard H. Price, Jin Nam Choi & Amiram D. Vinokur, *Links in the Chain of Adversity Following Job Loss: How Financial Strain and Loss of Personal Control Lead to Depression, Impaired Functioning, and Poor Health,* 7 J. OCCUPATIONAL HEALTH PSYCH. 302, 302 (2002) ("[L]oss of [personal control] is a pathway through which economic adversity is transformed into chronic problems of poor health and impaired role and emotional functioning.").

59. Osborn, Kripalani, Goggins & Wallston, *supra* note 58, at 506 ("Participants reporting more financial strain were significantly less adherent to their home medications, and this effect persisted after adjustment for demographic characteristics, prior health care utilization, and traditional, macro indicators of SES. Financial strain was also independently associated with worse self-rated health, after adjustment for the same covariates.").

60. *See, e.g.*, Price, Choi & Vinokur, *supra* note 58, at 309 ("The results presented in our model . . . offer support for the hypothesis that financial strain mediates the relationship of job loss and unemployment to depression and personal control. In addition, the results support the hypothesis that the ensuing depression triggers losses of personal control, which in turn erode role and emotional functioning and physical health.").

agency and ameliorate adverse emotional and physical health concerns.[61]

Lack of access to the FINRA arbitration forum, either as a result of inability to obtain counsel or as a result of the informational and procedural barriers pro se litigants face, may also prevent victims of stockbroker misconduct from being heard and subsequently healing.[62] Indeed, even if an investor incorrectly believes they are a victim of stockbroker misconduct, the ability to speak with a perceived independent resource—not their brokerage house or a regulator—may better assist them in understanding their situation and resolving negative feelings related thereto.[63]

Finally, individual investors may not be the only beneficiary of increasing access to justice in securities arbitration; harms from stockbroker misconduct extend beyond the aggrieved investors and impact society. As an initial matter, investors whose limited resources decline due to stockbroker misconduct may have a greater need for social services and support, especially if they are in their retirement years.[64] Such services are critically stretched already, with more people in need of help than available resources.[65] In addition, economic and health costs of

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61. *See, e.g.*, Barnard, *supra* note 50, at 41 (proposing victim allocution in financial crimes sentencing "(1) to permit the victim to regain a sense of dignity and respect rather than feeling powerless and ashamed; (2) to require defendants to confront—in person and not just on paper—the human consequences of their illegal conduct; and (3) to compel courts to fully account in the sentencing process for the serious societal harms—harms that go well beyond issues of money—that economic crimes often impose"); Daniel L. Shapiro, *Reconciliation Systems Design: A Systematic Approach to Collective Healing in Post-Conflict Societies*, 26 HARV. NEGOT. L. REV. 193, 232 (2021) (discussing importance of ensuring that parties are heard in developing systems to resolve conflict).

62. *See, e.g.*, Clinic Letter, *supra* note 34, at 2 ("Whether or not [law school securities arbitration] clinics accept them as clients, the investors who reach out for assistance appreciate being able to talk about their situation and get answers."); *id.* at 3 (quoting thank you note from investor whose case was not accepted); *see also infra* Part II.C (describing difficulties pro se parties face in securities arbitration).

63. Clinic Letter, *supra* note 34, at 2 ("Whether or not clinics accept them as clients, the investors who reach out for assistance appreciate being able to talk about their situation and get answers.").

64. *See, e.g.*, *id.* at 6 (arguing that law school clinics' "work often prevents aggrieved investors from becoming destitute").

65. *See, e.g.*, Frank Munger, *Afterword*: *How Can We Save the Safety Net?*, 69 BROOK. L. REV. 543, 548 (2004) ("America's safety net is being rapidly altered

securities misconduct may also raise the demand for other legal services—including those related to government benefits, landlord-tenant disputes, and bankruptcy—where access to justice is also severely lacking.[66]

Finally, investors who suffer smaller monetary losses resulting from stockbroker misconduct are more likely to be members of already vulnerable and otherwise under-represented groups with less of a safety net, meaning that those least able to shoulder investment losses are forced to do so.[67] The typical American investor is not a multi-millionaire.[68] Among the droves of investors entering the stock market for the first time in 2020, for example, 84% held less than $25,000 in investment accounts.[69] Researchers also found a differential in the total account balance of all investors—new and experienced—based upon race and ethnicity, with traditionally underrepresented groups having lower total account balances.[70] Eighty-five percent of the Black investors and 82% of the Hispanic/Latino investors studied had $25,000 or less in account balances, compared to 56% of white investors.[71] Follow-up studies have shown that investors who entered the stock market for the first time in 2020 are still in the market and likely to stay.[72] Moreover, researchers have uncovered a "substantial" trend of 2020 market entrants moving away

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to shift more responsibility for coping with economic insecurity and poverty to the least secure and poorest members of society.").

66. *See, e.g.*, Jabeen Adawi, *Changing Every Wrong Door into the Right One: Reforming Legal Services Intake to Empower Clients*, 3 GEO. J. POVERTY L. & POL'Y 361, 365 (2022) (illustrating reality of multiple, overlapping legal issues facing individuals with claims).

67. *See, e.g.*, Mark Lush, Angela Fontes, Meimeizi Zhu, Olivia Valdes & Gary Mottola, *Investing 2020: New Accounts and the People Who Opened Them*, FINRA INVESTOR EDUC. FOUND. 5 (Feb. 2021) https://www.finrafoundation.org/sites/finrafoundation/files/investing-2020-new-accounts-and-the-people-who-opened-them_1_0.pdf [https://perma.cc/4J58-BRTT] (describing smaller account balances of investors who are Black or Latino).

68. *See generally id.*

69. *Id*. at 5.

70. *Id*.

71. *Id*.

72. Fontes, Meagher, Mulford, Bloomfield, Ganem, Valdes & Mottola, *supra* note 39, at 1 ("The majority (78.9 percent) of investors (both New Investors and Experienced Investors) who opened new accounts in early 2020 are still in the market two years later, suggesting that the observed expansion of investors in 2020 was not merely a temporary uptick related to the pandemic or market conditions, but a durable rise in the investing population.").

from making their own investment decisions to instead relying on the advice of financial professionals.[73]

Yet, older investors and investors belonging to a traditionally underrepresented group are more likely to be impacted by investment fraud.[74] For example, Black and Latino/a Americans are at greater risk of affinity fraud, a financial fraud scheme where purported expert advisers exploit relationships or status as a member of the same group to defraud them.[75] Approximately one-third of adults aged sixty-five or older experience economic insecurity.[76] The percentage increases to 43.4% and 44.1% for Black and Latinx adults aged sixty-five or older, respectively.[77] Advanced age is also associated with higher risk of being an investment fraud victim.[78] Older investors who are members of traditionally underrepresented groups may suffer from even

73. *Id*. at 4 ("New Investors exhibited a shift away from the use of 'other personal research' (down almost 10 percentage points compared to 2020) and a greater reliance on financial professionals (up 9.3 percentage points compared to 2020)."); *id*. at 8 ("With experience and modest gains in investing knowledge have come a greater reliance on financial professionals as information sources and a diminished reliance on personal research.").

74. *See, e.g.*, Lisa M. Fairfax, *"With Friends Like These . . .": Toward a More Efficacious Response to Affinity-Based Securities and Investment Fraud*, 36 GA. L. REV. 63, 64–65 (2001) (detailing the phenomenon of affinity fraud); *id*. at 67 ("Securities regulators believe that the frequency of occurrence of these crimes has increased because of the susceptibility of the targeted victims and because the close-knit nature of many of the targeted groups makes these crimes difficult to detect and effectively investigate.").

75. *Id*. at 64–65 (defining affinity fraud as action "which targets members of a particular group and is perpetrated either by members of that group or by those claiming to advance its interests."); Complaint at 1, Sec. & Exch. Comm'n v. Moon, No. 23-cv-60715, 2023 WL 2974737 (S.D. Fl. Apr. 17, 2023) (alleging defendant "improperly offered investment advisory and brokerage services to investors, predominantly targeting African-American investors of the Christian Faith."); Fairfax, *supra* note 41, at 1143 ("[A]ffinity fraud can and should be viewed as a hate crime.").

76. *Get the Facts on Economic Security for Seniors*, *supra* note 45 ("More than 17 million (or roughly 1 in 3) older adults aged 65+ are economically insecure, with incomes below 200% of the Federal Poverty Level (FPL).").

77. *Id*. ("Economic insecurity is higher among minority older adults—43.4% of Black and 44.1% of Hispanic adults age 65+ have incomes below 200% of [the federal poverty level].").

78. Doug Shadel & Karla Pak, *AARP Investment Fraud Vulnerability Study*, AARP 6 (2017), https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2017/investment-fraud-vulnerability.doi.10.26419%252Fres.00150.001.pdf [https://perma.cc/EB5U-8YBK] ("More victims were over age 70 (50%) compared to general investors (35%).").

greater harms.[79] As a result, given that traditionally underrepresented ethnic and racial groups are more likely to have smaller claims, a lack of access to justice in the securities arbitration regime may extend the already wide racial wealth gap and deepen the impending retirement crisis.[80] Stockbroker misconduct does not only harm investors' account balances. Rather, stockbroker misconduct causes investors to suffer indirect financial harms that may render them indigent or impact their health, increases the racial wealth gap, and weakens bonds within social groups.

B. CAPITAL MARKET IMPACT

Even if investors do not become destitute or suffer physical and emotional harm as a result of stockbroker misconduct, abandoning valid claims because attorneys deem them too small to pursue will nevertheless have an impact that radiates beyond the aggrieved investor and may impact the capital markets more broadly.[81] The federal securities regime "is designed both to protect investors and to help ensure the overall integrity of our securities markets."[82] Securities arbitration has, at its roots, a market legitimization function.[83] Jill I. Gross argues that securities arbitration is "a central and critical component in a system

79. *See, e.g.*, Boni-Saenz, *supra* note 51, at 1588–94 (explaining the concept of aged racism).

80. *See, e.g.*, Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 HOW. L.J. 849, 857–61 (2013) (describing the racial wealth gap); Mehrsa Baradaran, *Closing the Racial Wealth Gap*, 95 N.Y.U. L. REV. ONLINE 57, 57–58 (2020) (describing the extent of the racial wealth gap); *see also supra* Part I.A (discussing the greater likelihood for older adults and members of traditionally underrepresented to have small claims).

81. *See infra* notes 84–85 and accompanying text (discussing how a perceived lack of access to justice can negatively affect investor trust, affecting the viability of markets more broadly).

82. Heminway, *supra* note 33, at 11.

83. *See generally* Jill Gross, *The Historical Basis of Securities Arbitration as an Investor Protection Mechanism*, 2016 J. DISP. RESOL. 171, 176 (2016) [hereinafter Gross, *Historical Basis*] (describing the roots of arbitration in the securities industry, noting arbitration's importance for maintaining the "good name and reputation" of the New York Stock Exchange during the nineteenth century). *See also* STUART BANNER, ANGLO-AMERICAN SECURITIES REGULATION: CULTURAL AND POLITICAL ROOTS, 1690–1860, at 250 (1998) (describing the creation of a private dispute resolution system to resolve claims arising from time contracts that were otherwise unenforceable at law).

of investor protection."[84] In other words, without the real ability to recover if harmed by a stockbroker, why would an investor part with their money?[85] Access to justice in the only system through which regular Americans can recover against a stockbroker—the small claims securities arbitration forum—is thus crucial to ensuring trust and encouraging investment in capital markets.[86]

Absent confidence in the capital markets, retail investors are less likely to invest and more likely to withdraw previously

84. Gross, *Historical Basis*, *supra* note 83, at 174; *see also* Iannarone, *Structural Barriers*, *supra* note 23, at 1399 (describing investor trust and market legitimization functions of securities arbitration).

85. Robert Prentice, *Whither Securities Regulation? Some Behavioral Observations Regarding Proposals for Its Future*, 51 DUKE L.J. 1397, 1501 (2002) ("Any investor rationally would be more willing to invest in an issuer or deal with a broker if she knew that mistreatment by the issuer or broker would be met not just with some ephemeral loss of reputation, but also legal sanctions."); *see also* James Fallows Tierney & Benjamin P. Edwards, *Stockbroker Secrets*, 26 U. PA. J. BUS. L. 793, 794 (2024) (arguing that disclosure of regulatory "red flags," including arbitration claims filed against stockbrokers, promotes trust in securities markets).

86. Investor trust is essential for the viability of financial markets. *See, e.g.*, Frank Partnoy, *Why Markets Crash and What Law Can Do About It*, 61 U. PITT. L. REV. 741, 762 (2000) ("[T]rust can be seen as the crucial element in preserving a viable financial market."); Lynn A. Stout, *The Investor Confidence Game*, 68 BROOK. L. REV. 407, 408 (2002) ("Investor trust provides the foundation on which the American securities market has been built."); Tamar Frankel, *Regulation and Investors' Trust in the Securities Markets*, 68 BROOK. L. REV. 439, 448 (2002) ("When investors' trust is lost, efficient markets will shrink and become less liquid, and the cost of capital will rise."); Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 BAYLOR L. REV. 139, 154–55 (2006) (describing "critical" role of investor trust in U.S. securities markets); Marc I. Steinberg, Tribute, *Curtailing Investor Protection Under the Securities Laws: Good for the Economy?*, 55 SMU L. REV. 347, 353–54 (2002) ("Widespread recognition of the curtailment of investor redress for alleged securities fraud may induce individual investor reallocation of assets to other sources, such as mutual funds, certificates of deposit, fixed annuities, real estate, and sports memorabilia. Such an eventuality would likely impair the efficiency of the U.S. markets and adversely impact the vitality of the U.S. economy."); Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 692 (1984) ("It is said that investors, especially small and unsophisticated ones, withdraw their capital to the detriment of the markets and the economy as a whole when the fear that they may be exploited by the firms or better-informed traders."); Investor Choice Act of 2024, H.R. 7168, 118th Cong. § 2(1) (2024) ("Investor confidence in fair and equitable recourse is essential to the health and stability of the securities markets and to the participation of retail investors in those markets.").

invested funds.[87] Indeed, "perceived threats to financial welfare are more salient to most Americans than perceived threats to our physical welfare."[88] If counsel is out of reach, lower dollar claims may be abandoned where, as in the securities arbitration forum, the class action device is unavailable.[89] At the same time, failing to prosecute valid claims permits misconduct to go unpunished.[90] If securities arbitration is only truly accessible to well-resourced investors who can afford to hire lawyers or whose claims are so large that a lawyer will accept it on a contingency basis, the market legitimizing aim of securities arbitration is undermined.[91] Given the increasing numbers of retail investors entering the capital markets over the last several years, ensuring trust in capital markets becomes even more important.[92]

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87. *See, e.g.*, Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 467 (2003) (noting that "significant withdrawals" from financial markets and investors' "hesitancy to put in new money" are evidence of low investor confidence).

88. Hurt, *supra* note 45, at 950–51.

89. Peter B. Rutledge, *Saturns for Rickshaws: Lessons for Consumer Arbitration and Access to Justice* ("Unlike employment claims, not all consumer claims are of high value, raising the possibility that the low-stakes claim, absent some aggregation mechanism, will deter the consumer from bothering with the suit."), *in* BEYOND ELITE LAW 493, 494 (2016).

90. *Cf.* Mark Egan, Gregor Matvos & Amit Seru, *The Market for Financial Adviser Misconduct*, 127 J. POL. ECON. 233, 287 (2019) (arguing that the lower rates of punishment for FINRA-registered investment advisers relative to non-investment advisers may "be driven by differences in . . . regulatory requirements/supervision").

91. *See* Ben Bradford, Naomi Creutzfeldt & Felix Steffek, *Thinking Holistically About Procedural Justice in Alternative Dispute Resolution: A Case Study of the German Federal Ombudsman Scheme*, 48 LAW & SOC. INQUIRY 748, 749 (2023) ("[L]egitimacy is awarded to an institution as a consequence of people feeling that they have been treated fairly by it."); *cf.* Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 483 (2010) (noting that in the context of the legal system, "perceived procedural fairness enhances the perceived legitimacy of legal institutions as well as citizens' commitment to the law").

92. *See, e.g.*, Jill E. Fisch, *GameStop and the Reemergence of the Retail Investor*, 102 B.U. L. REV. 1799, 1806–13 (2022) (describing a surge of retail investment in "meme stocks" during the COVID-19 pandemic); Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Harnessing the Collective Power of Retail Investors* (describing the rising number of retail investors entering financial markets since 2020), *in* A RESEARCH AGENDA FOR CORPORATE LAW 207, 207 (Christopher M. Bruner & Marc Moore eds., 2023). *But see* Alicia Davis Evans, *A Requiem for the Retail Investor?*, 95 VA. L. REV. 1105, 1105 (2009) ("The American retail investor is dying. In 1950, retail investors owned over 90% of the

C. IMPLICATIONS FOR FORCED ARBITRATION

More broadly, examining access to justice in the mandatory securities arbitration regime may provide lessons for access to justice in forced consumer arbitration.[93] Arbitration clauses are overwhelmingly present in consumer contracts in the United States.[94] In its formative years, arbitration was heralded as a solution that would increase access to justice.[95] Among the purported justice-enhancing benefits of arbitration are efficiency and cost-effectiveness,[96] as well as the alleged ease of use for unrepresented parties.[97] Since arbitration has become ubiquitous—and mostly forced—scholarship has focused on whether

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stock of U.S. corporations. Today . . . trades by individual investors represent, on average, less than 2% of NYSE trading volume for NYSE-listed firms. There is no question that U.S. securities markets are now dominated by institutional investors.").

93. *See, e.g.*, Nicole G. Iannarone, *A Model for Post-Pandemic Remote Arbitration?*, 52 STETSON L. REV. 393, 430–43 (2023) (describing features of the FINRA mandatory securities arbitration forum that may provide lessons for mandatory consumer arbitration).

94. *See* Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After* AT&T Mobility v. Concepcion, 88 NOTRE DAME L. REV. 825, 850–61 (2012) (cataloging arbitration clauses in consumer contracts); Michael S. Barr, *Mandatory Arbitration in Consumer Finance and Investor Contracts*, 11 N.Y.U. J.L. & BUS. 793, 795 (2015) (noting that "arbitration clauses are now . . . nearly ubiquitous in American consumer contracts"); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1639 (2005) ("It is difficult to assess how common mandatory arbitration clauses have become, but they certainly seem ubiquitous."); 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-of-justice.html [https://perma.cc/RZ86-DWL5] (describing the prevalence of mandatory arbitration clauses in various industries); Jacqueline Nolan-Haley, *Does ADR's "Access to Justice" Come at the Expense of Meaningful Consent?*, 33 OHIO ST. J. ON DISP. RESOL. 373, 379 (2019) ("Compulsory arbitration programs have effectively removed access to the courts for substantial segments of the population.").

95. Nolan-Haley, *supra* note 94, at 374 ("Over the last forty years, ADR processes, in particular, mediation and arbitration, have been advanced as vehicles to secure access to justice for individual litigants, and to improve efficiency in overburdened court systems.").

96. Constantine N. Katsoris, *The Level Playing Field*, 17 FORDHAM URB. L.J. 419, 430–31 (1989) ("What is attractive about arbitration is that it is expeditious and economical.").

97. *See* David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 81 (2015) ("Without full-fledged discovery and motion practice, [arbitration] cases move quickly and some consumers can even navigate the process themselves.").

arbitration's promise of providing access to justice has been fulfilled.[98] Some argue that mandatory arbitration plays a role in increasing access to justice by providing a better system for those who cannot afford attorneys and the costs of civil litigation while only slightly negatively impacting the most affluent by removing their ability to go to court.[99] Many more find that individuals

98. *See, e.g.*, Nolan-Haley, *supra* note 94, at 376 ("I question whether ADR processes have provided the kind of access to justice envisioned by proponents, or whether they have been stumbling blocks to achieving that goal."); Anjanette H. Raymond & Scott J. Shackelford, *Technology, Ethics, and Access to Justice: Should an Algorithm Be Deciding Your Case?*, 35 MICH. J. INT'L L. 485, 524 (2014) (analyzing the impact of technological changes to ADR processes on access to justice); Orna Rabinovich-Einy & Ethan Katsh, *The New New Courts*, 67 AM. U. L. REV. 165 (2017) (analyzing access to justice in online dispute resolution); Oladeji M. Tiamiyu, *The Impending Battle for the Soul of ODR: Evolving Technologies and Ethical Factors Influencing the Field*, 23 CARDOZO J. CONFLICT RESOL. 75, 130 (2022) ("While the access to justice threshold question in litigation is typically whether individuals have access to effective legal representation, a tempting yet unsatisfactory threshold question for [online dispute resolution] is whether individuals have access to, and an understanding of, how to operate the technology that relies upon the Internet."); Marc Galanter, *Access to Justice in a World of Expanding Social Capability*, 37 FORDHAM URB. L.J. 115, 121 (2010) ("As indicated by the fierce contention over the legitimacy and effects of mandatory arbitration and by concerns about court-imposed mediation, ADR no longer enjoys the assumption of facilitating Access to Justice. Rather, it has become an object of suspicion, and in some cases, a direct rival to access-to-justice programs."); Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 73 (2014) (investigating "the operation of mandatory arbitration as an employment dispute resolution system to investigate the degree to which it increases or decreases equality of access to justice in employment relations"); Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 703 (2018) ("[T]he presence of a mandatory arbitration provision dramatically reduces an employee's chance of securing legal representation, as well as her chance of any kind of recovery, any kind of hearing, or any formal complaint being filed on her behalf."); Bradford, Creutzfeldt & Steffek, *supra* note 91, at 749 (discussing studies concerning access to justice in ADR); Matthew A. Shapiro, *Distributing Civil Justice*, 109 GEO. L.J. 1473, 1503–09 (2021) (debating whether arbitration facilitates access to justice); Jill I. Gross, *Arbitration Archetypes for Enhancing Access to Justice*, 88 FORDHAM L. REV. 2319, 2321 (2020) [hereinafter Gross, *Arbitration Archetypes*] (assessing whether arbitration provides access to justice); H.R. REP. NO. 117-393, at 104 (2022) (directing the SEC to study mandatory pre-dispute arbitration contracts to determine their effect "on investors who are harmed by the conduct of [SEC-registered investment] advisers").

99. *See* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563–64 (2001) (arguing that, in the employment context, a "properly designed arbitration system . . . can do a better job of delivering

subject to mandatory arbitration clauses are unlikely to prosecute their claims, and, when they do, they face opponents with greater resources, information, and power.[100]

A difficultly arises in evaluating such claims: how is it that we are to determine whether civil litigation provides more or less access to justice than arbitration when pre-dispute arbitration agreements (PDAAs) mandate arbitration across entire categories of claims?[101] Mandatory arbitration is a "black box" with little data about what happens within individual cases.[102] Arguments favoring arbitration for those who cannot access counsel are difficult to assess and may be premised upon faulty assumptions concerning the availability of resources for unrepresented litigants in arbitration versus litigation.[103]

Forced securities arbitration provides a unique baseline from which to explore these questions because of the

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accessible justice for average claimants than a litigation-based approach" because of its lower costs, and that a "world without employment arbitration" would result in "a 'cadillac' system for the few and a 'rickshaw' system for the many"); Rutledge, *supra* note 89, at 494 (arguing that Estreicher's argument applies to consumer arbitration with equal force); Omri Ben-Shahar, *The Paradox of Access Justice, and Its Application to Mandatory Arbitration*, 83 U. CHI. L. REV. 1755 (2016) (theorizing that barring mandatory arbitration would disproportionately benefit affluent and sophisticated claimants who are able to access courts while imposing greater costs on consumers by incentivizing businesses to increase prices).

100. *See, e.g.*, Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2808 (2015) ("While conferring adjudicatory license on a variety of private processes, [ADR rules] rarely address the needs of indigent users, the independence of decision makers, and the rights of the public to participate."); Horton & Cann Chandrasekher, *supra* note 97, at 116 ("Supposedly, one of arbitration's primary benefits is its friendliness to plaintiffs with small-dollar disputes. . . . [T]his virtue appears to be more theoretical than real.").

101. *See, e.g.*, Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 HARV. NEGOT. L. REV. 29, 66–67 (2017) ("[S]tudies that gather data on arbitration, but not litigation, cannot by themselves support or contradict the belief that consumers and other individuals tend to experience worse outcomes in arbitration than litigation.").

102. *See, e.g.*, Charlotte S. Alexander & Nicole G. Iannarone, *Winning, Defined? Text-Mining Arbitration Decisions*, 42 CARDOZO L. REV. 1695, 1701 (2021) ("Arbitration has a reputation as a black box, from which scant information escapes about parties' experiences and proceedings' outcomes.").

103. *See, e.g.*, Carrie Menkel-Meadow, *Practicing "In the Interests of Justice" in the Twenty First Century: Pursuing Peace as Justice*, 70 FORDHAM L. REV. 1761, 1770 (2002) (describing "baseline" problem of comparing features and detriments of courts versus ADR processes).

transparency in results and process provided in the forum.[104] Gross posits that the mandatory securities arbitration regime is an "archetype for access to justice" because it features: (1) lower costs and faster results than a court proceeding, (2) published awards, (3) the ability of parties to bring the same claims and seek the same remedies as in court, and (4) the ability to be represented.[105] In addition, due to the regulatory structure of the broker-dealer industry, securities arbitration also contains unique features that may further enhance access to justice. These features include the ability to bar broker-dealer firms and stockbrokers from the industry if they do not pay arbitration judgments, governmental oversight of and public participation in the securities arbitration rulemaking processes, and broad transparency concerning settled and adjudicated claims.[106] Thus, studying access to justice within the securities arbitration forum may inform discussions concerning procedural and substantive access and fairness in other forced arbitration regimes.[107] Moreover, the transparency of results within and the regulatory requirement of public participation in the forum's rulemaking may also suggest that it is a more solid foundation upon which to build a truly fair arbitration system.[108]

Examining the experience of small claims investors in the mandatory security arbitration regime thus aids in assessing major questions including: whether investors need greater access to counsel, if the policies underlying mandatory securities arbitration are being met, and whether mandatory securities

104. *See generally* Gross, *Arbitration Archetypes*, *supra* note 98 (describing aspects of FINRA securities arbitration as ideal for promoting access to justice); Iannarone, *A Model For Post-Pandemic Remote Arbitration?*, *supra* note 93 (describing additional features that make FINRA arbitration more apt to provide access to justice than other mandatory arbitration).

105. Gross, *Arbitration Archetypes*, *supra* note 98, at 2327.

106. Iannarone, *A Model for Post-Pandemic Remote Arbitration?*, *supra* note 93, at 431–38 (describing the most commonly used mandatory consumer arbitration forums: AAA and JAMS).

107. *See generally* Gross, *Arbitration Archetypes*, *supra* note 98 (classifying securities arbitration as an "arbitration archetype" that can shape improvement in other mandatory arbitration schemes).

108. *See, e.g.*, Resnik, *supra* note 100, at 2852 ("But alternative rules are also produced by private providers, free to specify procedures without public input.").

arbitration—and forced arbitration more broadly—fulfills its alleged promise of providing justice to those with small claims.[109]

Investigating investor justice does more than simply aid in the recovery of an investor's monetary losses. Investor justice can help rebuild community trust, prevent financial anxiety-induced physical and mental illness, and protect investors from indigency. Retail investors—and the public more broadly—also experience these benefits. Moreover, capital markets and mandatory arbitration regimes also benefit from exploring retail investors' lack of access to justice.

II. INVESTOR JUSTICE AND FORCED SECURITIES ARBITRATION

Before delving into factors that impact investor justice in forced securities arbitration, some description of the process is in order. Securities arbitration has had a long foothold in the United States, coming to this country from England with America's founding.[110] Though it began as a voluntary process that only investors could force stockbrokers into, stockbrokers now overwhelmingly force investors into arbitration and have eliminated investors' ability to choose between court or arbitration.[111]

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109. *See infra* Part III; Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, *The Influence of Arbitrator Background and Representation on Arbitration Outcomes*, 9 VA. L. & BUS. REV. 43, 47 (2014) [hereinafter, Choi, Fisch & Pritchard, *Arbitrator Background*] ("Critical to the policy debate over arbitration provisions is the question of whether arbitration treats small claimants—consumers and customers—fairly.").

110. *See, e.g.*, Gross, *Historical Basis*, *supra* note 83, at 175–76 (tracing history of securities arbitration in the United States to late 1790s); Constantine N. Katsoris, *SICA: The First Twenty Years*, 23 FORDHAM URB. L.J. 483, 485 (1996) [hereinafter Katsoris, *SICA: The First Twenty Years*] ("The resolution of customers' securities disputes by arbitration can be traced back to 1871 at the New York Stock Exchange (NYSE)."); Robert S. Clemente, *Trends in Securities Industry Arbitration: A View of the Past, the Present, and the Future: "The Dream, the Nightmare, and the Reality,"* N.Y. ST. BAR J., Sept./Oct. 1996, at 18, 18 ("The judicial attitude toward arbitration was traditionally one of hostility. In spite of this hostility, securities industry arbitration continued throughout its nearly 200-year history to be recognized as a viable *alternative* method of resolving securities industry disputes.").

111. GARY SHORTER, CONG. RSCH. SERV., IF12076, LEGISLATION TO REPEAL MANDATORY ARBITRATION (2022) ("Virtually all securities broker-dealers and reportedly most investor advisors require their customers to agree that disputes that may arise between them must be resolved through arbitration rather than through lawsuits filed in federal or state courts."); Benjamin P. Edwards,

The modern securities arbitration scheme developed in the 1970s when the Securities and Exchange Commission (SEC) began examining the question central to this Article: can investors with small claims recover if they receive bad advice from a stockbroker?[112] The SEC was concerned that investors with small claims faced high barriers to obtaining redress when wronged by stockbrokers.[113] As a result of this inquiry, the first uniform securities arbitration code was born.[114] The initial code governing smaller claims—called simplified arbitration—was designed to "provide a more effective[,] efficient[,] and economical dispute resolution system for public investors with small claims" and to "protect investors and the public interest."[115] The idea was to simplify the process for investors with the smallest claims ($2,500 or less) and make it possible for them to proceed on their own "by merely filing a single typewritten or printed letter explaining the basis of his or her claim."[116] This simplified process was intended to permit investors to represent themselves, which

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Arbitration's Dark Shadow, 18 NEV. L.J. 427, 430 (2018) (noting that arbitration agreements are in "nearly all" brokerage contracts); Jill I. Gross, *The End of Mandatory Securities Arbitration?*, 30 PACE L. REV. 1174, 1179 (2010) (noting that arbitrations has functioned as the primary dispute resolution process among brokers and investors); Barr, *supra* note 94, at 801 (noting the "vast bulk" of disputes involve arbitration); Katsoris, *SICA: The First Twenty Years*, *supra* note 110, at 486 (noting an "unresolved dispute" typically ends in arbitration).

112. Iannarone, *Structural Barriers*, *supra* note 23, at 1401–03 (describing development of first uniform securities arbitration codes in small claims and transition to mandatory securities arbitration forum administered by FINRA).

113. *Id*.

114. *Id*.

115. Order Approving Proposed Rule Changes, 43 Fed. Reg. 20,585 (May 4, 1978) (providing rationale for NYSE and American Stock Exchange small claims proposals); *see also* Order Approving Proposed Rule Changes, 43 Fed. Reg. 28,278 (June 22, 1978) (stating that the Pacific Stock Exchange and Chicago Board Options Exchange small claims proposal "will protect investors and the public interest."); Order Approving Proposed Rule Change, 43 Fed. Reg. 28,597 (June 23, 1978) (stating the National Association of Securities Dealers proposal "will protect investors and the public interest"); Order Approving Proposed Rule Change, 43 Fed. Reg. 29,202 (June 26, 1978) (stating that the Philadelphia Stock Exchange small claim proposal "will protect investors and the public interest"); Order Approving Proposed Rule Change, No. SR-MSE-78-17, 1978 WL 171213 (Dec. 8, 1978) (approving Midwest Stock Exchange small claims procedure on other exchanges' systems).

116. SICA REPORT, *supra* note 23, at 5; *see also id.* ("The Conference has been especially desirous of making the system fair, simple, and inexpensive.").

would result in cost savings and provide an avenue for redress in the event the investor was unable to secure an attorney.[117] A simplified ("paper") proceeding would involve only a written submission, and there would not be a hearing or any testimony.[118]

At that time, each securities exchange individually administered its own arbitration forum, though they each adopted the same simplified arbitration code, ensuring a uniform investor experience no matter the exchange.[119] The arbitrator was chosen by the forum and the parties had no input.[120] While each forum would make "reasonable efforts" to choose an arbitrator from the public sector, all arbitrators on the roster would have securities industry knowledge.[121]

This design feature may have been driven by the fact that simplified arbitration was established to permit regular investors to bring a claim without a lawyer or securities industry knowledge.[122] If the arbitrator had knowledge of the securities industry, perhaps they would be able to determine if a violation of the self-regulatory organization (SRO) rules or securities law occurred even if a pro se party in the proceeding lacked such knowledge.[123] Indeed, the initial code permitted the sole arbitrator to add additional arbitrators to the case in the event

117. *Id*. at 3–5.

118. *Id*.

119. *See* Iannarone, *Structural Barriers*, *supra* note 23, at 1400–03 (describing adoption of uniform small claims arbitration).

120. SICA REPORT, *supra* note 23, attach.A ("The dispute, claim or controversy shall be submitted to a single arbitrator knowledgeable in the securities industry selected by the Director of Arbitration."); *see also id*. attach.D ("After the pleadings have been completed, the Director of Arbitration will appoint an arbitrator.").

121. SICA REPORT, *supra* note 23, at 4; *id*. attach.A ("The dispute, claim or controversy shall be submitted to a single arbitrator knowledgeable in the securities industry selected by the Director of Arbitration."); *id*. attach.D ("Reasonable efforts will be made to select a knowledgeable arbitrator from the public, that is, someone who is not associated with or employed by any member firm or securities industry organization. There may be instances when a public arbitrator is not available and a securities industry person must be chosen."); *id*. at 4 ("In appointing such a person, reasonable efforts will be made to select an arbitrator from the public sector.").

122. *Id*. at 5 ("The Conference has been especially desirous of making the system fair, simple and inexpensive.").

123. *Id*. at 3–4.

additional expertise was needed to resolve the case.[124] Thus, it appears that implicit in the then-voluntary simplified arbitration process was the promise that an unrepresented party facing a represented member of the securities industry could at least be guaranteed a neutral decision-maker with securities industry knowledge.

Securities arbitration has evolved with efforts to lower costs and increase efficiency, but these well-intentioned changes have considerable impact on regular investors.[125] The following Sections describe the evolution of securities arbitration to today's forced arbitration scheme, the rationale behind this evolution, and how forced securities arbitration uniquely impacts small claims investors and diminishes their access to justice.

A. FORCED SECURITIES ARBITRATION TODAY

Securities arbitration has evolved significantly since the first uniform code.[126] After its initial adoption, subsequent years brought a new code to encompass all claims, adding a uniform procedure for larger cases while retaining the simplified procedure for smaller claims.[127] Securities arbitration is no longer voluntary, as nearly all brokerage customers are required to arbitrate claims.[128] Instead of a dozen separately administered securities arbitration forums, there is now only one securities arbitration forum, run by FINRA Dispute Resolution Services.[129]

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124. *Id*. at attach.D ("Also, if the arbitrator believes that the controversy is such that additional expertise is needed, he can direct that an arbitration panel be formed composed of himself and two (2) additional arbitrators. The majority of this panel will be from the public.").

125. *See infra* Parts II.A–II.C (analyzing the evolution of securities arbitration).

126. *See* Iannarone, *Structural Barriers*, *supra* note 23, at 1419–26 (describing evolution of FINRA arbitrator selection process).

127. *See generally* SEC. INDUS. CONF. ON ARB., SECOND REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION TO THE SECURITIES AND EXCHANGE COMMISSION (Dec. 1978) [hereinafter SICA SECOND REPORT] (describing process behind adoption of first uniform code for all securities disputes).

128. *See* Gross *supra* note 111, at 1179 (describing mandatory nature of securities arbitration).

129. Order Approving Proposed Rule Change to Amend the By-Laws of NASD, Exchange Act Release No. 56,145, 72 Fed. Reg. 42,169 (July 26, 2007); News Release, Nancy Condon & Herb Perone, NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority - FINRA (July 30, 2007), https://www.finra.org/media-center/news-releases/2007/nasd

In addition to changes consolidating securities arbitration in one forum and making arbitration mandatory, there have been a number of changes to arbitration procedures that implicate smaller cases in the forum.[130] This Section describes the changes to securities arbitration, the implications of which will be discussed in Section B.

1. "Small" Claims Involve Higher Damage Amounts

FINRA describes claims seeking up to $100,000 as "small."[131] Damages of that size, however, set an investor far above the average investor in this country.[132] The limit for simplified arbitration today is $50,000, which after adjusting for inflation, is more than four times the original simplified arbitration limit.[133] FINRA has thus substantially increased the dollar ceiling for a claim to qualify for simplified arbitration procedures, and many more claims now fall under the simplified

-and-nyse-member-regulation-combine-form-financial-industry [https://perma.cc/434G-6PZH] ("FINRA was created through the consolidation of NASD and the member regulation, enforcement and arbitration operations of the New York Stock Exchange."); *Dispute Resolution: Arbitration & Mediation*, FINRA, https://www.finra.org/arbitration-and-mediation [https://perma.cc/VJY7-K8VX] ("FINRA operates the largest securities dispute resolution forum in the United States"); Jill I. Gross, McMahon *Turns Twenty: The Regulation of Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 493, 495 n.13 (2008) [hereinafter Gross, *Regulation of Fairness*] ("[D]ue to consolidation and the 2007 merger of the regulatory functions of NASD and the New York Stock Exchange (NYSE), FINRA is now the only meaningful forum for securities arbitration, handling more than 95% of the cases.").

130. *See infra* Parts II.A.1–A.5 (discussing the changes to arbitration procedure that include increased complexity).

131. *Regulatory Notice 17-34, supra* note 11, at 3 ("Investors with small claims (claims of $100,000 or less) who want to be represented in the forum have limited access to attorneys because some attorneys may not be willing to offer services given the small dollar value of a dispute."). For the remainder of this Article, I adopt FINRA's definition of "small claims" and explore changes to securities arbitration procedures that especially impact those investors whose claims are less than $100,000. *Id.*

132. *See supra* Part I.A (describing typical retail investor).

133. *See supra* Part I.A; FINRA Rule § 12800 (2024), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12800 [https://perma.cc/27AX-HNTC] (setting the upper limit for simplified arbitration at $50,000); *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=2500&year1=197711&year2=202312 [https://perma.cc/DFF6-2TMT] (calculating that $2,500 in November 1977 has the same buying power as $12,388.77 in December 2023).

arbitration umbrella.[134] The increase in what is considered a "small" claim also matters because it determines the number of arbitrators hearing an investor's case.[135] The threshold for three arbitrators deciding an investor's claim has increased almost ten-fold since 1978 when simplified arbitration was first adopted, to over $100,000, and investors with "small" claims have their cases heard by a single arbitrator.[136]

2. Changes to Arbitrator Qualification and Selection Process

Among the most significant changes to securities arbitration since its initial adoption relate to the arbitrator selection process and the required qualifications for an individual to serve as an arbitrator. This Subsection describes the move from forum-appointed arbitrators to party selection of arbitrators.

a. Party Agency in Arbitrator Selection

No matter the size of their claim, all investors now have a say in who decides their case, a substantial change from the original uniform codes under which the forum selected the arbitrator.[137] Arbitrators are chosen from lists randomly created by FINRA's selection algorithm, and each separately represented party may strike up to four arbitrators on each list and rank the remaining arbitrators.[138] Giving parties a voice in arbitration

134. FINRA Rule § 12800 (describing simplified arbitration).

135. *Id.* (stating that simplified arbitration is conducted by a single public arbitrator).

136. *Compare* SICA SECOND REPORT, *supra* note 127, attach.A (providing for at least three, and up to five arbitrators, for all customer cases), *with* FINRA Rule § 12401(c) (2024), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12401 [https://perma.cc/8XYQ-JUAS] (providing for three arbitrators in customers cases with more than $100,000 in damages). *See also CPI Inflation Calculator*, U.S. BUREAU OF LABOR STATISTICS, https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=2%2C501.00&year1=197812&year2=202312 [https://perma.cc/V4P4-6WLH] (calculating that $2,501 in December 1978 has the same buying power as $11,331.93 in December 2023).

137. *See generally* Iannarone, *Structural Barriers*, *supra* note 23, at 1419–26 (describing changes to arbitrator selection processes from first uniform codes until today's FINRA Code of Customer Arbitration Procedure).

138. FINRA Rule § 12402(b) (2024), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12402 [https://perma.cc/89FS-HFDN] (describing process for generating arbitrator list); *id.* § 12402(d) (stating that each party may strike up to four arbitrators). After the parties' time for submitting lists to FINRA concludes, FINRA chooses an arbitrator for the case by removing the names of

selection was intended to increase their agency in a dispute resolution modality that bases its legitimacy on party autonomy and choice.[139]

To facilitate public purchase in a system designed and overseen by the securities industry, arbitrators are now designated as public or non-public.[140] FINRA casts a wide net in its definition of non-public, including arbitrators who were employed by the industry, represented industry players, and even attorneys who have represented public investors in arbitration claims

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all stricken arbitrators and adding together the rankings of each remaining arbitrator. *id.* § 12402(e) (describing process for combining lists); *id.* § 12402(f) (describing selection of arbitrator to preside over case). The public, chair-qualified, arbitrator highest ranked by the parties presides over the case. *Id. See generally Report on the FINRA Arbitrator List Selection Process and Technology*, KPMG (Oct. 2023), https://www.finra.org/sites/default/files/2023-10/finra-arbitrator-list-selection-process-technology-report.pdf [https://perma.cc/S5RD-N9XH] (describing FINRA arbitrator selection process and reporting results of audit of FINRA arbitrator selection process and finding no exceptions). Parties were first given the ability to choose arbitrators in 1998 when NASD rules were changed to permit parties to have unlimited strikes of any arbitrators on the forum-generated list. Choi, Fisch & Pritchard, *Arbitrator Background*, *supra* note 109, at 56. Because this system could result in no names remaining on the list and the forum appointing an arbitrator randomly selected through a computer algorithm, the process was changed to the above-described striking and ranking protocol. *Id*. (noting changes to the arbitrator selection process by FINRA in 2006 and 2007).

139. Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Selection of Arbitrators in Arbitrations Involving Public Customers, Exchange Act Release No.40261, 63 Fed. Reg. 40,761 (July 24, 1998) ("[A]s a general principle that parties in arbitration [should] be given more input into the selection of arbitrators."); *see also* Order Granting Approval to Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 3 and 4 to Proposed Rule Change by the National Association of Securities Dealers, Inc., Relating to Selection of Arbitrators in Arbitrations Involving Public Customers, Exchange Act Release No. 40555, 63 Fed. Reg. 56,670, 56,681–84 (Oct. 22, 1998) (concluding that greater input in the selection of arbitrators will benefit the parties); *Arbitration Reform: Hearing on H.R. 4960 Before the Subcomm. on Telecomm. & Fin.*, 100th Cong. 497 (1988) (letter from Richard G. Ketchum, Dir., U.S. Sec. & Exch. Comm'n, to James E. Buck, Senior Vice President & Sec'y, N.Y. Stock Exch.) ("[I]ndustry affiliations of public arbitrators may undermine public confidence regardless of the character of the individual arbitrator.").

140. FINRA Rule § 12100(aa) (2024), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12100 [https://perma.cc/UFC5-F94Z] (defining public arbitrator); *id.* § 12100(t) (defining non-public arbitrator).

against stockbrokers.[141] Small claims are decided by only one arbitrator, and that arbitrator must be public.[142] An arbitrator is deemed public if they do not have any of the characteristics of a non-public arbitrator.[143]

The public versus non-public distinction was designed to situate arbitrators on a spectrum between judge and jury member.[144] Claimants with larger claims have their cases decided by three arbitrators, and one of those arbitrators may be non-public, though any party has the ability to have the case decided by an all-public arbitration panel.[145] Parties express their arbitrator preferences through a striking and ranking process which FINRA consolidates to select the panel hearing the case.[146]

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141. FINRA Rule § 12401(a) (2024), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12401 [https://perma.cc/79UA-USWH] (providing one arbitrator for simplified arbitration claims); *id.* § 12401(b) (providing one arbitrator for claims of more than $50,000 and up to $100,000); FINRA Rule § 12100(aa) (describing characteristics that disqualify an arbitrator from classification as a public arbitrator). The author, for example, is currently classified as a non-public arbitrator and will remain so until five years have passed since she last represented retail investors in securities arbitration proceedings. FINRA Rule § 12100(aa).

142. FINRA Rule § 12401(a) (providing one arbitrator for simplified arbitration claims); *id.* § 12401(b) (providing one arbitrator for claims of more than $50,000 and up to $100,000); *Id.* § 12402(a) (stating that in cases with one arbitrator the arbitrator must be public unless the parties agree otherwise).

143. FINRA Rule § 12100(t) ("The term 'non-public arbitrator' means a person who is otherwise qualified to serve as an arbitrator, and is disqualified from service as a public arbitrator under paragraph (aa).").

144. *See* Choi, Fisch & Pritchard, *Arbitrator Background*, *supra* note 109, at 60 ("We also note that the decision makers in the FINRA system function as a type of hybrid between a judge and a jury.").

145. FINRA Rule § 12403(c) (2024), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12403 [https://perma.cc/C8SX-4ZS2] (stating that parties can strike all non-public arbitrators if they wish); *see* Choi, Fisch & Pritchard, *Arbitrator Background*, *supra* note 109, at 60 ("We also note that the decision makers in the FINRA system function as a type of hybrid between a judge and a jury.").

146. In larger cases, each separately represented party may strike up to four names from the chair list, strike up to all the names on the non-public list, and strike up to four names on the public arbitrator list. FINRA Rule § 12403(c) (describing list generation process); *Report on the FINRA Arbitrator List Selection Process and Technology*, *supra* note 138 (describing FINRA arbitrator selection process and reporting results of audit of FINRA arbitrator selection process and finding no exceptions); FINRA Rule § 12402(d) (describing process for striking and ranking of arbitrators). Parties then rank the remaining arbitrators from their top choice (1) to their last choice (6). *Id.* FINRA selects the

b. Public Chair Requirement

Over the years, an unforeseen problem arose in the largest cases in the forum, those decided by three arbitrators: who would lead the proceeding? To address this concern, the forum began to randomly designate one of the three arbitrators as the chair of the proceeding. This solution left much to be desired, as parties—and other arbitrators—reported dissatisfaction when an inexperienced arbitrator was randomly selected to chair the case.[147] An initial solution of providing training materials that appointed chairs could review at their discretion failed to remedy these concerns, and in 2007 a new class of arbitrator was created: the public, chair-qualified arbitrator.[148]

In an Article focusing on access to justice for investors with the smallest claims, it may seem counterintuitive to describe an arbitrator category created for the largest cases in the forum. Yet the chair requirement has a significant impact on smaller dollar claims. First, the single arbitrator who decides cases seeking $100,000 or less must be a chair.[149] Second, chairs are required

arbitration panel by combining the rankings and selecting the highest rank arbitrator(s). *Id.* § 12402(e) (describing process for combining lists); *Id.* § 12402(f) (describing selection of arbitrator to preside over case).

147. David S. Ruder, Linda D. Fienberg, John W. Bachmann, Stephen J. Friedman, Stephen L. Hammerman, J. Boyd Page, Francis O. Spalding & Richard E. Speidel, *Securities Arbitration Reform*, LGESQUIRE 107–12 (1996) [hereinafter *Securities Arbitration Reform*], https://www.lgesquire.com/NASD_Ruder Report.pdf [https://perma.cc/VLP4-BBCA] (describing concerns with inexperienced chairs); Notice of Filing of Proposed Rule Change and Amendments Notice of Filing of Proposed Rule Change and Amendments Nos. 1, 2, 3, and 4 Thereto to Amend NASD Arbitration Rules for Customer Industry Disputes, Exchange Act Release No. 51,857, 70 Fed. Reg. 36,43001 (June 23, 2005) (proposing improvements to selection of arbitrators, such as training and experience requirements).

148. *See generally* Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules for Industry Disputes and Notice of Filing and Order Granting Accelerated Approval of Amendments 5, 6, and 7 Thereto, Exchange Act Release No. 55,158, 72 Fed. Reg. 4,574 (Jan. 31, 2007) (approving changes to require training and prior service as arbitrator to be qualified to serve as a public chair arbitrator); NASD Disp. Resol., THE ARBITRATION POLICY TASK FORCE REPORT—A REPORT CARD 7, 10–11 (July 27, 2007), https://www.finra.org/sites/default/files/Industry/p036466.pdf [https://perma.cc/W877-DP3N] (describing voluntary training instituted in 1996 and mandatory training requirement implemented in 2007).

149. FINRA Rule § 12402 (describing arbitrator selection process for cases with one arbitrator); FINRA Rule § 12401(a) ("If the amount of a claim is

to be public, meaning that investors with the smallest claims have no ability to obtain an arbitrator with industry experience because the only arbitrators they are able to choose are from the public chair pool.[150] While some advocates claim that industry experience is bias-producing, others believe that substantial industry experience is necessary when considering highly technical cases or those where a stockbroker's conduct deviates significantly from industry standards.[151] Third, to join the chair roster, an arbitrator must have been an arbitrator on at least one—and potentially three—larger claims cases that concluded after a hearing.[152] This experiential requirement is a high hurdle to clear because arbitrator selection rules for larger cases currently preference existing chairs, and repeat-player industry parties have a substantially greater ability to influence which arbitrators will be able to gain the requisite experience to become a chair.[153] For example, in prior research I have found that only 0.98% of claims seeking $100,000 or less were decided by a chairperson who became an arbitrator in the prior five-year period.[154] Though FINRA anticipated that requiring experience and additional education would limit the pool of available

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$50,000 or less, exclusive of interest and expenses, the panel will consist of one arbitrator and the claim is subject to the simplified arbitration procedures under Rule 12800."); FINRA Rule § 12800 (2024), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12800 [https://perma.cc/27AX-HNTC] (describing simplified cases and qualification for simplified treatment).

150. FINRA Rule § 12100(aa) (2024), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12100 [https://perma.cc/UFC5-F94Z] (defining public arbitrator); FINRA Rule § 12400(c) (2024), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12400 [https://perma.cc/5RL9-8TB4] (describing requirements for service as chair).

151. *See also infra* Part II.C (describing impact of arbitrator background requirements and prohibition on conducting outside research).

152. FINRA Rule § 12400(c) (describing eligibility requirements for service as chairperson).

153. Iannarone, *Structural Barriers*, *supra* note 23, at 1435 (showing how few new arbitrators the criteria allows); *see also* Order Approving Proposed Rule Change and Amendments, Exchange Act Release No. 55,158, 72 Fed. Reg. 4,574 (Jan. 31, 2007) (noting that FINRA predecessor NASD understood it would be difficult to obtain experiential qualification to serve as chair).

154. Iannarone, *Structural Barriers*, *supra* note 23, at 1426–35 (arguing that the requirement that arbitrators serve on at least one case through award (if an attorney) and complete chair training prevents newer and more diverse arbitrators from hearing the cases that are the most similar to the size of the average American's retirement balance).

chairpersons, it perhaps did not anticipate how substantial a barrier the chair qualification standards would be.[155]

c. Arbitrator Background and Experience

Over time, the qualifications needed to become an arbitrator in the securities arbitration forum have relaxed considerably. With the change to party-driven arbitrator selection, a broader pool of arbitrators was required. No longer is any experience or background in securities needed to serve as an arbitrator.[156] Nor must arbitrators have any legal background.[157] FINRA's arbitrator recruitment materials emphasize the low threshold for qualifying as an arbitrator: "No previous arbitration, securities or legal experience is required to apply—just five years of paid work experience and two years of college-level credits."[158] This is a marked change from the initial arbitration procedure where an arbitrator who had experience in the type of dispute would be appointed by the forum.[159] Based upon claimant and respondent representatives' feedback, an intentional decision was made to situate arbitrators in a role somewhere between that of a judge and a juror.[160]

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155. *Id*.; *see also* Notice of Filing of Proposed Rule Change Amending Rule 12400 of the Code of Arbitration Procedure for Customer Disputes and Rule 13400 of the Code of Arbitration Procedure for Industry Disputes Relating to Broadening Chairperson Eligibility in Arbitration, Exchange Act Release No. 78,729, 81 Fed. Reg. 61,288, 61,288 (Sept. 6, 2016) ("FINRA has had limited success in enrolling new public chairpersons.").

156. *See* SICA REPORT, *supra* note 23, attach.A (describing the process of the forum appointing an arbitrator knowledgeable in securities laws to preside over a case).

157. *See* Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, *Attorneys as Arbitrators,* 39 J. LEGAL STUD. 109, 111 (2010) (stating that the securities arbitrators are not required to have lawyer training by the Financial Industry Regulatory Authority).

158. *Become an Arbitrator*, FINRA, https://www.finra.org/arbitration-mediation/become-arbitrator [https://perma.cc/TXZ3-RGVK].

159. *See* SICA REPORT, *supra* note 23, attach.A ("The dispute, claim or controversy shall be submitted to a single arbitrator knowledgeable in the securities industry selected by the Director of Arbitration.").

160. *See Final Report and Recommendation of the FINRA Dispute Resolution Task Force,* FINRA DISP. RESOL. TASK FORCE 9 (2015), https://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf [https://perma.cc/RL5Z-XK9F] ("While the task force agreed that a deep and diverse pool of arbitrators is important to the operation of the forum, members expressed different views about the most important characteristics in an arbitrator. . . . Simply put, the

Although FINRA Dispute Resolution Services prides itself on providing transparency about the forced securities arbitration forum, little is known about the arbitrators on FINRA's arbitrator roster.[161] FINRA does not publish a list of arbitrators, let alone the experiences and qualifications of those arbitrators.[162] The most recent written estimates suggest that less than half of the arbitrators on FINRA's arbitrator roster are attorneys.[163] Stephen Choi, Jill Fisch, and Adam Pritchard found, in their random selection of awards from cases decided between 1992 and 2006, that 82.2% of the public arbitrators were attorneys.[164] This metric does not, however, detail the percentage of attorney-arbitrators in the FINRA public arbitrator pool. Rather, it illustrates a percentage of attorney-arbitrators selected by the parties to decide cases. Gross inquired as to the composition of the total FINRA arbitrator pool and found in 2008 that most securities arbitrators were not attorneys.[165] Without greater transparency from FINRA, however, it is impossible to determine the actual percentage of public arbitrators who are attorneys.[166]

The most recent research into the composition of FINRA's arbitrator pool is at least ten years old and, due to limited information provided by FINRA, is incomplete, focusing mostly on

question is whether the arbitrator should more closely resemble a juror or judge. Since the task force was not able to reach consensus on this question, it decided that the best solution was for FINRA to develop an arbitrator pool with sufficient variety to reflect the parties' preferences.").

161. *See* Nicole G. Iannarone, *Finding Light in Arbitration's Dark Shadow*, 4 NEV. L.J. 1, 10–11 (2020) [hereinafter Iannarone, *Finding Light*] (describing lack of information concerning arbitrators on FINRA roster); *see also* Iannarone, *Structural Barriers*, *supra* note 23, at 1447–50 (making recommendations to improve inclusion within FINRA arbitrator roster, including providing information about makeup of each category of arbitrator).

162. Iannarone, *Finding Light*, *supra* note 161, at 10–11 (describing lack of transparency with arbitrators); Iannarone, *Structural Barriers*, *supra* note 23, at 1440–47 (recommending greater transparency of arbitrators on FINRA rosters).

163. *See* Gross, *Regulation of Fairness*, *supra* note 129, at 519.

164. Choi, Fisch & Pritchard, *Attorneys as Arbitrators, supra* note 157, at 111.

165. Gross, *Regulation of Fairness*, *supra* note 129, at 519 ("[M]ore than half of FINRA arbitrators are not lawyers . . . .").

166. *See* Iannarone, *Structural Barriers*, *supra* note 23, at 1417–18.

racial and ethnic background, gender, and age.[167] In 2014, using arbitrator disclosure reports available only to attorneys who represent parties in securities arbitration, an investor-side securities arbitration bar association conducted a study to determine the age and gender composition of the FINRA arbitrator roster.[168] Of the 5,375 arbitrators the Public Investors Advocate Bar Associations (PIABA) identified, it found that 80% were male, their average age was sixty-seven, and 40% were over the age of seventy.[169] In response to this critique, FINRA undertook efforts to recruit more diverse arbitrators and report the results of its efforts.[170] Results of this voluntary and anonymous survey show that while FINRA has made strides in increasing arbitrator diversity since 2017, the neutral roster's demographics do not match those of the American public.[171] Over three-quarters of the arbitrator pool self-identify as Caucasian, with only 12% Black, 5% Hispanic or Latino, and 3% Asian arbitrators.[172] The arbitration roster skews older, with 42% of arbitrators aged seventy or older, 29% aged sixty-one to sixty-nine, and 29% sixty or younger.[173] Five percent of arbitrators identify as LGBTQ.[174] Comparatively, the U.S. Census estimates that in 2023, only 17.7% of the population is aged sixty-five and older, 58.4% is White, 19.5% is Hispanic or Latino, 13.7% is Black or African-American, 6.4% is Asian, and 50.5% is female.[175]

Though FINRA's commitment to increasing diversity and reporting how its diversification efforts fare is admirable, a wide range of information about arbitrators is not made publicly

167. *Id.* (describing a lack of transparency concerning arbitrator identity and background).

168. *See* Jason R. Doss, *The Importance of Arbitrator Disclosure,* PUB. INVS. ARB. BAR ASS'N 24–25 (2014), https://piaba.org/sites/default/files/newsroom/2014-10/The%20Importance%20of%20Arbitrator%20Disclosure%20(October%207,%202014).pdf [https://perma.cc/939T-X4GX].

169. *Id.* at 28–29.

170. Iannarone, *Structural Barriers*, *supra* note 23, at 1413–14 (describing FINRA efforts to increase arbitrator diversity in response to PIABA report).

171. *See id*.

172. *Id*.

173. *Id*.

174. *Id*.

175. *Quick Facts United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045222 [https://perma.cc/D59L-KALG**]**.

available.[176] FINRA does not break down its arbitrator demographics by type of arbitrator (public, non-public, chair-qualified).[177] As a result, an investor with a simplified-qualifying claim has no way of determining whether the public chair pool from which their arbitrator is selected is more or less diverse than FINRA's aggregate statistics.[178] Indeed, recent research suggests that an investor with a claim under $100,000 is unlikely to see the benefits of FINRA's recent diversification efforts and instead is likely to have their case decided by an arbitrator who has been part of FINRA's arbitration roster for well over a decade.[179]

3. Required Training

Despite the very low requirements to serve as an arbitrator, FINRA describes its arbitrator pool as "highly experienced."[180] Given that no arbitration, securities, or legal background is required to serve as a FINRA arbitrator,[181] these claims must be driven by the training FINRA provides. FINRA basic arbitrator training is a sixteen-module program that FINRA estimates can be completed in six hours.[182] An additional training must be completed to become a chair (once certain experiential requirements

176. *See Our Commitment to Achieving Arbitrator Diversity*, FINRA, https://www.finra.org/arbitration-mediation/diversity [https://perma.cc/W4KW-YJTH]; Iannarone, *Structural Barriers*, *supra* note 23, at 1418 (describing information not publicly available on FINRA's arbitrator demographics); *see also id*. at 1440–47 (detailing suggested transparency enhancements to better serve investing public and provide information about who is deciding their claims).

177. *Our Commitment to Achieving Arbitrator Diversity*, *supra* note 176 (listing all members of arbitration panel without distinction by status).

178. *Id*.

179. Iannarone, *Structural Barriers*, *supra* note 23, at 1435–38 (finding over half of arbitrators deciding claims seeking $100,000 or less in damages between 2014 and 2019 had been on FINRA's arbitration roster at least twenty years).

180. Narielle Robinson, *FINRA Dispute Resolution Services Mediation Program,* NEUTRAL CORNER (Fin. Indus. Regul. Auth., New York, N.Y.), vol. 2, 2023, at 1, 2, https://www.finra.org/sites/default/files/2023-07/neutral-corner-volume-2-2023-0706.pdf [https://perma.cc/3XSS-KQWU] ("DRS has a mediator roster with more than 200 highly experienced mediators.").

181. *Become an Arbitrator*, *supra* note 158 ("No previous arbitration, securities or legal experience is required to apply - just five years of paid work experience and two years of college-level credits.").

182. *Arbitrator Training*, FINRA, https://www.finra.org/arbitration-mediation/rules-case-resources/arbitrator-training [https://perma.cc/24AW-XZ3E].

are completed).[183] FINRA training focuses on the arbitration process, disclosure, and—for chairs—the chair's role in overseeing a proceeding.[184] FINRA estimates that the chair training takes approximately four hours to complete.[185] After completing the training, an applicant must take an assessment and earn a score of at least eighty percent, and they have up to two chances to satisfy this requirement.[186]

4. Prohibition on Outside Research by Arbitrators

Notably absent from FINRA's current arbitrator training is any module on securities law, securities instruments, or the securities industry. Instead of providing training on any aspect of the applicable law or securities rules, both the basic and chair training expressly instruct arbitrators that they are prohibited from conducting any outside research.[187] Instead, arbitrators are admonished throughout training that they should only rely upon law and facts as presented by the parties in their pleadings.[188] The prohibition on outside legal and factual research is also reiterated throughout FINRA's Arbitrator Guide.[189] FINRA's Neutral Corner publication, a newsletter circulated to all FINRA arbitrators and mediators, recently opened with an article

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *See, e.g.*, Fin. Indus. Regul. Auth., Basic Arbitrator Training Transcript 53 (on file with Minnesota Law Review) ("As a reminder, arbitrators must not conduct research on their own, but should ask parties to provide briefs.").

188. *Id.*

189. *See* FINRA Dispute Resolution Services, *Arbitrator's Guide*, FINRA 71 (Sept. 2024), https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf [https://perma.cc/DH3P-MMS7] ("You must not conduct independent legal research [on attorney's fees] . . . ."); *id.* at 79 ("Arbitrators cannot conduct their own research [on expungement] . . . ."); *id.* at 67 ("Sometimes, a claim will be based upon a statute that explains how damages should be calculated. If a claim is based upon such a statute, the panel should look to the parties for guidance on how the law requires damages to be calculated."); *id.* at 35 ("The arbitrators may ask the parties to brief them on the law relating to production issues."); *id.* at 40 ("Arbitrators should be aware that these demonstrative examples of court decisions are not binding on arbitration panels and panels may consider relevant case law presented to them by the parties."); *id.* at 40 ("The arbitrators may ask the parties to brief them on the law relating to production issues.").

reminding arbitrators of their duty to refrain from any outside legal or factual research.[190]

5. Increased Procedural Complexity

Since the initial adoption of rules for small claims securities arbitration in the late 1970s, securities claims have become much more complex and formal, with some observing that in many respects that FINRA arbitration is indistinguishable from litigation.[191] Similar observations have been made about arbitration more generally.[192] Among the most notable changes to securities arbitration procedure (other than the changes to arbitrator selection described above) are the addition of a formalized discovery process and the institution of additional hearing

190. *See* Jennifer LaMont, *Prohibited Independent Research in the Age of Artificial Intelligence: Don't Do It*, NEUTRAL CORNER (Fin. Indus. Regul. Auth., New York, N.Y.), vol. 2, 2024, at 1, 1, https://www.finra.org/sites/default/files/2024-06/neutral-corner-volume-2-2024-0628.pdf [https://perma.cc/MZ54-J6NF] ("Arbitrators should only seek clarity on legal issues by requesting additional information from the parties on their cases."); *id*. at 2 ("Parties must be confident that arbitrators are basing their decisions solely on the information the parties provide.").

191. Marc I. Steinberg, *Securities Arbitration: Better for Investors than the Courts?*, 62 BROOK. L. REV. 1503, 1506 n.17 (1996) (describing increased complexity of securities arbitration and quoting *Securities Arbitration Reform*, *supra* note 147)*; see also* Therese Maynard, McMahon*: The Next Ten Years*, 62 BROOK. L. REV. 1533, 1543 (1996) ("[P]iecemeal efforts to reform the procedural rules of [securities] arbitration have resulted in reworking the modern arbitration system into the image and likeness of the litigation system."); *id*. at 1548 ("[T]he current process of securities arbitration has become practically a clone of litigation."); Katsoris, *Securities Arbitration: A Clinical Experiment*, *supra* note 12, at 194 ("[A]rbitration began to look more like the courtroom through the introduction of expanded discovery requests, more frequent prehearing conferences, and other procedures intended to provide safeguard to ensure a fair and complete hearing."); Nicole G. Iannarone & Darlene Pasieczny, *Discovery Abuse in Customer Cases*, NEUTRAL CORNER (Fin. Indus. Regul. Auth., New York, N.Y.), vol. 3, 2022, at 1, 4, https://www.finra.org/sites/default/files/2022-09/neutral-corner-volume-3-2022-0927.pdf [https://perma.cc/7E5N-LKJL] ("Parties have reported that DRS arbitration is beginning to feel more like litigation in a court."); DAVID ROBBINS, SECURITIES ARBITRATION PROCEDURE MANUAL § 9-8 (5th ed. 2023). *But see id*. at 1512 (stating that despite increasing complexity, securities arbitration continues to retain features of informal process).

192. *See, e.g.*, Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 6 (2010) ("[I]t appears that as arbitration has been called upon to assume the burden of resolving virtually every kind of civil dispute, it has taken on more and more features of a court trial.").

modalities, changes that may remove the advantages that securities arbitration initially provided.[193]

First, provisions for discovery and exchange of anticipated hearing exhibits and witness lists were added in 1989.[194] Those provisions have continued to evolve to today's standard that whenever a FINRA case is decided via a live hearing, the parties are required to exchange certain "presumptively discoverable" documents.[195] These documents, listed on FINRA's Discovery Guide Lists 1 and 2, assist parties by requiring the exchange of documents that have been found to be necessary to properly prepare cases without the parties relitigating the same discovery disputes in every case.[196] Immediately before this article went to final press, the SEC approved a rule change that permits small claims parties to opt into this type of discovery. The rule is not yet effective.[197] As a result, because parties with smaller claims do not receive a hearing by default, mandatory document exchange does not come into play unless a simplified-qualifying claimant elects into a full-blown hearing.[198] These investors can, however, obtain documentary discovery by preparing and serving formal document requests.[199] Empirical research suggests

193. *See, e.g.*, Maynard, *supra* note 191, at 1536 ("[T]he procedural reforms that have been implemented piecemeal over the last ten years [to securities arbitration] are now seen as undermining the goals of the arbitration process, which was originally intended to offer speedy and final resolution of the parties' disputes in a cost-effective fashion.").

194. SEC. INDUS. CONF. ON ARB., SIXTH REPORT OF THE SECURITIES INDUSTRY CONFERENCE ON ARBITRATION 2 (Aug. 1989) (on file with Minnesota Law Review) (describing changes to the securities arbitration code after *McMahon*, including discovery provisions and twenty-day exchange of documents).

195. *See* FINRA Rule § 12506 (2024), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12506 [https://perma.cc/2LT5-E2ZF] (describing document production lists).

196. *See* NASD Notice to Members 99-90, *NASD Regulation Announces New Discovery Guide to be Used in Arbitration Proceedings* (Oct. 25, 1999).

197. Order Approving a Proposed Rule Change, Exchange Act Release No. 101,449, 89 Fed. Reg. 87,435 (Oct. 28, 2024) (approving rule change allowing document production lists in simplified arbitration at claimant's request).

198. *Simplified Arbitrations*, FINRA, https://www.finra.org/arbitration-mediation/rules-case-resources/special-procedures/simplified-arbitrations [https://perma.cc/8JMY-F9DH] ("[I]f a customer [in a case with $50,000 or less in damages] requests a regular hearing pursuant to FINRA Rule 12800(c)(3)(A), the regular provisions of the Code, including the Discovery Guide, apply.").

199. FINRA Rule § 12507 (2024), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12507 [https://perma.cc/UH6C-HRTH] (describing process for obtaining additional documentary discovery).

that unrepresented investors in simplified proceedings may not seek document discovery to assist in the preparation of their cases.[200] Self-represented investors may also not understand that a "meet and confer" or motions practice may be required to obtain even presumptively discoverable documents.[201] Failing to obtain information discovery may be detrimental to investors' cases.[202]

Second, additional modalities have been designed to afford investors with the smallest claims with more choices of how to present their claims.[203] By default, a simplified-qualifying claim will be decided solely on the pleadings and briefs submitted by the parties, leading to these claims being colloquially referred to as "paper" cases.[204] Investors are able to opt out of a paper proceeding and select a special telephonic hearing or regular in-person hearing.[205] Special telephonic hearings allow a party to testify and present witnesses without facing cross-examination, and the hearings are subject to strict time limits.[206] Regular in-person hearings include all of the available procedural mechanisms in the securities arbitration forum.[207] The ability of a claimant with a small claim to opt into a full-blown hearing may be driven by the reality that just because a claim is small does not mean that it is simple.[208]

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200. Iannarone, *Small Claims Securities Arbitration*, *supra* note 9, at 773–74 (describing faster time from filing to award for unrepresented claimants with non-hearing simplified cases and suggesting that finding driven by pro se parties not seeking discovery to assist in presentation of their claims).

201. *See, e.g.*, Iannarone & Pasieczny, *supra* note 191, at 1 (describing increase in parties failing to provide presumptively discoverable documents and filing of motions to compel in nearly fifty percent of customer arbitration cases from 2018–2020).

202. *See, e.g.*, Steinberg, *supra* note 191, at 1513–14 n.55 (collecting sources describing that lack of deposition discovery generally inures to industry respondents—and to the detriment of investors—because industry parties have in their possession all information needed to defend themselves).

203. FINRA Rule § 12800 (2024), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12800 [https://perma.cc/27AX-HNTC] (describing paper, special proceeding, and hearing options).

204. *Id.* § 12800(a).

205. *Id.* § 12800(c)(3).

206. *Id.* § 12800(c)(3)(B).

207. *Id.* § 12800(c)(3)(A).

208. *See, e.g.*, Nicole G. Iannarone, Assistant Clinical Professor & Dir., Inv. Advoc. Clinic, Ga. St. Univ. Coll. of L., Prepared Remarks at Investor Advisory

Throughout the decades since its adoption, securities arbitration has evolved considerably. Rather than having a choice between court and arbitration, investors today are forced to arbitrate claims with their stockbrokers. The dollar threshold for so-called "simplified" claims has increased four-fold. Investors with "small" claims under $100,000 are now only able to choose arbitrators without stock market industry experience who have appeared before repeat-player stockbrokers on multiple occasions. Arbitrators need not have any legal or securities experience, and they are prohibited from conducting any outside research. Instead, they must rely upon legal and industry norms provided by the parties to each proceeding. Finally, the complexity of securities arbitration has increased over the years, and in many respects, it looks more like litigation in court than an informal dispute resolution process. The intent and implications of these changes are examined in the following Sections.

B. JUSTIFYING PROCEDURAL CHANGES

Changes to the securities arbitration regime have been justified by alleged increases in efficiency and fairness to investors while also decreasing cost.[209] Increasing the dollar amount of damages that qualify for simplified arbitration, for example, was driven primarily by cost.[210] FINRA believed that the rule change would reduce forum fees by eliminating the expense of a hearing and affording more investors the ability to present their cases solely on the papers.[211] Reducing cost was also a primary rationale behind creating presumptively discoverable documents in all hearing cases.[212] Access to justice has been cited as a rationale behind some procedural rule changes. For example, FINRA believed that expanding the simplified arbitration category would also facilitate investor access to justice because more

Committee Meeting 1 (Oct. 12, 2017), https://www.sec.gov/spotlight/investor-advisory-committee-2012/nicole-iannarone-remarks-iac-101217.pdf [https://perma.cc/K7FR-MRH9] ("Many of our cases are $50,000 or less, qualifying them for simplified arbitration, yet those matters are anything but simple.").

209. *See, e.g.*, Simplified Arbitration, Notice 12-30, 2012 WL 2491696, at *1 (June 22, 2012) (listing benefits of simplified arbitration rules).

210. *Id.* (increasing simplified arbitration threshold from $25,000 to $50,000).

211. *Id.*

212. *See supra* note 196 and accompanying text.

investors would have the ability to present their cases without fear of cross examination.[213] Efficiency was also cited as a rationale for increasing the limit for simplified arbitration proceedings.[214] Public perception of fairness also drove FINRA to make some changes, particularly the reframing of arbitrator classification as public and non-public and giving all parties the ability to strike non-public arbitrators. Finally, professionalizing the forum has driven changes, such as the institution of the public chair requirement.[215]

C. INVESTOR JUSTICE IMPLICATIONS OF FORCED SMALL CLAIMS ARBITRATION

At first glance, the evolution of forced securities arbitration may seem in the interest of investors with smaller claims, or at least neutral in impact to those investors. Yet empirical research has shown a significant decline in pro se parties' recovery rates versus represented parties, suggesting that seemingly benign procedural changes have had a highly consequential impact on small claims investors.[216] In the years after securities arbitration became mandatory for most investor customers of broker-dealer firms, pro se and represented investor parties prevailed at similar rates, though represented parties were more likely to have a higher than average award.[217] A 1992 study reported a pro se recovery rate of 44.87% in small claims securities arbitration.[218] The most recent empirical research on pro se parties in

213. Simplified Arbitration, 2012 WL 2491696, at *1 ("[C]ustomers who are unable to retain an attorney, or are uncomfortable appearing at a hearing without representation, now have the option of having their claims decided on their written submissions.").

214. *Id*. ("FINRA can expedite administration of cases under the simplified arbitration rules because the arbitrator and the parties do not need to schedule a hearing.").

215. Order Approving Proposed Rule Change and Amendments, Exchange Act Release No. 55,158, 72 Fed. Reg. 4,574, 4,587 (Jan. 31, 2007).

216. *See, e.g.*, Iannarone, *Small Claims Securities Arbitration*, *supra* note 9, at 736 (describing research on declining win rates for pro se parties); U.S. GOV'T ACCOUNTABILITY OFF., GAO/GGD-92-74, SECURITIES ARBITRATION: HOW INVESTORS FARE (1992); Katsoris, *Securities Arbitration: A Clinical Experiment*, *supra* note 12, at 200–01 (describing studies of investor win/loss rates in securities arbitration).

217. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 216.

218. Katsoris, *Securities Arbitration: A Clinical Experiment*, *supra* note 12, at 200–01.

small claims securities arbitration tells a different story.[219] Between 2014 and 2019, investors with claims of up to $50,000 obtain an award in their favor in only 24% of cases decided by an arbitrator, compared to a 40% recovery rate for represented investors.[220] Though win/loss rates of arbitrated cases may not be themselves probative, skewed or widening win/loss rates can illustrate informational asymmetries favoring a more resourced party and disadvantaging the party with less access to information.[221] Because small claims investors today are more likely to be unrepresented and more likely to lose when they proceed on a pro se basis than unrepresented investors in prior decades, examining how seemingly benign rule changes impact pro se parties with small claims may shed light into why pro se investors with small claims today fare so much worse than similarly situated investors in past decades.[222]

The evolution of securities arbitration appears to have an outsized impact on investors with small claims, creating an access-to-justice gap that might be even wider than that experienced by pro se litigants in state and federal courts.[223] This Section explores the cumulative impact of rule changes on investors with the smallest claims, which may have contributed to the difficulties that pro se small claims investors appear to have versus represented investor claimants.

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219. Iannarone, *Small Claims Securities Arbitration*, *supra* note 9, at 784.

220. *Id*.

221. *See* David Horton, *Forced Remote Arbitration*, 108 CORNELL L. REV. 137, 166–67 (2022).

222. Iannarone, *Small Claims Securities Arbitration*, *supra* note 9, at 732. In 1992, for example, pro se and represented parties won at similar rates, though represented parties were more likely to have larger average recoveries. *See, e.g.*, Katsoris, *Securities Arbitration: A Clinical Experiment*, *supra* note 12, at 200 (describing U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 216). A 1997 study reported a pro se win rate of 44.87% in small claims securities arbitration. *Id*. at 200–01. The most recent reported win rate—24%—is substantially less than these historic rates. Iannarone, *Small Claims Securities Arbitration*, *supra* note 9, at 736 (finding pro se parties with simplified qualifying claims recovery in only 24% of cases decided by award).

223. Though the size of the gap may be wider, the impact of the access to justice gap may more immediately harm pro se parties with legal claims concerning housing, family law, and access to benefits. *See supra* Part I (noting that the Author does not claim that investors have greater need to counsel than other pro se parties).

1. Implications of Arbitrator Qualification Standards and Selection Protocols

More than half of investors with the smallest securities claims proceed pro se, and, when they do so, empirical research demonstrates they are far less likely to recover damages.[224] Research has shown that unlike broker-dealer firms and lawyers who specialize in securities arbitration, pro se parties are one-shot players who lack the informational advantages that assist repeat-player counsel and firms.[225] Choi, Fisch, and Pritchard have established that investors with lawyers are more likely to recover because lawyers appear to be able to navigate arbitrator selection and effectively strike arbitrators with conflicts of interest.[226] Indeed, they find that arbitrator selection "may create particular disadvantages for parties who are not represented by counsel."[227] Mark Egan, Gregor Matvos, and Amit Seru found that only investors represented by lawyers with specialized securities arbitration experience, as evidenced by membership in a securities bar association, were able to overcome informational asymmetries enjoyed by repeat-player stockbrokers and their lawyers.[228] Thus, unrepresented investors lack the background experience and knowledge to effectively navigate arbitrator selection, placing them at a severe disadvantage.[229]

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224. Iannarone, *Small Claims Securities Arbitration, supra* note 9, at 48, 53 (finding that claimants with larger claims are more likely to be represented (86% representation rate) than claimants with claims of $50,000 or less (42% representation rate) and investors with claims of up to $50,000 who were represented by an attorney were more likely to receive an award in their favor (40%) than those who proceeded pro se (24%)).

225. *See, e.g.*, Egan, Matvos & Seru, *supra* note 19, at 3 (finding that being represented by an attorney who is a member of a specialized securities arbitration bar eliminates disadvantages that investors otherwise faces in securities arbitration); Choi, Fisch & Pritchard, *Arbitrator Background*, *supra* note 109, at 73, 86 (finding that investors with counsel in securities arbitration fare better due to attorneys' ability to eliminate some arbitrator conflict of interest in the arbitrator selection process).

226. Choi, Fisch & Pritchard, *Arbitrator Background*, *supra* note 109, at 60, 87.

227. *Id.* at 87.

228. Egan, Matvos & Seru, *supra* note 19, at 3 (finding that representation by an attorney who is a member of the Public Investors Arbitration Bar Association (PIABA) helps to level the playing field for investors).

229. *See, e.g.*, *id.*; Choi, Fisch & Pritchard, *Arbitrator Background*, *supra* note 109, at 87 ("The party selection process—which in theory empowers both

In addition to not being able to effectively navigate arbitrator selection alone, pro se parties must choose between arbitrators that have been found to have a predisposition against them.[230] Choi, Fisch, and Pritchard have found that certain arbitrators—those who serve as professional arbitrators or serve as arbitrators during their retirement—exhibit bias against investors in securities arbitration by issuing lower awards.[231] Investors with claims up to $100,000 face an additional difficulty in the arbitrator selection process: they are only permitted to choose amongst public chair arbitrators who, regardless of their outside employment status, are more likely to favor stockbrokers and their firms.[232] Finally, these pro-industry biases may be increased as a result of arbitrator qualification standards that require public arbitrators to have previously served in larger claims cases that conclude after a hearing.[233] As an initial matter, in order to become a chair, a public arbitrator must have been chosen to serve multiple times.[234] Choi, Fisch, and Pritchard suggest that arbitrator selection disadvantages investors because "[p]arty control over the selection of the arbitrators appears to increase arbitrators' incentives to cater to the interests of brokers and brokerage firms."[235] In addition, FINRA arbitrator selection protocols substantially favor those arbitrators who have already become public chairs.[236] As a result, despite FINRA efforts to diversify public arbitrator pools in recent years, a small claims investor is unlikely to have their case decided by

claimants and respondents—may create particular disadvantages for parties who are not represented by counsel.").

230. Choi, Fisch & Pritchard, *Attorneys as Arbitrators*, *supra* note 157, at 85 (finding "support to the concern that arbitrators with industry experience tend to disfavor claimants").

231. *Id.* at 86.

232. *See* Egan, Matvos & Seru, *supra* note 19, at 9, 17.

233. *See supra* Part II.A.2; Iannarone, *Structural Barriers*, *supra* note 23, at 1426–33 (describing public chair qualification standards).

234. Iannarone, *Structural Barriers*, *supra* note 23, at 1427–29, 1432.

235. Choi, Fisch & Pritchard, *Attorneys as Arbitrators, supra* note 157, at 154; *see also supra* Part II.A.2.b (describing experiential requirements to become a public, chair-qualified arbitrator).

236. Iannarone*, Structural Barriers*, *supra* note 23, at 1424 (identifying two opportunities for chair-qualified arbitrators to appear on arbitrator selection lists, versus one opportunity for non-chair public arbitrators).

a chair with a diverse background.[237] Arbitrators deciding small claims cases are likely to be repeat-player arbitrators with decades of experience hearing investor claims, and barriers for new arbitrator entrants are substantial.[238]

Taken together, decisions to professionalize the arbitrator pool and facilitate arbitrator choice greatly disadvantage unrepresented investors because pro se parties can only choose an arbitrator from a non-diverse pool that already disfavors investors, and those pro se parties lack the knowledge that investor-side lawyers use to eliminate arbitrator conflicts of interest.

2. Implications of Arbitrator Background Standards and Training

Unrepresented investors continue to face monumental challenges after an arbitrator is chosen to decide their case. Unlike state courts, where judges hearing claims above $10,000 are typically required to have legal training, as evidenced by a law degree, arbitrators in the FINRA forum are not required to have any legal training at all and can hear claims of unlimited dollar size.[239] With an average claim size of $37,521.24,[240] small claims investors would likely have a judge with a law degree deciding their claim if they were allowed to proceed in court, rather than being forced into arbitration.[241] Moreover, small claims investors are limited to arbitrators without any securities industry affiliation, meaning that unlike investors with larger claims, they have

237. *Id.* at 1435–36 (finding that only 0.98% of public chairs deciding cases from January 1, 2015 to December 31, 2019, had become chairs in the prior five-year period, with most having at least ten years' experience in the FINRA forum); *id.* at 1440 (describing the difficulty new, diverse arbitrators face in obtaining experiential requirements to qualify for public chair status).

238. *Id.*

239. *See generally* Sara Sternberg Greene & Kristin M. Renberg, *Judging Without a J.D.*, 122 COLUM. L. REV. 1287 (2022) (describing a landscape of magistrate-level courts or cases with a claims limit of $10,000, in which a judge need not have a law degree).

240. *See* Iannarone, *Structural Barriers*, *supra* note 23, at 38–40 (finding investors with small claims have an average claim size of $37,521.24 and investors with simplified-qualifying claims have an average claim size of $24,512.49).

241. *See* Greene & Renberg, *supra* note 239.

no ability to select an arbitrator with securities experience who may be better positioned to understand the investors' case.[242]

Though one might expect that the prospect of non-lawyer arbitrators without securities experience would result in the forum providing substantive training on the underlying law and industry norms, FINRA training only covers arbitration procedure and provides neither legal nor securities law training.[243] Arbitrators are expected to learn the relevant law and securities procedures, if at all, by participating in prior proceedings, where represented industry parties are likely to be providing their own, industry-biased training.[244] This effect is substantial because, unlike judges, FINRA arbitrators are expressly prohibited from conducting any outside research—including legal research—so arbitrators can only question parties' positions by comparing their pleadings and relying upon their own knowledge bases.[245] If an arbitrator believes they need additional legal or securities information, FINRA makes clear that they may only ask the

242. *See supra* Part II.A.2; *see also* Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform of the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 HARV. J.L. & PUB. POL'Y 607, 630 (2010) ("By understanding the industry, non-public arbitrators may be better able to distinguish violations from non-violations."); *id.* at 631–32 (reporting results of a securities arbitration forum pilot whereby parties were able to obtain an all-public panel by striking all non-public arbitrators, and parties exercised this option about half of the time); Choi, Fisch & Pritchard, *Arbitrator Background*, *supra* note 109, at 53 (noting, concerning arbitrators, that "[b]roker-customer disputes frequently involve technical issues in which familiarity with industry practice is valuable"); *id.* at 75 (suggesting that while arbitrators with securities experience issue lower awards, this result may be partially ameliorated when investors are represented by an attorney).

243. *See generally Basic Arbitrator Training Program Transcript*, FINRA DISP. RESOL. SERVS. (May 2024), https://www.finra.org/sites/default/files/2024-05/FINRA-Basic-Arbitrator-and-Expungement-Training-Full-Course-Transcript.pdf [https://perma.cc/4T2L-VZPE] (overviewing the FINRA arbitrator training program); *Chairperson Training Transcript*, FINRA DISP. RESOL. SERVS. (May 2024), https://www.finra.org/sites/default/files/2024-05/FINRA_Chair-Training-Full-Transcript.pdf [https://perma.cc/4G9Y-SZF9] (overviewing the FINRA chairperson training program).

244. *See, e.g.*, Order Approving Proposed Rule Change and Amendments, 72 Fed. Reg. 4,574, 4,587 (Jan. 31, 2007) ("NASD [FINRA's predecessor] believes that the experience and training gained in the time it takes to serve on three hearings through award should qualify an arbitrator to serve as a chair, even without legal training or experience.").

245. *See supra* Part II.A.4.

parties for such additional information.[246] The stockbroker always has securities industry experience to lend to the case, and almost always has an attorney.[247] In many cases, a stockbroker also hires an expert witness to testify and provide an opinion on industry procedures and practices that is favorable to the respondent broker-dealer firm and associated person.[248] A significant imbalance thus occurs when an unrepresented investor faces off against a repeat-player, represented respondent before an arbitrator that already has a pro-industry bias.[249] The public chair arbitrator will obtain all information about the relevant law and standards from the respondent stockbroker, brokerage firm, or their paid expert witness.[250] This problem impacts investors with significant claims—up to $100,000—whose cases are also decided by only one public chair arbitrator.[251] Even the rare unrepresented stockbroker respondent fares better than the typical investor claimant: the stockbroker has vastly more securities industry experience to provide to the arbitrator simply due to their work experience.[252] This imbalance is even more profound when the arbitrator does not have a legal background and their only knowledge of the applicable law and securities

246. *Id.*

247. Iannarone, *Small Claims Securities Arbitration*, *supra* note 9, at 3, 62; Choi, Fisch & Pritchard, *Arbitrator Background*, *supra* note 109, at 53.

248. *See, e.g.*, Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 Nw. U. L. Rev. 1261, 1265–1266 (2012) (describing concerns of bias from party-paid scientific witnesses); Tracy Remy, *Evidentiary Issues in Arbitration*, NEUTRAL CORNER (Fin. Indus. Regul. Auth., New York, N.Y.), vol. 4, 2022, at 1, 5, https://www.finra.org/sites/default/files/2023-01/neutral-corner-volume-4-2022-1231.pdf [https://perma.cc/CYW2-FHRG] ("Parties often have expert witnesses testify during the [securities arbitration] hearing to express views, give interpretations and apply their expertise to facts others have provided.").

249. Choi, Fisch & Pritchard, *Arbitrator Background*, *supra* note 109, at 86 ("Legal representation appears to mitigate but not eliminate the effect of industry experience, such that unrepresented litigants suffer the most from the effect of 'industry bias.'").

250. *See, e.g.*, Greene & Renberg, *supra* note 239, at 1335 (highlighting the "inappropriate influence of district attorneys (DAs) and law enforcement" on nonlawyer magistrate judges).

251. *See supra* Part II.A.1 (describing a one chair-qualified arbitrator deciding all cases seeking up to $100,000).

252. *See* Choi, Fisch & Pritchard, *Arbitrator Background*, *supra* note 109, at 53; Bondi, *supra* note 242, at 630–31.

protocols came from prior arbitrations involving represented industry parties.[253]

A concrete example of why an arbitrator's knowledge of the law matters may further illustrate the inequities faced by unrepresented parties. Investors are only permitted to bring claims in the FINRA forum if those claims arose in the past six years.[254] This so-called "six year rule"[255] is one of the only grounds upon which a respondent broker-dealer firm and its associated persons may seek to have the investor's arbitration claim dismissed.[256] Indeed, FINRA's Code of Arbitration Procedure makes clear that "[m]otions to dismiss a claim prior to the conclusion of a party's case in chief are discouraged in arbitration."[257] Respondents nevertheless often assert in defense that a claim is ineligible for arbitration under the six-year rule.[258] These parties typically choose the earliest date upon which a claim could be based—like the first trade in an account—to seek to have the claim dismissed.[259] Such arguments, however, may not have any basis in law.[260] If an investor lacks knowledge of applicable case law, FINRA guidance, and industry practice, they may not be able to describe why their claim is timely and the respondent's defense is unfounded.[261] Indeed, multiple dates

253. *See* Iannarone, *Structural Barriers*, *supra* note 23, at 1445 ("An additional layer of asymmetry appears for parties who either appear pro se or retain counsel who is not experienced in the forum.").

254. *See* FINRA Rule § 12206(a) (2024), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12206 [https://perma.cc/6A3W-BHG5] ("No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim.").

255. *See* Philip M. Aidikoff, Robert A. Uhl, Ryan K. Bakhtiari, Katrina M. Boice & Steven B. Caruso, *FINRA Six-Year Eligibility Rule 12206: The Purchase Date is Often Not the Triggering "Occurrence or Event Giving Rise to a Claim*," 20 PIABA BAR J. 1, 1 (2013) (reviewing the six-year rule).

256. *See* FINRA Rule § 12504(c) (2024), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12504 [https://perma.cc/H3QK-JNHH] (referencing FINRA Rule 12206(a) as a ground for dismissal).

257. *Id.* § 12504(a)(1).

258. *See*, *e.g.*, Aidikoff, Uhl, Bakhtiari, Boice & Caruso, *supra* note 255, at 1 ("In an attempt to avoid liability for wrongful conduct, brokerage firms argue the 'occurrence or event' is the purchase date of the investment in issue.").

259. *Id.*

260. *See id.* ("Accepting the brokerage firm's argument creates situations in which certain claims would be barred before they arose.").

261. *Cf. id.* at 8 (describing the variety of case law interpretations as to what constitutes the triggering event).

after the initial purchase where the stockbroker made a recommendation could instead be the proper claim-triggering event.[262] Arbitrators without legal knowledge may not understand the often complex law of when a claim accrues and base a decision on the respondent's improper argument, with the perverse result that an investor's claim is dismissed based upon a date before the investor's claim had even arisen.[263]

Respondent firms also routinely defend their cases by pointing to customer signatures on account opening statements and claiming that the investor understood the risks of the transaction at issue.[264] Unless an investor understands that the law requires broker-dealers and their firms to make investment recommendations in the investor's best interest, however, the investor may have a difficult time responding to such an argument.[265] Identifying alternative products and recommendations that were more suitable for the investor would be difficult for a non-lawyer, non-industry arbitrator, and perhaps impossible for most investors.[266]

3. Implications of Increased Procedural Complexity

A legal and securities background matters for more than just preparing a pleading or participating in a hearing. The increased procedural complexity which has made securities arbitration look much more like traditional litigation also results in disadvantages to pro se parties, particularly when facing

262. *See id.* at 15, 23–24 (discussing court decisions which recognized, as triggering events, post-purchase arbitration actions based on brokerage firms' recommendations of allegedly unsuitable investments).

263. *Id.*

264. *See, e.g.*, Samuel B. Edwards, President, Pub. Invs. Advoc. Bar Ass'n, Comment Letter on Conflict of Interest Rule—Retirement Investment Advice 10 (Aug. 6, 2020), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA29/00047.pdf [https://perma.cc/N6WU-EWWX] ("When Kathy sued, the broker-dealer claimed that Kathy understood the risks because she signed the REIT's subscription agreement with risk disclosures—buried in over 30 pages of documents Herbert had provided to Kathy.").

265. *See* 17 C.F.R. § 240.15*l*-1 (2024) (outlining brokers' obligations to act in the best interest of their customers when making recommendations).

266. *Cf.* Edwards, *supra* note 264, at 5 (expressing concern over "the wide financial sophistication gap between Americans and the financial services industry").

arbitrators without legal or securities backgrounds.[267] There is an association between whether an investor is represented and the time between filing a case to award: pro se parties' cases move more quickly than represented parties' cases.[268] This counterintuitive result indicates that pro se parties may not be using or aware of discovery mechanisms that can help them obtain information needed to bring their claim.[269] Discovery procedures add time to a case while parties review and respond to discovery requests, meet and confer, and provide documents responsive to the requests.[270] The process is often iterative, with a second round of discovery after initial documents are provided.[271] Investors are most in need of discovery information because stockbrokers and their firms have at their disposal the information concerning the customer's account that gave rise to the arbitration claim.[272] Even if pro se parties are aware that they can obtain discovery, they likely lack the legal background to navigate objections, let alone meet and confer requirements, and motions practice.[273] And, if an arbitrator is asked to decide a dispute, they are much more likely, absent their own legal or industry knowledge, to rely upon a represented industry respondent's representations that documents do not exist or are unnecessary for the claimants' case and should not be produced.[274] Arbitrators

267. *See* Iannarone, *Small Claims Securities Arbitration*, *supra* note 9, at 9, 55–56.

268. *Id.* at 43.

269. *Id.* at 44.

270. *Id.* ("The study's finding of an association between attorney representation and the duration of a paper case may be suggestive of attorneys participating more fully in the discovery process."); FINRA Rule § 12800(g)(2) (2024), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12800 [https://perma.cc/27AX-HNTC] ("The parties may request documents and other information from each other.").

271. *Cf.* FED. R. CIV. P. 26(d)(3)(A) ("[M]ethods of discovery may be used in any sequence . . . .").

272. *See supra* Part II.A.5 (describing investors' need for discovery documents).

273. *See* Iannarone & Pasieczny, *supra* note 191, at 4 ("Failure to attempt meaningful conferral prior to filing a motion to compel could be a violation of FINRA discovery rules and subject that party to sanctions."). *See generally* FED. R. CIV. P. 26 (outlining discovery requirements, including parties' obligations to meet and confer before bringing suit).

274. *Cf.* Iannarone & Pasieczny, *supra* note 191, at 4 (describing the objecting party's burden of demonstrating the contested document's irrelevance to the arbitrator).

are directed by FINRA to rely only upon law provided by the parties to determine discovery issues.[275]

This is not merely a theoretical risk. Especially in small claims cases, respondents routinely object to claimant-investor requests for discovery, claiming that requests for documents are inapplicable because FINRA's discovery guide only applies to claims worth over $50,000.[276] Yet, the discovery guide—which mandates that the respondent promptly produce certain presumptively discoverable documents without any separate discovery requests—applies to all FINRA cases in which a hearing occurs, regardless of the size of the claim.[277] Such respondent arguments have become so commonplace that FINRA proposed a new rule in mid-2024 to further clarify its repeated guidance that the discovery guides apply to all hearing cases.[278] The SEC recently approved the rule and it will soon go into effect.[279] Represented claimants have an advantage over unrepresented claimants because their counsel are either aware of how the discovery guides operate or have the requisite training to conduct legal research to discover that the respondents' argument is incorrect. Arbitrators without legal training or knowledge may, when there is no claimant argument to the contrary, deny the investor the right to documents that are necessary for presenting their claim.

4. Arbitrator Pay in Small Claims Disincentivizes Careful Preparation

While many arbitrators spend significant time preparing for all of their cases, FINRA's arbitrator compensation model disincentivizes arbitrators from carefully preparing for cases. In paper cases—those cases in which no hearing is held—the

275. *See* FINRA Dispute Resolution Services, *supra* note 189, at 40 ("The arbitrators may ask the parties to brief them on the law relating to production issues.").

276. *But see* Notice of Filing and Order, Exchange Act Release No. 100,787, 89 Fed. Reg. 68,686, 68,687 (Aug. 21, 2024) (describing why discovery guides should apply in simplified-qualifying cases in which a customer seeks a regular hearing).

277. *See id.*

278. *See id.* at 5–7.

279. *See supra* note 197 and accompanying text.

arbitrator is paid a flat rate of $350.[280] The paper case honorarium is approximately the same as the average rate a New York attorney charges for one hour of work.[281] The honorarium is awarded regardless of how many hours the arbitrator spends on the case.[282] A dedicated arbitrator may spend several hours—or days—reviewing the materials submitted in a paper case. Making up the paper case file are the investor-claimant's statement of claim, the industry-respondent's answer, and final evidentiary briefs submitted by each of the parties.[283] To carefully review all of the materials contained in a paper case before rendering their decision, arbitrators are likely to spend far more than one hour of their time, and when they do so, they are not being compensated for that time.[284] As a result, arbitrators do not have an economic incentive to thoughtfully review all of the parties' materials prior to deciding the case.

As forced arbitration became entrenched in the securities realm, well-intentioned amendments were implemented, resulting in a more nuanced arbitration process with increased

280. FINRA Rule § 12800(h)(i) (2024), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12800 [https://perma.cc/27AX-HNTC] ("FINRA will pay the arbitrator an honorarium of $350 for each arbitration decided on the pleadings and other materials submitted by the parties.").

281. *How Much Should I Charge as a Lawyer in New York?*, CLIO, https://www.clio.com/resources/legal-trends/compare-lawyer-rates/ny [https://perma.cc/DE8V-6A65] ("[L]awyers in New York typically charge between $158 and $677 per hour, with the average being $358 . . . .").

282. *See* FINRA Rule § 12800(h)(i) (2024).

283. FINRA Rule § 12302 (2024), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12302 [https://perma.cc/S2H3-M7U4] (describing the requirements of statements of claim); FINRA Rule § 12303 (2024), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12303 [https://perma.cc/BL2Z-FGJT] (describing the requirements of answers); FINRA Rule § 12800(a) ("All arbitrations administered under this [Simplified Arbitration] rule will be decided on the pleadings and other materials submitted by the parties unless the customer requests a hearing . . . .").

284. *See Honoraria & Expenses for Arbitrators*, FINRA, https://www.finra.org/arbitration-mediation/rules-case-resources/honoraria-expenses [https://perma.cc/4DGL-NFPF] ("[T]he arbitrators' honorarium is set at a fixed rate. Arbitrators should not ask the parties, or the FINRA staff member assigned to the case, to pay a higher rate."); *FINRA's Arbitration Process*, FINRA, https://www.finra.org/arbitration-mediation/about/arbitration-process [https://perma.cc/9TBD-94NW] (outlining arbitrators' extensive responsibilities, which include "consider[ing] the evidence and testimony" and "decid[ing] all claims presented by the parties and how to allocate FINRA forum fees").

procedural complexity and party agency.[285] Procedural improvements have appeared to benefit investors with larger claims and legal representation.[286] Yet, they have had a deleterious impact on small-claims investors without legal counsel.[287] Taken together, these changes make it difficult, if not impossible, for unrepresented investors with small claims to obtain justice when they are harmed by stockbroker misconduct.

III. TOWARDS INVESTOR JUSTICE

Pro se small claims investors face barriers at every stage of a FINRA proceeding: arbitrator selection, case preparation, and case presentation.[288] These difficulties arise from a combination of their self-represented status and the cumulative impact of multiple well-intentioned procedural rule changes that uniquely affect small investors, particularly those without counsel.[289] This Part describes recommendations to ameliorate the justice gap facing pro se investors in forced securities arbitration, including providing greater access to counsel, in addition to interventions to alleviate the imbalances that favor securities industry parties, even when small claims investors have their own legal representation.

A. INVESTOR ACCESS TO COUNSEL

When empirical research suggests that the biases facing pro se parties in securities arbitration are eliminated simply if they have legal counsel,[290] an obvious recommendation to reduce the access-to-justice gap is to provide more attorneys to investors. In addition to leveling the playing field against repeat-player stockbrokers and broker-dealer firms, providing investors with

285. *See* Iannarone, *Small Claims Securities Arbitration*, *supra* note 9, at 6–7, 14.

286. *Id.* at 50–56 (finding that represented investors were more likely than pro se investors to secure larger awards in large claims, small claims, and simplified claims).

287. *Id.*

288. *See supra* Part II.C.

289. *Id.*

290. *Id.*; Choi, Fisch & Pritchard, *Arbitrator Background*, *supra* note 109, at 86.

counsel results in additional positive outcomes.[291] First, providing greater access to counsel ensures that stockbroker misconduct does not go unpunished, disincentivizing abhorrent stockbroker behavior and bolstering trust in capital markets.[292] Moreover, providing lawyers for investors even inures to the benefit of stockbrokers and firms.[293] Lawyers are ethically prohibited from bringing frivolous claims, and as a result, provide an important filtering mechanism to prevent meritless claims from being filed in the mandatory securities arbitration forum.[294] When lawyers evaluate an investor complaint and determine that there is no claim, they also provide an important service to the client because the client receives independent, non-conflicted advice about why the investor does not have an actionable claim.[295] At the same time, the securities industry benefits because they are not forced to bear the cost of defending against a meritless claim.[296] In other words, legal counsel for investors ensures that misconduct does not go unpunished while also preventing meritless claims by explaining to investors why they do not have a case.

Providing lawyers for all investors is not without monetary cost, particularly if attorney time costs more than a potential recovery.[297] Private lawyers are typically unwilling to assist an

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291. *See supra* Part II.C (describing how when claimants have legal counsel, it eliminates informational asymmetries otherwise existing between investors and respondent firms and stockbrokers).

292. *See supra* Part I.B (describing harms of unpunished stockbroker behavior and the lack of trust in capital markets when investors do not believe there is redress for misconduct).

293. *See* Clinic Letter, *supra* note 34, at 2 (describing law clinics' assistance of investors).

294. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2020) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

295. Clinic Letter, *supra* note 34, at 3 (describing clinics receiving thank you notes for taking the time to explain why an investor does not have a claim).

296. *Id.* at 2 (describing the law clinic's role in screening out meritless claims).

297. *See generally* Suzanne Blake, *Middle-Class Americans Can't Afford to Lawyer Up*, NEWSWEEK (Jan. 24, 2024), https://www.newsweek.com/middle-class-afford-lawyer-fees-legal-help-1863747 [https://perma.cc/935L-4CGV] (describing attorney fees' prohibitive effects on hiring legal representation).

investor unless the investor has lost more than $100,000.[298] As a result, in the late 1990s, then-SEC Chair Arthur Levitt proposed that law schools fill this representation gap by establishing securities arbitration clinics.[299] Multiple law schools responded to Levitt's call.[300] For over twenty-five years, securities arbitration clinics have provided "a win-win-win"[301]: "[M]odest investors gain access to otherwise inaccessible legal services, law students become more qualified and ready to practice securities law and represent clients in alternative dispute resolution processes, and the securities industry gains immeasurable good will through the investor protection function that [securities arbitration clinics] offer to countless Americans."[302]

Clinics have high success rates.[303] Small claims investors represented by law school clinics prevail at the highest rates in simplified arbitration, more than their non-clinic attorney peers.[304] Securities arbitration clinics also lie at the intersection of multiple areas of increasing public concern because their work focuses on small claims and forced arbitration.[305] Law school clinics represent regular Americans—"retirees, hairdressers,

298. *See supra* note 11 and accompanying text.

299. Press Release, Sec. Exch. Comm'n, SEC Announces Pilot Securities Arbitration Clinic to Help Small Investors—Levitt Responds to Concerns Voiced at Town Meetings (Nov. 12, 1997), https://www.sec.gov/news/press/pressarchive/1997/97-101.txt [https://perma.cc/EJD8-RJQQ] ("Because their claims are often not large enough, it is difficult for small investors to obtain counsel to represent them in arbitration. To help solve this problem, the Commission is working with law schools in the New York City area to set up pilot arbitration clinics. Students in the pilot programs will, under supervision of a lawyer, assist small investors in the securities arbitration process."); *see* Katsoris, *Securities Arbitration: A Clinical Experiment*, *supra* note 12, at 202 (describing Levitt's recommendation to create securities arbitration clinics across the country, including development of a pilot program in New York). *See generally* Jill I. Gross, *The Improbable Birth and Conceivable Death of the Securities Arbitration Clinic*, 15 CARDOZO J. CONFLICT RESOL. 597 (2014) [hereinafter Gross, *Improbable Birth*] (describing the development of securities arbitration clinics across the country).

300. *See* Gross, *Improbable Birth*, *supra* note 299, at 601–03.

301. *Id.* at 622.

302. *Id.*

303. *See* Iannarone, *Small Claims Securities Arbitration*, *supra* note 9, at 50, 52 (finding that law clinics prevail at the highest rate within the attorney representative category, for large and small claims).

304. *Id.* at 52.

305. *Id.* at 24–26.

mail carriers, welders, schoolteachers, and librarians"—as they seek to recover losses due to stockbroker misconduct.[306]

However, implementing securities arbitration clinics across the country has proven a difficult task. Despite the benefits that they provide, securities arbitration clinics have struggled to survive due to the difficulty of obtaining sustained funding.[307] Original funding sources, including grants from New York regulators and the FINRA Investor Education Foundation, no longer exist.[308] Ten years ago, Gross predicted that absent new financial support, many clinics would close.[309] Gross' prediction has come to pass; though twenty-five securities arbitration clinics once existed, today only ten remain, with the majority (six) located in New York state.[310] Investors in forty-five states have no access to counsel unless their claim is large enough for a private attorney to take interest.[311] Other than a clinic in Illinois, unless an investor lives on the East Coast, there is no law school clinic to help them.[312] The lack of clinics means that there are few investors who, like the Florida woman whose story opens this article, are able to overcome the extreme advantages that securities arbitration procedures afford to industry players.[313] Instead, investors who live in states without law school clinics may be forced to return to the workforce at an advanced age, like the California senior.

306. Clinic Letter, *supra* note 34, at 2.

307. Gross, *Improbable Birth*, *supra* note 299, at 617 ("[P]erhaps the biggest challenge to [securities arbitration clinics] is the maintenance of ongoing funding.").

308. *Id.* at 618–19.

309. *Id.* at 600 ("Unless dollars flow . . . to this type of clinic, the [securities arbitration clinic] may not make it to its twentieth anniversary.").

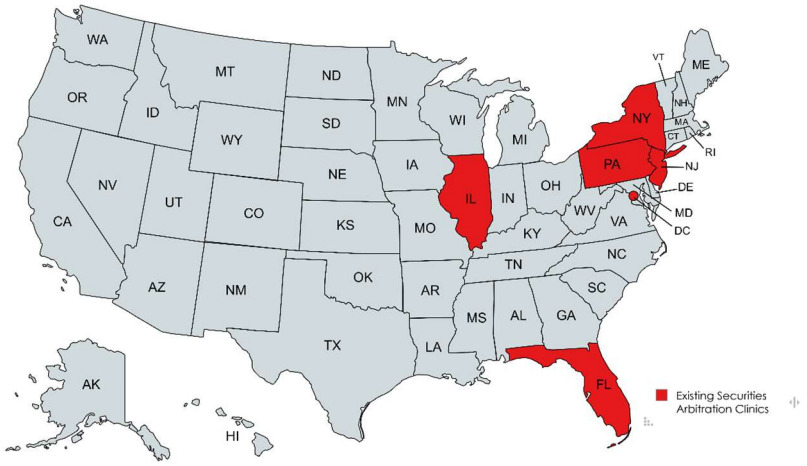
310. Letter from Complex Civ. Litig. & Inv. Prot. Ctr. et al., to Mike Quigley, Congressman, House of Reps. (June 3, 2022) [hereinafter Letter in Support of Investor Justice Act], https://www.sechistorical.org/collection/papers/2020/2022_0602_Clinics_Letter_in_Support_of_Investor_Justice_Act.pdf [https://perma.cc/L4DP-UXS9]; Nicole Iannarone & Christine Lazaro, *Investor Protection Requires Access to Representation*, FIN. PLAN. (Dec. 17, 2021), https://www.financial-planning.com/opinion/investor-protection-requires-access-to-representation [https://perma.cc/T3ZW-URLG].

311. *See* Letter in Support of Investor Justice Act, *supra* note 310, at 4.

312. *See id.*; Iannarone & Lazaro, *supra* note 310.

313. Iannarone & Lazaro, *supra* note 310.

Figure 1: States with Law School Securities Arbitration Clinics



Five years ago, the SEC's Investor Advisory Committee (IAC) looked into the issue of representation in small claims FINRA arbitration.[314] After holding a hearing and taking testimony, the IAC recommended that the SEC "explore ways to improve external funding sources to the law school investor advocacy clinics" in order to address the "threat to investor protection and to small investors' ability to retain representation in arbitration" as a result of a "declining number of investor advocacy clinics."[315] Among the solutions the IAC identified for funding clinics were reactivating the FINRA Foundation clinic grant program and ensuring that it provided sustained funding, as opposed to simply startup funding.[316] The IAC also recommended that the SEC seek congressional funding through the SEC Investor Protection Fund, potentially modeled off of the Low Income Taxpayer Clinics (LITC) funding model.[317]

314. *See* Inv. Advisory Comm., *Recommendation of the Investor Advisory Committee Financial Support for Law School Clinics that Support Investors*, U.S. SEC. & EXCH. COMM'N 4 (2018), https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac030818-law-clinics-recommendation.pdf [https://perma.cc/G95F-3PY6].

315. *Id.*

316. *Id.*

317. *Id.* at 8.

The plight of regular investors in forced securities arbitration has since caught the attention of legislators, who in recent years have expressed increasing concern about consumers in forced mandatory arbitration.[318] Congress has taken tentative steps towards providing sustaining economic support for securities arbitration clinics through the introduction of the Investor Justice Act of 2022 in the House and Senate.[319] Under the Act, the SEC would administer a grant program to fund legal clinics that provide free legal advice to investors with smaller claims.[320] Years earlier, advocates had suggested this approach to fill the representation gap for regular American investors, borrowing the idea from the Internal Revenue Service's (IRS) LITC grant program.[321] The Investor Justice Act did not make it out of committee.[322]

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318. *See, e.g.*, H.R. REP. NO. 117-393, at 104 (2023) (directing the SEC to conduct study of arbitration in registered investment advisory contracts).

319. *See* Investor Justice Act of 2022, H.R. 7923, 117th Cong. (2022) (aiming to "amend the Securities Exchange Act of 1934 to establish a grant program to fund qualified investor advocacy clinics, and for other purposes"); Investor Justice Act of 2022, S. 4657, 117th Cong. (2022) (same language).

320. H.R. 7923; S. 4657.

321. *See, e.g.*, Clinic Letter, *supra* note 34, at 8 (recommending a funding model for securities arbitration clinics similar to that of the IRS Low Income Taxpayer Clinic grant program); U.S. Sec. & Exch. Comm'n*, 2017 10 12 Investor Advisory Committee*, YOUTUBE, at 2:57:20 (Jan. 13, 2022), https://www.youtube.com/watch?v=s7caJEzkx7w (recommending the Office of the Investor Advocate examine the feasibility of creating a grant program similar to the LITC clinic program); Benjamin P. Edwards, *Vanishing Investor Clinics and the Hope on the Horizon*, LAW PROFESSOR BLOGS: BUS. L. PROF BLOG (Mar. 25, 2021), https://lawprofessors.typepad.com/business_law/2021/03/vanishing-investor-clinics-and-the-hope-on-the-horizon.html [https://perma.cc/FDF8-Z5R4] ("We might eventually get something similar for securities law to what already exists for tax clinics . . . ."); Letter in Support of Investor Justice Act, *supra* note 310, at 5 ("The grant program envisioned by the Investor Justice Act is not the first of its kind . . . In 2021, the IRS awarded more than $12 million in grants to 130 orgnaizations [sic] in 47 states and the District of Columbia. The proposed SEC grant program similarly would provide resources to sustain existing clinics and expand these essential resources to other parts of the country."). *See generally* Keith Fogg, *Taxation with Representation: The Creation and Development of Low-Income Taxpayer Clinics*, 67 TAX LAW. 3 (2013) (describing growth of low-income taxpayer clinics due to congressional passage of a bill establishing a grant program); 26 U.S.C. § 7526 (establishing the LITC grant program).

322. *All Actions: S.4657 — 117th Congress (2021-2022)*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/senate-bill/4657/all-actions [https://perma.cc/GWE3-Y622] (stating the Act was referred to the Committee

To better protect investors, Congress should reconsider and pass the Investor Justice Act. The Act, which would provide up to $5,000,000 in total funding for clinics that serve investors who cannot otherwise obtain counsel,[323] would have an immediate impact by assisting investors in states where investors currently have no option for free legal assistance for stockbroker misconduct. Passing the Investor Justice Act would ensure that the current securities arbitration clinics receive the funding they need to survive and would permit new clinics to open in underserved populations across the country. If the Act is not reintroduced, or if it does not fund sufficient clinics to meet the need, other sources of funding should be pursued. FINRA's Investor Education Foundation previously provided startup funding for law school clinics.[324] Reviving that program and expanding it so that funding is available for both establishing and sustaining law school securities arbitration clinics should be considered.[325] In addition, fines paid by FINRA members for rule violations should be considered as a potential source of funding for clinics.[326]

Even if the Investor Justice Act is passed, there is no question that law school clinics would not be able to help all of the smaller investors harmed by stockbrokers.[327] Though they may

on Banking, Housing, and Urban Affairs on July 28, 2022 and no action has been taken since).

323. Investor Justice Act of 2022, S. 4657, 117th Cong. (2022).

324. Gross*, Improbable Birth*, *supra* note 299, at 603 (describing the FINRA Investor Education's Foundation's grant program).

325. *See generally* Clinic Letter, *supra* note 34 (urging FINRA to expand the program by highlighting the impact funding has on securities arbitration clinics).

326. *See id.* at 8 (arguing that adding this source of funding would "ensure longevity of existing clinics and create capacity for new clinics in high need areas").

327. *Id.* at 7 (describing the University of Miami's clinic which had a waitlist so long that they ceased adding names to it); *see also* Iannarone, *Small Claims Securities Arbitration*, *supra* note 9, at 770 (illustrating that fifty-two percent of claimants proceed on a pro se basis in simplified claims in New York state, which currently has six legal clinics). Law school clinics are limited in the number of students that faculty can supervise, typically no more than eight students to every one licensed attorney overseeing the students' work. In addition, while law school clinics are designed to provide greater access to justice to clients who ordinarily could not obtain counsel, they are also designed to provide on-the-ground training for law students who are shifting into the role of an attorney. As a result, they cannot handle the same volume of clients that private attorneys represent.

not be able to meet all of the need, clinics are a first step in ensuring that all investors have access to assistance in their home state. Given law school clinics' expertise and the fact that small claims investors represented by clinics are the only category of claimants who recover at a greater than fifty percent rate, expanding securities arbitration clinics should be considered as an initial intervention.[328]

Nontheless, solutions in addition to law school securities arbitration clinics are needed. Additional possibilities for expanding investor access to counsel in securities arbitration include the FINRA forum hosting pro bono days where lawyers meet with investors for one-day, limited service consultations to evaluate whether a claim exists, provide advice for navigating the securities arbitration forum, and potentially take on an investor's case to fulfill the attorney's pro bono obligation.[329] In the past, for example, the New York City Bar Association would help screen cases for law school securities arbitration clinics, seek private attorneys for claims above $15,000, and refer only those cases to clinics where a private attorney could not be found.[330] Moreover, the PIABA Foundation has a pro bono project that could be expanded from its current focus on expungement claims to also provide direct representation to individual investors who are unable to obtain a lawyer due to the size of their claim.[331] The FINRA forum could also learn from the IRS and host pro bono settlement days where pro se investors receive

328. *See* Iannarone, *Small Claims Securities Arbitration*, *supra* note 9, at 782 (finding law clinics prevail in fifty-six percent of claims in simplified proceedings that proceeded to award from 2014–2019).

329. *See, e.g.*, *Saturday Lawyer Program*, AVLF, https://avlf.org/volunteer/saturday-lawyer-program [https://perma.cc/2DDH-TKAM] (describing a program that allows lawyers to meet with clients for one day to assess their claim during an initial screening, provide advice, and potentially take on their case).

330. Katsoris, *Securities Arbitration: A Clinical Experiment*, *supra* note 12, at 202 (describing discussions with the New York City Bar Association and its subsequent commitment "to help screen eligible cases for clinical representation").

331. *Learn About Our Pro Bono Representation*, PIABA FOUNDATION, https://www.piabafoundation.org/learn-about-our-pro-bono-representation [https://perma.cc/8QU8-TEDA] (describing a pro bono project where attorneys assist in representing investors when a stockbroker seeks to remove the investor's claim from the Central Registration Depository (CRD) database).

same-day advice from licensed attorneys in a mediation setting.[332]

Critics of expanding access to legal counsel sometimes claim that increased access to counsel will result in an increase in frivolous litigation.[333] Scholars have discovered, however, that there is little threat of frivolous claims in the FINRA forum.[334] Moreover, securities arbitration clinics report that they decline more cases than they take, educating investors who do not have claims about why a claim does not exist.[335] In so doing, they filter claims out of the system, saving stockbrokers and broker-dealer firms the cost of defending against meritless claims.[336] At the same time, they provide investors with answers about what happened—at no cost.[337] Clinics have even reported receiving thank you notes from investors who learned that they did not have claims, expressing their gratitude to the clinic for being the first to take the time to explain what had happened in their account.[338]

Expanding small-claims investors' access to counsel would ameliorate the harms that those investors currently face. From identifying funding to support the expansion of law school securities arbitration clinics to creating opportunities for attorneys to assist small claims investors through expanded pro bono programs, providing investors with access to counsel has

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332. *See* Lauren Allred, *Pro Bono Settlement Day Provides Experience and Gets Results*, GA. STATE UNIV. (Apr. 18, 2023), https://news.gsu.edu/2023/04/18/pro-bono-settlement-day-provides-experience-and-gets-results [https://perma.cc/8KGB-A4GT] (describing Georgia State University College of Law's Low-Income Taxpayer Clinic's coordination with the IRS to provide representation to taxpayers and assist in resolving disputes). FINRA provides numerous low-cost mediation solutions, especially during its yearly mediation month. Coordinating with attorneys willing to assist pro se parties during an organized settlement day may strengthen parties' access to counsel as attorneys' representation would be limited to settlement only.

333. *See, e.g.*, Egan, Matvos & Seru, *supra* note 19, at 32 ("[C]onsumer(s) may be willing to pay the legal costs of filing a merit-less case in hope of winning a large award . . . .").

334. *See id.* ("Given the fixed costs of arbitration, our results suggest that there is a limited benefit to filing frivolous cases under the current regime.").

335. Clinic Letter, *supra* note 34, at 2 (explaining that the "vast majority of investors" who contact the clinics "do not have a viable claim" and detailing what the subsequent process is for handling these instances).

336. *Id.*

337. *Id.*

338. *Id.* at 2–3.

numerous positive implications for aggrieved investors, capital markets, and even the broker-dealer industry.[339]

B. INVESTOR JUSTICE WITHOUT COUNSEL

Though guaranteeing qualified legal counsel to all investors could address the access to justice gap, it is not without significant cost.[340] Deborah Rhode advocated for interventions that do not involve lawyers to remedy the access to justice gap.[341] This Section describes interventions to increase investor justice without counsel.

1. Investor Choice

In the event that barriers impede small claims investors from obtaining representation in securities arbitration, the mandatory nature of securities arbitration should be reconsidered.[342] For almost 200 years, investors had the sole right to compel their stockbrokers into arbitration.[343] It was not until the late 1980s that the Supreme Court gave its blessing to mandatory arbitration, forcing investors to arbitrate claims in the securities realm.[344] Reconsidering which party—investor or brokerage firm—can choose securities arbitration is in order. Given the severe disadvantages that pro se parties face when bringing small claims in forced securities arbitration,[345] investor choice may level the playing field by permitting investors to determine whether court or arbitration is better for their case. This solution

339. *See supra* notes 328–32 and accompanying text (analyzing these potential solutions in further detail and providing examples of the positive impacts they have had).

340. For example, the Investor Justice Act would have provided each legal clinic with up to $150,000 each year to serve unrepresented investors. S. 4657, 117th Cong. (2022).

341. *See, e.g.*, RHODE, *supra* note 24, at 20 ("Reforms that minimize the need for costly representation could enable many individuals to more effectively address their law-related problems.").

342. *See, e.g.*, Edwards, *supra* note 111, at 434 (highlighting issues with the current arbitration scheme and presenting consumer choice as a potential solution).

343. *See* Gross, *Historical Basis*, *supra* note 83, at 175–76 (describing arbitration at the NYSE in the 1800s).

344. *Id*. at 182.

345. *See, e.g.*, Iannarone, *Small Claims Securities Arbitration*, *supra* note 9, at 780 (highlighting the discrepancies in success rates for represented versus pro se parties).

is not without precedent: some companies with mandatory arbitration clauses already carve out small dollar claims and permit them to go to small claims court.[346] Small claims in securities arbitration are of a much higher dollar value (approximately $40,000) than most procedural carveouts for small claims court ($1,500), so any mechanism permitting investors to opt into court may require a different dollar limit or no limit.[347] Indeed, the justice enhancement that small claims investors would obtain in court—including a judge with a law degree who is permitted to conduct outside legal research—would only attach in court levels above small claims.[348] This solution is currently being considered by Congress, and the findings in this Article support that pending Act.[349]

2. Opening the Arbitral Black Box

Arbitration is often described as a black box because information concerning what happens within it is generally only accessible, if at all, to repeat-players who force their customers into arbitration.[350] FINRA exhibits more transparency than most arbitration forums, publishing the results of all cases decided by an arbitrator and making those awards available in a searchable database.[351] However, FINRA Dispute Resolution's

346. *See* Richard Frankel, *Corporate Hostility to Arbitration*, 50 SETON HALL L. REV. 707, 730–31 (2020) (describing procedural carveouts in arbitration clauses for small-dollar claims when the company is more likely to be the plaintiff as well as carve-outs in the consumer financial context for claims less than $1,500); *see also* Rutledge, *Saturns for Rickshaws: Lessons for Consumer Arbitration and Access to Justice*, *supra* note 89, at 496 ("Arbitration agreements routinely contain 'carve outs' reserving to the consumer (or either party) the right to proceed in small claims court."); Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1, 21 (2013) ("Even if the contract includes a broad arbitration clause, the parties may agree to exclude, or 'carve-out' certain claims from arbitration.").

347. Iannarone, *Small Claims Securities Arbitration*, *supra* note 9, at 768 (finding the average dollar amount requested by small claims claimants to be $37, 521.24); Frankel, *supra* note 346, at 730 (describing the most common carve-out in the consumer financial context to be for claims less than $1,500).

348. *See* Greene & Renberg, *supra* note 239, at 1310–14 (describing state court levels at which a law degree is unnecessary to become a judge).

349. *See* Investor Choice Act of 2024, H.R. 7168, 118th Cong. (2024).

350. *See, e.g.*, David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 388 (2018) (describing the "black box of the arbitral forum").

351. *Arbitration Awards Online*, FINRA, https://www.finra.org/arbitration-mediation/arbitration-awards [https://perma.cc/93JU-YC5Z].

transparency does not go far enough to ameliorate informational asymmetries that benefit industry players because the identity of arbitrators and arbitrator-industry interaction is not fully available.[352] Conversely, courts are an open forum, with pleadings, decisionmakers, and results that are entirely public, a factor that may render them more accessible to unrepresented parties.[353] Accordingly, I have previously argued for greater transparency in the forced securities arbitration forum, including a public list of all arbitrators and details of all cases where they have been chosen to serve as an arbitrator, including cases settled prior to an award, and making pleadings and settlements public.[354] These recommendations could level the playing field for small claims investors by shedding light on repeat-player arbitrators and firms, as well as providing pro se investors with more concrete examples of what pleading documents in the forum look like. In addition, such transparency may reduce previously-identified arbitrator bias in favor of repeat-player industry members because arbitrators are aware that the cases in which they have appeared and the awards they have rendered are easily accessible in a single location by the public.[355]

3. Investor-Accessible Securities Arbitration

Small claims securities arbitration also needs to be reworked to be more accessible to investors who proceed without

352. Iannarone, *Finding Light*, *supra* note 161, at 2–8 (describing the ways in which FINRA has demonstrated greater transparency than other industries that participate in forced arbitration); Edwards, *supra* note 111, at 431 (explaining the importance of transparency in dispute resolution).

353. Resnik, *supra* note 100, at 2904 ("The variables that could make courts more accessible than arbitration include fees that are sometimes lower . . . , knowledge about how to use the system, and the ease of sharing information among claimants—in that all of these courts are open to the public.").

354. Iannarone, *Structural Barriers*, *supra* note 23, at 1440–47 (advocating for arbitrator transparency by suggesting making additional information publicly available including a list of arbitrators on FINRA's roster, the number of times each arbitrator has been chosen to serve even if the case settled before award, and the parties before whom each arbitrator has appeared); Iannarone, *Small Claims Securities Arbitration*, *supra* note 9, at 791 (recommending that FINRA provides settlement and pleading information through case disposition documents maintained in FINRA's awards database).

355. *See supra* note 162 and accompanying text (describing the lack of a central repository with all arbitrator information); *supra* Parts II.C.1–.2 (describing the presence of arbitrator bias in favor of repeat-player industry members).

counsel.[356] Given the empirical research illustrating the severe challenges that investors face when they proceed pro se, steps should be taken to meet the initial goal of simplified securities arbitration, providing a process by which an investor can recover by simply writing a letter and describing what went wrong.[357] As an initial matter, Rhode suggested that "[a]ll jurisdictions should have comprehensive pro se assistance programs," and the forced securities arbitration forum especially needs such resources.[358]

Currently, FINRA provides limited resources for pro se parties on a webpage.[359] This webpage begins with advice that a pro se party should hire an attorney.[360] It then provides a high-level discussion of arbitration procedures and terms.[361] FINRA's advice does not, however, answer *how* to best navigate the process (other than hiring an attorney).[362] A printed guide written by a securities arbitration clinic is listed as an additional resource on the far right of the webpage with no description of how the information may assist an investor.[363] That guide, written over seven years ago, provides more substantive information, but is in need of revision as a result of recent changes in the law and procedure.[364] Once updated, the guide should also be more prominently available on FINRA's website as well as more readily accessible (*e.g.*, its own interactive webpage versus a linked hard-

356. *See, e.g.*, RHODE, *supra* note 24, at 20 ("Reforms that minimize[] the need for costly representation could enable many individuals to more effectively address their law-related problems.").

357. *See generally supra* Part II (describing the initial aims of simplified arbitration). *See id.* at Part II.C (describing how procedures disadvantage pro se parties in securities arbitration); *see also* RHODE, *supra* note 24, at 5 ("[T]oo little effort has been made to ensure that [the legal system] is fair or even comprehensible to the average claimant.").

358. RHODE, *supra* note 24, at 20.

359. *See Resources for Individuals Representing Themselves*, FINRA, https://www.finra.org/arbitration-mediation/about/pro-se [https://perma.cc/MN5V-7V8B].

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*; *see also* Jill Gross & Elissa Germaine, *Investors' Guide to Securities Industry Disputes: How to Prevent and Resolve Disputes with Your Broker*, FINRA (2017), https://www.finra.org/sites/default/files/Investors_Guide_to_Securities_Industry_Disputes_0.pdf [https://perma.cc/35GT-Q24P].

364. Gross & Germaine, *supra* note 363.

copy guide).[365] Additionally, electronic resources that guide investors in preparing pleadings should be designed to level the playing field.[366] Technology can play a role in facilitating document drafting, for example, guiding pro se investors to provide information needed to properly present a case and damages.[367] Any self-help, however, must be assessed to determine its accessibility and effectiveness.[368] D. James Greiner, Dalié Jimenéz, and Lois R. Lupica have suggested a model for evaluating such resources.[369]

The securities arbitration forum should, in addition to providing guidance to clinics who may be able to assist investors, facilitate access to other non-legal professionals who may be able to assist investors in determining whether they have a claim.[370] For example, financial and investment experts may be willing to provide pro bono advice concerning whether an investor has

365. RHODE, *supra* note 24, at 20 (listing "readily accessible self-help materials" among solutions that may help individuals address their legal issues more effectively).

366. *See, e.g.*, *id.* (listing document-preparation assistance among recommendations for increasing access to justice); J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993, 1994–2001 (2017) (describing how platform technology may be used to increase access to justice and the potential impacts of doing so); Kristen M. Blankley, *Online Resources and Family Cases: Access to Justice in Implementation of a Plan*, 88 FORDHAM L. REV. 2121, 2124–25 (2020) (highlighting the ways increased access to online resources can assist pro se parties when navigating continuing court orders—such as custody and child support arrangements—in family court).

367. *See, e.g.*, Prescott, *supra* note 366, at 2012 (explaining technology that states have implemented to assist parties in preparing documents).

368. *See, e.g.*, Greiner, Jimenéz & Lupica, *supra* note 25, at 1123 ("Self-help materials cannot be successful unless two conditions are met: (1) the lay would-be user can find materials in a timely manner (are self-help materials *accessible?*), and once found, (2) the lay would-be user can successfully use the materials to advance his or her cause (are the self-help materials *deployable?*).").

369. *Id.* at 1166–71 (suggesting ways to test new self-help materials and summarizing findings thus far).

370. *See, e.g.*, RHODE, *supra* note 24, at 20–21 (advocating for "greater access to nonlawyer providers" and "less restrictive rules governing unauthorized lay practice"); *id.* ("An appropriate regulatory structure should take account of the ability of nonlawyer specialists to provide adequate assistance, the risks of injury if they do not, and the ability of consumers to evaluate providers' qualifications and to remedy problems resulting from ineffective performance.").

experienced damage from stockbroker misconduct and assist in quantifying any loss.[371]

Rhode advocated for expanding the ability of non-legal professionals to assist in activities that are traditionally considered the practice of law to increase consumer access to justice.[372] Such non-attorney representatives (NARs) have participated in forced securities arbitration for decades due to deviation in state law as to whether securities arbitration constitutes the practice of law.[373] However, for at least three decades, serious complaints have been raised concerning NARs who charge investors to provide representation in forced securities arbitration.[374] These compensated NARs claim that they provided a service to investors with small claims who are unable to obtain an attorney.[375] Opponents and regulators worry that compensated NARs pose a threat to retail investors.[376] For example, FINRA has raised concerns that NARs may victimize already harmed investors a second time because they are not bound by ethical rules that govern attorney conduct.[377] As a result, NARs can charge high fees, are not subject to professional discipline, and are not prohibited from filing frivolous claims.[378] Indeed, NARs representing small

371. *See, e.g.*, SEC. EXPERTS ROUNDTABLE, https://www.securitiesexpert.org [https://perma.cc/HTD5-LAZX] (describing their member organization of finance and investment professionals that provide assistance in all aspects of dispute resolution involving securities related matters). The Securities Experts Roundtable offers pro bono expert witness services to law school securities arbitration clinics. *Id.*

372. *See, e.g.*, RHODE, *supra* note 24, at 20–21.

373. Nicole G. Iannarone, Gabrielle Beers & Emma Schurmeier, *Ethically Remote? Virtual Representation in FINRA Arbitration*, 28 PIABA BAR J. 337, 339–43 (2021) (describing FINRA's representation rule and restrictions on the right to practice within the FINRA forum).

374. *See* Katsoris, *Securities Arbitration: A Clinical Experiment*, *supra* note 12, at 195 (describing the initial complaints concerning NARs within the securities arbitration forum).

375. *Id.* ("One of the principal arguments the NARs used—in touting the need for their services to public customers in disputes with their brokers/dealers—was that it was often difficult to retain the services of an attorney, especially in small claims.").

376. *See, e.g.*, *id.* at 195–96 (discussing the initial arguments being made regarding NARs involvement in securities arbitration and SICA's response).

377. *Regulatory Notice 17-34, supra* note 11, at 3.

378. *Id.*; *see also* MODEL RULES OF PRO. CONDUCT r. 1.5 (AM. BAR ASS'N 2020) (prohibiting lawyers from charging excessive fees); MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 2020) (requiring lawyers to follow rules of

claims investors fare only slightly better than pro se parties, recovering in 27% of simplified proceeding as compared to 24% of pro se parties, suggesting that FINRA's concerns are well-placed.[379] FINRA has pushed to ban compensated NARs from its securities arbitration forum for some time.[380] In January 2024, the SEC's Division of Trading and Markets approved a final rule that would prohibit compensated NARs from representing parties in the securities arbitration forum.[381] Though such an approval almost always results in a rule becoming effective, the SEC has taken the unusual step of reviewing the deferred rulemaking.[382] With empirical evidence illustrating that NARs and pro se parties prevail at similar rates—both of which are substantially lower than the recovery rate of represented parties—the SEC should take action to protect investors from further victimization.[383]

A complete prohibition on any non-attorney representation in the securities arbitration forum would, however, reduce the options available to investors with smaller claims.[384] When conducting its review of FINRA's NAR rulemaking, the SEC should look further into what is driving NARs' low recovery rate and determine if guardrails can be put into place to protect investors

professional conduct to maintain integrity of profession); MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2020) (prohibiting frivolous claims).

379. Iannarone, *Small Claims Securities Arbitration*, *supra* note 9, at 780.

380. Order Approving a Proposed Rule Change, 89 Fed. Reg. 3,481 (Jan. 18, 2024).

381. *Id*.

382. Letter from J. Matthew DeLesDernier, Deputy Sec'y, U.S. Sec. & Exc. Comm'n, to Kristine Vo, Assistant Gen. Couns., Fin. Indus. Regul. Auth. (Jan. 19, 2024), https://www.sec.gov/files/rules/sro/finra/2024/34-99335-letter.pdf [https://perma.cc/6XWG-JN7B] ("This letter is to notify you that . . . the Commission will review the delegated action. In accordance with Rule 431(e), the January 11, 2024 order [approving compensated NAR ban] is stayed until the Commission orders otherwise.").

383. Iannarone, *Small Claims Securities Arbitration*, *supra* note 9, at 780.

384. *See, e.g.*, Katsoris, *Securities Arbitration: A Clinical Experiment*, *supra* note 12, at 199 ("Restricting the extent of NARs representation in securities arbitration proceedings, however, does not alleviate the persistent problem investors with small claims experience in obtaining counsel to represent them as they seek to recoup their damages. In fact, limiting the use of NARs representation can only exacerbate the problem.").

from predatory NARs without limiting access to representation.[385]

Additionally, empirical research suggests that pro se parties with small claims may not be aware that they are able to obtain discovery, or, if they are aware of such procedures, may not be able to effectively navigate them when facing off against a well-resourced and represented stockbroker.[386] Expanding the reach of presumptively discoverable documents in securities arbitration to include all claims—and not just those in which a regular hearing is held—would better balance the playing field and ensure that all investors have access to documents they need to prove their claims.[387] FINRA has recently proposed such a change,[388] and the SEC recently approved it.[389]

4. Investor Justice via Better Resourced Arbitrators

Current arbitrator selection and qualification standards disadvantage pro se investors in small claims securities arbitration.[390] While represented investors with larger claims may benefit from these procedures, unrepresented small claims investors

385. Jill Gross, *Compensated Non-Attorney Representation Banned in FINRA Arbitrations and Mediations*, INDISPUTABLY (Jan. 16, 2024), http://indisputably.org/2024/01/compensated-non-attorney-representation-banned-in-finra-arbitrations-and-mediations [https://perma.cc/4SN5-RCJ4] ("Whether [barring compensated NARS] solves one problem (abusive NARs) but creates another one (lack of access to representation) remains an open question."); RHODE, *supra* note 24, at 21 (describing licensing and disciplinary requirements that can protect consumers while expanding access to representation through non-legal professionals).

386. Iannarone, *Small Claims Securities Arbitration*, *supra* note 9, at 773–75 (describing significant difference in time to award between represented and unrepresented parties in simplified securities arbitration and suggesting that differential may exist because of a lack of familiarity with discovery procedures).

387. *See supra* Part II.A.5 (describing increased complexity of securities arbitration procedure and presumptively discoverable documents in larger cases); *supra* Part II.C.3 (describing impact of increased procedural complexity); Diego A. Zambrano, *Missing Discovery in Lawyerless Courts*, 112 COLUM. L. REV. 1423, 1469 (2022) (calling for mandated discovery and an open file statute to address the "double-edged sword" of discovery that "can empower small claimants but may also impose costs and complexity that these litigants cannot handle.").

388. Notice of Filing of a Proposed Rule Change to Amend FINRA Rule 12800, Exchange Act Release. No. 100,204, 89 Fed. Reg. 46,210 (May 28, 2024).

389. *See supra* note 197 and accompanying text.

390. *See supra* Part II.C.2.

do not.[391] Multiple interventions to strengthen arbitrator training and resources can assist in alleviating these discrepancies.

First, to address the specific burdens that unrepresented small claims investors face, a specially trained arbitrator pool could be developed. These arbitrators would only preside over smaller claims where the investor was unrepresented. The arbitrators deciding these cases should not be extreme-repeat-players. To ameliorate informational asymmetries between pro se claimants and represented industry members, the special arbitrators must have a law degree and be permitted to conduct legal research. By creating a new arbitrator pool for pro se small claims, the chance for bias resulting from an arbitrator's desire to be selected to appear in a large case may be reduced.[392] Arbitrators in smaller cases receive a flat fee instead of the hearing session fee paid to arbitrators in larger cases, which could be quite substantial if the arbitration takes multiple weeks or months.[393] Eliminating the opportunity for the special arbitration pool members to earn these larger sums may reduce bias. In addition, the arbitrators should be provided additional training related to working with pro se parties, determining whether a claim exists, and the law underlying various damages theories.

Creating a specialized arbitrator pool for pro se small claims may be difficult, however. The low remuneration for presiding over paper cases could hamper FINRA's ability to recruit arbitrators for this role. Moreover, if arbitrators from FINRA's current arbitration pool move to a special arbitrator roster, there would be a reduction in the number of arbitrators available to hear larger cases. This impact could be particularly acute in locations where FINRA already has difficulty constituting arbitrator lists.

As a result, other arbitrator-focused interventions may be more tenable. For example, simply requiring that arbitrators presiding over single-arbitrator cases have a law degree and be

391. *See supra* Part II.C.2.

392. *See* Choi, Fisch & Pritchard, *Arbitrator Background*, *supra* note 109, at 85–86 (describing the potential of arbitrator biases when arbitrators are full time arbitrators or working as an arbitrator in retirement).

393. *Become an Arbitrator*, *supra* note 158 ("FINRA arbitrators receive an honorarium: typically $600 per day or $850 per day for arbitrators serving as chairpersons . . . ."); FINRA Rule § 12214 (2024), https://www.finra.org/rules-guidance/rulebooks/finra-rules/12214 [https://perma.cc/JCK9-LM5K] (describing payment of arbitrator honorarium).

permitted to conduct legal research would address most of the concerns I have identified with the current system. Indeed, permitting such outside research by a trained attorney would counteract any imbalance that appears when the only lawyer in an arbitration is industry counsel.[394] Additional resources can also include more robust arbitrator training materials that detail the applicable law and industry standards that apply to FINRA securities arbitration claims. FINRA could develop a pool of securities industry experts to provide access to unbiased information concerning the relevant industry protocols at issue in a case. Finally, FINRA could establish an office staffed by counsel who are specially trained to assist arbitrators presiding over cases in which there is at least one unrepresented party.

A wide range of interventions could increase investor access to justice, and a multi-pronged approach would best reduce the access to justice gap. While the promise of legal counsel to every aggrieved investor is an impossibility, providing funding to establish and sustain law school clinical programs along with expanding attorney pro bono opportunities would provide substantial positive improvement. Non-lawyer interventions, including self-help, technological, and procedural interventions layered upon expanded access to counsel would even more substantially assist aggrieved retail investors and strengthen capital markets.

CONCLUSION

When over half of all simplified claims investors proceed pro se and prevail less than a quarter of the time when they do, understanding why is crucial for ensuring investor justice. This Article identifies procedural mechanisms that severely disadvantage pro se investors and prevent them from obtaining justice in forced securities arbitration. Securities arbitration claims are complex and difficult for pro se parties to present on their own without legal or securities experience. This is especially true when arbitrators deciding their claims are repeat-players who may not be lawyers and receive their training on law and securities, if at all, from industry players in whose favor these arbitrators are already biased. Seemingly benign

394. *See, e.g.*, Jennifer J. Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration*, 84 N.C. L. REV. 123, 163–65 (2005) (highlighting the need for highly competent, expert arbitrators specifically in the securities arbitration realm given the complexity of the legal issues).

procedural changes result in an outsized burden on the investors least able to navigate arbitration on their own. This Article proposes solutions to narrowing the investor justice gap, including providing greater access to counsel and identifying reforms that facilitate investor justice without lawyers. With more and more investors entering the stock market and the increased use of arbitration agreements in the financial advice arena, ensuring investor access to justice is essential to the health of not only regular people but also of American capital markets.[395]

395. *See* H.R. REPORT NO. 117-393, at 104 (2022) ("The Committee directs the SEC to gather detailed information about how such contracts are used by SEC-registered investment advisers and the effect such contracts have on investors who are harmed by the conduct of advisers.").