

August 25, 2022

The Honorable Catherine Cortez Masto
United States Senate
313 Hart Senate Office Building
Washington, DC 20510

Re: S. 4657, The Investor Justice Act of 2022

Dear Senator Cortez Masto:

We are law professors who write individually and on behalf of the undersigned entities in support of S. 4657, the Investor Justice Act of 2022. American investors who have suffered losses to their savings as a result of broker misconduct have difficulty obtaining counsel to help them recover if their losses are less than \$100,000. The Investor Justice Act will help ensure that American investors have access to justice by establishing a sustainable source of funding for investor advocacy clinics that provide free legal representation to this underserved population.

Nearly all securities disputes in the U.S. are subject to mandatory arbitration before the Financial Industry Regulatory Authority (“FINRA”) due to pre-dispute arbitration provisions in the customer agreements between investors and their brokerage firms.¹ Securities attorneys who represent investors typically handle these cases on a contingency fee basis, and many cannot accept cases under \$100,000 because they are not economically feasible. As a result, “small claim” investors have difficulty finding legal representation and must often choose between pursuing their claim *pro se* – navigating a complicated arbitration system against experienced industry counsel – or abandoning otherwise valid claims. However, for many of these investors, the claim is anything but small and represents most or all of their net worth.² These losses are life-changing and being able to recover them is often the difference between poverty and self-sufficiency.

¹ In the late 1980s, the U.S. Supreme Court held that brokerage firms could require customers to arbitrate their federal securities law claims. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (claims under the Securities Act of 1933 are arbitrable) and *Shearson/Am. Express v. McMahon*, 482 U.S. 220 (claims under the Securities Exchange Act of 1934 are arbitrable). As a result of these cases, “[v]irtually all broker-dealers – and many investment advisers – now include a pre-dispute arbitration clause in their retail customers’ account agreements.” Jill Gross, *The Improbable Birth and Conceivable Death of the Securities Arbitration Clinic*, 15 CARDOZO J. OF CONFLICT RESOL. 597, 598-99 (2013) (hereinafter “*The Securities Arbitration Clinic*”).

² The median value of all financial assets held by families is \$25,700, while the mean is \$363,700. A highly disproportionate share of wealth is held by few households. See Board of Governors of the Federal Reserve System, *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, Federal Reserve Bulletin, Vol. 106, No. 5 (Sept. 2020), <https://www.federalreserve.gov/publications/files/scf20.pdf>.

Accordingly, many small claim investors go it alone, impacting their ability to meaningfully access justice. They file their claims on a *pro se* basis. The amount of investors who brought small claims without representation between 2009 to 2015 was 61%.³ Investors who file claims without counsel have great difficulty as they face well-represented repeat player securities firms. *Pro se* investors are much less likely to succeed in their cases than represented investors.⁴ Twenty-nine percent of *pro se* investors recovered some of their losses, while 44% of represented investors were successful.⁵ This lack of access to representation has a meaningful impact on the investors' outcomes.

This is not a new issue. Twenty-five years ago, then SEC Chairman Arthur Levitt recognized that investors with smaller claims had difficulty finding counsel and, as a result, often did not pursue valid claims.⁶ To address this problem, Chairman Levitt suggested a novel solution: that law schools create legal clinics to meet the need and provide free legal assistance to investors who are unable to attain it because their claims are too small for private lawyers to take.⁷ Pace opened the first law school securities arbitration clinic in 1997.⁸ After Pace, twenty-four additional law school securities arbitration clinic were opened, at Fordham and Brooklyn (1998); Buffalo (1999); Duquesne (2001); University of San Francisco (2002); Albany, Cardozo, Syracuse and St. John's (2004); Touro, New York Law School, and Northwestern (2005); Hofstra (2006); Cornell (2008); Florida International, Howard, Suffolk, and Pepperdine (2009); Seton Hall and University of Miami (2010); University of Pittsburgh (2011); Georgia State and Michigan State (2012); and UNLV (2018).⁹ Unfortunately, today only ten clinics remain.¹⁰

Clinics are the only source of legal representation for investors who are unable to obtain an attorney due to the size of their claim. The clinics typically represent individual investors with low or modest income, no significant assets other than a primary residence, and with potential claims less than \$100,000.¹¹ Clinic clients include seniors, veterans, teachers, artists, hairdressers, mail carriers, welders, and librarians.

Clinics do not simply file arbitration proceedings. First and foremost, they provide valuable counseling to their clients and filter out meritless claims that could otherwise clog the system and increase the securities industry's costs. For those investors who do not have viable claims, the clinics help them understand why a claim does not exist and

³ SECURITIES ARBITRATION COMMENTATOR, 6, Vol. 2016, No. 4 (2016).

⁴ *Id.*

⁵ *Id.*

⁶ *The Securities Arbitration Clinic*, *supra* note 1 at 601.

⁷ *Id.* at 601-602.

⁸ *Id.* at 602.

⁹ *Id.* at 602-603. Some received funding from the New York State Attorney General's Office, others received seed funding from the FINRA Foundation.

¹⁰ FINRA, *How to Find an Attorney*, <https://www.finra.org/arbitration-mediation/how-find-attorney> (listing clinics currently operating)

¹¹ *The Securities Arbitration Clinic*, *supra* note 1 at 604.

what happened in their account. 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. If a client does have a claim, the clinics are familiar with the arbitration rules and are able to navigate the arbitration process on behalf of small claim investors. This representation provides much needed assistance to small claim investors in what might otherwise be an overwhelming process. The clinics' representation also ensures that the firms' resources are not diverted from defending claims to address questions and issues from *pro se* investors who are unfamiliar with the process.

In addition to providing legal advice to small investors, clinics protect vulnerable investors from harm through investor education and outreach.¹² For example, Pace authored the *Investor's Guide to Securities Industry Disputes: How to Prevent and Resolve Disputes with Your Broker*, a guide that aims to help "investors learn more about their legal rights and best practices for responsible investing, before a dispute arises, and to gain an understanding of their options in case a dispute does arise."¹³ Clinics provide links to investor education tools on their websites.¹⁴ Clinics maintain investor education blogs with regular contributions from students breaking down complicated investing topics into easy to digest pieces.¹⁵ Clinics regularly provide in-person educational presentations at high schools, libraries, community centers, and to vulnerable groups including members of the military, seniors, young professionals, and faith communities.¹⁶ Northwestern even created an educational guide to help other law

¹² J. Samuel Tenenbaum and Thomas Morsch, *Guidelines for Establishing a Law School Investor Advocacy Clinic*, at 11, ("Legal clinics exist not only to provide education for their students and to serve individual clients but also to reach out to the community-at-large.").

¹³ Pace Law School Investor Rights Clinic, the *Investor's Guide to Securities Industry Disputes*, https://www.finra.org/sites/default/files/Investors_Guide_to_Securities_Industry_Disputes.pdf.

¹⁴ See, e.g., Miami, *Investor Resources*, <http://investorrights.law.miami.edu/investor-resources/>; and Miami, *Resources for Broker Claims: Investor Rights Clinic*, <http://www.law.miami.edu/academics/clinics/resources-for-broker-claims-investor-rights-clinic>.

¹⁵ See Miami Blog, <http://investorrights.law.miami.edu/>.

¹⁶ See Cornell, *Securities Law Clinic*, <http://www.lawschool.cornell.edu/Clinical-Programs/securities-law-clinic/> ("As part of its community outreach, the SLC also provides public education on investment fraud, with particular attention to investment schemes targeting the elderly and retirees."); Howard, *Investor Justice and Education Clinic (IJEC)*, <http://law.howard.edu/content/investor-justice-and-education-clinic-ijec> ("[S]tudents also have an opportunity to work with a team of fellow IJEC students to design, implement, and present at least one investor education and outreach program for the underserved investing community each semester. These programs are designed for the students to serve their communities by providing investment protection education to schools, church groups, retirement communities, scouts, sororities and fraternities, and others. Students provide attendees with a basic understanding of financial markets and professionals, and products, as well as their rights as investors."); Miami, *IRC Provides Financial Education Services to South Florida Investors*, <http://investorrights.law.miami.edu/community-outreach/fall-2012-community-outreach/> (describing four investor outreach presentations to young adults and seniors); Pittsburgh, *Securities Arbitration Clinic*, <http://law.pitt.edu/academics/experiential/clinics/securities> ("[T]he Securities Arbitration Clinic also provides public education about investment fraud, with particular attention to investment schemes targeting PA residents and the elderly."); Seton Hall, *FINRA Investor Advocacy Program*, <https://law.shu.edu/forms/finra-investor-advocacy-program.cfm> ("The IAP has acquired a national reputation for being among the vanguard of investor education. Each semester, our student advocates traverse New Jersey's 21 counties and engage with diverse audiences ranging from grammar school

schools establish an investor advocacy clinic.¹⁷ Generally, the clinics' status as operating entirely independently from industry groups or financial motives makes others trust the information they provide and opens doors not available to others.

American investors who rely on clinics, and the securities firms who benefit from not having to defend against meritless claims, are at grave risk of losing the important public services that investor protection clinics provide. Though many clinics began with or at some point in time received financial support from the FINRA Investor Education Foundation or state regulators, those sources do not support existing clinics.¹⁸ Unlike other types of clinics focused primarily on poverty law, investor advocacy clinics do not have access to outside funding sources despite the fact that their work often prevents aggrieved investors from becoming destitute.

In 2013, Professor Jill Gross identified “maintenance of ongoing funding” as “perhaps the biggest challenge” for investor advocacy clinics and expressed fear that some clinics may close.¹⁹ Unfortunately, this fear has become a reality. Presently only ten of the twenty-five clinics once in operation are still representing clients.²⁰ The clinics are operating in Florida, Washington, D.C., Illinois, New Jersey, New York, and Pennsylvania. This means Americans in forty-five states do not have access to free legal assistance for securities disputes. Moreover, these few remaining clinics are unable to meet the demand. For example, despite the large population of seniors in Florida, there is only one remaining investor advocacy clinic in that state, at the University of Miami, and there are no clinics in other areas of the country with large senior and retiree communities, such as Arizona, New Mexico, and Texas. Yet older Americans are particularly vulnerable to fraud and other misconduct because they are typically at the peak of their wealth accumulation phase. Cognitive impairments such as Alzheimer's disease and dementia are also projected to rise as the population grows older, further increasing the vulnerability of seniors.²¹ Indeed, the SEC's Office of the Investor

students to residents of assisted living communities. We customize presentations to meet the needs of a given group, thereby ensuring a high level of interactivity.”); St. John's, *Securities Arbitration Clinic*, <https://www.stjohns.edu/law/about/places/securities-arbitration-clinic> (“Students also conduct Investor Education Seminars in local public libraries and other community organizations.”).

¹⁷ See *Guidelines for Establishing a Law School Investor Advocacy Clinic*, *supra* note 12.

¹⁸ See *The Securities Arbitration Clinic*, *supra* note 1 at 602-603 (describing grants from NASD Foundation, New York State Attorney General's Office, FINRA Foundation, and Pennsylvania Securities Commission).

¹⁹ See *The Securities Arbitration Clinic*, *supra* note 1 at 617-618, 621-622.

²⁰ FINRA, *How to Find an Attorney*, <https://www.finra.org/arbitration-mediation/how-find-attorney>.

²¹ See Alzheimer's Association, *2022 Alzheimer's Disease, Facts and Figures* (2022), <https://www.alz.org/media/Documents/alzheimers-facts-and-figures.pdf> (noting that, “An estimated 6.5 million American age 65 and older are living with Alzheimer's dementia.”); see also K. L. Triebel & D. C. Marson, *The Warning Signs of Diminished Financial Capacity in Older Adults*, GENERATIONS, Summer 2012, at 39-45, <https://www.jstor.org/stable/26555909?seq=1>; Robert Abrams, *The Dementia Crisis*, 89 N.Y. ST. B. ASS'N J., Jan. 2017, at 9, https://nysba.org/NYSBA/Publications/Bar%20Journal/PastIssues2000present/2017/Journal_January_2017_web.pdf (“Approximately 47 million people have dementia worldwide, over 20 percent of whom

Advocate described elder financial exploitation as “‘a burgeoning public health crisis’ and ‘a virtual epidemic.’”²² Yet at a time when this demographic is exploding, the legal resources available to this vulnerable group are shrinking.

The Investor Justice Act will expand these critical resources for investors nationwide by creating an ongoing, matching grant program at the SEC, administered by the Office of the Investor Advocate. Specifically, the bill proposes to amend the Securities Act of 1934 to provide grant authority to the SEC to give yearly matching grants of up to \$150,000 to qualified investor advocacy clinics that provide legal and educational services to small claim investors. The grants could be used to open new clinics, expand existing clinics, or provide resources to ensure existing clinics’ continued operation. The Investor Justice Act will allow for the establishment and maintenance of clinics in underserved communities because they can rely on continued funding if the clinic provides legal representation and educational services. If passed, the Investor Justice Act would significantly improve access to justice for investors who need legal representation, help them understand whether they have been victimized, and, if so, assist them in recovering their losses.

The grant program envisioned by the Investor Justice Act is not the first of its kind. The IRS Office of the Taxpayer Advocate created a successful low income taxpayer clinic in 1999.²³ In its first year, the IRS “awarded grants totaling nearly \$1.5 million to 34 entities in 18 states and the District of Columbia.”²⁴ In 2021, the IRS awarded more than \$12 million in grants to 130 organizations in 47 states and the District of Columbia.²⁵ The proposed SEC grant program similarly would provide resources to sustain existing clinics and expand these essential resources to other parts of the country.

The proposed legislation is also consistent with the March 8, 2018 recommendation by the SEC’s Office of the Investor Advocate that the SEC explore ways to improve external funding sources to the investor advocacy clinics, including requesting “legislation from Congress to consider permanent funding.”²⁶ The Investor Advocate observed that the “importance and impact of law school investor advocacy clinics have increased considerably since 1997.”²⁷

reside in the United States. By 2050, 135 people worldwide are projected to have dementia and similar growth of this disease is expected to increase proportionately in the United States.”)

²² See Stephen Deane, *Elder Financial Exploitation*, U.S. SEC. & EXCH. COMM’N OFFICE OF THE INV’R ADVOCATE (June 2018), <https://www.sec.gov/files/elder-financial-exploitation.pdf>.

²³ IRS, *LITC 2023 Grant Application Package and Guidelines*, <https://www.irs.gov/pub/irs-pdf/p3319.pdf>.

²⁴ *Id.* at 3.

²⁵ IRS, *Low Income Taxpayer Clinics 2021 Program Report*, <https://www.irs.gov/pub/irs-pdf/p5066.pdf>.

²⁶ U.S. Sec. & Exch. Comm’n Office of the Inv’r Advocate Investor Advisory Committee, *Financial Support for Law School Clinics that Support Investors* (Mar. 8, 2018), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/law-clinics-recommendation.pdf>.

²⁷ U.S. Sec. & Exch. Comm’n Office of the Inv’r Advocate, *Report on Activities, Fiscal Year 2021* at 50 (Dec. 16, 2021), https://www.sec.gov/files/FY21_OIAD_SAR_ACTIVITIES_REPORT_FINAL_508.pdf.

We commend your efforts to support the essential work of these investor advocacy clinics. If we can provide any additional information, please let us know.

Very truly yours,

Complex Civil Litigation and Investor Protection Center
Bluhm Legal Clinic
Northwestern Pritzker School of Law

Fairbridge Investor Rights Clinic
Elisabeth Haub School of Law at Pace University

Investor Advocacy Program
Seton Hall University School of Law

Investor Rights Clinic
University of Miami School of Law

Public Policy Clinic
William S. Boyd School of Law
University of Nevada, Las Vegas

Securities Arbitration Clinic
Cardozo School of Law

Securities Arbitration Clinic
New York Law School

Securities Arbitration Clinic
St. Vincent de Paul Legal Program, Inc.
St. John's University School of Law

Securities Arbitration Clinic
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Signing in their individual capacities (affiliations listed for informational purposes only):

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