

February 11, 2021

The Honorable Jerrold Nadler, Chairman
The Honorable Jim Jordan, Ranking Member
Committee of the Judiciary
U.S. House of Representatives
Washington, DC 20515

RE: Support for the Forced Arbitration Injustice Repeal (FAIR) Act

Dear Chairman Nadler and Ranking Member Jordan:

We, the undersigned organizations, strongly support the Forced Arbitration Injustice Repeal (FAIR) Act. The legislation would ensure that workers, consumers, servicemembers, nursing home residents, ordinary investors, and small businesses harmed by bad actors will be able to bring valid claims in court, and would not be forced into private, secretive, corporate-controlled arbitration systems required by nonnegotiable contracts. The FAIR Act would cover cases involving consumer, civil rights, employment, or antitrust violations, and would ensure that harmed individuals in these cases can enforce related federal and state protections.

During this period in the midst of a pandemic when working families have become even more vulnerable to deception, fraud, abuse, and discrimination, it is even more critical that Congress restores and upholds every person's ability to seek relief when harmed.

I. Forced Arbitration Requirements Hurts Workers, Consumers, Patients, Servicemembers, and Small Businesses

Forced arbitration clauses undermine fundamental rights. Often hidden in "take-it-or-leave-it" corporate-written contracts, the terms require claims to be heard in private, secret arbitration proceedings and prevent people from seeking justice in court before an impartial judge or jury. Also prevalent in forced arbitration clauses are provisions prohibiting consumers, patients, servicemembers, small businesses, or workers from banding together in class actions to address widespread, systemic harm. Forced arbitration clauses, particularly those with class action bans, deter many harmed individuals from even attempting to take legal action to seek remedies.

A forced arbitration clause typically dictates the rules for an arbitration, including specifying the arbitration provider, the location for the arbitration, and the payment terms, all written for the benefit of the corporation. Private arbitration also lacks due process protections that are normally assured in our courts, including the ability to obtain key evidence necessary to prove one's case. And arbitration proceedings are secret and provide virtually no right to appeal. Moreover, corporations benefit even more due to the repeat business that they deliver to private arbitration firms, providing incentive for arbitrators to rule in their favor.

Studies have shown that those forced into arbitration are less likely to win, receive smaller awards, and are otherwise severely disadvantaged. According to the Economic Policy Institute, "Consumers obtain relief regarding their claims in only 9 percent of disputes. On the other hand, when companies make

claims or counterclaims, arbitrators grant them relief 93 percent of the time—meaning they order the consumer to pay.”¹

II. Forced Arbitration Clauses Are Everywhere

Hundreds of millions of individuals are subject to forced arbitration clauses. They are ubiquitous in terms and conditions governing bank accounts, student loans, cell phones, employment, small business merchant accounts, nursing home admissions, and even newer online product application technologies. Because the restrictive terms are typically included in nonnegotiable contracts, consumers, workers, patients, and small businesses are hardly given a “choice,” when they sign away their rights, because refusing to sign effectively means they have to forego critical goods, services, or employment. According to the Economic Policy Institute, over 60 million workers, more than half of non-union, private-sector employees, have surrendered their right to go to court if harmed by their employer.²

For consumers, a majority of credit cards, prepaid cards, storefront payday loans and online lenders, cell phone and cable companies, for-profit college admissions, and big banks include arbitration clauses in their one-sided contracts. According to a 2019 study, 81 corporations in the Fortune 100, including subsidiaries or related affiliates, have used arbitration clauses in consumer transactions, and 78 of those arbitration requirements include class action bans.³ Meanwhile, many small businesses are also forced to agree to arbitrate disputes with larger corporations, even when the more powerful parties steal, price-fix, or engage in other illegal behavior that stifles smaller players in the market.

III. Forced Arbitration Clauses Allow Corporations to Evade Accountability for Illegal Misconduct

The broad corporate use of forced arbitration in the marketplace stems from the U.S. Supreme Court’s continuous expansive interpretation of the Federal Arbitration Act, enacted in 1925 to facilitate arbitration of disputes between sophisticated commercial entities of equal bargaining power. In a sweeping 2011 decision, the Court in *AT&T Mobility v. Concepcion* held that corporations could ban individuals from joining together to enforce their rights even when consumers’ individual claims are too small for the forum and are more suitable for class actions.⁴ In 2018, the Court held that workers may be forced, as a condition of employment, to surrender their right to band together to enforce their legal rights.⁵

Consequently, forced arbitration has become a tool to eviscerate statutory and common law rights. It allows big corporations to exploit customers with virtually no accountability because consumers are too often unable to go to court to enforce longstanding laws against predatory or discriminatory practices, unfair and deceptive conduct, and even pervasive fraud. It allows corporate employers to quash serious claims of systemic misconduct, such as harassment and discrimination, misclassification of workers, and wage theft.

¹ Heidi Shierholz, *Correcting the Record*, Economic Policy Institute (Aug. 1, 2017), <https://www.epi.org/files/pdf/132669.pdf>.

² Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute (Sept. 27, 2017), <https://www.epi.org/files/pdf/135056.pdf>.

³ Imre S. Szalai, *The Prevalence of Consumer Arbitration Agreements by America’s Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233 (2019).

⁴ *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

⁵ *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

In sum, forcing consumers, workers, and small businesses into arbitration has played a significant role in allowing corporate wrongdoers to evade accountability because it allows them to keep systemic corporate misconduct secret and out of the public eye.

IV. Congress Must Act

Until Congress acts to correct the legal fiction — that workers, consumers, servicemembers, patients, ordinary investors, and small businesses have consented to the deprivation of their rights — these clauses will continue to endanger individuals and small businesses.⁶

The FAIR Act would make arbitration fair. It would not ban arbitration but rather make it truly voluntary, allowing aggrieved individuals and businesses the opportunity to choose it or the courts after they have been harmed. And it would not change collective bargaining agreements that require arbitration between unions and employers.

Congress can act now to protect working families from forced arbitration, particularly in light of the economic crisis so many are facing as we embark on COVID-19 recovery. With passage of the FAIR Act, Congress will restore access to our courts and will reinvigorate important civil rights, employment, and consumer protections. We urge you to pass it quickly.

Please contact Remington A. Gregg at rgregg@citizen.org or Christine Hines at christine@consumeradvocates.org with questions.

Sincerely,

A Better Balance
AKPIRG
Alliance for Justice
American Association for Justice
Americans for Financial Reform
Association of Late Deafened Adults (ALDA)
Autistic Self Advocacy Network
Bayard Rustin Liberation Initiative
Better Markets
California Employment Lawyers Association
California Reinvestment Coalition
Center for Auto Safety
Center for Economic Integrity
Center for Justice & Democracy
Center for Popular Democracy
Center for Responsible Lending
Citizen Works
Committee to Support the Antitrust Laws
Consumer Action

⁶ See, *Meyer v. Kalanick*, 200 F.Supp.3d 408 (S.D.N.Y. 2016).

Consumer Federation of America
Consumer Reports
Consumers for Auto Reliability and Safety
Consumer Watchdog
D.C. Consumer Rights Coalition
Demos
Delaware Community Reinvestment Action Council, Inc.
Disability Rights Advocates
Disability Rights Legal Center
Disability Rights Texas
Earthjustice
Economic Policy Institute
Every Texan
Googlers for Ending Forced Arbitration
Impact Fund
Justice for Migrant Women
KGACLC
Lawyers' Committee for Civil Rights Under Law
Legal Aid Center of Southern Nevada
Legal Aid Justice Center
Long Term Care Community Coalition
Make the Road New York
Maryland Consumer Rights Coalition
NAACP
NACA-Ohio
National Association of Consumer Advocates
National Association of Consumer Bankruptcy Attorneys (NACBA)
National Association of the Deaf
National Center for Law and Economic Justice
National Consumer Law Center (on behalf of its low income clients)
National Consumers League
The National Consumer Voice for Quality Long-Term Care
The National Disabled Law Students Association
National Disability Rights Network (NDRN)
National Employment Law Project
National Employment Lawyers Association
National LGBTQ Task Force Action Fund
National Network to End Domestic Violence
National Organization for Women
National Women's Health Network
National Women's Law Center
New Economy Project
New Georgia Project
New Jersey Citizen Action
Northwest Workers' Justice Project
Oregon Communications Access Project
People's Parity Project

Public Citizen
Public Good Law Center
Public Justice
Public Justice Center
Public Law Center
Rights & Democracy, NH & VT
S.C. Appleseed Legal Justice Center
Sikh Coalition
SPLC Action Fund
Strategic Organizing Center
Student Borrower Protection Center
Texas Watch
Towards Justice
Veterans Education Success
Virginia Organizing
VOICE-OKC
The Washington State Communication Access Project (www.Wash-CAP.com)

cc: Members of the Committee