

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.”<sup>1</sup>

## **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.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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.

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

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

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

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

<sup>5</sup> *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.<sup>6</sup>

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](mailto:rgregg@citizen.org) or Christine Hines at [christine@consumeradvocates.org](mailto: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

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<sup>6</sup> 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](http://www.Wash-CAP.com))

cc: Members of the Committee