

April 27, 2023

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

The Honorable Dick Durbin, Chair  
The Honorable Lindsey Graham, Ranking Member  
Committee of the Judiciary  
U.S. Senate  
Washington, DC 20510

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

Dear Chairman Jordan, Ranking Member Nadler, Chairman Durbin, and Ranking Member Graham:

We, the undersigned consumer, civil rights, worker rights, health, environmental, community, faith, student, and other public interest 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 will not be forced into private, secretive, corporate-controlled arbitration systems that nonnegotiable contracts overwhelmingly require. The FAIR Act covers cases involving consumer, civil rights, employment, or antitrust violations, and will ensure that harmed individuals in these cases can enforce related federal and state protections.

During this period of recovering from the aftermath of a global pandemic, followed by sharp price hikes for goods and services, as well as recent bank failures, 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. Forced 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

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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).

rights.<sup>5</sup> In recent years, appellate courts have issued other decisions on forced arbitration which continue to fracture the rights and remedies of consumers and workers who are simply seeking access to justice when corporate entities harm them.<sup>6</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.

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.

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. With passage of the FAIR Act, Congress will restore access to our courts and will reinvigorate important civil rights, employment, and consumer protections. Thank you for your attention to this critical issue.

Please contact Christine Hines at [christine@consumeradvocates.org](mailto:christine@consumeradvocates.org) with questions.

Sincerely,

AKPIRG  
Alliance for Justice  
Americans for Financial Reform  
American Association for Justice  
California Employment Lawyers Association  
Center for Auto Safety  
Center for Biological Diversity  
Center for Economic Integrity  
Center for Economic Justice

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

<sup>6</sup> See, e.g., *Chamber of Commerce of the United States v. Bonta*, 62 F.4th 473 (9th Cir. 2023) (Federal Arbitration Act preempted California state employment law on private, pre-dispute arbitration).

Center for Justice & Democracy  
Center for LGBTQ Economic Advancement & Research (CLEAR)  
Center for Progressive Reform  
Center for Responsible Lending  
Church State Council  
Citizen Works  
Committee to Support the Antitrust Laws  
Consumer Action  
Consumer Attorneys of CA  
Consumer Federation of America  
Consumer Reports  
Consumer Watchdog  
Consumers for Auto Reliability and Safety  
DC Consumer Rights Coalition  
Delaware Community Reinvestment Action Council, Inc.  
Demand Progress  
Earthjustice  
Economic Action Maryland  
Economic Policy Institute  
Essential Information  
Farmworker Association of Florida  
Food & Water Watch  
Googlers for Ending Forced Arbitration (Former)  
Impact Fund  
Indiana Community Action Poverty Institute  
Jacksonville Area Legal Aid  
Justice in Aging  
Kansas Holistic Defenders  
Katharine & George Alexander Community Law Center  
LatinoJustice PRLDEF  
Long Term Care Community Coalition  
Mobilization for Justice  
National Association of Consumer Advocates  
National Association of the Deaf  
National Center for Law and Economic Justice  
National Consumer Law Center (on behalf of its low-income clients)  
National Consumer Voice for Quality Long-Term Care  
National Consumers League  
National Disability Rights Network (NDRN)  
National Employment Law Project  
National Employment Lawyers Association  
National Organization for Women  
National Urban League  
National Women's Law Center  
NETWORK Lobby for Catholic Social Justice  
New Jersey Citizen Action

Northwest Workers' Justice Project  
People's Parity Project  
Prosperity Indiana  
Protect All Children's Environment  
Public Citizen  
Public Good Law Center  
Public Justice  
Public Justice Center  
South Carolina Appleseed Legal Justice Center  
Student Borrower Protection Center  
Texas Appleseed  
Texas Watch  
The New Mexico Center on Law and Poverty  
THE ONE LESS FOUNDATION  
The Sikh Coalition  
Tzedek DC  
USPIRG  
Virginia Organizing  
Woodstock Institute  
Workplace Fairness

cc: Members of the Committee