

March 15, 2022

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, DC 20515

The Honorable Kevin McCarthy
Minority Leader
U.S. House of Representatives
Washington, D.C. 20515

RE: Support for H.R. 963, the Forced Arbitration Injustice Repeal (FAIR) Act

Dear Speaker Pelosi and Minority Leader McCarthy:

We, the undersigned organizations, strongly support the Forced Arbitration Injustice Repeal (FAIR) Act, H.R. 963. 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 pandemic period 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 Hurt 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

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).

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.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 recover from COVID-19. With passage of the FAIR Act, H.R. 963, 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 Joanne Doroshow at Center for Justice & Democracy, joanned@centerjd.org or Christine Hines at National Association of Consumer Advocates, christine@consumeradvocates.org with any questions.

Sincerely,

A Better Balance
 AKPIRG
 Alliance for Justice
 American Association for Justice
 American Family Voices
 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 Progressive Reform
 Center for Responsible Lending
 Citizen Works
 Committee to Support the Antitrust Laws
 Consumer Action
 Consumer Federation of America
 Consumer Reports
 Consumer Watchdog

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

Consumers for Auto Reliability and Safety	National Disability Rights Network (NDRN)
D.C. Consumer Rights Coalition	National Disabled Law Students Association
Delaware Community Reinvestment Action Council, Inc.	National Employment Law Project
Demos	National Employment Lawyers Association
Disability Rights Advocates	National Network to End Domestic Violence
Disability Rights Legal Center	National Organization for Women
Disability Rights Texas	National Urban League
Earthjustice	National Women's Health Network
Economic Policy Institute	National Women's Law Center
Every Texan	New Economy Project
Googlers for Ending Forced Arbitration	New Georgia Project
Impact Fund	New Jersey Citizen Action
Institute for Local Self-Reliance	Northwest Workers' Justice Project
Justice for Migrant Women	Oregon Communications Access Project
KGACLC	Oregon Consumer Justice
Lawyers' Committee for Civil Rights Under Law	People's Parity Project
Leadership Conference on Civil and Human Rights	Policy Matters Ohio
Legal Aid Center of Southern Nevada	Public Citizen
Legal Aid Justice Center	Public Counsel
Long Term Care Community Coalition	Public Good Law Center
Make the Road New York	Public Justice
Maryland Consumer Rights Coalition	Public Justice Center
NAACP	Public Law Center
National Association of Consumer Advocates	Rights & Democracy, NH & VT
National Association of Consumer Bankruptcy Attorneys (NACBA)	S.C. Appleseed Legal Justice Center
National Association of the Deaf	Sikh Coalition
National Center for Law and Economic Justice	SPLC Action Fund
National Consumer Law Center (on behalf of its low income clients)	Strategic Organizing Center
National Consumer Voice for Quality Long-Term Care	Student Borrower Protection Center
National Consumers League	Texas Watch
	TIME'S UP Now
	Towards Justice
	Virginia Organizing
	VOICE-OKC
	Washington State Communication Access Project
	Woodstock Institute
	Workplace Fairness

cc: Members of the U.S. House of Representatives