



Center for Justice & Democracy's  
Public Policy Clinic  
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## **MEMORANDUM IN SUPPORT OF BANNING FORCED ARBITRATION CLAUSES FOR SERVICEMEMBERS SUFFERING EMPLOYMENT AND FINANCIAL ABUSES**

*We urge support for both the Justice for Servicemembers Act and the FAIR Act*

### **Introduction**

Congress has tried to protect servicemembers with two important laws: the Uniformed Services Employment and Reemployment Rights Act (USERRA), protecting their jobs when they are called to active duty; and the Servicemembers Civil Relief Act (SCRA), keeping them from being victims of financial abuse. Congress intended servicemembers to be able to enforce their rights in court when companies break these laws. However, these rights – and Congress' intent – are being regularly undermined by the increasing use of forced arbitration clauses in employment and financial contracts, forcing servicemembers to resolve disputes in rigged, private arbitration.

Congress is taking two approaches to fix this injustice. The Justice for Servicemembers Act, which was introduced in the last Congress and is expected to be reintroduced shortly, would ban forced (pre-dispute) arbitration clauses in servicemember contracts. The FAIR Act (S.610/H.R.1423) would broadly ban use of forced arbitration clauses and class action waivers in any consumer or employment contract. Both would remedy a grave injustice for those who have pledged to die for our country, only to find that they've lost their job, or been cheated or defrauded by predatory companies.

### **What is USERRA?**

Congress enacted USERRA to protect servicemembers' employment and reemployment rights.<sup>1</sup> The law is meant to protect servicemembers like Captain Rebecca Cruz, who was fired less than a week after receiving military orders to train for a new position in the Air National Guard.<sup>2</sup>

Specifically, under the law employers must rehire servicemembers in the job they would have attained if the servicemember was not called to active duty. It also prohibits discrimination

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<sup>1</sup> 38 U.S.C. §§ 4301–4335; Your Rights Under USERRA, <https://www.dol.gov/vets/programs/userra/aboutuserra.htm>

<sup>2</sup> Justice Department sues Glendale, AZ, <https://www.justice.gov/opa/pr/justice-department-sues-glendale-az-violating-employment-rights-arizona-air-national-guard>

against disabled servicemembers, dropping servicemembers' healthcare, or removing them from a company's pension plan.<sup>3</sup>

## **What is SCRA?**

Congress enacted SCRA to protect servicemembers from predatory lending and other financial abuses.<sup>4</sup> According to the Department of Defense, predatory lenders target servicemembers with high-interest short term loans, including payday, car title, tax refund and installment loans, such as rent to own loans. These often “feature high fees/interest rates, with some requiring balloon payments, while others pack excessive charges into the product.” Some predatory lenders scheme to work around existing usury laws.<sup>5</sup> Such predatory loans hurt the readiness of the U.S. military in addition to hurting the servicemember and their family. For Navy personnel, 80% of denied and revoked security clearances were due to financial issues.<sup>6</sup>

SCRA provides five protections to active servicemembers: interest rates capped at 6%, default judgment protection in civil cases, protection against foreclosure, protection against repossession, and the ability to terminate residential and auto leases.<sup>7</sup>

## **Forced Arbitration Clauses in Servicemember Contracts**

Both USERRA and SCRA allow servicemembers experiencing illegal misconduct to seek legal redress in court. However, a growing number of companies are inserting forced arbitration clauses into non-negotiable employment and consumer contracts. It is a legal fiction that these servicemembers have a “choice” when signing away their rights when in fact refusing to sign means forgoing the financial service or employment.

When a dispute is in forced arbitration, the company accused of wrongdoing sets the arbitration terms. It selects the arbitration company, which likely relies on that same company for repeat business and therefore is biased in the company's favor. This arbitrator may have no legal training, is not required to follow law, and need not issue a written legal opinion. Once the arbitrator has ruled, their decision is enforceable with the full weight of the law even though it might be legally incorrect. There is no right to appeal.

The Department of Defense found that “most predatory lenders require borrowers to waive their rights to go to court to resolve disputes and instead submit borrowers to private adjudication through mandatory arbitration.”<sup>8</sup> And forced arbitration clauses, now in widespread use by

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<sup>3</sup> 38 U.S.C. §§ 4301–4335; VETS USERRA Fact Sheet 3 [https://www.dol.gov/vets/programs/userra/userra\\_fs.htm](https://www.dol.gov/vets/programs/userra/userra_fs.htm)

<sup>4</sup> 50 U.S.C. App. §§ 501 et seq.

<sup>5</sup> Department of Defense, Report on Predatory Lending Practices Directed at Members of the Armed Forces and their Dependents (Aug. 9, 2006), [http://archive.defense.gov/pubs/pdfs/report\\_to\\_congress\\_final.pdf](http://archive.defense.gov/pubs/pdfs/report_to_congress_final.pdf)

<sup>6</sup> Armed Forces and Forced Arbitration, <https://www.citizen.org/sites/default/files/armed-forces-and-forced-arbitration-report.pdf>

<sup>7</sup> 50 U.S.C. App. §§ 501 et seq. CFPB SCRA [https://files.consumerfinance.gov/f/documents/cfpb\\_servicemembers-civil-relief-act\\_factsheet.pdf](https://files.consumerfinance.gov/f/documents/cfpb_servicemembers-civil-relief-act_factsheet.pdf)

<sup>8</sup> Department of Defense, Report on Predatory Lending Practices Directed at Members of the Armed Forces and their Dependents (Aug. 9, 2006), [http://archive.defense.gov/pubs/pdfs/report\\_to\\_congress\\_final.pdf](http://archive.defense.gov/pubs/pdfs/report_to_congress_final.pdf)

employers,<sup>9</sup> are being used to deny rights to servicemembers whose rights have been violated by USERRA.<sup>10</sup> These involuntary clauses place every servicemember's financial security at risk. They also encourage illegal misconduct, as employers and financial institutions who break the law know that they won't be held accountable in court.

## **What We Support**

We support legislation that is expected to be introduced shortly, the Justice for Servicemembers Act. This legislation would directly address the issue of a servicemember's consent to arbitrate disputes by letting them choose arbitration *after* a dispute occurs, but not force them to agree to waive their legal rights before a dispute arises. It would prohibit companies from burying these clauses in servicemember financial and employment contracts, thus safeguarding servicemembers' rights to file legal claims in court for USCERRA and SCRA violations.

We also support the FAIR Act (S.610/H.R.1423), which would broadly ban use of forced arbitration clauses and class action waivers in consumer and employment contracts by amending the 1925 Federal Arbitration Act, a federal law that the Supreme Court has cited to uphold forced arbitration clauses and class actions waivers.<sup>11</sup>

## **What Do Bill Opponents Say?**

Opponents of the Justice for Servicemembers Act and the FAIR Act may argue that arbitration is quicker, cheaper, and provides better resolutions for servicemembers. Of course if that were true, then forced arbitration proponents should have no problem allowing servicemembers to choose arbitration after a dispute occurs. That is precisely what these bills would do. But it is not true.

Those forced into arbitration are less likely to win, receive smaller awards, and are otherwise severely disadvantaged. As the Economic Policy Institute (EPI) found, "consumers only win relief in 9 percent of disputes." Even worse, what is far more typical is that companies fight consumers in arbitration with claims or counterclaims. In those situations, arbitrators grant companies relief 93 percent of the time, and then often order the consumer to pay the financial institution. So considering "both sides of this equation," in arbitration, the average consumer is actually paying \$7,725 to the company.<sup>12</sup>

Arbitration costs can be exorbitant, including filing fees, travel costs, and "loser pays" provisions that can threaten people with economic devastation. And EPI found, "consumers typically wait

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<sup>9</sup> Alexander J.S. Colvin, Economic Policy Institute, The growing use of mandatory arbitration: Access to the courts is now barred for more than 60 million American workers., September 27, 2017 , available at, <https://www.epi.org/files/pdf/135056.pdf>, last accessed 3.2.2019

<sup>10</sup> R. Joseph Barton, "Defending servicemembers from forced arbitration," Trial, June 2018. <https://www.justice.org/what-we-do/enhance-practice-law/publications/trial-magazine/defending-servicemembers-forced>

<sup>11</sup> 9 U.S.C. Ch. 1. See, *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (June 20, 2013). *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

<sup>12</sup> Correcting the record, <https://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/>

150 days for a decision in arbitration.”<sup>13</sup> Yet when compared to a class action, which costs a victim nothing to join, arbitration is just a few months quicker. A few months quicker in exchange for owing a bank \$7,725 is not a favorable result for any servicemember.

### **Expected Supporters**

These bills are expected to have widespread support from military and veteran organizations. For example, the Military Coalition, a group of 32 veteran’s organizations including the Veterans of Foreign Wars, will likely support this legislation. In 2016, the group issued a letter supporting the Consumer Financial Protection Bureau’s proposed rule that would limit forced arbitration agreements and class action waivers in financial consumer contracts.<sup>14</sup> Coalition members also include the Military Order of the Purple Heart (MOPH), Veterans of Foreign Wars (VFW), and the Wounded Warrior Project (WWP).

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<sup>13</sup> Correcting the record, <https://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/>

<sup>14</sup> Letter: The Military Coalition Supports the CFPB’s Proposed Rule on Arbitration Agreements, <https://fairarbitrationnow.org/letter-military-coalition/>

## APPENDIX: VICTIM STORIES

### **Nicole Mitchell**

Since the age of 17, Nicole Mitchell has served as an Air Force Reservist in the elite Hurricane Hunters squadron. In 2010, after working for six years as a meteorologist for The Weather Channel, Nicole was terminated for attending her annual two-week reservist training. This was in violation of USERRA. Her employment contract contained a forced arbitration clause so she was never able to enforce her rights in court. Instead, four years later, an arbitrator made an unappealable ruling in secret without ever holding a hearing or having met Nicole.<sup>15</sup>

### **Kevin Ziober**

Kevin Ziober is a Lieutenant Commander in the Navy Reserves. Two years after enlisting in the Navy Reserves, Kevin was hired as a manager by BLB Resources, Inc., a federal contractor. Six months later, along with all the other employees at BLB, Kevin was forced to sign an arbitration agreement or be fired. Two years later, Kevin was deployed to Afghanistan. On his last day at BLB, 40 of Kevin's coworkers held a surprise party for him. On his red, white, and blue cake was the message, "Best Wishes Kevin." After his going away party, BLB fired Kevin, telling him that his job wouldn't be waiting for him.

Returning from Afghanistan, Kevin filed a USERRA action in federal court. Kevin was denied his day in court due the forced arbitration agreement BLB made him sign. Kevin appealed all the way to the Supreme Court, which declined to hear his case. Now, seven years after he was fired, Kevin is still waiting for an arbitration decision.<sup>16</sup>

### **Charles Beard**

Santander Bank repossessed the car of Charles Beard, a sergeant in the Army National Guard, while he was deployed in Tikrit, Iraq. This was in violation of SRCA. A forced arbitration clause prevented Charles from enforcing his rights against the bank in court. Instead, over four years later, an arbitrator awarded him the value of the car without interest or damages.

In this case, the U.S. Department of Justice (DOJ) began investigating Santander after several servicemember complaints. DOJ found that Santander used a forced arbitration clause to prevent servicemembers from filing lawsuits to enforce their SCRA rights in court. In fact, over a five-year period, Santander illegally repossessed 1,112 servicemember vehicles. Fortunately in 2015, DOJ reached a settlement with Santander for \$9.35 million. However, it should not have taken this highly unusual governmental action for the bank to be held accountable. Sergeant Beard should had the opportunity to bring his own case in court.<sup>17</sup>

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<sup>15</sup> [www.afj.org/wp-content/uploads/2014/09/Overview-of-cases.pdf](http://www.afj.org/wp-content/uploads/2014/09/Overview-of-cases.pdf); <https://veritasnews.com/nicole-mitchell-arbitration-without-a-hearing/>

<sup>16</sup> <https://www.judiciary.senate.gov/imo/media/doc/Ziober%20Testimony.pdf>

<sup>17</sup> <https://www.nytimes.com/2015/03/17/business/wronged-troops-are-denied-recourse-by-arbitration-clauses.html>; <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-santander-consumer-usa-resolve-allegations-concerning>