

May 28, 2019

The Honorable Lindsey Graham  
Chairman  
Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Dianne Feinstein  
Ranking Member  
Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

**RE: Coalition Letter Supporting Introduction of the Forced Arbitration Injustice Repeal (FAIR) Act**

Dear Chairman Graham and Ranking Member Feinstein:

We, the undersigned organizations, strongly support the Forced Arbitration Injustice Repeal (FAIR) Act. This important legislation would prevent corporations from forcing workers, consumers, and small businesses to resolve disputes in private, company-controlled arbitration systems, even when that company has engaged in illegal misconduct. The bill would specifically cover cases involving consumer, civil rights, employment, or antitrust violations, and it would ensure that federal and state laws enacted to protect legal rights in those cases are properly enforced.

**I. Forced Arbitration Disadvantages Workers, Consumers, and Small Businesses**

Forced arbitration clauses are usually hidden in the fine print of “take-it-or-leave-it” agreements. These clauses deprive people of their right to seek justice in court before an impartial judge or jury. They are ubiquitous in contracts governing bank accounts, student loans, cell phones, employment, small business merchant accounts, and even nursing home admissions. Corporations that place forced arbitration clauses in their standard contracts with consumers, non-union employees, and small businesses shield themselves from accountability for illegal practices and other wrongdoing. The contracts typically designate:

- The arbitration provider, who often rely on the company for repeat business and therefore may be biased in the company’s favor;
- The arbitration rules, which provide none of the legal safeguards that protect individuals who use the courts, including their ability to obtain key evidence necessary to prove one’s case;
- The state in which the arbitration is to occur, which is always at the company’s convenience, not the harmed individual who may have to travel far to get there, and

- The payment terms, which might include exorbitant filing fees, as well as continuous fees for procedures such as motions and written findings, and “loser pays” rules that are prohibitive for many individuals.

The proceedings are secret and final with few rights to appeal. 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 and are Not Voluntary**

Since arbitration clauses are usually contained in non-negotiable contracts, the consumer, worker, or small business is presented with a legal fiction that they actually have a “choice” when signing away their rights when in fact refusing to sign means forgoing the goods, services, or employment. As a result, according to the Economic Policy Institute, 60.1 million workers, more than half of non-union, private-sector employees, have signed away their right to go to court if harmed by their employer.<sup>2</sup> In consumer contracts, a majority of credit cards, prepaid cards, storefront payday loans, cell phone companies, and private student loan contracts, along with a large segment of banks, include arbitration clauses in non-negotiable contracts. Many small businesses are also forced to agree to arbitrate disputes with larger companies, even when those companies steal money, price-fix, and otherwise violate antitrust laws that harm the small business.

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

Forced arbitration clauses allow banks and lenders to cheat customers with no accountability. They allow companies to hide systemic harassment and discrimination, including sexual harassment. That is why thousands of Google workers around the world walked off of the job in late 2018 to protest, among other things, Google’s use of forced arbitration clauses to hide mistreatment of workers who alleged harassment and discrimination against high-level executives. They also prevent small businesses from enforcing their rights against companies engaged in illegal antitrust conspiracies, allowing criminals to keep ill-gotten gains and leaving small businesses with little or nothing.

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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>.

In sum, forcing consumers, workers, and small businesses into arbitration has played a significant role in hiding systemic wrongdoing and allowing corporate wrongdoers to evade accountability for bad acts.

#### **IV. Congress Must Act**

Congress must rein in the overly expansive interpretation that courts have given to the Federal Arbitration Act. Forced arbitration weakens federal and state laws that are intended to protect consumers and employees by removing individuals' ability to enforce those laws in court. In 2011, the U.S. Supreme Court dealt a devastating blow to consumers and employees, ruling that companies could ban individuals from joining together to enforce their rights.<sup>3</sup> In 2018, the Court held that workers may be forced, as a condition of employment, to waive their right to act collectively to enforce their legal rights.<sup>4</sup> Until Congress acts to correct the legal fiction — that workers, consumers, and small businesses have consented to the deprivation of their rights — these clauses will continue to endanger individuals and small businesses. Judge Jed S. Rakoff recently said:

“...while appellate courts still pay lip service to the ‘precious right’ of trial by jury, and sometimes add that it is a right that cannot readily be waived, in actuality federal district courts are now obliged to enforce what everyone recognizes is a totally coerced waiver of both the right to a jury and the right of access to the courts — provided only that the consumer is notified in some passing way that in purchasing the product or service she is thereby ‘agreeing’ to the accompanying voluminous set of ‘terms and conditions.’ This being the law, this judge must enforce it — even if it is based on nothing but factual and legal fictions.”<sup>5</sup>

The FAIR Act does not seek to eliminate arbitration and other forms of alternative dispute resolution agreed to voluntarily post-dispute. It would allow workers, consumers, and small businesses to choose arbitration in the aftermath of being harmed if they truly perceived arbitration to have benefits over proceeding in court. Nor would it affect collective bargaining agreements that require arbitration between unions and employers. Rather, the FAIR Act's sole aim is to end the practice of forcing consumers, workers, and small businesses into secretive, one-sided arbitration proceedings that bind people long before they are harmed.

It is past time that Congress intervene and protect individuals from the insidious practice of forced arbitration. We strongly support the FAIR Act, which would restore access to our civil

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<sup>3</sup> AT&T Mobility v. Concepcion, 563 U.S. 333 (2011).

<sup>4</sup> Epic Systems Corp. v. Lewis, 584 U.S. \_\_\_\_ (2018).

<sup>5</sup> Meyer v. Kalanick, 200 F.Supp.3d 408 (S.D.N.Y. 2016).

justice system and preserve important civil rights, employment, and consumer protections. We urge you to pass it quickly. With questions, please contact Remington A. Gregg at [rgregg@citizen.org](mailto:rgregg@citizen.org).

Sincerely,

Alaska PIRG  
Alliance for Justice  
Allied Progress  
American Association of University Women  
American Family Voices  
Americans for Financial Reform  
Arkansans Against Abusive Payday Lending  
Bend the Arc Jewish Action  
Cape Cod Consumer Assistance Council, Inc.  
Center for Civil Justice  
Center for Economic Integrity  
Center for Justice & Democracy  
Center for Responsible Lending  
Citizen Works  
Committee to Support the Antitrust Laws  
Communications Workers of America (CWA)  
Connecticut Legal Services, Inc.  
Consumer Action  
Consumer Advocacy and Protection Society (CAPS)  
Consumer Federation of America  
Consumer Watchdog  
Consumers for Auto Reliability and Safety  
Demos  
Earthjustice  
East Bay Community Law Center  
Empire Justice Center  
Equal Rights Advocates  
Equality North Carolina  
Florida Alliance for Consumer Protection  
Georgia Watch  
Heartland Alliance  
Housing and Economic Rights Advocates  
Impact Fund  
Indiana Institute for Working Families

Interfaith Center on Corporate Responsibility  
International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW  
Jacksonville Area Legal Aid, Inc.  
Kentucky Equal Justice Center  
The Leadership Conference on Civil and Human Rights  
Long Term Care Community Coalition  
Main Street Alliance  
Michigan Community Action  
Movement Advancement Project  
NAACP  
National Association for College Admission Counseling  
National Association of Consumer Advocates  
National Association of Social Workers  
National Center for Law and Economic Justice  
National Center for Transgender Equality  
National Consumer Law Center (on behalf of its low income clients)  
National Consumer Voice for Quality Long-Term Care  
National Consumers League  
National Council on Independent Living (NCIL)  
National Domestic Workers Alliance  
National Employment Law Project  
National Employment Lawyers Association  
National Equality Action Team (NEAT)  
National LGBTQ Task Force Action Fund  
National Organization for Women  
National Student Legal Defense Network  
National Urban League  
National Women's Law Center  
New Mexico Center on Law & Poverty  
North Carolina Justice Center  
Oxfam America  
Pipeline Parity Project  
Policy Matters Ohio  
Pride at Work  
Prosperity Works  
Public Citizen  
Public Good Law Center  
Public Justice  
Public Justice Center

Public Law Center  
SC Appleseed Legal Justice Center  
Statewide Poverty Action Network  
Tennessee Citizen Action  
The Center for Popular Democracy  
The Community Church  
The D.C. Consumer Rights Coalition  
Virginia Poverty Law Center  
West Virginia Center on Budget and Policy  
Wildfire: Igniting Community Action to End Poverty in Arizona  
Witness to Mass Incarceration  
Women Employed  
Woodstock Institute  
Workplace Fairness

Cc: Members of the Committee