



October 25, 2021

The Honorable Jerrold Nadler, Chairman  
The Honorable Jim Jordan, Ranking Member  
Committee on the Judiciary  
United States House of Representatives  
Washington, DC 20515

Dear Chairman Nadler and Ranking Member Jordan:

Consumer Reports writes in support of H.R. 963, the Forced Arbitration Injustice Repeal (FAIR) Act.

Forced arbitration is a spreading injustice in the marketplace, in which corporations are forcing consumers, workers, and small family businesses to relinquish fundamental legal protections as a pre-condition for obtaining a product, service, or even a job. We urge the Committee to correct this harm by approving the FAIR Act.

Forced arbitration is being slipped into the fine print of standard-form contracts and terms of service that are presented to consumers as a take-it-or-leave-it pre-condition for obtaining such basic products and services as a credit card, bank loan, student loan, apartment lease, mobile phone, video subscription, or nursing home admission – and a wide range of everyday consumer products. Forced arbitration is also in the fine print of contracts that workers and small family businesses are being required to sign.

Congress never intended this. The Federal Arbitration Act was enacted in 1925 to give *businesses* – with relatively equal bargaining power – options for resolving their *business* disputes. But ill-conceived Supreme Court rulings<sup>1</sup> have warped that statute into a weapon that is being used against people who have *no* bargaining power. There is no meaningful sense in which these people have “agreed” to give up bedrock legal protections. Their only “choice” is to decline the product or service – or job – altogether. Many times, that is just not a practical option. And it is never fair.

When forced on consumers – and on workers and small businesses – in this way, the arbitration process, designed by corporations and their lawyers, inherently tends to be one-sided,

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<sup>1</sup> AT&T Mobility v. Concepcion, 563 U.S. 333 (2011); American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013); DirectTV Inc. v. Imburgia, 136 S. Ct. 463 (2015); Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018).

tilted to favor the corporation that has arranged for it. The process is a “black hole,” where the law does not apply, there is no right of appeal, and too often, the outcome is required to be kept secret. The arbitrator, chosen by the corporation, has a skewed incentive to heed the interests of the corporation, in hope and expectation of repeat business. The corporation can also choose where the arbitration will take place, what the rules will be, and how the costs will be borne. There are none of the fundamental safeguards that are the hallmarks of a fair, impartial, and accessible court proceeding to appropriately protect people and hold accountable a corporation that has committed widespread abuse, or has marketed an unsafe product or service.

Justice Ginsburg observed that the Court’s forced arbitration rulings “have predictably resulted in the deprivation of consumers’ rights to seek redress for losses, and turning the coin, they have insulated powerful economic interests from liability for violations of consumer protection laws.”<sup>2</sup>

In an interview with the New York Times, former Federal District Judge William G. Young, appointed in 1985 by President Reagan, was even blunter: “Ominously,” he said, “business has a good chance of opting out of the legal system altogether and misbehaving without reproach.”<sup>3</sup>

Contrary to the claims of forced arbitration defenders, the FAIR Act would in no way “ban” arbitration when it is genuinely agreed to. It would stop *forced* arbitration from *being imposed* as a pre-condition for obtaining a product, or for obtaining or continuing service or employment, and closing off access to the courts for consumer law claims, employment law claims, civil rights claims, and antitrust claims by small businesses. Once a dispute actually arises, and the stakes are clear, consumers (or workers or small businesses) could freely choose arbitration if they determine it to be actually fair, and to actually be a better option for them than the courts.

Consumer Reports reviewed consumer products in the most popular product categories we rate – and in two additional categories where safety is a paramount concern, bike helmets and child car seats – and published our findings last year.<sup>4</sup> We examined 117 brand/category combinations, and the results were striking: 60 percent included arbitration clauses.

In the absence of effective legal protection, our article advises consumers to look for arbitration clauses, and when they are choosing between comparable products, to choose one that does not force them into arbitration. But that is often not a practical option. And it is not a satisfactory solution.

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<sup>2</sup> DirectTV Inc. v. Imburgia, 136 S. Ct. at 477 (Ginsburg, J., dissenting).

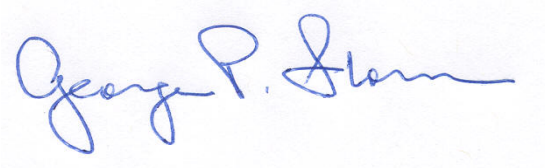
<sup>3</sup> Jessica Silver-Greenberg and Robert Gebeloff, Arbitration Everywhere, Stacking the Deck of Justice, NY Times, Oct. 31, 2015, <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>.

<sup>4</sup> Scott Medintz, Forced Arbitration: A Clause for Concern, Consumer Reports, Jan. 2020, <https://www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern/>.

Isolated pledges by individual corporations to forswear forced arbitration in specific contexts are no substitute for a comprehensive law to prohibit it. Indeed, those isolated pledges reflect a recognition that forced arbitration is fundamentally unfair and needs to stop.

We look forward to working with you to correct this spreading injustice.

Sincerely,

A handwritten signature in blue ink that reads "George P. Slover". The signature is fluid and cursive, with the first name being the most prominent.

George P. Slover  
Senior Policy Counsel  
Consumer Reports

A handwritten signature in blue ink that reads "Syed Ejaz". The signature is cursive and somewhat stylized, with the first name being the most prominent.

Syed Ejaz  
Policy Analyst  
Consumer Reports

cc: Members, Committee on the Judiciary