



Submitted Testimony of

Remington A. Gregg

Public Citizen

Counsel for Civil Justice and Consumer Rights

to the

Subcommittee on Antitrust, Commercial, and Administrative Law

Committee on the Judiciary

United States House of Representatives

on

Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights

February 11, 2020

## **I. Introduction**

Public Citizen appreciates the opportunity to submit this testimony. Public Citizen is a non-profit organization with more than 500,000 members and supporters nationwide. We represent the public interest through legislative and administrative advocacy, litigation, research, and public education on a broad range of issues including fair and equitable access to justice for all people.

Thank you for scheduling today's hearing to explore how forced arbitration erodes legal rights. Today, workers, consumers, servicemembers, patients, and small businesses nationwide are shut out of court and instead forced into a secretive, privatized system of justice. Congress must address this by banning predispute, forced arbitration clauses. Public Citizen has been fighting for 50 years to protect access to justice for all. We stand ready to help you in any way as you explore this issue in greater detail.

## **II. Forced Arbitration Clauses, Which Usually Are Not Voluntary, Harm Workers, Consumers, Patients, Servicemembers, and Small Businesses**

Predispute binding arbitration clauses and class action waivers, together known as forced arbitration clauses, are typically buried in "take-it-or-leave it" agreements that waive an individual's fundamental rights to seek redress in court when they are harmed or when their legal rights are violated. Forced arbitration clauses have become ubiquitous in such varied settings as agreements governing bank accounts, student loans, cell phones, employment, and nursing home admissions. These clauses deprive people of their day in court when they are harmed by violations of the law, no matter how widespread or egregious the misconduct may be. The contracts that contain forced arbitration clauses are oftentimes written by corporate entities, so it is unsurprising that their terms are corporate friendly.

Defenders of arbitration sometimes refer to this legal regime as a mandatory arbitration "agreement." But in reality, that agreement is a legal fiction. Arbitration clauses are often contained in non-negotiable contracts, and a consumer, worker, patient, servicemember, or small business who refuses to sign would have to give up goods, services, or employment. Moreover, few know that forced arbitration clauses are included in their contract, much less understand just how it impacts one's ability to seek redress in court if harmed.

According to the Economic Policy Institute (EPI), 60.1 million workers—more than half of non-union, private-sector employees—have signed away their right to go to court if

harmful by their employer.<sup>1</sup> By 2024, EPI and the Center for Popular Democracy project that more than 80% of private sector nonunion workers will be subject to forced arbitration clauses (including class/collective-action waivers).<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. According to Consumer Reports, more than two-thirds of its most popular reviewed products included a forced arbitration clause as a term of purchase. Currently, more than 60% of US retail e-commerce sales are subject to forced arbitration.<sup>3</sup> Eighty-one of the 100 largest U.S. companies, moreover, use arbitration in their dealings with consumers,<sup>4</sup> with no indication that this pace will slow.

Servicemembers are also impacted by forced arbitration clauses. A Public Citizen report found that federal laws and policies designed to protect servicemembers are undermined by forced arbitration clauses.<sup>5</sup> While the Servicemembers Civil Relief Act temporarily suspends “judicial and administrative proceedings and transactions” while a servicemember is on active duty overseas,<sup>6</sup> Public Citizen’s report shows that creditors were nonetheless illegally forcing servicemembers into arbitration. The Military Lending Act (MLA) is intended to protect servicemembers from certain lending practices including protections from outrageous interest rates. Because the MLA’s ban on forced arbitration for servicemembers is narrow, and the Department of Defense has further interpreted it even narrowly, servicemembers are still subject to forced arbitration for many uncovered products like installment loans or predatory rent-to-own contracts.<sup>7</sup>

Families around the country have now experienced how nursing homes use forced arbitration clauses to suppress claims of neglect and abuse.<sup>8</sup> While the Obama

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<sup>1</sup> See Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POLICY INST. 2 (2018), <https://www.epi.org/files/pdf/144131.pdf>.

<sup>2</sup> See Kate Hamaji, et al., *Unchecked Corporate Power: Forced Arbitration, the enforcement Crisis, and How Workers are Fighting Back*, CTR. FOR POPULAR DEMOCRACY (2019), <https://populardemocracy.org/sites/default/files/Unchecked-Corporate-Power-web.pdf>.

<sup>3</sup> See Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America’s Top Companies*, 52 U.C. DAVIS L.R. ONLINE 233, 234 (2019).

<sup>4</sup> *Id.*

<sup>5</sup> See Christine Hines, *Armed Forced and Forced Arbitration*, PUBLIC CITIZEN (2012), <https://www.citizen.org/wp-content/uploads/armed-forces-and-forced-arbitration-report.pdf>.

<sup>6</sup> JENNIFER K. ELSEA, CONG. RESEARCH SERV., R45283, *THE SERVICEMEMBERS CIVIL RELIEF ACT (SCRA): SECTION-BY-SECTION SUMMARY 2* (2019), CONG. RESEARCH SERV.

<sup>7</sup> See Hines, *supra* note 6.

<sup>8</sup> *Nursing Homes*, FAIR ARBITRATION NOW (Aug. 31, 2015), <https://fairarbitrationnow.org/nursing-home-arbitration/>.

administration sought to bar nursing homes from using predistpote arbitration agreements, the Trump administration successfully limited those critical protections.<sup>9</sup>

Small businesses have also been on the losing end of forced arbitration clauses. Many small businesses are 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. Those agreements also prohibit small businesses from banding together via class action even when litigating on an individual basis would not be economically feasible.<sup>10</sup>

### **III. Forced Arbitration Clauses Are Designed to Give Corporate Entities an Advantage**

Justice Hugo Black summed up the unfairness of arbitration well:

“For the individual, whether his case is settled by a professional arbitrator or tried by a jury can make a crucial difference. Arbitration differs from judicial proceedings in many ways: arbitration carries no right to a jury trial as guaranteed by the Seventh Amendment; arbitrators need not be instructed in the law; they are not bound by rules of evidence; they need not give reasons for their awards; witnesses need not be sworn; the record of proceedings need not be complete; and judicial review, it has been held, is extremely limited.”<sup>11</sup>

Arbitration clauses generally limit the type of damages that a person can receive, such as punitive or compensatory damages. They prohibit individuals from banding together in a class or collective action, which may be the only realistic avenue for bringing small claims. Arbitration clauses, moreover, often limit discovery and other attempts to obtain evidence. For example, a Public Citizen report detailed that “54 percent of arbitration clauses discussed discovery or evidentiary standards, in most instances to ‘alert consumers that discovery may be limited and evidentiary standards may be relaxed by comparison to litigation.’”<sup>12</sup> In addition, arbitration fees “are dramatically higher than court costs.”<sup>13</sup> Arbitrators are paid a daily rate and “typically paid \$1,000–\$2,000 a day, on top of the cost

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<sup>9</sup> Remington Gregg, *Trump Administration Places Company Profits Over Quality Care for Seniors*, FAIR ARBITRATION NOW (July 19, 2019), <https://fairarbitrationnow.org/trump-administration-places-company-profits-over-quality-care-for-seniors/>.

<sup>10</sup> See, e.g., *American Express v. Italian Colors Restaurant*, 563 U.S. 333 (2011); *Epic Systems v. Lewis*, 138 S. Ct. 1612 (2018).

<sup>11</sup> *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 664 (1965) (Black, J., dissenting).

<sup>12</sup> Taylor Lincoln & David Arkush, *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration*, PUBLIC CITIZEN 38 (2008), available at <https://www.citizen.org/sites/default/files/arbitrationdebatefinal.pdf>.

<sup>13</sup> *Id.* at 39.

of travel, meals, and other expenses associated with a hearing.”<sup>14</sup> An arbitration clause, moreover, may also include a “loser pays” provision, which creates a significant disincentive for an individual to bring a claim out of fear that they will be on the hook for all fees if they do not prevail.

For these reasons and others—including relationships that corporate entities have with arbitration providers and arbitrators so that they become “repeat players” in the arbitration system—arbitration disadvantages consumers, workers, patients, servicemembers, and small businesses. The Economic Policy Institute has also found that “[c]onsumers 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>15</sup>

If a worker, consumer, patient, servicemember, or small business brings a claim in arbitration and loses—and the odds are very high that they will—an arbitrator’s decision is given “limited judicial review.”<sup>16</sup> “Under the [Federal Arbitration Act], courts may vacate an arbitrator’s decision ‘only in very unusual circumstances.’”<sup>17</sup> These circumstances include:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.<sup>18</sup>

Thus, it is clear why corporate entities prefer this venue to the court system where each party is provided with basic procedural rights before a neutral, open court.

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<sup>14</sup> *How Much Does Arbitration Cost? And Who Pays For It?*, ARBITRATION INFO (2015), <https://law.missouri.edu/arbitrationinfo/2015/10/11/how-much-does-arbitration-cost/>

<sup>15</sup> Heidi Shierholz, *Correcting the Record*, Economic Policy Institute (Aug. 1, 2017), <https://www.epi.org/files/pdf/132669.pdf>.

<sup>16</sup> *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013).

<sup>17</sup> *Id.* (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)).

<sup>18</sup> 9 U.S.C. § 10 (2012).

#### **IV. Forced Arbitration Clauses Allow Corporations to Evade Full Accountability for Misconduct**

Forced arbitration clauses allow corporate entities to escape public accountability for misconduct because the proceedings are often held in secret, and the arbitration clause may prohibit parties from disclosing what transpired in, or the outcome of, the arbitration proceeding. This lack of accountability will only get worse as more people are subject to arbitration clauses.

Worse still, forced arbitration suppresses claims, preventing many workers from ever bringing claims related to workplace abuses. According to Professor Cynthia Eastland, a staggering 98 percent of workers abandon their claims if they are denied access to courts rather than moving forward with private arbitration proceedings.<sup>19</sup> It is no surprise, then, that the National Employment Law Project projected that employers have pocketed \$12.6 billion in wages from private-sector non-union workers earning less than \$13 an hour who have abandoned claims for wage theft rather than proceeding in arbitration.<sup>20</sup> As a result, employers have received billions in ill-gotten gains that made them wealthier while low-income families continue to struggle.

Forced arbitration clauses also allow companies to hide systemic harassment and discrimination, including sexual harassment. That is why thousands of Google workers around the world walked off 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.<sup>21</sup> In sum, forcing individuals into arbitration has played a significant role in hiding systemic wrongdoing and allowing corporate wrongdoers to evade accountability for bad acts.

#### **V. Congress Must Act**

Public Citizen highlights the ubiquity of forced arbitration in all sectors of the economy in its forced arbitration “Wall of Shame”—a list that seemingly only increases. In 2019, Amtrak amended the terms and conditions for purchasing tickets or traveling on Amtrak to add an arbitration clause under which disputes with Amtrak must be submitted to binding arbitration before a private arbitrator. The only way that riders can escape agreeing to its terms is forgoing using Amtrak—the only national rail service in the

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<sup>19</sup> Cynthia L. Estlund, *The Black Hold of Mandatory Arbitration*, 96 N.C. L. REV. 679, 696 (2018).

<sup>20</sup> Hugh Baran, *Forced Arbitration Enabled Employers to Steal \$12.6 Billion From Workers in Low-Paid Jobs in 2019*, NAT'L EMPLOYMENT LAW CTR. (2020), <https://www.nelp.org/publication/forced-arbitration-cost-workers-in-low-paid-jobs-12-6-billion-in-stolen-wages-in-2019/>.

<sup>21</sup> Claire Stapleton et al., *We're the Organizers of the Google Walkout. Here Are Our Demands*, N.Y. MAG. (Nov. 1, 2018).

country. Public Citizen is currently litigating this issue, seeking injunctive relief against forcing riders to agree to arbitration.<sup>22</sup>

Recently, the stock trading and investment app Robinhood gained notoriety for its use of forced arbitration. Robinhood claims that it was founded on a quest to “democratize” trading by making trades easy and the market’s processes transparent.<sup>23</sup> Yet, like so many other companies, Robinhood is insulated from accountability in the courts because it requires users to agree to binding arbitration.<sup>24</sup> This month, as Robinhood feared a loss of liquidity as customers bought shares of GameStop in droves, the company limited traders’ ability to buy and sell GameStop stock. In response, several traders sued Robinhood in a class action. Whether the traders will be able to proceed in a timely manner depends on whether they will be able to proceed to court, or be required instead to arbitrate through the FINRA arbitration system.<sup>25</sup>

Congress must comprehensively reform arbitration law by limiting the application of the Federal Arbitration Act, whose sway the courts have steadily expanded. Forced arbitration weakens federal and state laws that are intended to protect consumers and workers by removing individuals’ ability to enforce those laws in court. In 2011, the U.S. Supreme Court dealt a devastating blow to consumers and workers, ruling that companies could ban individuals from joining together to enforce their rights.<sup>26</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>27</sup> Because these cases turn on the Court’s interpretation of federal law, Congress has the power to correct the legal fiction that workers, consumers, servicemembers, patients, and small businesses have consented to signing away their rights. Until Congress does so, forced arbitration 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

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<sup>22</sup> *Public Citizen v. National Passenger Railroad Corporation, d/b/a Amtrak*, PUBLIC CITIZEN, <https://www.citizen.org/litigation/public-citizen-v-national-passenger-railroad-corporation-d-b-a-amtrak/>.

<sup>23</sup> *About Us*, ROBINHOOD, <https://robinhood.com/us/en/about-us/>.

<sup>24</sup> Marcia Brown, *How the Supreme Court Protects Robinhood*, AM. PROSPECT (Feb. 2, 2021), <https://prospect.org/justice/how-the-supreme-court-protects-robinhood/>.

<sup>25</sup> *Id.*

<sup>26</sup> *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

<sup>27</sup> *Epic Systems v. Lewis*, 138 S. Ct. 1612 (2018).

law, this judge must enforce it — even if it is based on nothing but factual and legal fictions.”<sup>28</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, patients, servicemembers, and small businesses to choose arbitration after being harmed if they truly perceived arbitration to have benefits over proceeding in court. It would not affect collective bargaining agreements that require arbitration between unions and employers. Rather, the FAIR Act’s sole aim is to end the practice of individuals into secretive, one-sided arbitration proceedings that bind people long before they are harmed.

Thank you for the opportunity to share our views.

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<sup>28</sup> Meyer v. Kalanick, 200 F.Supp.3d 408 (S.D.N.Y. 2016).