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September 18, 2019

SUPPORT H.R. 1423, THE FORCED ARBITRATION INJUSTICE REPEAL ACT

Dear Representative,

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 organizations to promote and protect the civil and human rights of all persons in the United States, we **urge you to vote YES on final passage of H.R. 1423, the Forced Arbitration Injustice Repeal Act (FAIR Act) and NO on all amendments. We also urge a NO vote on any Motion to Recommit (MTR) in connection with this legislation. The Leadership Conference will score these votes in our voting record for the 116th Congress.**

The FAIR Act would prohibit corporations from forcing working people and consumers into pre-dispute forced arbitration agreements and class action waivers, which are hidden in many employment and consumer contracts. Increasingly, signing these agreements is required to begin a job, open a credit card account, obtain a loan, receive nursing home services, have a cell phone, and more. This practice allows large employers, insurers, lenders, and financial service companies to push aggrieved working people and consumers into private, individual arbitration proceedings controlled and designed by corporations, rather than allowing them to exercise their right to seek justice through the courts and hold bad actors publicly accountable for wrongdoing.

The need for the FAIR Act is clear. Corporations must not be able to shield themselves from accountability by preventing working people and consumers from using the courts to enforce the federal and state laws enacted to protect them from abuse. Through forced arbitration agreements and class action waivers, corporations select the arbitrators, prevent workers from asserting claims together, pick the rules under which arbitration takes place, choose the state in which the proceeding will occur, and decide the payment terms.

More than half of nonunion, private-sector employers require their employees to enter into forced arbitration agreements.¹ That translates to more than 60 million working people who do not have access to the courts to enforce their rights under all types of employment and civil rights statutes, including Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Fair Labor Standards Act.

The most vulnerable working people are also the most likely to be trapped into forced arbitration. Forced arbitration is much more common among the lowest-paid workforces.

Industries that have disproportionate numbers of women workers and African American workers are also more prone to impose forced arbitration. Overall, 59 percent of African American workers and 58 percent of women workers have no way to enforce their rights outside of arbitration processes that are controlled by their employers.ⁱⁱ

Importantly, the FAIR Act is a ban on forced arbitration, not a ban on all arbitration. Our coalition therefore strongly opposes the Jordan-Collins amendment which aims to undermine collective bargaining by striking a safe harbor in the FAIR Act for arbitration provisions that are negotiated between unions and employers as part of a collective bargaining agreement. Collectively bargained arbitration agreements are outside the purview of this bill, as are arbitration agreements negotiated between businesses, because these agreements are not forced, take-it-or-leave propositions. Arbitration agreements in collective bargaining agreements are negotiated between counsel for unions and employers where both parties have input on the procedures and scope of such agreements. Working people have the right to be represented by unions. This amendment, which seeks to undercut that right, should be opposed.

It is no surprise though that forced arbitration is biased in favor of the corporations who draft and control the terms of the arbitration agreements. The Economic Policy Institute has found that employees are less likely to obtain relief through arbitration and generally receive lower damages than in court.ⁱⁱⁱ Forcing employees into individual arbitration also impacts their ability to obtain legal counsel. Faced with low win rates and lower damage awards, attorneys are less likely to take on these clients.^{iv} Consumers are similarly disadvantaged. On average, consumers win less often in arbitration proceedings than in court, obtaining relief regarding their claims in only 9 percent of arbitrated disputes, whereas companies that make claims or counterclaims, prevail 93 percent of the time.^v Bias in the system, however, leads many hardworking, everyday people to simply give up their rights when faced with forced arbitration, leaving corporations with no incentive to follow the law or to quickly and fairly address consumer or worker claims.

The use of class action waivers also substantially diminishes access to justice. Of employees subject to forced arbitration, over 49 percent—more than 24 million people—are also subject to a class action waiver, making it nearly impossible to address systemic discrimination or widespread violations of law.^{vi} Class actions have leveled the playing field against bad corporate actors for thousands of women and people of color. Class actions may be the only way to prove a pattern or practice of discrimination. They also can provide relief specially designed to remedy large scale violations and change how corporations do business.^{vii} In addition, class actions provide for legal redress when individuals are unlikely to file claims of their own, often due to the small value of the claim or because similarly situated individuals were unaware their rights had been violated. Eliminating the ability to file class actions prevents accountability and transparency and takes away pathways for significant reform.

Employment contracts, however, represent only a portion of forced arbitration agreements and class action waivers. A recent survey of forced arbitration in consumer agreements found that more than 60 percent of online U.S. retail sales are covered by broad consumer arbitration agreements. Eighty-one companies in the Fortune 100 force consumers into arbitration agreements, and of those eighty-one, 78 also utilize class action waivers. In 2018, there were, at a minimum, more than 826 million consumer

arbitration agreements in force in the U.S., a country with an overall population of approximately 330 million people.^{viii} Congress must act when millions of people are unknowingly forced to give up their right to access our courts and forego the protection of our laws.

We join the overwhelming majority of the public, both Republicans and Democrats, that support ending forced arbitration,^{ix} and call on the House of Representatives to pass the FAIR Act to restore the right of working people and consumers to choose how to enforce their rights. If you have any questions, please contact Gaylynn Burroughs, Senior Policy Counsel, at burroughs@civilrights.org.

Sincerely,



Vanita Gupta
President and CEO



Kristine Lucius
Executive Vice President for Policy
and Government Affairs

ⁱ 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 (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>.

ⁱⁱ *Id.*

ⁱⁱⁱ Katherine V.W. Stone & Alexander J.S. Colvin, Economic Policy Institute, The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumer of Their Rights (Dec. 7, 2015), <https://www.epi.org/files/2015/arbitration-epidemic.pdf>.

^{iv} *Id.*

^v Heidi Shierholz, Economic Policy Institute, Correcting the Record: Consumers Fare Better under Class Actions than Arbitration (Aug. 1, 2017), <https://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/>

^{vi} *Id.*

^{vii} Center for Justice & Democracy, Civil Rights Class Actions: A Singularly Effective Tool to Combat Discrimination (Jan. 6, 2014), <https://centerjd.org/content/fact-sheet-civil-rights-class-actions-singularly-effective-tool-combat-discrimination>.

^{viii} Imre Stephen Szalai, The Prevalence of Consumer Arbitration Agreements by America's Top Companies, UC Davis Law Review Online (Feb 2019), <https://lawreview.law.ucdavis.edu/online/vol52/52-online-Szalai.pdf>.

^{ix} National Survey on Required Arbitration, Hart Research Associates, Feb. 28, 2019, available at <https://www.justice.org/sites/default/files/2.28.19%20Hart%20poll%20memo.pdf>.