



April 8, 2024

The Honorable Richard Durbin, Chairman  
Ranking Member Lindsay Graham  
Honorable Members, Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
Washington, DC 20515

Dear Chair Durbin, Ranking Member Graham, and Honorable Members:

On behalf of more than 500,000 members and supporters of Public Citizen across the country, we provide the following statement for your consideration relevant to the Senate Committee on the Judiciary hearing entitled “Small Print, Big Impact: Examining the Effects of Forced Arbitration” scheduled for April 9, 2024. We specifically write in support of the passage bills banning the inclusion of forced arbitration provisions in consumer and employment contracts, like the Forced Arbitration Injustice Repeal (FAIR) Act of 2023<sup>1</sup>. We also support existing bills addressing specific issue-areas, like the Ending Forced Arbitration of Race Discrimination Act of 2023.<sup>2</sup>

We thank the Committee for holding a hearing on this important and pressing issue. Forced arbitration provisions can be found in employment agreements and in the terms of service agreement of consumer products and services. For example, they can be found in agreements for nursing home care<sup>3</sup>, cellular phone agreements<sup>4</sup>, ticket purchasing agreements<sup>5</sup>, online

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<sup>1</sup> S.1376 - 118th Congress (2023-2024): Forced Arbitration Injustice Repeal Act, <https://www.congress.gov/bill/118th-congress/senate-bill/1376?s=1&r=93>.

<sup>2</sup> S.1408 - 118th Congress (2023-2024): Ending Forced Arbitration of Race Discrimination Act of 2023, <https://www.congress.gov/bill/118th-congress/senate-bill/1408/text?s=1&r=97>.

<sup>3</sup> Paula Span, Arbitration Has Come to Senior Living. You Don't Have to Sign Up, New York Times (Sept. 2022), <https://www.nytimes.com/2022/09/24/health/assisted-living-arbitration.html>.

<sup>4</sup> Alison Frankel, Column: Facing arbitration onslaught, Samsung changes the rules for consumer claims, Reuters (Apr. 2023), <https://www.reuters.com/legal/transactional/column-facing-arbitration-onslaught-samsung-changes-rules-consumer-claims-2023-04-11/>.

<sup>5</sup> Lewis Kamb & Safia Samee Ali, Ticketmaster's 'Kafkaesque' arbitration process is rigged, lawyers say, nbcnews.com (Apr. 2023), <https://www.nbcnews.com/news/us-news/ticketmaster-live-nation-arbitration-process-rigged-lawyers-say-rcna78172>.

streaming services,<sup>6</sup> child and pet care services<sup>7</sup>, public utility apps,<sup>8</sup> and in buy now, and pay later agreements<sup>9</sup>. They can also be found in terms of service agreements for a wide variety of consumer goods like car purchases,<sup>10</sup> and children's toys<sup>11</sup>, among others. It is impossible to overstate the role these clauses play in keeping consumers from obtaining equitable and financial relief for corporate wrongdoings in the courts.

Forced arbitration clauses require consumers to resolve any disputes between them and the company or employer that might arise in the future through private arbitration, rather than in a public court. They also typically bar consumers from joining class action lawsuits – an especially onerous limitation in circumstances where a claimant has a small-dollar claim that is cost-prohibitive to file as a stand-alone case. Forced arbitration provisions almost always dictate the arbitration firm that will oversee resolution of any disputes between the corporation and the consumer. For this reason, in recent years, the number of class actions brought by or on behalf of low-income consumers has drastically dropped.<sup>12</sup>

Academic experts agree that empirical research demonstrates that consumers cannot meaningfully consent to arbitration clauses because consumers do not generally comprehend the terms.<sup>13</sup> This may be for a number of reasons including the length and complexity of the contract,<sup>14</sup> the manner in which consumer contract is presented to consumers (as a click-through

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<sup>6</sup> Devin Coldway, Roku disables TVs and streaming devices until users consent to new terms, techcrunch.com (Mar. 2024), <https://techcrunch.com/2024/03/05/roku-disables-tvs-and-streaming-devices-until-users-consent-to-forced-arbitration/>.

<sup>7</sup> See, e.g.: Rover, Inc., Terms of Service (Feb. 2024), <https://www.rover.com/terms/tos/>; see also, e.g.: Care.com, Inc., Care.com Terms of Use, (March 2024), <https://www.care.com/about/terms-of-use/>.

<sup>8</sup> See, e.g.: Ameren Services, Terms and Conditions (Dec. 2023), <https://www.ameren.com/terms-and-conditions>.

<sup>9</sup> Candace Milner & Martha Perez-Pedemonti, Report: *Consumers' Fraught Journey into Forced Arbitration*, Public Citizen (Feb. 2024), <https://www.citizen.org/article/consumers-fraught-journey-into-forced-arbitration/>.

<sup>10</sup> Jack Ewing, Tesla's Direct Sales Model Helps It Thwart Customer Lawsuits, New York Times (Dec. 2022), <https://www.nytimes.com/2022/12/19/business/tesla-class-action-lawsuit-arbitration.html>.

<sup>11</sup> See, e.g.: Lovevery, Inc., Terms and Conditions (Oct. 2023), <https://lovevery.com/pages/terms-and-conditions>.

<sup>12</sup> See, Myriam Giles, *Class Warfare: The Disappearance of Low-Income Litigants from The Civil Docket*, 65 Emory Law. J. 1531 (2016). Giles posits that the privatization of the justice system is one of several factors for the observable drop in class actions brought by or on behalf of minority claimants. They further argue that the privatization of the justice system "ha[s] erected a near-impossible obstacles in the path to the courthouse for economically disadvantaged groups." *Id.* at 1537.

<sup>13</sup> See, Prentiss Cox et. al., *Comments of Consumer Law Professors on Petition No. CFPB-2023-0047-0001* (Nov. 14, 2023), available at: <https://fingfx.thomsonreuters.com/gfx/legaldocs/zgvorxbxypd/frankel-cfpbrule--lawprofletter.pdf>.

<sup>14</sup> See, Caroline Cakebread, *You're Not Alone, No One Reads Terms of Service Agreements*, businessinsider.com (Nov. 15, 2017, available at: <https://www.businessinsider.com/deloitte-study-91->

agreement or in small print),<sup>15</sup> and the sheer impossibility of reading all of the terms of service agreements that consumers are presented with on a daily basis.<sup>16</sup> For example, a July 2023 academic study found that over 97% of the study participants reported having opened an account with a company that requires disputes to be submitted to binding arbitration (e.g., Netflix, Hulu, and Cash App), yet most were unaware that they had agreed to arbitration. According to the study, over 99% of respondents who think they have never entered into an arbitration agreement have likely done so.<sup>17</sup>

Forced arbitration provisions funnel claimants away from public courts and into privatized judicial systems with no public oversight. Private arbitration firms follow their own general arbitration rules and procedures, have their own filing and fee structures, and have their own standards for assigning arbitrators to oversee matters.<sup>18</sup>

Because arbitration firms rely on a return-business model to make a profit, the arbitrator has an incentive to rule in favor of the corporation to cultivate a happy return-customer relationship.<sup>19</sup> Even when ruling in favor of a plaintiff, arbitrators tend to award less money than juries award to successful plaintiffs.<sup>20</sup> Legal researchers have noted that structural features of arbitration firms make it difficult for arbitrators to be entirely unbiased in their decisions.<sup>21</sup> For instance,

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percent-agree-terms-of-service-without-reading-2017-11#:~:text=A%20new%20Deloitte%20survey%20found,consequences%20in%20exchange%20for%20access.

<sup>15</sup> See, The Editorial Board, *What Happens When You Click*, *nytimes.com*, available at:

<https://www.nytimes.com/2021/01/23/opinion/sunday/online-terms-of-service.html>.

<sup>16</sup> See, David Lazarus, *Column: Want to read a tech company's user agreements? Got 90 minutes to spare?*, *latimes.com* (Aug. 24, 2021), available at: <https://www.latimes.com/business/story/2021-08-24/column-consumer-contracts>.

<sup>17</sup> Roseanna Sommers, *What do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation*, *papers.ssrn.com* (Jul. 25, 2023), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4521064](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4521064).

<sup>18</sup> Silver-Greenberg, *infra*, note 6.; Michael Corkery, Jessica Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, *The New York Times* (Nov., 2, 2015).

<sup>19</sup> Edmund L. Andrews, *Why the Binding Arbitration Game is Rigged Against Customers*, *gsb.stanford.edu* (Mar. 8, 2019), available at: <https://www.gsb.stanford.edu/insights/why-binding-arbitration-game-rigged-against-customers>. Experts cite a “repeat player bias” existing in these types of arbitrator-corporation relationships where the arbitrator’s bias works more favorably on behalf of the respondent corporations who are repeat players because they have been involved in multiple arbitrations before the same arbitrator. See, Pittman, *Arbitration and Federal Reform: Recalibrating the Separation of Powers Between Congress and the Court*, 80 Wash. & Lee L. Rev. 893, 901-02 (2023).

<sup>20</sup> See, Larry J. Pittman, *Arbitration and Federal Reform: Recalibrating the Separation of Powers Between Congress and the Court*, 80 Wash. & Lee L. Rev. 893, 902-03 (2023).

<sup>21</sup> A 2021 American Association for Justice Report found that arbitrators at JAMS, AAA and other firms are “mostly male and overwhelmingly white.” Because most Americans are bound by forced arbitration agreements, it follows that arbitrator pools should reflect the demographics of consumers being forced before them. See, Meghan Leonhardt, *The Huge Diversity Issue Hiding on Companies’ Forced Arbitration*

from 2014-2018, only 6.3% of cases arbitrated by the American Arbitration Association (AAA) or JAMS, two of the largest arbitration firms in the United States, provided consumers with a monetary award.<sup>22</sup> According to one report, “Americans are more likely to be struck by lightning than they are to win a monetary award in forced arbitration.”<sup>23</sup>

Forced arbitration provisions allow corporations to pick the arbitration firm and the arbitrator, to the detriment of consumers. Academic commentators have observed that corporate entities tend not to select women and BIPOC arbitrators, even when more diverse pools are made available.<sup>24</sup> Intentional racism, implicit bias, stereotypes based on protected classes, and other harmful criteria may also contribute to limiting the number of women and BIPOC arbitrators serving on arbitrator rosters.<sup>25</sup> If not intentionally using bias in their favor, representatives for corporations may be using principles of risk-aversion to avoid choosing diverse arbitrators because “[d]eviating from the familiar can breed contempt if the result is a loss.”<sup>26</sup> In this scenario, if a corporation prevailed using a white-male-heterosexual arbitrator, the corporation is likely to choose a similar arbitrator the next time and the next. This repeat-use of arbitrators who rule in favor of the corporation has especially negative effects on claimants belonging to vulnerable and marginalized communities, not likely to have their claim heard by arbitrators with similar life experiences.

Although they have largely succeeded in tipping the scales of justice in their favor by turning away from the use of public courts, corporations continue to develop and insert language in their arbitration provision that further impedes consumers from even filing arbitration claims or banding together to obtain large-scale relief. For example, some corporations require consumers to engage in “informal” dispute resolution proceedings before they can officially file an arbitration claim.<sup>27</sup>

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*Agreements*, cnbc.com (Jun. 7, 2021). See also, S. Puig & A. Strezhnev, *Affiliation Bias in Arbitration*, *The J. of Legal Studies*, Vol. 46, No. 2 (Jun. 2017) p. 372. See also, James Carstensen, *Legal Experts Say Bias In Arbitration is a Growing Problem*, LAW.com (Spt. 23, 2021).

<sup>22</sup> Abi Velasco and Remington A. Gregg, *Forced Arbitration Stacks the Deck Against Everyday People, Especially Against Workers and Consumers of Color*, citizen.org (Feb. 23, 2022).

<sup>23</sup> *Id.*

<sup>24</sup> See, Sarah Rudolph Cole, *Arbitrator Diversity: Can It Be Achieved?*, 98 Wash. U. L. Rev. 965 at 984-985. “Even when provided with candidate lists that include diverse neutrals, businesses seem to default to arbitrators who are either judges or experienced litigators—frequently with backgrounds similar to those who select them. This approach predominantly results in the selection of older, white, male arbitrators because these arbitrators likely have the most experience and name recognition.”

<sup>25</sup> *Id.*, p. 959.

<sup>26</sup> See, Michael Z. Green, *Arbitrarily Selecting Black Arbitrators*, 88 Fordham L. Rev. 2255, 2273 (2020).

<sup>27</sup> Alison Frankel, *Could states block corporate tactics to avert mass arbitration? This law prof says yes*, Reuters (Mar. 2024), <https://www.reuters.com/legal/government/column-could-states-block-corporate-tactics-avert-mass-arbitration-this-law-prof-2024-03-13/>.

Other forced arbitration provisions contain confidentiality clauses prohibiting claimants from discussing the matter at arbitration, making it especially difficult for claimants to alert others about existing dangers or harms.<sup>28</sup> Still other provisions prohibit claimants from filing mass arbitration claims by inserting “batch arbitration” provisions which limit the number of consumers who can file similar claims while being represented by the same attorney or law firm. Even when consumers have managed to successfully file arbitration claims, some corporations have blatantly refused to pay the up-front fees required to initiate an arbitration claim, in accordance with their own arbitration provisions.<sup>29</sup>

### **Impact of Forced Arbitration on Vulnerable Consumers**

Low-income communities of color are already reluctant to engage the courts for assistance.<sup>30</sup> The problem of access to courts is made worse still by the prevalence of forced arbitration clauses in consumer contracts. Arbitration systems are further out of reach for low-income and otherwise vulnerable communities because they are procedurally inaccessible and lack the resources to accommodate vulnerable and marginalized communities. Financial service providers take advantage of the inaccessibility of arbitration forums.<sup>31</sup>

For example, an estimated 85% of all major credit cards use forced arbitration clauses in their terms of service agreements.<sup>32</sup> Considering that in 2022 approximately 82% of adults in America had a credit card, forced arbitration agreements impact the vast majority of American consumers. The Consumer Financial Protection Bureau (CFPB) has reported that subprime cards<sup>33</sup> and private label credit cards (used widely by minorities and vulnerable communities

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<sup>28</sup> See, e.g.: The Honest Company, Inc., Terms of Service (Jul. 2023), <https://www.honest.com/about-us/terms.html>.

<sup>29</sup> Alison Frankel, Column: Facing arbitration onslaught, Samsung changes the rules for consumer claims, Reuters (Apr. 2023), <https://www.reuters.com/legal/transactional/column-facing-arbitration-onslaught-samsung-changes-rules-consumer-claims-2023-04-11/>.

<sup>30</sup> See, Erika Rickard, *State Courts Seek to Address Racial Disparities in their Operations, Chief Justices Identify Ways to Implement Reforms as part of Modernization Efforts*, pewtrusts.org (Jan. 11, 2021), (“[C]ourt leaders have identified steps that should be taken to reduce racial disparities and acknowledge that people of color, particularly Black Americans, have historically been treated differently by the legal system than their White peers ... [s]evere racial disparities are not just an unfortunate byproduct of a race-blind system, but the manifestation of discrimination embedded in the system itself.”).

<sup>31</sup> Edmund L. Andrews, *Why the Binding Arbitration Game is Rigged Against Customers*, gsb.stanford.edu (Mar. 8, 2019), available at: <https://www.gsb.stanford.edu/insights/why-binding-arbitration-game-rigged-against-customers>.

<sup>32</sup> See, Martha Perez-Pedemonti, *Regaining the Right to Reject: Forced Arbitration Clauses in Credit Card Contracts, Out-Resourced Consumers are Overwhelmingly Forced into Biased Arbitration Proceedings*, Public Citizen, May 15, 2023, <https://www.citizen.org/article/regaining-the-right-to-reject-forced-arbitration-clauses-in-credit-card-contracts/>.

<sup>33</sup> The CFPB defines sub-prime borrowers as having a credit score between 580 – 619 and deep sub-prime borrowers as having a credit score below 580. See, Consumer Financial Protection Bureau, *Borrow Risk Profiles*, consumerfinance.gov, available at: <https://www.consumerfinance.gov/data-research/consumer->

with sub-prime credit scores) are more susceptible to late fee charges and that consumers residing in low-income areas (with a high concentration of Black residents) bear a disproportionate burden of late fees. A 2022 study, reported that low-income and Black consumers are more likely to pay credit card fees in comparison to white consumers<sup>34</sup> and low-income consumers of color are more likely to be offered credit cards at higher interest rates.<sup>35</sup>

The lack of initial contract readership combined with claimants' inability to access public courts leaves vulnerable consumers and employees open to exploitation via the use of lengthy contracts filled with legalese.<sup>36</sup> Deceptive business practices are further likely to target non-English speaking communities who are more vulnerable due to a confluence of factors including their low bargaining power, limited or bad credit history, limited choices in financial providers, and obstacles to processing information (including language and accessibility barriers).<sup>37</sup>

One of the most damaging effects forced arbitration clauses have on marginalized communities is that they keep lower-income consumers from joining in class actions, and other forms of aggregate litigation, as a means of bringing similarly situated, small-value, and cost-sharing litigation claims before the courts. Additional barriers exist for claimants who are indigent or who have accessibility needs. For instance, the AAA Consumer Arbitration Rules state that if a party "wants" an interpreter, they are responsible for making arrangements directly with the interpreter and are also responsible for paying for the costs of the service.<sup>38</sup>

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credit-trends/student-loans/borrower-risk.profiles/#:~:text=Deep%20subprime%20(credit%20scores%20below,scores%20of%20720%20or%20above). See also, *Id.*

<sup>34</sup> See, Oz Shy & Johanna Stavins, *Who Is Paying All These Fees? An Empirical Analysis of Bank Account and Credit Card Fees*, Federal Reserve Bank of Boston, bostonfed.org (2022), available at: <https://www.bostonfed.org/publications/research-department-working-paper/2022/who-is-paying-all-these-fees-an-empirical-analysis-of-bank-account-and-credit-card-fees.aspx>.

<sup>35</sup> See, Jump To, *Credit Cards: Pandemic Assistance Likely Helped Reduce Balances, and Credit Terms Varied Among Demographic Groups*, U.S. Government Accountability Office, gao.gov (Sept. 29, 2023), pp. 25-31, available at: <https://www.gao.gov/products/gao-23-105269>.

<sup>36</sup> Myriam Giles, *Class Warfare: The Disappearance of Low-Income Litigants from The Civil Docket*, 65 Emory Law. J. 1537 (2016).

<sup>37</sup> *Id.* See also, Sonia Lin, Blog: Identifying and Addressing the Financial Needs of Immigrants, consumerfinance.gov (Jun. 27, 2022), <https://www.consumerfinance.gov/about-us/blog/identifying-and-addressing-the-financial-needs-of-immigrants/>. (Noting that "[w]ith limited or no access to mainstream financial services and products, many immigrants are driven to high-cost or even predatory service providers who charge exorbitant fees or otherwise engage in exploitative practices. Often, these actors target and mislead immigrant consumers with in-language marketing, convenient access, and familiarity with cultural norms, but without adequate disclosure of terms and conditions.").

<sup>38</sup> *Id.* AAA at note 45, R-28 Interpreters p. 22.

This means that, without access to the courts, marginalized communities are actively kept from accessing monetary and equitable relief for valid legal claims, becoming aware of existing pitfalls in consumer products and employment, and ultimately from obtaining monetary relief that may otherwise help them escape the cyclical poverty.<sup>39</sup>

Although far from perfect, public courts offer vulnerable and low-income litigants access to important resources that assist them in engaging the legal system and pursuing valid legal claims. First, court proceedings are public and subject to scrutiny from legislators, the media, bar associations, and the public. Second, depending on the jurisdiction, civil litigants have access to civil legal assistance programs, court *pro se* resources, and language access assistance. Finally, although not quantifiable, there is an element of empowerment civil litigants, especially members of marginalized communities, experience when they are able to see and interact with other claimants also seeking to assert their rights and obtain relief for legal claims.

## **Conclusion**

Banning the inclusion of forced arbitration provisions in terms of service and employment agreements is simply the right thing to do. One of the most pressing challenges Americans have in accessing justice is the increasing numbers of claimants being funneled into privatized judicial systems lacking basic resources for claimants and public oversight.

The only way to address the scourge of pre-dispute forced arbitration clauses in consumer and employment contracts is through the passage of legislation banning their use across the board. There are a number of bills Public Citizen has endorsed which would take steps towards this goal. They should be passed immediately:

- The Forced Arbitration Injustice Repeal (FAIR) Act of 2023, which would eliminate forced arbitration clauses in employment, consumer, and civil rights cases.<sup>40</sup>
- The Ending Forced Arbitration of Race Discrimination Act of 2023, which would end the practice of forcing individuals who have experienced racial discrimination at work into arbitration.<sup>41</sup>

Moreover, because consumer and employment matters are increasingly being handled by privatized arbitration firms, these firms must be required to report on the demographics of their arbitrators, the cases they are hearing, and the outcomes of those cases (equitable and financial relief). This data is crucial to understanding the impact privatized arbitration is having on our

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<sup>39</sup> *See, Id.* at 1550-1551.

<sup>40</sup> S.1376 - 118th Congress (2023-2024): Forced Arbitration Injustice Repeal Act, <https://www.congress.gov/bill/118th-congress/senate-bill/1376?s=1&r=93>.

<sup>41</sup> S.1408 - 118th Congress (2023-2024): Ending Forced Arbitration of Race Discrimination Act of 2023, <https://www.congress.gov/bill/118th-congress/senate-bill/1408/text?s=1&r=97>.

most vulnerable communities and how we can hold corporations and arbitration firms accountable for their roles in inequitable outcomes.

Thank you for the opportunity to provide comment on this legislation. For questions, please contact Martha Perez-Pedemonti at [mperezpedemonti@citizen.org](mailto:mperezpedemonti@citizen.org) or Lisa Gilbert at [lgilbert@citizen.org](mailto:lgilbert@citizen.org).

Sincerely,

Public Citizen